WHAT WERE THEY THINKING? OFFICERS' SUBJECTIVE KNOWLEDGE AND THE "GOOD FAITH" EXCEPTION OF FOURTH AMENDMENT JURISPRUDENCE— *UNITED STATES V. LAUGHTON*

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I. INTRODUCTION

On November 1, 2001, the Isabella County Sheriff's Department arranged for a confidential informant named Thomas Pell to make a controlled purchase of methamphetamine from suspect James Laughton.[1] Pell conducted a similar transaction less than a week later. The police did not physically witness the interactions between the informant and Laughton, but relied solely on the informant's testimony as to what had occurred.[2]

Deputy Sheriff Scott Clarke swore out an affidavit in application for a warrant authorizing a search of the residence in which the narcotics purchases had allegedly occurred.[3] Clarke asserted that Laughton was known to keep drugs in the crotch area of his pants and in his pockets, and further that he maintained various stashes throughout the residence.[4] Regarding the informant Pell, Clarke stated that he was credible because he had provided reliable information in the past that was corroborated by the police department.[5] A county court magistrate signed and issued the warrant, and the police executed the search the following day, recovering several forms of narcotics, firearms, and other evidence.[6]

Following a suppression hearing, the U.S. District Court for the Eastern District of Michigan agreed with Laughton that the search warrant was unsupported by probable cause and was therefore invalid.[7] However, the court ruled that the evidence was admissible because the

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1. United States v. Laughton, 409 F.3d 744, 746 (6th Cir. 2005).
2. *Id*.
3. *Id*.
4. *Id*. at 747.
5. *Id*.
6. *Id*.
7. *Id*. The district court at Bay City heard Laughton's case.

search qualified under the "good faith" exception to the exclusionary rule.[8] The court found that the officers had executed the search through reasonable reliance upon the issuance of the warrant.[9] Laughton was subsequently convicted and sentenced to consecutive prison terms totaling more than eight years.[10]

In May 2005, the U.S. Court of Appeals for the Sixth Circuit reversed the district court, holding that the evidence should have been suppressed.[11] For the majority, Judge Martha Daughtrey wrote that the lower court correctly concluded that the affidavit was not supported by probable cause because the officer failed to establish the requisite connection between Laughton and the place to be searched.[12] However, the court held that the good faith exception did not apply because the meager facts set forth in the affidavit did not permit reasonable reliance upon the issuance of the warrant.[13] The court interpreted the doctrine to preclude consideration of facts known to the affiant but not explicitly set forth in the affidavit.[14] Rather, the determination of whether the good faith exception applied was to be governed solely by those facts within "the four corners of the affidavit."[15]

This Casenote asserts that the Sixth Circuit adopted the proper approach for application of the good faith exception. Part II of this Casenote examines relevant precedent, particularly *United States v. Martin*,[16] an Eleventh Circuit decision adhering to a contrary interpretation of the good faith analysis. In Part III, this Casenote explains the Sixth Circuit's holding in *Laughton*. Part IV then analyzes the *Laughton* decision in light of prevailing search and seizure doctrine and the rationale underpinning it. Finally, Part V concludes that *Laughton* will ultimately be recognized as the controlling case on interpretation of the good faith exception to the exclusionary rule.

8. *Id*. The "good faith" exception was established by the U.S. Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

9. *Laughton*, 409 F.3d at 746.

10. *Id*.

11. *Id*. at 752.

12. *Id*. at 747–48.

13. *Id*. at 751.

14. *Id*.

15. *Id*.

16. 297 F.3d 1308 (11th Cir. 2002).

II. THE FOURTH AMENDMENT AND RELEVANT AUTHORITY

A. The Fourth Amendment and Probable Cause

The Fourth Amendment to the U.S. Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[17]

The fundamental inquiry on the "reasonableness" of a search under the Fourth Amendment is whether such search is supported by probable cause.[18] In the context of informants, the Supreme Court has adopted a totality of the circumstances approach to probable cause analysis in which the informant's reliability and his "basis of knowledge" will be balanced.[19] The Court emphasized that probable cause is a fluid concept, rather than a rigid rule dealing with technicalities.[20] Further, the Court seemed to espouse a strong policy objective favoring the preservation of officers' ability to use informants' tips, finding that courts must employ a flexible standard in analysis of probable cause.[21]

B. The Exclusionary Rule

The exclusionary rule was formally adopted by the U.S. Supreme Court in the 1914 case, *Weeks v. United States*.[22] In 1961, the Court extended the doctrine's application from the federal courts to the

17. U.S. CONST. amend. IV.

18. *See* Arizona v. Hicks, 480 U.S. 321 (1987) (stating that probable cause is the "traditional standard" of the Fourth Amendment). The Supreme Court stated that "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *See* Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

19. Illinois v. Gates, 462 U.S. 213 (1983). The Court's ruling in *Gates* abrogated the earlier two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), which was a more restrictive standard requiring that both the veracity and basis of knowledge prongs be satisfied independently. *Gates*, 462 U.S. at 233. As with the former standard, though, the *Gates* Court provided that if one of the factors is somehow deficient, independent corroboration by the police could save probable cause. *Id*. at 241–42.

20. *Gates*, 462 U.S. at 232.

21. *See id*.

22. 232 U.S. 383 (1914). *See generally* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949), discussing how the *Weeks* Court "for the first time" recognized this exclusionary rule in the federal courts).

states.[23] The exclusionary rule holds that all evidence secured in violation of the Fourth Amendment is barred from admission in court.[24]

The primary rationale offered in support of the exclusionary rule is the deterrence of police misconduct.[25] In theory, officers will be dissuaded from violating constitutional protections to obtain evidence if they know that such evidence is subject to being excluded from admissibility at trial because of their unlawful actions.[26] A second rationale sometimes offered on behalf of the exclusionary rule is the preservation of the integrity of the judicial system.[27] The Court has held that to allow the presentation of evidence gathered by unlawful methods would stamp such conduct with a constitutional imprimatur.[28]

The Court clearly indicated in *Mapp v. Ohio* that the exclusionary rule was mandated by the Constitution.[29] However, the Court's approach evolved, and later it firmly stated that the exclusionary rule was a judicially created remedy, rather than a personal constitutional right.[30] The significance of this distinction is that the appellation "judicially created remedy" necessarily leaves such remedy open to subsequent interpretation and modification through the creation of exceptions to the rule.

In addition to the good faith exception discussed below, the Court has created other exceptions to the exclusionary rule.[31] For example, the rule does not apply in the context of civil proceedings.[32] Even in the criminal context, the exclusionary rule does not always apply, such as with grand jury proceedings.[33] Additionally, the Court has created an "impeachment-of-defendant" exception under which evidence that has been unlawfully obtained may be presented to refute a defendant's

23. *Mapp*, 367 U.S. 643.

24. *Id*. at 655.

25. *Id*. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

26. *Id*.

27. Terry v. Ohio, 392 U.S. 1, 12–13 (1968).

28. *Id*. at 13.

29. *Mapp*, 367 U.S. at 648 ("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.'" (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920))).

30. United States v. Calandra, 414 U.S. 338, 348 (1974).

31. *See generally* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1 (1987) (discussing different versions of a proposed "comparative reprehensibility" approach to the exclusionary rule).

32. United States v. Janis, 428 U.S. 433, 447 (1976).

33. *Calandra*, 414 U.S. at 354–55.

testimony that directly contradicts known facts.[34] Modifications of the exclusionary rule such as these, and the good faith exception, result from the Court's designation of the exclusionary rule as a judicially created remedy.

A defendant who wishes to invoke the exclusionary rule must satisfy a standing requirement.[35] The general rule is that only a defendant who is challenging a violation of his own constitutional rights may seek the suppression of evidence.[36] He may not bring such claims on the basis of an alleged unlawful search or seizure against another party.[37] In *Rakas v. Illinois*, the Supreme Court transformed this standing inquiry into a generalized evaluation of whether the defendant had a legitimate privacy interest in the place searched or in the evidence seized.[38] However, the latter part of this analysis was abrogated by the Court in *Rawlings v. Kentucky*,[39] such that the remaining test was simply whether the petitioner had a reasonable expectation of privacy regarding the place that was searched.

C. The "Good Faith" Exception

The U.S. Supreme Court introduced the "good faith" exception to the exclusionary rule in *United States v. Leon*.[40] The Court modified the Fourth Amendment exclusionary rule so as to uphold the admissibility of evidence obtained by officers acting in reasonable reliance upon a search warrant subsequently found to be unsupported by probable cause.[41] The majority reasoned that the exclusionary rule was a judicially created remedy intended to protect citizens' Fourth Amendment rights through its deterrent effect.[42] Thus, evidence should only be suppressed if the officer knew that the search was unconstitutional.[43] Nothing could be gained by excluding evidence recovered upon an officer's objectively reasonable reliance, because no

34. *See* Walder v. United States, 347 U.S. 62 (1954). For example, a defendant may not take advantage of the suppression of unlawfully seized narcotics by claiming to never have possessed narcotics.

35. *See generally* Alderman v. United States, 394 U.S. 165 (1969).

36. *Id*. at 171–72.

37. Jones v. United States, 362 U.S. 257, 261 (1960).

38. 439 U.S. 128, 142–43 (1978).

39. 448 U.S. 98 (1980).

40. 468 U.S. 897 (1984).

41. *Id*. at 905.

42. *Id*. at 906.

43. *Id*. at 919–20.

police misconduct existed to deter.[44]

In stating this new exception, the Court cited the "substantial social costs" incurred in the application of the exclusionary rule.[45] Initially, the Court suggested that the exclusion of evidence impedes the truth-finding process in court proceedings.[46] The Court went on to note that a consequence of such interference was that in some cases guilty defendants could be acquitted or they might receive favorable plea deals.[47] The *Leon* majority demonstrated its disdain for such a result in stating that the magnitude of the benefit to guilty defendants "offends basic concepts of the criminal justice system."[48] Essentially, the Court disapproved of defendants receiving sympathetic treatment because of technicalities. Moreover, the Court stated that unchecked application of the exclusionary rule could engender disrespect for the rule of law.[49]

The *Leon* Court pointed out several circumstances in which an officer would not have a reasonable basis to believe that a warrant was properly issued.[50] First, the good faith exception does not apply if the affiant officer knows the information contained in the affidavit is false, or if she recklessly disregards its truth or falsity.[51] Second, courts will not countenance "rubber-stamping."[52] Magistrates must maintain a "neutral and detached" position, or the exception will not apply.[53] The third situation noted by the Court in which suppression may be an appropriate remedy is in the case of "bare bones" affidavits that are "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"[54] Finally, the good faith exception will not apply when the warrant is so facially deficient that the executing officers cannot reasonably rely upon its validity.[55] For example, if the warrant

44. *Id*.

45. *Id*. at 907.

46. *Id*.

47. *Id*.

48. *Id*. at 908. Professor Dripps theorized that the *Leon* majority would not have approved the Fourth Amendment if it had been put to them. *See* Donald Dripps, *Living With Leon*, 95 YALE L.J. 906, 948 (1986) ("What after all is the point of a law whose observance is a 'cost' and whose violation is 'objectively reasonable?'").

49. *Leon*, 468 U.S. at 908.

50. *Id*. at 923.

51. *Id*.

52. *Id*. at 914, 923.

53. *Id*. at 923.

54. *Id*. (quoting Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring in part)). *See also* 68 AM. JUR. 2d *Searches and Seizures* § 191. The standard requires that officers have a reasonable understanding of the legal prerequisites to a search, and that the officers exercise reasonable professional judgment. *Id.*

55. *Leon*, 468 U.S. at 923.

fails to particularly identify the place to be searched or the things to be seized, it would fall within this limitation.[56]

The Court approached these principles a year earlier in *Illinois v. Gates*, holding that officers must present sufficient information to the magistrate to allow her to conduct the probable cause assessment.[57] The magistrate's action on the affidavit cannot be a mere ratification of an officer's bare conclusions.[58] Further, the Court emphasized the importance of courts carefully reviewing the sufficiency of affidavits to ensure that magistrates maintain their neutral position.[59]

The *Leon* Court also addressed the concern that its new good faith exception would "freeze" Fourth Amendment jurisprudence and forestall legitimate claims by aggrieved defendants.[60] In other words, a defendant might be dissuaded from bringing forth a colorable claim of a constitutional violation in seeking the suppression of evidence because she knows a court could simply find that the officer acted in objectively reasonable reliance, without ever reaching the issue of whether the defendant's Fourth Amendment rights were abridged. The Court dismissed this concern, indicating that courts need not necessarily address the reasonableness inquiry first.[61] Rather, courts could choose to first evaluate the validity of the defendant's constitutional claim.[62]

Justice Brennan, who authored a dissenting opinion in *Leon* that was joined by Justice Marshall, asserted that the exclusionary rule should not be thought of as punishing officers, but rather as incentivizing institutional compliance with the Fourth Amendment mandates.[63] Further, a good faith exception to this rule would actually encourage officers to act in willful ignorance of the law.[64] They could be trained that it is "reasonable" to rely upon a warrant simply because the magistrate has signed it.[65] Justice Brennan went on to criticize the majority's new good faith exception because it would communicate to magistrates that their authorization of warrants would be insulated from judicial review.[66] Essentially, the issuance of an improper warrant

56. *Id*.
57. 462 U.S. 213 , 239 (1983).
58. *Id*.
59. *Id*.
60. *Leon*, 468 U.S. at 924.
61. *Id*. at 924.
62. *Id*.
63. *Id*. at 953 (Brennan, J., dissenting).
64. *Id*. at 955.
65. *Id*.
66. *Id*. at 956.

would be met with no consequence.[67]

D. Circuit Split

1. The *Martin* Approach

The Eleventh Circuit held in *United States v. Martin* that courts could look beyond the affidavit in assessing whether an officer reasonably relied upon the issuance of a search warrant.[68] The court upheld the admissibility of cocaine and a handgun recovered from the defendant's apartment.[69] The affiant officer corroborated much of the information provided by the informant.[70] It was the magistrate who made the mistake in not requiring greater specificity in the affidavit, though the court noted that his actions had not constituted an abdication of duties sufficient to meet the second situation discussed in *Leon*.[71]

The *Martin* court suggested that it applied a "totality of the circumstances" approach, which comported with the inquiry as to whether the officer knew that the search was unconstitutional in spite of the magistrate's authorization.[72] In short, courts were permitted to consider all circumstances in determining whether the good faith doctrine applied.[73] The court stressed that the purpose of the exclusionary rule was to deter unlawful conduct by police; thus, officers should not be punished when relying in good faith upon a warrant.[74]

A number of earlier authorities have employed a similarly broad interpretation of the good faith exception inquiry. In the Tenth Circuit case of *United States v. Danhauer*, the affidavit did not set forth the informant's basis of knowledge, nor did it sufficiently verify the informant's allegation that the defendant was manufacturing narcotics.[75] Yet, the court went beyond the affidavit to examine the officer's investigation of the informant's allegations, and it upheld the district court's refusal to suppress the evidence.[76] Similarly, the First Circuit determined in *United States v. Procopio* that facts known to the affiant officer but not presented to the magistrate nevertheless supported a

67. *Id*.
68. 297 F.3d 1308, 1318 (11th Cir. 2002).
69. *Id*. at 1309.
70. *Id*. at 1319–20.
71. *Id*. at 1320.
72. *Id*. at 1318–19.
73. *Id*.
74. *Id*. at 1320.
75. 229 F.3d 1002, 1006 (10th Cir. 2000).
76. *Id*. at 1007.

finding that the good faith exception of *Leon* applied.[77]

The Eighth Circuit also referenced information known to an affiant police officer though not set forth in the affidavit in *United States v. Marion*.[78] The court upheld the admissibility of evidence, finding that officers reasonably relied upon the judge's probable cause determination.[79] The court suggested that it was necessarily part of the "totality of the circumstances" approach to evaluating the good faith exception to take into consideration facts known to the officer, even if not set forth expressly in the affidavit.[80]

In *United States v. Taxacher*, the Eleventh Circuit upheld the admissibility of evidence obtained through a vehicle search.[81] The executing officer had never filled out an affidavit before, and he even went so far as to call the local district attorney for advice on the process.[82] The court noted that although the officers did not have probable cause for the search, the good faith exception to the exclusionary rule applied, and thus the evidence was not suppressed.[83]

To a degree, the Sixth Circuit employed the *Martin* standard in *United States v. Gahagan*.[84] The court held that an officer reasonably relied upon a defective warrant in part because of information known to the executing officer.[85] The court specifically stated that "the relevant information known by the executing officers . . . can be relied upon to validate a warrant if the description contained in the warrant itself is less than complete."[86] Consideration of this information was meant to save a deficient warrant, which is arguably a different issue from the sufficiency of the information presented in the affidavit applying for such warrant. Nevertheless, the very court that later decided *United States v. Laughton* seemed to take the opposing viewpoint in *Gahagan*, that outside information could be considered for purposes of making these types of evaluations.[87]

In 1988, the Fourth Circuit decided in *United States v. Owens* that the officers executing a search acted in good faith by relying upon information known to them, even though the information was not

77. 88 F.3d 21, 28 (1st Cir. 1996).
78. 238 F.3d 965 (8th Cir. 2001).
79. *Id*. at 969.
80. *Id*.
81. 902 F.2d 867 (11th Cir. 1990).
82. *Id*. at 870.
83. *Id*. at 872–73.
84. 865 F.2d 1490 (6th Cir. 1989).
85. *Id*. at 1498.
86. *Id*.
87. *Id.*

expressly set forth in the affidavit.[88] In particular, the warrant failed to properly identify the place to be searched.[89] The *Owens* court cited *Maryland v. Garrison*[90] for the proposition that police mistakes should be forgiven, provided that they are acting on facts that comport with a reasonable determination of probable cause.[91] This is particularly so given the ambiguity that often arises in their work.[92]

The primary justification supporting this approach to the good faith exception inquiry is that the purpose of the exclusionary rule is served: deterrence of unlawful police conduct.[93] The *Martin* court noted that the exclusionary rule protected against the intentional omission of facts in an affidavit when those facts could defeat a finding of probable cause.[94] Rather, the court found that a determination of whether an officer acted in good faith reliance upon a search warrant could be supported by facts known to the officer, even if not set forth explicitly in the affidavit applying for such warrant.[95]

2. The *Laughton* Approach

Few cases have interpreted the good faith exception to the exclusionary rule to allow consideration only of those facts set forth expressly in the affidavit. The Sixth Circuit held in *United States v. Weaver* that a boilerplate, "bare bones" affidavit lacked sufficient supporting facts of criminal activity to justify a search.[96] The court stated that the facts in the affidavit must be sufficient to allow the magistrate to conduct an independent determination of probable cause,[97] which suggests that facts not set forth in the affidavit are excluded because they could not be relied upon by the magistrate in conducting his analysis. The *Weaver* court relied upon the "totality of the circumstances" analysis set forth in *Gates*.[98] Essentially, the search here failed the good faith exception because the officer did not set forth sufficient corroboration of the information provided by the informant in

88. 848 F.2d 462, 466 (4th Cir. 1988).
89. *Id*. at 465.
90. 480 U.S. 79 (1987).
91. *Owens*, 848 F.2d at 465–66.
92. *Id*.
93. United States v. Martin, 297 F.3d 1308, 1320 (11th Cir. 2002).
94. *Id*. at 1320.
95. *Id*.
96. 99 F.3d 1372, 1379–80 (6th Cir. 1996).
97. *Id*. at 1376–77.
98. *Id*. at 1377.

order to demonstrate probable cause.

The Sixth Circuit in *Laughton* cited two authorities from the 1970s (pre-good faith exception doctrine) for the proposition that a determination of whether an affidavit is "bare bones" is limited to the language in the affidavit itself.[99] The basic idea is that if facts set forth in the affidavit are so meager as to be considered "bare bones," it cannot be saved by referencing outside information that did not impact the issuance of the warrant.

The *Laughton* court referenced the 1971 Supreme Court decision in *Whitely v. Warden, Wyoming State Penitentiary*,[100] for the proposition that inquiries into the sufficiency of facts in the affidavit are limited to the language in the affidavits themselves. The court also noted its own 1973 decision in *United States v. Hatcher*,[101] positing a similar principle.

III. *LAUGHTON*: THE SIXTH CIRCUIT'S OPINION

A. Opinion of the Court

The Sixth Circuit first addressed the district court's determination that the affidavit lacked probable cause sufficient to justify the issuance of a search warrant.[102] The court promptly agreed on the ground that the warrant did not establish a connection between the criminal activity and the premises to be searched.[103] Further, the affidavit failed to sufficiently link James Laughton to the residence or the criminal acts.[104]

The court then turned its attention to the good faith exception to the exclusionary rule, finding that the district court improperly upheld the search under this doctrine.[105] Judge Daughtrey wrote that, although the Sixth Circuit had applied the good faith exception in earlier cases in which probable cause did not exist,[106] the affidavit in the present case lacked "some modicum of evidence, however slight, to connect the criminal activity described in the affidavit to the place to be

99. United States v. Laughton, 409 F.3d 744, 752 (6th Cir. 2005).

100. 401 U.S. 560 (1971).

101. 473 F.2d 321 (6th Cir. 1973).

102. *Laughton*, 409 F.3d at 747.

103. *Id*. The court cited its decision in *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc) ("There must . . . be a 'nexus between the place to be searched and the evidence sought.'" (quoting United States v. Van Shutters, 163 F.3d 331, 336 (6th Cir. 1998))).

104. *Laughton*, 409 F.3d at 747.

105. *Id*. at 748.

106. *See generally Carpenter*, 360 F.3d 591; *Van Shutters*, 163 F.3d 331; United States v. Washington, 380 F.3d 236 (6th Cir. 2004); United States v. Schultz, 14 F.3d 1093 (6th Cir. 1994); United States v. Savoca, 761 F.2d 292 (6th Cir. 1985).

searched."[107] The court went on to state that the good faith exception doctrine would not tolerate inquiries into the subjective mindset of officers to fill in the gaps of an affidavit.[108]

The *Laughton* court cited several authorities when discussing this nexus between the criminal activity and the place to be searched.[109] In particular, the court noted that the case presenting "perhaps the weakest link between criminal activity and the place to be searched" was *United States v. Schultz*.[110] In that case, the court considered a warrant authorizing the search of safe deposit boxes on the basis of meager facts connecting the place to be searched and the criminal activity.[111]

The *Laughton* opinion also concluded that, as with probable cause determinations, an evaluation of an officer's good faith reliance was limited to the express words of the affidavit.[112] The court held it was improper to consider information known to the officer but not presented to the magistrate within the four corners of the affidavit.[113] The majority reasoned that the alternative would plunge courts down a "slippery slope," requiring them to assess how much affiants knew, when they learned it, and from whom.[114] Further, such an approach would invite a subjective analysis that has been clearly rejected by the Supreme Court.[115]

Although the Sixth Circuit agreed with the district court that the warrant was not founded upon probable cause, it reversed the lower court by determining that the search was not saved by the good faith exception to the exclusionary rule.[116] The officers, in executing the warrant, could not have reasonably relied upon the issuance of the warrant.[117] Thus, the court ruled that the evidence obtained from the

107. *Laughton*, 409 F.3d at 749.

108. *Id*. at 750. The court noted that this approach accords with the express words of the Supreme Court in *Leon*. *See* United States v. Leon, 468 U.S. 897, 922 (1984). Specifically, the *Leon* Court stated "we . . . eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant." *Id*. at 922 n.23. The asserted rationale was that "'"sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'" *Id*. (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

109. *Laughton*, 409 F.3d at 749 (citing *Washington*, 380 F.3d 236; *Carpenter*, 360 F.3d 591; *Van Shutters*, 163 F.3d 331; *Savoca*, 739 F.2d 220).

110. *Laughton*, 409 F.3d at 749.

111. 14 F.3d 1093 (6th Cir. 1994).

112. *Laughton*, 409 F.3d at 751.

113. *Id*.

114. *Id*. at 752.

115. *Id*.

116. *Id*.

117. *Id*.

invalid search should have been suppressed.[118]

B. Dissenting Opinion

Judge Ronald Lee Gilman asserted that the good faith exception applied to the facts of *Laughton*, and therefore the search should have been upheld.[119] Judge Gilman would have held the affidavit did establish a nexus between the residence to be searched and the criminal acts, calling it an "unwarranted hypertechnicality" to require a more explicit link within the affidavit.[120] Further, he wrote that the affidavit was more than "bare bones," contrary to the stance of the majority.[121] Judge Gilman believed that the officer had acted in an objectively reasonable way, and that the officer's good faith belief in the validity of the affidavit was evidenced by the fact that he brought it first to the county prosecutor for his approval before presenting it to the magistrate.[122] For these reasons, Judge Gilman favored upholding the admissibility of the evidence.[123]

IV. DISCUSSION

A. Majority Rule

Based upon the authorities discussed in Part II, the majority rule appears to be the *Martin* approach, which allows courts to consider facts known to an affiant officer though not set forth in the affidavit. A number of circuits followed this standard of inquiry, determining that it best effectuated the Supreme Court's intent behind the good faith exception.[124]

Only a few cases clearly espouse the *Laughton* view in requiring that consideration be given only to those facts laid out in the four corners of the affidavit.[125] In addition to *Laughton*, *Hatcher* and *Weaver* are both Sixth Circuit decisions. Beyond these authorities, there seems to be

118. *Id*.

119. *Id*. at 753 (Gilman, J., dissenting).

120. *Id*.

121. *Id*.

122. *Id*.

123. *Id*.

124. United States v. Procopio, 88 F.3d 21 (1st Cir. 1996); United States v. Owens, 848 F.2d 462 (4th Cir. 1988); United States v. Marion, 238 F.3d 965 (8th Cir. 2001); United States v. Danhauer, 229 F.3d 1002 (10th Cir. 2000); United States v. Taxacher, 902 F.2d 867 (11th Cir. 1990).

125. United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996); United States v. Hatcher, 473 F.2d 321 (6th Cir. 1973).

little precedent following with this approach. Nevertheless, the *Laughton* interpretation of the good faith doctrine best accords with the policy justifications discussed in *Leon*.

B. Guidance by Relevant Authority

1. The Fourth Amendment

The Fourth Amendment imposes a "particularity" requirement upon warrant applications in which affiants must specify the nature of the place to be searched and the persons or things to be seized.[126] A warrant that is to be saved by information known to the officer but not provided in the affidavit could be considered deficient in this "particularity" requirement. The Supreme Court asserted in *Lo-Ji Sales, Inc. v. New York* that "the Fourth Amendment [does not] countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out."[127]

2. Exclusionary Rule Jurisprudence

The most prominent rationale underpinning the exclusionary rule is the deterrence of unlawful police conduct.[128] By the same token, the anticipated consequence of the suppression of unlawfully obtained evidence is to provide incentive to police departments to create institutional policies that comport with citizens' Fourth Amendment rights.[129] In recognition of the criticism offered against the good faith exception, one could argue that an extension of that doctrine to allow consideration of facts known to the officer but not set forth in the affidavit would further dilute the institutional incentives and the potential deterrent effect of the exclusionary rule. This suppression doctrine is already so riddled with exceptions and judicial tinkering that an additional amendment such as that provided by the Eleventh Circuit in *Martin* would seem to further diminish citizens' constitutional

126. U.S. CONST. amend. IV. *See generally* John E. Theuman, *Sufficiency, Under Federal Constitution's Fourth Amendment, of Description in Search Warrant of Place to Be Searched or of Person or Thing to Be Seized—Supreme Court Cases*, 94 L. Ed. 2d 813 (1999).

127. 442 U.S. 319, 325 (1979). *See generally* Stanford v. Texas, 379 U.S. 476, 481–82 (1965) (discussing the historical roots of the Fourth Amendment, particularly the motivating factors inspiring the Framers).

128. Mapp v. Ohio, 367 U.S. 643, 648 (1961); *see also* United States v. Leon, 468 U.S. 897, 906 (1984).

129. *Leon*, 468 U.S. at 953 (Brennan, J., dissenting).

rights.[130]

Another theory presented in support of the exclusionary rule is the preservation of judicial integrity.[131] The Supreme Court has stated that an important goal of the exclusionary rule is to reduce unlawful acts by government officials in derogation of recognized constitutional rights.[132] Both defendants and citizens alike must be assured that their judicial system works to enforce the Fourth Amendment protections afforded to them. This goal is thwarted when officers are permitted to violate constitutional protections on reasonable reliance of a warrant's issuance, with no accountability for their failure to explicitly set forth information that should otherwise have been included in the warrant application. Rather, defendants will rightly view these violations of Fourth Amendment mandates, such as the particularity requirement, as further evidence that the system is stacked against them.

3. *Leon*

The *Leon* Court held that having a "bare bones" affidavit is one of four circumstances in which the good faith exception is inapplicable.[133] Specifically, a "bare bones" affidavit is one that is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[134]

The Court's discussion on the insufficiency of these affidavits supports the notion that courts cannot look beyond the affidavit's words in evaluating the applicability of the good faith exception. In setting apart this situation, the Court referred to the meagerness of the affidavit itself, which is an independent document divorced from any facts known to the officer but not set forth in the affidavit itself.[135] In other words, a "bare bones" affidavit does not also refer to insufficient information that might have simply been withheld by the officer. Thus, the Court implicitly rejected the consideration of information outside the four corners of the affidavit.

A further point of guidance by the Court in *Leon* is that if the facts set forth in the affidavit are so meager as to be considered "bare bones," the

130. *See generally* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

131. Terry v. Ohio, 392 U.S. 1, 12–13 (1968).

132. *Id*. *See also* Elkins v. United States, 364 U.S. 206, 222 (1960).

133. *Leon*, 468 U.S. at 923 (majority opinion).

134. *Id*.

135. *Id*.

magistrate had no basis to issue the warrant in the first instance.[136] It would be incongruous to claim that the search could be saved by referencing other information not presented to the magistrate. Simply pointing to other facts known only to the officer would defy the Court's purpose of distinguishing the circumstance of having a "bare bones" affidavit.

Leon also addressed the concern of "rubber stamping" magistrates, singling out this circumstance as yet another in which the good faith exception has no application.[137] The policy concern of discouraging such conduct by magistrates counsels in favor of limiting good faith inquiries to those facts in the affidavit. Consider that a magistrate may rely upon his prior relationship or experiences with an affiant officer in making a probable cause assessment in a warrant application. If he knows such officer to be a "true" man, he might feel more secure about issuing a warrant on less than probable cause with the understanding that the subsequent search could still be saved by the "good faith" of the executing officer. Such a hypothetical circumstance is not so far-fetched, though it is by no means the only such situation in which "rubber stamping" by magistrates raises a concern. Ultimately, disallowing the consideration of outside information not presented to the magistrate better serves the end of avoiding this abdication of authority.

The final circumstance cited by the *Leon* Court in which the good faith exception does not apply is when the warrant is so facially deficient that the officers executing it cannot reasonably rely upon its validity.[138] This situation significantly overlaps the Court's admonition against "bare bones" affidavits. In the same way, a warrant may be found facially deficient in consideration of the facts set forth in the affidavit. This focus upon the language in the affiant's warrant application implicitly recognizes that no consideration is given to facts known to the officer but not presented to the magistrate.

As noted earlier, one concern voiced by critics of the new good faith exception is that it would effectively "freeze" Fourth Amendment jurisprudence and cause defendants to forego adjudication of constitutional claims in light of a court's power to simply find the officer acted in objectively reasonable reliance upon a warrant's issuance.[139]

136. *Id.* at 915.

137. *Id*. at 923.

138. *Id*.

139. *See generally* Jeremy S. Simon, *Privacy vs. Practicality: Should Alaska Adopt the* Leon *Good Faith Exception?*, 10 ALASKA L. REV. 143 (1993) (discussing how the *Leon* Court's good faith exception minimizes personal privacy rights in favor of judicial expediency, and arguing that the doctrine should not be adopted in Alaska).

Defendants would thereby be cowed into complacency, believing a court would not even look at the validity of their Fourth Amendment claim. No matter the truth or falsity of this proposition, one could certainly postulate that an extension of the good faith doctrine to incorporate knowledge of the officer not provided in the affidavit would have even more of a "chilling" effect on defendants. Theoretically, the defendant already may have little incentive to litigate a Fourth Amendment claim with the availability of the broad good faith exception to save the evidence from suppression. Further, allowing for consideration of facts known to the officer, yet not set forth in the warrant application, makes the good faith exception even easier to satisfy. With that in mind, defendants or their counsel could justifiably assess the breadth of exceptions to the exclusionary rule and determine that litigation of a Fourth Amendment claim would not be worthwhile.

C. The Eleventh Circuit Approach

1. Problems with the Eleventh Circuit Approach

The Eleventh Circuit's good faith inquiry presents difficulties for reviewing courts. Such an approach forces courts to make evaluations of what information the officers had, how much information existed, and when it was known. Courts can become mired in a difficult and time-consuming fact-finding process to untangle these issues. As an example, a court taking the *Martin* approach would have to ensure that information claimed to be known by the officer was in fact known by him before the warrant application.[140] One can imagine the threat to privacy if warrants could first be issued upon less than probable cause, then later saved when officers encountered information during their search and later claimed to have known it before the warrant was issued. Further, a reviewing court would be forced into difficult evaluations of the quality and quantity of the information, in essence making its own determination on the sufficiency of that information.

An additional concern voiced by the *Laughton* court is that allowing consideration of information outside of the affidavit invited courts down a slippery slope toward the very kind of subjectivity repudiated by the Supreme Court.[141] Evaluations of an officer's good faith reliance on the issuance of an affidavit must necessarily turn on, in some part,

140. *See* United States v. Martin, 297 F.3d 1308, 1319–20 (11th Cir. 2002) (reviewing the information corroborated by the officer prior to application for the search warrant).

141. United States v. Laughton, 409 F.3d 744, 752 (6th Cir. 2005).

subjective considerations.[142]

Another significant concern with the *Martin* approach is that it amounts to an evaluation of whether probable cause existed in fact.[143] The *Laughton* court suggested that consideration of facts outside of the affidavit could constitute a substituted probable cause assessment.[144] As Judge Gilman stated in his concurring opinion in *United States v. Carpenter*, "the relevant question is whether the officer reasonably believed that the warrant was properly issued, *not* whether probable cause existed in fact."[145] When the inquiry goes beyond the facts set forth in the affidavit, the court is essentially reevaluating the sufficiency of the evidence, albeit under the guise of the good faith exception. However, the standard is meant to address an officer's reasonable reliance upon the issuance of a warrant. When the issuance of such a warrant was not predicated upon information uniquely possessed by the affiant, one could not be said to rely upon it in referencing outside knowledge.

2. Virtues of the Eleventh Circuit Approach

The approach of *Martin* and other authorities discussed above could be said to comport with the purpose of the exclusionary rule: to deter unlawful conduct of officers.[146] No deterrence is necessary when an officer acts reasonably.[147] Thus, allowing consideration of information from outside the affidavit into the good faith inquiry does nothing to threaten the deterrent effect of the exclusionary rule.

Another important consideration is that citizens' Fourth Amendment rights are still generally preserved. Whether information from outside the affidavit is allowed does nothing to change the standard of reasonableness placed upon affiant officers.

As noted in *Marion*, the consideration of all facts, including those known to the officer but not set forth in the affidavit, comports with the "totality of the circumstances" approach generated by the Supreme Court in *Illinois v. Gates*.[148] Essentially, any facts known to the officer become part of the inquiry as to the sufficiency of the evidence

142. *Id*.

143. *Id*.

144. *Id*.

145. 360 F.3d 591, 598 (6th Cir. 2004) (Gilman, J., concurring).

146. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE, § 21.04 *Exclusionary Rule: Should It Be Abolished?* (3d ed. 2002).

147. United States v. Leon, 468 U.S. 897, 918–19 (1984).

148. United States v. Marion, 238 F.3d 965, 969 (8th Cir. 2001).

informing the officer's position.

D. The Sixth Circuit Approach

1. Problems with the Sixth Circuit Approach

One of the foremost problems with the *Laughton* approach is that it may needlessly punish mistakes by the police or magistrates.[149] An officer may innocently neglect to set forth certain relevant facts in an affidavit. Yet, the reviewing court would ignore those facts even though they could establish that the officer at least acted in good faith. The *Martin* court noted that on the facts of the case before it, to disallow consideration of facts known to the officer would in fact punish the officer for mistakes made by the magistrate in failing to demand greater specificity.[150] Such circumstances could repeat themselves as magistrates issue warrants on less than probable cause when they simply could have asked the officer to first set forth more detail in the affidavit.

A further problem with the *Laughton* approach is that it may forget the purpose of the exclusionary rule, which is to deter unlawful police conduct. As discussed earlier, when an officer acts in good faith reliance, the concern of unlawful conduct is not raised.[151] Thus, the issue of what other information was known to the officer does not fall within the ambit of the exclusionary rule's purpose. To disallow consideration of outside facts does nothing to further such purpose, and may undermine it by convincing officers that the warrant process is not worth the trouble.

2. Virtues of the Sixth Circuit Approach

The *Laughton* approach to the good faith analysis preserves the principles set forth in *Leon* and consequently relied upon by citizens. As discussed earlier, the *Leon* Court noted several circumstances in which the good faith exception is not applicable.[152] Among these situations are "rubber stamping" by magistrates and "bare bones" affidavits.[153]

Limiting the inquiry to the language within the four corners of the

149. *See generally Leon*, 468 U.S. at 921 (suggesting that imposition of the exclusionary rule without a "good faith" exception based upon reasonable reliance would penalize the offending law enforcement officer).

150. United States v. Martin, 297 F.3d 1308, 1320 (11th Cir. 2002).

151. *Leon*, 468 U.S. at 918–19.

152. *Id.* at 923.

153. *Id*.

affidavit prevents "rubber stamping" by magistrates in that it raises the accountability of such magistrates. They cannot rely upon their trust in the affiant officers to save the search. Rather, if the assessment focuses solely upon the words in the affidavit that actually went before the magistrate, the magistrate is exposed and forced to make honest assessments of whether probable cause exists in a given case.

Further, the *Laughton* approach to good faith analysis overcomes the threat of "bare bones" affidavits sufficing to conduct a search. The *Leon* Court expressly repudiated these meager affidavits, placing it among four situations in which the good faith exception did not apply.[154] If courts may look beyond the affidavit to find that the affiant officer acted in good faith on the basis of other facts, the effect is to allow such "bare bones" affidavits to circumvent the standards in *Leon*.

Another virtue of the *Laughton* interpretation of the good faith inquiry is that it serves as a check on magistrates and affiant officers. The parties are thereby forced to observe the particularity requirement of the Fourth Amendment. The standard is intended to be high given the serious nature of the intrusion upon the privacy rights of citizens. It would dilute the specificity requirements in the process of issuing warrants to allow for a less-than-sufficient affidavit to be compensated by information otherwise known only to the officer.

E. The Best Approach to "Good Faith" Exception Analysis

The validity of the good faith exception and the exclusionary rule itself has come into question. As to the good faith exception, saying that although an affidavit fails to set forth probable cause, the subsequent search may still be upheld despite the lack of support for the standard is arguably contradictory. The probable cause requirement is thereby being swallowed by the exception that can overcome deficiencies in the affidavit.

The usefulness of the exclusionary rule also is in doubt. Those officers already acting in good faith, and exercising reasonable professional judgment, do not need such deterrence.[155] Rather, it punishes them for innocent mistakes. On the other hand, for those officers acting unreasonably, the effects of the exclusionary rule may be too remotely felt to have an impact on their behavior. However, no matter the propriety of the good faith exception or the exclusionary rule, the courts must determine the proper approach to the inquiry.

154. *Id.*

155. *Id*. at 918–19.

On balance, the Sixth Circuit's approach to the good faith exception inquiry, as set forth in *United States v. Laughton*, reflects the ideal standard of interpretation. It best effectuates the principles discussed by the Supreme Court in *Leon*, in which the Court first set forth explicitly the good faith exception to the exclusionary rule. Further, the *Laughton* approach protects the Fourth Amendment rights of citizens while upholding the particularity requirement.

Though the *Martin* approach of allowing consideration of outside information known to the officer though not set forth in the affidavit may comport with the stated purpose of the exclusionary rule, its failings overcome the potential value of such a standard. It forces courts into difficult and time-consuming inquiries into the information known by officers, as well as the quality and timing of that information. The *Martin* approach also leads to a slippery slope in which unwanted subjectivity may be introduced into the analysis.[156] Finally, to consider outside facts may amount to a substituted inquiry into whether probable cause existed in fact.[157] Courts must remember that the good faith exception is to focus on the reasonableness of the officer's reliance upon the issuing of the warrant.[158] It is incongruous to suggest that one could reasonably rely upon a defective warrant on the basis of information that was not even known to the issuing magistrate.

The *Laughton* approach suffers from fewer flaws, and benefits from greater virtues, than does the standard espoused by the Eleventh Circuit in *Martin*. *Laughton* best effectuates the intent of the Supreme Court, and it maintains the principles of the Fourth Amendment meant to protect citizens.

V. CONCLUSION

The *Laughton* court properly found that the good faith exception inquiry should consider only those facts set forth explicitly within the four corners of the affidavit. Though the *Martin* approach might be said to support the exclusionary rule's purpose of deterrence, it forces courts to make extensive evaluations of the information known to the officer, and it invites unwelcome subjectivity. In contrast, the *Laughton* approach of denying consideration of facts outside the four corners of the affidavit best approximates the principles discussed by the Supreme Court when it established the good faith exception in *United States v.*

156. United States v. Laughton, 409 F.3d 744, 752 (6th Cir. 2005).

157. *Id*.

158. *Leon*, 468 U.S. at 905.

Leon.

The language of the Fourth Amendment and the policy rationales forwarded for the exclusionary rule both implicitly support the *Laughton* form of analysis. The constitutional requirement that warrant applications state with "particularity" those items to be seized and the premises to be searched suggests that an affidavit deficient in its facts may not be saved by information known to the officer but simply not set forth for consideration by the magistrate. Moreover, the exclusionary rule's policies of deterrence and preservation of the integrity of the judicial system both point toward a good faith exception analysis centered on the information provided in the affidavit itself.

The *Leon* Court's discussion of the policy of its good faith exception further supports the notion that a judicial inquiry should be relegated to the facts within the four corners of the affidavit. The Court therein set forth four circumstances in which application of the exclusionary rule would still be appropriate.[159] Among these situations included so-called "bare bones" affidavits, and warrants that are so facially deficient that an executing officer could not reasonably rely upon its validity.[160] A rule that allows for consideration of facts known to the officer, but not explained in the affidavit, would seem to contradict the provisions the Court made for these two contexts in particular.

The *Laughton* court took an authoritative position on the standard of good faith inquiry. The court's holding, and the policy justifications underpinning it, should serve as a solid precedent for other circuits to follow in the future. However, it is uncertain whether the *Laughton* standard will ultimately supersede the *Martin* approach.[161] Insofar as the *Laughton* inquiry makes it more difficult to uphold searches as valid under the good faith exception, courts may be disinclined to impose the more stringent standard.[162] In particular, this may be true in that courts

159. *Id*. at 923.

160. *Id*.

161. In fact, the very court that decided *Laughton* later seemed to qualify its position on the good faith inquiry. United States v. Frazier, 423 F.3d 526, 533–34 (6th Cir. 2005). The Sixth Circuit asserted that *Laughton* did not prohibit consideration of evidence outside the four corners of the affidavit in *all* circumstances. *Id*. at 534. Rather, the court distinguished *Laughton* on the facts because the officer in *Frazier* had told the magistrate of the relevant matters, and he had even included this information and sworn to it in several related warrant affidavits presented contemporaneously to the magistrate. *Id*. at 535.

162. Consider the potential impact of the perceived "law and order" values favoring a "tough on crime" approach in American politics. Legal standards that are viewed as obstacles to the administration of justice against criminals might be summarily disposed. *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Vincent R. Johnson, *Judicial Independence: The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007 (2002) (discussing the potential threats to judicial

might subconsciously view the incriminating evidence as a demonstration of the defendant's guilt, and may be thereby swayed in favor of finding a way to uphold the admissibility of the evidence. There are prevailing societal forces demanding a tougher stance on crime, and courts have been increasingly flexible to accommodate officers with the rigors of complying with the forest of rules and standards meant to protect citizens through the operation of the Fourth Amendment. Thus, although the *Laughton* standard may be a better approach than that taken by the *Martin* court, the outlook is questionable as to whether *Laughton's* stance will ultimately be followed.

independence). *See also* Republican Party v. White, 536 U.S. 765, 788–89 (2002) (O'Connor, J., concurring) (asserting that a system of popular election presents a threat to the impartiality of judges).