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Good Faith and the Particularity-of-Description Requirement

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NOTES

GOOD FAITH AND THE PARTICULARITY-OF-DESCRIPTION REQUIREMENT

Maryland v. Garrison[1]

In 1984, the United States Supreme Court adopted a "good-faith" exception to the exclusionary rule of the fourth amendment.[2] Criticism of the new rule immediately followed.[3] While the merits of the good-faith exception had been debated and the rule's adoption anticipated for years before the Supreme Court accepted it,[4] the new exception added to an already confusingly complex

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1. 107 S. Ct. 1013 (1987).

2. The Court adopted the good-faith exception in United States v. Leon, 468 U.S. 897 (1984). Under *Leon*, the exclusionary rule will not affect evidence which is obtained by police officers who act in objectively reasonable reliance on a search warrant that is valid on its face but later held invalid. *Id.* at 913. The central rationale of the good-faith exception is that an officer acting in good faith is not acting illegally, and therefore the main purpose of the exclusionary rule — deterrence — is lost. *Id.* at 918-19.

3. Justices Brennan and Marshall dissented in *Leon* and in Massachusetts v. Sheppard, 468 U.S. 981 (1984), a companion case to *Leon*. Justice Stevens dissented in *Leon* but concurred in *Sheppard*. Scholarly criticism has been widespread. *See, e.g.*, Alschuler, *Close Enough for Government Work: The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 315-16 (*Leon* doctrine may not alter the "bottom line" of the review of warrants from pre-*Leon* days; the Court only "shifted the review of search and arrest warrants"); LaFave, *The Seductive Call of Expediency:* United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 901-02 (*Leon* suspect in several ways; *Leon* erroneously based on the assertion that exclusionary rule is not a constitutional right but only a judge-made remedy for fourth amendment violations); Note, *Constitutional Criminal Procedure - The Good Faith Exception in Action* - Massachusetts v. Sheppard, 59 TUL. L. REV. 1100, 1111 (1985) (criticizing *Sheppard* for extending "an exception created for evidence gained through a magistrate's mistake concerning probable cause to evidence gained via technically deficient warrants").

4. For a sampling of the pre-*Leon* debate, see Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

Justice White, who wrote for the majority in *Leon*, advocated adoption of a good-faith exception in his dissent in Stone v. Powell, 428 U.S. 465, 537-39 (1976) (White,

area of criminal procedure.

In *United States v. Leon*,[5] the Court approved the good-faith exception. In so doing, it spelled out the several considerations behind the adoption of the exception. First, the decision whether to apply the exclusionary rule is a weighing process, the result of which will differ with each case.[6] The purpose of the exclusionary rule, the Court said, is to discourage misconduct of the police. This deterrence ideal does not have effect when an officer acts reasonably.[7] In essence the Court said that good-faith actions of police, even though those actions are errant, cannot be deterred by the exclusionary rule.

In *Maryland v. Garrison*[8] the Court seized another opportunity to deal with a facet of good faith and the fourth amendment. The Court in *Garrison* faced a factual situation that seemed simple on its face but in the end led to fourth amendment problems not easily resolved. Police in Baltimore obtained a warrant to search Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment."[9] The officers had made a "reasonable investigation"[10] of the premises to be searched; they had checked with a police informant concerning the layout of the third floor, they performed an examination from the exterior of the premises to be searched, and they checked with a local utility company, all of which led to the conclusion that only one apartment existed on the third floor.[11]

McWebb was outside the building when the police arrived to conduct the search, and the police used his key to get in the third-floor door.[12] The police entered Harold Garrison's apartment on the third floor, searched it and found heroin, drug paraphernalia and cash.[13] It was not until the search had turned up the illegal materials that the officers realized that the third floor housed two apartments, and as soon as that realization was made the search was ended.[14]

The judge at Garrison's trial for possession of heroin with intent to distribute denied Garrison's motion to suppress the evidence obtained during the search. The Maryland Special Court of Appeals affirmed, but the Maryland Court of Appeals reversed.[15] The United States Supreme Court was faced with two issues: the validity of the search warrant in view of its overbreadth

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J., dissenting) and in a concurring opinion in Illinois v. Gates, 462 U.S. 213, 246 (1983) (White, J., concurring in judgment).

5. 468 U.S. 897 (1984).
6. *Id.* at 906-08.
7. *Id.* at 918-21.
8. 107 S. Ct. 1013 (1987).
9. *Id.* at 1015.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

and the method of the warrant's execution.[16] The Court judged the validity of the warrant from the point of view of the officers at the time they acted to obtain it because "items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued."[17] The Court concluded with some ease that the warrant was valid because the officers disclosed all information they had about the nature of the premises, despite the fact that "it authorized a search that turned out to be ambiguous in scope."[18]

The Court considered the issue of the reasonableness of the mistake on the issue of the warrant's execution. The majority's test for warrant execution reasoned that "the validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable."[19]

One of the central controversies between the majority and three dissenting Justices involved support for the majority's reliance on the reasonableness of the mistake to conclude that no fourth amendment violation occurred.[20] In a footnote that appeared important both to the majority's and dissent's analyses, the dissent pointed out a rationale that had been used in lower federal courts and in state courts to resolve just the type of situation faced by the *Garrison* Court with respect to the warrant's validity:

> Lower court cases, that deal with an exception to the particularity-of-description requirement in a warrant, may support this standard of a 'reasonable mistake.' Some courts have recognized an exception that applies where, to outward appearances, a building appears to be a single-occupancy structure but contains, in reality, several units, and where the officers executing the warrant could not have discovered its multiple-occupancy character despite reasonable efforts.[21]

The majority had done everything but expressly recognize that rationale and incorporate it into law.

Although the dissent disputed its importance and its applicability, the rationale set forth in the footnote seems to fit neatly with the majority's holding

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16. *Id.* at 1017.
17. *Id.*
18. *Id.* at 1018.
19. *Id.* at 1019. The Court's discussion of mistake by the police centered around Hill v. California, 401 U.S. 797 (1971). In *Hill*, police had probable cause to arrest Hill and went to his apartment to make a warrantless arrest. Miller, who matched Hill's description, answered the door of Hill's apartment. *Id.* at 799. The police believed in good faith that Miller was in fact Hill, the Court said, and therefore Miller's arrest was valid. *Id.* at 802. The Court in *Garrison* said that *Hill's* "underlying rationale that an officer's reasonable misidentification of a person does not invalidate a valid arrest is equally applicable to an officer's reasonable failure to appreciate that a valid warrant describes too broadly the premises to be searched." 107 S. Ct. at 1019.
20. *Id.* at 1022.
21. *Id.* at 1023 n.4.

in declaring the warrant valid. It is this new application of the good-faith doctrine that seems to have been adopted by the Supreme Court.[22]

This Note will present an outline of the *Garrison* approach to the good-faith doctrine as it has been debated, created and applied in lower federal courts and in state courts, show how and why this rule fits the Court's thinking and approach in *Garrison*, distinguish the new application from the good-faith exception announced in *United States v. Leon*, and compare the extension of the doctrine to the rule in *Leon* in anticipation of their coexistence.

The *Garrison* Approach to Good Faith

The fourth amendment, of course, requires that search warrants contain a specific description of the place, person or thing to be searched or seized.[23] Unique problems arise when dealing with warrants to search buildings with several separate apartments, hotels or other multiple-occupancy dwellings because police must first determine which unit will be the target of the search. In view of the particularity-of-description requirement the sound rule has developed that a warrant that does not specify a particular unit to be searched will be held invalid because of overbreadth.[24] One commentator astutely noted that "the probable cause requirement would be substantially diluted if a search of several living units could be authorized upon a showing that some one of the units within the description, not further identifiable, probably contained the items sought."[25] An example of an inadequate description would be a description using only a street number of a multi-unit structure.[26]

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22. For a good discussion of the doctrine's existence in lower courts, see 2 W. LAFAVE, SEARCH AND SEIZURE § 4.5(b) (1978).

23. U.S. CONST. amend. IV. The exact language 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*" (emphasis added). See United States v. Hinton, 219 F.2d 324 (7th Cir. 1955) for a general discussion of the particularity-of-description requirement as it applies to multiple-occupancy buildings.

24. United States v. Busk, 693 F.2d 28 (3d Cir. 1982); United States v. Higgins, 428 F.2d 232 (7th Cir. 1970); Tynan v. United States, 297 F. 177 (9th Cir.), *cert. denied*, 266 U.S. 604 (1924); United States v. Parmenter, 531 F. Supp. 975 (D. Mass. 1982); United States v. Esters, 336 F. Supp. 214 (E.D. Mich. 1972); United States v. Barkouskas, 38 F.2d 837 (M.D. Pa. 1930); People v. Grossman, 19 Cal. App. 3d 8, 96 Cal. Rptr. 437 (1971); Fance v. State, 207 So. 2d 331 (Fla. Dist. Ct. App. 1968); State v. Gordon, 221 Kan. 253, 559 P.2d 312 (1977); State v. Manzella, 392 So. 2d 403 (La. 1980); State v. Stevenson, 589 S.W.2d 44 (Mo. Ct. App. 1979).

25. 2 W. LAFAVE, *supra* note 22, at § 4.5(b).

26. United States v. Hinton, 219 F.2d 324 (7th Cir. 1955); People v. Alarid, 174 Colo. 289, 483 P.2d 1331 (1971); Jones v. State, 126 Ga. App. 841, 192 S.E.2d 171 (1972); Commonwealth v. Erickson, 14 Mass. App. Ct. 501, 440 N.E.2d 1190 (1982); State v. Ratushny, 82 N.J. Super. 499, 198 A.2d 131 (1964); People v. Rainey, 14 N.Y.2d 35, 197 N.E.2d 527, 248 N.Y.S.2d 33 (1964). For examples of sufficiently particular descriptions in a warrant, see 2 W. LAFAVE, *supra* note 22, § 4.5(b), at 79.

The new application of the good-faith doctrine to the particularity-of-description requirement which seems to have been adopted in *Garrison* hinges on objectively reasonable behavior on the part of the police.[27] It should be noted that the Court never explicitly adopted this line of cases and school of thought. The same approach has been created and has evolved primarily in various federal appellate courts and in some state appellate courts.

A leading case is *United States v. Santore*.[28] In *Santore* a defendant named Orlando was convicted of selling narcotics.[29] The warrant to search Orlando's apartment identified the premises as "164 Hill Street, Elmont, Long Island, New York, being a one family house, in the Eastern District of New York."[30] As it turned out, however, the building housed two families. Although the house was registered with local housing authorities as a one-family dwelling, Orlando had divided the house without gaining permission to do so.[31] Orlando argued that the warrant was void for not meeting the particularity-of-description requirement.[32] The Court of Appeals disagreed, saying that the warrant had the necessary "practical accuracy"[33] and that since the police had no indication of the change in the inside of the house the description was sufficient.[34]

The *Garrison* dissent's important fourth footnote[35] mentioned *United States v. Davis*,[36] in which officers obtained a warrant to search the house of defendant Davis. When the warrant was obtained the officers thought the house was a single-family dwelling.[37] During the search, however, the officers found that there were two apartments in the house, and when that fact was discovered the search was confined to those areas of the house "under Davis's use and control."[38] The warrant was upheld based on the reasoning of *Santore*.[39]

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27. LaFave states that:

> [I]f the building in question from its outward appearance would be taken to be a single-occupancy structure and neither the affiant nor other investigating officers nor the executing officers knew or had reason to know of the structure's actual multiple-occupancy character until execution of the warrant was under way, then the warrant is not defective for failure to specify a subunit within the named building.

2 W. LAFAVE, *supra* note 22, § 4.5(b), at 79.

28. 290 F.2d 51 (2d Cir. 1960).
29. *Id.* at 66.
30. *Id.*
31. *Id.* at 66-67.
32. *Id.* at 66.
33. *Id.* at 67.
34. *Id.*
35. 107 S. Ct. at 1023 n.4 (Blackmun, J., dissenting).
36. 557 F.2d 1239 (8th Cir.), *cert. denied*, 434 U.S. 971 (1977).
37. *Id.* at 1248.
38. *Id.*
39. *Id. Accord* Owens v. Scafati, 273 F. Supp. 428 (D. Mass.), *cert. denied*, 391 U.S. 969 (1967); People v. McGill, 187 Colo. 65, 528 P.2d 386 (1974); Jackson v.

Without referring to any of the cases which outline the doctrine, the *Garrison* majority applied the above reasoning to resolve the issue of the warrant's validity and to satisfy the particularity requirement.[40] The lack of a specific reference to the *Santore-Davis* rationale makes it unclear that the Court had those cases in mind, but as the discussion that follows will show, albeit with minor incongruities which are not difficult to explain, the Court embraced the principle.

The officers in *Garrison* were reasonably mistaken as to the existence of two apartments on the third floor of the building that was to be searched, and, based on the lack of information available to the officers when the warrant was issued, the Court held the warrant valid.[41] An exception to a *part* of the warrant requirement — that the warrant particularly describe the place to be searched — was thus recognized when dealing with multiple-unit structures. The dissent argued that this exception should not apply in *Garrison* because the police knew that the *building* contained several units, but they did not know how many apartments were on the third floor.[42] The police in *Garrison* knew, however, that the suspect lived on the third floor and for that reason were unconcerned with the other portions of the house. Therefore, the third floor in essence was treated as a separate dwelling. Because the police reasonably believed that there was only one apartment on the third floor, there appeared to be no danger of offending the rights of non-suspects.[43]

Careful scrutiny of the *Garrison* application reveals its soundness.[44] Professor LaFave, who has criticized the *Leon* exception,[45] offers two reasons in support of the rule.[46] First, the rule recognizes that reasonable investigations, not perfect ones, are what we demand of the police. In *Garrison* the police

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State, 129 Ga. App. 901, 201 S.E.2d 816 (1973).

40. 107 S. Ct. at 1017-18.

41. *Id.*

42. 107 S. Ct. at 1023 n.4 (Blackmun, J., dissenting). Justice Blackmun reasoned that officers should be held to a higher standard when they know that a building contains several apartments. Since they already know that there are several apartments, the argument goes, the police are aware that there is a greater risk of infringing on the fourth amendment rights of non-suspects. *Id.*

43. The majority's discussion in its footnote 13 goes a long way toward distinguishing *Garrison* from the types of cases that would seem to distress the dissenters. 107 S. Ct. at 1019 n.13. The footnote reads:

> We expressly distinguish the facts of this case from a situation in which the police know there are two apartments on a certain floor of a building, and have probable cause to believe that drugs are being sold out of that floor, but do not know in which of the two apartments the illegal transactions are taking place. A search pursuant to a warrant authorizing a search of the entire floor under those circumstances would present quite different issues from the ones before us in this case.

Id.

44. 2 W. LAFAVE, *supra* note 22.

45. LaFave, *The Seductive Call of Expediency:* United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895.

46. 2 W. LAFAVE, *supra* note 22.

used three sources — an informant, their own examination of the building and a utility-company check — to ascertain the number of third-floor apartments.[47] The Court held that reliance on such sources was reasonable. Second, when this type of mistake occurs it is not discovered until the search has begun.[48] Such was the case in *Garrison*, and when the police realized that a mistake had been made the search of Garrison's apartment ended.[49] This in itself tends to show good faith by the police. Additionally, LaFave contends that the rule is sound as long as it is given a narrow construction.[50]

Misapplication of the *Garrison* rationale to protect police when legitimate fourth amendment violations occur seems to be avoidable in that the rule is distinguishable on at least two grounds. The doctrine will apply only in a few situations as long as it is given the recommended narrow construction.[51] Moreover, the rule rarely will need to be invoked, given the factual distinctiveness of cases like *Garrison.*

The rule also serves as an example of the application of reality to criminal procedure in recognition of the imperfection involved in criminal investigations. The central rationale for this portion of the *Garrison* rule is essentially identical to the rationale of *United States v. Leon*: deterrence will not be effective when police make unintentional mistakes while acting reasonably.[52]

Comparing and Contrasting *Garrison* and *Leon*

Some critics voice the concern that *Garrison* represents an unreasonable extension of the *Leon* good-faith exception.[53] That criticism is inaccurate in that *Garrison's* application and approach to good faith are distinguishable from *Leon's*, although the two rules are similar and share rationales. The *Gar-*

47. 107 S. Ct. at 1015.

48. 2 W. LAFAVE, *supra* note 22. Although in *Garrison* the mistake in describing the premises to be searched was not discovered until the search began, it is not clear that this will always be the case as LaFave implies. Perhaps LaFave's point is better expressed in his statement that in most of these cases, "the discovery of the multiple occupancy occurred only after the police had proceeded so far that withdrawal would jeopardize the search." *Id.* at 80.

49. 107 S. Ct. at 1015.

50. 2 W. LAFAVE, *supra* note 22. LaFave says that the rule should be applied only when three factors exist. First, the officers did not know and could not have reasonably known that more than one apartment existed. Second, the error is not discovered until the search is under way. Third, when the multiple-unit character is discovered the police make "reasonable efforts" to decide which apartment is the target. *Id.* In *Garrison* the first factor was satisfied by the pre-search investigation. The error was not discovered until the search had begun, thereby satisfying the second factor. Finally, when the police discovered that two apartments existed on the third floor they chose to discontinue the search of the wrong apartment, and thus the third factor was met.

51. *Id.*

52. *See supra* notes 5-7 and accompanying text.

53. Bernstein, *Supreme Court Review*, TRIAL, June 1987, at 90.

rison rule deals specifically with an element of the warrant requirement;[54] in *Leon*, the Court explicitly left "untouched the probable-cause standard *and the various requirements for a valid warrant.*"[55] The *Leon* exception prevents the use of the exclusionary rule to bar evidence in the prosecution's case-in-chief when the evidence is obtained by officers acting in good-faith reliance on a warrant that later is found invalid.[56] The warrant in *Garrison* was held to be valid.[57] Therefore, although the doctrines are similar, it is clear that they deal with separate areas of fourth amendment law.

The discussion of good faith and the particularity-of-description requirement in *Garrison* solves the problem of whether a valid warrant was issued. For resolution of the issue of the method of execution of the warrant, the Court used a reasonableness analysis,[58] relying solely on *Hill v. California*[59] for the proposition that the legality of searching Garrison's apartment hinges on whether it was reasonable for the officers not to realize that the warrant involved was too broad.[60]

Discussion of the *Leon* exception in connection with the issue of warrant execution and a comparison of the *Leon* and *Garrison* rules in that light may prove useful.[61] It appears that a not-far-removed corollary of the *Leon* good-faith exception could have been (and perhaps was) applied in *Garrison*. The *Leon* rule — "that evidence seized, albeit pursuant to an invalid warrant, may be admitted in evidence in the prosecution's case-in-chief, if the law enforcement officer secured the warrant in good faith"[62] — is based on the assumption that the search warrant was executed properly and that police "searched only those places and for those objects that it was reasonable to believe were covered by the warrant."[63] Similarly, in *Garrison* the police searched only where they thought they legally could do so.[64] Therefore, the concept of rea-

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54. *See supra* notes 41-43 and accompanying text.

55. United States v. Leon, 468 U.S. 897, 923 (1984) (emphasis added).

56. *Id.* at 920-21.

57. 107 S. Ct at 1018. For a discussion of the good-faith issue as it applies to the warrant execution issue, see *infra* notes 59-65 and accompanying text.

58. 107 S. Ct. at 1018-20.

59. 401 U.S. 797 (1971).

60. *See supra* note 19 and accompanying text. In its discussion of warrant execution, the Court reiterated its intent to give police "some latitude" in which mistakes may be tolerated. 107 S. Ct. at 1018. In addition, the Court said the officers acted properly in the circumstances "even if the warrant is interpreted as authorizing a search limited to McWebb's apartment rather than the entire third floor." *Id.* at 1019.

61. Despite an admonition against confusing *Leon* with the issue of warrant execution, *see* Note, *The Good Faith Exception: Should It Allow Courts to Avoid Explication of Underlying Fourth Amendment Issues?*, 52 BROOKLYN L. REV. 799, 800 n.8 (1986), the discussion here about the effect of the *Leon* and *Garrison* approaches on warrant execution will explore the logical relationship between the two approaches.

62. *Id.* at 800 (1986).

63. United States v. Leon, 468 U.S. 897, 918 n.19 (1984).

64. 107 S. Ct. at 1019. The police "perceived McWebb's apartment and the third-floor premises as one and the same; therefore their execution of the warrant rea-

sonableness was central in both cases.

The difference comes in consideration of the crucial distinguishing factor between the cases: *Leon* involved an invalid warrant, but the warrant in *Garrison* was expressly held to be valid. If we will allow admission of evidence obtained pursuant to an *invalid* warrant when the police obtain the warrant with good faith, we should allow admission of evidence obtained pursuant to a *valid* warrant when both procurement of the warrant and the execution thereof were done with good faith. Viewed in these terms, the *Garrison* rule is merely a logical extension of *Leon.* The two rules are not contradictory but complementary, and because of this compatibility their coexistence should be harmonious.

Conclusion

The United States Supreme Court in *Maryland v. Garrison* added another good-faith consideration to a part of fourth amendment analysis.[65] The Court approved an exception to the fourth amendment warrant requirement's particularity-of-description requirement as it applies to searches of multiple-occupancy buildings.[66] The approach used by the Court seems to have its roots and rationale in the other, expressly recognized good-faith exception of *United States v. Leon.*[67] Both rules are grounded in the notion that police will not be deterred by the exclusionary rule from committing fourth amendment violations when they mistakenly or in good faith commit the violation.[68]

Although the *Garrison* rule shares characteristics with the *Leon* good-faith exception, the two deal with quite different situations and areas of the law of search and seizure.[69] The similarities make the rules complementary. Most important, the *Garrison* case involves common sense in recognition of the fact that we cannot demand perfection of our law enforcement officers but merely reasonable, good-faith efforts.

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sonably included the entire third floor." *Id.* In *Leon's* terms, the police in *Garrison* searched only the places that they reasonably thought were included in the warrant.

65. *See supra* notes 21-24 and accompanying text.
66. *See supra* notes 41-44 and accompanying text.
67. *See supra* notes 5-7 and accompanying text.
68. *Id.*
69. *See supra* notes 55-58 and accompanying text.