SURVEY OF TRENDS IN SEARCH AND SEIZURE LAW

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This article surveys significant trends in search and seizure law.[1] Recent United States Supreme Court decisions are reviewed. The scope of this survey is limited to the following four areas: (1) fourth amendment protected interests; (2) the probable cause requirement; (3) the automobile exception to the warrant requirement; and (4) the "good faith" exception to the exclusionary rule. These four areas were selected because of their practical and doctrinal significance.

I. FOURTH AMENDMENT PROTECTED INTERESTS

The fourth amendment protects individuals against unreasonable searches and seizures by the government.[2] In the landmark case of *Katz v. United States*,[3] the United States Supreme Court held that this protection applies to any interest in which an individual has a reasonable expectation of privacy. The expectation of privacy must be both subjective and one that society recognizes as reasonable.[4] The *Katz* decision shifted the focus of constitutional protection from physical areas to privacy interests. Thus, the fourth amendment "protects people, not places."[5] During the past two years, the Court has decided several cases involving the fundamental issue of protected interests.

In *Oliver v. United States*,[6] the Court considered whether, under the *Katz* test, fourth amendment protections extend to open fields.

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[1] Excerpts from other publications written by the author are included in this article.

[2] The fourth amendment provides:

> 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.

U.S. CONST. amend. IV.

[3] 389 U.S. 347, 351-53 (1967).

[4] *Id.* at 361 (Harlan, J., concurring).

[5] *Id.* at 351. The Court later conformed its fourth amendment standing test to *Katz* by rejecting property concepts and requiring defendants to have a legitimate expectation of privacy in the area searched or the object seized. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

[6] 466 U.S. 170 (1984).

In *Oliver,* narcotics agents received reports that the defendant was raising marijuana on his farm. The agents conducted a warrantless search on foot of the farm area and found a marijuana field over a mile from the defendant's home. The field was secluded and could not be seen from any point of public access. The defendant had locked the entrance gate to his farm and posted "no trespassing" signs.[7]

The Court held that the search was lawful, concluding that no legitimate expectation of privacy per se exists in open fields.[8] The expectation of privacy in an open field is not one that society is prepared to recognize as reasonable. Therefore, although the defendant treated his secluded marijuana field as an area of private use, erecting barriers and "no trespassing" signs, those actions could not convert his subjective expectation of privacy into a legitimate interest protected by the fourth amendment.[9]

During its last term, in the companion cases of *California v. Ciraolo*[10] and *Dow Chemical Co. v. United States,*[11] the Court considered the impact of aerial surveillance on privacy expectations. Both cases were analyzed under the *Katz* test.

In *Ciraolo,* police received a tip that the defendant was growing marijuana in his backyard. The backyard was completely enclosed by two tall fences. The police flew over the yard in public airspace and, without visual assistance, observed vegetation that appeared to be marijuana plants. This led to the issuance of a search warrant and the subsequent seizure of the plants.[12]

The Court held that the search was lawful because the defendant's expectation of privacy was not objectively reasonable. The defendant demonstrated his subjective expectation of privacy under the *Katz* test by fencing his marijuana crop. The Court reasoned, however, that the defendant's expectation was unreasonable because anyone flying in the same public airspace could have seen the marijuana plants.[13]

In *Dow,* the Court held that it was not a fourth amendment search to engage in conventional aerial photography of the outdoor areas of a large industrial complex.[14] The Court, however, hinted that the result might be different if the surveillance involved highly sophisticated equipment.[15] Furthermore, the Court's emphasis on the lower expectation of privacy in commercial facilities indicated that even conventional aerial photography, which enhances the na-

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[7] *Id.* at 173-74.

[8] *Id.* at 182-83. Thus, the Court reaffirmed the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), which held that police officers may enter and search a field without a warrant.

[9] *See* 466 U.S. at 182-83.

[10] 106 S. Ct. 1809 (1986).

[11] 106 S. Ct. 1819 (1986).

[12] 106 S. Ct. at 1809-10.

[13] *Id.* at 1813.

[14] 106 S. Ct. at 1827.

[15] *Id.* at 1826.

ked eye, might be prohibited in *Ciraolo*-type private residence searches.[16]

Oliver, Ciraolo, and *Dow* demonstrate the Court's adherence to the *Katz* test. Although the conclusions in these cases may be disputed,[17] the Court's analyses are consistent with *Katz*. Thus, the fourth amendment protection continues to apply to any interest in which an individual has a reasonable expectation of privacy.

II. PROBABLE CAUSE REQUIREMENT

Generally, searches and seizures must be based on probable cause and made pursuant to a warrant.[18] Probable cause to search exists when there are sufficient facts, given the totality of the circumstances, to lead a reasonable person to believe that there is a fair probability that the items sought are connected with criminal activity and will be present at the time and place of the search.[19] This traditional standard has been reaffirmed by the Court in recent decisions.

In *Illinois v. Gates,*[20] the Court examined whether the strict *Aguilar-Spinelli*[21] test should be replaced by the traditional "totality of the circumstances" standard when evaluating informant information for probable cause. In *Gates,* the Bloomingdale, Illinois Police Department received an anonymous letter that stated the defendants were selling illegal drugs. The letter described in detail the routine the defendants followed in traveling to Florida, picking up the drugs, and returning to Bloomingdale where they sold them. According to the letter, the defendants transported over $100,000 in drugs per trip. The informant further claimed that the defendants had over $100,000 in drugs in the basement of their home.[22]

On the basis of the information in the letter, police corroboration of many of its details, and police surveillance of the defendants' suspected drug-buying trip to Florida, a search warrant was issued for the defendants' car and residence. The searches revealed 350 pounds of marijuana in the car, and marijuana, weapons, and other contraband in the home. All of these items were eventually suppressed on the ground that the affidavit for the search warrant failed the *Aguilar-Spinelli* test for probable cause.[23]

The Court rejected the strict interpretation of the *Aguilar-*

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[16] *See id.*

[17] For a critical analysis of these cases, see Note, *Aerial Surveillance and the Fourth Amendment, infra* at page 57.

[18] U.S. CONST. amend. IV.

[19] Illinois v. Gates, 462 U.S. 213, 238 (1983).

[20] 462 U.S. 213 (1983).

[21] Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[22] 462 U.S. at 225-28.

[23] *Id.*

Spinelli test and reversed the lower court's suppression of the evidence. The *Aguilar-Spinelli* test required that an affidavit establish the means by which the informant acquired his information and the veracity of the informant or the reliability of his information. The Court abandoned the *Aguilar-Spinelli* test, refusing to bind the concept of probable cause to such a strict set of rules. The Court explained that veracity or credibility should not be analyzed separately, but should be considered with the basis of knowledge in a practical, common sense analysis of the totality of the circumstances.[24]

In *New York v. P.J. Video, Inc.*,[25] the Court next examined the impact of first amendment considerations on the "fair probability" probable cause standard. *P.J. Video* involved the seizure of allegedly pornographic films pursuant to a search warrant. The supporting affidavit described "patently offensive" sex acts depicted in the films.[26]

Although the seizure of materials presumptively protected by the first amendment raises special concerns, the Court held that the "fair probability" standard of probable cause is sufficient.[27] The Court emphasized, however, that the defendant is entitled to a prompt postseizure judicial determination of probable cause and that a warrant for presumptively protected materials requires more than the officer's conclusions that the materials are obscene.[28]

Gates and *P.J. Video* demonstrate the Court's reaffirmation of the traditional probable cause standard. Although these cases raise distinctive issues, the Court reasoned that a higher standard of probable cause was unwarranted.

III. AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT

Probable cause searches of vehicles generally do not require a warrant. This long-standing exception to the warrant requirement is justified on two grounds. First, the inherent mobility of vehicles often creates exigent circumstances that make obtaining a warrant impractical.[29] Second, there is a lower expectation of privacy in

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[24] *Id.* at 238. The Court, however, stated that the "reliability" and "basis of knowledge" prongs of the *Aguilar-Spinelli* test are highly relevant factors in the "totality of the circumstances" analysis. *Id.* Thus, while the Court has relaxed these requirements, the two factors should not be completely disregarded when analyzing probable cause.

[25] 106 S. Ct. 1610 (1986).

[26] *Id.* at 1613 (quoting People v. P.J. Video, Inc., 65 N.Y.2d 566, 570-71, 493 N.Y.S.2d 988, 992, 483 N.E.2d 1120, 1124 (1985)).

[27] *Id.* at 1615-16 (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983)). *See also supra* text accompanying notes 18-19.

[28] 106 S. Ct. at 1614 (citing Heller v. New York, 413 U.S. 483 (1973)).

[29] Carroll v. United States, 267 U.S. 132, 151 (1925).

vehicles.[30]

Automobile exception searches are often poorly executed by police. This is due, in part, to the unsettled law in this relatively confusing area.

In the 1982 decision of *United States v. Ross*,[31] the Court attempted to clarify the scope of these searches. The Court held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[32] Thus, *Ross* extended the scope of the automobile exception beyond the vehicle's integral parts to include containers within the vehicle.

Although *Ross* clarified the scope of automobile exception searches, the search of containers pursuant to this exception remains unsettled. The Court in *Ross* clearly stated that if the probable cause is *directed at the vehicle*, police may search containers that may conceal the object of the search.[33] Furthermore, the Court reaffirmed that the automobile exception does not apply to situations in which the probable cause is *directed at a container* that is *subsequently* placed in a vehicle.[34] The Court, however, has not specifically addressed whether the automobile exception applies to situations in which the probable cause is directed solely at a container that is *already* in a vehicle.[35]

In 1985, the Court decided two automobile exception cases. The first case, *United States v. Johns*,[36] involved a delayed automobile exception search of packages. *Johns* offered insight into the Court's position on the scope of container searches pursuant to the automobile exception. The second case, *California v. Carney*,[37] resulted in a controversial decision involving the types of vehicles covered under the automobile exception.

In *Johns*, DEA agents followed the defendants to a remote airstrip and seized two trucks that they had probable cause to believe contained marijuana. The agents removed packages from the trucks and placed them in a government warehouse. Three days later, without obtaining a search warrant, the agents opened the packages and found marijuana.[38]

The Court held that the search did not violate the fourth amendment. Relying on *Ross*, the Court held that the agents could have

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[30] *See id.* at 151-62.

[31] 456 U.S. 798 (1982).

[32] *Id.* at 824.

[33] *Id.* at 820-24.

[34] *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977). In these situations, police may seize the container, but must obtain a warrant to search it. 442 U.S. at 766-67; 433 U.S. at 13-14.

[35] In Oklahoma v. Castleberry, 105 S. Ct. 1859 (1985) (per curiam), an equally divided Court affirmed a decision that in this situation police must detain the container and delay the search until a warrant is obtained.

[36] 469 U.S. 478 (1985).

[37] 471 U.S. 386 (1985).

[38] 469 U.S. at 480-81.

lawfully searched the packages when they first seized them at the airstrip. Since the agents lawfully seized the packages and continued to have probable cause to believe they contained contraband, a three-day delay in the execution of the warrantless search was not unreasonable. The Court reasoned that it would not further an individual's privacy interests to require a warrant for a subsequent search not conducted at the place of seizure.[39]

On the surface, *Johns* merely extended *Chambers v. Maroney*[40] to the search of containers. The decision, however, also shed light on the unsettled scope of container searches pursuant to the automobile exception. The Court in *Johns* stressed that the search was within the automobile exception because the probable cause was directed at not only the packages but also the vehicles themselves.[41] Thus, by implication, the automobile exception does not apply to situations in which the probable cause is directed solely at a container that is *already* in a vehicle.

In *Carney,* the other 1985 case, the Court attempted to define the types of vehicles covered under the automobile exception. DEA agents had information that the defendant was exchanging marijuana for sex in his motor home parked in a public lot. The agents watched the defendant approach a youth who then entered the motor home with the defendant. When the youth emerged, he told the agents that the defendant gave him marijuana in exchange for sexual contacts. The agents convinced the youth to return to the motor home and to ask the defendant to come out. When the defendant stepped out, an agent entered the motor home, found marijuana, and arrested the defendant.[42]

The Court held that the search did not violate the fourth amendment, finding it lawful under the "automobile exception" to the warrant requirement. The Court explained that motor homes, like automobiles, are mobile. Also, there is a diminished expectation of privacy in a motor home that is operated on public roads and in public areas. The Court rejected the argument that the exception did not apply simply because the motor home was equipped to function as a residence. In this case, the motor home was licensed to operate on public streets, was serviced in public places, was found in a public parking lot, and was subject to extensive regulation and inspection not applicable to a residence. The Court refused to create fine distinctions in the automobile exception based on the size of the vehicle and its purported use.[43]

The variety of vehicles combined with a myriad of factual situa-

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[39] *Id.* at 486-87.

[40] 399 U.S. 42 (1970). The Court in *Chambers* held that a vehicle may be searched pursuant to the automobile exception after it has been impounded at the police station. *Id.* at 52. Thus, *Johns* updated the *Chambers* decision to conform with the search of containers permitted in *Ross.*

[41] 469 U.S. at 486.

[42] 471 U.S. at 387-88.

[43] *Id.* at 390-94.

tions will undoubtedly create gray areas as to the types of vehicles covered under the automobile exception. *Carney,* however, has provided guidelines that will assist in analyzing these gray areas.[44]

IV. "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE

The exclusionary rule is a judicially created remedy that prohibits the use of evidence obtained by police through means that violate the defendant's fourth amendment rights.[45] Limitations on the controversial rule prevent its strict application. The "good faith" exception is the most recent limitation on the rule.

In the companion cases of *United States v. Leon*[46] and *Massachusetts v. Sheppard,*[47] the Supreme Court adopted the "good faith" exception to the exclusionary rule. The "good faith" exception set forth in these cases is limited to search warrant situations. Although the practical impact of these cases is speculative, from a doctrinal standpoint they are perhaps the most significant criminal cases decided by the Burger Court.

In *Leon,* police successfully searched the defendants' residences and automobiles for drugs pursuant to a facially valid search warrant. The affidavit contained both specific information from a confidential informant of unproven reliability and extensive surveillance that indicated drug trafficking.[48]

The defendants were indicted for federal drug offenses and moved to suppress the evidence seized pursuant to the warrant. The district court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause. Although the court found that the police had acted in good faith, it rejected the Government's suggestion to recognize a "good faith" exception to the exclusionary rule. The court of appeals affirmed, also refusing to recognize the exception. The Government's petition for certiorari presented only the question whether a "good faith" exception to the exclusionary rule should be recognized. The Supreme Court granted certiorari, recognized the "good faith" exception, and ac-

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[44] We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

Id. at 394 n.3.

[45] *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961).

[46] 468 U.S. 897 (1984).

[47] 468 U.S. 981 (1984).

[48] 468 U.S. at 901-02.

cordingly, reversed the decision of the court of appeals.[49]

Underlying the Court's recognition of the "good faith" exception was its basic conception of the exclusionary rule. The Court emphasized that the rule is not constitutional in origin, but rather a judicially created remedy designed primarily to protect fourth amendment rights through its deterrent effect.[50] Accordingly, the Court has restricted the rule's application to those situations in which its deterrent purpose is effectively served.[51] Using a cost-benefit analysis in applying the rule,[52] the Court weighs the cost of losing reliable and probative evidence against the benefit of deterring fourth amendment violations.[53] Applying this cost-benefit analysis, the Court has rejected the application of the rule in a variety of situations.[54]

The Court employed the cost-benefit analysis to support its recognition of the "good faith" exception in search warrant cases.[55] After noting that the exclusionary rule is not directed at judicial conduct, the Court reasoned that the rule cannot deter objectively reasonable law enforcement activity.[56] This is particularly true when a police officer acting with objective good faith has obtained a search warrant from a judge and acted within its scope.[57] Thus, the Court concluded that the application of the exclusionary rule to these situations cannot logically deter fourth amendment violations.[58]

Applying these principles, the Court in *Leon* found the "good faith" exception appropriate. Despite the lower courts' findings of no probable cause, the search warrant affidavit contained the results of an extensive investigation that arguably may have established probable cause.[59] Under these circumstances, the officers' reliance on the magistrate's erroneous determination of probable cause was

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[49] *Id.* at 902-05.

[50] *Id.* at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

[51] *Id.* at 909.

[52] *Id.* at 906-07.

[53] *See id.* at 909-10.

[54] *Id.* at 909. For example, the exclusionary rule has been held not applicable to grand jury proceedings, United States v. Calandra, 414 U.S. 338, 349-52 (1974); civil proceedings, United States v. Janis, 428 U.S. 433, 449-54 (1976); and impeachment at trial, Harris v. New York, 401 U.S. 222, 224-26 (1971). Furthermore, the Court has applied the cost-benefit analysis to procedurally limit the impact of the exclusionary rule. For example, the Court drastically limited fourth amendment federal habeas relief, Stone v. Powell, 428 U.S. 465, 489-95 (1976), and limited standing to invoke the rule in fourth amendment cases to defendants who have actually suffered a violation of their own rights, Rakas v. Illinois, 349 U.S. 128, 138-40 (1978).

[55] 468 U.S. at 913.

[56] *Id.* at 916.

[57] *Id.* at 920.

[58] *Id.* at 921. The Court emphasized that the "good faith" exception is not applicable under any of the following circumstances: the judge issuing the warrant was misled by false information in the affidavit that was knowingly or recklessly included by the police; the issuing judge abandoned his neutral and detached role; the affidavit was so lacking in probable cause as to render belief in its existence entirely unreasonable; or the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the police cannot reasonably presume it to be valid. *Id.* at 923.

[59] *Id.* at 925-26.

objectively reasonable.[60] Accordingly, the application of the exclusionary rule to this case was inappropriate.[61]

Sheppard, on the other hand, involved the application of the "good faith" exception to a situation in which the search warrant established probable cause but was technically defective. Based on information gathered in a homicide investigation, a police detective drafted a search warrant affidavit. The affidavit requested authority to search the defendant's residence for certain described items, including the victim's clothing and a blunt instrument that might have been the murder weapon. The district attorney and his first assistant approved the affidavit. Because it was Sunday, the detective could not find an appropriate warrant application form and, consequently, used a controlled substances form. After making some changes in the form, the detective presented it and the affidavit to a judge at his residence. The detective told the judge that the warrant form might need further modifications. The judge found that the affidavit established probable cause and told the detective that the necessary changes in the warrant form would be made.[62]

Although the judge made some further changes, the warrant continued to authorize a search for controlled substances and failed to incorporate the affidavit. After signing the warrant, the judge returned it and the affidavit to the detective, assuring him that it was proper in form and content. The search of the defendant's residence was limited to the items listed on the affidavit, and police seized several pieces of incriminating evidence.[63]

After being charged with first-degree murder, the defendant moved to suppress the evidence on the ground that the warrant did not particularly describe the items to be seized. The trial court agreed, but denied the motion because the police acted in good faith. At the subsequent trial, the defendant was convicted. On appeal, the state supreme court refused to recognize the "good faith" exception and reversed. The United States Supreme Court granted certiorari, applied the "good faith" exception, and accordingly, reversed.[64]

Having recognized the "good faith" exception in *Leon,* the only issue before the Court in *Sheppard* was whether the police reasonably believed that the search was authorized by a valid warrant.[65] It was undisputed that the officers believed the warrant was valid.[66] Regarding the objective reasonableness of the officers' belief, the Court found that they "took every step that could reasonably be expected of them."[67] The Court concluded that to suppress the evi-

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[60] *Id.* at 926.
[61] *Id.*
[62] 468 U.S. at 984-86.
[63] *Id.* at 986-87.
[64] *Id.* at 987, 991.
[65] *Id.* at 987-88.
[66] *Id.* at 988.
[67] *Id.* at 989.

dence because of the judicial error demonstrated in this case would not serve the exclusionary rule's deterrent function.[68] Thus, application of the exclusionary rule was inappropriate.[69]

The "good faith" exception set forth in *Leon* and *Sheppard* is a logical extension of the Court's cost-benefit approach to the judicially created exclusionary rule. Suppression of evidence obtained by police through objective good faith reliance on a search warrant does not effectively serve the rule's deterrent purpose. Critics of the "good faith" exception, on the other hand, believe that the cost-benefit approach is illusory because the exclusionary rule is implicit in the fourth amendment and, therefore, constitutional in nature. Unless the cost-benefit analysis is applied, however, the exclusionary rule would be rigidly enforced. It is illogical to rigidly apply the rule to situations in which its deterrent purpose is not appreciably served. Irrational applications of the rule do not promote constitutional rights, but rather, generate disrespect for the criminal justice system.

The exclusionary rule, even when rationally applied, impedes the truth-finding process by excluding probative and reliable evidence and occasionally permits the guilty to go free. Application of the rule to situations in which the police have relied in objective good faith on a defective search warrant is not only illogical, but also grants an unwarranted windfall to criminal defendants. Consequently, the narrow "good faith" exception set forth in *Leon* and *Sheppard* is a logical and necessary limitation on the exclusionary rule.[70]

V. CONCLUSION

The cases in these four areas reflect the trend in search and seizure law. Fundamental fourth amendment doctrine has returned to the basics. Protected interests are now founded on fourth amendment principles of privacy rather than arcane principles of property. The traditional standard of probable cause has been reaffirmed. In specific areas, such as the automobile exception, the Court has attempted to clarify the law—usually in favor of law enforcement. Finally, and perhaps most importantly, the Court has taken a pragmatic approach to the exclusionary rule and has limited the rule's impact by applying a cost-benefit analysis.

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[68] *Id.* at 990-91.

[69] *Id.* at 991.

[70] If, contrary to logical expectations, the "good faith" exception results in a significant increase in fourth amendment violations, the Court should reconsider its decisions in *Leon* and *Sheppard*. *See Leon*, 468 U.S. at 928 (Blackmun, J., concurring). It is unlikely, however, that violations will significantly increase. Furthermore, it is possible that fourth amendment violations will actually decrease because police have an additional incentive to obtain search warrants under the "good faith" exception.