UIC Law Review

Volume 18 | Issue 4 Article 12

Summer 1985

Bench Memorandum Third Annual Benton National Moot Court Competition Briefs, 18 J. Marshall L. Rev. 1017 (1985)

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No. 1984
IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

ROGER CARTER,
Petitioner,
vs.
PEOPLE OF THE STATE OF MARSHALL,
Respondent.

BENCH MEMORANDUM

GEORGE B. TRUBOW* RALPH RUEBNER**
and KENNETH MICHAELS***

STATEMENT OF THE CASE

This case comes before the Marshall Supreme Court on its order granting Petitioner leave to appeal the decision of the Appellate Court of Marshall. The parties are directed to address all issues presented in the record on appeal.

The case came before the Appellate Court on an interlocutory appeal by the State's Attorney of Lincoln County, from the order of the Circuit Court suppressing evidence, namely two pounds of cocaine and a cordless telephone which were taken from Roger Carter's home under authority of a search warrant. The defendant was arrested and charged with the illegal possession of controlled substances, in violation of Mar. Rev. Stat. ch. 56½, sec. 1402 (1983). The defendant filed a motion to quash the warrant and suppress the evidence, claiming the warrant was issued without probable cause, in violation of the Fourth Amendment to the United States Constitution; Article I, Sec. 6 of the Marshall Constitution; Title III of the Omnibus Crime Control**** and Safe Streets Act of 1968; Family 11

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**** The Bench Memorandum, Appellant's Brief, and Appellee/Cross-Appellant's Brief are printed here as they were submitted to the Third Annual Benton National Moot Court Competition. Except for a few, obvious typographical errors, no changes have been made and no editing has been done to

Educational Rights and Privacy Act of 1974; and, in violation of a right of privacy under the United States Constitution and the Constitution of the State of Marshall.

The complaint in support of the search warrant was made by Bruce Collins, Special Agent for the Narcotics Trafficking Division of the Marshall Bureau of Investigtion (MBI). The facts alleged in the complaint show that the MBI was conducting an investigation into suspected narcotics trafficking by Alfred Ross and Barney Cooper, two students at the State University of Marshall, Lincoln County Campus. On May 13, 1983, Agent Collins met with Gary Drummer, Dean of Students at the University, and asked to see the student records on the two suspects. Dean Drummer fully cooperated with Agent Collins. In reviewing the files of the two suspected students, Collins noted that the defendant's name appeared in both files. Roger Carter was a student at the University and belonged to the same campus organizations and social fraternity as the two suspected students. Agent Collins next asked to see Carter's student records. Drummer complied with the request and made Carter's student records available to Collins for inspection. Collins read a letter in defendant's file addressed to Dean Drummer, by an anonymous "concerned citizen" who complained that Carter was a drug peddler and a menace to the young people of the community.

On May 23, 1983, the MBI received a telephone call from someone who claimed to be Roger Carter's neighbor. The anonymous caller said she had visited Carter at his house on numerous occasions and knew that he used a cordless telephone. The informant related that on May 22, 1983, at 5:30 p.m., while tuning her radio to an FM band frequency, she overheard a telephone conversation over the radio. She said she recognized the voice to be that of Roger Carter. In the conversation, Carter allegedly mentioned that he had just received a "case of coke," and the informant suspected
12 Roger Carter to be a drug dealer.⊥

During the following week Special Agents Collins and Randall Brown of the MBI staked-out Carter's house in an unmarked car which was parked approximately 500 feet from the Carter home at 2246 West Coastal Road, Emerson, Marshall. During the stake-out the agents saw no known addicts or drug peddlers in the area. They also listened to the car's F.M. radio, and on May 29, at 10:00 p.m., while seated in the car, they heard over the radio a telephone conversation which had been transmitted from within the Carter house. Roger Carter identified himself by name and he spoke to a

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the briefs. The inverted T's have been used to preserve the internal pagination of the Briefs. The page numbers in the Tables of Contents and Tables of Authorities refer to the internal pagination as is indicated by the inverted T's in the margin.

person whose identity the agents did not know. Carter said he had "some good stuff" for sale. The agents tape-recorded the conversation.

On May 30, 1983, the agents appeared before a Lincoln County magistrate and presented a sworn complaint for the issuance of a search warrant. Based upon the foregoing facts the magistrate issued a warrant to search Carter's house and seize any illegal narcotics and cordless telephone units in the house. On May 30, 1983, at 11:00 a.m., the MBI agents searched Roger Carter's home and found two pounds of cocaine. A cordless telephone was also discovered in the house. The MBI agents seized the narcotics and the cordless telephone and arrested Roger Carter.

At a pre-trial hearing, Carter presented a written motion to quash the warrant and suppress the evidence, claiming that the warrant was issued without probable cause, in violation of his federal and state constitutional rights, and in violation of federal statutory law.

In response to defendant's motion to quash, the State's Attorney filed an affidavit by Dean Drummer explaining the University's system of records. Only one file is maintained on each student in which all information about the student is kept. In its catalogues the University publishes notice that certain student directory information, including student's name, address and telephone number, will be made available to third parties unless a student objects to the disclosure of such information by informing Dean Drummer's office. Carter never objected to the disclosure of directory[1] information. However, at no time did Carter sign a consent form allowing the University to release any other information from his file. [13]

The judge found that the anonymous letter in Carter's student file and the anonymous call from Carter's neighbor lacked reliability and failed to meet the standards of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). The judge also determined that the letter was seized by the MBI in violation of Carter's right to privacy under both the state and federal constitutions, and in violation of federal law affording confidentiality expectations to a student's educational records. The judge also found that the MBI, in intercepting and recording Carter's conversation, engaged in an illegal wiretap, in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The judge therefore concluded that neither the letter obtained from Carter's student file nor the recorded conversation could support the request for the issuance of a search warrant. The warrant was quashed and the evidence ordered suppressed. The judge granted the State's Attorney's request for interlocutory appeal.

The Appellate Court reversed and remanded after holding that Carter did not enjoy a reasonable expectation of privacy in his student records at the University; that the recorded cordless telephone conversation was not a wire communication, but instead, an oral communication in which Carter lacked a reasonable expectation of privacy; that the MBI agents acted in good faith in obtaining the University file and monitoring the cordless telephone conversations; and, that under the totality of the circumstances there was sufficient probable cause to issue the search warrant.

Chief Judge Weaver of the Appellate Court dissented, rejecting the conclusion that Carter did not enjoy federal constitutional privacy protections in his student records. The dissenting opinion also looked to the Marshall Constitution to find privacy protection for both Carter's student records and cordless telephone conversations. Lastly, the dissenting opinion disagreed with the application of the
14 *Gates* standard for determining probable cause and urged that under the state constitution the *Aguilar-Spinelli* test should apply.

Carter was given leave to appeal to the Supreme Court of Marshall; the parties may address all issues presented in the record.

I. WAS THERE A VALIDLY ISSUED SEARCH WARRANT?

A. Was The Warrant Issued In Violation Of Federal Law?

1. *Under the* Gates *test of "totality of the circumstances" did the Magistrate have a substantial basis for a finding that probable cause existed?*

The Fourth Amendment to the United States Constitution states that "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.

The affidavit supporting a search warrant application may be based on an informant's hearsay which would not be admissible in a criminal trial. *Draper v. United States*, 358 U.S. 307, 311 (1959). In such case, however, prior to 1983, the *Aguilar-Spinelli* test was applied to command the State to satisfy two independent requirements as foundation for the issuance of a search warrant whenever it relied on information obtained from informants. The first requirement is that the issuing magistrate must be informed of some of the underlying circumstances that reveal the basis of knowledge of the informant, or the particular means by which the affiant came by the information given in his report. Second, the issuing magistrate must have facts sufficient to establish the veracity of the informant, or, alternatively, the reliability of the informant's report.

Aguilar v. Texas, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).⊥ ⊥5

Recently, in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983), the United States Supreme Court abandoned the rigidity of the *Aguilar-Spinelli* test in favor of a more flexible "totality of the circumstances" test. In *Gates*, an anonymous letter sent to the police accused the defendants of drug peddling. This was followed by police surveillance of the defendants, which disclosed unusual and arguably suspicious travel activities that corroborated the letter. In holding that there was sufficient information to establish probable cause to issue a search warrant for the defendants' residence and automobile, the Court said that probable cause is a practical, nontechnical concept to be determined by the "totality of the circumstances." The basis of the informant's knowledge, or his veracity or reliability, are relevant considerations in the analysis, but are not "separate and independent requirements to be rigidly exacted in every case." *Gates*, 103 S. Ct. at 2327. In elaborating on this point, the Court observed:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, 103 S. Ct. at 2332.

The State may cite *Massachusetts v. Upton*, — U.S. —, 104 S. Ct. 2085 (1984) (*per curiam*) (case remanded to determine whether information provided by ex-girlfriend and presence of motor-home constituted probable cause under the *Gates* test), for the proposition that a reviewing court should not conduct a *de novo* review of the probable cause determination, but should apply a deferential standard of review to the magistrate's determination, since "[a] grudging or negative attitude by reviewing courts toward warrants . . . is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe. . . ." *Upton*, 104 S. Ct. at 2088 (citation omitted).⊥ ⊥6

The State may also cite *Upton* regarding the adequacy of the information supporting the warrant. The United States Supreme Court criticized the two-pronged *Aguilar-Spinelli* test as being "hypertechnical and divorced from practical considerations."

Upton, 104 S. Ct. at 2087. The Court held that while a mere "hunch" or a bare recital of legal conclusions would not suffice under *Gates*, if the magistrate's decision was a "practical, common-sense decision" it would suffice. *Upton*, 104 S. Ct. at 2089.

2. *Did prior illegal police conduct produce evidence which the magistrate should have excluded from his determination of probable cause?*

Even if the "totality of the circumstances" gives a magistrate probable cause to issue a search warrant, the validity of the warrant may not rest solely upon information which was unlawfully obtained. *United States v. Karo*, — U.S. —, 104 S. Ct. 3296 (1984). If an affidavit in support of a search warrant contains information which was in part unlawfully obtained, the validity of the warrant and subsequent search depends on whether lawfully obtained information, standing alone, establishes probable cause for the warrant to issue. *Karo*, 104 S. Ct. at 3306. In *Karo*, federal narcotics agents obtained a court order authorizing the placement of a beeper in cans of ether. The agents suspected that the defendants were using the ether to process cocaine. The beeper allowed the agents to monitor the whereabouts of the defendants. The agents tracked the beeper for several months and were eventually led to the defendants' residence. An open window on a cold day suggested that ether was being used. The issuance of a search warrant based on these events was upheld by the Court. The Court said that the monitoring of a beeper in a private residence, which reveals information that could not be obtained by visual surveillance, violates the Fourth Amendment. However, the Court said that "the warrant affidavit, after striking the facts about monitoring the beeper while
17 it was in the [defendants'] residence,⊥ contained sufficient untainted information to furnish probable cause for the issuance of the search warrant." *Karo*, 104 S. Ct. at 3306. In *Karo*, the magistrate could rely on the agents' visual observations to find probable cause.

In the instant case, if either the seizure of the letter in Carter's education file or the monitoring and recording of Carter's telephone conversations amounted to violations of Carter's rights, evidence obtained as a result of these activities could not support the magistrate's probable cause determination, which would then have to rest only on the anonymous telephone call from an alleged neighbor.

a. The Letter in The Education File

i. Did the seizure violate due process?

Carter may argue that the letter was illegally seized by the MBI, in violation of federal due process because he was not given notice prior to disclosure, and therefore it should not have been included in the magistrate's evaluation of probable cause under the "totality of the circumstances" test.

Carter may argue that a liberty interest under the Fourteenth Amendment's Due Process Clause was violated. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the United States Supreme Court invalidated a state law which allowed a sheriff to post in public the name of an alcoholic without prior notice and hearing, stating:

> The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

400 U.S. at 436.

In a subsequent decision, *Paul v. Davis*, 424 U.S. 693 (1976), the Court held that reputational interests alone do not invoke due process protections. In *Paul*, the plaintiff, who had once been arrested for shoplifting but never convicted, brought a civil rights action 18 against a police chief who had distributed pamphlets which displayed the plaintiff's name and photograph in a list of "known" shoplifters. The Court rejected Paul's due process claim because he could not establish the loss of a state right; therefore no liberty interest arose. 424 U.S. at 708-09. Plaintiff in *Constantineau* had lost a right because he was not allowed to purchase alcohol. In the instant case, Carter may contend that his situation is controlled by *Constantineau* and not *Paul*, because the release of the letter not only stigmatized his reputation, but he also suffered grievous loss when that letter was utilized by a magistrate issuing a search warrant.

ii. Did disclosure of the letter violate protected rights under the Family Educational Rights and Privacy Act of 1974 (FERPA)?

Commonly known as the Buckley Amendment, FERPA, 20 U.S.C. § 1232g, has been summarized as

> [providing] that no federal funds shall be made available to any educational agency or institution which has a policy or practice of releasing or providing access to any "personally identifiable information" in education records other than "directory information," . . . in the absence of consent or judicial order or subpoena.

Krauss v. Nassau Community College, 469 N.Y.S.2d 553, 554 (Sup. 1983). The purpose of the Buckley Amendment is to protect the student's and his parents' expectations of privacy in student records. A nationwide study had found that unauthorized school personnel and third parties often gained access to student records which contain personal information. 121 Cong. Rec. S7974 (daily ed. May 13, 1975) (remarks of Senator Buckley). In *Krauss v. Nassau Community College*, 469 N.Y.S.2d 553, 555 (Sup. 1983), the court said that under FERPA and the New York state freedom of information act, the college properly refused requested disclosure of student names and addresses because (1) the college never published a notice to the students that their names and addresses constituted "directory information," and (2) the requestor failed to show a need
19 to know sufficient to outweigh the student's privacy rights.1

The State may counter that the Congressional enactment of FERPA does not invalidate law enforcement access to university files, in furtherance of a lawful investigation, because no private right of action exists under FERPA. *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977) held that enforcement of the statute is solely in the hands of the Secretary of Health, Education and Welfare through his ability to halt dispersal of federal funds, and the sole sanction for its violation is governmental withdrawal of federal funding.

b. Interception and Recording of Cordless Telephone Conversations

The Petitioner may argue that the MBI unlawfully monitored and tape-recorded his cordless telephone conversations, in violation of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1976), which governs eavesdropping practices of federal and state agents. As one commentator has noted:

> The law is particularly important for two reasons. First, it evidences a legislative decision to require more than the constitutional minimum in an area that is especially sensitive in a modern technological society. Secondly, because Title III is a comprehensive scheme, it preempts state law pertaining to eavesdropping. [footnote omitted] Congress intended the federal law to prescribe the minimum level of privacy protection which must be included in state law.

Whitebread, Charles H., *Criminal Procedure: An Analysis of Constitutional Cases and Concepts*, § 13.04 (1980).

Title III regulates governmental eavesdropping of two types of communications—wire and oral. Wire communications are those "made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or like connection. . . ." 18 U.S.C. § 2510(1). Oral communications are defined as

those "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). Section 2511 prohibits the warrantless interception and disclosure of wire or oral⊥ commu- ⊥10
nications, as defined in Title III, and the use of electronic, mechanical or other devices for the purpose of interception, regardless whether an interception actually occurs.

Petitioner may argue that his cordless telephone conversations are wire communications protected under Title III. The base unit receives radio transmissions from the user's mobile unit and sends them over wires or through satellite networks, just as regular telephone communications are transmitted. In *United States v. Hall*, 488 F.2d 193 (9th Cir. 1973), the court reversed and remanded the narcotics convictions of defendants who had used radio telephones in their cars to conduct illegal drug trafficking, noting in *dicta* the problems raised by the statutory definition of "wire" and "oral" communications:

> As a radio broadcast must be deemed an oral conversation, we believe it would strain the legislative intent to hold that conversations emanating from a radio telephone would not be treated similary . . . .
>
> [However] we are forced to conclude that, when part of a communication is carried to or from a land-line telephone, the entire conversation is a wire communication and a search warrant is required. . . .
>
> We realize that our classification of a conversation between a mobile and a land-line telephone as a wire communication produces what appears to be an absurd result. . . . However, Congress's definition of a wire communication necessitates this conclusion.

United States v. Hall, 488 F.2d at 197.

Petitioner may also argue, that even if the Court deems the cordless telephone conversations to be "oral" communications, he is still protected. Under Title III, eavesdropping of an oral communication is not prohibited, unless the speaker exhibits "an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510 (2).

The State of Marshall may argue that the cordless telephone conversations were not wire communications. In *State v. Howard*, 679 P.2d 197 (1984), the⊥ Kansas Supreme Court held that because a ⊥11
cordless telephone uses radio transmissions between the mobile and base units, the transmissions were not "wire" communications and defendants had no justifiable expectation that the transmissions would not be intercepted. The recorded cordless telephone tranmissions were held admissible in evidence in a criminal action charging the users with narcotic drug violations.

The State will further contend that because a cordless telephone conversation can be monitored by any person on an ordinary FM band radio, the user cannot objectively expect privacy.

In *United States v. Hoffa*, 436 F.2d 1243 (7th Cir. 1970) (affirmed convictions of union leaders for wire and mail fraud where defendants communicated over mobile phones in their cars), the court said:

> Surely, there was no expectation of privacy as to the Hoffa calls in Detroit which were exposed to everyone in that area who possessed an F.M. radio receiver or another automobile telephone tuned in to the same channel.

436 F.2d at 1247. Similarly, in *Dorsey v. State*, 402 So.2d 1178 (Fla. 1981), the Supreme Court of Florida rejected the *Hall* analysis and held that defendants charged with state RICO violations did not enjoy a justifiable expectation that the police would not intercept their "pocket-pager" messages. The court stated: "We emphasize the *broadcast* nature of such messages, since one who sends beeper messages should know . . . that such communications are open to any members of the public who wish to take the simple step of listening to them." *Dorsey*, 402 So.2d at 1183-84. (footnote omitted).

B. Was the Warrant Issued in Violation of State Law?

1. *Should the Supreme Court of Marshall adhere to the* Aguilar-Spinelli *test in construing the state constitutional guarantees against illegal search and seizures?*

Article I, Section 6 of the Marshall Constitution provides:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or
> 112 interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Mar. Const. art. I. Sec. 6 (1971).

Under the principles of federalism, a state may afford greater protection to individual rights than available under the United States Constitution. The United States Supreme Court has recognized that its holdings "[do] not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." *Cooper v. California*, 386 U.S. 58, 62 (1967). Any decision a state court may reach based upon federal law is subject to review by the United States Supreme Court; however, the states have unreviewable authority to reach a

decision based on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983).

Three recent state court decisions, for example, rejected more relaxed Supreme Court standards for state constitutions. In *State v. Ball*, 471 A.2d 347 (N.H. 1983), the state supreme court rejected the United States Supreme Court's application of the "plain view" doctrine and held that the warrantless seizure of a hand-rolled cigarette violated the state constitutional prohibition against illegal searches and seizures. In *People v. Sporleder*, 666 P.2d 135 (Colo. 1983), the state supreme court rejected the United States Supreme Court's decision that pen registers, which record the numbers called from a telephone, do not violate a reasonable expectation of privacy, and instead held that under the state constitution a citizen does enjoy a protected expectation of privacy in dialing telephone numbers in his own home. In *State v. Chrisman*, 676 P.2d 419 (Wash. 1984) the state supreme court, on remand from the United States Supreme Court held that under the state constitution a police officer may accompany an arrestee into a private room only where there is a threat to the officer's safety, the possibility of destruction of evidence, or likelihood of escape, thereby restricting what the United States Supreme Court would have permitted under the Fourth Amendment.⊥ ⊥13

2. *Did the MBI agents' conduct violate expressed privacy protections under the Marshall Constitution?*

Article I, Section 6 of the Marshall Constitution expressly provides that citizens have a right to be secure from invasions of privacy. This provision may be subject to different constructions. It may be construed to provide for constitutional privacy protection for personal information in the records of a third party. A different view may be that section 6 merely protects a citizen's reasonable expectations of privacy as construed under traditional fourth amendment analysis, which has not protected personal information in third-party records.

Carter may argue that under Article I, Section 6 of the Marshall Constitution he has a state constitutional right to informational privacy in his school records which was violated by the MBI's search of his file and seizure of the anonymous letter from the file. In construing identical language in the Illinois Constitution, the Illinois Appellate Court has held that the provision guarantees a right to informational privacy. *People v. Jackson*, 116 Ill.App.3d 430, 452 N.E.2d 85 (1983) (defendant enjoyed a legitimate expectation of privacy in her financial records under the Illinois Constitution and did not waive that expectation by resorting to the banking system; sup-

pression of defendant's bank records reversed because proper grand jury subpoena *duces tecum* outweighed defendant's expectation).

In *United States v. Miller*, 425 U.S. 435 (1976), the Court held that a bank depositor had no reasonable expectation of privacy in his bank records under the Federal Constitution because the information was voluntarily given to the bank in the ordinary course of business. Some state courts, for example California, have looked to their own constitutions to find a constitutional right to informational privacy, in such a case. In *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590 (Cal. 1974), under an expressed state constitutional right of privacy, a bank depositor was held to have reasonable expectation of privacy in his bank records because
114 "it[is impossible to participate in the economic life of contemporary society without maintaining a bank account." More recently, the California Supreme Court extended *Burrows* by affirming a suppression order which held that the warrantless disclosure by the telephone company of a name and address of a suspected "phone spot" bookie violated the state constitutional guarantee against unreasonable searches and seizures. *People v. Chapman*, 679 P.2d 62 (Cal. 1984).

Carter may also argue that the same state constitutional provision protects his reasonable expectation of privacy in his cordless telephone conversations and that the MBI violated this right by intercepting and monitoring his conversations.

The State of Marshall may counter that Article I, Section 6, of the Marshall Constitution should not be read to create a state constitutional right of informational privacy.

The Illinois Supreme Court, construing identical language, left the question open:

> Not all members of the court are convinced that this provision should be interpreted as asserting anything beyond protection for invasion of privacy by eavesdropping devices or other means of interception.

Illinois State Employees Ass'n v. Walker, 57 Ill.2d 512, 523, 315 N.E.2d 9, 15 (1974).

If section 6 is read to only protect against unreasonable invasions of privacy by eavesdropping or other means of interception, then Carter had no state constitutional right of privacy in the university records. Furthermore, the records were the university's, not his, so he cannot reasonably expect privacy protection in someone else's record system.

The State may also argue that monitoring the cordless telephone conversation was not an unlawful interception, because Carter waived any privacy expectations he enjoyed when he chose

to use a cordless telephone which transmits conversations over public airwaves.⊥ ⊥115

II. IF THE SEARCH WARRANT WAS INVALID, MAY THE EVIDENCE SEIZED PURSUANT TO THE WARRANT NEVERTHELESS BE ADMITTED AT TRIAL?

In 1914, the Court held that the Fourth Amendment rights of a criminal defendant were violated when evidence was unconstitutionally seized from his house and subsequently admitted at trial. *Weeks v. United States*, 232 U.S. 383 (1914). Later cases explained that this "exclusionary rule," as it has come to be known, was a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved." *United States v. Leon*, 104 S. Ct. 3405, 3412 (1984). The rationale for the rule is that law enforcement officers will refrain from illegal searches and seizures if they know that the fruits of these illegal activites may not subsequently be used at trial. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court held that the Due Process Clause of the Fourteenth Amendment made the exclusionary rule enforceable against the States.

A. The "Good Faith Exception"

In *United States v. Leon*, 104 S. Ct. 3405 (1984), the Court carved a major exception to the exclusionary rule. It is known as the "good faith exception," permitting the use of evidence in the prosecutor's case-in-chief which was obtained by law enforcement officers who acted in objectively reasonable reliance on a search warrant issued by a netural magistrate, even though the warrant was ultimately found to be unsupported by probable cause.

In *Leon*, police seized drugs from the defendants' residence pursuant to a search warrant for which a judge believed there was probable cause. The District Court did not agree there was probable cause for the search warrant, and the Ninth Circuit affirmed. In creating the "good faith exception," the Supreme Court said that insofar as the exclusionary rule was designed to deter illegal police conduct, that end was not furthered by excluding evidence when the police reasonably believed they were acting⊥ legally in execut- ⊥116
ing the warrant. "Penalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 104 S. Ct. at 3420. The Court held that under the circumstances of *Leon*, "[t]he officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate." *Leon*, 104 S. Ct. at 3423. The Government had

expressly declined to seek review of the lower court's determination that there was no probable cause. *Leon*, 104 S. Ct. at 3412.

Three expressed exceptions limit the "good faith" rule. First, "the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." Second, the magistrate is under a duty to "perform his 'neutrual and detached' function and not serve merely as a rubber stamp for the police." Third, "reviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existense of probable cause.' " *Leon*, 104 S. Ct. at 3417.

Relying on *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) (magistrate who issued the warrant used an improper form and did not make substantive changes to reflect the officer's request; held, officer had reasonable reliance that the warrant was valid and the evidence should not be suppressed), respondent may claim that an officer is not required to disbelieve a judge who has just advised him that the warrant he possesses is valid. The constitutional requirement is that the officer must reasonably believe that the search he conducts is authorized by a valid warrant.

B. May The State Of Marshall Decline To Apply The Good-Faith Exception To The Exclusionary Rule Of *Leon* Under The Authority Of Its Own Constitution?

As previously noted Carter may argue: "States that are more
117 sensitive than [the United States Supreme] Court to the privacy and other interests of individuals caught up in the criminal justice system are certainly free to adopt or adhere to higher standards under state law." *Paul v. Davis*, 424 U.S. 693, 735 n.18 (Brennan, J., dissenting).

The State of Marshall may argue that there are no overriding state interests which justify a greater protection under the Marshall Constitution than the *Leon* case affords.

C. Should The Evidence Be Suppressed Based Upon Violations Of Title III?

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*, contains a provision prohibiting the use as evidence of intercepted wire or oral communications, and any "evidence derived therefrom." 18 U.S.C. § 2515.

Carter may argue that if the monitoring and recording of conversations on his cordless telephone was a violation of Title III, the items seized pursuant to the search warrant were "evidence de-

rived" from the Title III violations and should therefore be suppressed regardless of the constitutional validity of the search warrant and any good faith exception.

The State may argue that Title III did not purport to alter or enlarge the common law exclusionary rule. *Scott v. United States*, 436 U.S. 128 (1978) (affirming defendants' convictions for drug trafficking after rejecting the defendants' argument that the government agents' motives should be considered in determining whether the agents properly complied with a wiretap authorization). In *Scott*, the Court said "[Section] 2515 was not intended 'generally to press the scope of the suppression rule beyond present search and seizure law.'" *Id.* at 139.⊥ ⊥18

D. Assuming That There Was Illegal Conduct By The MBI Prior To The Issuance Of The Search Warrant, Was Evidence Obtained Pursuant To The Warrant Unconstitutionally Tainted?

In *Segura v. United States*, 104 S. Ct. 3380 (1984), the Court held that the exclusionary rule does not apply if the connection between the illegal police conduct, and the discovery and seizure of evidence is "so attenuated as to dissipate the taint."

In *Segura*, state narcotics agents began surveillance of the defendants after receiving information that they were selling drugs. Several weeks later the agents witnessed an apparent sale of drugs at a restaurant. Two individuals were arrested and they implicated the defendants. The agents then went to the defendants' apartment and arrested them. The agents "secured" the premises to prevent destruction of evidence, but owing to "administrative delay" a search warrant did not arrive until 19 hours later. After the warrant arrived, the agents searched and discovered drugs, weapons, and large amounts of cash. A district court found that although the warrant was valid, the initial illegal entry required suppression of all evidence seized.

The Supreme Court, after finding that the initial entry by the agents was unconstitutional, held that the information on which the warrant was based came from "sources wholly unconnected with the [illegal] entry, and was known to the agents well before the initial entry." *Segura*, 104 S. Ct. at 3391. The Court reasoned that since the agents possessed independent information to justify the search under the warrant, the "taint" arising from the illegal entry was "purged." *Id.*

In the instant case, the applicability of *Segura* depends on whether the search of Carter's residence could be justified by independent sources known to the MBI.⊥ ⊥19