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Brief for Respondent Third Annual Benton National Moot Court Competition Briefs, 18 J. Marshall L. Rev. 1079 (1985)

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NO. 1984

IN THE SUPREME COURT
OF THE STATE OF MARSHALL
October Term, 1984

ROGER CARTER,
Petitioner,
- AGAINST -
PEOPLE OF THE STATE OF MARSHALL,
Respondents.

On Writ Of Certiorari
To The Appellate Court Of The
State Of Marshall

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether the appellate court properly held that Special Agent Collins' review of petitioner's student file fully complied with the privacy guarantees of the federal and state constitutions and the Family Educational Rights and Privacy Act.

II. Whether the appellate court correctly found no violation of state or federal eavesdropping laws by the Agents' overhearing and recording petitioner's cordless telephone conversation broadcast to the public over a standard FM radio.

III. Whether the appellate court properly held that the search warrant was constitutionally valid when the magistrate issued the warrant based on the officer's presentation of:

(a) an incriminating anonymous letter;
(b) an anonymous telephone tip
(c) independent police corroboration.

IV. Whether the good-faith exception to the exclusinoary rule should bar suppression of probative evidence, if such evidence was seized in good-faith reliance on a search
ii warrant later held invalid on probable cause grounds.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision and order of the Circuit Court of Lincoln County, State of Marshall, granting petitioner's motion to quash the search warrant and suppress the evidence for constitutional and statuory violations is unreported. These findings are set forth on pages [1]-4 ⊥1 of the record. The decision and order of⊥ the Appellate Court of Marshall, reversing and remanding to admit the evidence, is not yet reported. The decision is set forth on pages [1]-10 of the reocrd.

JURISDICTION

Pursuant to Rule III(F) of the 1984 Rules of the Benton National Moot Court Competition in Information Law & Privacy, a formal jurisdictional statement is omitted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provision relevant to this case is the fourth amendment to the United States Constitution. This provision is set forth on page A-1 of the appendix. The state constitutional provision relevant to this case is art. I, § 6 of the Constitution

of the State of Marshall. This provision is set forth on page A-1 of the appendix.

Statutory provisions involved in this case include The Family Educational Rights and Privacy Act of 1974 (hereinafter, "FERPA"), codified at 29 U.S.C. § 1232g (1982), and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter, "Title III"), codified at 18 U.S.C. 2510-2511 (1982). These provisions are set forth on pages A-1 through A-3 of the appendix.

STATEMENT OF THE CASE

On May 30, 1983, Special Agents of the Narcotics Trafficking Division of the Marshall Bureau of Investigation (hereinafter "MBI"), presented a sworn affidavit before a Lincoln County⊥ mag- ⊥2
istrate to obtain a search warrant of petitioner's residence (R. 3). The warrant particularly described the place to be searched and the things to be seized: any illegal drugs and any cordless telephones in the house (R. 3). The magistrate issued the warrant (R. 3). In their subsequent search of the house, the Agents seized two pounds of cocaine and a cordless telephone (R. 3). They arrested petitioner for violating the state drug possession statute (R. [1]).

Prior to petitioner's arrest, the MBI had been conducting an independent investigation of two college students suspected of drug dealing (R. 2). On May 13, Special Agent Bruce Collins went to the Lincoln County campus of Marshall State University to gather information on the suspects (R. 2). While on campus, Collins met with Gary Drummer, Dean of Students, and asked to see student records for Alfred Ross and Barney Cooper (R. 2;). The college maintains one file as a repository for all information about each student (R. 3). University policy allows directory information to be released to third parties (R. 3). An announcement of that policy, including any student's right to object to data disclosure, appears in the school bulletin (R. 3).

The Dean gave the school files on Ross and Cooper to Agent Collins (R. 2). While reading, Collins noticed a third name appeared in both files: Roger Carter, the petitioner herein (R. 2). Observing that the trio belonged to the same fraternity and campus clubs, Collins asked to see the file on petitioner (R. 2). Since petitioner had never filed a written objection to disclosure, the Dean accommodated Collins' request (R. 2-3).⊥ ⊥3

In petitioner's file Agent Collins found a letter addressed to the Dean (R. 2). The sender only identified himself as a "concerned citizen" writing to complain that petitioner trafficked in narcotics and constituted a menace to society (R. 2). Collins removed the letter, but took no immediate action (R. 2, 4).

Ten days elapsed (R. 3). Then, on May 23, 1983, an anonymous citizen telephoned the MBI with an incriminating tip about petitioner (R. 3). She said she was his neighbor, had visited his home many times and knew he used a cordless telephone throughout the house (R. 2). She then related that on May 22, 1983, at 5:30 p.m., she turned on her radio and heard a private telephone conversation broadcast over the FM frequency (R. 2). She recognized petitioner's voice, and heard him say he had just received a "case of coke" (R. 2). She suspected petitioner to be a drug dealer (R. 2).

Several days later Collins and MBI Special Agent Randall Brown parked their car about 500 feet from petitioner's home for observation (R. 2-3). During their surveillance, they turned on their car radio and overheard two persons engaged in a conversation (R. 3). One party identified himself as petitioner, Roger Carter, and said he had "some good suff" for sale (R. 3). Collins and Brown recorded the broadcast (R. 3).

A warrant to search petitioner's home was issued predicated upon the letter addressed to Dean Drummer, the telephone tip from petitioner's neighbor, and the coversation which Agent Col-
14 lins and Brown overheard and recorded (R. 3).⊥

At pretrial Carter moved to quash the warrant and suppress the evidence, alleging the warrant was issued without probable cause (R. 3). The judge ordered the evidence suppressed on the grounds that the letter and the recording violated constitutional and statutory law, and the telephone tip alone could not support the issue of a warrant (R. 4). The State's Attorney for Lincoln County brought an interlocutory appeal to the Appellate Court of the State of Marshall. The appellate court reversed the suppression order, finding 1) the letter was seized in compliance with both state and federal law (R. 5-6); 2) petitioner's conversation was recorded in compliance with state and federal law because petitioner lacked a justifiable expectation of privacy (R. 7); and 3) that the entirety of the evidence met the high standards for probable cause under the fourth amendment (R. 7-8). Petitioner's writ of certiorari was granted by this court on May 1, 1984 (R. [n.p.]).

SUMMARY OF THE ARGUMENT

I.

The appellate court correctly found Agent Collins' review of petitioner's student file harmonious with all relevant state and federal law. Neither the fourth amendment nor its counterpart in the state constitution promises an unbounded entitlement to privacy. These provisions only shield procreative and family rights, not student records. Petitioner has no legitimate expectation of privacy in

a letter written about him, addressed to another party, and conveyed to police. Similarly, FERPA does not protect a student file document originating from a source outside the school system. Even if a violation occurred,⊥ the Act's only remedy directs the ⊥5 withholding of federal funds from schools.

II.

The appellate court properly held that the Agents fully complied with state and federal law, when they overheard and recorded petitioner's conversation broadcast over the radio. Since he exposed his statements to the general public, petitioner's privacy claim dissolves. Recording the conversation was consistent with Title III, which authorizes interception of oral communications lacking any objective expectation of privacy. Courts have uniformly found no such expectation exists for users of cordless telephones and similar devices.

III.

The appellate court correctly found the probable cause requirement of the fourth amendment satisfied. Agent Collins presented to the magistrate a collation of data sufficient to fulfill either the old standard for probable cause or the modern "totality of circumstances" test. The file letter aroused suspicion which was later buttressed by an anonymous tip, and corrobrated by police surveillance. The magistrate determined the entirety of the evidence trustworthy. Such a decision requires great deference from reviewing courts.

IV.

In the alternative, the recently announced good-faith exception to the exclusionary rule mandates the admissibility of evidence when police act in good faith, as in the case at bar. This exception is a reasonable, inevitable response to widespread dissatisfaction with the operation of the suppression doctrine. Absent police misconduct, suppression is a misdirected remedy,⊥ which has no conceiva- ⊥6 ble impact on magistrates who may have erred on some warrant technicality.

AGRUMENT

I. RESPONDENTS' INVESTIGATION OF PETITIONER WAS FULLY CONSISTENT WITH PRIVACY RIGHTS AS GUARANTEED BY THE UNITED STATES CONSTITUTION, THE MARSHALL CONSTITUTION, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT.

None of the constitutional provisions involved in the case at bar guarantees an absolute right to privacy. Federal law grants petitioner no special right to privacy in an anonymous letter inadvertently placed in his student file. The statute was designed to protect classes of information totally unrelated to this particular letter. Under state law the result is the same.

In recording petitioner's cordless telephone conversation, the officers again complied with both federal and state law. Since such conversations are oral communications generating no expectation of privacy, petitioner suffered no injury from the Agent's conduct.

A. There Is No Absolute Right To Privacy Under Either The Federal Or Marshall Constitution

The fourth amendment to the United States Constitution and art. I, § 6 of the Marshall Constitution offer limited privacy guarantees. Although petitioner may claim certain rights through these sources as well as FERPA, none guarantees an unfettered right to privacy. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965).
17 Elsewhere in the federal constitution, not even the1 first amendment delivers unqualified protections couched in the language of absolutes. *See, e.g., Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). As Justice Holmes observed, constitutional provisons are "organic living institutions" rather than mathematical formulas: their significance "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers v. United States*, 244 U.S. 604, 610 (1913).

The fourth amendment to the United States Constitution has historically protected individuals only from arbitrary governmental interference. In drafting the fourth amendment, the Framers intended to prohibit systematic governmental intrusions without justification or limits. Moreover, the fourth amendment was enacted to prevent the government from abusing the warrant proceess as a tool of political persecution. *See generally* T. Taylor, *Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance* and *Fair Trail and Free Press* 25-43 (1969).

"[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy' ". *Katz v. United States*, 389 U.S. 347, 350 (1967). It merely delineates guidelines for acceptable and unacceptable governmental intrusion. While the Framers had governmental general warrants and writs of assistance in mind, "their frame of reference should not bind the future as the technological and cultural environment changes. History should be used to illumine, not blind, to allow each generation to deal responsibly with the predicament that it faces."1 Landever, *Electronic Surveillance,* 18
Computers, and the Fourth Amendment—The New Telecommunications Environment Calls for Reexamination of Doctrine, 15 Toledo L. Rev. 597, 617 (1983).

B. The Appellate Court Correctly Found The Federal Constitution's Guarantee Of Privacy Inapplicable To Government Inspection Of Non-Privileged Information.

Petitioner has no legitimate expectation of privacy in a letter written about him by a third party. The privacy guarantees of the federal constitution "must be limited to those which are 'fundamental' or 'implicit' in the concept of ordered liberty." *Paul v. Davis*, 424 U.S. 693, 713 (1976), *reh'g denied*, 425 U.S. 985 (1976). "If the right of privacy means anything, it is the right . . . to be free from *unwarranted* governmental intrusion into matters fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (emphasis added). Ordered liberty embraces activities such as marriage, procreation, contraception, family relationships, child rearing and education. *See Roe v. Wade*, 410 U.S. 113 *reh'g denied*, 410 U.S. 959 (1973). Telephone conversations and student records are not included.

In his dissenting opinion below, Chief Judge Weaver stated that *United States v. Miller*, 425 U.S. 435 (1976), should not govern the instant case, because *Paul v. Davis* left the privacy issue open (R. 9). However, he failed to recognize that *Miller* was decided after *Paul*. Therefore, the Miller decision *is* controlling and properly addresses this issue.1 19

Privacy guarantees cannot apply to one about whom a letter is written. *Katz*, 389 U.S. at 347, delineates the boundaries of constitutional privacy. The proper test is whether the petitioner had a legitimate expectation of privacy. *See id.* at 362, (Harlan, J., concurring).

In *Miller*, the court found that a bank patron had no legitimate expectation of privacy in his bank records. 425 U.S. at 443. The Court determined the fourth amendment did not protect information revealed to a thrid party who passed it on to government authorities. *Id.* Whether fourth amendment protections apply in such

a case revolves around "the nature of the particular document sought to be protected." *Id.* at 440. In *Miller* the bank owned the documents. The individual could assert neither ownership nor possession. *Id.* " '[N]o interest legitimately protected by the Fourth Amendment is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into 'the security a man relies upon when he places himself or his property within a constitutionally protected area.' " *Id.* (quoting *Hoffa v. United States*, 385 U.S. 293, 301-302 (1966)).

In the case at bar, the anonymous letter was not a part of petitioner's private papers and he can assert neither ownership nor possession. *Miller* found no legitimate expectation of privacy in information voluntarily conveyed to a third party, who then conveyed it to the government. *Id.* at 443. Agent Collins' actions were even more remote than those in *Miller*. A *third party* conveyed the information to the Dean, who in turn, conveyed it to Agent Collins.
110 Here, petitioner knew nothing about the letter until after he was arrested. The *Miller* Court's reasoning compels the conclusion that no legitimate expectation of privacy exists for information conveyed to a third person by a fourth, and even more distant party.

The letter was addressed to the Dean and was, in effect, his personal property. He could rightfully have sent the letter to the MBI or the university police in the first place, instead of placing it in petitioner's file. Petitioner thus had no legitimate expectation of privacy in this letter. Absent such expectancy, respondent urges this court to find no violation of petitioner's federally guaranteed right to privacy.

C. Agent Collins' Review Of Petitioner's Student File Was Fully Consistent With Privacy Rights Guaranteed By The Marshall Constitution.

Art. I, § 6 of the Marshall Constitution has no legislative history for interpretive purposes. Because of the lack of direction, it is illuminating to analogize the Marshall guarantee to the federal fourth amendment and the Illinois Constitution, which as an identical gaurantee.[1] (*See* app. A-1). As with the application of federal law, the proper test is to determine whether the petitioner had a legitimate expectation of privacy in the letter. *See People v. Richardson*, 60 Ill. 2d 189, 328 N.E.2d 260, *cert. denied*, 423 U.S. 805 (1975); and *People v. Jackson*, 116 Ill. App. 3d 430, 452 N.E.2d 85
111 (1983).

1. Ill CONST. art I, § 6. Other states also guarantee a specific right to privacy. *See* Ariz. CONST. art I, § 8; Alaska CONST. art. I, § 22; Hawaii CONST. art. I, §§ 6, 7; La. CONST. art. I, § 5; Mont. CONST. art. II, § 10; S.C. CONST. art. I, § 10, and Wash. CONST. art. I, § 7.

The Marshall guarantee does not grant petitioner a privacy interest in the Dean's letter because the Dean voluntarily consented to its review. In *People v. Heflin*, 71 Ill. 2d 525, 376 N.E.2d 1367 (1978), *cert. denied*, 439 U.S. 1074 (1979), the Illinois Supreme Court concluded that "when one with [possession] consents to [a] search, . . . the search will not be invalidated because [another party] claims an "expectation of privacy" in the . . . same effects subjected to the search." 71 ILL. 2d at 541, 376 N.E.2d at 1374-75. Dean Drummer had possession of the anonymous letter, and authority to allow review of petitioner's file. Petitioner can claim neigher ownership of the letter, knowledge that it even existed, nor an intrusion into his personal premises and effects. Therefore, the search cannot be invalidated.

Even if petitioner could demonstrate any ground for such an expectation, the government's interest in obtaining the letter outweighed petitioner's interest in having it remain undisclosed. For example, in *People v. Jackson*, 116 Ill. App.3d at 435, 452 N.E.2d at 89, the court found the protection afforded by art. I, § 6 of the Illinois Constitution must be determined by balancing the public interest in having access against the individual's interest in nondisclosure. *See also United States v. Westinghouse*, 638 F.2d 570, 575 (3d Cir. 1980) (even material subject to privacy protection may be revealed upon a proper showing of govermental interest).

The government's imperative duty to cleanse communities of pernicious drug pushers substantially outweighs petitioner's interest in having the letter remain undisclosed. The governmentl also 112
has a substantial interest in providing realistic guidelines for its law enforcement officers, and should not be made subject to privacy claims where only doubtful intrusions are alleged. Even if some minimal intrusion occurred, petitioner's interest is insufficient when compared to the government's compelling need to eradicate illegal narcotic operations.

Petitioner has no legitimate expectation of privacy in the anonymous letter. Even if a legitimate expectation of privacy could be found, the government's interest in having access outweighs petitioner's minimal interest in nondisclosure. Respondent urges this court to find no violation of petitioner's privacy rights as guaranteed by art. I, § 6 of the Marshall Constitution.

D. No Violation Of The Family Educational Rights And Privacy Act Occurred When Agent Collins Gained Access To The Anonymous Letter In Petitioner's Student File.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1982) (hereinafter "FERPA" or "The Act"), establishes the guidelines for federal funding assistance to state educa-

tional institutions. It directs withholding federal funds from institutions having "a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information)." 20 U.S.C. § 1232g(b)(1). FERPA provides a check and balance on state institutions, sanctioning improper government actions without specifying any private remedy. Petitioner alleges he enjoys a right to privacy in the anonymous letter, pursuant to FERPA's provisions. However,
113 FERPA only⊥ protects students from disclosure of "personally identifiable information." *Matti T. v. Johnston*, 74 F.R.D. 498, 501 (N.D. Miss. 1976). The Act was intended "to assure parents of students, and students themselves . . . access to their educational records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." 120 Cong. Rec. 39862-64 (1974) (statement by Sen. Buckley and Sen. Pell). FERPA meant to protect only "[s]ensitive and intimate information collected in the course of teacher-pupil or counselor-pupil contacts . . ." *Rios v. Read*, 73 F.R.D. 589, 598 E.D.N.Y. 1977). FERPA does not apply to other information, such as the social and athletic activities a student engages in while attending an educational institution. *See* 20 U.S.C. § 1232g(a)(5)(A), and § 1232g(b)(1).

FERPA cannot protect petitioner from the Dean's decision to reveal the anonymous letter. In *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979), the court found the "prohibitions of the amendment cannot be deemed to extend to information which is derived from a source independent of school records." *Id.* at 1050. Although Dean Drummer may have inadvertently placed the anonymous letter in petitioner's file, he retained the right to produce it upon request. The letter originated from a third party—a source independent of petitioner's school records. Thus the prohibitions of FERPA cannot apply. No privileged document was involved.

E. Even If Placing The Anonymous Letter In Petitioner's File Constituted A Violation Of FERPA, Petitioner Has No Remedy,
114 **Due To The Exclusive Nature Of Its Provisions.⊥**

FERPA "establishes minimum standards for the protection of students' privacy . . . and enforces such standards by authorizing the denial of funds to those educational institutions and agencies which fail to meet these prerequisites." *Matti T. v. Johnston*, 74 F.R.D. at 501. Nowhere within the Act is a private remedy given to the student whose personal information is released. *See Daniel B. v. Wisconsin Department of Public Instruction*, 581 F. Supp. 585 (E.D. Pa. 1984).

In *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977), the court held that FERPA does not grant a private remedy. "En-

forcement is solely in the hands of the Secretary of Health, Education and Welfare. . . . Under such circumstances, no private [remedy] arises by inference." 563 F.2d at 1276-77. *See also Reeg v. Fetzer*, 78 F.R.D. 34 (W.D. Okla. 1976).

Petitioner's rationale for having the letter suppressed from the probable cause determination is unpersuasive. There is no support for this request. While incompetent evidence may not be utilized at trial, it may be used in probable cause determinations. *See United States v. Buchner*, 164 F. Supp. 836 (D.D.C. 1958), *cert. denied*, 359 U.S. 908 (1959).

FERPA grants no remedy to petitioner. Even if the university violated its provisions, suppression is inappropriate. To deny the MBI the use of the letter to support a probable cause warrant, based on the Dean's conduct, would too greatly impede effective law enforcement.

II. THE APPELLATE COURT CORRECTLY FOUND NO VIOLATION OF STATE OR FEDERAL LAW BY THE AGENTS' OVERHEARING AND RECORDING PETITIONER'S CORDLESS TELEPHONE CONVERSATION.1

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> [T]he government of the union . . . is created by the people, who have bestewed [*sic*] upon it certain powers for their own benefit, and who administer it for their own good. The people are as much interested, their liberty is as deeply concerned in preventing encroachments on that government, in arresting the hands which would tear from it the powers they have conferred upon it, as in restraining it within its constitutional limits.

J. Marshall, "A Friend of the Constitution", in *John Marshall's Defense of* McCulloch v. Maryland (G. Gunther, ed., 1969) (*reprinted from Alexandria Gazette*, June 30-July 5, 1819).

Petitioner alleges violations of both Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2511 (1982) (hereinafter "Title III"), and art. I, § 6 of the Marshall Constitution. However, Agents Collins and Brown could hardly have violated Title III or the state provision, since they employed no illicit mechanical device to listen to petitioner's conversation. It was already being broadcast to anyone who wished to listen.

A. To Determine If A Violation Of Petitioner's Privacy Rights Has Occurred, The Proper Test Is Whether He Exhibited A Reasonable Expectation Of Privacy In The Cordless Telephone Conversation.

Petitioner's conversation made over the cordless telephone lacked a justifiable expectation of privacy. By virtue of the nature

of the cordless telephone, anyone listening to the same FM fredquency as Agents Collins and Brown could have overheard petitioner's conversation. The technology is such that petitioner's voice was transmitted over radio waves and broadcast on an FM band, (*See* app. A-4). The MBI Agent's overhearing and recording pe-
116 titoner's conversation was a reasonable and good1 faith effort to investigate and document petitioner's suspected drug activity.

Katz v. United States, 389 U.S. 347 (1967), is a landmark decision applied for determining whether government agents have exceeded their authority in recording a conversation. *Katz* sets out the parameters of fourth amendment privacy guarantees and delineates guidelines for determing whether a person has exhibited a reasonable expectation of privacy under the fourth amendment. In concurring opinion in *Katz*, Justice Harlan outlined a two-prong test for analyzing fourth amendment protections. The requirements are "[f]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.* at 461. He went on to explain that statements exposed to the "plain view" of the general public are not "protected." *Id.*

Petitioner may only claim a fourth amendment violation if he has first exhibited a subjective expectation of privacy, and second, and of equal importance, if society is prepared to recognize the expectation as reasonable. Neither prong can be met where the accused is communicating over a cordless telephone, a broadcast medium.

Petitioner may argue the Marshall Constitution grants a greater right of privacy than that guaranteed by the fourth amendment and *Katz* principles. However, other states which grant their citizens a specific right to privacy apply tests similar to that used in *Katz* when determining whether a privacy violation has occurred.
117 Art. I, § 6 of the Illinois Constitution1 guarantees an identical right of privacy as guaranteed in Marshall. Illinois courts also apply a similar test in determining whether a violation has occurred. *See People v. Richardson*, 60 Ill.2d 189, 328 N.E.2d 260 (1975), *cert. denied*, 423 U.S. 805 (1975), where the Illinois Supreme Court found "the subjective expectations of the defendant are irrelevant. It is the reasonableness of the conduct of the police with which the fourth amendment [and art. 1, § 6 are] concerned." 60 Ill. 2d at 194, 328 N.E.2d at 263. Similarly, *People v. Davis*, 93 Ill. App.3d 217, 221-22, 416 N.E.2d 1197, 1201 (1981), found "[t]he guiding principle governing searches and seizures under constitutional provisions was reasonableness, and whether the police have acted reasonably depends on the circumstances of each case." Illinois case law establishes that unless an objective expectation of privacy can be shown

in petitioner's conversation, no violation of art. I, § 6 may be found. In this respect the federal and state privacy guarantees are identical, despite their wording. The purpose is the same—protection against unreasonable intrusions.

Title III reinforces *Katz* by differentiating between recording "wire" as opposed to "oral" communications. A "wire" communication is defined as any communication made through "the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." 18 U.S.C. § 2510(1). On the other hand, an "oral" communication is defined as a "communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances⊥ justifying such expec- ⊥118
tations." 18 U.S.C. § 2510(2). Based on these statutory definitions, no wire communication whatsoever may be intercepted. An oral communication, in which the communicator has exhibited an objective expectation that it is not subject to disclosure, may be intercepted and disclosed only with prior court approval. In the absence of this objective expectation, oral communications may be recorded at any time.

B. Taping Petitioner's Conversation Fully Complied With State And Federal Law Because Conversations Made Over Cordless Telephones Are Oral Communications Lacking Any Objective Expectation Of Privacy.

Federal statutory and state constitutional law requires that petitioner prove his conversation was one *not* "broadcast to the world." *Katz v. United States*, 389 U.S. 347, 352 (1967). *Accord* Walinski & Tucker, *Expectation of Privacy: Fourth Amendment Legitimacy through State Law*, 16 Harv. C.R.-C.L. L. Rev. 1, 27 n.95 (1981). It is physically impossible for petitioner to meet his burden of proof. The technology of the cordless telephone is such that each conversation is subject to overhearing by the general public. (*See* app. A-4). The cordless telephone utilizes radio waves transmitted over standard FM frequencies. Conversations such as petitioner's, transmitted over radio or air waves, are considered oral communications with no reasonable expectation of privacy.

In *United States v. Hall*, 488 F.2d 193 (9th Cir. 1973), the court determined that conversations made over a car telephone were "oral" rather than "wire" communications. *Id.* at 196-97. The *Hall* court noted that car telephones transmit conversations⊥ over radio ⊥119
waves, rather than traditional telephone wires. Such conversations are "analogous to carrying on an oral communication in a loud voice." *Id.* at 196. As with any broadcast, "the invitation to listen is afforded to all those who can hear." *Id.*

Similarly, in *United States v. Hoffa*, 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), the court found no expectation of privacy in conversations made over automobile telephones. They were oral communications because they were accessible to everyone possessing an FM radio receiver. 436 F.2d at 1246-47. The court in *United States v. Rose*, 669 F.2d 23 (1st Cir. 1982), *cert. denied sub nom. Hill v. United States*, 459 U.S. 828 (1982), reached the same result regarding point-to-point radio transmissions.

In *Dorsey v. State*, 402 So.2d 1178 (Fla. 1981), as in the case at bar, the appellants' arrests stemmed from an investigation into the operation of a narcotics ring which began with information gathered by an informant. In finding no expectation of privacy in "beeper" messages sent over airwaves, the court found that wiretap provisions would only apply to conversations "not broadcast in a manner available to the public." *Id.* at 1183-84. The court emphasized the broadcast nature of such messages, since "such communications are open to any member of the public." *Id.* "They are, by the very nature of being broadcast, communications unprotected by any constitutional right or . . . wiretap law." *Id.*

Likewise, petitioner's conversation was broadcast to the public. Agent Collins overheard the conversation on a standard FM radio
120 in his automobile. He was lawfully listening to the FM⊥ radio in a place where he might lawfully be. *See United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974), where the court held the recording of a conversation is immaterial when the overhearing is itself legal. Petitioner possessed no reasonable expectation of privacy and the recording of his conversation did not violate any of his protected freedoms. In *State v. Howard*, 235 Kan. 236, —, 697 P.2d 197, 205-06 (1984), the Kansas Supreme Court reached the same conclusion, holding that police officials lawfully monitored and recorded conversations heard over ordinary FM radio waves.

In *Howard*, defendant's neighbor was listening to an AM/FM radio and suddenly began hearing a conversation regarding narcotics. He recognized defendant's voice, recorded the conversation, and provided the information to the police. 235 Kan. at —, 679 P.2d at 198. Although the officers did not obtain a court order authorizing further monitoring and recording, the neighbor was directed to continue to listen and record the conversations. *Id.* Based on the recorded conversations, a search warrant issued to search defendant's residence, resulting in the seizure of a cordless telephone and drugs. 235 Kan. at —, 679 P.2d at 198-99.

In reversing the district court's suppression order, the Kansas Supreme Court found no reasonable expectation of privacy. A witness employed by the manufacturer of the cordless telephone had testified as follows: 1) that communications over cordless tele-

phones take place through the reception and transmission of FM radio signals; 2) the FM signal utilized by a cordless telephone is not specialized in any way; 3) a standard FM radio⊥ could pick up the ⊥21
radio transmissions; and 4) anyone listening to the proper FM frequency could have listened to the petitioner's conversation. 235 Kan. at —, 679 P.2d at 199-200. (*See* app. A-4). Based on this testimony, the court concluded that "these portions of the telephone conversations intercepted by an ordinary FM radio in this case did not fall into the category of a 'wire communication', but were in fact oral communications," 235 Kan. —, at 679 P.2d at 206.

> We hold that these defendants, who as owners of the cordless telephone had been fully advised by the owner's manual as to the nature of the equipment, had no reasonable expectation of privacy under the circumstances. . . . In reaching this conclusions, we have followed what we believe to be the Congressional intent in the enactment of Title III—to protect the individuals right of privacy and also to provide a uniform and systematic method . . . [for] police officials to protect the public from criminal activities.

Id.

Communications by users of cordless telephone are "oral" as opposed to "wire." Courts have uniformly found no reasonable expectation of privacy by one using a cordless telephone or similar apparatus. Without a reasonable expectation of privacy there can be no violation of either federal law or state-guaranteed privacy rights. Under the circumstances, Agents Collins and Brown utilized a proper and reasonable method of investigation. Their interest was the protection of society. For the foregoing reasons, respondent urges this court to apply the same rationale and find the appellate court of Marshall was correct in reversing the circuit court's suppression order.⊥ ⊥22

III. WHEN A MAGISTRATE ISSUES A SEARCH WARRANT BASED ON AN OFFICER'S PRESENTATION OF EVIDENCE CONSISTING OF AN INCRIMINATING ANONYMOUS LETTER, AN ANONYMOUS TELEPHONE TIP, AND INDEPENDENT POLICE CORROBORATION, THE WARRANT IS CONSTITUTIONALLY VALID AND THE FRUITS OF THE SEARCH ARE ADMISSIBLE IN TRAIL.

> [This] constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.) (emphasis original).

The former rule for determining probable cause for the issue of a search warrant has become a legal dinosaur. The United States Supreme Court has replaced it with a modern, practical standard perfectly suited to the needs of those who use it, and spacious enough to accommodate the diversity of fact patterns facing magistrates who issue warrants. Although the new rule is by far wiser, the information presented by Agent Collins to the magistrate in the case at bar satisfies either standard for probable cause. Under the antique rule or the new design, the warrant is constitutionally valid.

A. The "Totality Of The Circumstances" Test Properly Replaces The Old Rule With A Practical, Commonsense Standard For Probable Cause

In *Illinois v. Gates*, 103 S. Ct. 2317, *reh'g denied*, 104 S. Ct. 33 (1983), the Court expressly overruled the antiquated standard for probable cause which had been effective for twenty years. Previously, the rules of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), operated in tandem to exclude evidence from trial unless excessively stringent mandates were
123 satisfied.1

The *Aguilar-Spinelli* test was intended to assist magistrates in determining probable cause grounds for a warrant based on hearsay from a confidential informant. Reilley, Witlin & Curran, Illinois v. Gates: *Probable Cause Redefined?*, 17 J. Mar. L. Rev. 335, 347 (1984). The test has two basic components: basis of knowledge and veracity.[2] The Court never expected that the analytic prongs developed in *Spinelli* would metamorphose into a crushing vise which courts would squeeze into a punishing grip. *Gates*, 103 S. Ct. at 2328 n.6. A dramatic example of this occurred when the Illinois Supreme Court applied the old test to an anonymous tip, buttressed by police corroboration. *See Gates*, 103 S. Ct. at 2332. Even though a prudent man could find more than adequate reason to suspect criminal activity was afoot, the old test compelled suppression. In an entire class of cases, tangible incriminating evidence could not endure judicial scrutiny, simply because some elements could not fit into *Aguilar-Spinelli*'s procrustean beds. *Id.* at 2330.

In *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 Mercer L. Rev. 742, 774-75 (1974), Judge Moylan isolated reasons why the old test has often caused otherwise stable judicial minds to wander. *Aguilar* diagnoses hearsay flaws; *Spinelli*

2. The magistrate must know "some of the underlying circumstances" leading the informant to his stated conclusion and "some of the underlying circumstances" leading the officer to conclude the informant was "credible" or his information "reliable." *Aguilar*, 378 U.S. 108, 114. Self-verifying detail in a tip may cure a defect only in the first prong. *Spinelli*, 393 U.S. 410, 416-17 (1969).

prescribes remedies. "Chaotically, however, the national case law is now replete with the undifferentiated⊥ application of either ⊥24 *Spinelli* remedy to either *Aguilar* defect," producing the syndrome of "faulty perception." *Id.* at 774. Then, "too many different symptoms are carelessly described by the universal adjective 'reliable,' " resulting in a hopeless tangle of terms, effectively stripping the old test of whatever precision it may once have had. *Id.* at 775. This is the "faulty narration" syndrome. *Id.* For example, in *Manely v. Commonwealth*, 211 Va. 146, 150-51, 176 S.E.2d 309, 312-13 (1970), *cert. denied*, 403 U.S. 936 (1971), the court used the term "reliability" interchangeably, confusing the reliability spur with the basis of knowledge prong.

Finally, the elusive quality of hearsay itself excludes absolute uniformity in hearsay assessments. There is no magic formula. "The factors that lead one man to believe that another man is telling the truth are as varied as the experiences of mankind itself." Moylan, *supra* p. 24, at 760. *See also* Livermore, *The* Draper-Spinelli *Problem*, 21 Ariz. L. Rev. 945, 956 n.58 (1979).

Mercifully, the Court has put an end to this confusion and given the old test a respectful interment. *Gates* declared that the test hindered more than helped magistrates and officers, and required "an excessively technical" analysis which virtually excluded the valuable resource of anonymous tips. 103 S.Ct. at 2330-32. *See also id.* at 2350 (White, J., concurring). *Gates* clarified the proper role of corroboration with a fluid standard which embraces a broad range of fact patterns and satisfies the dictates of common sense. Waller, Illinois v. Gates: *A Flight from Analysis or the Path to Practicality?*, 20⊥ Idaho L. Rev. 157, 172, 174-75 (1984). Drawing on ⊥25 traditional notions of "fair probability" and "substantial basis" for probable cause, the Court has fashioned a simple rule intended to serve the needs of those who use it in the real world: officers seeking warrants, and judges who issue them.

Justice Brennan and others still believe *Aguilar-Spinelli* lives on beyond the grave. *See, e.g.*, *Gates*, 103 S. Ct. at 2355, 2357 (dissenting opinion); *Massachusetts v. Upton*, 104 S. Ct. 2085, 2089-90 (1984) (Stevens, J., concurring); and Reilley, *supra* p. 24, at 372-73, 376. Indisputably this court has the right to retain *Aguilar-Spinelli* under independent state grounds. But this should scarcely affect the ultimate outcome of the case at bar since 1) the *Aguilar-Spinelli* standard is inadequate, 2) Agent Collins presented sufficient grounds for probable cause no matter which test is applied, and 3) the good-faith exception recently enunciated in *United States v. Leon*, 104 S. Ct. 3405 (1984), compels the admission of evidence at trial under circumstances fully compatible with the facts herein.

In *Illinois v. Gates*, 103 S. Ct. 2317, 2325 (1983), police received an anonymous letter predicting in detail the itinerary of identified couple about to embark on a drug-run from Chicago to Florida and back. Surveillance by federal agents in Florida and other corroboration verified salient aspects of the tip. *Id.* at 2326. A magistrate issued a warrant, and when the couple returned, a search of their automobile and home revealed a quantity of drugs and other contraband. *Id.*

On these facts, *Gates* held that a "totality of circumstances" ap-
126 proach reflecting traditional notions of probable cause required the overruling of *Aguilar-Spinelli*. Corroboration of major portions of the tip predicting criminal activity was sufficient. *Id.* at 2317. Corroboration of parts of the tip strongly suggested the inference that the writer's conclusory claims were true, reducing any chance that the tip was maliciously contrived. *Id.* at 2335.

The *Gates* standard rests upon a simple premise: warrant-issue is a unique transaction—an exchange between human beings who happen to be policemen and judges. Many unforseeable variables enter into each transaction between any two actors. *See* Moylan, *supra* p. 24, at 760. The judge must perform as a neutral and detached arbiter to protect citizens from unconstitutional intrusions; the officer provides community protection by "ferreting out crime" to the point of arrest. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

The wisdom of the *Gates* test lies in its flexibility to accommodate real transactions. *Gates* speaks of a "fair probability" that evidence will be found where specified. Absolute documented proof, and the high degree of certainty inherent in the trial process, have no place here. 103 S. Ct. at 2328, 2335-36; *id.* at 2349 (White, J., concurring). The probable cause decision requires a practical, commonsense judgment, a balanced assessment of all indicia of trustworthiness, and enough latitude to bring all possible information before the magistrate. *Id.* at 2330, 2332 n.11, 2335. The magistrate must have enough data "to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify
127 bringing into play the further steps of the criminal process." *Id.* at 2328 n.6 (quoting, *Jaben v. United States*, 381 U.S. 214, 224-25, *reh'g denied*, 382 U.S. 873 (1965)). The analytic prongs of *Aguilar-Spinelli* remain "highly relevant," but should now be considered dependent, "closely intertwined issues," where a strong showing in one area may compensate for weakness in another. 103 S. Ct. at 2327-29.

The *Gates* guideline remedies the worst of *Aguilar-Spinelli*'s flaws by treating data presented to a magistrate in a way reflecting the actual investigation. The officer presents all of his information,

describing a natural flow of events as they actually occurred. If one event arouses enough suspicion to cast incriminating shadows on subsequent acts, which would seem innocent in isolation, the magistrate should weigh the entire chain of events. This guideline benefits law enforcement by its simplicity. An officer need not grapple with intricate, arcane modes of proof. Instead he merely presents a detailed exposition of his investigation. The magistrate weighs the exposition for the fair probability that contraband will be found where the officer believes it to be.

This probable cause formulation restores the "substantial basis" standard which had been unnaturally distorted by *Aguilar-Spinelli*. The inherent nature of probable cause decisions requires a broad principle because of the equivocal character of diverse fact patterns. Even the psychology of decision-making supports the need for a broadly phrased probable cause standard. When the input is highly equivocal, with great uncertainty as to how to treat each item, the natural selection is for a small number of broadly phrased rules. However, persons1 making decisions based on less 128
equivocal input naturally choose a greater number of specific, mechanical rules to apply. K. Weick, *The Social Psychology of Organizing* 114 (2d ed. 1979). Thus the *Gates* standard supplies the broad type of standard which diverse fact patterns demand.

B. Agent Collins Presented Sufficient Grounds For Probable Cause Under Either Test.

1. *Agent Collins' data provides sufficient probable cause under the* Aguilar-Spinelli *model.*

In deciding the magistrate properly issued the warrant to Agent Collins, the appellate court properly applied the *Gates* test (R. 7-8). Moreover, Collins' data also satisfied both prongs of the *Aguilar-Spinelli* rule.

The anonymous call satisfied the basis of knowledge prong by furnishing precise information regarding how the informant knew what she said she knew: she reported being in petitioner's home several times, seeing him use his cordless telephone throughout his house, and overhearing his incriminating conversation (R. 2). She reported what she saw and heard first-hand, and provided a description of the underlying circumstances from which she acquired her information. *Aguilar-Spinelli* requires no more.

The tip could also satisfy the first prong through its self-verifying detail. *See Spinelli*, 393 U.S. at 410, 416-17. The informant did not give the police a prediction of criminal conduct as in *Gates*, nor a physical description of a drug courier, as in *Draper v. United States*, 358 U.S. 307 (1959). Rather, she described accurately a criminal *mo-*

129 *dus operandi* too⊥ bizarre in its improvidence to be a mere fictional creation. A magistrate could reasonably infer that the informant was reporting first-hand information even if she had not specified how she obtained it.

Finally, the second spur of the veracity prong was satisfied by Agent Collins' verification that the informant was reliable on this particular occasion. By swearing an oath that he heard petitioner use the cordless telephone, just as the informant reported, Collins informed the magistrate of a major underlying circumstance leading Collins to conclude the informant was reliable. *Aguilar*, 378 U.S. 108, 114. The tape recording was an additional means of allowing the magistrate himself to assess the probability of criminal activity from petitioner's recorded conversation.

In the alternative, substantial police corroboration may somethimes be so strong as to overcome defects in either prong. In *Spinelli* 383 U.S. at 417, the Court obsserved that police corroboration merely suggested that Spinelli could have used his telephones for some purpose. "*This cannot by itself* be said to support" both the basis of knowledge prong and the veracity prong (emphasis added). The Court then used an illustration: police corrobration of an informant's details may preclude further inquiry into veracity when "the report was of the sort which in common experience may be recognized as having been obtained in a reliable way." 393 U.S. at 417. Some believe this passage means that police corroboration may only buttress the veracity prong. *See, e.g.*, Reilley, *supra* p. 24, at
130 340 n.31. *See also Gates*,⊥ 103 S. Ct. at 2349 n.22 (White, J., concurring); and *id.* at 2354 n.4, 2356 (Brennan, J., dissenting).

However, a leading commentator interprets the passage to mean that vigorous police corroboration could overcome deficiencies in *either* prong. "Such a degree of corroboration certainly exists in one instance if in no other, namely, where the informant's tip causes the officer's presence at a place where he observes" highly suspicious conduct. LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 Univ. Ill. L. R. 1, 9. Professor LaFave's example is precisely on point. The anonymous call caused Agents Collins and Brown to park on the street where petitioner lived (R. 3). While sitting in their car, they heard and recorded petitioner's drug solicitation (R. 3). What they heard was highly suspicious. This alone would have justified seeking a warrant.

2. *The* Gates *model compels admission of the evidence because the totality of Agent Collins' data surpasses the "fair probability" threshold.*

Agent Collins presented the following information to the magistrate: the letter from petitioner's educational file, the anonymous tip received ten days later, and the fruits of surveillance (R. 2-3). The letter Collins inadvertantly found stated the writer's conclusion that petitioner was engaged in criminal activity (R. 2). Whether the letter could justify further police action scarcely matters, since Collins took no action (R. 2). Only after receiving the telephone tip, ten days⊥ later, did he initiate non-obtrusive surveil- ⊥31
lance of petitioner's home from a distance of 500 feet (R. 2-3).

The letter doubtless aroused only a low degree of suspicion, which the tip buttressed with a highly incriminating piece of information: that the informant had personally heard petitioner report receiving a "case of coke" when she tuned in her radio (R. 2). Likewise, when the police tuned in their car radio, they heard petitioner identify himself by name and offer "some good stuff" for sale (R. 3). This closely paralleled the informant's tip. Petitioner may argue that "coke" and "good stuff" could just as easily refer to an especially fine shipment of soda pop. *Gates* reminds us, however, that such word games offend common sense. 103 S. Ct. at 2335 n.13. The Court has repeatedly stated that "after-the-fact scrutiny by courts of the sufficiency of the affidavit should not take the form of *de novo* review." *Id.* at 2331.

Seen in the incriminating light of the original letter and the subsequent tip, the officers were fully justified in concluding that petitioner was selling drugs from his home. By presenting the magistrate with a recording of that conversation, the officers allowed the magistrate to hear and evaluate for himself what they heard, and reach his own conclusion. In the case at bar, the magistrate believed probable cause was satisfied, and the warrant issued (R. 3). The Court has often insisted that a magistrate's decision deserves "great deference," to encourage use of the warrant process. *United States v. Leon*, 104 S. Ct. 3405, 3417 (1984); *Massachusetts v. Upton*, 104 S. Ct. at 2088, (1984); *Gates*, 103 S. Ct. at 2331.⊥ ⊥32

Petitioner may also argue that the author of the letter and the neigbhor who telephoned her tip to the police had malicious motives. Any such argument is not germane. An informant's evil intent is irrelevant when police verify the thrust of the tip by independent means. Livermore, *supra* p. 25, at 950 n.32; and Moylan, *supra* p. 24, at 779. In *Upton*, the anonymous informant declared her motive for reporting her tip was revenge against her former boy friend. 104 S. Ct. at 2088. The Court applied the *Gates* test, concluding that "[t]he informant's story and the surrounding

facts possessed an internal coherence that gave weight to the whole," so that probable cause justified issuance of the warrant. *Id.*

Therefore, whether the old test or the *Gates* model is applied, the result is the same: the probable cause standard has been met, and the issue of a warrant was constitutionally justified.

IV. THE SUPPRESSION DOCTRINE NO LONGER BARS THE USE OF PROBATIVE EVIDENCE IF SUCH EVIDENCE WAS SEIZED IN GOOD-FAITH RELIANCE ON A SEARCH WARRANT LATER HELD INVALID ON PROBABLE CAUSE GROUNDS.

> [Our constitution] requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

McCullouch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.).

The fourth amendment contains no self-execution clause. Future generations remain free to choose adaptable enforcement
133 mechanisms. From its genesis, the exclusionary rule emerged to inhibit police from constitutional violations. Deterrence of police misconduct was and remains its only justification. Suppresssion is a misdirected remedy when police conduct is faultless, as in the case at bar. When a magistrate has issued a search warrant relied upon by police acting in good faith, and the validity of that warrant turns on complex questions of probable cause, the social cost of crippling the prosecution exceeds any possible benefit of suppression. By admitting the fruits of such a search, the good-faith exception restores fairness and proportionality to the trial process.

A. A Good-Faith Modification Of The Exclusionary Rule, Which Retains Appropriate Protections For Defendants, Is A Realistic Response To Widespread Disillusion With Its Rigid Appplication In The Criminal Justice System.

Thirteen years ago, Chief Justice Burger denounced the exclusionary rule as a "monolithic, and drastic judicial response to all official violations," and as "both conceptually sterile and practically ineffective in accomplishing its stated objective." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 430 U.S. 388, 415 (1971) (dissenting opinion). The rule has become a "draconian, discredited device" which serves no constitutional interest in the absence of police error. *Illinois v. Gates*, 103 S. Ct. 2317, 2336, *reh'g denied*, 104 S. Ct. 33 500 (1976) (Burger, C.J., concurring), *reh'g denied*, 429 U.S. 874 (1976). In numerous decisions of the Court, individual justices have urged that the rule needs an overhaul. *See, e.g.*,

United States v. Leon, 104 S. Ct. 3405, 3416 n.11 (1984). In an⊥ influ- ⊥34
ential and frequently cited statement, the United States Attorney General vigorously recommended adopting a good-faith exception, since rigid application of the exclusionary rule has "eroded" its original purpose of detterence. (*See* app. A-6.) In a wealth of commentary, in state legislatures, and in Congress itself, we find reflections of the Court's profound discontent with the suppression doctrine.[3]

The Court of Appeals for the Fifth Circuit added momentum to the rising trend by expressly adopting a good-faith exception in *United States v. Williams* 622 F.2d 830 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981). *Williams* held that heroin found on defendant during a search incident to arrest was not barred by the exclusionary rule, when the search was made in good faith. *Williams* apparently was the turning point. Reilley, *supra* p. 24, at 343. To date, numerous circuit and state courts have either carved out some form of good-faith exception, or applauded the *Williams* model. (*See* app. A-7) The United States Supreme Court has vindicated *Williams* by adopting the good-faith exception in *Leon*.

B. Since Agents Collins And Brown Demonstrated Commendable Conduct Which Fulfills Objective Criteria Of Good-Faith Behavior, The Evidence Obtained By Their Action Should Be Admissible At Trial.⊥ ⊥35

In the case at bar the appellate court declared that Agent Collins "acted in good faith" by relying on Dean Drummer's consent to release information on students (R. 6). Since this issue was raised before the court below, we address it again before this court.[4] Parties are not confined to the same arguments advanced below, and may enlarge a question previously advanced, or introduce an arguement closely connected with it. *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899).

United States v. Leon, 104 S. Ct. 3405 (1984), held the exclusionary rule should not be applied to suppress evidence from trial when that evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid. At 104 S. Ct. 3413-17, Justice

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3. *See e.g.*, Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365, 369-70 n.29, 446 n.472 (1981) (discussing enacted or proposed amendments modifying the rule). *See also Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, Hearings on S. 101 and S. 751, the Exclusionary Rule Bills*, 97th Cong., 1st and 2d Sess. (1981).

4. Both *Gates* and *Leon* govern our case. *See Gates*, 103 S. Ct. at 2322-23, and *Leon*, 104 S. Ct. at 3412. Because they overlap, this court should first address the question whether a fourth amendment violation occurred. Only upon finding a violation, should this court consider applying the good-faith exception. *See Leon, id.* at 3422-23; *Gates*, 103 S. Ct. at 2346 (White, J., concurring).

White, for the majority, describes example of police behavior rebutting any presumption of good-faith conduct: 1) willful or negligent conduct depriving defendant of some right; 2) actual or constructive knowledge of a constitutional violation; 3) failure to conform to a "reasonable officer" standard of behavior; 4) failure to obtain a warrant or act within its scope; 5) dishonesty or "reckless disregard of the truth" in completing the warrant applicaton; and 7) unreasonable reliance on a warrant failing to comply with the particularity
136 clause of the fourth amendment (citations omitted).

In the case at bar, we find no suggestion that Agents Collins and Brown conducted themselves negligently, dishonestly, or beyond their authorized power. Collins went to the university to gather routine information on suspected drug dealers, an action as ordinary as requesting car registration records from the state licensing bureau. Recording petitioner's conversation was likewise a common investigative technique. He had no reason to suspect his actions violated any constitutional provision, whether state or federal, because the law in both spheres supported his conduct or was, at best, unsettled.

After Collins inadvertently found the letter in the file, he took no immediate action (R. 2). Only after receiving the telephone tip ten days later, after corroborating its essence, and after obtaining a warrant, did he proceed with the search (R. 2-3). Presentation of the warrant at petitioner's home negated any inference of unlawful or intrusive conduct, by assuring petitioner of "the lawful authority of the executing officer, his need to search and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977); Sharpe & Fennelly, Massachusetts v. Sheppard: *When the Keeper Leads the Flock Astray—A Case of Good Faith or Harmless Error?*, 59 Notre Dame L. Rev. 665, 681-82 (1984). Obtaining evidence under the authority and scope of a warrant is "prima facie the result of good faith on the part of the officer seizing the evidence." *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982). "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judi-
137 cial officer before acting." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). *See also Leon*, 104 S. Ct. at 3417; *Gates*, 103 S. Ct. at 2331; and *Aguilar v. Texas*, 375 U.S. 108, 111 (1964).

Once the warrant issued, Agent Collins had a sworn duty to carry it out. *Leon*, 104 S. Ct. at 3420 n.21. *See also Massachusetts v. Sheppard*, 104 S. Ct. 3424, 3429 (1984), where the Court held it was improper for an officer to question the probable cause determination of a magistrate. Agent Collins could neither have known, nor be charged with knowledge that the warrant lacked probable cause. An officer cannot be held accountable for accurately predicting the

solution of a complex legal issue upon which "thoughtful and competent judges" differ. *Leon*, 104 S. Ct. at 3423. When courts and commentators cannot agree upon a critical detail of law left open in a previous case, it is too much to expect more profound wisdom for a narcotics agent of ordinary training and experience as in the present case. "[S]urely probative evidence of guilt should not be excluded simply because the police were not able to fathom the unfathomable." LaFave, *supra* p. 31, at 67-68.

Officers who draft affidavits under the pressure of an on-going criminal investigation cannot realistically fulfill demands for "elaborate specificity once exacted under common law." *Gates*, 103 S. Ct. at 2330: *Ventresca*, 380 U.S. at 108. Nor should officers be held chargeable to a higher standard than magistrates, who under the old *Aguilar-Spinelli* rule "certainly do not remain abreast of each judicial refinement of the nature of "probable cause.' " *Gates* 103 S. Ct. at 2330 (citing *Shadwick v. City of Tampa*, 407 U.S. 345, 348-50 (1972)).1 138

Agent Collins acted as any reasonable officer would have under the same circumstances. He could have attempted a warrantless search, but did not. He could have risked a consensual search, but did not. He could have presented his complaint for a warrant without benefit of corroboration, but did not. In this case reasonable discretion was applied, and Collins exercised commendable restraint. Nothing in his conduct bears any connection to the flagrant constitutional abuses of *Mapp v. Ohio*, 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961), or *Irvine v. California*, 347 U.S. 128, *reh'g denied*, 347 U.S. 931 (1954). Collins cannot be deterred from future illegal searches when he could not have known this search was illegal in the first place. *See* Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex. L. Rev. 736, 740 (1972).

Leon, 104 S. Ct. at 3417-18, also instructs us to examine the magistrate's behavior for signs of collusion with police. Mere "rubber-stamping" of the affidavit, or other indicia of failure to perform his "neutral and detached" function cannot be tolerated. The record discloses no suggestion of such conduct. In fact, Agents Collins' and Brown's behavior was faultless.

C. In The Absence Of Police Misconduct, Suppression Is The Wrong Remedy If A Magistrate Has Erred In Issuing A Warrant.

Leon stands for the proposition that the courts' previous decisions have effectively turned a remedy into a monster by mechanical application of the suppression doctrine. *See* Harris, *Back to Basics: An Examination of the Exclusionary Rule In Light of Common Sense and the Supreme Court's Original Search and*1 *Seizure* 139 *Jurisprudence*, 37 Ark. L. Rev. 649, 649 (1983). In such cases it

leaves a trail of distressing consequences: deprives victims of moral retribution; delivers unequal justice for equally guilty defendants; appears to excuse criminal acts because of offficial mistakes; wrongly turns the trial process from a search for the truth into a search for police error; makes the justice system seem arbitrary; and encourages citizens' vigilante justice. *Id.* at 650-51. Simply put, the exclusionary rule has gone too far.

That the exclusionary rule is a constitutional mandate specifically integrated into the fourth amendment is the source of several corollary arguments summarized by the *Leon* dissenting opinions. *See* 104 S. Ct. at 3431-35 (Brennan, J., dissenting); and *id.* at 3452-53 (Stevens, J., dissenting). The *Leon* majority squarely rejected that premise and its corollaries. Drawing upon a long line of cases, the Court stressed that the exclusionary rule is a fluid, adaptable rule of evidence generated by the fourth amendment, but certainly not wedded to it. *Id.* at 3412; *id.* at 3424 (Blackmun, J., concurring); *Gates*, 103 S. Ct. at 2340 (White, J., concurring).

The primary purpose of suppression was, and remains, deterrence of police misconduct: "to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disgregard it." *Segura v. United States*, 104 S. Ct. at 3380, 3399 (1984) (Stevens, J., dissenting) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). When police have relied in good faith on a warrant issued by a neutral and detached magistrate, and
140 that warrant⊥ later proves defective, the error belongs to the magistrate. Suppression has no deterrent effect on the conduct of magistrates, and is therefore a misdirected remedy. *Leon*, 104 S. Ct. at 3418. Whether suppression in any case is the proper remedy "must be resolved by weighing the costs and benefits" of preventing the prosecution from using probative evidence at trial, against the degree of deterrent effect on police misconduct. *Id.* at 3413 n.6. In the absence of misconduct, the rule cannot exert substantial deterrent effect: "we conclude that it cannot pay its way in those situations." *Id.*

Rigid application of the rule creates a stumbling block in the trial process. As Justice White explained, "any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited" to those cases where it will "pay its way by deterring official lawlessness." *Gates*, 103 S. Ct. at 2342 (concurring opinion). When probative evidence is suppressed, the resulting windfall for defendants "offends basic concepts of the criminal justice system." *Leon*, 104 S. Ct. at 3413. Chief Justice Burger wrote in his concurrence to *Stone v. Powell*, 428 U.S. 465, (490 (1976), that the extreme disparity between the officer's error and the resulting windfall "is

contrary to the idea of proportionality that is essential to the concept of justice." The good-faith exception restores proportionality to the rule by distinguishing judicial error from police error. This is the correct analysis; it removes the aberrational effect resulting from undue emphasis on a minor error.⊥ ⊥141

In the case at bar we do not know from the record what other evidence the prosecutor might have in his trial arsenal. If the two pounds of cocaine found in petitioner's home constitute the entirety of the evidence against him, and this evidence is suppressed, the state's case would be severely crippled or destroyed. This is precisely the sort of windfall Chief Justice Burger seems to have had in mind: by sheer good luck, petitioner is to go free on a technicality. The dissenters' *in terrorem* cry of a "frozen fourth amendment" rings hollow. The majority noted the exception might discourage some frivolous suppression motions, but litigation of claims should not decrease significantly. *Leon*, 104 S. Ct. at 3422 n.25.

The exclusionary rule originally served to guard the legitimate public interest in protecting the individual and his property. When *Weeks v. United States*, 232 U.S. 383 (1914) first gave us this doctrine, it seemed to be the only possible remedy for police misconduct. *See also Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting). The Court saw an imperative duty to put teeth into the fourth amendment. The exclusionary rule was the only reasonable means to accomplish this. If the Court had simultaneously created a good-faith exception, there might have been substance to the notion that such an exception would breed constitutional evil. However, this wisely crafted exception is meant to modify the rule, not abolish it. The exeption softens doctrinal contours when the inequity of its application would otherwise prove as offensive as the misconduct it was meant to deter.⊥ ⊥142

An eminently sensible critic of the early exclusionary rule wrote that "[s]omeday, no doubt, we shall emerge from this quaint method of enforcing the law. . . It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice." 4 J. Wigmore, *Wigmore on Evidence* § 2184 (2d ed. 1923). The United States Supreme Court has finally achieved this. Its wisdom can be applied by this court in regard to a proper application of state law. If the search warrant in the instant case is held defective, we respectfully urge this court to apply the good-faith rule exeption to the exclusionary rule.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this court to affirm the decision of the Appellate Court of the State of Marshall.

Respectfully submitted,

Attorneys for Respondent,
People of the State of Marshall

⊥43 September 26, 1984⊥

PROOF OF SERVICE

On this 26th day of September, 1984 the Measuring Brief and five (5) copies of the foregong Brief were served by certified mail, return receipt requested, postpaid, on the Benton Committee, the John Marshall Law School, 315 South Plymouth Court, Chicago, Illinois 60604, and on each participating team in the Benton Competition.

Attorneys for Respondent,
People of the State of Marshall⊥ ⊥44

APPENDICES

APPENDIX A

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, house, 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.

Mar. Const. art. I, sec. 6:

> The People shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy and 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.

Ill. Const. art. I, sec. 6

> 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 interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable casue, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

STATUTORY PROVISONS

The Family Educational Rights and Privacy Act of 1974
(Pertinent Sections)

20 U.S.C. § 1232g(a)(5)(A)(1982)

> For the purpose of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by
> ⊥A-1 the student.⊥

20 U.S.C. § 1232g(b)(1)(1982)

No funds shall be made available under any applicable program to any educational agency or institution which as a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without ithe written consent of their parents to any individual, agency or organization . . .

Title III of the Omnibus Crime Control and Safe Streets Act of 1968
(Pertinent Sections)

18 U.S.C. § 2510 (1982)

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communicaitons:

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

18 U.S.C. § 2511 (1982)

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communciation;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communication by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof⊥ has been sent ⊥A-2 through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes commercial establishment the operations of which affect interstate

or foreign commerce; or (B) information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire communication or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the content of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of a wire or oral communication in violation of this subsection; shall be fined not more than $10,000 or imprisoned not more than five years, or both.⊥

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APPENDIX B

State v. Howard, 235 Kan. 236-, 697 P.2d 197, 199-200 (1984)

Technology of the Cordless Telephone:

At the hearing on the motion to suppress, James Hutchison, an employee of Carden's Radio Shack in Hutchinson, testified as to the nature and operational dynamics of the cordless telephone. The cordless telephone was manufactured by the Radio Shack Corporation. It works much like a CB radio. It consists of a base unit and a mobile unit. The base unit is physically attached to two separate wires, one of which is the land based telephone line and the second of which is an AC power source. The mobile unit is a self-contained unit with its own batteries rested upon the base unit. No cord or line or physical connection of any kind exists between the mobile unit and the base unit. The mobile unit is much like a conventional telephone and one can both hear from and speak into the mobile unit. Communications between the base unit and the mobile unit take place through the reception and transmission of FM radio signals by both the base and mobile units.

At the hearing, defendants introduced into evidence the owner's manual for the cordless telephone. Hutchison testified that an average customer would be able to determine from the manual that the device in question was a radio transmitter and receiver. He based this conclusion upon the information contained in the manual. The manual sets forth the transmitted frequencies and the received frequencies of both the base unit and the portable handset. The manual differentiates between the telephone and radio aspects of the cordless telephone by separating the telephone specifications from the radio transmission and reception specifications. Reference is made to the "antenna" of the mobile unit. The mobile unit and base unit communicate with each other by means of FM radio signals. The FM signal utilized by both the mobile and base units is the same as any other FM signal and is not specialized in any way. The FM signal utilized is of the same or similar frequency utilized by commerical FM radio stations. A standard FM radio would be able to pick up the radio transmission from both the mobile and base units of the cordless telephone.

The FM signal transmitted from either the base or mobile unit is nondirectional and will reach out in all directions simultaneously. The FM signal transmitted will penetrate and pass through almost any material, including a normal concrete or wooden wall. The effective rated range of communication between a mobile and base

⊥A-4 unit is⊥ approximately 50 feet, but this range varies with the physical surroundings, weather conditions, the sensitivity of the receiver, and the power output of the transmitter. The manual states that, although the cordless telephone is designed for a normal range of 50 feet, the range can vary from anywhere between 30 to 100 feet depending upon the particular surroundings.

The manual states that "walkie-talkies" can share the same frequencies of the cordless telephone which can produce some interference. If two cordless telephones were hooked to separate lines and were physically close enough, calling one telephone would cause the second telephone to ring and both telephones would be privy to the same conversation. The only way to correct this situation would be to return the cordless telephone to its place of manufacture for frequency modifications. The cordless telephone in question is required to pass Federal Communications Commission regulations which are limited to compliance with production specifications and not transmission capabilities. One is not required to have a license to operate either the base or the mobile unit because the power of each unit is less than one watt. Hutchison testified that the hand-held mobile unit contains a "confidential" button. When that button is depressed, a person holding the telephone could talk to others in the immediate vicinity without having his voice broadcast over the hand-held unit. This would also allow the operator of the hand-held unit to hear incoming transmissions but
⊥A-5 not to broadcast from the unit.⊥

APPENDIX C

Attorney General's Task Force on Violent Crime—Final Report, 29 Crim. L. Rep. 3131, 3134 (1981):

Exclusionary Rule

40. The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief. We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees.⊥ ⊥A-6

APPENDIX D

Case Law Supporting Good-Faith Exceptions to the Exculusionary Rule

Commonwealth v. Bradshaw, 290 Pa. Super. 162, 434 A.2d 181 (1981) (exclusionary rule inapplicable to good faith mistaken belief in informant's tip).

Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982) (suppression inapplicable when evidence seized under technically invalid warrant by Occupational Safety and Health Administration).

Holloman v. Commonwealth, 221 Va. 947, 275 S.E.2d 620 (1981) (*Williams* logic persuasive but inapplicable to search of places unreasonably suspected to conceal objects of search).

Nix v. State, 621 P.2d 1347, 1349-50 (Alaska 1981) (suppression inapplicable to good-faith mistake of fact in consensual search).

People v. Adams, 439 N.Y.S.2d 877, 881, 422 N.E.2d 537, 540-41, *cert. denied*, 454 U.S. 854 (1981)(good-faith exception applies in consensual search where girldfriend gave consent in absence of resident of premises).

People v. Eichelberger, 620 P.2d 1067, 1069, 1071 n.2 (Colo. 1980) (*en banc*) (rule should not impede police from duty when police conduct reasonable).

People v. Pierce, 88 Ill. App. 3d 1095, 411 N.E.2d 295, 301 (1980) (*Williams* rule applies to minimal police intrusion situations).

Richmond v. Commonwealth, 637 S.W.2d 642 (Ky. 1982) (exclusionary rule inapplicable when drugs seized in good faith under warrant issued by magistrate in other jurisdiction).

State v. Lehnen, 403 So.2d 683, 686 (La. 1981) (good-faith exception in *Williams* is proper model when cost of exclusion too high).

State v. Mincey, 130 Ariz. 389, 636 P.2d 637, 650 n.2 (1981), *cert. denied*, 455 U.S. 1003 (1982) (*Williams* rationale applies to officers following defined police procedure).

Tirado v. Commissioner, 689 F.2d 307 (2d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983) (evidence illegally seized by federal drug
⊥A-7 agents admissible in federal tax litigation).⊥

United States v. Ajlouny, 629 F.2d 830, 840-41 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (exclusionary rule inapplicable to warrantless good-faith wiretap).

United States v. Bailey, 628 F.2d 938 (6th Cir. 1980) (fruits of beeper surveillance admissible even though warrant lacked termination date).

United States v. Bazzano, 712 F.2d 826 (3d Cir. 1983) (*en banc*), *cert. denied* sub nom. Mollica v. United States 104 S. Ct. 1439 (1984) (exclusionary rule inapplicable to probation hearings).

United States v. Beck, 729 F.2d 1329 (11th Cir. 1984) (good-faith exception applies to FBI officers' search of defendant's apartment).

United States v. Hill, 447 F.2d 817, 818-19 (7th Cir. 1971) (exclusionary rule inapplicable to probation revocation proceedings).

United States v. Lee, 540 F.2d 1205, 1211 (4th Cir.), *cert. denied*, 429 U.S. 894 (1976) (exclusionary rule inapplicable to sentencing proceedings).

United States v. Mahoney, 712 F.2d 956 (5th Cir. 1983) (follows *Williams*).

United States v. Nolan, 530 F. Supp. 386, 396-99 (W.D. Pa. 1981) (technical violation of knock-and-announce rule made in good faith so evidence admissible).

United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (exclusionary rule inapplicable to sentencing proceedings).

United States ex. rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-64 (2d Cir. 1970) (exclusionary rule inapplicable to parole revocation proceeding).

United States v. Wilson, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (evidence admissible when officer makes citizen's arrest outside of own jurisdiction but in good faith).

United States v. Wyler, 502 F. Supp. 969, 973-74 (S.D.N.Y. 1980) (suppression inapplicable when police entered building with good faith though mistaken belief building abandoned).1 1A-8