

## Case Comment

### Appellate Review and the Exclusionary Rule

*United States v. Koerth*, 312 F.3d 862 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 1947 (2003).

Today, application of the exclusionary rule to evidence obtained in reliance on a potentially invalid search warrant is governed by the Supreme Court's holding in *United States v. Leon*.<sup>1</sup> *Leon* instructs courts to admit evidence obtained on the basis of a potentially invalid search warrant, so long as the executing law enforcement officers "acted in good faith" and "in objectively reasonable reliance on . . . [the] warrant."<sup>2</sup> According to *Leon*, conduct of the judge or magistrate who issued the warrant cannot provide grounds for suppression of evidence unless the defendant can show that the issuing judge or magistrate "wholly abandoned his judicial role."<sup>3</sup>

The scope and application of the exclusionary rule have always bred disagreement.<sup>4</sup> For some, the rule is an unnecessary impediment that allows guilty criminals to escape conviction on procedural technicalities. For others, it is an indispensable substantive component of the Fourth Amendment's protections against unnecessary search and seizure. Set against the backdrop of this historic conflict, *Leon* can be seen as a great achievement, one that has freed courts from "a difficult dilemma."<sup>5</sup> Yet

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1. 468 U.S. 897 (1984).

2. *Id.* at 922 (quoting *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982)).

3. *Id.* at 923.

4. *Compare, e.g., Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (stating that without the exclusionary rule, "the protection of the Fourth Amendment declaring [the] right to be secure against such searches and seizures is of no value" (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914))), with *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) (stating that the exclusionary rule allows "[t]he criminal . . . to go free because the constable has blundered").

5. *United States v. Reilly*, 76 F.3d 1271, 1273 (2d Cir. 1996) (stating that, prior to *Leon*, federal appellate courts had faced the binary choice of either holding a search unconstitutional, and thereby increasing the chances that a guilty person would go free, or finding the search constitutional, and thereby condoning similar searches and increasing the possibility of future

nearly twenty years later, *Leon* remains an uneasy compromise—and a source of enduring controversy.<sup>6</sup>

Reforming appellate review of the good faith exception to the exclusionary rule along the lines suggested in *United States v. Koerth*<sup>7</sup> would eliminate a significant problem: the failure of post-*Leon* jurisprudence to reach underlying probable cause issues in exclusionary rule cases. Part I of this Comment describes this problem and discusses the nature of the *Koerth* reform. Part II explains why *Koerth*'s “substantial basis” test is preferable to current practice. Part III responds to possible criticisms of the *Koerth* approach, including the objection that *Koerth* is inconsistent with *Leon*.

## I

Today, appellate courts sometimes decline to rule on the underlying issue of probable cause when they review cases that revolve around the application of the exclusionary rule.<sup>8</sup> At times, these cases involve difficult or borderline probable cause determinations, which appellate courts simply duck by invoking *Leon*'s good faith standard for the conduct of law enforcement officers.<sup>9</sup> Contrary to some predictions,<sup>10</sup> these shortcuts have not eroded Fourth Amendment protections,<sup>11</sup> but they do represent

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intrusive investigations); *cf.* Donald Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986) (defending the result of *Leon* but criticizing the justification offered in the Court's opinion). *But see* Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405 (1986) (criticizing the result of—and rationale behind—*Leon*, as well as Dripps's attempt to defend *Leon*'s result).

6. *See, e.g.*, *United States v. Carter*, 139 F.3d 424, 435 (4th Cir. 1998) (en banc) (Ervin, J., dissenting) (“The practical effect of *Leon* has been to enable prosecutors to preserve cases that would have otherwise failed for lack of evidence.”); *Holman v. Page*, 95 F.3d 481, 490 (7th Cir. 1996) (citing *Leon* in the context of a particularly horrific rape and murder and noting that “the exclusionary rule may well make verdicts less reliable by precluding the jury from considering all—and sometimes the most—probative evidence”).

7. 312 F.3d 862 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 1947 (2003).

8. *See, e.g.*, *United States v. Beckett*, 321 F.3d 26, 31-32 (1st Cir. 2003); *United States v. Martin*, 297 F.3d 1308, 1315-16 (11th Cir.), *cert. denied*, 537 U.S. 1076 (2002).

9. *See, e.g.*, *United States v. Langford*, 314 F.3d 892, 893-94 (7th Cir. 2002) (proceeding directly to the *Leon* question of law enforcement good faith reliance, while conceding that the only significant issue presented was the “[t]hin” “legal sufficiency” of the warrant, a matter to be determined by “the judicial officer” issuing the warrant and not by the police involved), *cert. denied*, 124 S. Ct. 920 (2003); *United States v. Fisher*, 137 F.3d 1158, 1164 (9th Cir. 1998); *United States v. Shugart*, 117 F.3d 838, 841-43 (5th Cir. 1997); *United States v. Cancelmo*, 64 F.3d 804, 807 (2d Cir. 1995); *United States v. Edwards*, 798 F.2d 686 (4th Cir. 1986); *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985).

10. *See, e.g.*, Joan Greenberg Levenson, Case Comment, *The Good Faith Exception: Should It Enable Courts To Avoid Explication of Underlying Fourth Amendment Issues?*, 52 BROOK. L. REV. 799, 802, 827 (1986) (predicting, in the wake of *Leon* and *Fama*, that widespread appellate “failure to determine the existence of probable cause” will lead to the “demise of the fourth amendment”).

11. *See, e.g.*, Sean R. O'Brien, Note, *United States v. Leon and the Freezing of the Fourth Amendment*, 68 N.Y.U. L. REV. 1305, 1307 (1993) (arguing that “the recognition of the good faith exception has not had the effect of freezing fourth amendment law”).

significant abdications of appellate responsibility. At times, the refusal to rule on the underlying probable cause issues in such cases even creates tension with the guiding principles for appellate review of the exclusionary rule set forth by *Leon* itself.<sup>12</sup>

When there is a genuine dispute about whether law enforcement officers could have reasonably relied in good faith upon the judge's decision to issue a search warrant, *Koerth* provides a clear outline for orderly appellate review of exclusionary rule cases. *Koerth*'s "substantial basis" test requires appellate courts to review probable cause issues *before* turning to questions about the good faith reliance of law enforcement officers on the search warrant. *Koerth* charges appellate courts to continue to accord deference to the warrant-issuing judge's initial determination of probable cause, so long as there is a "substantial basis" in the factual record to support the issuing judge's decision.<sup>13</sup> If an appellate court finds that this substantial basis was present, "then it follows that the officer's actions were reasonable," and the evidence uncovered in the challenged search should be admitted.<sup>14</sup>

If the appellate court finds that a substantial basis for the issuing judge's probable cause determination was lacking, *Koerth* directs the appellate court to turn to the issue of good faith reliance of law enforcement officers upon the search warrant. At this stage, appellate courts simply reapply the familiar *Leon* test and ask whether law enforcement officers "reasonably believed" that the warrant and supporting affidavits were sufficient to sustain a finding of probable cause.<sup>15</sup> When law enforcement officers are found to have reasonably relied on an invalid warrant, *Koerth*'s substantial basis test mandates admission of the evidence uncovered under *Leon*'s good faith exception to the exclusionary rule.

*Koerth* functions as a simple extension of *Leon*'s central holding: Appellate courts should continue to admit evidence unless the defendant can show *both* that the warrant-issuing magistrate wholly abandoned the proper judicial role *and* that the reliance of law enforcement officers upon the defective search warrant was not objectively reasonable.<sup>16</sup> Crucially, by

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12. See *United States v. Leon*, 468 U.S. 897, 925 (1984) ("Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation.")

13. *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 1947 (2003); see also *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (setting forth the deferential and "flexible" "substantial basis" test for magistrate probable cause determinations, from which the *Koerth* test derives).

14. *Koerth*, 312 F.3d at 866.

15. *Id.* (emphasis omitted).

16. Compare *id.* ("By resolving the issue of probable cause before addressing the question of good-faith reliance, we further the *Leon* Court's goal of establishing legal principles . . . to guide . . . law enforcement officers and magistrates' . . ." (quoting *Leon*, 468 U.S. at 925)), with

requiring appellate courts to resolve the issue of probable cause before addressing the question of good faith reliance, *Koerth* forces appellate courts to establish guiding principles and factual precedents for future action by judges and magistrates who review and issue search warrants. *Koerth* departs from *Leon* only in imposing a single additional constraint upon appellate courts: It requires them to address the underlying presence or absence of probable cause in the preliminary substantial basis step before turning to the paramount *Leon* issue of objectively reasonable law enforcement reliance. Widespread implementation of *Koerth*'s substantial basis test would allow appellate courts to "correct erring magistrates and provide them with guidance without incurring the social cost of letting the guilty profit from decisions that define the boundaries of the Fourth Amendment."<sup>17</sup>

## II

*Koerth*'s substantial basis test resolves the ambiguity that *Leon* created regarding appellate discretion over probable cause.<sup>18</sup> Some have interpreted *Leon* as reserving near-absolute appellate discretion to dispense with a review of probable cause issues in cases involving good faith law enforcement reliance: If an appellate court can determine as an initial matter that law enforcement officers relied "on the warrant in good faith, it is no longer logically necessary" to reach the fundamental probable cause issues.<sup>19</sup> Other courts have presumed or assumed that probable cause for a warrant was lacking before proceeding directly to a consideration of law enforcement good faith reliance upon the warrant.<sup>20</sup> Still other judges have stated that appellate refusal to "decide the probable cause question in cases in which the good faith exception applies" is acceptable, but only in rare cases "when the [appellate] court is genuinely uncertain about whether

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*Leon*, 468 U.S. at 925 ("If . . . necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding [the Fourth Amendment question] before turning to the good-faith issue.").

17. *United States v. Reilly*, 76 F.3d 1271, 1273 (2d Cir. 1996).

18. *Compare Leon*, 468 U.S. at 925 (finding nothing to prevent appellate courts from deciding Fourth Amendment questions before turning to good faith issues where necessary to instruct magistrates and law enforcement officers), *with id.* (stating that in some circumstances courts might "reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith").

19. O'Brien, *supra* note 11, at 1317; *cf. United States v. Huggins*, 299 F.3d 1039, 1044 (9th Cir.) ("[W]e initially ask only whether [the law enforcement officer] conducted the search in good faith reliance on the magistrate judge's determination that probable cause existed."), *cert. denied*, 537 U.S. 1079 (2002); *United States v. Shugart*, 117 F.3d 838, 843 (5th Cir. 1997) ("[W]e must first determine whether the good-faith exception . . . applies.").

20. *See, e.g., United States v. Garey*, 329 F.3d 573 (7th Cir. 2003); *United States v. Owens*, 167 F.3d 739, 744-45 (1st Cir. 1999).

probable cause exists.”<sup>21</sup> Uniform application of *Koerth*’s substantial basis test would bring clarity and consistency to this confusing array of approaches to questions of probable cause in good faith cases.

These current approaches by appellate courts are problematic for at least two reasons. As a practical matter, allowing appellate courts broad discretion to proceed directly to good faith questions allows such courts to evade probable cause determinations in important or troubling cases.<sup>22</sup> Further, it is simply incorrect to say that probable cause determinations in good faith cases are not “logically necessary”.<sup>23</sup> If law enforcement officers are not consistently informed about the fact-specific limits of probable cause, they cannot very well “harbor a good faith belief in its existence.”<sup>24</sup> However difficult it may be for appellate judges to criticize the findings of warrant-issuing judges and magistrates, it is unwise and unfair to limit criticism in probable cause cases to the actions of law enforcement. Current doctrine requires law enforcement officers to bear responsibility for decisions that they do not make and for which they are not trained.

Empirical evidence on the educative effects of the exclusionary rule upon law enforcement officers is scant, but there is reason to believe that those officers involved in exclusionary rule cases “learn most about changes in the law of search and seizure” from case-specific court experiences.<sup>25</sup> Despite the “minimal training and qualifications”<sup>26</sup> of some magistrates, case-specific appellate review of probable cause determinations under *Koerth* will likely be at least as instructive to magistrates as case-specific appellate review of good faith under *Leon* currently is to law enforcement officers. The niceties of judicial courtesy should not be allowed to insulate warrant-issuing judicial officers from appellate review. Widespread adoption of *Koerth*’s substantial basis test should rectify this systemic flaw, and extend the educative benefits of case-by-case appellate review to warrant-issuing magistrates as well as to law enforcement officers.

### III

One might object to *Koerth*’s reform of current exclusionary rule review on a variety of grounds. First, one might adopt the hoary objection

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21. *United States v. Cancelmo*, 64 F.3d 804, 809 (2d Cir. 1995) (Calabresi, J., concurring).

22. *See* cases cited *supra* note 9.

23. O’Brien, *supra* note 11, at 1317.

24. Levenson, *supra* note 10, at 819.

25. Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1036 (1987).

26. Rosemarie A. Lynskey, Note, *A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with United States v. Leon*, 41 VAND. L. REV. 811, 829 (1988).

formulated by Cardozo over half a century ago,<sup>27</sup> and argue that even *Koerth's* modest procedural reform increases the likelihood that guilty defendants will go free because of highly technical errors committed by well-intentioned magistrates and law enforcement officers. Second, one might contend that adopting *Koerth's* substantial basis test will impose needless costs on overworked appellate courts. Third, one might argue that *Koerth* is fundamentally incompatible with the letter or spirit of the Supreme Court's prior exclusionary rule jurisprudence. The remainder of this Comment answers these potential objections.

First, it is important to stress that *Koerth* need not alter the deferential standard of review that appellate courts apply to the decisions of warrant-issuing judges and magistrates. Like *Leon*, *Koerth* continues to require that evidence obtained during a questionable search be admitted, under the objectively reasonable good faith exception, *even if* the appellate court finds that the warrant-issuing judge's decision on the issue of probable cause was erroneous.<sup>28</sup> In other words, *Koerth's* substantial basis test continues to protect the effects of difficult decisions made by warrant-issuing judges and magistrates, while allowing appellate courts to create instructive precedent to guide similar decisions in the future. *Koerth's* impact will thus likely be confined to clarifying post-*Leon* exclusionary rule doctrine for judicial officers issuing warrants.

Second, *Koerth's* substantial basis test might impose slight additional decision costs upon appellate courts, but these trivial costs should not prevent *Koerth's* much-needed procedural reforms. Adoption of *Koerth's* substantial basis test would cut off the presumption/assumption shortcut that some courts apply to probable cause determinations in good faith cases.<sup>29</sup> For such courts, adopting *Koerth's* test might well impose additional time and costs. But these burdens will only be significant in cases where the probable cause ruling represents a difficult or novel question of law. These are exactly the shots that appellate courts should be calling; they should not be allowed to assume away these important decisions. In cases where the presence or absence of probable cause is truly uncertain on appellate review, *Koerth's* substantial basis test only requires appellate courts to briefly confront and admit the causes of their uncertainty before proceeding to the good faith determination.

Finally, *Koerth's* reforms do not represent a significant break with *Leon* or other Supreme Court exclusionary rule precedent. As stated above,

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27. See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

28. See, e.g., *United States v. Savage*, 59 Fed. Appx. 821, 824-25 (7th Cir.) (unpublished decision) (citing *Koerth*, and ruling that the search warrant at issue "was invalid," but nonetheless admitting the evidence in question under *Leon's* good faith exception), *cert. denied*, 124 S. Ct. 123 (2003).

29. See cases cited *supra* note 20.

*Koerth*'s substantial basis test should not be understood as a substantive review of *Leon*'s objectively reasonable good faith reliance standard. Rather, *Koerth* provides a much-needed formal outline for appellate courts to consider when applying *Leon*'s substantive standards. Some might wrongly interpret *Koerth* as an attempt to rehabilitate the intermediate "substantial basis" standard of review set forth in *United States v. McKinney*.<sup>30</sup> However, the two decisions are actually quite different. Unlike *McKinney*, *Koerth* does not subvert or replace *Leon*'s highly deferential standard for appellate review of warrant-issuing magistrates' decisions. *Koerth*'s substantial basis test merely sets forth a procedure under which appellate courts should continue to deferentially review the decisions of warrant-issuing magistrates before turning to the issue of law enforcement officers' good faith.

*Koerth* is also fundamentally compatible with the spirit of *Leon*. Since its inception, some have interpreted *Leon* as "unfortunately convey[ing] a 'clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review.'" <sup>31</sup> Though this gloomy diagnosis of *Leon*'s effect upon the exclusionary rule is supported by the actions of some appellate courts since *Leon* was decided,<sup>32</sup> it is not warranted by *Leon* itself. The majority in *Leon* reaffirmed that "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment."<sup>33</sup> Far from absolving issuing magistrates from error, *Leon* merely held that "[i]mposition of the exclusionary sanction is not necessary . . . to inform judicial officers of their errors" in issuing warrants, because the "threat of exclusion . . . cannot be expected significantly to deter them."<sup>34</sup> *Koerth* is completely consistent

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30. 919 F.2d 405 (7th Cir. 1990), *abrogated by* *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992). The *McKinney* "substantial basis" standard for reviewing probable cause determinations was attacked in a concurrence by Judge Posner that assailed the *McKinney* majority's reform as unworkable and out of touch with Supreme Court precedent in *Leon* and elsewhere. *See id.* at 419-23 (Posner, J., concurring). In *United States v. Spears*, the Seventh Circuit adopted the language of Posner's *McKinney* concurrence, and held that *McKinney*'s "substantial basis" language had actually created a new and inappropriate standard of review for probable cause determinations in warrant cases: "something more deferential than *de novo*, but less deferential than clear error." *Spears*, 965 F.2d at 269-70.

31. Wayne R. LaFave, "The Seductive Call of Expediency": *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 908 (quoting *United States v. Leon*, 468 U.S. 897, 956 (1984) (Brennan, J., dissenting)); *see also* *Lynskey*, *supra* note 26, at 828 ("A chief consequence of the *Leon* decision is to insulate from effective review the magistrate's decision to issue warrants.").

32. *See* cases cited *supra* note 9.

33. *Leon*, 468 U.S. at 921.

34. *Id.* at 917.

with this language, because it allows appellate courts to identify judicial error in issuing warrants without resorting to the extreme measure of exclusion. In fact, *Koerth's* substantial basis test provides an excellent opportunity to reconcile *Leon's* affirmation of the central roles and responsibilities of magistrates with its admonitions against excluding evidence solely on the basis of magistrate error.

*Koerth's* consistency with Supreme Court exclusionary rule jurisprudence becomes even more pronounced when considered in light of the Court's other Fourth Amendment decisions. *Leon*, *United States v. Janis*,<sup>35</sup> and *Calandra v. United States*<sup>36</sup> may well have represented a significant shift in defining the deterrence of law enforcement officials as the primary objective of the exclusionary rule.<sup>37</sup> But this shift did not create a blanket dispensation to prohibit review of the decisions of judicial officers who issue search warrants. Only a year before *Leon*, in *Illinois v. Gates*, the Court held that "[i]n order to ensure that . . . an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued."<sup>38</sup> In the absence of an insupportably selective reading both of *Leon* and of prior Supreme Court holdings, *Koerth's* substantial basis test conforms to the full sweep of the Supreme Court's exclusionary rule jurisprudence.

#### IV

Current doctrine and important public policy considerations demonstrate that appellate courts "owe a duty to define the boundaries of probable cause, so that affiants . . . , issuing magistrates, reviewing courts, and the executing officers on whose good faith we rely may have appropriate guidance. And these boundaries are best set, not by abstract statements, but by case-by-case decisions in real situations."<sup>39</sup> Today this obligation often goes unmet. Adoption of *Koerth's* substantial basis test would allow appellate courts to consistently exercise their duty to define and preserve Fourth Amendment protections.

—Zack Bray

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35. 428 U.S. 433, 446 (1976).

36. 414 U.S. 338, 347 (1974).

37. See Stephen J. Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 MIL. L. REV. 83, 89 (1983).

38. 462 U.S. 213, 239 (1983).

39. *United States v. Cancelmo*, 64 F.3d 804, 809 (2d Cir. 1995) (Calabresi, J., concurring).