

COMMENT: WHEN IS GOOD FAITH GOOD ENOUGH?—THE HISTORY,
USE, AND FUTURE OF TEXAS CODE OF CRIMINAL PROCEDURE
ARTICLE 38.23(b)

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I. INTRODUCTION

Generally “the Fourth Amendment bar[s] the use of evidence secured by an illegal search and seizure.”¹ This rule preventing the use of illegally obtained evidence is known as the “exclusionary rule.”² The United States Supreme Court created an exception to the exclusionary rule in *United States v. Leon*.³ In *Leon*, the Court held that evidence gathered by officers acting in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate is admissible despite the fact that warrant is subsequently invalidated due to a lack of probable cause.⁴ This exception is known as the “good faith” exception because of its requirement that the officer’s actions in obtaining and executing the search warrant be in “objective good faith.”⁵

In an apparent attempt to codify the *Leon* into Texas law and thereby create good faith exception to the Texas statutory equivalent of the exclusionary rule⁶, the Texas legislature amended Texas Code of Criminal

¹ *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (discussing *Weeks v. United States*, 232 U.S. 383 (1914) and quoting *Wolf v. Colorado*, 338 U.S. 25, 28 (1949)).

² *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (describing *Weeks* as the “announcement of the exclusionary rule”); *United States v. Leon*, 468 U.S. 897, 905–09 (1984) (discussing suppression of evidence under the Fourth Amendment in terms of the “exclusionary rule”).

³ 468 U.S. at 897.

⁴ *Id.*

⁵ *Id.* at 920 (noting that exclusion cannot affect an officer’s future conduct “when an officer acting with *objective good faith* has obtained a search warrant from a judge or magistrate and acted within its scope”) (emphasis added).

⁶ TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) (“No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of

Procedure article 38.23.⁷ Some court of appeals cases and individual justices recognized the purpose of the amendment, arguing that the new subsection (b) of the article was an implementation of the full *Leon* good faith exception.⁸ However, within three years of enactment, the Court of Criminal Appeals expressed its opinion that the new subsection was not a codification of *Leon*.⁹ While the court's initial statement regarding article in *Gordon v. State* 38.23(b) was arguably dicta,¹⁰ the court soon reached the same conclusion regarding article 38.23(b) as a holding in *Curry v. State*.¹¹

Since the Court of Criminal Appeals' first interpretation of article 38.23(b), rather than dealing with situations in which a warrant is deemed to be without the support of probable cause on appellate review as does the good faith exception created by *Leon*, the courts of Texas have found only a handful of instances in which the article applies to address "less important" warrant defects.¹² These uses are generally redundant of existing law and demonstrate just how impotent article 38.23(b) has been rendered by the decisions in *Gordon* and *Curry*.¹³ Moreover, as a result of the Court of Criminal Appeals' interpretation of article 38.23(b), the criminal justice system is deprived of trustworthy, probative evidence in situations where there is generally no police misconduct to deter, thereby creating the potential for allowing guilty defendants to go free in exchange for no

Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.").

⁷ Act of May 29, 1987, 70th Leg., R.S., ch. 546, § 1, 1987 Tex. Gen. Laws 2207.

⁸ *Gordon v. State*, 767 S.W.2d 866, 868 (Tex. App.—Eastland 1989), *rev'd*, 801 S.W.2d 899 (Tex. Crim. App. 1990); *Curry v. State*, 780 S.W.2d 825, 826–27 (Tex. App.—Houston [14th Dist.] 1989), *vacated*, 808 S.W.2d 481 (Tex. Crim. App. 1991); *Vance v. State*, 759 S.W.2d 498, 500 n.3 (Tex. App.—San Antonio 1988, *pet. ref'd*) (refusing to address the applicability of article 38.23(b) to a suppression argument based in part on the fact that the warrant was supported by probable cause); *Eatmon v. State*, 738 S.W.2d 723, 725 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*) (Robertson, J., dissenting) (arguing that other exceptions to the exclusionary rule had been adopted without explicit statutory support and thus the *Leon* good faith exception should be adopted as well).

⁹ *Gordon*, 801 S.W.2d at 912–13.

¹⁰ *Id.* at 912 (noting that Art. 38.23 did not govern the case at bar because the evidence was obtained two months prior to the effective date of the statute).

¹¹ *Curry*, 808 S.W.2d at 482.

¹² *Smith v. State*, 962 S.W.2d 178, 187 n.1 (Tex. App.—Houston [1st Dist.] 1998, *pet. ref'd*) (O'Connor, J., concurring).

¹³ *See Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (holding, without reliance upon article 38.23(b), that technical discrepancies do not automatically invalidate a search warrant).

prospective protection of the Fourth Amendment or its Texas equivalent.¹⁴ Oddly, although article 38.23(b) as interpreted in *Gordon* and *Curry* has a much narrower application than the full *Leon* good faith exception, some applications of the rule seem to be contrary to United States Supreme Court precedent and the Fourth Amendment.¹⁵

This Comment examines the good faith exception as it exists in Texas. First, the Comment outlines the background of the exception, both at the Federal level and in Texas. Included in this discussion will be a representative sampling of uses of article 38.23(b). Next, the Comment analyzes the interpretation of article 38.23(b) offered by the Court of Criminal Appeals. This analysis includes a discussion of the uses of article

¹⁴TEX. CONST. art. I, § 9 (“Searches and Seizures - The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.”); *United States v. Leon*, 468 U.S. 897, 907, 920–21 (1984) (noting that where an officer obtains a warrant and acts within its scope there is generally no police illegality to deter and that an “objectionable collateral consequence” of the exclusionary rule is that some guilty defendants may go free); *See, e.g., Crowell v. State*, 147 Tex. Crim. 299, 304, 180 S.W.2d 343, 346 (1944) (stating that “Art. I, Sec. 9 of the Constitution of this State, and the 4th Amendment to the Federal Constitution are, in all material aspects, the same.”); *but see* *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991) (holding that when interpreting Tex. Const. art. I, § 9, the Court of Criminal Appeals is not bound by United States Supreme Court Fourth Amendment precedent). Because of the general equivalence of Texas Constitution article I, § 9, the arguments made based on Fourth Amendment principles are applicable to suppression arguments based on Texas Constitution article I, § 9. *See infra* part IV.B (discussing *Martin v. State*, 761 S.W.2d 26 (Tex. App.—Beaumont 1988), *pet. granted, remanded*, 764 S.W.2d 562 (Tex. Crim. App. 1989) and its holding that the full *Leon* good faith exception applies where a defendant relies upon TEX. CONST. art. I, § 9 and U.S. Const. amend. IV, rather than TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) in arguing for suppression of evidence).

¹⁵*Compare* *Arizona v. Evans*, 514 U.S. 1, 14–15 (1995) (holding that the purpose of the exclusionary is to deter police misconduct and thus where the fact a warrant has been quashed is not entered into the police computer system due to judicial error the good faith exception may apply) to *White v. State*, 989 S.W.2d 108, 111 (Tex. App.—San Antonio 1999, no pet.) (holding that the distinction between law enforcement error and judicial error, as announced by the United States Supreme Court in *Arizona v. Evans*, 514 U.S. 1 (1995), does not play a role under article 38.23(b)); *also compare* *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding that, though incorporation of other documents is allowed, the Fourth Amendment requires particularity in the warrant itself) and *United States v. Leon*, 468 U.S. 897, 923 (1984) (stating that a warrant may be so facially invalid as to preclude application of the good faith exception); to *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.) (holding that although the affidavit described a home to be searched, evidence found pursuant to a warrant which listed “vehicle” as the place to be searched was admissible).

38.23(b) where the Court of Criminal Appeals' interpretation has rendered the article too narrow, in the sense that its application has been reduced to technical defects rather than situations in which probable cause is lacking, while at the same time too broad, in the sense that some applications seem to violate the United States Constitution. Finally the Comment discusses factors bearing upon the likelihood that article 38.23(b) will ever achieve its intended goal.

II. BACKGROUND

In *United States v. Leon*, the United States Supreme Court created an exception to the exclusionary rule of the Fourth Amendment.¹⁶ This exception renders evidence, obtained by officers acting in objectively reasonable reliance upon a warrant which is subsequently invalidated on appeal, admissible.¹⁷ This exception has come to be known as the "good faith" exception.¹⁸

After the United States Supreme Court's ruling in *Leon* the Texas legislature enacted article 38.23(b).¹⁹ Article 38.23(b) creates a "good faith" exception to the statutory exclusionary rule stated in article 38.23(a).²⁰ However, the Court of Criminal Appeals' interpretation of article 38.23(b) has prevented it from having the full effect of the "good faith" exception created in *Leon*.²¹

A. The Federal Good Faith Exception

1. United States v. Leon

In *United States v. Leon*, after receiving a tip from a confidential informant and performing surveillance of residences suspected of being used for drug distribution, Burbank, California Police officers obtained a

¹⁶ 468 U.S. at 922.

¹⁷ *Id.*

¹⁸ *See id.* at 919 (quoting from *United States v. Peltier*, 422 U.S. 531, 539 (1975) "[w]here official action [is] pursued in complete good faith . . . the deterrence rationale [of the exclusionary rule] loses much of its force").

¹⁹ Act of May 29, 1987, 70th Leg., R.S., ch. 546, § 1, 1987 Tex. Gen. Laws 2207; *Leon*, 468 U.S. at 897 (noting the date of decision as July 5, 1984).

²⁰ TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2005).

²¹ *See infra* Part II.B.

facially valid search warrant for the residences.²² When the warrant was executed, large quantities of drugs were found.²³ After being indicted and charged in federal district court with several drug offenses, the defendants challenged the validity of the warrant arguing that the supporting affidavit did not demonstrate probable cause.²⁴ The district court held that the informant tip had not been sufficiently corroborated and granted the defendants' motion to suppress.²⁵ The government appealed the decision eventually reaching the United States Supreme Court.²⁶ In the end the Court held that although the warrant was not supported by probable cause and thus its execution unconstitutional, because the officers obtained a facially valid warrant from a detached and neutral magistrate and relied upon it in gathering the contested evidence, the "marginal or nonexistent benefits" of suppressing the challenged evidence could not "justify the substantial costs of exclusion."²⁷ In so concluding, the Court created what has come to be known as the "good faith" exception to the exclusionary rule. The exception is so known because of the requirement that the officer act in objectively reasonable good faith reliance upon a warrant in order for the exception to be applicable.²⁸

Certain aspects of *Leon* must be emphasized for a proper understanding of the "good faith" exception it created. In *Leon*, the Court dealt with a search conducted pursuant to a warrant that was not supported by probable cause.²⁹ Therefore the "good faith" exception developed in *Leon* applies "to a concededly unconstitutional search."³⁰ The question for the Court was what, if any, is the proper remedy to be applied in a scenario such as that presented in *Leon*—officers obtaining a warrant from a detached and neutral magistrate that, on appeal, proves to be without probable cause and

²² *Leon*, 468 U.S. at 901–02.

²³ *Id.*

²⁴ *Id.* at 902–03.

²⁵ *Id.* at 903.

²⁶ *Id.* at 903–05.

²⁷ *Id.* at 922.

²⁸ *Id.* at 920 (noting that where an officer's conduct is objectively reasonable "excluding evidence will not further the ends of the exclusionary rule in any appreciable way" and this is "particularly true" where the officer has in *objective good faith* obtained a warrant and acted within its scope) (emphasis added).

²⁹ *Id.* at 903–05.

³⁰ *Id.* at 915 n.13.

acting in objectively reasonable reliance upon it in gathering the evidence in question.³¹

Next, the *Leon* “good faith” exception rests upon a proper understanding of the exclusionary rule.³² In *Weeks v. United States* the United States Supreme Court held that evidence obtained as part of a violation of a person’s Fourth Amendment rights is not admissible against that person.³³ This rule was incorporated into the Fourteenth Amendment and thus made applicable to the states in *Mapp v. Ohio*.³⁴ The rule would seem to be a necessary aspect of the Fourth Amendment that is itself a rule limiting the means by which the government can gather evidence for use in prosecutions.³⁵ However, in the years since *Weeks* the Court has tempered its holding, stating that the exclusionary rule is a “judicially created remedy” rather than part and parcel of the Fourth Amendment.³⁶ Application of the exclusionary rule has been deemed to present “an issue separate from the question of whether the Fourth Amendment . . . [was] violated.”³⁷

By recharacterizing the exclusionary rule as a creation of the Court rather than a constitutional mandate, the Court is free to create exceptions to the rule.³⁸ In determining whether the exclusionary rule should be applied

³¹ *Id.*

³² *Id.* at 908 (paying “close attention” to the objective of the exclusionary rule in defining its scope).

³³ 232 U.S. 383, 393 (1914).

³⁴ 367 U.S. 643 (1961).

³⁵ In *Weeks*, the Court noted “the duty of giving [the Fourth Amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.” 232 U.S. at 392. See also *Mapp*, 367 U.S. at 651, 655–57; *Olmstead v. United States*, 277 U.S. 438, 462–63 (1928).

³⁶ See *Leon*, 468 U.S. at 906 (noting “the wrong condemned by the [Fourth] Amendment is ‘fully accomplished’ by the unlawful search or seizure itself” and that the exclusionary rule is not a “personal constitutional right of the party aggrieved”); citing *United States v. Calandra*, 414 U.S. 338, 348 (1974) (noting the exclusionary rule is a “judicially created remedy”); *Stone v. Powell*, 428 U.S. 465, 486 (1976) (noting “the Fourth Amendment ‘has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons’”).

³⁷ *Id.* at 906 (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

³⁸ *Id.* at 905 (noting “in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions”). See also *Murray v. United States*, 487 U.S. 533, 537–42 (1988) (holding evidence that is discovered from an independent, lawful source is admissible despite a related Fourth Amendment violation); *Nix v. Williams*, 467 U.S. 431, 440–48 (1984) (holding that evidence which would have inevitably been discovered by lawful means is admissible despite a Fourth Amendment violation).

in a particular context or if an exception should be created, the Court applies a balancing approach.³⁹ In doing so, the court weighs the costs and benefits of excluding evidence from use at trial.⁴⁰

The potential benefit weighed is the rule's deterrent effect.⁴¹ That is, the objective of the rule is to "deter unreasonable searches" by "removing an officer's 'incentive to disregard the Fourth Amendment.'"⁴² In this way the exclusionary rule operates as a remedial device, not by curing an already complete Fourth Amendment violation, but by safeguarding against future violations.⁴³

As a remedial device, application of the exclusionary rule must be "restricted to those situations in which its remedial purpose is effectively advanced."⁴⁴ When an officer seizes evidence acting in reasonable good faith reliance on a warrant issued by a detached and neutral magistrate, the remedial purposes of the exclusionary rule cannot be served because there is generally no police illegality to punish.⁴⁵ Rather, such an officer is "acting as a reasonable officer would and should."⁴⁶ Applying the exclusionary rule to such an officer cannot be expected to alter the officer's

³⁹*Id.* at 913 (discussing the balancing approach that has evolved in the context of the exclusionary rule).

⁴⁰*See id.* at 907–10 (discussing the costs and benefits of the exclusionary rule).

⁴¹*Leon*, 468 at 908 n.6 (citing *Gates*, 462 U.S. at 257–58 (White, J., concurring)) (noting a "rule which denies the jury access to clearly probative and reliable evidence must . . . be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness").

⁴²*Bartnicki v. Vopper*, 532 U.S. 514, 551 (2001) (Rehnquist, J., dissenting) (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) and *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

⁴³*Leon*, 468 U.S. at 906 (noting the rule is a "judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect" but is "neither intended nor able to cure the invasion of the defendant's rights which he has already suffered") (citing *Stone v. Powell* 428 U.S. 465, 540 (1976) (White, J., dissenting) and *United States v. Calandra*, 414 U.S. 338, 348 (1974)) (internal quotations omitted). *Leon* discusses deterrence of the unlawful activity of magistrates as a potential benefit but dismisses this by noting that there is nothing to suggest judges or magistrates are inclined to subvert the Fourth Amendment or that there is lawlessness among these actors sufficient to require application of the exclusionary rule. *Leon*, 468 U.S. at 916, 917 n.14.

⁴⁴*Illinois v. Krull*, 480 U.S. 340, 347 (1987); *Calandra*, 414 U.S. at 348.

⁴⁵*Leon*, 468 U.S. at 921–22 (noting that "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope . . . there is no police illegality . . . to deter").

⁴⁶*Id.* at 920 (discussing *Stone v. Powell*, 428 U.S. 465, 539–40 (1976) (White, J., dissenting)).

future conduct to deter future unlawful police activity.⁴⁷ In fact, punishing the actions of such officers would be counter to the interests of the criminal justice system as, once a warrant has been issued, it is the officer's duty to execute it.⁴⁸

Once a warrant has been issued and the officer acts in accordance with its terms a "deep inquiry into reasonableness" is rarely required.⁴⁹ This is because "a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search."⁵⁰ The magistrate has evaluated probable cause and "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination."⁵¹ The magistrate's evaluation of probable cause and related decision regarding issuance of the warrant act as a safeguard against improper searches conducted by law enforcement "engaged in the often competitive enterprise of ferreting out crime."⁵²

Indeed, in *Leon* it was the initial evaluation of probable cause performed by a magistrate in deciding if a warrant should issue that the Court relied upon in allowing the use of evidence obtained during an unconstitutional search.⁵³ Thus, *Leon* also rests upon a proper understanding of issuance. The evaluation of probable cause inherent in the issuance process⁵⁴ provides "valid authorization for an otherwise unconstitutional search" under *Leon*.⁵⁵ Subject to certain stipulations, such as ensuring that the magistrate's probable cause evaluation was based upon sufficient facts and was

⁴⁷ *Id.* at 918–19 (discussing *United States v. Peltier*, 422 U.S. 531, 539 (1975) and discussing the assumption, upon which the exclusionary rule rests: that police have engaged in willful or at least negligent misconduct).

⁴⁸ *Id.* at 919–20 (noting that where an officer acts reasonably "excluding the evidence will not further the ends of the exclusionary rule" and "can in no way affect his future conduct unless it is to make him less willing to do his duty."); *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (quoting the trial court, and noting once the officer determined there was an outstanding warrant for the appellant, "the police officer [was] bound to arrest" and that the officer "would [have been] derelict in his duty if he failed to arrest") (alteration in *Evans*).

⁴⁹ *Leon*, 468 U.S. at 922.

⁵⁰ *Id.* (citing *United States v. Ross*, 456 U.S. 798, 823 n. 32 (1982)).

⁵¹ *Id.* at 922.

⁵² *Id.* at 913–14.

⁵³ *Id.* at 913–15, 922–23 (discussing the magistrate's determination of probable cause and the limitations imposed on officer reliance on this determination in the context of the good faith exception).

⁵⁴ See U.S. CONST. amend. IV (stating "no warrants shall issue, but upon *probable cause* . . .") (emphasis added).

⁵⁵ *Leon*, 468 U.S. at 914.

conducted in a detached and neutral manner, appellate review that finds probable cause lacking does not prevent application of the good faith exception.⁵⁶

It has also been suggested that deterring subversions of the Fourth Amendment by judges and magistrates is a benefit of the exclusionary rule.⁵⁷ The *Leon* Court dismissed this assertion noting that there is no indication that judges or magistrates are inclined to subvert the Fourth Amendment.⁵⁸ Most importantly, because judges and magistrates are not members of law enforcement and are thus without a “stake in the outcome of particular criminal prosecutions,” the “threat of exclusion cannot be expected significantly to deter” violations committed by these parties.⁵⁹ Instead, applying the exclusionary rule to deter violations by judges and magistrates would unduly punish law enforcement.⁶⁰

As for the costs to be considered in deciding whether the exclusionary rule should be applied, the Court has characterized them as “substantial.”⁶¹ Application of the exclusionary rule works to prevent the prosecution’s use of probative evidence.⁶² This creates a risk that guilty defendants will go free or receive favorable plea agreements.⁶³ In light of these substantial costs, “unbending application” of the exclusionary rule would impermissibly interfere with the truth finding function of the criminal justice system.⁶⁴

The Court considered all of these interests in applying the balancing test in *Leon* and creating the “good faith” exception.⁶⁵ Specifically, the Court held where evidence is seized by officers acting in reasonable “good faith” reliance on a warrant issued by a detached and neutral magistrate such as in *Leon*, “our evaluation of the costs and benefits of suppressing reliable physical evidence . . . leads to the conclusion that such evidence should be

⁵⁶ *Id.* at 914–15.

⁵⁷ *See id.* at 916, 917 n.14 (discussing application of the exclusionary rule to magistrate misconduct).

⁵⁸ *Id.*

⁵⁹ *Id.* at 917.

⁶⁰ *See id.* at 921 (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”).

⁶¹ *Id.* at 907.

⁶² *Id.* at 907, 908 n.6.

⁶³ *Id.* at 907.

⁶⁴ *Id.* (citing *United States v. Payner*, 447 U.S. 727, 734 (1980)).

⁶⁵ *See id.* at 916–21.

admissible in the prosecution's case in chief" although the warrant is later deemed to lack probable cause.⁶⁶

Exclusion is not always inappropriate in cases where a warrant has been obtained and the executing officer abides by its terms.⁶⁷ Application of the good faith exception is subject to certain limitations. "[T]he officer's reliance on the magistrate's probable cause determination and technical sufficiency of the warrant . . . must be objectively reasonable."⁶⁸ Under certain circumstances such reliance by an officer cannot be deemed reasonable. For instance, nothing in *Leon* prevents inquiry into the knowing or reckless falsity of the affidavit on which the magistrate's probable cause determination is made.⁶⁹ Thus, an officer is not free to present false information in obtaining a warrant and then rely upon that warrant in good faith. The issuing magistrate must "perform his neutral and detached function and not serve merely as a rubber stamp for the police."⁷⁰ A magistrate who acts as an "adjunct law enforcement officer cannot provide valid authorization for an otherwise unconstitutional search."⁷¹ Nor can an officer "manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."⁷² Within the affidavit, officers must "provide the magistrate with a substantial basis for determining the existence of probable cause."⁷³ Finally, *Leon* is based on the assumption that officers invoking the good faith exception properly execute and act within the scope of the warrant upon which they rely.⁷⁴ In these ways the Court limited the exception created in *Leon*.

2. Further Development of the "Good Faith" Exception—Illinois v. Krull and Arizona v. Evans

Cases subsequent to *Leon* have clarified that the key to the good faith exception is its requirement that officers rely on some authority apart from

⁶⁶*Id.* at 913.

⁶⁷*Id.*

⁶⁸*Id.* at 922.

⁶⁹*Id.* at 914 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

⁷⁰*Id.* (citing *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)) (internal quotations omitted).

⁷¹*Id.* (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326–27 (1979)) (internal quotations omitted).

⁷²*Id.* at 923 (citing *Brown v. Illinois*, 422 U.S. 590 (1975)) (internal quotations omitted).

⁷³*Id.* at 915 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)) (internal quotations omitted).

⁷⁴*Id.* at 918 n.19.

themselves in conducting the unconstitutional search. In *Illinois v. Krull*, the Court dealt with an officer's reliance upon legislation in conducting a search.⁷⁵ An Illinois statute required those who deal in automobile sales, automotive parts or automotive scrap metal to be licensed.⁷⁶ In turn licensees were required to allow inspection of their records and premises "at any reasonable time during the night or day."⁷⁷ During an inspection of a wrecking yard pursuant to the statute, a Chicago detective determined three vehicles on the premises to be stolen.⁷⁸ The vehicles were seized and the operators of the yard were charged with various criminal violations.⁷⁹ At trial, the evidence seized during the statutory inspection was suppressed.⁸⁰ On appeal, the Illinois Supreme Court affirmed, holding the statute to be an inadequate substitute for a warrant and therefore unconstitutional.⁸¹

The United States Supreme Court granted certiorari on the issue of whether evidence obtained in a search conducted pursuant to a statute that is held unconstitutional subsequent to the search is nevertheless admissible under the good faith exception.⁸² In holding such evidence admissible, the Court found the reasoning of *Leon* "equally applicable" to the situation presented by *Krull*.⁸³ Just as when officers act in objective good faith reliance on a warrant, when they rely similarly on a statute application of the exclusionary rule would not serve its remedial purpose.⁸⁴ The Court restated its logic from *Leon* and simply replaced "magistrate's" with "legislature's," stating "[p]enalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."⁸⁵ This is because, just as when an officer obtains a warrant from a magistrate and cannot be expected to question the magistrate's evaluation of probable cause, an officer "cannot be expected to

⁷⁵ 480 U.S. 340 (1987).

⁷⁶ *Id.* at 342.

⁷⁷ *Id.* at 343.

⁷⁸ *Id.*

⁷⁹ *Id.* at 343–44.

⁸⁰ *Id.* at 344.

⁸¹ *Id.* at 346; *State v. Krull*, 481 N.E.2d 703 (Ill. 1985), *rev'd*, 480 U.S. 340 (1987).

⁸² *Krull*, 480 U.S. at 346.

⁸³ *Id.* at 349.

⁸⁴ *Id.*

⁸⁵ *Id.* at 350 (quoting *United States v. Leon*, 468 U.S. 897, 921 (1984)) (alterations in *Krull*).

question the judgment of the legislature.”⁸⁶ Rather, an officer’s duty is simply to “enforce the statute as written.”⁸⁷

In fact, the potential deterrence in the case of good faith reliance upon a statute may be even less than in the case of good faith reliance upon a warrant. The *Krull* Court notes that exclusion of evidence, even where officers in good faith rely upon a warrant issued by a detached and neutral magistrate, may have the effect of preventing “‘future inadequate presentations [of probable cause] or ‘magistrate shopping’ . . . thus promot[ing] the ends of the Fourth Amendment.’”⁸⁸ On the other hand, “the possibility that a police officer might modify his behavior does not exist at all when the officer relies on an existing statute that authorizes warrantless inspections and does not require any preinspection action, comparable to seeking a warrant, on the part of the officers.”⁸⁹

The Court points out that the goal of the exclusionary rule is to deter future police misconduct, not misconduct on the part of the legislature.⁹⁰ Thus, just as the potential for misconduct of magistrates did not justify application of the exclusionary rule in *Leon*, the potential misconduct of the legislature did not justify the application of the exclusionary rule in *Krull*.⁹¹ Still, application of the good faith exception is similarly constrained in the context of reliance on legislation as it is in the context of reliance upon a warrant.⁹² There can be no good faith reliance upon a facially unconstitutional statute or a statute passed by a legislature that “wholly abandoned its responsibility to enact constitutional laws.”⁹³

The Court passed upon the good faith exception again in *Arizona v. Evans*.⁹⁴ In *Evans*, the Court made clear the requirement that, in order for the good faith exception to apply, law enforcement must be relying on judicial or legislative authority rather than their own.⁹⁵

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 350 n.7 (quoting *United States v. Leon*, 468 U.S. 897, 918 (1984)).

⁸⁹ *Id.*

⁹⁰ *Id.* at 350–53.

⁹¹ *Id.*

⁹² *Id.* at 355.

⁹³ *Id.*

⁹⁴ 514 U.S. 1 (1995).

⁹⁵ *Id.*

The case began as a traffic stop.⁹⁶ Evans was stopped for driving the wrong way on a one way street.⁹⁷ The officer conducting the stop ran a computer check on Evans's name and found that Evans's license was suspended and there was a misdemeanor warrant for his arrest.⁹⁸ Based on the warrant, the officer arrested Evans and, during the arrest, Evans dropped a marijuana cigarette.⁹⁹ Officers then searched Evans's vehicle and discovered a bag of marijuana.¹⁰⁰ Evans was charged with possession of marijuana and the Arizona Justice Court that issued the misdemeanor arrest warrant was notified of his arrest.¹⁰¹ The Justice Court had originally issued the warrant for failure to appear for traffic violations.¹⁰² Evans had eventually appeared however, and the warrant had been quashed 17 days before Evans was arrested.¹⁰³ Yet there was no indication that the Justice Court clerk had communicated that the warrant had been quashed to law enforcement.¹⁰⁴

Based on these facts, Evans argued that the marijuana should be suppressed. Specifically, Evans argued that the good faith exception was inapplicable "because it was police error, not judicial error, which caused the invalid arrest."¹⁰⁵ In ruling that the evidence should be suppressed the Supreme Court of Arizona "rejected the 'distinction . . . between clerical errors committed by law enforcement personnel and similar mistakes by court employees.'"¹⁰⁶ The high court of Arizona believed the exclusionary rule would be served in that record keeping processes may be improved as a result of suppression.¹⁰⁷

The United States Supreme Court reversed.¹⁰⁸ Using the analytical framework developed in *Leon* and affirmed in *Krull*, the Court concluded that the distinction between errors made by judicial employees and those

⁹⁶ *Id.* at 4.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 4–5.

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.* at 6.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.* at 6; *State v. Evans*, 866 P.2d 869, 871 (Ariz. 1994), *rev'd*, 514 U.S. 1 (1995).

¹⁰⁷ *Evans*, 514 U.S. at 6; *Evans*, 866 P.2d at 872.

¹⁰⁸ *Evans*, 514 U.S. at 6.

made by law enforcement personnel was central to the question of whether the exclusionary rule should be applied.¹⁰⁹ “If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule . . . could not be expected to alter the behavior of the arresting officer.”¹¹⁰ The Court reiterated that exclusion of evidence is meant to punish police misconduct, not the errors of judicial employees.¹¹¹ Just as there was no evidence in *Leon* that magistrates choose to ignore or subvert the Fourth Amendment, there is no evidence judicial employees seek to undermine the Fourth Amendment.¹¹² Nor is there evidence of lawlessness among judicial employees sufficient to warrant application of the exclusionary rule.¹¹³ Most important to the Court was that judicial employees do not have an interest in the “competitive enterprise of ferreting out crime” and therefore application would likely have no significant effect on their future actions.¹¹⁴ Thus, if the error in updating the status of Evans’s warrant was made by a judicial employee rather than a member of law enforcement, the good faith exception applies and the evidence should not be excluded.¹¹⁵

Leon and *Krull* demonstrate that when evidence has been obtained in violation of the Fourth Amendment, in order to prevent application of the exclusionary rule, law enforcement must have relied on an authority separate from itself in obtaining the evidence.¹¹⁶ The *Evans* holding, that *because* judicial employees *are not* members of law enforcement excluding evidence obtained in violation of the Fourth Amendment as a result of their mistakes is not warranted, further clarified the role reliance plays in the

¹⁰⁹ *Id.* at 14–16.

¹¹⁰ *Id.* at 15.

¹¹¹ *Id.*

¹¹² *Id.* at 14–15.

¹¹³ *Id.* at 15.

¹¹⁴ *Id.* at 15 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

¹¹⁵ *See id.* at 14 (noting that “If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction.”).

¹¹⁶ *See Illinois v. Krull*, 480 U.S. 340, 350 (1987) (holding penalizing law enforcement for relying on statute subsequently held unconstitutional does not serve the deterrent purpose of the exclusionary rule); *United States v. Leon*, 468 U.S. 897, 921 (1984) (holding penalizing law enforcement for relying on subsequently invalidated warrant does not serve the deterrent function of the exclusionary rule).

good faith exception.¹¹⁷ In light of these cases there can be no doubt that the distinction between law enforcement and members of the judiciary and the legislature is one of Fourth Amendment import as it determines whether the exclusionary rule should apply.¹¹⁸

B. The Texas Good Faith Exception

1. Texas Code of Criminal Procedure Article 38.23(b)

The Texas legislature seemed to recognize that *Leon* had struck the proper balance between the deterrent effect and social cost of the exclusionary rule. *Leon* was decided on July 5, 1984.¹¹⁹ Just over two years after *Leon* Senate Bill One was introduced into the Texas Legislature.¹²⁰ The purpose of the bill was to amend article 38.23 of the Texas Code of Criminal Procedure.¹²¹ As it existed then, article 38.23 provided in relevant part:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.¹²²

This text became subsection (a) of the current article 38.23 while the amendment that resulted from Senate Bill One became subsection (b).¹²³ The amendment provides “It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement

¹¹⁷See *Evans*, 514 U.S. at 14–15 (noting that the purpose of the exclusionary rule is to deter police misconduct and that because judicial employees have no stake in the outcome of criminal prosecutions applying the exclusionary rule could not alter the behavior of judicial employees or law enforcement).

¹¹⁸*Id.* (holding application of the exclusionary rule is not appropriate where mistakes leading to an unlawful arrest were made by judicial employees); *Krull*, 480 U.S. at 350 (holding application of the exclusionary rule is not appropriate where officers rely upon a statute in conducting an otherwise unconstitutional search).

¹¹⁹*Leon*, 468 U.S. at 897.

¹²⁰Tex. S.B. 1, 70th Leg., R.S. (1987).

¹²¹S. Comm. on Criminal Justice, Bill Analysis, S.B. 1, 70th Leg., R.S. (1987).

¹²²Act of May 27, 1965, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317 amended by Act of May 29, 1987, 70th Leg., R.S., ch. 546, § 1, 1987 Tex. Gen. Laws 2207.

¹²³TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2005).

officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.”¹²⁴

In his analysis of the bill, Senator J.E. “Buster” Brown observed “[t]he Supreme Court has ruled that evidence obtained in ‘good faith’ is admissible as an exception to the ‘exclusionary rule.’ Presently, Article 38.23 does not parallel this exception.”¹²⁵ Thus it would seem that article 38.23(b) was passed in an attempt to give *Leon* effect in Texas. This purpose is hinted at in other parts of the legislative history of the article as well.¹²⁶ Whatever the legislature’s intent, the Texas Court of Criminal Appeals soon weighed in on the matter and made it clear that article 38.23(b) would not be treated as the full *Leon* good faith exception.

2. Gordon v. State

The Court of Criminal Appeals first discussed the new subsection (b) to article 38.23 in *Gordon v. State*.¹²⁷ Gordon was convicted of aggravated sexual assault.¹²⁸ During the investigation, officers were unable to develop sufficient probable cause to arrest Gordon for the crimes.¹²⁹ In order to gain custody of Gordon, officers executed an outstanding arrest warrant based on Gordon’s failure to appear in municipal court for traffic tickets.¹³⁰ Gordon challenged the legality of his arrest in an effort to render his subsequent confession to the sexual assault inadmissible.¹³¹ Specifically, Gordon argued that the affidavit supporting the warrant did not contain sufficient facts to constitute probable cause.¹³²

¹²⁴ *Id.*

¹²⁵ S. Comm. on Criminal Justice, Bill Analysis, S.B. 1, 70th Leg., R.S. (1987).

¹²⁶ See H. Comm. on Criminal Jurisprudence, S.B. 1, 70th Leg., R.S. (1987) (stating the purpose of the bill is to “allow evidence obtained by honest mistake in reliance on a warrant to be used in a criminal trial”); H.R.O., Bill Analysis, S.B. 1, 70th Leg., R.S. (1987) (citing *Leon* as support for the bill and noting “[u]nder the *Leon* exception, when a magistrate issues an invalid search warrant, but a police officer in good faith carries out that warrant and seizes evidence, the evidence is admissible even though it was obtained without a proper legal basis.”).

¹²⁷ 801 S.W.2d 899, 912–13 (Tex. Crim. App. 1990).

¹²⁸ *Id.* at 901.

¹²⁹ *Id.* at 902.

¹³⁰ *Id.* at 902, 903, 916.

¹³¹ *Id.* at 912, 915, 917.

¹³² *Id.* at 912.

The Eleventh Court of Appeals deemed the warrant to be valid.¹³³ However, the Court went on to state “the ‘good faith’ exception to the exclusionary rule which was established in *United States v. Leon*, and codified in TEX. CODE CRIM. PRO. ANN. art. 38.23(b) is applicable”¹³⁴ As a result, in the court of appeals’ opinion, even if the warrant was not supported by probable cause, the trial court did not err in overruling Gordon’s motion to suppress.¹³⁵ On appeal, the Court of Criminal Appeals first noted that article 38.23(b) was not applicable to the case because the evidence was obtained before the article’s effective date.¹³⁶ Despite this, the court went on to note:

[T]he appeals court was incorrect in finding the statute a codification of *United States v. Leon*, because Art. 38.23(b) requires a finding of probable cause, while the exception enunciated in *Leon* appears more flexible in allowing a good faith exception if the officer’s belief in probable cause is reasonable. Thus, we must direct our attention to the validity of the warrant and affidavit without recourse to any “good faith” exception to the warrant requirement.¹³⁷

With this, the Court of Criminal Appeals made clear that in its opinion article 38.23 did not embody the good faith exception announced in *Leon*. Instead, in order for article 38.23(b) to be applicable, the warrant must actually be supported by probable cause.¹³⁸

3. *Curry v. State*

In *Curry v. State*, the court revisited article 38.23(b) and solidified the position it had announced in *Gordon*.¹³⁹ Officers performing surveillance of an address at which they suspected an illegal bookmaking operation was being run noted that Curry was at the premises.¹⁴⁰ After confirming Curry

¹³³ *Gordon v. State*, 767 S.W.2d 866, 868 (Tex. App.—Eastland 1989), *rev’d*, 801 S.W.2d 899 (Tex. Crim. App. 1990).

¹³⁴ *Id.* (citations omitted).

¹³⁵ *Id.*

¹³⁶ *Gordon*, 801 S.W.2d at 912.

¹³⁷ *Id.* at 912–13.

¹³⁸ *See, e.g., Brent v. State*, 916 S.W.2d 34, 38 (Tex. App.—Houston [1st Dist.] 1995, *pet. ref’d*) (analyzing probable cause as a requirement of article 38.23(b)).

¹³⁹ 808 S.W.2d 481, 482 (Tex. Crim. App. 1991).

¹⁴⁰ *Id.* at 481.

had outstanding warrants for his arrest, the officers executed a search warrant for the premises and arrested Curry.¹⁴¹ Curry was searched incident to arrest and 5.7 grams of cocaine was discovered.¹⁴² In his subsequent prosecution for possession of a controlled substance, Curry challenged the propriety of his arrest arguing the warrant was not supported by probable cause.¹⁴³

Like the Eleventh Court of Appeals, the Fourteenth Court of Appeals held that article 38.23(b) was a codification of the “good faith” exception announced in *United States v. Leon*.¹⁴⁴ Based on this interpretation of article 38.23(b), the court of appeals held that while the affidavit “may not have demonstrated the existence of probable cause,” the arrest and search of Curry were nevertheless lawful because the officers had acted in good faith reliance on the arrest warrant.¹⁴⁵

The Court of Criminal Appeals reversed and remanded.¹⁴⁶ After reproducing the text of article 38.23(b) the court stated “The plain wording of Art. 38.23(b) requires an initial determination of probable cause.”¹⁴⁷ The court then quoted its one paragraph discussion of the article from *Gordon*.¹⁴⁸ Thus, with essentially one paragraph, originating in *Gordon* and restated in *Curry*, the court frustrated the legislature’s attempt to make the *Leon* good faith exception a part of Texas law.

4. The Consequences of the Court of Criminal Appeals’ Interpretation of Article 38.23(b)

In *Curry*, the Court of Criminal Appeals added emphasis to the phrase “based upon probable cause” in its reproduction of the text of article 38.23(b).¹⁴⁹ This is noteworthy as in the next sentence the court explicitly qualifies its holding as requiring

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 482.

¹⁴⁴ *Curry v. State*, 780 S.W.2d 825, 826 (Tex. App.—Houston [14th Dist.] 1989), *rev’d* 808 S.W.2d 481 (Tex. Crim. App. 1991).

¹⁴⁵ *Id.*

¹⁴⁶ *Curry*, 808 S.W.2d at 482.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* See also *supra* text accompanying note 137.

¹⁴⁹ *Curry*, 808 S.W.2d at 482.

only an “initial determination of probable cause”¹⁵⁰ under article 38.23(b).¹⁵¹ Despite this explicit qualification, the effect of the holding in *Curry*, an apparent result of the emphasis on the “based upon probable cause” language, is to require not simply an *initial* determination of probable cause at the time the warrant is issued but to require that the initial determination be upheld on appeal as well.¹⁵²

This interpretation of article 38.23(b) all but robbed it of its intended purpose—to make evidence obtained by officers acting in objectively reasonable good faith reliance upon a warrant invalidated on appeal due to a lack of probable cause admissible.¹⁵³ The courts of Texas were left to find other uses for the article. Article 38.23(b) was left to apply only to “less important”¹⁵⁴ or “technical” defects.¹⁵⁵ These uses demonstrate just how limited article 38.23(b) had been rendered by the Court of Criminal Appeals’ decisions in *Gordon* and *Curry*.

¹⁵⁰*Id.* As discussed below a difference highly relevant to the application of the “good faith” exception exists between the initial determination of probable cause inherent in the issuance of a warrant and an ultimate finding that the warrant was supported by probable cause. See *supra* Part III.A.1. Note that it may be argued that the court’s reference to “initial” here was not to the determination of probable cause which is a necessary part of a magistrate’s issuance of a warrant but is instead a directive to reviewing courts to evaluate the presence of probable cause as an initial step in determining the applicability of article 38.23(b). See, e.g., *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.) (explaining the good faith exceptions announced in *United States v. Leon*, 468 U.S. 897 (1984) and TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005) and then noting the presence of probable cause). The court does not make itself clear.

¹⁵¹*Curry*, 808 S.W.2d at 482. See also *Smith v. State*, 962 S.W.2d 178, 187 n.1 (Tex. App.—Houston [1st Dist.] 1998, pet. ref’d) (O’Connor, J., concurring) (noting that the difference between the “good faith” exception created in *United States v. Leon*, 468 U.S. 897 (1984) and that articulated in Texas Code of Criminal Procedure Article 38.23(b) is that the latter applies only to defects that are “less important” than probable cause determinations).

¹⁵²For example on remand from the Court of Criminal Appeals’ decision in *Curry*, the Houston Court of Appeals, 14th District, simply evaluated the affidavits in question for probable cause without addressing whether an initial determination of probable cause was made by the issuing magistrate or whether the officer’s reliance upon such initial determination could be sufficient to render the evidence discovered pursuant to the warrant admissible under article 38.23(b). *Curry v. State*, 815 S.W.2d 263, 265–66 (Tex. App.—Houston [14th Dist.] 1991, no pet.). See also, e.g., *Brent v. State*, 916 S.W.2d 34, 38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref’d) (analyzing probable cause as a requirement of article 38.23(b)).

¹⁵³For a discussion of this intended purpose see *infra* Parts III.B.1, III.B.5.

¹⁵⁴*Smith*, 962 S.W.2d at 187 n.1.

¹⁵⁵*Taylor v. State*, 974 S.W.2d 851, 855–56 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

These uses represent no significant extension of the law. In *Green v. State*, the Texas Court of Criminal Appeals stated that “purely technical discrepancies. . . do not automatically vitiate the validity of search or arrest warrants.”¹⁵⁶ The *Green* court notes that, similar to the totality of the circumstances approach used to evaluate the existence of probable cause, courts should “review technical discrepancies with a judicious eye for the procedural aspects surrounding issuance and execution of the warrant.”¹⁵⁷ Otherwise technical rules would provide protection for those whose complaint is not based upon the substantive issue of probable cause but rather upon “technical default by the State.”¹⁵⁸ A court evaluating a claimed technical default by the State may hear testimony and evaluate evidence from the State to explain the discrepancy.¹⁵⁹ *Green* demonstrates that a remedy for technical warrant defects existed prior to article 38.23(b), and that, in light of this preexisting remedy, *Curry* and *Gordon* cause the article to be superfluous.

5. Illustrations

The following are illustrations of typical uses of article 38.23(b) since its interpretation in *Gordon* and *Curry*. Among the simplest uses of the article is to account for technical shortcomings in the affidavit supporting the warrant. For instance Texas Code of Criminal Procedure article 15.05(4) states that the affidavit in support of a warrant “must be signed by the affiant by writing his name or affixing his mark.”¹⁶⁰ In *Brent v. State*, Brent had participated in the murder and robbery of three men.¹⁶¹ Brent spent the proceeds of his crime lavishly which drew the attention of Brent’s girlfriend’s mother.¹⁶² Based on information provided by his girlfriend’s

¹⁵⁶*Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (noting, before the passage of article 38.23(b) that technical discrepancies do not automatically invalidate a search warrant). *Green* has not been limited to date or time discrepancies. See *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.) (using *Green* to account for a discrepancy between the warrant and the affidavit regarding the place to be searched).

¹⁵⁷*Green*, 799 S.W.2d at 757.

¹⁵⁸*Id.* at 758.

¹⁵⁹*Id.* at 758–61 (discussing *Martinez v. State*, 162 Tex. Crim. 356, 285 S.W.2d 221 (1955); *Lyons v. State*, 503 S.W.2d 254 (Tex. Crim. App. 1973); *Rougeau v. State*, 738 S.W.2d 651 (Tex. Crim. App. 1987), *overruled by* *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989)).

¹⁶⁰TEX. CODE CRIM. PROC. ANN. art. 15.05(4) (Vernon 2005).

¹⁶¹916 S.W.2d 34, 36 (Tex. App.—Houston [1st Dist.] 1995, pet. ref’d).

¹⁶²*Id.*

mother, the police obtained an arrest warrant for Brent and during its execution found \$9,000 in cash and many newly purchased items.¹⁶³ However, the officer who obtained the warrant failed to sign the affidavit.¹⁶⁴

The First Court of Appeals recognized that this failure was a violation of article 15.05(4) and that such failure rendered the warrant invalid.¹⁶⁵ The court went on to apply article 38.23(b) to overcome this invalidity noting “the fact that the warrant was invalid is not dispositive of the question of whether the evidence should have been admitted; under article 38.23(b), the evidence was admissible *even though* the warrant was invalid.”¹⁶⁶ In applying article 38.23(b) the court first evaluated the officer’s “good faith reliance on the warrant” and deemed that such reliance was present.¹⁶⁷ Next, the court determined that “the warrant was issued by a neutral magistrate.”¹⁶⁸ Finally, the court affirmed that the warrant was supported by probable cause.¹⁶⁹ This finding was critical to the court’s ultimate conclusion that the evidence was admissible¹⁷⁰ because, under article 38.23(b) as interpreted in *Gordon and Curry*, probable cause is required for evidence to be admissible.¹⁷¹

Another affidavit defect that has been addressed by article 38.23(b) is the failure to date the affidavit. In *Forcha v. State*, based on information provided by a confidential informant, officers obtained a search warrant for a residence.¹⁷² Upon executing the warrant, the officers found Forcha in possession of a used crack pipe containing cocaine residue.¹⁷³ The affidavit in support of the warrant was not dated.¹⁷⁴ In *Heredia v. State*, such a mistake was held to invalidate the warrant.¹⁷⁵ After noting that *Heredia* was decided before the passage of article 38.23(b) the *Forcha* court applied

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 37.

¹⁶⁵ *Id.* at 37, 38.

¹⁶⁶ *Id.* at 38–39.

¹⁶⁷ *Id.* at 37–38.

¹⁶⁸ *Id.* at 38.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 39.

¹⁷¹ See *supra* Parts II.B.2, II.B.3, II.B.4.

¹⁷² 894 S.W.2d 506, 508 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Heredia v. State*, 468 S.W.2d 833, 835 (Tex. Crim. App. 1971).

the article and deemed the evidence admissible despite the failure to date the affidavit.¹⁷⁶

Article 38.23(b) has also been applied to deficiencies in the warrant itself. In *Dunn v. State*, officers presented a magistrate with several related affidavits and warrants totaling twenty pages.¹⁷⁷ The magistrate determined probable cause existed for all of the warrants and signed all of the pages except the warrant for Dunn, which was inadvertently overlooked.¹⁷⁸ The warrant was subsequently executed and, during its execution, evidence linking Dunn to a murder was discovered.¹⁷⁹ Citing article 15.02 of the Texas Code of Criminal Procedure, which requires that the magistrate sign the warrant, Dunn argued that the warrant was invalid and thus the evidence obtained during its execution should be suppressed.¹⁸⁰ Noting that this sort of omission “appears to be exactly the type of situation intended to be covered by article 38.23(b)” the court held the evidence admissible under the article as the officers relied in good faith upon a warrant based on probable cause issued by a neutral magistrate.¹⁸¹

Other defects in the warrant that have been overcome by article 38.23(b) include the failure to state or the misstatement of the charged offense. In *Lockett v. State*, Lockett was arrested and convicted of felony murder after participating in a robbery.¹⁸² The affidavit in support of the warrant pursuant to which Lockett was arrested properly stated that Lockett was suspected of murder.¹⁸³ However, the warrant itself stated Lockett was suspected of being involved with controlled substances.¹⁸⁴ In fact, rather than allege a specific controlled substance offense, the warrant simply stated Lockett was suspected of violating Chapter 481 of the Texas Health and Safety Code.¹⁸⁵ Thus, Lockett argued that due to these discrepancies the warrant was invalid, and the written statement he gave subsequent to his

¹⁷⁶ *Forcha*, 894 S.W.2d at 510.

¹⁷⁷ 951 S.W.2d 478, 479 (Tex. Crim. App. 1997).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 478–79.

¹⁸¹ *Id.* at 479.

¹⁸² No. 14-96-00150-CR, 1997 Tex. App. LEXIS 3190 at *1–2 (Tex. App.—Houston [14th Dist.] June 19, 1997, no pet.) (not designated for publication).

¹⁸³ *Id.* at *4

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

arrest should be suppressed.¹⁸⁶ The *Lockett* court pointed out that, while prior cases have held the failure to state a specific charge within the warrant rendered the warrant invalid and thus evidence discovered pursuant to it inadmissible, these cases were decided before the passage of article 38.23(b).¹⁸⁷ Applying article 38.23(b), the court noted the affidavit which stated the proper charge was incorporated into the warrant and contained facts constituting probable cause.¹⁸⁸ The court affirmed the trial court's refusal to suppress the statement, holding the deficiency in the warrant was "encompassed by the statutory good faith exception."¹⁸⁹

Article 38.23(b) has also been applied to mistakes in the execution of the warrant. In *Brochu v. State*, the Fourteenth Court of Appeals used article 38.23(b) to uphold a district court's decision not to instruct the jury to resolve factual issues regarding the legality of the search as required by article 38.23(a). In *Brochu*, Houston police officers went to a residence to serve a felony arrest warrant for Michael Kelly.¹⁹⁰ After Brochu answered the door, officers demanded he produce identification to demonstrate he was not Kelly.¹⁹¹ Brochu invited the officers in while he retrieved his identification, at which point the officers observed drug paraphernalia.¹⁹² More drugs were discovered, and Brochu was charged with possession of a controlled substance.¹⁹³

Brochu argued that under article 38.23(a) he was entitled to a jury instruction on his purported consent to the officers' entry of the residence and their observation of the drugs.¹⁹⁴ Brochu asserted the jury should have been allowed to resolve factual issues regarding the legality of the police

¹⁸⁶ *Id.* at *5.

¹⁸⁷ *Id.* at *6 & n.1 (citing *Sullivan v. State*, 67 Tex. Crim. 113, 148 S.W. 1091 (Tex. Crim. App. 1912); *Fulkerson v. State*, 43 Tex. Crim. 587, 67 S.W. 502 (1902)).

¹⁸⁸ *Id.* at *7.

¹⁸⁹ *Id.* at *8. It should be noted that the analysis in *Lockett* is not necessarily a proper analysis of an exception to the statutory exclusionary rule announced in article 38.23(a). It is unclear from the court's analysis whether article 38.23(b) is used to justify incorporation of the supporting affidavit which would remedy the failure to state a specific charge and thereby render the search legal or if the court is using article 38.23(b) to justify not applying the exclusionary remedy to a search pursuant to an invalid warrant. See *id.* at *6–8.

¹⁹⁰ *Brochu v. State*, 927 S.W.2d 745, 747 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

¹⁹¹ *Id.*

¹⁹² *Id.* at 747–48.

¹⁹³ *Id.* at 748.

¹⁹⁴ *Id.*

conduct and the resulting admissibility of the evidence.¹⁹⁵ The court of appeals held that, even if a fact issue existed regarding the officers' entry, all of the requirements of 38.23(b) were met and the evidence was admissible.¹⁹⁶ First, the officers possessed and relied upon a valid arrest warrant.¹⁹⁷ Second, the officers were authorized to continue their investigation even after Brochu told them he was not Kelly.¹⁹⁸ The officers had information that Kelly could be found at the residence, and Brochu admitted that Kelly had been at the residence the previous week.¹⁹⁹ Brochu allowed the officers to enter the residence while he retrieved his identification.²⁰⁰ Even assuming Brochu did not give consent, the officers had authority to enter due to their possession of an arrest warrant.²⁰¹ As the officers acted in reliance upon a warrant and were lawfully present at the time they observed the drugs, the trial court was correct in not giving the jury instruction.²⁰²

An even more substantial use of article 38.23(b) regarding the execution of a warrant occurred in *Durio v. State*.²⁰³ While out on patrol, a police officer observed Durio walking down the street.²⁰⁴ The officer had become aware of an outstanding warrant for Durio's arrest a week earlier and, after seeing Durio, radioed his dispatcher to confirm that the warrant was still outstanding.²⁰⁵ Durio was placed under arrest and during the subsequent pat frisk the officer discovered drug paraphernalia and cocaine.²⁰⁶ It was later determined that the warrant had been recalled by the time of the arrest because Durio had served time for the offenses for which the warrant was issued.²⁰⁷ In holding the evidence admissible, the court of appeals notes the officers were acting in good faith reliance on a facially valid warrant issued

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 748–49.

¹⁹⁷ *Id.* at 748.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 748–49 (citing TEX. CODE CRIM. PROC. ANN. art. 15.25 (Vernon 1979); *Anderson v. State*, 787 S.W.2d 221, 228 (Tex. App.—Fort Worth 1990, no pet.)).

²⁰² *Id.* at 749.

²⁰³ 807 S.W.2d 876 (Tex. App.—Corpus Christi 1991, no pet.).

²⁰⁴ *Id.* at 877.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

by a neutral magistrate.²⁰⁸ Thus, despite the fact the arrest was made, and therefore the evidence was obtained under a recalled search warrant, the court held the evidence admissible under the article 38.23(b) good faith exception.²⁰⁹

III. THE FLAWED INTERPRETATION AND USE OF ARTICLE 38.23(B)

The interpretation of article 38.23(b) offered by the Court of Criminal Appeals in *Gordon* and *Curry* is dubious for a number of reasons. The court offers little analysis in support of its conclusion that article 38.23(b) does not represent the full *Leon* exception.²¹⁰ The analysis that is offered is questionable because it is based upon a mischaracterization of *Leon*,²¹¹ runs contrary to clear legislative intent²¹² and renders article 38.23(b) superfluous.²¹³ The court simply asserts that the “plain wording” of article 38.23(b) does not support the full *Leon* good faith exception.²¹⁴ This is despite the fact that, with a proper understanding of the “issuance” of a

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 877–78. In *Durio* the court notes that the evidence would be admissible whether the mistake was made by a judicial officer or law enforcement. *Id.* at 878. See *infra* part III.B.1, I argue that the failure to make such a distinction is in violation of the United States Supreme Court’s decision in *Arizona v. Evans*, 514 U.S. 1 (1995). *Durio* predates *Evans* and thus was not decided contrary to *Evans*, as opposed to the cases discussed *infra* part III.B.1 which were decided after *Evans*.

²¹⁰ See *Curry v. State*, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991) (stating that the plain wording of the article requires an initial determination of probable cause and quoting its one paragraph discussion of the article from *Gordon* in determining the article is not the full *Leon* exception).

²¹¹ Compare *id.* at 482 (characterizing *Leon* as rendering evidence admissible where the officer’s belief in probable cause is reasonable) with *United States v. Leon*, 468 U.S. 897, 898 (1984) (holding that an officer’s reliance is upon a magistrate’s determination of probable cause and must be objectively reasonable).

²¹² See H.R.O., Bill Analysis, S.B. 1, 70th Leg., R.S. (1987) (citing *Leon* as a basis for support of article 38.23(b)).

²¹³ Since *Curry* and *Gordon*, the article has been limited to overcoming “technical” defects in the affidavit and warrant. *Taylor v. State*, 974 S.W.2d 851, 855–56 (Tex. App.—Houston [14th Dist.] 1998, no pet.). However, a remedy for such defects already existed in Texas law. *Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (discussing *Martinez v. State*, 162 Tex. Crim. 356, 285 S.W.2d 221 (1955); *Lyons v. State*, 503 S.W.2d 254 (Tex. Crim. App. 1973); and *Rougeau v. State*, 738 S.W.2d 651 (Tex. Crim. App. 1987), overruled by *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989) in which the state was allowed to produce evidence to overcome technical defects in the warrant).

²¹⁴ *Curry*, 808 S.W.2d at 482.

warrant, the language of article 38.23(b) does support the full exception.²¹⁵ Moreover, a requirement of strict statutory support for the full good faith exception departs from the court's previous approach in recognizing exceptions to the exclusionary rule.²¹⁶

A. *Flawed Interpretation*

1. The Plain Language of the Article

The analysis of article 38.23(b) performed by the court in *Gordon* and *Curry* is superficial. Based on the "plain wording" of the article, the court holds that, unlike *Leon*, article 38.23(b) requires an "*initial* determination of probable cause"²¹⁷ This requirement does not distinguish article 38.23(b) from *Leon*. In *Leon*, a facially valid warrant was issued, which necessarily entails an *initial* determination of probable cause.²¹⁸ *Leon* applies to situations in which officers act in "objectively reasonable reliance on a *subsequently* invalidated search warrant."²¹⁹ The *Leon* Court notes magistrates must still perform their "neutral and detached function."²²⁰ A magistrate failing to meet this demand cannot "provide valid authorization for an *otherwise unconstitutional search*."²²¹ That is, a search conducted pursuant to a warrant which was initially deemed supported by probable cause but invalidated on appeal.²²² Thus, just as the "plain wording" of article 38.23(b) requires that officers act in reliance upon "a warrant *issued* by a neutral magistrate based on probable cause,"²²³ *Leon* itself requires a determination of probable cause at the time the warrant is issued—an *initial*

²¹⁵TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005); *White v. State*, 989 S.W.2d 108, 110 (Tex. App.—San Antonio 1999, no pet.) (citing *Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997) and defining issuance as "a neutral magistrate find[ing] probable cause . . . and sign[ing] the accompanying affidavit").

²¹⁶*See Eatmon v. State*, 738 S.W.2d 723, 725 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (Robertson, J. dissenting) (noting areas where similar exceptions have been created without strict statutory support).

²¹⁷*Curry v. State*, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991) (emphasis added).

²¹⁸U.S. CONST. amend. IV (stating "no warrants shall issue, but upon probable cause . . ."); *United States v. Leon*, 468 U.S. 897, 902–03 (1984).

²¹⁹*Leon*, 468 U.S. at 922.

²²⁰*Id.* at 914 (citing *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)).

²²¹*Id.* (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326–27 (1979)) (emphasis added).

²²²*Id.* at 922 (holding the good faith exception applies to a subsequently invalidated warrant).

²²³TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005) (emphasis added).

determination of probable cause.²²⁴ Appellate review that deems the warrant lacking in probable cause does not prevent application of the good faith exception.²²⁵ Instead, it presents the very scenario to which the Supreme Court envisioned the exception would apply.²²⁶

In fact, the courts of Texas, including the Court of Criminal Appeals, have recognized the difference between the issuance of a warrant and subsequent actions taken related to the warrant. In *White v. State*, the San Antonio Court of Appeals faced a situation in which the defendant was arrested pursuant to a warrant.²²⁷ Unknown to the arresting officers, prior to its execution, the warrant had been recalled.²²⁸ *White* argued that the evidence should be suppressed because it was obtained during a warrantless arrest.²²⁹ Relying upon article 38.23(b), the State argued that the evidence was admissible despite the recalled warrant.²³⁰ In evaluating the applicability of article 38.23(b), the court first determined whether the warrant was “issued” within the meaning of the article.²³¹ The, relying on *Dunn v. State*, court defined “issuance” for the purposes of article 38.23(b) as “a neutral and detached magistrate find[ing] probable cause . . . and sign[ing] the accompanying affidavit.”²³² Because the recalled warrant met this standard, the *White* court held the evidence was properly admitted.²³³

White demonstrates that “issuance” under Texas law is fulfilled with the initial determination of probable cause.²³⁴ Subsequent actions regarding the warrant, such as recall or invalidation due to an appellate court’s determination that the warrant lacked probable cause, do not negate the fact that a magistrate issued the warrant, an act that required an initial

²²⁴ *Leon*, 468 U.S. at 902–03, 922.

²²⁵ *Id.* at 903, 915 n.13 (noting that *Leon* dealt with a “concededly unconstitutional search” in that appellate review of the affidavit had held the affidavit lacking in probable cause).

²²⁶ *Id.* at 900 (stating the issue presented as “whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecutions’ case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause”).

²²⁷ 989 S.W.2d 108, 109 (Tex. App.—San Antonio 1999, no pet.).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 110.

²³¹ *Id.*

²³² *Id.* at 110–11 (citing *Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997) which had previously defined “issuance” for purposes of article 38.23(b)).

²³³ *Id.* at 110–11.

²³⁴ *Id.*

determination of probable cause.²³⁵ With this understanding of issuance, the language of article 38.23(b) can support the full *Leon* “good faith” exception.

It might be argued that rather than referencing the determination of probable cause necessary for a magistrate’s issuance of a warrant, the Court of Criminal Appeals’ reference to an “initial” determination of probable cause is instead a directive to Texas courts to evaluate the presence of probable cause as prerequisite or a step in determining if article 38.23(b) is applicable. This has been the effect of the court’s decisions in *Gordon* and *Curry*.²³⁶ Article 38.23(b) creates an exception to the Texas statutory exclusionary rule where officers rely on “a warrant issued by a neutral and detached magistrate based on probable cause.”²³⁷ This language ties the presence of probable cause to issuance and thus proper issuance satisfies article 38.23(b).²³⁸ Any requirement of an appellate confirmation of probable cause comes not from the plain language of article 38.23(b) but instead was created by the Court of Criminal Appeals in *Gordon* and *Curry*.²³⁹

2. The Need for Explicit Statutory Support

Even assuming the language of article 38.23(b) does not explicitly support the full good faith exception, requiring strict statutory support for an exception to the exclusionary rule is a departure from the approach taken by the Court of Criminal Appeals in the past. In his dissent in *Eatmon v. State*, Justice Robertson notes as much.²⁴⁰ Justice Robertson provides

²³⁵ See *id.* at 110 (defining issuance for the purposes of article 38.23(b) as “a neutral and detached magistrate find[ing] probable cause . . . and sign[ing] the accompanying affidavit”).

²³⁶ See, e.g., *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.) (explaining the good faith exceptions announced in *United States v. Leon*, 468 U.S. 897 (1984); and TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005) and then noting the presence of probable cause).

²³⁷ TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005).

²³⁸ See *White v. State*, 989 S.W.2d 108, 110 (Tex. App.—San Antonio 1999, no pet.) (defining the issuance of a warrant as a magistrate finding probable cause and signing the accompanying affidavit).

²³⁹ See *Curry v. State*, 780 S.W.2d 825, 826–27 (Tex. App.—Houston [14th Dist.] 1989), *rev’d*, 808 S.W.2d 481 (Tex. Crim. App. 1991) (finding that even if the warrant used to obtain the challenged evidence was not supported by probable cause, under article 38.23(b) there was no error in admitting the evidence).

²⁴⁰ 738 S.W.2d 723, 725 (Tex. App.—Houston [14th Dist.] 1987, pet. *ref’d*) (Robertson, J., dissenting). Notably, while Justice Robertson characterizes the emergency doctrine as an

examples of exceptions to the statutory exclusionary rule of article 38.23(a) that have been adopted in Texas without express statutory support. For instance, there is no statutory support for the “emergency doctrine” which provides a “warrantless search may be justified by a need to act immediately to protect or preserve life or to prevent serious injury.”²⁴¹ Nevertheless, the Court of Criminal Appeals recognized this exception in *Bray v. State*.²⁴² Also, there is no statutory exception to the exclusionary rule allowing admission of an identification when the identification is a result of an illegal arrest and subsequent “line-up” proceeding.²⁴³ However, the Court of Criminal Appeals seemed to provide for such an exception in the cases of *Lujan v. State*²⁴⁴ and *Pichon v. State*.²⁴⁵

Justice Robertson also points out the example of the attenuation of taint doctrine.²⁴⁶ The doctrine was announced by the United States Supreme Court in *Brown v. Illinois* and provides that when unlawful police conduct that leads to the police obtaining evidence becomes sufficiently removed from such evidence, that evidence is admissible despite the illegality.²⁴⁷ A confession obtained during an illegal detention is the sort of evidence that article 38.23 generally excludes.²⁴⁸ Yet, as Justice Robertson notes, “even in the face of article 38.23,” “an illegal arrest does not *automatically* render a confession [obtained during the illegal arrest] inadmissible.”²⁴⁹ This is

exception to the statutory exclusionary rule, the doctrine more accurately determines whether the search was illegal in the first instance.

²⁴¹ *Bray v. State*, 597 S.W.2d 763, 764 (Tex. Crim. App. 1980) (“The emergency doctrine is an exception to the general, constitutional prohibitions of searches by officials without a warrant from a magistrate. A warrantless search may be justified by a need to act immediately to protect or preserve life or to prevent serious injury.”).

²⁴² *Id.* Note that in reading *Bray* the “emergency doctrine” may be better understood as an exception to the warrant requirement rather than an exception to the exclusionary rule. *Id.* However, in arguing the “emergency doctrine” as an exception to the warrant requirement, the state hoped to have evidence obtained during an otherwise unlawful search deemed admissible despite the exclusionary rule of article 38.23(a). See generally *Bray v. State*, 597 S.W.2d 763 (Tex. Crim. App. 1980). Whatever the case may be, it serves as an example of an exception to general search and seizure principles created without explicit statutory support.

²⁴³ *Eatmon*, 738 S.W.2d at 725.

²⁴⁴ 428 S.W.2d 336, 338 (Tex. Crim. App. 1968).

²⁴⁵ 683 S.W.2d 422, 425–26 (Tex. Crim. App. 1984).

²⁴⁶ *Eatmon*, 738 S.W.2d at 725.

²⁴⁷ 422 U.S. 590, 599–604 (1975).

²⁴⁸ See, e.g., *Self v. State*, 709 S.W.2d 662, 665 (Tex. Crim. App. 1986).

²⁴⁹ *Eatmon*, 738 S.W.2d at 725 (emphasis in original).

because in *Foster v. State*,²⁵⁰ and later more clearly in *Bell v. State*,²⁵¹ the Court of Criminal Appeals adopted the attenuation of the taint doctrine in regard to confessions obtained during a period of illegal detention. The Court did so without citing any express statutory authority.²⁵²

3. Mischaracterization of Leon

Not only does the Court of Criminal Appeals provide a questionable and superficial analysis of the language of article 38.23(b) in concluding that the article is not the full good faith exception, the court mischaracterizes *Leon*. The court, first in *Gordon* and again in *Curry*, states that “article 38.23(b) requires a finding of probable cause, while the exception enunciated in *Leon* appears more flexible in allowing a good faith exception if the officer’s belief in probable cause is reasonable.”²⁵³ This is an oversimplification, if not a misreading, of *Leon* and cannot serve as a basis for distinction between *Leon* and article 38.23(b).

As discussed above, *Leon* requires a finding of probable cause.²⁵⁴ Moreover, in order to avoid application of the exclusionary rule stated in article 38.23(a), under article 38.23(b) the officer must be “acting in objective good faith reliance upon a warrant.”²⁵⁵ The requirements of *Leon* are no different. Under *Leon*, an officer’s belief in probable cause is relevant only to the extent that the officer may not seek to rely upon an affidavit “so lacking in indicia of probable cause as to render official belief in [the] existence [of probable cause] entirely unreasonable” or provide false information in obtaining the warrant upon which the officer attempts to rely in invoking the good faith exception.²⁵⁶ While these stipulations

²⁵⁰ 677 S.W.2d 507, 509–10 (Tex. Crim. App. 1984).

²⁵¹ 724 S.W.2d 780, 786–96 (Tex. Crim. App. 1986).

²⁵² *Id.*; *Foster*, 677 S.W.2d at 509–10.

²⁵³ *Curry v. State*, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991); *Gordon v. State*, 801 S.W.2d 899, 912–13 (Tex. Crim. App. 1990).

²⁵⁴ See *supra* notes 221–30 and accompanying text.

²⁵⁵ TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005); *Brent v. State*, 916 S.W.2d 34, 37–38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref’d).

²⁵⁶ *United States v. Leon*, 468 U.S. 897, 923 (1984) (citing *Franks v. Delaware*, 438 U.S. 154 (1978); *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975)).

limit the application of the good faith exception, the exception does not turn on the officer's belief in probable cause.²⁵⁷

In *Leon*, just as with article 38.23(b), it is the fact that a magistrate has determined that probable cause exists and that the officers in question acted in reliance on this determination that makes illegally obtained evidence admissible.²⁵⁸ It is central to the exception created in *Leon* that, in performing an otherwise unconstitutional search, the executing officers relied upon a warrant.²⁵⁹ Indeed, it is the fact that the officer is not relying on his own belief in probable cause that renders the good faith exception applicable.²⁶⁰ The officer's reliance upon a magistrate's detached and neutral evaluation of probable cause, inherent in the issuance of a warrant, justifies an exception to the exclusionary rule because the magistrate's evaluation serves as a "safeguard against improper searches . . ."²⁶¹ The Court of Criminal Appeal's description of *Leon* as turning on the officer's belief in probable cause is a mischaracterization of the case and the exception to the exclusionary rule it created and, therefore, not an appropriate basis for distinction between article 38.23(b) and *Leon*.

4. Recognition of the Principles Underlying *Leon*

Oddly, in *Gordon* itself, before reaching the conclusion that article 38.23(b) was not the *Leon* good faith exception, the Court of Criminal Appeals acknowledges the basic theoretical underpinnings of the *Leon*. In *Gordon*, the defendant alleged his arrest pursuant to a warrant issued for outstanding traffic violations was a pretext to allow a search of his

²⁵⁷ *Id.* at 920–21 (justifying creating an exception to the exclusionary rule on the grounds that there is generally no police misconduct to deter and no deterrence to be achieved where officers act in reasonable reliance upon a warrant).

²⁵⁸ See TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 2005) (stating it is an exception to the statutory exclusionary rule where officers act in "objective good faith *reliance upon a warrant* . . .") (emphasis added); *Leon*, 468 U.S. at 920–21 (noting that where officers rely upon a warrant there is generally no law enforcement misconduct to deter justifying application of the good faith exception).

²⁵⁹ *Leon*, 468 U.S. at 913, 922 (holding that where an officer objectively reasonably relies upon a warrant subsequently invalidated warrant evidence discovered during an otherwise unlawful search is admissible).

²⁶⁰ *Id.* at 913–14 (noting in support of developing the good faith exception the "detached scrutiny of a neutral magistrate" provides "a more reliable safeguard against improper searches than the hurried judgment of a law enforcement . . .").

²⁶¹ *Id.*

apartment as part of a sexual assault investigation.²⁶² In its discussion of the pretext issue, the court had to decide the proper standard to use to evaluate the officers' motives in pursuing the allegedly pretextual arrest.²⁶³ Within this discussion, the court notes that the purpose of the exclusionary rule is "to deter unlawful actions by police"²⁶⁴ The court also notes that "a showing of objectively [sic] good faith on the part of the police officers will ordinarily redeem honest errors and prevent the application of the exclusionary rule"²⁶⁵

Two principles underlie *Leon*: the recognition of the exclusionary rule's purpose and the refusal to apply the rule where this purpose would not be served, i.e., where officers act in good faith.²⁶⁶ Indeed, the Fourteenth Court of Appeals, in its decision of *Curry*, made this connection in the context of article 38.23(b), noting that "exclusion of improperly obtained evidence does not always serve the deterrent purpose behind the [exclusionary] rule."²⁶⁷ Nevertheless, even after recognizing the validity of the principles underlying *Leon*, the Court of Criminal Appeals refused to adopt the full *Leon* good faith exception in the context of article 38.23(b).

5. Legislative History

The interpretation of article 38.23(b) offered by the Court of Criminal Appeals in *Gordon* and *Curry* is all the more unreasonable (and that of the 14th Court of Appeals in *Curry* all the more reasonable) in light of the legislative history of article 38.23(b). *United States v. Leon* clearly inspired the article. In his analysis of the bill that eventually became article 38.23(b), bill sponsor J.E. "Buster" Brown notes that "The United States Supreme Court has ruled that evidence obtained in 'good faith' is admissible as an exception to the 'exclusionary rule.' Presently, Article 38.23(b) does not parallel this exception."²⁶⁸ From these comments, it seems Senator Brown intended article 38.23(b) to bring Texas law in line

²⁶² *Gordon v. State*, 801 S.W.2d 899, 903 (Tex. Crim. App. 1990).

²⁶³ *Id.* at 903–13.

²⁶⁴ *Id.* at 909 (quoting *United States v. Causey*, 834 F.2d 1179, 1184–85 (5th Cir. 1987)).

²⁶⁵ *Id.*

²⁶⁶ See *supra* Part II.A.1.

²⁶⁷ 780 S.W.2d 825, 827 (Tex. App.—Houston [14th Dist] 1989), *rev'd* 808 S.W.2d 481 (Tex. Crim. App. 1991).

²⁶⁸ S. Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 1, 70th Leg., R.S. (1987) (noting the "United States Supreme Court has ruled that evidence obtained in 'good faith' is admissible as an exception to the exclusionary rule.").

with the United States Supreme Court's development of the good faith exception in *Leon*.

The House Research Organization bill analysis goes even further in demonstrating that article 38.23(b) was intended to codify *Leon*. Citing *Leon*, the HRO explains that supporters of the bill assert that the bill will "includ[e] the federal good-faith exception in the state exclusionary rule."²⁶⁹ The House Research Organization's bill analysis goes on to explain that "[u]nder the *Leon* exception, when a magistrate issues an invalid search warrant, but a police officer in good faith carries out that warrant and seizes evidence, the evidence is admissible even though it was obtained without a proper legal basis."²⁷⁰ Thus, it is apparent from the legislative history that the legislature understood the significance of *Leon* and intended to codify it in Texas law.

6. Gordon and Curry Render Article 38.23(b) Superfluous

As discussed above, the effect of the Court of Criminal Appeals' decisions in *Curry* and *Gordon* has been to render article 38.23(b) largely superfluous.²⁷¹ Since *Gordon* and *Curry*, article 38.23(b) has been left to apply only to "technical" defects.²⁷² This is in spite of the fact that, in *Green v. State*, the court recognized a general rule that technical discrepancies do not vitiate a search or arrest warrant.²⁷³

Green was convicted of possession of amphetamine and marijuana.²⁷⁴ Article 18.06 of the Texas Code of Criminal Procedure provides a three day period, exclusive of the day of issuance, during which a warrant may be executed.²⁷⁵ The warrant in *Green* was dated March 20, 1987 as the date on which the magistrate issued the warrant.²⁷⁶ However, the warrant was not executed until March 25, 1987, during which amphetamine and marijuana were found.²⁷⁷ As a result, the warrant was stale at the time of its execution

²⁶⁹H.R.O., Bill Analysis, Tex. S.B. 1, 70th Leg., R.S. (1987).

²⁷⁰*Id.*

²⁷¹*See supra* Part II.B.4.

²⁷²*See Taylor v. State*, 974 S.W.2d 851, 855–56 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

²⁷³*See Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (holding that technical discrepancies do not automatically invalidate a search warrant).

²⁷⁴*Id.* at 757.

²⁷⁵TEX. CODE CRIM. PROC. ANN. art. 18.06(a) (Vernon 1990).

²⁷⁶*Green*, 799 S.W.2d at 757.

²⁷⁷*Id.*

and the resulting seizure of items was invalid.²⁷⁸ Based on this, Green filed a motion to suppress.²⁷⁹ Although the court held the trial court erred in overruling Green's motion to suppress, the court noted "purely technical discrepancies in dates or times do not automatically vitiate the validity of search or arrest warrants."²⁸⁰

The Court of Criminal Appeals' recognition of this rule is a result of a line of cases that allow the State to produce evidence to explain technical discrepancies.²⁸¹ In *Martinez v. State*, the court allowed testimony from the issuing magistrate in order to explain a discrepancy between the date stated on the affidavit and that on the warrant as clerical error.²⁸² The court upheld similar uses of evidence and evidentiary hearings to explain typographical errors in both *Lyons v. State*²⁸³ and *Rougeau v. State*.²⁸⁴

The general statement of the rule regarding technical discrepancies, gleaned from these cases and announced in *Green*, is not limited to discrepancies in dates and times. For instance, in *Champion v. State*, the Fourteenth Court of Appeals used *Green* to allow the State to explain erroneous addresses stated in an affidavit.²⁸⁵ Based on testimony in the record, the court held that under *Green* the discrepancy was merely a typographical error and did not vitiate the warrant.²⁸⁶

In light of *Green*, the well established precedent on which it was based, and the expanding use of its rule, a proper remedy existed for technical defects before article 38.23(b) came into being. Thus, the sort of errors that article 38.23(b) has been used to address could easily have been resolved by

²⁷⁸ *Id.* at 758.

²⁷⁹ *Id.* at 757.

²⁸⁰ *Id.* at 759 (emphasis omitted).

²⁸¹ *Id.* at 758–59 (discussing *Martinez v. State*, 162 Tex. Crim. 356, 285 S.W.2d 221, 222 (1955); *Lyons v. State*, 503 S.W.2d 254, 255–56 (Tex. Crim. App. 1973); and *Rougeau v. State*, 738 S.W.2d 651, 663 (Tex. Crim. App. 1987), *overruled by* *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989) in which the state was allowed to produce evidence to overcome a technical defect in the warrant).

²⁸² *Martinez*, 285 S.W.2d at 222

²⁸³ *Lyons*, 503 S.W.2d at 255–56 (allowing testimony of the officer who obtained the warrant to explain typographical discrepancy).

²⁸⁴ *Rougeau*, 738 S.W.2d at 663 (considering evidence elicited at an evidentiary hearing in concluding that a discrepancy was a typographical error and thus did not vitiate the warrant).

²⁸⁵ 919 S.W.2d 816, 818–19 (Tex. Crim. App. 1996).

²⁸⁶ *Id.*

the law as it existed prior to article 38.23(b).²⁸⁷ Given that a solution for technical discrepancies already existed, it is all the more reasonable to conclude that article 38.23(b) was meant to expand the law by codifying the full *Leon* good faith exception.

B. Constitutionally Questionable Uses of Article 38.23(b)

As demonstrated above, the Court of Criminal Appeals' interpretation of article 38.23(b) has generally meant that the article has a very narrow application.²⁸⁸ However, at least two scenarios to which Texas courts have applied article 38.23(b) seem to violate the Fourth Amendment.

1. Evidence Obtained Under a Recalled Warrant

Established in *United States v. Leon*, the good faith exception renders evidence discovered by officers acting in objectively reasonable good faith reliance upon a warrant admissible though the warrant is subsequently invalidated on appeal.²⁸⁹ A key element of this exception is that officers act in reliance upon the probable cause determination of a judicial officer.²⁹⁰ The magistrate's evaluation of probable cause and decision to issue a warrant act as a safeguard against improper searches conducted by law enforcement "engaged in the often competitive enterprise of ferreting out crime."²⁹¹ Moreover, as a general proposition, where an officer obtains a warrant and acts within its scope, there is no illegality to deter.²⁹² Upon

²⁸⁷ See *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.) (using *Green* to account for a discrepancy between the warrant and the affidavit regarding the place to be searched and, alternatively, article 38.23(b)); compare *Green v. State*, 799 S.W.2d 756, 759 (holding error in dates on affidavit and warrant does not invalidate the warrant or the search) to *Forcha v. State*, 894 S.W.2d 506, 510–11 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (relying upon article 38.23(b) to hold that evidence was admissible despite the fact that the affidavit was undated). The court in *Forcha* took care to point out that Court of Criminal Appeals' precedent establishing an undated affidavit invalidates a warrant was decided before the passage of article 38.23(b). *Forcha*, 894 S.W.2d at 510 n.2 (discussing *Heredia v. State*, 468 S.W.2d 833 (Tex. Crim. App. 1971)).

²⁸⁸ See *supra* Parts II.A.4, II.A.5.

²⁸⁹ *United States v. Leon*, 468 U.S. 897, 913, 921–22 (1984).

²⁹⁰ *Id.* at 913–14, 921 (noting that a magistrate's judgment provides a more reliable safeguard against unlawful searches than the officer's own judgment and where an officer obtains a warrant there is nothing more that can be done to comply with the law).

²⁹¹ *Id.* at 913–14.

²⁹² *Id.* at 920–21.

obtaining a warrant, an officer has done all that he or she can do “in seeking to comply with the law.”²⁹³

In subsequent cases, the Court has reaffirmed the good faith reliance requirement of *Leon*. In *Illinois v. Krull*, the Court held that the *Leon* analysis applied to evidence obtained during a search pursuant to a statute subsequently held unconstitutional.²⁹⁴ When an officer relies in good faith upon authority granted to him by the legislature, excluding evidence serves no deterrent function.²⁹⁵ “Unless the statute is clearly unconstitutional” an officer’s duty is to enforce the statute as written, not to question the legislature’s judgment.²⁹⁶ Thus, just as in *Leon*, the fact that the officer relies upon the judgment of a separate authority—in this case the legislature—renders the “good faith” exception applicable.²⁹⁷

The reliance aspect of the good faith exception was made all the more evident in *Arizona v. Evans*. In *Evans*, a man arrested pursuant to a recalled warrant moved to have evidence found during that arrest suppressed.²⁹⁸ While it was not clear why the records of the officer who executed the warrant did not reflect the recall, evidence suggested that the clerk of the issuing court had failed to communicate the recall to law enforcement.²⁹⁹ Despite this ambiguity as to who was to blame for the erroneous records, the Arizona Supreme Court held the evidence inadmissible.³⁰⁰ The United States Supreme Court reversed and remanded, deeming this distinction key to an evaluation of whether the good faith exception was applicable.³⁰¹ If the failure to update the records to show that the warrant had been recalled was due to a judicial clerk’s error, the officers were entitled to rely upon the warrant in making the arrest.³⁰² Just as when the mistake that leads to an invalid search is committed by a judge or the legislature, suppressing evidence due to a judicial clerk’s error could have no deterrent effect on

²⁹³ *Id.* at 921.

²⁹⁴ *See supra* Part II.A.2.

²⁹⁵ *Illinois v. Krull*, 480 U.S. 340, 349 (1987).

²⁹⁶ *Id.* at 349–50.

²⁹⁷ *Id.* at 349.

²⁹⁸ *Arizona v. Evans*, 514 U.S. 1, 4 (1995).

²⁹⁹ *Id.* at 5.

³⁰⁰ *Id.* at 6.

³⁰¹ *Id.* at 15.

³⁰² *See id.* at 14–16 (holding that if court employees were responsible for the error, application of the exclusionary rule was not justified and discussing the reasons why).

future police misconduct.³⁰³ Once an officer determines that a warrant exists for a particular individual, it is the officer's duty to place that individual under arrest.³⁰⁴ Thus, rather than preventing future misconduct, suppression of evidence due to an error made by judicial personnel could have the effect of causing officers to neglect their duties for fear of being held responsible for the mistakes of others.³⁰⁵

Despite these cases clarifying the proper application of the good faith exception and the crucial role played by the officer's reliance upon an authority separate from law enforcement, the Fourth Court of Appeals has held the distinction between mistakes made by law enforcement and those made by members of the coordinate branches to be irrelevant under article 38.23(b).³⁰⁶ In *White v. State*, the San Antonio Court of Appeals faced a factual situation highly similar to the one the United States Supreme Court dealt with in *Evans*. After learning that White had an outstanding felony warrant for his arrest, a Sheriff's deputy went to White's apartment to execute the warrant.³⁰⁷ Before proceeding to White's apartment complex, the deputy had verified the outstanding warrant through computer records.³⁰⁸ The deputy knocked on White's door and, after receiving no response, entered the apartment using a key he had been given by the manager of the apartment complex.³⁰⁹ The deputy discovered White coming out of the shower and placed him under arrest.³¹⁰ As he left the apartment, the deputy observed marijuana, and White was subsequently charged with possession of the marijuana.³¹¹

The Sheriff's department later discovered that at the time of White's arrest, the issuing court had recalled the warrant.³¹² White moved to suppress the marijuana, arguing it was discovered as part of a warrantless search.³¹³ At the suppression hearing, the deputy testified that he relied on the warrant in arresting White, and the trial court denied White's motion to

³⁰³ *Id.* at 15.

³⁰⁴ *Id.*

³⁰⁵ *Id.* (citing *United States v. Leon*, 468 U.S. 897, 920 (1984)).

³⁰⁶ *White v. State*, 989 S.W.2d 108, 108, 111 (Tex. App.—San Antonio 1999, no pet.).

³⁰⁷ *Id.* at 108.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 108–09.

³¹⁰ *Id.* at 109.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

suppress.³¹⁴ The court of appeals affirmed based on the “plain language” of article 38.23(b), “declin[ing] to engraft the *Evans* distinction [between errors by judicial employees and law enforcement personnel] onto . . . article 38.23(b).”³¹⁵

The court of appeals bolstered its holding that the distinction between law enforcement and judicial employees did not govern its decision in *White* based upon a footnote from *Evans*.³¹⁶ In *Evans*, the Supreme Court noted that the question of whether suppression is appropriate when evidence is obtained as a product of clerical errors by police personnel was not before the Court.³¹⁷ Thus, the Court did not pass upon the issue.³¹⁸

Despite this footnote, the role of reliance in the good faith exception is clear from the Court’s decisions of *Leon*, *Krull*, and *Evans*. The exclusionary rule is meant to deter police misconduct.³¹⁹ Applying the exclusionary rule is generally unnecessary where errors are made by the judiciary in the evaluation of probable cause or the maintenance of records or by the legislature in passing statutes later deemed unconstitutional.³²⁰ Because the legislature and judiciary stand separate from law enforcement and are not engaged in the “enterprise of ferreting out crime,” law enforcement may rely upon their judgment and authority in fulfilling the good faith exception.³²¹ Indeed, in *Leon* the Court recognized that members of the judiciary could abandon their neutral and detached status and thereby become “adjunct members of law enforcement.”³²² And while it might be argued that law enforcement clerical personnel are not so central to the task of enforcing the law as to justify application of the exclusionary rule,

³¹⁴ *Id.*

³¹⁵ *Id.* at 111.

³¹⁶ *Id.* at 110.

³¹⁷ *Arizona v. Evans*, 514 U.S. 1, 16 n.5 (1995).

³¹⁸ *Id.*

³¹⁹ *Id.* at 14; *Illinois v. Krull*, 480 U.S. 340, 350 (1987); *United States v. Leon*, 468 U.S. 897, 916 (1984).

³²⁰ *Evans*, 514 U.S. at 514–15; *Krull*, 480 U.S. at 350; *Leon*, 468 U.S. at 921.

³²¹ See *Krull*, 480 U.S. at 350–51 (holding the exclusionary rule inapplicable to searches conducted pursuant to a statute subsequently deemed unconstitutional as legislators are not members of law enforcement); *Leon*, 468 U.S. at 913–14 (noting that because magistrates are not engaged in law enforcement they provide a safeguard against Fourth Amendment violations); *Leon*, 468 U.S. at 917 (holding the exclusionary rule inapplicable where officers rely upon a subsequently invalidated warrant as judges and magistrates are not “adjunct members of the law enforcement team” and thus “have no stake in the outcome of particular criminal prosecutions”).

³²² *Leon*, 468 U.S. at 914.

application of the exclusionary rule and the exception thereto developed in *Leon* are premised on the assumption “that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession *as a whole* to conduct itself in accord with the Fourth Amendment.”³²³ The clear implication of *Leon*, *Krull*, and *Evans* is that when law enforcement attempts to rely on its own errors, application of the exclusionary rule is proper.³²⁴ Therefore, the application of article 38.23(b) in *White* appears to be contrary to United States Supreme Court precedent and thus unconstitutional.

It might also be argued that *White* was solely an interpretation of article 38.23(b) because *White* did not specifically rely on the Fourth Amendment in arguing for suppression,³²⁵ and thus, the court of appeals acted properly by not adopting the distinction between law enforcement and judicial employees developed in *Evans* in the context of a Fourth Amendment analysis.³²⁶ However, the decision in *White* cannot be justified on this basis. Exclusion under article 38.23 is conditioned upon a violation of some other law,³²⁷ and it appears the underlying law in *White* was the Fourth Amendment.³²⁸ Moreover, the court of appeals chose to address *Evans* rather than simply dismissing it as inapplicable.³²⁹

One Texas court has recognized the importance of the distinction between relying on a mistake made by law enforcement and relying on a mistake made by members of the judiciary in applying the good faith

³²³ *Id.* at 918–19 (emphasis added); see also *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (describing the *Leon* assumption).

³²⁴ See *Leon*, 468 U.S. at 919 (citing *United States v. Peltier*, 422 U.S. 531, 539 (1975)) (noting that by refusing to admit evidence obtained by willful or negligent violations of the defendant’s rights, the courts hope to instill in law enforcement officers a greater degree of care towards citizens’ rights).

³²⁵ *White v. State*, 989 S.W.2d 108, 110 (Tex. App.—San Antonio 1999, no pet.).

³²⁶ *Arizona v. Evans*, 514 U.S. 1, 14–16 (1995) (discussing the Fourth Amendment and application of the exclusionary rule in the context of a mistake made by judicial clerical personnel).

³²⁷ See TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) (stating “No evidence obtained by an officer or other person *in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case”) (emphasis added).

³²⁸ *White*, 989 S.W.2d at 110–11 (discussing the applicability of *State v. Mayorga*, 938 S.W.2d 81 (Tex. App.—Dallas 1996, no pet.) which addressed an exclusion argument under article 38.23 that was predicated on the Fourth Amendment).

³²⁹ *Evans*, 514 U.S. at 10–16 (discussing the Fourth Amendment); *White*, 989 S.W.2d at 110–11.

exception. The Dallas Court of Appeals was specifically faced with the issue of whether the *Evans* distinction applies to article 38.23(b) in *State v. Mayorga*.³³⁰ In *Mayorga*, a police dispatcher informed officers that Mayorga had outstanding warrants for his arrest.³³¹ Based on this information, an officer arrested Mayorga.³³² After Mayorga was transferred to jail, the officer discovered that the outstanding warrants were not for Mayorga but instead for someone with a similar name.³³³ During the arrest, Mayorga apparently resisted and was charged under Texas Code of Criminal Procedure article 38.03 for doing so.³³⁴ The court of appeals had previously heard the case, deciding that the evidence was admissible because it had not been obtained through exploitation of an illegal arrest.³³⁵ The Court of Criminal Appeals affirmed and remanded with specific instructions to decide whether the *Evans* distinction applies to article 38.23(b).³³⁶ On remand, the court of appeals decided “[t]he categorical exception to the exclusionary rule in *Evans* is limited to ‘clerical errors of court employees.’”³³⁷ The court deemed dispatchers adjunct members of law enforcement noting “they directly provide warrant information.”³³⁸ As a result, the court declined “to create another exception to the [exclusionary] rule for errors caused by police personnel.”³³⁹

Leon, *Krull*, and *Evans* establish that for the good faith exception to apply, the officers conducting the unconstitutional search must have done so acting in reliance on the authority of the legislature or the judiciary. While *Evans* declined to address clerical errors made by law enforcement, the implication of its holding is clear; if the judiciary or legislature makes the mistake leading to an illegal seizure of evidence, the good faith exception may be applied, but if law enforcement makes the mistake, the evidence should be excluded. Finally, *Mayorga* establishes that the *Evans* distinction between errors by law enforcement and those made by members

³³⁰ *State v. Mayorga*, 938 S.W.2d 81, 82 (Tex. App.—Dallas 1996, no pet.).

³³¹ *Id.* at 83.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 82; *State v. Mayorga*, 876 S.W.2d 176, 178 (Tex. App.—Dallas 1994), *aff’d and remanded by* 901 S.W.2d 943 (Tex. Crim. App. 1995).

³³⁵ *Mayorga*, 876 S.W.2d at 178.

³³⁶ *State v. Mayorga*, 901 S.W.2d 943, 946 (Tex. Crim. App. 1995).

³³⁷ *Mayorga*, 938 S.W.2d at 83.

³³⁸ *Id.*

³³⁹ *Id.* at 83–84.

of the legislature or judiciary is relevant under article 38.23(b), at least where exclusion is predicated on the Fourth Amendment. Therefore, the interpretation of the article offered in *White* is likely unconstitutional.

2. The Particularity Requirement

A warrant must describe with “particularity . . . the place to be searched, and the persons or things to be seized.”³⁴⁰ Any search conducted pursuant to a warrant that fails to meet this requirement is unconstitutional.³⁴¹ The United States Supreme Court discussed this particularity requirement in *Groh v. Ramirez*.³⁴² In *Groh*, an Alcohol, Tobacco and Firearms agent in Montana received information that a stockpile of illegal weapons could be found at the Ramirezes’ ranch.³⁴³ The agent completed a detailed application for a warrant and supported the application with an affidavit.³⁴⁴ The application described the place to be searched and the items to be seized with particularity, but the warrant failed to do so.³⁴⁵ Specifically, in the section of the warrant where the description of the property to be seized could be entered, the agent described the Ramirezes’ two story house rather than the stockpile of weapons they allegedly possessed.³⁴⁶

Although no charges were brought against the Ramirezes, they sued the officers involved in the search, arguing, among other things, that the officers had violated their Fourth Amendment rights.³⁴⁷ They argued that the officers executed a warrant that was invalid due to its failure to describe with particularity the items to be seized.³⁴⁸ The Court agreed, stating “[t]he Fourth Amendment by its terms requires particularity in the warrant”³⁴⁹

³⁴⁰ U.S. CONST. amend. IV; *Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

³⁴¹ *Groh*, 540 U.S. at 559.

³⁴² *See generally* 540 U.S. 551 (2004).

³⁴³ *Id.* at 554.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 555.

³⁴⁸ U.S. CONST. amend. IV (stating “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*”) (emphasis added); *Groh*, 540 U.S. at 557–66.

³⁴⁹ *Groh*, 540 U.S. at 557.

Despite *Groh*, Texas courts have used article 38.23(b) to find evidence gathered under warrants containing deficient descriptions admissible.³⁵⁰ In *State v. Tipton*, officers obtained a warrant to search Tipton's home based on information provided by a confidential informant.³⁵¹ The warrant completely failed to name the person to be arrested, the place to be searched or the items to be seized.³⁵² Characterizing the failure to adequately describe the targets of the search within the warrant or to provide such a description to the person subject to the search as a "ministerial violation" of the Code of Criminal Procedure, the Thirteenth Court of Appeals relied in part on article 38.23(b) to find the trial court had abused its discretion in granting Tipton's motion to suppress.³⁵³

In reaching its conclusion, the court also relied upon the Fourth Court of Appeals' decision in *Rios v. State*.³⁵⁴ In *Rios*, a police officer obtained a search warrant after receiving information that Rios was in possession of cocaine.³⁵⁵ However, rather than describing the house where the officer suspected the cocaine could be found, the warrant commanded the officer to search the "vehicle described in the Affidavit."³⁵⁶ Relying in part on article 38.23(b) to affirm the trial court's decision to admit the cocaine, the court of appeals noted that "the exclusionary rule is designed to deter police misconduct."³⁵⁷ The court concluded the deterrent purpose of the exclusionary rule would not be fulfilled in *Rios* because the officer obtained a warrant based on probable cause, and the faulty description in the warrant was a result of typographical error.³⁵⁸

It is clear that the Fourth Amendment's particularity requirement was not satisfied by the warrants in *Tipton* and *Rios*, and the searches at issue in these cases were unconstitutional.³⁵⁹ However, the *Tipton* and *Rios* courts went beyond the warrants, looking to the supporting affidavits to find the

³⁵⁰ *State v. Tipton*, 941 S.W.2d 152, 155–56 (Tex. App.—Corpus Christi 1996, pet. ref'd); *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.).

³⁵¹ *Tipton*, 941 S.W.2d at 153.

³⁵² *Id.*

³⁵³ *Id.* at 155–56.

³⁵⁴ *Id.* at 155 (citing *Rios v. State*, 901 S.W.2d 704, 707–08 (Tex. App.—San Antonio 1995, no pet.)).

³⁵⁵ *Rios*, 901 S.W.2d at 706.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 707 (citing *United States v. Leon*, 468 U.S. 897, 916 (1984)).

³⁵⁸ *Id.* at 707–08.

³⁵⁹ *Tipton*, 941 S.W.2d at 154–55 (noting the particularity requirement of the Fourth Amendment but looking to the description in the affidavit); *Rios*, 901 S.W.2d at 706 (same).

challenged evidence admissible.³⁶⁰ The *Tipton* and *Rios* courts looked to Texas incorporation law in conjunction with article 38.23(b) to justify holding evidence found under a facially invalid warrant admissible.³⁶¹ In *Rios*, the affidavit properly described Rios's residence.³⁶² The *Rios* court found the challenged evidence admissible under article 38.23(b) based in part on the executing officer's testimony that he relied on the description in the affidavit in performing the search.³⁶³ In *Tipton*, the affidavit, which included a description of the person to be arrested, the place to be searched, and the items to be seized, was referenced in the warrant.³⁶⁴

The Supreme Court notes in *Groh* that its holding does not foreclose a warrant from cross referencing other documents and construing the warrant in light of these documents.³⁶⁵ The warrant at issue in *Groh* did not incorporate the application, and thus the Court did not explore the incorporation issue further.³⁶⁶ Nevertheless, the Court does point out that most courts of appeals that have passed on the issue have allowed a warrant to be construed with reference to supporting documents.³⁶⁷

Regardless of the constitutionality of looking to supporting documents in construing the description contained in a warrant as a general principle, the practice cannot make the use of article 38.23(b) in *Tipton* or *Rios* constitutional. First, it is not clear that Fourth Amendment incorporation standards were satisfied in *Tipton* and *Rios*. The cases cited by the Supreme Court in *Groh* allow for incorporation so long as the warrant uses appropriate words of incorporation and the supporting documents accompany the warrant.³⁶⁸ This seems to be the standard endorsed by the

³⁶⁰ *Tipton*, 941 S.W.2d at 155–56; *Rios*, 901 S.W.2d at 706–08.

³⁶¹ See *Tipton*, 941 S.W.2d at 154–56 (discussing article 38.23(b) and the admissibility of the challenged evidence after noting the warrant incorporated the affidavit by reference); *Rios*, 901 S.W.2d at 706–08 (discussing warrant's incorporation of the supporting affidavit and then going on to find the evidence admissible under article 38.23(b)).

³⁶² *Rios*, 901 S.W.2d at 708.

³⁶³ *Id.* at 707–08.

³⁶⁴ *Tipton*, 941 S.W.2d at 153.

³⁶⁵ *Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

³⁶⁶ *Id.* at 558.

³⁶⁷ *Id.* at 557–58.

³⁶⁸ *Groh*, 540 U.S. at 557–58 (citing *United States v. McGrew*, 122 F.3d 847, 850 n. 5 (9th Cir. 1997) (noting that the Ninth Circuit requires that an affidavit be attached to a warrant to supplement its general description); *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993); *United States v. Blakeney*, 942 F.2d 1001, 1024 (6th Cir. 1991); *United States v. Maxwell*, 920 F.2d 1028, 1031 (D.C. Cir. 1990); *United States v. Curry*, 911 F.2d 72, 77 n.4 (8th

Court.³⁶⁹ While some circuits apply a more lax version of this standard, all require fulfillment of some form of them in order for an affidavit to be considered in evaluating the adequacy of the description provided in a warrant.³⁷⁰ These courts note “[t]he traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant.”³⁷¹

Neither *Tipton* nor *Rios* satisfies these standards.³⁷² While the affidavit in *Tipton* was referenced in the warrant, it was not attached to the

Cir. 1990); *United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980)); *see also* *United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982) (“When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant.”); *United States v. Haydel*, 649 F.2d 1152, 1157 (5th Cir. Unit A July 1981) (noting where an affidavit is used to clarify ambiguity in the warrant it must be attached to the warrant so that both the officer and the person subject to the search have the information).

³⁶⁹*Groh*, 540 U.S. at 560 (“[U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit”) (emphasis added).

³⁷⁰*United States v. Bianco*, 998 F.2d 1112, 1115–17 (2d Cir. 1993) (noting the general rule requiring both incorporation by reference and attachment but taking a “commonsense” approach to hold a search reasonable because the affidavit was present during the search and an officer familiar with the affidavit and the nature of the investigation approved of the seizure of each item); *United States v. Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982) (noting the general rule of requiring both incorporation and attachment but allowing consideration of the affidavit where the executing officers were instructed on the limitations of their search, were given an opportunity to familiarize themselves with the affidavit, the affidavit was present at the scene of the search, an inventory was given to the party subjected to the search, and a copy of the affidavit was provided after the search). *But see* *United States v. Hurwitz*, 459 F.3d 463, 471 (4th Cir. 2006) (noting the law of the Fourth Circuit that either attachment or incorporation by reference allows a court to consider an affidavit in construing the description contained in a warrant); *United States v. Jones*, 54 F.3d 1285, 1291 (7th Cir. 1995) (noting the Seventh Circuit has “upheld a warrant against a challenge to its particularity when an affidavit attached to the warrant or incorporated into it provides the necessary specificity”).

³⁷¹*United States v. Curry*, 911 F.2d 72, 76–77 (8th Cir. 1990); *see also* *United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982) (articulating essentially the same standard).

³⁷²Perhaps part of the problem with the use of article 38.23(b) in cases like *Tipton* is Texas law governing use of supporting documents in construing a warrant. The courts of Texas have recognized that the description contained in an affidavit not only may supplement the description in the warrant but actually controls and limits the description in the warrant. *E.g.*, *Phenix v. State*, 488 S.W.2d 759, 764 (Tex. Crim. App. 1972). Although generally Texas courts deem incorporation of the affidavit into the warrant by reference sufficient to allow the description in

warrant.³⁷³ In fact, evidence did not demonstrate that the affidavit was physically present at the time the warrant was executed.³⁷⁴ Also, although the court of appeals concludes that the affidavit was incorporated into the warrant by reference in *Rios*, the warrant refers to an affidavit describing a vehicle.³⁷⁵ However, the purportedly incorporated affidavit in *Rios* contained a description of a residence.³⁷⁶ Because the warrant reference to the affidavit was itself erroneous, the warrant's incorporation of the affidavit is doubtful.³⁷⁷ Furthermore, the descriptions in the warrants in *Tipton* and *Rios* were not merely erroneous, as in the cases cited by the Supreme Court.³⁷⁸ Instead, in *Rios*, the warrant provided an obviously erroneous description of the place to be searched, and in *Tipton*, the warrant completely failed to describe the persons to be arrested, the place to be searched, or the items to be seized.³⁷⁹

Even granting incorporation in *Tipton* and *Rios*, the use of article 38.23(b) in these cases would still be unconstitutional. The Fourth Amendment requires particularity in the warrant, not in the supporting

the affidavit to be considered, there is some indication that attachment of the affidavit to the warrant or availability of the affidavit may also be required. *Phenix*, 488 S.W.2d at 764; *State v. Saldivar*, 798 S.W.2d 872, 873 (Tex. App.—Austin 1990, pet. ref'd); see also *Cantu v. State*, 557 S.W.2d 107, 108–09 (Tex. Crim. App. 1977) (stating “the warrant and attached affidavit should be considered together...”) (emphasis added). For instance, in *Phenix v. State*, the appellant claimed the search warrant failed to accurately describe the place to be searched, merely referencing the description contained in the affidavit which he claimed was a wholly separate document. *Phenix*, 488 S.W.2d at 764. In holding that the description in the warrant could be supplemented by the affidavit, the court noted that the warrant incorporated the affidavit by reference, which was sufficient to make the description of the place to be searched in the affidavit part of the warrant. *Id.* Despite this, the court went on to specifically address the attachment issue, noting at the time the warrant was executed the affidavit and warrant were stapled back to back and thus made “one instrument.” *Id.*

³⁷³ *State v. Tipton*, 941 S.W.2d 152, 153–54 (Tex. App.—Corpus Christi 1996, pet. ref'd).

³⁷⁴ *Id.* at 156.

³⁷⁵ *Rios v. State*, 901 S.W.2d 704, 706, 708 (Tex. App.—San Antonio 1995, no pet.).

³⁷⁶ *Id.* at 705.

³⁷⁷ See *United States v. Beaumont*, 972 F.2d 553, 561 (5th Cir.1992) (requiring the warrant to contain a “reference to the affidavit upon which an executing officer may have to rely”). See also *United States v. Vesikuru*, 314 F.3d 1116, 1121 (9th Cir. 2002) (citing *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1026 (requiring “suitable words of incorporation”)).

³⁷⁸ See, e.g., *United States v. Williamson*, 1 F.3d 1134, 1136 (ruling upon a warrant which included the businesses mail box number rather than physical address).

³⁷⁹ *Rios*, 901 S.W.2d at 705 (Tex. App.—San Antonio 1995, no pet.) (referring to a vehicle as the target of the search although the actual target was a resident); *Tipton*, 941 S.W.2d at 153.

documents.³⁸⁰ The Court in *Groh* notes that the high function of the warrant “is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection.”³⁸¹ The cases the Court cites to note the general acceptance of incorporation clarify the purposes of a particularized warrant. These cases note a particularized description of the place to be searched or items to be seized serves two functions. First, an adequate description limits the discretion of the officer executing the search.³⁸² Second, the description in the warrant informs the person subject to the search what places or items are covered by the warrant.³⁸³ These are functions to be served by the warrant itself, not the supporting documents.³⁸⁴ As the Court in *Groh* notes, it is the particularity of the description in the warrant that assures the magistrate found probable cause to search or seize a given place or item.³⁸⁵ Without a particularized warrant, it is possible that the magistrate found probable cause to search or seize only some of the places or items listed in the affidavit.³⁸⁶ Because the description of the place to be searched in the warrant in *Rios* was completely erroneous, and the warrant in *Tipton* lacked any description at all, the warrants in *Tipton* and *Rios* failed to serve the functions of the particularity requirement and the use of article 38.23(b) to hold evidence admissible in these cases was unconstitutional.³⁸⁷

³⁸⁰ *Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

³⁸¹ *Id.*

³⁸² *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (“The manifest purpose of th[e] particularity requirement was to prevent general searches.”); *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997).

³⁸³ *Groh*, 540 U.S. at 561 (“A particular warrant also ‘assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.’”); *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997); *see also* *United States v. Haydel*, 649 F.2d 1152, 1157 (5th Cir. Unit A July 1981) (noting where an affidavit is used to clarify ambiguity in the warrant it must be attached to the warrant so that both the officer and the person subject to the search have the information).

³⁸⁴ *See Groh*, 540 U.S. at 557 (noting particularity is required of the warrant itself, not the supporting documents).

³⁸⁵ *See id.* at 560 (noting that unless particular items described in the affidavit are also described in the warrant “there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit”).

³⁸⁶ *Id.* at 560–61.

³⁸⁷ *Rios v. State*, 901 S.W.2d 704, 705 (Tex. App.—San Antonio 1995, no pet.); *State v. Tipton*, 941 S.W.2d 152, 153 (Tex. App.—Corpus Christi 1996, pet. ref’d).

Moreover, the nature of the warrant defects at issue in *Tipton* and *Rios* defy remedy by either article 38.23(b) or the *Leon* good faith exception, even in conjunction with incorporation. In *Groh*, the warrant described the residence to be searched in the space provided for a description of the items to be seized.³⁸⁸ Similarly, in *Rios*, the warrant described a vehicle rather than the residence that was actually the target of the search.³⁸⁹ Even more egregious was the warrant in *Tipton*, which completely failed to list the person to be arrested, the place to be searched, or the items to be seized.³⁹⁰

The Court in *Groh* notes such mistakes cannot be deemed “mere technical mistake[s] or typographical error[s].”³⁹¹ Citing *Leon*, the Court found that the complete failure of the warrant in *Groh* to describe the items to be seized caused the warrant to be “so obviously deficient” that the search had to be regarded as “warrantless.”³⁹² This sort of obvious facial deficiency is one of the limitations to the good faith exception created in *United States v. Leon*. In *Leon*, the Court notes that the form of the warrant may be so improper or the warrant so facially invalid “in failing to particularize the place to be searched or the thing to be seized that the executing officers cannot reasonably presume it to be valid.”³⁹³ Where an officer attempts to rely upon a facially invalid warrant there is misconduct to deter and therefore “[s]uppression . . . remains an appropriate remedy.”³⁹⁴ The fact that the supporting documents provide an adequate description “does not save the warrant from its facial invalidity.”³⁹⁵ Thus, evidence discovered under the sort of facially invalid warrants at issue in *Rios* and *Tipton* cannot be deemed admissible under either the federal good faith exception or its Texas statutory counterpart.

IV. GETTING BACK TO WHAT WAS INTENDED

Though unlikely, several factors surrounding article 38.23(b) would justify judicial or legislative action to rectify the erroneous interpretation of

³⁸⁸ *Groh*, 540 U.S. at 558.

³⁸⁹ *Rios*, 901 S.W.2d at 705.

³⁹⁰ *Tipton*, 941 S.W.2d at 153.

³⁹¹ *Groh*, 540 U.S. at 558.

³⁹² *Id.* at 558.

³⁹³ *United States v. Leon*, 468 U.S. 897, 923 (1984) (internal punctuation omitted).

³⁹⁴ *Id.*

³⁹⁵ *Groh*, 540 U.S. at 557 (emphasis omitted).

the article offered in *Gordon* and *Curry* and the resulting limited use, and at times misuse, of the article.

A. *A Flawed Interpretation and Stare Decisis*

As discussed above, the interpretation itself is superficial and questionable.³⁹⁶ The interpretation is not only contrary to clear legislative intent, it rests upon a mischaracterization of *Leon*.³⁹⁷ The language of article 38.23(b) supports an interpretation that it is the full *Leon* good faith exception.³⁹⁸ Such an interpretation is supported by case law defining “issuance.”³⁹⁹ Apart from the language of article 38.23(b), the Court of Criminal Appeals’ current interpretation of the article has rendered it almost superfluous.⁴⁰⁰ Moreover, requiring express statutory support for the full *Leon* good faith exception departs from the Court of Criminal Appeals’ approach in adopting exceptions to the exclusionary rule.⁴⁰¹

Given these factors surrounding the original interpretation of the article, the Court of Criminal Appeals is not bound to blindly adhere to its decisions in *Gordon* and *Curry*. The court generally gives great deference to its prior decisions under the doctrine of stare decisis.⁴⁰² However, the court has recognized that the rule of stare decisis is not an inexorable one.⁴⁰³ Where the interpretation of a statute proves to be poorly reasoned, the court will decline to follow the rule.⁴⁰⁴ The Court of Criminal Appeals has noted that when the situation calls for as much, the court must be free to overturn precedent.⁴⁰⁵ With the near absence of analysis of article 38.23(b) in *Gordon* and *Curry*, the flaws in the analysis that was offered, and the other

³⁹⁶ See *supra* Part II.C.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Peek v. State*, 106 S.W.3d 72, 80 (Tex. Crim. App. 2003) (noting that stare decisis is the “traditional rule requiring respect for precedent” and “creates a strong presumption for established law”) (internal citations omitted).

⁴⁰³ *Id.*

⁴⁰⁴ *State v. Medrano*, 67 S.W.3d 892, 902–03 (Tex. Crim. App. 2002).

⁴⁰⁵ *Peek*, 106 S.W.3d at 80.

factors surrounding the interpretation of the article discussed above, this would seem to be just such a situation.⁴⁰⁶

B. Suppression Arguments Based on the United States and Texas Constitutions

When defendants have relied solely upon the Texas or United States Constitutions, the courts of Texas have applied the full *Leon* good faith exception.⁴⁰⁷ In *Martin v. State*, officers executed a search warrant for the residence of Ronald Yarbrough.⁴⁰⁸ The warrant also authorized the search of all outbuildings, structures, and vehicles on the premises.⁴⁰⁹ Martin's vehicle was among those present, and, upon searching it, officers discovered a small amount of methamphetamine.⁴¹⁰

After being charged with possession of a controlled substance, Martin filed a motion to suppress the drugs found in her car.⁴¹¹ Martin argued that the warrant "stated no facts showing probable cause to believe [her vehicle] contained methamphetamine."⁴¹² Martin based this argument on the fact that the affidavit asserted only that "Yarbrough had concealed methamphetamine in 'his' vehicles."⁴¹³ Because the affidavit contained no facts indicating methamphetamine could be found in vehicles on Yarbrough's premises that were not his, Martin contended "the warrant was not issued upon probable cause insofar as it authorized the search of 'all vehicles on the premises.'"⁴¹⁴

In addressing this claim, the Beaumont Court of Appeals notes that Martin relied exclusively upon the Texas Constitution Article I, Section 9

⁴⁰⁶ Admittedly the chance for the court to overrule *Gordon* and *Curry* may never come as, in order to be given the opportunity, the state would have to offer an argument that is highly unlikely to succeed under existing law. The more likely remedy is legislative action.

⁴⁰⁷ *Martin v. State*, 761 S.W.2d 26, 30 (Tex. App.—Beaumont 1988), *pet. granted, remanded*, 764 S.W.2d 562 (Tex. Crim. App. 1989); *see also* *Hicks v. State*, 753 S.W.2d 419, 421–22 (Tex. App.—Beaumont 1988, no *pet.*); *Moffett v. State*, 716 S.W.2d 558, 566–67 (Tex. App.—Dallas 1986, *pet. ref'd*).

⁴⁰⁸ *Martin*, 761 S.W.2d 26, 28.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 27, 28.

⁴¹² *Id.* at 30.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

and the Fourth Amendment of the United States Constitution.⁴¹⁵ As a result, the exclusionary rule established in article 38.23(a) of the Code of Criminal Procedure was not an issue and purely constitutional standards governed.⁴¹⁶ Without mentioning the presence of probable cause to search the vehicle, the court notes the officers were acting in good faith reliance upon a warrant issued by a neutral and detached magistrate and thus, under Texas and United States constitutional standards, the evidence was admissible.⁴¹⁷

Decisions such as *Martin* would seem to allow for recognizing article 38.23(b) as the full *Leon* good faith exception. The exclusionary rule announced in article 38.23(a) is predicated on a violation of some other law including the Texas and United States Constitutions.⁴¹⁸ If Texas courts are willing to adopt the full *Leon* good faith exception in the context of suppression arguments based solely on the Texas and United States Constitutions, at least where a suppression argument under article 38.23(a) is predicated on a constitutional violation and the facts of the case would support the *Leon* good faith exception, no reason exists that prohibits the state to invoke article 38.23(b) as the full *Leon* good faith exception.

C. Exceptions to the Statutory Exclusionary Rule of Article 38.23(a) and Violations of Statutory Law

Even where a defendant argues for suppression based on article 38.23(a) predicated on a violation of a statute, the Texas courts have created exceptions to the Texas statutory exclusionary rule. For example, in *Bachick v. State*, a Euless police officer initiated a traffic stop after seeing a driver swerve and fail to stop at a traffic light.⁴¹⁹ While the traffic light was located in Euless, the parking lot which appellant pulled into was in Bedford.⁴²⁰ As result, the officer had no jurisdiction over the parking lot.⁴²¹ When the officer approached the vehicle he noticed the smell of alcohol on

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ See TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) (stating “[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case”) (emphasis added).

⁴¹⁹ 30 S.W.3d 549, 550 (Tex. App.—Fort Worth 2000, pet. ref’d).

⁴²⁰ *Id.*

⁴²¹ *Id.*

Bachick.⁴²² After failing field sobriety tests, Bachick was arrested and charged with driving while intoxicated.⁴²³ Although required by the Code of Criminal Procedure, the Euless officer failed to provide notice of the arrest to any law enforcement agency with jurisdiction over the parking lot where the arrest was made.⁴²⁴ Based on this failure, the defendant argued the evidence of his intoxication was obtained illegally and thus should be suppressed.⁴²⁵

The Fort Worth Court of Appeals held the evidence was admissible, stating that “[a]rticle 38.23(a) may not be invoked for statutory violations unrelated to the purpose of the exclusionary rule.”⁴²⁶ The implication of this holding is three fold. First, it reinforces the proposition that Texas courts have recognized the rationale underlying *Leon*. In reaching its conclusion the court notes “[t]he primary purpose of the exclusionary rule is to deter police activity that could not have been reasonably believed to be lawful by the officers committing the conduct.”⁴²⁷ This is the very rationale that underlies the development of the good faith exception in *Leon*.⁴²⁸

Also, this case reinforces the proposition that Texas courts are generally willing to develop exceptions to the exclusionary rule announced in article 38.23(a), even without explicit statutory support. As *Bachick* demonstrates, the courts of Texas have been willing to adopt an “unrelated statutory violation” exception.⁴²⁹ This is despite the fact that there is no statutory support for such an exception in the Code of Criminal Procedure, which is

⁴²² *Id.*

⁴²³ *Id.* at 550–51.

⁴²⁴ *Id.* at 552.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 552–53.

⁴²⁸ *United States v. Leon*, 468 U.S. 897, 920–22 (1984) (holding where officers obtain a warrant they are generally entitled to believe their actions to be lawful and thus where officers rely on a warrant exclusion of evidence would not serve a deterrent function sufficient to outweigh the substantial social cost of exclusion).

⁴²⁹ *Bachick*, 30 S.W.3d at 552–53 n.5 (citing *Pannell v. State*, 666 S.W.2d 96, 97–98 (Tex. Crim. App. 1984); *Reeves v. State*, 969 S.W.2d 471, 486–87 (Tex. App.—Waco 1998, pet. ref’d); *Fisher v. State*, 839 S.W.2d 463, 469 (Tex. App.—Dallas 1992, no pet.); *Ramirez v. State*, 822 S.W.2d 240, 246 (Tex. App.—Houston [1st. Dist.] 1991, pet. ref’d); *Lopez v. State*, 817 S.W.2d 150, 151–53 (Tex. App.—El Paso 1991, no pet.); *Stockton v. State*, 756 S.W.2d 873, 874 (Tex. App.—Austin 1988, no pet.)).

the very reason the Court of Criminal Appeals refused to treat article 38.23(b) as the full *Leon* good faith exception.⁴³⁰

Finally, and most importantly, *Bachick* establishes that the potential for treating article 38.23(b) as the full *Leon* good faith exception is not limited to the context of suppression arguments under article 38.23(a) predicated on constitutional violations. *Bachick* based his motion to suppress on article 38.23(a) and a statutory violation,⁴³¹ rather than relying on the Texas and United States Constitutions, as did the defendant in *Martin*.⁴³² Despite the fact that *Bachick*'s article 38.23(a) suppression argument was predicated on a statutory violation, the *Bachick* court cited a long line of cases and concluded that evidence should not be suppressed under article 38.23(a) for statutory violations where the purpose of the exclusionary rule would not be served.⁴³³

V. CONCLUSION

The good faith exception created in *United States v. Leon* represents a logical limitation on the exclusionary rule. As announced in *Leon*, the exception recognizes that exclusion of probative evidence exacts a substantial social cost, depriving the judicial system of probative evidence that may give defendants an undeserved benefit. *Leon* recognizes exclusion of evidence under the proper circumstances can serve as a deterrent against future law enforcement misconduct. However, *Leon* holds that where law enforcement has obtained a warrant and acted within its scope, there is generally no law enforcement wrongdoing to deter. Under such circumstances application of the exclusionary rule can serve no deterrent purpose and, in light of the social costs of the rule, should not be applied.

In an attempt to adopt this logical limitation of the exclusionary rule into Texas law, the legislature passed article 38.23(b). This attempt was frustrated by the Court of Criminal Appeals in *Gordon* and *Curry*. Although the language of the article supports the full *Leon* exception, the court offers sparse and questionable reasoning to conclude it does not. This conclusion not only contradicts what seems to be clear legislative intent, it

⁴³⁰ *Curry v. State*, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991); *Gordon v. State*, 801 S.W.2d 899, 912–13 (Tex. Crim. App. 1990).

⁴³¹ *Bachick*, 30 S.W.3d at 552–53.

⁴³² *Martin v. State*, 761 S.W.2d 26, 30 (Tex. App.—Beaumont 1988), *pet. granted, remanded*, 764 S.W.2d 562 (Tex. Crim. App. 1989); *see also supra* Part IV.B.

⁴³³ *Bachick*, 30 S.W.3d at 552–53 & n.5.

contradicts the court's prior precedent. Since *Gordon* and *Curry* the court has recognized all of the principles underlying *Leon*. Moreover, the interpretation of article 38.23(b) in *Gordon* and *Curry* deprives the Texas criminal justice system of reliable, probative evidence at the risk of letting guilty defendants go free in exchange for no discernable benefit.

Many of these same factors may allow the Court of Criminal Appeals or the Texas legislature to remedy the current interpretation of the article. Given that the original interpretation was flawed, stare decisis does not require the court to adhere to it. The principles underlying the full *Leon* good faith exception have been recognized in Texas. Indeed, the full exception has been recognized where the defendant argues for exclusion based solely upon constitutional standards. Even where the statutory exclusionary rule is invoked there are grounds for applying the full good faith exception. Exclusion under article 38.23(a) is predicated on the violation of other law, such as the Fourth Amendment of the United States Constitution or Article I, Section 9 of the Texas Constitution. Where the Fourth Amendment of the United States Constitution or Article I, Section 9 of the Texas Constitution is invoked as the basis of exclusion under article 38.23(a), the standards related to these constitutional provisions logically apply. This would include the full *Leon* good faith exception. Further, even where a suppression argument under article 38.23(a) is predicated on a statutory violation, the courts of Texas have developed exceptions to hold evidence admissible. Thus, a chance still exists that the good faith exception, as announced in *United States v. Leon*, will become part of Texas law.