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COMMENTS

THE EXCLUSIONARY RULE: AN EXAMINATION OF THE CASE LAW AND THE PRESENT POSTURE OF THE FLORIDA SUPREME COURT

MICHAEL SHAW TAMMARO

I. INTRODUCTION

Both the United States Constitution and the Florida Constitution contain prohibitions against "unreasonable searches and seizures." The relationship between the state and federal provisions has been the subject of controversy and court decision since the early 1920's. On April 29, 1982, the Florida Supreme Court presented its latest statement on this issue in the case of State v. Rickard.2

1. The fourth amendment to the United States Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Declaration of Rights, section 22, appeared in the Florida Constitution of 1885 as follows:

Section 22. The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

This provision remained unchanged until the 1968 revision. The section now appears as article I, section 12 of the Florida Constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

The language of the 1885 constitution was substantially the same in all prior constitutions. Compare FLA. CONST. of 1838, art. I, § 7 and FLA. CONST. of 1861, art. I § 7 and FLA. CONST. of 1865, art. I, § 7 and FLA. CONST. of 1868, Decl. of Rts., § 19 with FLA. CONST. of 1885, Decl. of Rts., § 22.

2. 7 FLA. L.W. 193 (April 29, 1982), withdrawn, 7 FLA. L.W. 453 (Sept. 30, 1982). The opinion issued by the court to replace the April 29 opinion did not address the relationship between the state and federal exclusionary provisions since the new decision was based entirely on federal constitutional law. Nevertheless, the analysis and language utilized by the court in the original opinion to discuss the relationship still provides an important insight.
The defendant, William M. Rickard, was arrested after his neighbor informed detectives that he believed the defendant to be growing marijuana in his back yard. Upon the detectives’ arrival, the neighbor took them to a citrus grove located behind Rickard’s chain-link-fenced back yard to observe the plants reputed to be marijuana, as the view from the neighbor’s yard was obstructed by Rickard’s construction of a storage shed and plywood partition. The next day the detectives returned and, after waiting an hour for Rickard to tend the plants, went to Rickard’s mobile home and arrested him. The defendant requested permission to remove some money from his trousers on the floor but the detectives, fearing a weapon, reached into the pocket and discovered a small bag of marijuana. The detectives then seized the marijuana plants growing in the defendant’s back yard. The officers were armed with neither a search warrant nor an arrest warrant.3

The defendant subsequently plead nolo contendere to a charge of manufacture and felony possession of marijuana, reserving his right to appeal the trial court’s denial of his motion to suppress. The Second District Court of Appeal upheld the denial of the motion to suppress the evidence which was seized from Rickard’s trousers, finding the seizure to be incident to a lawful arrest. The court reluctantly reversed the denial of the motion as to the back yard seizure of the plants, citing as authority its own decision in Morsman v. State.4 The court did, however, certify the following question to the Florida Supreme Court:

Where contraband is seen in plain view by police in the defendant’s back yard from a point adjacent to the property, may the police seize the contraband without a warrant in the absence of exigent circumstances?5

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3. Rickard v. State, 361 So. 2d 822, 823 (Fla. 2d DCA 1978). The supreme court added in its initial Rickard opinion that the arrest was made “before entry.” Appendix, infra, at A2. Both Rickard opinions focused, however, on the legality of the arrest and seizure inside the home. Id. at A9; 7 FLA. L.W. at 453-54.

4. 360 So. 2d 137 (Fla. 2d DCA 1978). The district court found conflict with other recent Florida cases as they related to an expectation of privacy in one’s back yard: “[I]t appears that Morsman stands alone among Florida decisions. In deference to stare decisis, we have elected to follow Morsman and quash the seizure of the marijuana plants.” 361 So. 2d at 824.

5. 7 FLA. L.W. at 454.
The Florida Supreme Court accepted jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. The court's opinion was informally drawn into two parts. Initially addressing the certified question, the court answered in the negative, utilizing the occasion to again clarify the correct application of the "plain view" doctrine as articulated by the United States Supreme Court in Coolidge v. New Hampshire. Subsequent to Rickard's arrest, however, the United States Supreme Court held in Payton v. New York that the fourth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment, prohibited the warrantless entry into a suspect's home for the purpose of a routine felony arrest. The Florida Supreme Court, therefore, also had to pass on Payton's retroactivity.

The Florida Supreme Court utilized the test applied by the United States Supreme Court for almost two decades and opined that the United States Constitution did not prohibit the prospective-only application of Payton. Since the court found the search lawful under federal law, the court had to pass on Payton's retroactivity under the state constitution. Analyzing the relationship between the two provisions, the court found the prospective-only application of Payton to be permissible under state law as well. The court therefore approved the district court decision to admit the bag of marijuana and remanded for further proceedings consis-

6. Id. at 453. The applicable provision is now located at Fla. Const. art. V, § 3(b)(4).
7. 7 Fla. L.W. at 454.
8. 403 U.S. 443 (1971). The "plain view doctrine," as announced in the Coolidge decision, had as its basic premise that when a police officer has a prior justification for an intrusion into a constitutionally protected area, he by warrant or warrant exception, and he inadvertently comes across evidence incriminating the accused, he may seize the evidence without the further necessity of obtaining a warrant to seize that evidence. Id. at 466. A "plain view" seizure merely supplements the prior justification for entry into the constitutionally protected area. Id. Thus, three elements of a plain view seizure are required to be present before the doctrine may be invoked: (1) a prior intrusion into a constitutionally protected area by virtue of a warrant or warrant exception, (2) an inadvertent discovery of evidence in "plain view" within the constitutionally protected area and, (3) the apparently incriminating nature of the evidence. Id. at 464-72.
10. Id. at 574. This principle has been extended to the home of a third party. Steagald v. United States, 451 U.S. 204 (1981). For a good discussion of these cases, see Harbaugh & Faust, "Knock on any Door"—Home Arrests After Payton and Steagald, 86 Dick. L. Rev. 191 (1982).
12. Id. at 411.
13. Id. at 410-11.
Subsequent to the Rickard decision, however, the United States Supreme Court disagreed with the Florida court's conclusion on the retroactivity of Payton under the federal constitution. In United States v. Johnson, the court announced that Payton would have to be applied retroactively. Therefore, Rickard's routine felony arrest without a warrant was illegal under the United States Constitution. As a result, the bag of marijuana was inadmissible at Rickard's trial as not being incident to a lawful arrest. Since the arrest was unlawful under the United States Constitution, it was no longer necessary for the Florida Supreme Court to address the legality of the arrest under Florida law. As such, the court on September 30, 1982 withdrew its opinion of April 29, 1982 and substituted another opinion "in lieu thereof."

The majority's discussion of the "plain view doctrine" in the new opinion was essentially identical to the prior opinion, but the decision of the district court affirming the trial court's denial of the motion to suppress was reversed to accommodate the Johnson decision. The supreme court's analysis of federal retroactivity law and the discussion of the state constitutional issues, which were no longer necessary to the decision, were omitted from the opinion. The Florida Supreme Court's position on the state constitutional

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14. Id. at 412.
15. 50 U.S.L.W. 4742 (U.S. June 21, 1982). The Johnson decision deserves comment itself. The United States Supreme Court, finding that "retroactivity must be rethought," held that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." Id. at 4748. The decision overruled a consistent line of decisions, beginning with Johnson v. New Jersey, 384 U.S. 719 (1966), and Stovall v. Denno, 388 U.S. 293 (1967), which had outlined a three-part test for a retroactivity analysis. See 50 U.S.L.W. at 4744; Annot., United States Supreme Court's Views as to Retroactive Effect of its Own Decisions Announcing New Rules, 22 L. Ed. 2d 821, 825 (1970). The Florida Supreme Court in Rickard relied on the past pronouncements of the United States Supreme Court to hold Payton non-retroactive. Appendix, infra, at 410-11. The United States Supreme Court noted in Johnson that its decision would not apply to those cases which would be "clearly controlled by existing precedent," i.e., in which there was not a clear break with the past. 50 U.S.L.W. at 4745-46. The Supreme Court found Payton not to be such a "new" rule, as the Court had not sanctioned the practice in prior cases and the decision was not an overruled past precedent. Id. at 4746 n.13. But, as pointed out in Rickard, "the United States Supreme Court implicitly gave its stamp of approval (prior to Payton) to earlier decisions by declining to accept certiorari jurisdiction." Appendix, infra, at 420. Note that the Florida Supreme Court and the Fifth Circuit had specifically held the activity permissible. See State v. Perez, 277 So. 2d 778 (Fla. 1973), cert. denied, 414 U.S. 1064 (1973); United States v. Williams, 573 F.2d 348 (5th Cir. 1978).
16. 7 FLA. L.W. at 453.
17. Compare id. at 455 with Appendix, infra, at 405.
issues nevertheless remains both important and timely.

On November 2, 1982, the voters of Florida were asked to inextricably alter Florida's exclusionary provision by constitutional referendum. The net effect of passage of the proposed constitutional amendment would be to tie forever the meaning of Florida's constitutional protections to the United States Supreme Court's interpretation of the federal constitution and federal search and seizure law.

Because of the great importance of these issues and the special relevance of the highest Florida court's interpretation of the state constitution, the court's pronouncements in Rickard on the state issues, now withdrawn as unnecessary, will be included and examined in this comment, along with the other relevant law on the subject. As the prior opinion will not appear in the official reporter, the full text of the opinion is set out in the Appendix to this article. While the prior Rickard opinion is of limited precedential value, it does reflect the current position of the Florida Supreme Court in this area of search and seizure law.

This comment first will review the seemingly conflicting language in Florida case law on the relationship between the Florida and federal provisions. Next, the history of the constitutional revision in 1968 will be examined with reference to the meaning and intent of the constitutional language. Finally, an attempt will be made to reconcile the case law. Special emphasis will be placed on the Florida Supreme Court's position as revealed in the most recent discussion of these issues in the initial Rickard decision.

II. THE CONFUSED AND CONFLICTING CASE LAW

A. Supreme Court Opinions

Florida courts have been bound to follow the fourth amendment's prohibition against unreasonable searches and seizures since Wolf v. Colorado was decided in 1949.18 However, the Weeks doctrine19 which states that evidence seized in violation of the fourth amendment would not be admissible in federal criminal tri-
als (the exclusionary rule), was not pressed upon the state until *Wolf* was overruled in part by *Mapp v. Ohio*\(^\text{20}\) in 1961. This distinction between the constitutional prohibition against unreasonable searches and seizures (the substantive protections) and the exclusionary rule itself is extremely important. As will be shown later, the failure to differentiate between the two is partially to blame for the confusion in the case law.

Because of the great similarity between the federal and state constitutional provisions,\(^\text{21}\) Florida courts have consistently analogized to the federal counterpart when interpreting the Florida provision. Thus, the Florida Supreme Court in *Gildrie v. State*\(^\text{22}\) found that as “[t]he Fourth Amendment to the federal Constitution is almost identical in statement to Section 22, Bill of Rights [now article I, section 12] of our Constitution,”\(^\text{23}\) evidence seized in violation of the fourth amendment could also not be admitted in a Florida prosecution.\(^\text{24}\) The *Gildrie* decision is recognized as having judicially adopted the exclusionary rule in Florida,\(^\text{25}\) thus “anticipating” the *Mapp* decision thirty-four years later.\(^\text{26}\) The court in *Thurman v. State*\(^\text{27}\) stated that the Florida provision “has the same meaning, and uses almost identically the same language, as the Fourth Amendment to the Federal Constitution.”\(^\text{28}\) The court held that evidence seized without a search warrant was therefore inadmissible in a Florida court.\(^\text{29}\)

The position of Florida in already having a judicially adopted exclusionary rule, however, caused interpretation problems when *Mapp* was subsequently decided.\(^\text{30}\) In *Sing v. Wainwright*,\(^\text{31}\) the

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21. *See supra* note 1 and accompanying text.
22. 113 So. 704, 705 (Fla. 1927).
23. *Id.* at 705 (quoting Jackson v. State, 99 So. 548 (Fla. 1924)).
24. *Id.* at 706. The court reached a similar conclusion based on a fifth amendment analysis and section 12 of the declaration of rights. *Id.* It has been suggested that many states adopted the rule in the 1920's to "soften the enforcement of Prohibition." Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 682 n.11.
25. *See, e.g.*, Odom v. State, 403 So. 2d 936, 940 (Fla. 1981), cert. denied, 50 U.S.L.W. 3838 (U.S. April 20, 1982) (No. 81-1113); Thurman v. State, 156 So. 484, 485 (Fla. 1934); Taylor v. State, 355 So. 2d 180, 184 (Fla. 3d DCA), cert. denied, 361 So. 2d 835 (Fla. 1978).
27. 156 So. 484 (1934).
28. *Id.* at 485.
29. *Id.* at 488.
30. Florida was not alone in this respect. The relationship between a state exclusionary
petitioners asserted that evidence allegedly seized illegally should have been suppressed as the result of the *Mapp* decision rendered subsequent to their conviction. The court stated in reply:

[T]he decision in *Mapp v. Ohio* . . . added nothing whatever to the law of Florida. It created no new procedural right so far as the jurisprudence of this State is concerned. This Court long ago concluded that evidence obtained as the product of an unreasonable search is not admissible in a criminal proceeding. Florida has long recognized the so-called "exclusionary rule" regarding the inadmissibility of such evidence. . . . [I]t is clear that the rule of *Mapp v. Ohio* . . . created no new right in favor of those being tried for crimes in this state.

By constitutional referendum of November 5, 1968, the judicially created exclusionary rule was adopted into organic law and now appears as the last sentence of article I, section 12 of the Florida Constitution: "Articles or information obtained in violation of this right [against unreasonable searches and seizures] shall not be admissible in evidence." 80 Like the *Mapp* decision before it, this incorporation resulted in interpretation problems for the courts and the cases appear to be hopelessly inconsistent.

The Florida Supreme Court decision in *Croteau v. State* 85 relied on federal law to hold that evidence obtained as the result of an "unreasonable" search in violation of the fourth amendment would have been admissible in a Florida probation revocation hearing, but was *not* admissible in the new criminal trial that was the subject of the appeal. 86 Judge, then-Justice, Hatchett noted in his concurring opinion that article I, section 12 "require[d] the same result, independently of the Fourth and Fourteenth Amendments." 87 Judge Hatchett noted also that the facts of the case did not require a determination of whether article I, section 12 also required unreasonably obtained evidence to be excluded at a probation revocation and a federal provision in those states that had prior law on the subject is conceptually difficult to grasp. See Ker v. California, 374 U.S. 23 (1963).

31. 148 So. 2d 19 (Fla. 1962).
32. 148 So. 2d at 20.
33. 148 So. 2d (citations omitted.) See, e.g., State v. Leveson, 151 So. 2d 283, 285 (Fla. 1963) (recognizing the practice of analogizing to the federal constitution for the meaning of the Florida provision); Houston v. State, 113 So. 2d 582 (Fla. 1st DCA 1959).
34. FLA. CONST. art. I, § 12. See note 1 supra for the full text of this section.
35. 334 So. 2d 577 (Fla. 1976).
36. 334 So. 2d at 580.
37. Id. (Hatchett, J., concurring).
ocation hearing.\textsuperscript{38}

Three years later, however, in Grubbs \textit{v. State},\textsuperscript{39} the supreme court, noting that it had "held" in Croteau that evidence obtained as a result of an unreasonable search would be admissible in a probation revocation hearing,\textsuperscript{40} held that while under federal law the fourth amendment's exclusionary rule was applicable to a new criminal charge but inapplicable to a probation revocation hearing, Florida law mandated a different result:

Article I, section 12, of the Florida Constitution, prohibiting unreasonable searches and seizures, is \textit{more restrictive} than its federal counterpart. . . . The last sentence is an express constitutional exclusionary rule as distinguished from the federal rule which exists by case decision. As a consequence, in Florida for evidence derived from a search or seizure to be admissible in either probation revocation proceedings or a new criminal action, the evidence \textit{must be properly or reasonably obtained.}\textsuperscript{41}

\textit{Grubbs} thus represents the initial holding that Florida's provision is "more restrictive" than the federal.

The subsequent decision of Hetland \textit{v. State}\textsuperscript{42} appeared to reverse the "more restrictive" approach of \textit{Grubbs}. In Hetland, the district court of appeal was confronted with the question of "whether a higher or different standard" was to be utilized in Florida to determine the validity of a \textit{Terry}\textsuperscript{43} stop and frisk.\textsuperscript{44} The court adopted \textit{in toto} the opinion of the court below\textsuperscript{45} which, citing Thurman and Houston \textit{v. State},\textsuperscript{46} stated: "We have no difficulty in concluding that the search and seizure provision of the Florida Constitution imposes no higher standard than that of the Fourth Amendment to the United States Constitution."\textsuperscript{47}

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38. Id. \\
39. 373 So. 2d 905 (Fla. 1979). \\
40. Id. at 908. \\
41. Id. at 909 (emphasis added). A fair translation of this is that once a court has determined evidence to be unreasonably seized under federal or Florida law, it must be excluded. \\
42. 387 So. 2d 963 (Fla. 1980). \\
44. 366 So. 2d 831, 836 (Fla. 2d DCA 1979). \\
45. "Since it would serve no useful purpose to expand upon the exhaustive and well reasoned analysis of the district court below, we hereby adopt its opinion as our own." 387 So. 2d at 963. \\
46. 113 So. 2d 582 (Fla. 1st DCA 1959) (rulings of the federal courts on the meaning of "reasonable" searches generally accepted as authority for rulings under the Florida Constitution). \\
47. 366 So. 2d at 836 (emphasis added). The court erroneously cites \textit{Mapp v. Ohio} for
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THE EXCLUSIONARY RULE IN FLORIDA

The pendulum appeared to swing again in 1981 with two decisions of the court. In the “landmark” decision of State v. Sarmiento the court passed on the constitutionality of a statute which authorized the warrantless, electronic interception of communications by police officers under certain circumstances. Pursuant to that statute, conversations between the defendant and an undercover police officer in the defendant’s home were transmitted to officers stationed outside the defendant’s dwelling. At trial, the eavesdropping officers testified to the conversations. The court held that such an interception, conducted in the home, was “unreasonable” under article I, section 12, despite Justice Alderman’s argument in dissent that the activity in question was permissible under federal law since it did not involve a justifiable expectation of privacy. Recognizing a fundamental principle of federalism, the majority stated that “the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution.” In Odom v. State, the court, on similar facts, held that while there was no bar under federal law to admission of the taped conversations, once the evidence was found to have been obtained in violation of article I, section 12, and was thus an “unreasonable” search under Florida law, the evidence was inadmissible in Florida courts. The court held that Florida’s constitutional principle would apply “regardless of whether the evidence in question was obtained in violation of the Fourth Amendment, and regardless of the scope of the Fourth Amendment exclusionary rule.”

the proposition that the fourth amendment applies to the states. Id. at 836 n.9. The Mapp decision, more correctly, applied the exclusionary rule to the states. See supra notes 18-20 and accompanying text.

49. 397 So. 2d 643 (Fla. 1981).
50. Id. at 645.
52. 397 So. 2d at 645. See also Hoberman v. State, 400 So. 2d 758 (Fla. 1981).
54. Id. at 939-40.
55. Id. at 940. The court cited Taylor v. State, 355 So. 2d 180 (Fla. 3rd DCA 1978) for this proposition.
Adoue v. State provides the last supreme court discussion before Rickard on the issue of the relationship between the Florida and federal provisions. The majority relied on federal law to find the warrantless seizure of marijuana from a parked airplane to comport with constitutional guarantees. While the majority did not address the extent of Florida's provision, then-Chief Justice Sundberg, in his partial dissent cited Grubbs while reiterating that "Florida's constitutional mandate is more restrictive than its federal counterpart" in that it has "expressed its preference for exclusion" of evidence obtained as a result of an unreasonable search. Chief Justice Sundberg also noted that a finding of the unreasonableness of the search was "dictated by our state constitution with its greater concern for the privacy of Florida's citizens." It was therefore the chief justice's opinion that, notwithstanding the permissibility of the activity under the United States Constitution, the state constitution should be utilized to invalidate such a search.

B. The District Court Opinions

The various district courts of appeal have also struggled with a proper interpretation of the scope of Florida's provision and the relationship to its federal counterpart; the decisions are also somewhat inconsistent. These district court decisions are important statements of present search and seizure law, as the Rickard court relied heavily on them to reach its conclusions on the scope of Florida's provision. In Dornau v. State, the Second District Court of Appeal addressed the issue of whether two illegally seized parking tickets which placed the defendant at the scene of an extortion attempt could be admitted into evidence for rebuttal purposes. Federal law permitted the introduction of illegally seized evidence from a prior prosecution for purposes of rebuttal. The

56. 408 So. 2d 567 (Fla. 1981).
58. 408 So. 2d at 577 (Sundberg, C.J., concurring in part and dissenting in part) (emphasis added) (footnote omitted).
59. Id. at 575 (emphasis added).
60. Id. at 577.
61. 306 So. 2d 167 (Fla. 2d DCA 1974), cert. denied, 422 U.S. 1011 (1975).
62. Id. at 168.
63. Id. at 169. The federal case cited was Walder v. United States, 347 U.S. 62 (1954), a case which pre-dates Mapp. The court's language seems to state, however, that judicial interpretation between the Mapp decision in 1961 and the constitutional revision in 1968 was
court concluded that although the evidence was illegally obtained it could have been used by the state for impeachment purposes, notwithstanding the exclusionary rule incorporated into Florida's constitution:

[W]e are of the view that this language was intended merely to incorporate expressly the exclusionary rule first promulgated in Weeks v. United States and made binding on the states in Mapp v. Ohio. Certainly, we think, there was no intent to enlarge the exclusionary rule.

We are of the view, too, that such incorporation of the exclusionary rule must necessarily include all judicial expression and interpretation of the rule existing at the time the constitution was revised.

Note that this "no intent to enlarge" language of Dornau thus appears facially to conflict with the "more restrictive" supreme court language of Grubbs. The Dornau analysis also differs from Grubbs in that it goes beyond the language of the provision to take a more interpretive approach.

In the subsequent decision of Taylor v. State, the Third District Court of Appeal addressed the validity under the federal and Florida constitutions of the defendant's consent to a search. The consent was given after the marine patrol officer involved had already begun an illegal search. The court recognized the independent nature of the Florida exclusionary rule, stating that "even if the federal exclusionary rule is changed, this in no way affects the fifty year old rule in Florida that evidence seized in violation of Article I, Section 12, of the Florida Constitution is inadmissible in evidence." The court did not, however, address which provision provided "greater" protection, finding instead that both the Florida and federal provisions had been violated.

A footnote in Blatch v. State, another Third District Court of

also incorporated.

64. 306 So. 2d at 169-70 (footnotes omitted).
65. 355 So. 2d 180 (Fla. 3d DCA 1978).
66. Id. at 181-82.
67. Id. at 184. See also Norman v. State, 388 So. 2d 613, 614 (Fla. 3d DCA 1980) (stating that an overruling of Mapp v. Ohio "would have no effect upon our constitutional mandate"); State v. Hutchinson, 404 So. 2d 361, 363-64 (Fla. 2d DCA 1981) (federal standards are a minimum requirement and state courts are unaffected by federal retreat if they independently meet the federal minimum).
68. 355 So. 2d at 186.
69. 389 So. 2d 669 (Fla. 3d DCA 1980).
Appeal opinion, appears to agree with the Dornau rationale, finding that "[t]he effect of making the exclusionary rule a part of the Florida Constitution in 1968 . . . was not to impose an exclusionary rule, but rather to give the existing exclusionary rule constitutional dimension immunizing it from possible future retreat by the United States Supreme Court from its holding in Mapp." But in State v. Thomas, the Third District Court of Appeal in a marked departure from its prior analysis, held that Payton could not be applied only prospectively. Contrary to the Dornau analysis, the court reasoned that once it is decided that the evidence was obtained illegally, Florida courts are "mandated" to exclude the evidence because of Florida's express exclusionary rule. The Thomas court cited and relied on Grubbs and Odom to reach this conclusion.

C. The Rickard Holding

Against this vacillating case law background on the extent of Florida's constitutional prohibition against unreasonable searches and seizures and its constitutionally enforced exclusionary rule, the Rickard court held in its initial opinion that "[t]he exclusionary rule embodied in the Florida Constitution was no broader than the federal exclusionary rule." The court in this regard cited the footnote in Blatch that it was the existing exclusionary rule that was incorporated into the constitution, and the Dornau position that there was no intent to enlarge the exclusionary rule. It also cited State v. Hutchinson, and its own decision in Hetland. The

70. Id. at 675 n.6 (emphasis added). The Blatch court cited its prior holding in Norman v. State, 388 So. 2d 613 (Fla. 3d DCA 1980), for this proposition. Norman, however, stated that unless Florida courts had adopted a fourth amendment principle (there, automatic standing) independently of federal requirements, Florida courts were "free" to reject it if the federal courts "took it away." 388 So. 2d at 615. But the issue in Norman involved a pre-Mapp decision, Jones v. United States, 362 U.S. 257 (1960), which had therefore become part of the "existing exclusionary rule" at incorporation, while the decision which "took it away," United States v. Salvucci, 448 U.S. 83 (1980), was a post-Mapp, post-incorporation retreat from Mapp. Thus, the Blatch footnote appears to preclude the Norman rationale, i.e., Florida could not be "free" to discard the incorporated principle if the incorporation was designed to "immunize" the rule from just such a "retreat," as Blatch hypothesized. Ironically, the two cases were decided by the court less than a month apart.

71. 405 So. 2d 462 (Fla. 3d DCA 1981).
72. Id. at 463.
73. Id.
74. Appendix, infra, at 410.
75. Id. See supra notes 66-67 and accompanying text.
76. Appendix, infra, at 410. See supra notes 61-64 and accompanying text.
77. Appendix, infra, at 410. See supra note 67.
Thomas decision, which had relied on the supreme court decisions in Grubbs and Odom to find a stricter provision in Florida, was specifically disapproved. 79

III. THE HISTORY OF THE 1968 CONSTITUTIONAL REVISION

Against this confusing collection of judicial interpretation an analysis of the history and intent of the incorporation of the exclusionary rule into the Florida constitution is appropriate. The minutes of the Constitutional Revision Commission of 1966-1968 80 furnish a basis for constructing the legislative intent behind the incorporation. 81 During the debates, Senator Friday, in response to a question from Mr. Turlington as to why this provision was needed, stated:

It's entirely possible that over a period of time a repeated erosive action such as [the federal efforts] might eventually wear down the substantive law, the case law, to the point that [illegally seized evidence] could be used; and if we write it into the Constitution, then it is clear.

... [I]t hasn't yet been done. I say to you, however, that there are many things that have come about in the past few years by court decree that were previously determined to be clearly unconstitutional but not specifically spelled out. ...

... I think we set up several additional barriers against that erosive process. 82

Justice B. K. Roberts, who was chairman of the Committee on Human Rights which drafted the provision to incorporate the exclusionary rule, also spoke at length in favor of the provision, stating: "The exclusionary rule should not continue to hang in this state on the slender threat [sic] of case law. It should be written

78. Appendix, infra, at 410. See supra notes 42-47 and accompanying text.
79. Appendix, infra, at 409. See supra notes 71-73 and accompanying text.
80. Minutes of the Constitutional Revision Commission, Vol. 4, § 12 (Nov. 28 - Dec. 16, 1966) (on file in "Special Collections," Florida State University Law Library; copies are available at the Florida Board of Archives and the Florida Supreme Court Library) [hereinafter cited as Minutes].
82. Minutes, supra note 80, at 288-89. The provision being debated was a lengthier version of what now appears as the last sentence of article I, section 12 which was substituted as "the same thought." Id. at 294.
into the Constitution." In response to Mr. Turlington's continued reservations as to the need for the provision itself, the "inflexible language" used, and the lack of any definite statement as to what the provision would do, Justice B. K. Roberts responded:

Let me explain [the exclusionary rule]. I realize that you probably are not as familiar with that as some of the rest of us. The exclusionary rule . . . simply means that if evidence is obtained against you in violation of one of your fundamental constitutional rights, the majesty of the law will not permit that evidence to be used against you and will exclude it from your trial. Now, that's the exclusionary rule that is presently the law of this state by judicial decision.

. . . .

If I told you [this provision] simply writes into the organic law of the state the exclusionary rule which is now made a part of the case law of the state, would you still object to putting it in the organic law?

. . . .

. . . [T]he purpose of the last sentence in this amendment is for no other purpose in the world except to write the exclusionary rule into the Constitution of this state. It does not change any existing law. It simply insures to the people of this state that 10, 15, 20 years from now the courts of this state could not recede from the exclusionary rule as we now know it.

. . . [W]e might change judges and we might change decisions and we might change case law, but we're not going to change the exclusionary rule. 87

Another appropriate source of the intent behind the language is the section-by-section commentary to the 1968 revision of the constitution authored by Talbot "Sandy" D'Alemberte. The comment to article I, section 12, states: "The other major change contained in this section is the incorporation of the evidentiary exclusionary rule into the constitution. . . . This exclusionary rule was approved by the United States Supreme Court in Weeks v.

83. Id. at 291.
84. See, e.g., id. at 289, 311-17, and 337-38. Mr. O'Neil and Mr. Taylor expressed similar reservations. Id. at 287, 301.
85. See, e.g., id. at 317, 327, 334, 338, 341, and 345.
86. See, e.g., id. at 313, 315, 316 and 338.
87. Id. at 337-40 (emphasis added).
United States . . . and the Weeks principle was made binding on
the states by Mapp v. Ohio." 89

To summarize this history, it appears that the intent of the re-
visors was to "freeze" the rule as it existed at the time of the incor-
poration and to thereby prevent any further "erosion" of the rule
in Florida. Although not explicit, it is logical to assume that the
"judicial interpretation" of the court-made rule was incorporated
as well. 90 The problem, however, with fixing an interpretation of an
ephemeral judicial construct like the exclusionary rule as of some
given moment in time is that it becomes conceptually difficult to
isolate exactly what exclusionary doctrine was incorporated. What
is and is not to be excluded under the exclusionary rule has never
been very clear. 91 Ironically, the language ultimately chosen to ex-
press the revisors' intent, i.e., that the rule "as we now know it" be
incorporated to prevent further "erosion," did not reflect that in-
tent. The language of article I, section 12 is absolute as to exclu-
sion once a determination of unreasonableness has been made:
"Articles or information obtained in violation of this right shall not
be admissible in evidence." 92 The supreme court, however, by judi-

cial interpretation prior to the 1968 constitution, had authorized
the admission of "unreasonably" seized evidence into various pro-
ceedings and for various purposes. 93 These decisions authorizing
the admission of evidence "unreasonably" seized were therefore
arguably incorporated as part of the rule then in effect.

As evidenced by the case law discussion above, Florida courts
have generally used an "unreasonableness" determination as a test
for exclusion and have ignored historical analysis. This is in accord
with the unequivocal plain meaning of the constitutional language.
But under the historical perspective, "unreasonably" seized evi-

90. This is the interpretation adopted by Dornau. See supra note 64 and accompanying
text.
91. "The course of true law pertaining to searches and seizures . . . has not — to put it
mildly — run smooth." Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J.,
concurring).
93. See, e.g., Linkletter v. Walker, 381 U.S. 618 (1965) (retroactivity); Walder v. United
States, 347 U.S. 62, 65 (1954) (use of fruits of "unreasonable" search from different prosecu-
tion admissible for impeachment). This is in spite of language in the opinions apparently to
the effect that all such evidence be excluded. Davis v. Mississippi, 394 U.S. 721, 724 (1969)
(citing to Mapp v. Ohio); Mapp v. Ohio, 367 U.S. 643 655 ("We hold that all evidence ob-
tained by searches and seizures in violation of the Constitution is . . . inadmissible in a state
court"); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). It seems all
such evidence will be excluded, but not in all situations.
vidence may be admitted in Florida if those judicial interpretations
which had the effect of allowing such evidence to be used were part
of the "incorporated" law.

To further complicate the analysis, only "unreasonably" seized
evidence violates the federal and state constitutions and both the
federal and state definitions of an "unreasonable" search are con-
tinually changing concepts. The definition of "unreasonable" de-

pends on striking some balance between the intrusiveness of the
search and the benefit to the public. Furthermore, if this defini-
tion is not evasive enough, the "costs" of applying the exclusionary
rule are figured under some modern juristic methodologies into the
unreasonableness determination — "illegally" seized does not
equal "unreasonably" seized.

Study of the extent and applicability of Florida's exclusionary
 provision must therefore address two issues. Courts must first de-
terminate whether the introduction of the evidence is barred by the
plain language of the provision, i.e., does the Florida Constitution
"mandate" exclusion once "unreasonableness" is found. Second,
the court must determine whether the evidence nevertheless
should be admitted under an historical analysis as part of the "in-
corporated" search and seizure law.

IV. A COMPARATIVE ANALYSIS

With the history of the exclusionary provision now in focus, an
attempt may be made to reconcile the language of the pre-Rickard
opinions and, in those cases in which the exclusionary provision
itself is implicated, to analyze the cases for consistency with the

94. Carroll v. United States, 267 U.S. 132, 147 (1925); United States v. Richards, 638
F.2d 765, 770 (5th Cir. 1981); Amsterdam, Perspectives on the Fourth Amendment, 58
Minn. L. Rev. 349, 358 (1974).
95. See generally Amsterdam, supra note 94, at 358-67.
96. Project, Eleventh Annual Review of Criminal Procedure: United States Supreme
97. Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared
189 (1978). Note the usefulness of the approach to Florida. The constitutional language
only mandates exclusion once an unreasonableness determination is made. To the extent
the courts, federal or state, label the search and seizure "unreasonable," evidence must be
excluded, at least as far as the language is concerned. If, however, the courts utilize the
analysis which considers the "costs" of exclusion in the process of defining if the "illegal"
search is "unreasonable," the "illegally" seized evidence could be admitted as "reasonably"
seized. Thus, the harsh result of the "absolute" constitutional language could be tempered
by the use of existing search and seizure principles.
98. Id. at 917.
language and history of the constitutional provision. While the Florida Supreme Court has not attempted to harmonize the seemingly 180 degree turns in the language of the opinions, it is possible on close analysis to reconcile the pre-Rickard opinions. The problem is the court’s lack of precision in the language of the opinions. An analysis of the context in which conflicting language appears will reveal that a coherent framework for search and seizure analysis under the Florida Constitution may be established. Throughout the analysis in this section, it is imperative that the distinction made earlier between the substantive constitutional prohibitions and the exclusionary rule itself be kept in mind.

A. Supreme Court Cases

In Croteau,99 the first supreme court case to focus on the exclusionary rule issue following the incorporation of the rule into the constitution, the majority simply did not address the issue of the extent of Florida’s provision. The holding, though, reflects an offense against the plain language of article I, section 12. The search was characterized as “unreasonable” yet the court found that the evidence would have been admissible in a probation revocation proceeding in spite of the constitutional language that evidence obtained in violation of the right against such searches shall not be admissible. The determination under the historical analysis of whether the evidence should have been admitted as part of the exclusionary rule law “incorporated” into the constitution illustrates the conceptual difficulty discussed above. The cases are not clear as to whether the pre-Mapp, pre-incorporation law excluded such evidence from probation revocation hearings.100 The post-Mapp, post-incorporation cases are equally confused as to the applicability of the rule to probation revocation proceedings.101 The Croteau

99. 334 So. 2d at 580. See supra notes 35-38 and accompanying text.
100. See, e.g., Brown v. Kearney, 355 F.2d 199 (5th Cir. 1966) (parolee is entitled to constitutional protection from illegal search but not necessary to pass on question); Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950) (fourth amendment applies to probationer although probationer status is a factor to consider in determining the unreasonable-ness of the search).
101. Compare United States v. Rea, 678 F.2d 382, 388 (2d Cir. 1982) (exclusionary rule applicable to probation revocation proceeding) and United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978) (exclusionary rule applicable; illegally seized evidence inadmissible at probation revocation proceedings) with United States v. Farmer, 512 F.2d 160, 162 (6th Cir. 1975) (absent police harassment, exclusionary rule does not apply at a probation revocation hearing) and United States v. Wiygul, 578 F.2d 577, 578 (5th Cir. 1978) (exclusionary rule does not apply to probation revocation hearing absent police har-
court, however, found the rule inapplicable because of the administrative nature of the proceeding. Under this view, the historical analysis would have permitted the admission of the unreasonably seized evidence as part of the incorporated Florida law.

In contrast with Croteau, the Grubbs analysis, which would exclude “unreasonably” obtained evidence from a probation revocation proceeding, is consistent with the constitutional language. The court found that a probation condition authorizing a warrantless search of a probationer by a law enforcement officer to be “unreasonable” under Florida and federal law. It therefore executed the Florida constitutional provision mandating exclusion of any evidence seized pursuant to that search. The “more restrictive” language of Grubbs refers to the exclusionary rule, and not the substantive provisions of article I, section 12. As previously established, Florida’s exclusionary rule is “more restrictive” than its federal counterpart for several reasons. First, the language expressly excludes the evidence once it is labeled “unreasonably” seized, while the federal exclusionary rule is a variably applied concept existing by case decision only. Second, the intent of the revisors was to “freeze” the rule at the time of the incorporation of the provision into the constitution, thereby committing Florida to resist the post-Mapp, post-incorporation “retreat” which the federal courts have allowed in construing the fourth amendment.

102. 334 So. 2d at 580. Contra Workman, 585 F.2d at 1209 (probation revocation proceeding is adjudicatory). Significantly, Mapp applied to criminal proceedings only. 367 U.S. at 659.
103. 373 So. 2d at 908-09. See supra notes 39-41 and accompanying text.
104. Id.
105. See supra notes 80-90 and accompanying text.
106. The Mapp decision itself has been described as a “watershed” marking the point from which future decisions would seek to limit the exclusionary rule rather than expand it. The shift was facilitated by the growing discontent with the rule which prompted then-President Nixon to appoint conservatives to the Court, including Chief Justice Burger. The additional appointment of Justices Blackmun, Rehnquist and Powell radically changed the posture of the Court toward the exclusionary rule. The Warren Court’s approach to the fourth amendment was marked by extensive use of the rule; the Burger Court has distinguished itself by refusing to extend it. See Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?, 30 DePaul L. Rev. 51, 58-72 (1980); Comment, Reason and the Fourth Amendment — The Burger Court and the Exclusionary Rule, 46 Fordham L. Rev. 139, 148-59 (1977).
An historical analysis of the Grubbs opinion is inconclusive, as the cases are again not clear as to the applicability of the exclusionary rule to probation revocation proceedings.107

The next decision by the court on this issue was State v. Hetland.108 The language in Hetland that "the search and seizure provision" in Florida "imposes no higher standard" than the federal provision109 is explainable as consistent with the seemingly conflicting "more restrictive" language of Grubbs once the context is reviewed. The imprecise use of the term "search and seizure provision" creates the confusion. While the Grubbs "more restrictive" statement was addressed to the exclusionary rule, the "no higher standard" language in Hetland referred to the standard as to what constituted an "unreasonable" search under the Florida Constitution, i.e., the substantive provision of article I, section 12, and not the exclusionary rule.

Similarly, in State v. Sarmiento,110 the majority’s "more protection" language is reconcilable with "the no higher standard is imposed" language of Hetland, regardless of the facial conflict. The issue in Sarmiento was again the "unreasonableness" of the search under Florida constitutional law.111 While it is true that no higher standard for unreasonableness is imposed by article I, section 12, it is fundamental that a state may provide its citizens with a higher standard of protection than the federal law provides when defining the unreasonableness of a search under state law.112 Thus, the Sarmiento language that a state may provide greater protection via a higher standard is entirely consistent with the Hetland rationale that a higher standard is not imposed. Of course, once the evidence was found to have been obtained by an "unreasonable" search under the state constitution, the plain language of the state exclusionary provision mandated exclusion. The historical analysis is not applicable in Sarmiento because Sarmiento dealt with an expansion of the "reasonable search" determination under Florida law and not the question of whether the exclusion of evidence was required as a part of the exclusionary rule incorporated into Flor-

107. See supra notes 100-02 and accompanying text.
108. 366 So. 2d at 836. See supra notes 42-47 and accompanying text.
109. Id.
110. 397 So. 2d at 645. See supra notes 49-52 and accompanying text.
111. Id.
ida law in 1968.\textsuperscript{113} The subsequent decision in \textit{Odom v. State}\textsuperscript{114} is also consistent with \textit{Grubbs, Hetland} and \textit{Sarmiento}. \textit{Odom} initially dealt with the same issue as \textit{Sarmiento}, finding the search "unreasonable" under the Florida Constitution, but not under the federal constitution. The court concluded with the observation, however, that the fruits of the search must therefore be excluded from evidence.\textsuperscript{115} Thus, \textit{Odom} addressed both the substantive protections under the "unreasonable searches and seizures" language of article I, section 12, as well as the exclusionary rule provision of that section. The court followed the \textit{Sarmiento} "more protection" perspective as to the substantive "unreasonableness" of the search. In addition, the court's conclusion that the Florida exclusionary rule applied "regardless" of federal provisions, is consistent with the language of the Florida provision, since the search was characterized as "unreasonable" under Florida law and therefore mandated the exclusion of evidence "regardless" of the fourth amendment.\textsuperscript{116} The historical analysis for \textit{Odom} is the same as for \textit{Sarmiento}, as again the issue was the expansion of substantive protections under Florida law.\textsuperscript{117}

The last pre-\textit{Rickard} supreme court language on the issue was then-Chief Justice Sundberg's comments in his partial dissent in \textit{Adoue v. State}.\textsuperscript{118} The comments again failed to differentiate between the substantive protections of article I, section 12, and the exclusionary rule provision. On close examination, however, it is apparent that the "more restrictive" statement is addressed to the exclusionary rule,\textsuperscript{119} while the "greater concern for privacy" language is addressed to the substantive provision.\textsuperscript{120} In this regard, the chief justice's comment that the "greater concern for privacy"
is "dictated" by the constitution is misleading. A more stringent exclusionary rule is "dictated" for our state courts by virtue of the incorporation of the rule in the constitution\textsuperscript{121} but, as noted above, the state may, but is not required to, impose higher standards as to what constitutes an "unreasonable" search through interpretation of its state constitution.\textsuperscript{122}

B. The District Court Opinions

An attempt to reconcile the district court opinions presents a little more difficult challenge. The Second District Court of Appeal in Dornau would have admitted "illegally seized" evidence for the purposes of impeachment because the court reasoned that such admissibility was part of the federal "judicial interpretation" incorporated by the Florida provision.\textsuperscript{122} This is a correct historical analysis, as the use of such evidence was part of incorporated Florida law. The holding, however, that unreasonably seized evidence could be admissible in rebuttal or in cross examination violates the plain, express constitutional language that such evidence shall be excluded. Dornau therefore illustrates the conflict noted earlier between the legislative history of the provision, which supports the incorporation of case law permitting the use of "unreasonably" seized evidence, and the absolute constitutional language, which mandates the exclusion of such evidence.\textsuperscript{124} Dornau's "no intent to enlarge the exclusionary rule" language can be reconciled with the Grubbs and Adoue comments that Florida's exclusionary provision "is more restrictive." There certainly was no intent to enlarge the rule.\textsuperscript{126} As noted above, however, the absolute language has the effect of making the provision "stricter" as to exclusion once an "unreasonableness" determination is made. Further, an "enlargement" necessarily resulted when the federal courts retreated from a mechanical application of the rule, thus leaving Florida behind with a "stricter provision."\textsuperscript{126}

The next district court opinion on this subject was the Taylor v.

\textsuperscript{121} See supra notes 103-06 and accompanying text.
\textsuperscript{122} See supra note 112 and accompanying text. Note also the progression from Hetland (imposes no higher standard) to Odom and Sarmiento (may impose higher standards) to Adoue (higher standard "dictated").
\textsuperscript{123} 306 So. 2d at 169-70. See supra notes 61-63 and accompanying text.
\textsuperscript{124} See supra notes 90-98 and accompanying text.
\textsuperscript{125} See supra notes 80-90 and accompanying text.
\textsuperscript{126} The result of this freezing of the exclusionary rule thus comports with the revisors' intent.
State decision in which the Third District Court of Appeal found the Florida provision to be unaffected by federal retreat.127 This conclusion accurately reflects the history of the revision and incorporation of the exclusionary rule and the necessary implications of the absolute language of the provision.

The footnote in Blatch v. State, which found the "existing exclusionary rule" to have been incorporated in 1968,128 addressed only the exclusionary provision of Florida's constitution. As in Dornau and Taylor, this finding is consistent with an historical analysis. Further evidence of the court's awareness of the historical perspective is provided by the court's recognition that the evidence would have been excluded under pre-incorporation law.129

The final district court opinion, State v. Thomas,130 was also from the third district. The Thomas court's reasoning in not applying Payton retroactively was that once a determination of unreasonableness is made the evidence must be excluded. This rationale is a proper reading of the constitutional language but ignores the fact that under an historical analysis, illegally obtained evidence may be admitted when the admission of such evidence is part of incorporated search and seizure doctrine.131

C. An Analysis of the Rickard Court's Posture

With the plain language analysis and the conceptually more difficult "historical" analysis of the revisors' intent in place and often at odds with each other, the initial Rickard decision can now be examined. The majority's conclusion that Florida's exclusionary rule "was no broader than the federal" may now be examined. The court cited with approval the language of the second district in Dornau that there "was no intent to enlarge the exclusionary rule."132 Similarly, the court agreed with the footnote in Blatch, finding that the effect of incorporating the rule was merely to immunize the existing rule from possible retreat from Mapp.133 The court also cited its own decision in Hetland to support its position. This citation to Hetland is inappropriate, however, as Hetland was not an exclusionary rule case but addressed instead the issue of the

127. 355 So. 2d at 184. See supra notes 65-68 and accompanying text.
128. 389 So. 2d at 675 n.6. See supra notes 69-70 and accompanying text.
129. Id.
130. 405 So. 2d at 463. See supra notes 71-73 and accompanying text.
131. See supra notes 93-98 and accompanying text.
132. Appendix, infra, at 410.
133. Id. See supra notes 42-46, 108 and accompanying text.
substantive standard of unreasonableness under Florida law, as did Sarmiento and, partially, Odom.

There must be serious doubt, however, about the viability of the Grubbs and Odom line of reasoning to the extent those cases held that a finding of "unreasonableness" of a search or seizure mandates the exclusion of evidence. The bare statement in the initial Rickard decision that the Florida exclusionary rule "was no broader than the federal" can be reconciled on a semantic level with the Grubbs language that Florida's provision "is more restrictive than its federal counterpart," despite the apparent facial inconsistency. As noted previously, the provision was no broader, but is currently more restrictive owing to the absolute language and the fact that the federal retreat has been prevented by freezing the rule's development by incorporation.¹³⁴

The conclusions reached, however, cannot be so reconciled. Odom and Grubbs stand for the proposition that once evidence is found to have been obtained as a result of an "unreasonable" search, as defined by either federal or state standards, Florida courts must exclude that evidence because of Florida's express provision requiring as much — even if the federal courts are not similarly bound.¹³⁵ The Rickard court, however, reasoned as follows: since (1) federal courts can apply Payton non-retroactively¹³⁶ (citing United States v. Peltier¹³⁷ for this proposition) and (2) the Florida exclusionary rule was no broader than the federal rule, therefore (3) Florida courts also can apply Payton non-retroactively.¹³⁸ It is extremely important to note, however, that in

¹³⁴ See supra notes 104-06, 125-26 and accompanying text.
¹³⁵ See the discussion of Odom at notes 53-55 and 114-16 and of Grubbs at notes 39-41 and 103-04. This reading of Odom and Grubbs was in fact the basis for the Thomas court's holding. See supra notes 71-73 and accompanying text. Note, Probation: The Florida Exclusionary Rule Fills the Fourth Amendment's Empty Promise, 9 Stetson L. Rev. 424, 437 (1980). The Thomas court hinted that for the same reason Florida courts could not adopt a "good faith exception" to the exclusionary rule. See infra notes 161-62 and accompanying text.
¹³⁶ Appendix, infra, at 405-08. This conclusion has since been overruled. See supra note 15 and accompanying text.
¹³⁷ 422 U.S. 531 (1975). Peltier summarized retroactivity law as follows:

The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

Id. at 537.
¹³⁸ Appendix, infra, at 411 ("[W]e decline to apply Payton retroactively").
the retroactivity cases, including *Peltier*, courts initially assume that the conduct does *in fact* violate constitutional principles, i.e., the evidence is the result of an "unreasonable" procedure. Nevertheless, the courts then decline to exclude the evidence based on a retroactivity analysis of some nature. The *Rickard* court's intimation, therefore, that the Florida provision allows for this introduction of "unreasonably" seized evidence does violence to the *ratio decidendi* of *Odom* and *Grubbs*, and therefore cannot be reconciled with those decisions. Finally, the *Rickard* court's rejection of *Odom* and *Grubbs* is evident in its specific disapproval of the district court opinion in *Thomas*. *Thomas* had cited *Grubbs* and *Odom* for the proposition that Florida courts were prohibited from admitting illegally seized evidence because of Florida's express provision.

Then-Chief Justice Sundberg's comment in *Adoue* that Florida's provision "is more restrictive" than its federal counterpart can also be reconciled with the language, but not the conclusion of *Rickard*. The chief justice was referring by this language in *Adoue* to the fact that Florida's provision is express as to exclusion once "unreasonableness" is found. The *Rickard* court's failure to exclude the evidence once an unreasonableness determination has been made is thus contrary to the chief justice's prior pronouncement.

The *Hetland* and *Sarmiento* opinions, and those portions of *Odom* and *Adoue* which addressed the "greater protection" afforded Floridians under the Florida Constitution, can emerge unscathed from a finding such as that made by the *Rickard* court. Those cases, as noted above, speak to the substantive protections under article I, section 12, while the *Rickard* court addressed the exclusionary rule.

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139. "[N]othing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated." 422 U.S. at 542. In fact, even the question of whether to apply the exclusionary rule assumes a present determination that the conduct violated some constitutional norm. A proper application of the exclusionary rule generally involves this two-part test. Note, *supra* note 97, at 917; Mertens & Wasserstrom, *supra* note 18, at 373-75.
140. *See* 405 So. 2d at 463; Appendix, *infra*, at 409.
141. *See supra* notes 103-06, 125-26 and accompanying text.
142. 408 So. 2d at 577.
143. Note that this conclusion raises a possibility similar to that discussed *supra* at note 113. If, as in *Sarmiento*, the scope of substantive protections under Florida law *exceeds* that of federal law but, as *Rickard* intimates, the Florida exclusionary provision would not require exclusion because Florida's provision "was no broader" than the federal, which would
The conclusion of the supreme court in the initial Rickard decision, in addition to disrupting the heretofore reconcilable case law on the subject, is consistent with neither the express language of the Florida Constitution's exclusionary rule provision nor the history of that provision. As previously noted, any retroactivity analysis such as that used in Rickard assumes an initial violation of constitutional rights before passing on the exclusion question. Additionally, Payton had specifically declared the activity in question in Rickard — the warrantless home arrest and subsequent taking of evidence — to constitute an "unreasonable" seizure. Whether one "assumes" an unreasonable procedure or that procedure is determined unreasonable, the plain language of the Florida provision precludes the introduction of evidence seized pursuant to such a procedure.

The court initially attempted to distinguish Rickard's situation, however, by stating that "the search and seizure were constitutionally reasonable" by "express judicial interpretation." While this may have been true, it is presently an unreasonable seizure owing to the Payton decision. The Florida provision's language excludes "unreasonably" seized evidence regardless of pedigree. If the court was suggesting that somehow the search and seizure in question is "reasonable" under article I, section 12, but "unreasonable" under the fourth amendment, then a fiction of the greatest sort was being employed, as the federal standard is a minimum on the states under the due process clause of the fourteenth amendment.

An historical analysis of the initial Rickard decision also reveals that the opinion was not consistent with the intent of the revisors in incorporating the exclusionary rule. In denying Payton retroactive effect the court cited extensively to United States v. Peltier and utilized the three-factor test espoused by the Supreme Court not exclude it, then the evidence seized in violation of article I, section 12, but not the fourth amendment, would not have to be excluded. At least one authority, however, has suggested that in a Sarmiento situation, where the legislature has defined the authority of the police to act too broadly, the evidence should still be excluded. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 Prrt. L. Rev. 307, 350 (1982).

144. 445 U.S. at 576.
145. Appendix, infra, at 409-10.
147. Appendix, infra, at 405-06.
prior to its recent opinion in United States v. Johnson. The court found that "[p]erhaps the most important of these factors is the purpose to be served by the new constitutional rule" which was "to deter illegal police action." The court concluded that the purpose of the rule could be achieved without applying the rule retroactively. Note, however, that if the revisors' intent was to prevent "erosion" of the rule by incorporating it in 1968 then the Rickard court's reliance on the 1974 decision of Peltier and a deterrence analysis is not justified, as Peltier is widely recognized as an integral part of the federal "retreat" from Mapp. The establishment of a deterrence rationale as the prime purpose of the rule is credited as the vehicle that the federal courts have used to modify, or retreat from, the rule: the rule would not be applied when its deterrence purpose would not be furthered. To the ex-

148. See supra note 15 and accompanying text.
149. Appendix, infra, at 410-11; But see Senate Staff Analysis and Economic Impact Statement, SJR 102 (March 12, 1982) (on file with the Senate Judiciary Civil Committee.) The analysis found no suggestion in the history of the Florida rule that the purpose of the rule is to deter illegal police activity. Id. at 3. The staff analysis correctly recognizes the rule as being a judicially created protective mechanism rather than a right in and of itself, id. at 2; see Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Peltier, 422 U.S. at 538 (1975); United States v. Calandra, 414 U.S. 338, 348 (1973); Wolf v. Colorado, 338 U.S. at 28 (1949); Comment, supra note 106, at 156, but it fails to make the connection that the rule "protects" by deterring. See, e.g., Calandra, 414 U.S. at 348; Mapp v. Ohio, 367 U.S. at 655, 658; Elkins v. United States, 364 U.S. 206, 217 (1960); Wolf, 338 U.S. at 31. The intent in incorporating the rule was to prevent further erosion by adopting the rule, as it existed in 1968, into organic law. See supra notes 82-90 and accompanying text.
150. Appendix, infra, at 411.
152. See infra notes 166-68 and accompanying text. The key to the Peltier decision is the state of mind of the police officer and a consideration of the deterrence rationale before the exclusionary rule is applied. Bernardi, supra note 106, at 65. The Peltier decision is also credited with laying the foundation for future curtailment of the rule to other areas besides retroactivity. Id. at 66.
153. Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. CRIM. L. & CRIMINOLOGY 635, 650 (1978); Note, supra note 97, at 923; Project, supra note 96, at 538. The Peltier decision prompted a strong dissent by Justice Brennan in which he criticized the majority for "covertly" discarding the exclusionary rule by use of the deterrence analysis. 422 U.S. at 561-62 (Brennan, J., dissenting). This analysis has resulted in narrowing the scope of the rule considerably. See Project, supra note 96, at 538.
tent that the *Rickard* court relied on the more traditional analysis\(^{154}\) of the cited pre-incorporation retroactivity cases,\(^{155}\) however, the opinion would be consistent with the revisors' intent, as these opinions and analyses would be available as "incorporated." Nevertheless, the deterrence analysis utilized by the *Rickard* court may not be entirely precluded under the historical analysis by removing *Peltier* from the court's arsenal. The court cited one pre-incorporation case, *Linkletter v. Walker*,\(^{156}\) which utilized some of the deterrence language in denying retroactive effect to the then "new rule" of *Mapp*.\(^{157}\) Unfortunately, as noted previously, the language of the Florida provision militates against the use of any analysis which has the effect of admitting unreasonably seized materials into evidence, no matter how expedient the end result of that analysis.

V. BEYOND *Rickard*

The *Rickard* court's utilization of the *Peltier* analysis in the context of Florida's exclusionary provision is important for another, related reason. The court initially noted that *Peltier* stood for the proposition that "the deterrent function of the exclusionary rule is not served by retroactive application to situations in which officers acted in *good faith reliance* on previously announced standards."\(^{158}\) The further significance of the court's reliance on *Peltier* and the rationale of that case in its analysis of the Florida provision lies in the suggestion that the court may be shifting position with respect to the rule beyond that required to permit the prospective-only application of a search and seizure decision. Even if the *Rickard* analysis — had it not been withdrawn — did not represent a major modification of the Florida rule, the position now

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154. The pre-*Peltier* retroactivity cases involved more of a "traditional" analysis, that is, the application of the now repudiated three-part test to determine retroactive effect. *See* Annot., supra note 15, at 825. It is not clear which way to characterize the *Rickard* opinion. The court cites the traditional three-part test, Appendix, *infra*, at 410. But the court further cites to *Peltier* and its "good faith" and deterrence language and, in applying the three-part test, found the "purpose of the new rule" to be to "deter illegal police conduct." *Id.*
157. 381 U.S. at 626-37. The *Linkletter* holding has also been cited as being "premised" on the deterrence analysis, Bernardi, supra note 131, at 58-59, and it has been suggested that after *Linkletter* the dominant purpose of the rule became deterrence. Mertens & Wasserstrom, supra note 18, at 382; *Note*, supra note 149, at 117 & n.42.
158. Appendix, *infra*, at 405 (emphasis added).
apparently subscribed to by the court certainly would allow for a major alteration. As discussed above, the Third District Court of Appeal in *State v. Thomas* found Florida's constitutionally based exclusionary rule not to permit its purely prospective application because of the provision's express mandate to exclude evidence "unreasonably" seized. The court, significantly, noted further:

For the same reason, it is at best highly doubtful that Florida courts are constitutionally free to adopt the theory advanced by thirteen judges of the fifth circuit in *United States v. Williams* . . . that evidence which is objectively determined to have been unconstitutionally and unreasonably secured may nevertheless be admitted if the officers were acting in subjective "good faith" at the time.

Nevertheless, the *Rickard* court specifically rejected the rationale utilized by the *Thomas* court in making these determinations, suggesting that the *Williams* analysis might now be permissible under Florida law.

This conclusion is bolstered by the fact that the court acknowledged the deterrence rationale for the rule and quoted *Peltier* 's "good faith" analysis, an analysis not necessary to the prospective-only application of *Payton*. As noted above, the recognition of the deterrence rationale as the prime purpose of the rule is credited as the vehicle the federal courts have used to modify the federal rule, and *Peltier* itself is almost universally recognized as a paradigm "good faith" case. *Peltier* was in fact relied on by the

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159. 405 So. 2d 462 (Fla. 3d DCA 1981).
160. Id. at 463. See supra notes 71-73, 130-31 and accompanying text.
161. 405 So. 2d at 463 n.3 (citations omitted). Accord Moline v. State, 404 So. 2d 826 (Fla. 1st DCA 1981); Walden v. State, 397 So. 2d 368 (Fla. 1st DCA 1981). The *Williams* court held, in a bifurcated opinion:

Henceforth, in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

162. Appendix, infra, at 409 ("We disagree").
163. Id. at 410.
164. Id. at 405.
165. LaFave, supra note 143, at 351-52.
166. See Ball, supra note 153, at 641-43, 652-55; Bernardi, supra note 106, at 65-66; Note, supra note 97, at 942-43; Note, Impending "Frontal Assault" on the Citadel: The
Williams court in adopting a good faith exception to the exclusionary rule. Further, Peltier has been described as representing the "technical violations" aspect of the "good faith" exception. A "technical violation" occurs when officers rely on "apparently valid legal directives" which are later invalidated; the rule should not apply in these circumstances as its deterrence rationale is not furthered. With this in mind, recall that the Rickard court found that the police conduct "was constitutionally permissible by express judicial interpretation," that the purpose of the new rule of Payton was deterrence of illegal police action and that this purpose could be furthered without applying the rule retroactively. Thus, the Rickard scenario is, by the court's own expression, arguably within the scope of the "technical violation" aspect of the "good faith" exception as articulated by federal cases and authorities.

Summarizing this last issue, it is difficult to tell just what the Florida Supreme Court's position is on the good faith exception owing to the court's additional use of the traditional retroactivity analysis now rejected by the United States Supreme Court. Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard, 12 TULSA L.J. 337, 352-53 (1976). The Supreme Court has since acknowledged that good faith was part of its rationale in Peltier. Stone v. Powell, 428 U.S. at 485 n.23; Note, supra, at 352.

167. 622 F.2d at 843.
168. Ball, supra note 153, at 635-36, 641-42; Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring); United States v. Williams, 622 F.2d at 841, 843; Note, supra note 149, at 123 & n.84.
169. Appendix, infra, at 409-10.
170. Id. at 410.
171. Id. at 411. Note that the court also found that the "imperative of judicial integrity," another proffered rationale for the rule, see Ball, supra note 153, at 636, was not offended by non-retroactive application. Appendix, infra, at 405-06 (quoting Peltier).
172. Appendix, infra, at 410-11. See supra note 139 and accompanying text. It may appear on first blush that this distinction — whether the court is utilizing a "good faith" or a retroactivity analysis — is not important, apart from indicating a trend in the court. Note, however, that the application of one analysis will have effects not precipitated by the other. For instance, applying the retroactivity analysis to a given case has the effect of giving the litigant at bar the benefit of the ruling even if it will be applied only prospectively otherwise, while the "good faith" analysis would preclude even that litigant of relief. Justice Brennan noted in his Peltier dissent that this would have the effect of stopping "dead in its tracks judicial development of Fourth Amendment rights," 422 U.S. at 554, as it would be pointless to appeal if the evidence would be admitted in any event pursuant to a "good faith" exception. LaFave, supra note 143, at 351 n.235. See also United States v. Johnson, 50 U.S.L.W. at 4748. But see Morrissey v. Brewer, 408 U.S. 719, 719 (1972) (applicable only to future applications for parole); Johnson v. New Jersey, 384 U.S. 719, 733 (1966).
173. United States v. Johnson, 50 U.S.L.W. at 4748. See supra note 15 and accompanying text. It appears that the good faith exception decision expected for so long from the
The court’s citation to the *Peltier* "good faith" language and the apparent repudiation of the doctrine that the Florida Constitution mandates exclusion of evidence unreasonably seized,\(^{174}\) however, indicates that the court may now be ready to modify the Florida provision to permit a more selective application of the exclusionary rule.\(^{175}\) Factually, however, the *Rickard* situation represents probably the most innocuous form of the "good faith" exception,\(^{176}\) militating against any certain forecast of possible future expansion in this direction.

**VI. Conclusion**

The *Rickard* court has only added to the confusion that characterizes the exclusionary rule law of this state. The court’s pronouncement that the Florida provision was no broader than the federal offers no guidance to the lower courts of this state as to just what is the breadth of the Florida rule. Furthermore, the opinion does not distinguish the exclusionary rule itself from the substantive guarantees which it is designed to protect, a shortcoming of prior law on the subject. While the court’s non-retroactive application of *Payton* could possibly be justified by the history of the Florida provision,\(^{177}\) no attempt was made to do so, and such an application would still conflict with the plain meaning of the language mandating exclusion.\(^{178}\) The revisors’ choice of language may have been unfortunate, but it does, as feared by those members of the Revision Commission who expressed doubt about its "inflexi-

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United States Supreme Court, see Note, supra note 166, at 356; Bernardi, supra note 106, at 108, also has been set back. Justice Powell, who joined the *Johnson* opinion, had been a staunch "good faith" supporter. See Brown v. Illinois, 422 U.S. 590, 606 (Powell, J., concurring). The remaining "good faith" supporters, Chief Justice Burger, Justice White, and Justice Rehnquist, joined by Justice O'Connor, who had been predicted to be a "good faith" supporter, LaFave, supra note 143, at 340, were clustered in dissent. The fact that *Johnson* forced the good faith supporters into arguing "good faith" in a dissent is intriguing because, had Justice Powell not "jumped ship," there would have been a majority of five supporters on the court. *Id.*; Ball, supra note 153, at 635. Additionally, Justice Blackmun, who had joined the opinion in *Peltier*, a retroactivity situation, authored the opinion in *Johnson*. He had been counted on by some authorities as a "good faith" supporter because of his support in *Peltier*. Bernardi, supra note 106, at 66-67. Given the similar factual situation in *Johnson*, it could have been expected he would have taken a similar approach, making a "good faith" majority of six on the court.\(^{174}\) See supra notes 153-64 and accompanying text.\(^{175}\) The exclusionary rule's non-selective application has been a point of major criticism. See Ball, supra note 153, at 635.\(^{176}\) See LaFave, supra note 143, at 354. But see *id.* at 350.\(^{177}\) See supra notes 154-57 and accompanying text.\(^{178}\) See supra notes 144-46 and accompanying text.
bility," prohibit the admission of evidence presently determined to be "unreasonably" seized.

A clarifying opinion from the court is urgently needed. The court should review the history of the provision and thereafter conclusively interpret its language. While the question has now been postponed due to the court's withdrawal of its state constitutional analysis, the next opportunity will present the same issues to the court for resolution. Common rules of statutory construction should be employed to clarify the limits of Florida's constitutional provision. Although the initial Rickard decision may be analytically incorrect, the non-application of the exclusionary rule in a Rickard situation is certainly defensible. Given various other situations in which application of the rule would not seem to serve its deterrence purpose, the analysis used by the Rickard court would allow for needed selectivity in the rule's application. Thus, to the extent the Rickard analysis finds that the Florida exclusionary provision need not be mechanically applied once an unreasonableness determination is made, the analysis provides a "decisional framework" for altering the exclusionary rule, while leaving substantive protections intact. The expansion, or maintenance, of state constitutional rights is a desirable goal, given the federal vacuum being created.

A clarifying decision at this point would also be extremely timely for another reason. Frustration, no doubt born of the rule's seemingly absolute, inflexible language, has caused a political reaction calling for modification of the Florida provision. The legislature has consequently responded: several bills were filed during the 1982 legislative session attempting to alter article I, section 12. If the last such legislative action in 1968 did not cause enough problems, this most recent proposal certainly will. Originally attempting to alter only the exclusionary rule provision itself to ac-

179. See supra note 85 and accompanying text.
180. See 2A A. SUTHERLAND, STATUTORY INTERPRETATION §§ 45.02, 45.05, 46.01, 46.04 (C. Sand 4th ed. 1973 & Supp. 1982). Rules of statutory construction are applicable to constitutional construction. See Levinson, supra note 81, at 556.
181. See supra note 175 and accompanying text.
182. See Bernardi, supra note 106, at 73. For example, Sarmiento's expansion of protections could remain intact, while the application of the rule could be decided independently.
183. See Brennan, supra note 112, at 502.
comodate the Williams result, the bill which was ultimately passed, HJR 31-H, would forever tie both the Florida exclusionary rule’s interpretation and the substantive protections under article I, section 12 to the United States Supreme Court’s interpretation of the fourth amendment and the federal exclusionary rule. This would have the effect of overruling all independently based Florida law on searches and seizures. Whatever benefit may accrue from the easing of the exclusionary rule is more than offset by the tragedy of eliminating Florida’s ability to provide its citizens with “greater protection” when defining what constitutes an unreasonable search, as established in the Sarmiento analysis. Sarmiento and Odom would be overruled if HJR 31-H becomes law, as would any case law purporting to independently offer greater protections under article I, section 12 than federal law would provide. When attempting to make such a radical modification of the individual rights and liberties guaranteed by the state constitution, it would be well to recall Justice Brennan’s admonition to the states:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.

186. See, e.g., Fla. SJR 102 (1981); Fla. HJR 39 (1982).
187. Fla. HJR 31-H (1982), was filed in the Office of Secretary of State on June 24, 1982.
188. See supra notes 79-83 and accompanying text.
190. Brennan, supra note 112, at 491.
APPENDIX*

STATE OF FLORIDA, Petitioner,

vs.

WILLIAM M. RICKARD, Respondent.

[APRIL 29, 1982]

ADKINS, J.

This cause is here on petition for writ of certiorari supported by certificate of the Second District Court of Appeal that its decision reported at Rickard v. State, 361 So. 2d 822 (Fla. 2d DCA 1978), is one which involves a question of great public interest. Fla. Const. art. V, § 3(b)(3).

The respondent, defendant at the trial court, William R. Rickard, was arrested after his neighbor, Martin, informed Detective Fitzgerald that he had observed some plants, which he believed to be marijuana, growing in the defendant's backyard. The plants could not be seen from Martin's yard, because defendant had erected a plywood partition next to a storage shed, thereby obstructing the view of his yard on Martin's side. There was also a chain link fence surrounding defendant's yard, but it did not block the view.

Martin took Detective Fitzgerald to a citrus grove behind defendant's yard. About fifty feet away, the detective observed some plants in defendant's yard which, from his experience, he believed to be marijuana. Since defendant was not home, he decided to return the next day to arrest defendant and seize the plants.

The next day, without obtaining a warrant, Detective Fitzgerald returned to the grove with Detective William Page and watched the yard for approximately one hour, hoping to observe defendant in the act of caring for the plants. When defendant did not appear, the two detectives went to his mobile home and, before entry, arrested him. Defendant asked the detectives if he could get some money from his trousers which were lying on the floor. As defendant reached into the pocket, Detective Page, fearing a concealed weapon, put his hand into the pocket and pulled out a small baggie of marijuana. The detectives then seized the marijuana in defendant's backyard.

Defendant was charged with manufacturing marijuana and fel-

* Citations have been changed to conform with Florida State University Law Review standards.
On possession of marijuana. A motion to suppress was denied by the trial court, and defendant plead nolo contendere, reserving his right to appeal the denial of his motion. On appeal, the Second District Court of Appeal upheld the trial court’s denial of defendant’s motion to suppress the marijuana seized from the trousers pocket as being incident to lawful arrest. However, the court reversed the denial of the motion to suppress the marijuana plants seized from defendant’s backyard, citing as its authority *Morsman v. State*, 360 So. 2d 137 (Fla. 2d DCA 1978), *cert. disch.* 394 So. 2d 408 (Fla. 1981). The district court certified the following question to this Court:

Where contraband is seen in plain view by police in the defendant’s backyard from a point adjacent to the property, may the police seize the contraband without a warrant in the absence of exigent circumstances?

361 So. 2d at 825. We answer the question in the negative.

Arguments in this case have shown a marked confusion between plain view *per se* and the “plain view doctrine” as espoused in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Confusion was dispelled in *Ensor v. State*, 403 So. 2d 349, 352 (Fla. 1981), when we said:

The term “plain view” has been misunderstood and misapplied because courts have made it applicable to three distinct factual situations. This has resulted in confusion of the elements of the “plain view doctrine.” To eliminate this confusion, we believe it appropriate to distinguish the true “plain view doctrine” as established in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed. 2d 564 (1971), from other situations where officers observe contraband.

The first factual situation we identify as a “prior valid intrusion.” In this situation, an officer is legally inside, by warrant or warrant exception, a constitutionally protected area and inadvertently observes contraband also in the protected area. It is this situation for which the United States Supreme Court created the “plain view doctrine” in *Coolidge* and held that an officer could constitutionally seize the contraband in “plain view” from within this protected area. We emphasize that it is critical under this doctrine for the officer to be already within the constitutionally protected area when he inadvertently discovers the contraband.

We identify the second factual situation as a “non-intrusion.” This situation occurs when both the officer and the contraband
are in a non-constitutionally protected area. Because no protected area is involved, the resulting seizure has no fourth amendment ramifications, and, while the contraband could be defined as in "plain view," it should not be so labeled to prevent any confusion with the *Coolidge* "plain view doctrine."

The third situation concerns a "pre-intrusion." Here, the officer is located outside of a constitutionally protected area and is looking inside that area. If the officer observes contraband in this situation, it only furnishes him probable cause to seize the item. He must either obtain a warrant or have some exception to the warrant requirement before he may enter the protected area and seize the contraband. As with the non-intrusion situation, the term "plain view" should not be employed here to prevent confusion. For clarity, we label an observation in the latter two non-*Coolidge* situations as a legally permissive "open view."

Here the officer was located outside of a constitutionally protected area and looking inside that area. The officer did not obtain a warrant nor did he have any exception to the warrant requirement. The seizure without a warrant was improper and the motion to suppress the plants in the backyard should be granted.

This case is distinguishable from *Morsman v. State* because an illegal search preceded the seizure in *Morsman*, whereas here there was no prior search. In *Morsman*, police found marijuana only after illegally entering Morsman's backyard. There was no evidence that the contraband was visible from outside the backyard, so the warrantless search and seizure were illegal. We are now presented a different situation. Police were in an orange grove where they had a legal right to be when they observed marijuana growing in respondent's backyard. The plants were open to view only fifty feet away; therefore, no search occurred.

*Lightfoot v. State*, 356 So. 2d 331 (Fla. 4th DCA 1978), is pertinent because of certain factual similarities. There, also, the marijuana was open to the view of police officers who were where they had a legal right to be. In *Lightfoot* and the current case, marijuana was growing in a backyard surrounded by a chain link fence which did not obstruct visibility. Police officers in both cases were answering neighborhood complaints, and neighbors directed them to unobstructed views of marijuana plants. The vantage point in *Lightfoot* was a neighbor's yard; in this case it was the orange grove behind defendant's mobile home.

The court in *Lightfoot* held that the defendant showed no expectation of privacy because he took no steps to conceal the mari-
juana plants from people who could see into the backyard. In the present case, defendant blocked the view of his next door neighbor with a shed and a plywood partition. It appears from the record that this was his only adjacent neighbor. However, the backyard and marijuana plants were completely open to view from the privately owned orange grove behind the yard. Since the owners were “up north,” people may not have been in the grove often, but the police had been asked to keep an eye on the grove for trespassers. Therefore, defendant’s backyard was open to view by police, possibly grove workers, and meandering neighbors.

In *Norman v. State*, 379 So. 2d 643 (Fla. 1980), this Court agreed that privacy should be recognized in areas where a person has exhibited an actual expectation of privacy, if society recognizes that expectation as reasonable. Privacy expectations may be bolstered by a cognizable property right in an invaded area. *Norman* quoted the United States Supreme Court in *Rakas v. Illinois*, 439 U.S. 128 (1978), that “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.” 439 U.S. at 143 n.12. The defendant in the present case exhibited an actual expectation of privacy by putting the marijuana behind a shed and erecting a plywood partition to obstruct the neighbor’s view. The question becomes whether society sees the backyard as harboring a reasonable expectation of privacy.

In *Huffer v. State*, 344 So. 2d 1332 (Fla. 2d DCA 1977), marijuana plants were illegally seized from a backyard hothouse. The plants were enclosed and not plainly visible to the public. Police observed the plants only after significant encroachment upon residential premises to look through a tear in plastic draped over the hothouse. The Court held that since the protection afforded to “houses” by the Fourth Amendment and by the Declaration of Rights of the Florida Constitution includes the curtilage surrounding a dwelling, the search of the backyard hothouse intruded upon Huffer’s right to privacy.

The case before us falls between *Lightfoot* (no expectation of privacy shown) and *Huffer* (great expectation of privacy shown). The privacy of a Florida backyard is generally protected by law, even the backyard of an apartment complex surrounded only by a chain link fence. One may not enter that area to observe occupants inside the residence. *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974); accord, *Olivera v. State*, 315 So. 2d 487 (Fla. 2d DCA 1975), cert. denied, 330 So. 2d 21 (Fla. 1976).
Under the analysis of Katz v. United States, 389 U.S. 347 (1967), there can be no question but that Rickard demonstrated an expectation of privacy in carrying on these activities in his backyard, which was not only secluded from view by virtue of lack of proximity of neighbors and others, but by his erection of a chain link fence and partition. That society is willing to honor this objectively manifested expectation of privacy was acknowledged by this Court in Morsman, 394 So. 2d at 409. See also Rakas v. Illinois, 439 U.S. 128 (1978) (property rights reflect society's recognition of privacy rights); Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974) (fourth amendment protects backyard of apartment). Even when the initial observation of the officer did not rise to the level of a search, as is probably the case here, courts will not allow an ensuing warrantless search or seizure in a constitutionally protected area such as one's backyard. See State v. Texeira, 62 Haw. 44, 609 P.2d 131 (1980). Since no showing of exigent circumstances was made, under the facts of this case we answer the certified question in the negative.

We must determine the legality of the arrest of defendant in his home without a warrant. The controlling authority on this issue at the time of his arrest was State v. Perez, 277 So. 2d 778 (Fla.), cert. denied, 414 U.S. 1064 (1973), and United States v. Williams, 573 F.2d 348 (5th Cir. 1978). These authorities indicated that no warrant was necessary to arrest one in his home.

In Payton v. New York, 445 U.S. 573 (1980), the Court held that any arrest made of a person in his home without a warrant and without the existence of exigent circumstances would be unreasonable and, as such, unconstitutional. We must decide whether Payton should be applied retroactively to void the arrest, making the evidence obtained pursuant thereto inadmissible at defendant's trial. The question of the retroactivity of Payton has not been directly considered by the United States Supreme Court. However, in United States v. Peltier, 422 U.S. 531 (1975), that Court noted that the deterrent function of the exclusionary rule is not served by retroactive application to situations in which officers acted in good faith reliance on previously announced standards. In this opinion the Court said:

Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises
serious questions about the accuracy of guilty verdicts in past trials," Williams v. United States, 401 U.S. 646, 653 (1971), the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. Linkletter v. Walker, 381 U.S. 618 (1965); Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, supra; Fuller v. Alaska, 393 U.S. 80 (1968); Desist v. United States, 394 U.S. 244 (1969); Jenkins v. Delaware, 395 U.S. 213 (1969); Williams v. United States, supra; Hill v. California, 401 U.S. 797 (1971).

The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

422 U.S. 535-37 (footnote omitted.)

In Peltier, the Court was presented with the question of whether to give retroactive application to its decision limiting border control searches. The Court upheld searches which were conducted pursuant to previously announced regulations that, although not declared invalid at the time of the search, were later declared unconstitutional infringements of the Fourth Amendment.

In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court refused to apply the federal exclusionary rule which had been enunciated in Mapp v. Ohio, 367 U.S. 643 (1961), to cases which had become final by the time the Mapp decision was rendered.

The Supreme Court, in practically all of the post-Linkletter opinions has held that new rules of law which expand the scope of the exclusionary rule under the fourth amendment shall be given retrospective effect only to the actual litigant of the particular case before the United States Supreme Court.

Thus, in discussing the retroactivity of Katz v. United States, 389 U.S. 347 (1967), the United States Supreme Court stated as follows in Desist v. United States, 394 U.S. 244 (1969):
The eavesdropping in this case was not carried out pursuant to such a warrant, and the convictions must therefore be reversed if \textit{Katz} is to be applied to the electronic surveillance conducted before the date of that decision. We have concluded, however, that to the extent \textit{Katz} departed from previous holdings of this Court, it should be given wholly prospective application.

394 U.S. at 246.

The United States Supreme Court further explained that all the reasons for making \textit{Katz} retroactive also undercut any distinction between final convictions and those still pending on review:

Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date. Exclusion of electronic eavesdropping evidence seized before \textit{Katz} would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-\textit{Katz} decisions, and would not serve to deter similar searches and seizures in the future.

394 U.S. at 253.

\textit{Desist} held that \textit{Katz} is to be applied only to cases in which the prosecution sought to introduce the fruits of electronic surveillance conducted after the date of the rendition of \textit{Katz}.

In \textit{Williams v. United States}, 401 U.S. 646 (1971), the United States Supreme Court held that \textit{Chimel v. California}, 395 U.S. 752 (1969), would not be retroactive and would not be applicable to searches conducted prior to the decision in that case:

Considering that \textit{Desist} represents the sound approach to retroactivity claims in Fourth Amendment cases, we are confident that we are not constitutionally bound to apply the standards of \textit{Chimel} to the cases brought here by Elkanich and Williams. Both petitioners were duly convicted when judged by the then-existing law; the authorities violated neither petitioner's rights either before or at trial. No claim is made that the evidence against them was constitutionally insufficient to prove their guilt. And the \textit{Chimel} rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after \textit{Chimel} was announced on June 23, 1969, and carried out by authorities who through mistake or ignorance have violated the precepts of that decision.

401 U.S. at 656.
An excellent discussion of all the above principles can be found in Annot., *United States Supreme Court's Views As To Retroactive Effect Of Its Own Decisions Announcing New Rules*, 22 L. Ed. 2d 821 (1969).

Applying the above principle to the question of retroactivity of *Payton*, we conclude that it is not applicable to arrests which occur prior to the effective date of the *Payton* decision.

The United States Supreme Court vacated a judgment of the First District Court of Appeal (*Busch v. State*, 355 So. 2d 488 (Fla. 1st DCA 1978)), and remanded the cause for further consideration, *Bush v. Florida*, 446 U.S. 902 (1980), with instructions to consider on remand whether the holding in *Payton* required that the confession of defendant Busch following his warrantless arrest in his home be suppressed. In its previous opinion the court had held that the trial court was correct in denying Busch's motion to suppress the confession. The District Court of Appeal gave *Payton* retroactive application, saying:

The United States Supreme Court would not have vacated the judgment in this case and remanded it to this Court for further consideration in light of *Payton* if there had been no intention on the part of the Supreme Court that *Payton* be applied to this case, which was not final and was pending in the Supreme Court at the time its opinion in *Payton* was rendered.

*Busch v. State*, 392 So. 2d 272, 274 (Fla. 1st DCA 1980).

The federal courts have reasoned differently. In *United States v. Bowen*, 462 F.2d 347 (9th Cir. 1972), it appeared that defendant was stopped by border patrol authorities who discovered contraband in his vehicle. This led to the defendant's conviction on drug related offenses in federal court. The Ninth Circuit Court of Appeals affirmed his conviction. Bowen petitioned the United States Supreme Court for certiorari. While that petition was pending, the Court announced its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which invalidated the use of roving patrols to search motor vehicles with neither a warrant nor probable cause at points removed from the border. Shortly thereafter, the Supreme Court of the United States granted Bowen's petition, vacated the judgment below and remanded the matter to the court of appeals, "for further consideration in light of *Almeida-Sanchez*." The court of appeals considered whether the new rule of law should be applied to events occurring before its announcement and, concluding that the mandate would not be applied to invali-
date border patrol searches conducted prior to the date of the Almeida-Sanchez opinion, reaffirmed Bowen's conviction. See United States v. Bowen, 500 F.2d 960 (9th Cir. 1974). Bowen again petitioned the United States Supreme Court for a grant of certiorari, but that Court affirmed the ninth circuit. Bowen v. United States, 422 U.S. 916 (1975).

Judge Daniel S. Pearson, in his specially concurring opinion in Williams v. State, 403 So. 2d 430, 434 (Fla. 3d DCA 1981) said:

There can be no doubt that Busch holds Payton retroactive, but the rationale of that holding in Busch v. State, supra, is, in my view, wrong.

We agree with Judge Pearson and his reasoning in reaching this conclusion.

Article I, section 12, Florida Constitution (1968), provides:

The right of the people to be secure in their persons, houses, papers and effects against the unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. . . . Articles or information obtained in violation of this right shall not be admissible in evidence. [emphasis supplied]

The court in State v. Thomas, 405 So. 2d 462, 463 (Fla. 3d DCA 1981), held that this required retroactive application of Payton, saying:

This provision leaves no room in Florida for a purely prospective application of a judicial determination that a given search or seizure is constitutionally unreasonable. Once it is decided, as by Payton, that this is the case, the Florida courts are mandated to reject any evidence thus secured. See Grubbs v. State, 373 So. 2d 905 (Fla. 1979) (exclusionary rule applicable in probation proceeding only because of Florida constitutional provision); see also, Odom v. State, 403 So. 2d 936 (Fla. 1981) ("constitutional principle applies . . . regardless of the scope of the Fourth Amendment exclusionary rule.")

(Footnote omitted).

We disagree. Under our previous interpretation of our constitutional provision the search and seizure were constitutionally reasonable. The baggie of marijuana was not obtained in violation of this state constitutional right. In fact, it was constitutionally per-
missible by express judicial interpretation.

The exclusionary rule embodied in the Florida Constitution was no broader than the federal exclusionary rule. As noted in *Blatch v. State*, 389 So. 2d 669, 675 n.6 (Fla. 3d DCA 1980):

Florida was not one of those states that was compelled by the constitutional imperative of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), to exclude unlawfully seized evidence. *Sing v. Wainwright*, 148 So.2d 19 (Fla. 1961). The effect of making the exclusionary rule a part of the Florida Constitution in 1968, compare art I, § 12 Fla. Const. (1968) with § 22 Decl. of Rts., Fla. Const. (1885) was not to impose an exclusionary rule, but rather to give the existing exclusionary rule constitutional dimension immunizing it from possible future retreat by the United States Supreme Court from its holding in *Mapp*. See *Norman v. State*, 388 So.2d 613 (Fla. 3d DCA 1980).

Also in *Dornau v. State*, 306 So. 2d 167, 169-70 (Fla. 2d DCA 1974), the court said:

Section 12 of the Declaration of Rights, F.S.A., now contains the proviso that "...articles or information obtained in violation of this right (i.e., against illegal searches and seizures) shall not be admissible in evidence" (Italics supplied). But we are of the view that this language was intended merely to incorporate expressly the exclusionary rule first promulgated in *Weeks v. United States*, [232 U.S. 383 (1914)] and made binding on the states in *Mapp v. Ohio*, [367 U.S. 643 (1961)]. Certainly, we think, there was no intent to enlarge the exclusionary rule.

*See also State v. Hutchinson*, 404 So. 2d 361 (Fla. 2d DCA 1981); *Hetland v. State*, 387 So. 2d 963 (Fla. 1981), adopting *State v. Hetland*, 366 So. 2d 831 (Fla. 2d DCA 1961).

In exercising its power to grant or deny retroactive effect to its new rules, the Supreme Court of the United States has indicated that the relevant criteria for deciding the issue of retroactivity in a particular case are: (1) The purpose to be served by the particular new rule; (2) the extent of reliance which has been placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule. *See Annot.*, 22 L. Ed. 2d at 825.

The purpose to be served by the new rule is to deter illegal police action. The alleged misconduct of the police had already occurred at a point in time when such conduct was not considered
illegal. It would not be corrected by excluding evidence secured by the officers after the illegal arrest. The purpose of the new rule can be achieved without applying the rule retroactively. This is a significant factor in favor of denying the rule retroactive effect. See Annot., 22 L. E. 2d at 832.

The criterion of the extent of the reliance by law enforcement authorities on the old standards also strongly supports prospective application. Payton was the first case in the state or federal jurisdictions which held that such an arrest was illegal. As previously noted, the United States Supreme Court implicitly gave its stamp of approval (prior to Payton) to earlier decisions by declining to accept certiorari jurisdiction. It was quite reasonable for the officers in the case sub judice to rely upon the pre-Payton law.

The criterion of the effect on the administration of justice strongly supports prospective application. Exclusion of evidence seized before Payton would increase the burden of the administration of justice, would overturn convictions based on fair reliance upon pre-Payton decisions, and would not serve to deter similar searches and seizures in the future.

Perhaps the most important of these factors is the purpose to be served by the new constitutional rule. That purpose can only be discerned by a close examination of the rule to determine if the application of the same goes to the very integrity of the factfinding process. In our opinion, the subject rule, i.e. that absent exigent circumstances, a warrantless entry for the purpose of a routine felony arrest is unconstitutional, is not so essential to the very integrity of the factfinding process that all past reliances upon existing statutory laws should be negated so as to rehabilitate with innocence those who by their intentional acts seriously offended our penal statutes. Accordingly, we decline to apply Payton retroactively and agree with the decision of the district court of appeal that the arrest was legal. This being so, the seizure of the baggie of marijuana should be upheld as incident to a lawful arrest.

Summarizing, we hold that backyards may reasonably harbor privacy expectations as exhibited by a person's actual demonstration of such expectations. Where, as here, the observation is made without any intrusion into a protected area, the fourth amendment does apply.

We answer the certified question as follows:

Where contraband is seen in plain view by police in the defendant's backyard from a point adjacent to the property, the police
may not seize the contraband without a warrant in the absence of exigent circumstances.

The seizure of the baggie of marijuana in the home of defendant should be upheld, because it was incident to a lawful arrest.

The decision of the district court of appeal is approved and this cause is remanded to the district court of appeal for further proceedings consistent with this opinion.

It is so ordered.

SUNDBERG, C.J., OVERTON and McDONALD, J.J., Concur
ALDERMAN, J., Concurs in part and dissents in part with an opinion, with which BOYD, J., concurs
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ALDERMAN, J., concurring in part, dissenting in part.

I agree completely with that portion of the majority opinion that declines to apply Payton retroactively and holds that Rickard's arrest was legal. I also agree in principle with the majority's answer to the certified question that where contraband is seen in plain view by police in the defendant's backyard from a point adjacent to the property, the police may not seize the contraband without a warrant in the absence of exigent circumstances. I do not agree, however, that the marijuana plants in this case were unlawfully seized.

Because of the particular facts of this case, Ensor is not controlling. The police, when they first observed the marijuana plants, were in a "nonconstitutionally protected area." The contraband they were observing, however, was in Rickard's fenced-in backyard, a "constitutionally protected area." This is what Ensor describes as a "pre-intrusive" situation with the officers standing outside a constitutionally protected area looking in. At that point, in the absence of exigent circumstances, the officers could not have proceeded directly into the backyard and seized the plants without a warrant. There is an additional factor in this case, however, which takes it outside the scope of Ensor's pre-intrusive rationale and allows the seizure to be upheld. The open viewing of the marijuana plants gave the officers probable cause to arrest Rickard. Since Payton is not retroactive, they had the right to go onto the premises without a warrant to make the arrest. Once they were lawfully on the premises and the defendant was arrested, no search was necessary to find the marijuana plants which were in open view in the backyard. At that point, I do not believe the officers had to go
through the formality of obtaining a search warrant before they seized the marijuana plants. This was no longer a pre-intrusive situation. Instead, what now existed was a "prior valid intrusion." The officers were legally on the premises, the defendant had been arrested, and the marijuana plants were in plain view. I see no constitutional impediment to the officers' seizure of the contraband under these circumstances.

BOYD, J., Concurs