Bernie v. State, 524 So. 2d 988 (Fla. 1988)

Douglas Underwood
THE WAR on drugs in recent years has brought tough choices for Florida’s electorate and judiciary. One such choice made by voters was the 1982 amendment to article I, section 12 of the Florida Constitution, which requires that Florida’s constitutional protection against unreasonable searches and seizures be interpreted as the United States Supreme Court interprets the fourth amendment to the United States Constitution.1 Since 1982, the Supreme Court has ruled that in certain instances courts should apply a “good faith exception” to the judicially created exclusionary rule, which requires the exclusion of evidence obtained in violation of the defendant’s fourth amendment rights.2 The Court allows evidence to be admitted under the “good faith exception” when a police officer, executing an invalid search warrant, acts in good faith.3 Under Florida’s 1982 constitutional amendment, the “good faith exception” to the exclusionary rule is now the law in Florida.4

The purpose of this Note is to examine the Florida Supreme Court’s recent treatment of the exclusionary rule and “good faith exception” in Bernie v. State in light of the 1982 amendment to the Florida Constitution. This Note will analyze the Bernie decision and argue that the Supreme Court of Florida erred when it affirmed the lower court’s decision on grounds other than the “good faith exception” and also

1. Prior to the 1982 amendment, the Supreme Court of Florida had held that the Florida Constitution provided greater search and seizure protection than that provided by the fourth amendment to the United States Constitution. State v. Sarmiento, 397 So. 2d 643 (Fla. 1981) (holding that the electronic eavesdropping of a conversation between a suspected drug seller and a consenting informant required an “intercept warrant” under article I, section 12 of the Florida Constitution even though federal case law interpreted the United States Constitution as not requiring a warrant in such instances).
3. Id.
4. See Howard v. State, 483 So. 2d 844 (Fla. 1st DCA 1986) (discussed infra note 119); Sims v. State, 483 So. 2d 81, 82-83 (Fla. 1st DCA 1986) (citing Leon’s “good faith exception” but refusing to apply exception because affidavit authorizing search was facially invalid); Rand v. State, 484 So. 2d 1367 (Fla. 2d DCA 1986) (applying Leon analysis to determine if officer acted with “objective reasonable reliance” upon the search warrant); Albo v. State, 477 So. 2d 1071 (Fla. 3d DCA 1985) (holding Leon inapplicable when police rely on inaccurate information from other police sources).
when it failed to address the "good faith exception" in light of an applicable Florida statute. Further this Note will suggest that the supreme court examine the "good faith exception" as applied by the Second District Court of Appeal in State v. Bernie, and query whether the United States Supreme Court's rulings on the "good faith exception" should be applied to admit evidence from searches invalidated by Florida statute. Finally, the Note will recommend that article I, section 12 of the Florida Constitution be amended to allow Florida courts greater discretion in interpreting the search and seizure protections provided by both the Florida Constitution and Florida statutes.

I. FACTS AND BACKGROUND: THE LAW OF SEARCH AND SEIZURE

On October 13, 1983, a package addressed to Vickie Bernie of Sarasota, Florida broke open at the Emery Air Freight facility in Tampa, Florida. The envelope, shipped from Dayton, Ohio, was marked "urgent . . . deliver immediately." After determining the package contained a suspicious powder-like substance, Emery officials contacted a drug enforcement agent who tested the substance and identified it as cocaine. The agent then contacted the Sarasota County Sheriff's Office. Meanwhile, Vickie's husband, Dr. Bruce Bernie, visited the Emery office in Tampa to check on the package, whereupon Emery officials advised him that the package would be delivered to his residence on the following day.

On the morning of October 14, 1983, Detective Steven Matosky requested that a circuit judge issue a search warrant to authorize a search of the Bernies' residence pursuant to the controlled delivery of the package of cocaine. The circuit judge issued the warrant based upon Matosky's affidavit swearing that the Bernies were expecting the package to be delivered to their residence and that the cocaine would be located inside the Bernies' residence following the delivery. A few

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5. 472 So. 2d 1243, 1244 (Fla. 2d DCA 1985), aff'd, 524 So. 2d 988 (Fla. 1988).
6. Id.
7. Id.
8. Id.
9. Id.
10. Id. A "controlled delivery" occurs when an officer maintains "dominion and control" over the previously searched package to ensure that the contents do not change after the initial search. Illinois v. Andreas, 463 U.S. 765, 768 (1983).
11. State v. Bernie, 472 So. 2d 1243, 1245 (Fla. 2d DCA 1985), aff'd, 524 So. 2d 988 (Fla. 1988). The affidavit recited in part:

That based upon your Affiant's experience as a law enforcement officer, and narcotics detective, and further upon the events described above, your Affiant believes that BRUCE and VICKIE BERNIE are in fact expecting this package to be delivered at their residence (apartment) at #608 C, 5770 Midnight Pass Road, Sarasota, Florida.
minutes after the controlled delivery was made, law enforcement officers knocked and announced their presence and purpose. Mrs. Bernie opened the door, allowing the officers to enter, and Detective Matosky approached Dr. Bernie in the bathroom area. After reading the search warrant to the Bernies, the officers conducted a full search of the apartment, discovering a hollow pen body with cocaine residue inside, a knife and small mirror, cocaine residue on the rim of the toilet, and the Emery package.¹²

The Bernies were arrested and charged with possession of cocaine in violation of section 893.13, Florida Statutes.¹³ The defendants moved to suppress the evidence, contending that the state seized the cocaine as a result of an unreasonable search and seizure. They argued that a Florida statute and Florida case law prohibited the circuit judge from issuing the warrant to search the Bernies' home when the judge had no reason to believe that narcotics laws were being violated within the residence at the time the warrant was issued.¹⁴ The Bernies relied on section 933.18, Florida Statutes, which provides in part:

No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:

... (5) The law relating to narcotics or drug abuse is being violated therein;
...

No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he has reason to believe that one of said conditions exists which affidavit shall set forth the facts on which such reason for belief is based.¹⁵

The Bernies also relied upon Gerardi v. State,¹⁶ which held that section 933.18 requires that a violation of narcotics laws be occurring

Your Affiant was advised that the package would be delivered to the residence on the afternoon of October 14, 1983. Your Affiant therefore believes that the suspect cocaine will be inside the residence of #608 C, Midnight Pass Road, Sarasota, Florida with the full knowledge of BRUCE and VICKIE BERNIE.

Id. (emphasis added by Fla. 2d DCA).

12. Id.
13. FLA. STAT. § 893.13 (1983). Section 893.13(1)(a), Florida Statutes, states in relevant part: "Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, purchase, manufacture, or deliver, a controlled substance."
16. 307 So. 2d 853 (Fla. 4th DCA 1975).
within the private dwelling at the time a magistrate issues the warrant. The trial judge "reluctantly" obeyed Gerardi and section 933.18 and granted the Bernies' motion to suppress.

On appeal, the Second District Court of Appeal reversed the trial court and held that the illegally seized evidence was admissible, grounding its holding on two authorities. The first authority cited by the court was the 1982 constitutional amendment. Florida voters, the court noted, thereby amended the Florida Constitution to provide that the search and seizure protection guaranteed by the Florida Constitution be construed to conform with the United States Supreme Court decisions interpreting the fourth amendment to the United States Constitution. The italicized portions represent changes in the text of article I, section 12 of the Florida Constitution as amended in 1982:

**Searches and seizures.**—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. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*

The district court stated that after the amendment's effective date of January 4, 1983, Florida courts were required to follow the United

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17. *Id.* at 854-55. In Gerardi, a magistrate issued a warrant to search Gerardi's home after a package mailed to Gerardi's address was found to contain hashish. The magistrate issued the warrant before the package was delivered to the Gerardi's address. Before executing the warrant, the deputy sheriff telephoned the judge and confirmed the defendant's receipt of the package. Although the Fourth District Court of Appeal noted that this procedure was acceptable in other jurisdictions, it held that section 933.18, Florida Statutes, (1971), prohibited such a procedure in Florida. *Gerardi,* 307 So.2d at 855.


20. *Id.*

States Supreme Court rulings concerning admissibility of evidence under the fourth amendment to the United States Constitution. The district court also relied on the United States Supreme Court holding in *United States v. Leon*, where a judge issued a search warrant authorizing a search of defendant Leon's house after a confidential informant of unproven reliability contacted the police. Drugs were found in the house and Leon filed a motion to suppress the evidence, contending that the magistrate issued the warrant without the requisite probable cause. The district court granted the motion, which the Ninth Circuit Court of Appeals affirmed. The United States Supreme Court reversed, stating that the exclusionary rule operates as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."

The Court noted that the exclusionary rule was created to act as a safeguard against improper searches by "law enforcement officers engaged in the often competitive enterprise of ferreting out crime." In *Leon*, the police acted in good faith both in presenting to the magistrate an affidavit outlining the confidential informant's tips and in awaiting the search warrant. Finding probable cause in the affidavit, the magistrate issued the search warrant. Although the district court later determined that no probable cause existed, the United States Supreme Court allowed the contraband into evidence, stating that rea-

22. See Comment, United States v. Leon and Illinois v. Gates: *A Call For State Courts To Develop State Constitutional Law*, 2 U. ILL. L. REV. 311 (1987). Of the fifty state constitutions containing search and seizure provisions, only the Florida Constitution explicitly conforms to the Supreme Court's construction of the fourth amendment. Article I, section 13 of the California Constitution provides essentially the same language as the fourth amendment to the United States Constitution. However, article I, section 28(d) of the California Constitution, known as the "truth-in-evidence" provision, requires that "relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d).

It follows that while evidence in violation of federal law may be excluded under the federal exclusionary rule, "relevant evidence" shall always be admitted, even if it is in violation of California law. *California v. Greenwood*, 108 S. Ct. 1625, 1631 (1988) (holding that "the people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.") Thus, like Florida, the California Constitution was amended to provide that search and seizure protection in California would extend only as far as does the federal exclusionary rule protection.

25. Id. at 903.
28. Id. at 914 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).
29. Id. at 902.
30. Id. at 903.
reasonable judicial minds would differ as to the existence of probable cause in a particular affidavit.\textsuperscript{31} The Court determined that the exclusionary rule cannot have any deterrent effect when an officer acts in the objectively reasonable belief that his or her conduct is in accordance with the protection of the fourth amendment.\textsuperscript{32}

The Court concluded that a cost-benefit analysis must be applied in determining whether to admit evidence seized in violation of a defendant’s fourth amendment rights.\textsuperscript{33} When courts apply the exclusionary rule to exclude evidence, they should determine whether the likelihood of deterring police misconduct is sufficient to justify the loss of valuable evidence in the case.\textsuperscript{34} \textit{Leon} thus created the “good faith exception” to the exclusionary rule, which allows evidence seized in violation of the defendant’s fourth amendment rights to be admissible when the executing officer acted with an objectively reasonable belief that no fundamental rights had been violated.\textsuperscript{35}

The district court in \textit{Bernie} relied upon \textit{Leon} to hold that although the dispatched search warrant violated section 933.18, Florida Statutes, the evidence was admissible because the police officer acted with "objective good faith" pursuant to the "facially valid warrant" authorizing the search of the Bernies' apartment.\textsuperscript{36} The district court noted that although neither the officer nor the judge obeyed section 933.18 in issuing the warrant before the narcotics were located within the residence, the officer fully complied with section 933.09, Florida Statutes, by announcing his authority and purpose before entering the Bernies' apartment.\textsuperscript{37} The district court determined that the "good faith exception" to the exclusionary rule applied because the officer's conduct was "objectively reasonable"\textsuperscript{38} and the "benefits, if any, produced by suppressing the cocaine . . . cannot outweigh the substantial societal cost of excluding the cocaine from evidence."\textsuperscript{39} The district court reversed the trial court and ruled that the evidence was admissible.\textsuperscript{40}

\textsuperscript{31} \textit{Id.} at 914.
\textsuperscript{32} \textit{Id.} at 918-19.
\textsuperscript{33} \textit{Id.} at 922.
\textsuperscript{34} State v Bernie, 472 So. 2d 1243, 1247 (Fla. 2d DCA 1985) (construing United States v. \textit{Leon}, 468 U.S. 897 (1984), \textit{aff'd}, 524 So. 2d 988 (Fla. 1988)).
\textsuperscript{35} \textit{Leon}, 468 U.S. at 922-24.
\textsuperscript{36} State v. Bernie, 472 So. 2d at 1247-48.
\textsuperscript{37} \textit{Id.}; \textit{FLA. STAT.} § 933.09 (1983).
\textsuperscript{38} State v. Bernie, 472 So. 2d at 1247-48.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 1248.
II. Bernie v. State: The Supreme Court Opinion

On January 7, 1988, the Supreme Court of Florida approved the judgment of the district court in a two-part majority opinion. In part I, the court asserted that the 1982 amendment to article I, section 12, of the Florida Constitution mandated that Florida’s constitutional right to be free from unreasonable searches and seizures comport with the United States Supreme Court rulings construing the fourth amendment to the United States Constitution. The court found that the language of article I, section 12, “clearly indicates an intention to apply to all United States Supreme Court decisions regardless of when they are rendered.”

The court stated that even though the electors in 1982 “could not have foreseen nor ratified” the prospective decisions of the United States Supreme Court, the electors voted to bind Florida to the Court’s future decisions.

In part II of Bernie, the Supreme Court of Florida held that the search warrant was valid in light of recent case law upholding such an “anticipatory search,” which the court defined as a search “based upon an affidavit showing probable cause that at some future time, but not presently, certain contraband will be at the location set forth in the warrant.” After finding that neither the Florida Constitution nor the United States Constitution prohibits anticipatory searches, the court adopted language requiring only a substantial probability that the evidence be on the premises at the time of the search.

42. The two-part opinion acquired a 5-2 majority in the following configuration: McDonald, C.J., Shaw, J., and Ben C. Willis (Ret.), Associate Justice, formed the majority opinion.
43. Ehrlich, J., concurred with parts I and II with an opinion in which McDonald, C.J., and Shaw, J., concurred.
44. Overton, J., concurred in judgment but dissented to part I.
45. Kogan, J., concurred with part I and dissented to part II.
46. Barkett, J., dissented to part I and part II.
47. Id. at 992-93.
48. Id. at 990-91.
49. Id. at 991.
50. Id. at 991-92.
51. Id. at 992.
52. Id. (citing 2 W. LAFAYE, SEARCH AND SEIZURE § 3.7(c) (2d ed. 1978)).
53. Id. at 991.
54. Id. (quoting People v. Glen, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972)).
55. Glen allowed the search warrant to be issued while the contraband was en route to the defendant’s home stating that such an anticipatory search was permissible in the absence of any state statute requiring that defendant have a “present possession of the seizable property.” 30 N.Y.2d at 260, 282 N.E.2d at 618, 331 N.Y.S.2d at 662. The language in Glen indicates that the New York court anticipated statutes such as section 933.18, Florida Statutes. The Bernie court also cited United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984), cert. denied, 470 U.S. 1006 (1985) as a related authority.
The majority in *Bernie* relied on *Illinois v. Andreas*,\(^49\) which established that recipients of a package, properly searched, no longer enjoyed any expectation of privacy in that package.\(^50\) In *Andreas*, after a search at the United States border revealed contraband within a container, police officers reopened the container\(^51\) and arranged its controlled delivery to the addressee. The *Andreas* Court held that the addressee had no expectation of privacy in the container after the initial search,\(^52\) and that any gap in surveillance created an insufficiently significant possibility that the contents of the package had been changed.\(^53\)

Finally, the court in *Bernie* held that section 933.18, Florida Statutes,\(^54\) which prohibits the issuance of a warrant to search a private dwelling unless narcotics laws are being violated therein, did not prevent the issuance of a search warrant in this case.\(^55\) The court determined that a "reasonable construction" of the words in the statute would allow a warrant to be issued when evidence and supporting affidavits show drugs have already been legally discovered in transit to the private dwelling.\(^56\) Ruling that the warrant was valid, the court did not address the applicability of the "good faith exception" to the exclusionary rule.\(^57\)

### A. The Prospective Constitutional Amendment

When the Supreme Court of Florida decided five to two\(^58\) to apply the 1982 amendment to the Florida Constitution\(^59\) to all prospective United States Supreme Court decisions regarding the fourth amendment,\(^60\) it overturned a longstanding rule in Florida. Before the 1982 constitutional amendment, under article I, section 12, the courts of Florida were free to provide Florida’s citizens with higher standards of protection against governmental intrusion than provided by the


\(^{50}\) Id. at 771.

\(^{51}\) Id. at 766.

\(^{52}\) Id. at 771.

\(^{53}\) Id. at 773.

\(^{54}\) See supra text accompanying note 15.

\(^{55}\) Bernie v. State, 524 So. 2d 988, 992 (Fla. 1988).

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) See supra note 42.


\(^{60}\) See Bernie v. State, 524 So. 2d 988, 991 (1988).
fourth amendment to the United States Constitution.\textsuperscript{61} In \textit{Bernie v. State},\textsuperscript{62} however, the court refused to accept the Bernies’ argument that the rights of Floridians under Florida’s state constitution could never be limited by future United States Supreme Court opinions.\textsuperscript{63} As Justice Ehrlich stated in his concurrence, “‘[n]owhere in either article I, section 12 or the statement placed on the November ballot is there any indication that the amendment was intended to encompass only those United States Supreme Court decisions existing at the time of adoption.’”\textsuperscript{64} The ballot statement read:

\begin{quote}
Constitutional Amendment
Article I, section 12

SEARCHES AND SEIZURES—Proposing an amendment to the State Constitution to provide that the right to be free from unreasonable searches and seizures shall be construed in conformity with the 4th Amendment to the United States constitution and to provide that illegally seized articles or information are inadmissible if decisions of the United States Supreme Court \textit{make} such evidence inadmissible.\textsuperscript{65}
\end{quote}

Justice Ehrlich concluded that it would be an affront to the voters of Florida for the court to hold that article I, section 12, does not apply to future decisions rendered by the United States Supreme Court.\textsuperscript{66}

In his concurring opinion, Justice Overton argued against applying all future United States Supreme Court decisions to the 1982 amendment.\textsuperscript{67} Justice Overton wrote that the amendment simply requires the court to interpret the Florida constitutional provision in accordance with Supreme Court decisions existing at the time of the amendment.\textsuperscript{68} The justice reasoned that a constitution is a written document “totally superior to the operations of government” and as such, a constitution should not be amended by future decisions of the United States Supreme Court.\textsuperscript{69} Balkling at the idea that the application of the Florida Constitution should depend upon the “whims” of the United States

\begin{footnotes}
\item[61.] See, e.g., State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983).
\item[62.] 524 So. 2d 988 (Fla. 1988).
\item[63.] Id. at 990-91.
\item[64.] Id. at 993.
\item[65.] \textit{Bernie}, 524 So. 2d at 993 (Ehrlich, J., concurring) (quoting FlA. H.R. Jour. 4 (Spec. Sess. June 21, 1982) (emphasis added by the Supreme Court of Florida)).
\item[66.] Id. at 994 (Ehrlich, J., concurring).
\item[67.] Id. (Overton, J., concurring in judgment).
\item[68.] Id.
\item[69.] Id.
\end{footnotes}
Supreme Court, he called such an application "contrary to the meaning and purpose of a constitution."\(^7\)

Another argument against the prospective application of Supreme Court decisions to the Florida Constitution is discussed in *Freimuth v. State*,\(^7\) where the Supreme Court of Florida prohibited the Legislature from defining a hallucinogenic drug in accordance with a federal statute enacted after the effective date of the Florida statute. The *Freimuth* decision held that to do so was an unconstitutional delegation of legislative power.\(^7\) *Bernie* differs from *Freimuth* in that in *Bernie* the voters of Florida, not the Legislature, delegated to the United States Supreme Court the power to construe the Florida Constitution. However, the principle seems clear that new laws should be controlled by the current electorate, not by broad delegations of power to a "governmental entity outside the state and not responsible to the citizens of the state."\(^7\)

The Senate Staff Analysis and Economic Impact Statement which accompanied the House Joint Resolution proposing the amendment expressed the legislators' intent that the amendment be applied prospectively.\(^7\) However, this intent was not translated to the actual wording of the ballot—the ballot contained no specific language indicating its prospective application.\(^7\) Consequently, it is unclear whether the voters interpreted the ballot summary to mean that they were approving all future United States Supreme Court decisions regarding the fourth amendment as part of the Florida Constitution. Additionally, if the amendment was intended to provide Floridians the identical search and seizure protection which the fourth amendment provides, the voters might have simply *repealed* article I, section

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70. *Id.* Justice Overton reasoned that Floridians clearly intended to reduce the scope of the exclusionary rule in 1982, but, under the majority's prospective application of Supreme Court decisions, if the Supreme Court decided to expand the exclusionary rule's scope, Florida would be bound by this decision. Justice Overton did not address the fact that should the Supreme Court expand rights under the fourth amendment, the states would be required to protect these rights.

71. 272 So. 2d 473 (Fla. 1972).

72. *Id.* at 476. Justice Drew concurred, stating that courts have "uniformly and without deviation" held that any attempt by the Legislature or any other lawmaking branch of government to incorporate into law future regulations or laws is an unconstitutional delegation of power. *Id.* at 477.


74. *See* Staff of Fla. S. Comm. on Judiciary-Crim., HJR 31-H (1982) Staff Analysis 10 (final June 29, 1982) (on file with committee). The staff analysis specifically states that although it is unlikely that the United States Supreme Court will adopt a "good faith exception" to the exclusionary rule, if it did adopt the exception, Florida courts must follow suit under the proposed amendment. *Id.*

75. *See supra* text accompanying note 65.
One reason that a proposal to repeal article I, section 12 was not made in 1982 could be that the repeal of Florida’s independent constitutional guarantee against unreasonable searches and seizures would have created more controversy and more opposition than the amendment. However, the effect on the rights of Floridians is the same.

The wording of the 1982 amendment suggests that the Legislature intended to substantially limit search and seizure protection in Florida. The amending language states that evidence seized in violation of one’s constitutional rights “shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court . . . .”77 The added (italicized) language does not state that evidence deemed admissible by the Supreme Court would be admissible in Florida. Rather, the amendment states that evidence inadmissible under Supreme Court decisions would similarly be inadmissible in Florida. The phraseology permits a different interpretation. The distinction lies in the recent trend of Supreme Court rulings favoring admission of evidence under certain situations with few determinations that evidence is inadmissible.78 This trend provides a more limited search and seizure protection.

In the future, because the federal exclusionary rule is judicially created79 and may be judicially eliminated, the 1982 amendment could abrogate Florida’s constitutional search and seizure rights. If the United States Supreme Court abolishes the exclusionary rule, under the language of the 1982 amendment Florida courts similarly might eliminate the state exclusionary rule. The words “illegally seized articles or information are inadmissible if decisions of the United States Supreme Court make such evidence inadmissible”80 indicate that should the Supreme Court abrogate the rule and allow evidence to be admitted, then evidence will not be “inadmissible” under article I, section 12, and will be similarly admitted in Florida.

Arguably, the amendment was never intended to abrogate Florida’s constitutional right in the event that the Supreme Court rescinds the

76. See Bernie, 524 So. 2d at 1000 (Barkett, J., dissenting).
77. State v. Bernie, 472 So. 2d 1243, 1246 (Fla. 2d DCA 1985) (quoting FLA. CONST. art. I, sec. 12) (emphasis in court opinion), aff’d, 524 So. 2d 988 (Fla. 1988).
78. See, e.g., Massachusetts v. Shepard, 468 U.S. 981 (1984) (holding evidence seized pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge admissible); Nix v. Williams, 467 U.S. 431 (1984) (holding evidence that would have inevitably been discovered despite police misconduct admissible); Terry v. Ohio, 392 U.S. 1 (1968) (holding evidence seized by a police officer in the belief that an individual is armed and dangerous admissible).
federal rule. A countervailing argument is that under article I, section 12, Florida’s exclusionary rule would continue to exist even if the Supreme Court abrogated the federal exclusionary rule, but would not operate to exclude any evidence so long as the Supreme Court finds the evidence not “inadmissible.” At least one writer has argued that the amendment would effectively repeal Florida’s independent constitutional search and seizure protections and that Florida politicians intentionally misled voters calling the amendment a “reform” of Florida’s search and seizure protections.\footnote{See Castillo, Voters May Forfeit Rights by Approving Measure, Tallahassee Democrat, Oct. 24, 1982, at B1, col. 1.}

At least one Florida judge has objected to the 1982 amendment and called for another referendum to strike the language approved in the 1982 amendment.\footnote{See Bizzaro, It’s Time to Reclaim Forfeited Rights, Judge Says, Fla. Bar News, Aug. 15, 1987, at 10, col. 2.} Judge Hugh Glickstein of the Fourth District Court of Appeal believes that by succumbing to their fear of crime, Floridians forfeited their ability to interpret their own state constitution. Glickstein asserts that Floridians would be wiser to entrust their personal freedoms to the state judiciary, rather than to the United States Supreme Court.\footnote{Id.}

Nevertheless, the Supreme Court of Florida stated in \textit{Bernie v. State}\footnote{524 So. 2d 988, 992 (1988).} that the voters of Florida had spoken. The 1982 amendment to article I, section 12 of the Florida Constitution, the court noted, mandates that Florida’s search and seizure protections shall conform with all past and future United States Supreme Court decisions construing the fourth amendment to the United States Constitution.\footnote{Id.}

83. \textit{Id.}
84. 524 So. 2d 988, 992 (1988).
85. \textit{Id.} Interestingly, a related constitutional question has recently been addressed by the Supreme Court of Florida. \textit{See} Welker v. State, 504 So. 2d 802 (Fla. 1st DCA 1987), quashed in part, aff’d in part, rem’d in part, 536 So. 2d 1017 (Fla. 1988). In \textit{Welker}, a defendant was convicted of the unlawful sale and possession of cocaine. The First District Court of Appeal refused to hold that the 1982 amendment to article I, section 12 overturned existing Florida case law. \textit{Id.} at 806-07. The district court reversed and remanded on the grounds that the confidential informant who tape recorded a conversation between himself and the defendant failed to testify as to his consent to the tape recording as required by Tollett v. State, 272 So. 2d 490 (Fla. 1973). Tollett rejected the holding in United States v. White, 401 U.S. 745 (1971), holding that a confidential informant must testify as to his or her consent to inform, even though \textit{White} held that such testimony was unnecessary to show consent. Tollett construed section 934.03(2)(c), Florida Statutes (1971), to require the informant’s testimony of consent. In \textit{Welker}, the district court declined to overrule \textit{Tollett} and certified the following question of great public importance to the Supreme Court of Florida:

\textbf{HAS THE REQUIREMENT, ENUNCIATED IN TOLLETT V. STATE, 272 SO. 2D 490 (FLA. 1973), THAT CONSENT TO THE TAPEING OF A CONVERSATION MUST BE ESTABLISHED BY THE TESTIMONY OF THE PERSON WHO CON-}
B. Validity of the Search Warrant

In part II of the *Bernie* opinion, the supreme court concluded that the search itself was legal. Regarding the constitutionality of an "anticipatory search,"86 the court cited *United States ex. rel. Beal v. Skaff*,87 a seventh circuit case holding that a search warrant could be issued *in futuro* pursuant to an affidavit alleging that contraband would be located at a certain place some time in the future.88 The *Bernie* court stated that the "law is clear that such warrants are not constitutionally invalid for lack of a present violation of law at the premises where the contraband will be delivered in the future."89 The court's own emphasis of the word "constitutionally" might lead one to expect the court to discuss section 933.18, Florida Statutes,90 which required that narcotics laws be violated within the dwelling before a search warrant could be issued and imposed a statutory prohibition upon anticipatory searches, despite the absence of a constitutional prohibition upon anticipatory searches in Florida.

Before addressing section 933.18, the court focused on *Illinois v. Andreas*,91 where the United States Supreme Court announced that the threshold question was "whether an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched container."92 The *Andreas* Court answered in the negative, stating that "[n]o protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal."93 The Supreme Court of Florida found that the factual circumstances in *Bernie* and in *Andreas* were similar.94 The court thus concluded that "the law is now clear that

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88. *Id.* at 991 (emphasis in original); see, e.g., *United States v. Hendricks*, 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985) (where customs officials intercepted box full of cocaine and procured a search warrant, leading to court's determination that no probable cause existed, but that *Leon* 's "good faith exception" applied and evidence was admissible).
89. See supra text accompanying note 15.
90. *Id.* at 771.
92. *Id.* at 771.
93. *Id.*
neither the Florida Constitution nor the United States Constitution requires issuance of a warrant for this type of search."

Similarities between the facts in *Andreas* and the facts in *Bernie* are not obvious. *Andreas* involved a warrantless search of a container, outside the defendant’s home, after the container had already been lawfully searched. In addition, the police officers never entered the defendant’s home. *Bernie*, on the other hand, involved the validity of a search warrant authorizing the search of the defendant’s home after a container of drugs, sent to the home, was legally searched while in transit. *Andreas* involved an exigent situation. The police officer was in the process of securing a search warrant when the defendant attempted to leave his apartment building with the contraband. Nothing in *Bernie* suggests that exigency prevented the officers from securing a search warrant after the narcotics were located in the dwelling, as required by Florida statute.

It is difficult to see how the *Bernie* majority concluded that the “law is clear” that no warrant is needed. As stated by Justice Kogan in his dissent, even if the Bernies had no expectation of privacy in the package of cocaine on the basis of *Andreas*, undoubtedly the Bernies continued to have an expectation of privacy in their home. As Justice Kogan further pointed out, whereas in *Andreas* police officers searched a previously searched package outside the defendant’s home, in *Bernie* police officers entered the Bernies’ home with a warrant in violation of a state statute. It cannot be argued that *Andreas* permits entrance into a private residence without a warrant or with an invalid warrant. In addition, it is untenable to translate the lack of expectation of privacy in a previously opened container of contraband to a lack of expectation of privacy in one’s home when a container of contraband is in transit to that home.

### 1. Statutory Criteria

Following its discussion of *Andreas*, the court addressed the application of section 933.18, Florida Statutes, to the facts of *Bernie*. The court did not apply section 933.18, but noted that the drugs were in the “constructive possession” of the law enforcement officers because of the search and seizure of the cocaine after the package broke

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95. *Id.*
96. *Andreas*, 463 U.S. at 767.
97. *Id.*
98. *Bernie*, 524 So. 2d at 998.
99. *Id.* at 992.
100. *Id.* at 998 (Kogan, J., concurring and dissenting).
The majority found that a "reasonable construction" of section 933.18 indicated that the Florida Legislature did not intend to prohibit the search of the Bernies' apartment under these circumstances. The court found that section 933.18, explicitly prohibiting the issuance of a search warrant unless narcotics laws are being violated within the private dwelling, did not apply to situations where the "state already knows the drug laws have been violated." The court concluded that because the statute did not apply the warrant was valid, and it was, therefore, unnecessary to apply United States v. Leon.

In its effort to conform to United States Supreme Court rulings, the court virtually ignored a Florida statute which directly addresses the issuance of search warrants in situations such as that in Bernie. As the court observed, section 933.18 requires that: "No search warrant shall issue under this chapter . . . to search any private dwelling . . . unless . . . [t]he law relating to narcotics or drug abuse is being violated therein." The language of the statute is neither limited nor ambiguous. It logically follows from such language that an affiant seeking a search warrant must show probable cause that a narcotics law is being violated within the dwelling at the time the warrant is issued. No evidence exists that the Legislature intended section 933.18 to be interpreted as requiring that the affiant seeking a warrant show probable cause that a law relating to narcotics is about to be violated or that a law relating to narcotics will be violated in the near future. If the Legislature had intended such a construction, it would have so indicated.

The court also appeared to ignore Gerardi v. State, which held that warrants to search private dwellings, issued before the narcotics violation occurred within the private dwelling, are in violation of Florida statutory law. The cases relying upon Gerardi affirm such an adherence to Florida law. As noted in Justice Kogan's dissent in

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101. Id. at 992.
102. Id.
103. Id.
104. Id.
105. Id. (quoting section 933.18, Florida Statutes) (emphasis supplied by court).
106. See, e.g., Carson v. Miller, 370 So. 2d 10, 11 (Fla. 1979) (stating that the court has "consistently held that unambiguous statutory language must be accorded its plain meaning") (citing Thayer v. State, 335 So. 2d 815 (Fla. 1976)); McDonald v. Roland, 65 So. 2d 12 (Fla. 1953); A.R. Douglas, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157 (1931); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).
107. 307 So. 2d 855 (Fla. 4th DCA 1975).
108. Id. at 855.
109. See, e.g., State v. Powers, 388 So. 2d 1050 (Fla. 4th DCA 1980) (requiring that there
**Bernie**, "every appellate court that has addressed the issue of the degree of compliance (sic) with search and seizure statutes required, has consistently held that such compliance (sic) must be absolute."\(^{10}\) The court in **Bernie** failed to apply section 933.18, Florida Statutes, and also failed to overturn **Gerardi**, which theretofore had required application of the statute.

A troubling aspect of **Bernie v. State** is that the court, in its effort to conform to the United States Supreme Court rulings on the fourth amendment, conveniently sidestepped a pertinent Florida statute by applying an arguably similar United States Supreme Court case and construing the Florida statute as inapplicable to the circumstances at bar.\(^{11}\) It appears to follow that Florida courts can now search the opinions of the United States Supreme Court in search of "similar" cases, and apply these to Florida cases by virtue of the 1982 amendment to article I, section 12 of the Florida Constitution. If there exists a Florida statute affording greater search and seizure protection than that required by the United States Supreme Court, then the Florida courts may construe the statute as inapplicable to the particular facts before the court. This possibility may provide Florida prosecutors a greater opportunity to convict the accused. Before **Bernie**, prosecutors applied Florida case law interpreting the Florida Constitution and Florida statutes.\(^{12}\) Following **Bernie**, prosecutors may apply United States Supreme Court rulings to circumvent the laws of Florida.

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exist probable cause that contraband is located within the private dwelling before a magistrate may issue a warrant to search the dwelling) (citing **Gerardi v. State**, 307 So. 2d 855 (Fla. 4th DCA 1975)).

10. **Bernie v. State**, 524 So. 2d 988, 998 n.2 (Fla. 1988) (citing Gildrie v. State, 94 Fla. 134, 113 So. 704 (1927); Jackson v. State, 87 Fla. 262, 99 So. 548 (1924); State v. Bernie, 472 So. 2d 1243 (Fla. 2d DCA 1985); State v. Tolmie, 421 So. 2d 1087 (Fla. 4th DCA 1982); Hurt v. State, 388 So. 2d 281 (Fla. 1st DCA 1980), pet. for rev. denied, 399 So. 2d 1146 (Fla. 1982); Hesselrode v. State, 369 So. 2d 348 (Fla. 2d DCA), cert. denied, 381 So. 2d 766 (Fla. 1980); Leveson v. State, 138 So. 2d 361 (Fla. 3d DCA 1962)).

11. *Id.* at 992.

12. The exclusionary rule, judicially created in Weeks v. United States, 232 U.S. 383 (1914), existed in Florida long before the United States Supreme Court imposed it upon the states in Mapp v. Ohio, 367 U.S. 643 (1961). In Gildrie v. State, 94 Fla. 135, 113 So. 704 (Fla. 1927), the Supreme Court of Florida relied upon interpretations of the fourth and fifth amendments to the United States Constitution to construe the Florida Constitution to require the exclusion of evidence obtained by the unlawful search of a dwelling. In 1968, an explicit exclusionary rule was written into the Florida Constitution, which read: "Articles or information obtained in violation of this right shall not be admissible in evidence." FLA. CONST. art. I, § 12 (1968). During the 1966 Constitution Revision Commission debates, Justice B.K. Roberts, one of the chief proponents of the exclusionary rule, stated:

> It's my personal view that if we should recede from the exclusionary rule, we take out the only weapon that the citizen has to enforce his rights against unreasonable searches and seizures. The exclusionary rule should not continue to hang in this state...
It seems unlikely that such a result is what the voters of Florida intended. Because the 1982 amendment to article I, section 12 was not intended to restrict the Legislature's ability to provide additional rights for Floridians against unreasonable searches and seizures, it should be construed to define only the constitutional limits of searches and seizures in Florida. Florida statutes regulating search and seizure procedures act independently of the Florida Constitution when statutes impose greater protection against unreasonable searches and seizures. To interpret the Florida Constitution any other way might lead to the conclusion that any statute providing greater search and seizure protection than the United States Supreme Court provides violates the amended article I, section 12 and is, therefore, unconstitutional. In 1982, Florida's voters removed the supreme court's ability to interpret the state constitutional search and seizure guarantees; however, they did not limit the Legislature's power to provide greater search and seizure protection than the Constitution requires.

2. Constitutional Criteria

In accordance with the Florida constitutional requirement that Florida courts apply United States Supreme Court rulings, the Second District Court of Appeal applied Leon’s "good faith exception" in State v. Bernie. The district court held that although the warrant was issued in violation of Florida law, the officers acted in "objectively reasonable reliance" on the warrant. The court stated:

[W]e conclude that under the cost-benefit approach of Leon, exclusion of the cocaine would be improper because "there is no police illegality and thus nothing to deter." Indeed, Deputy Matosky did everything that was asked of him and acted with objective good faith; he conducted an independent investigation, submitted all information to the circuit judge for a probable cause determination, and obtained a facially valid warrant authorizing a search of the Bernies' residence.

The district court also stated that it is the magistrate's responsibility to establish probable cause and that an officer cannot be expected to

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113. Bernie. 524 So. 2d at 999 (Kogan, J., concurring and dissenting).
114. 472 So. 2d 1243, 1248 (Fla. 2d DCA 1985), aff'd, 524 So. 2d 988 (Fla. 1988).
115. Id. at 1247 (quoting United States v. Leon, 468 U.S. 897, 921 (1984)).
116. Id. (citation omitted).
scrutinize a magistrate's determination that there is probable cause or that a search warrant is technically correct. The court concluded that where an affidavit is "so fundamentally defective" that no Florida law enforcement officer could reasonably rely upon it, the "good faith exception" to the exclusionary rule does not apply.

The Second District Court of Appeal misapplied Leon's "good faith exception" in State v. Bernie. The United States Supreme Court held in Leon that where police officers act in good faith reliance on a warrant they have no reason to believe to be invalid, the deterrent value of excluding the evidence is nominal while the cost of excluding the evidence is great. Although nothing in Leon indicates that the police officer should have known probable cause was lacking, the police officer in Bernie should have known he was acting pursuant to a warrant in direct violation of section 933.18, Florida Statutes.

As the Leon opinion states, the standard of reasonableness is an objective standard, which "requires officers to have a reasonable knowledge of what the law prohibits." The law in Florida prohibits search warrants issued in violation of section 933.18. The court in Bernie should have used the same test as used in Leon: "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's author-

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117. Id.
118. Id. at 1248.
119. See, e.g., Howard v. State, 483 So. 2d 844 (Fla. 1st DCA 1986). In Howard, the court cited to the Second District Court of Appeal in State v. Bernie, 472 So. 2d 1243 (Fla. 2d DCA 1985), aff'd, 524 So. 2d 988 (Fla. 1988), but refused to apply the "good faith exception" to evidence obtained pursuant to an invalid warrant. Howard, 483 So. 2d at 846. The search warrant in Howard described marijuana plants growing outside the defendant's home but did not allege any plants to be located within the home. Id. at 845-46. Consequently, the court found a "fundamental defect in the warrant" and refused to apply the "good faith exception" because the warrant was in violation of section 933.18, Florida Statutes (1983), which required that there be probable cause that the contraband be located within the private dwelling before a warrant could be issued. Id. at 847. The court found that the "executing officers cannot be said to have acted in 'objectively reasonable reliance' upon the warrant." The court granted the motion to suppress the evidence. Id.
121. This section, of course, explicitly requires that a narcotics violation be occurring within the dwelling to be searched at the time the warrant is issued. See Fla. Stat. § 933.18.
122. Leon, 468 U.S. at 920 n.20.
123. See Gildrie v. State, 94 Fla. 134, 113 So. 704 (1927). In Gildrie, the court reversed the appellant's conviction on the grounds that the warrant to search the appellant's house was invalid for failure to specify the items to be seized within the dwelling. The court stated that the statute authorizing the search warrant should be strictly construed because "there is no process known to the law the execution of which is more distressing to the citizen or that actsuates such intense feeling of resentment on account of its humiliating and degrading consequences." Id. at 139, 113 So. at 705.
126. *Id.* at 992.
127. See FLA. STAT. § 933.18 (1983).
128. *Bernie*, 524 So. 2d at 992.
129. 307 So. 2d 853 (Fla. 4th DCA 1975).
the states may surpass" to preserve the personal freedoms of their citizens. Justice Brennan cited several examples where states have responded to the United States Supreme Court by requiring greater protections under their respective state constitutions. Justice Brennan also lauded the 250 state court opinions over the past fifteen years which have held that Supreme Court constitutional minimums were insufficient to satisfy more stringent state constitutions. He called for liberals and conservatives alike to greet with enthusiasm "'[t]his rebirth in state constitutional law.'"

In 1982, the voters of Florida chose not to embrace enthusiastically their state constitutional protections. Instead, they declined to allow Florida's courts to continue interpreting Florida's constitutional provisions regarding searches and seizures and delegated that authority to the United States Supreme Court. The voters of Florida should reconsider this decision and should amend article I, section 12 of the Florida Constitution to allow Florida courts the opportunity to interpret the Florida Constitution as providing more constitutional protection than the United States Supreme Court interprets the fourth amendment as providing. The Florida Constitution serves the people of Florida, and accordingly should be interpreted by Florida's courts observing the minimum guarantees of the United States Constitution.

The Supreme Court of Florida improvidently affirmed the holding of the district court that Leon's "good faith exception" included instances where a police officer acted pursuant to a search warrant in direct violation of a state statute. The court should have addressed the holding of the district court on its merits, so that magistrates, law enforcement officers, and the citizens of Florida would know whether section 933.18, Florida Statutes, is to be followed. By holding that the Legislature did not intend to prohibit searches such as that in Bernie, the court sidestepped the issue of strict statutory adherence. The stat-

131. Id. (comparing South Dakota v. Opperman, 428 U.S. 364 (1976), which held that inventory search of car impounded for a parking violation was permissible under the fourth amendment to the United States Constitution, with State v. Opperman, 247 N.W.2d 673 (S.D. 1976), which held on remand that the same inventory search was impermissible under the South Dakota Constitution).
133. Id. at 550.
ute, taken on its face, clearly applies to this case as it purports to apply to all narcotics searches of private dwellings. Had the Legislature intended otherwise, it would have so stated.

The Supreme Court of Florida should not have applied *Illinois v. Andreas*, for the decision in *Andreas* allows only the warrantless reopening of a container of contraband *outside* a private dwelling, provided the container was previously opened pursuant to a lawful search. *Andreas* did not authorize the warrantless search of a private dwelling after a package en route to that dwelling broke open in transit and was lawfully searched.

The Supreme Court of Florida does not serve the citizens of this state well when it relies upon the 1982 amendment to article I, section 12 of the Florida Constitution to apply a remotely similar case in an effort to circumvent an explicit Florida statute. The court should have decided *Bernie* on the basis of section 933.18, Florida Statutes, and not on the basis of *Andreas*. For now, the citizens of Florida must wait to see which other Florida statutes fall by the wayside in the court's effort to conform to the decisions of the Supreme Court of the United States.
