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TESTIMONY BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE ON HOUSE BILL 1502

JULY 26, 1993

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

LARRY FRANKEL

LEGISLATIVE DIRECTOR

Good morning. My name is Larry Frankel. I am the Legislative Director of the American Civil Liberties Union of Pennsylvania. Thank you for providing me with this opportunity to testify on House Bill 1502.

The ACLU opposes this legislation because it violates the privacy rights of all Pennsylvanians and undermines everybody's right to be protected from unlawful searches. We are also troubled by the willingness of some legislators to use the amendment process to override decisions of the Pennsylvania Supreme Court. We think that this tendency minimizes the important role that the Pennsylvania Constitution has served for over 200 years.

House Bill 1502 proposes an amendment to Article I, Section 8 of the Pennsylvania Constitution. If that amendment were adopted, evidence could be introduced in a criminal proceeding even though the evidence was obtained via an unlawful search. The amendment, in essence, proposes an exception to Article I, Section 8, which has been interpreted to prohibit the introduction of such evidence.

In 1991, the Pennsylvania Supreme Court expressly rejected a suggestion by prosecutors that a "good faith" exception be grafted onto Article I, Section 8. Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991). This proposed legislation is nothing but an attempt to circumvent that result.

A review of the recent opinions of the Pennsylvania Supreme Court will establish a context for your consideration of this bill and will illustrate the grave implications of this proposed legislation.

In the Edmunds case, Justice Cappy, writing for the majority, discussed the history of Pennsylvania Constitution in general and Article I, Section 8 in particular. The Pennsylvania Constitution was adopted in 1776, more than 10 years prior to the adoption of the United States Constitution. The Pennsylvania Constitution included a Declaration of Rights. The federal Bill of Rights was derived, in part, from the Pennsylvania Declaration of Rights and similar provisions in the constitutions of other states.

The Declaration of Rights contained a specific search and seizure provision:

> The people have a right to hold themselves, their houses, papers and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right and ought not be granted.

That provision was revised extensively in 1790 and remained in the same form until 1873 when the phrase "subscribed to by the affiant" was added. Since that time the section has not undergone any further revision. It is fair to say that the

essence of the present search and seizure provisions, as set forth in Article I, Section 8, has been part of the Pennsylvania Constitution for more than 200 years.

The Pennsylvania Supreme Court has repeatedly found that Article I, Section 8 embodies a strong notion of privacy. That Court has steadfastly safeguarded the privacy interests protected by Article I, Section 8 against unreasonable searches and seizures. In Edmunds, the Pennsylvania Supreme Court expressly found that "Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth. See, Commonwealth v. Platou, (1973); Commonwealth v. DeJohn, (1979); Commonwealth v. Sell, (1983); Commonwealth v. Miller, (1986); Commonwealth v. Blystone, (1988); and Commonwealth v. Melilli, (1989)."

In order to fully protect and bolster that right of privacy, the Pennsylvania Supreme Court has refused to interpret Article I, Section 8 in as narrow a manner as the United States Supreme Court has interpreted the Fourth Amendment to the United States Constitution. In Commonwealth v. Edmunds, the Court declined to adopt the good faith exception to the exclusionary rule. In Commonwealth v. Sell, 504 Pa. 46, 470 A.2d 457 (1983), the Court rejected the suggestion that it adopt a standing requirement in the context of motions to suppress. In Commonwealth v. Melilli, 521 Pa. 405, 555 A.2d 1254 (1989), the

Court held that a pen register device could not be installed without probable cause, even though it would be permitted under the Fourth Amendment.

In Commonwealth v. Miller, 513 Pa. 118, 518 A.2d 1187 (1986), the Pennsylvania Supreme Court wrote movingly about the protection provided by Article I, Section 8:

> It is designed to protect us from unwarranted and even vindictive incursions upon our privacy. It insulates from dictatorial and tyrannical rule by the state, and preserves the concept of democracy that assures the freedom of its citizens. This concept is second to none it its importance in delineating the dignity of the individual living in a free society.

513 Pa. at 127, 518 A.2d at 1191-92.

This Commonwealth has a history and tradition of protecting the privacy interests of its citizens against the police powers of the state. The decisions from the last 20 years show that the Pennsylvania Supreme Court refuses to sacrifice the rights of our citizens. The highest court in this state has not made civil liberties a victim of the war on crime. The ACLU urges you to follow this wise course of action. We think that you should be just as vigilant in safeguarding the privacy interests of your constituents.

I am submitting along with my testimony copies of an article by Dr. Craig D. Uchida and Dr. Timothy S. Bynum entitled "Search Warrants, Motions to Suppress and 'Lost Cases:' The

Effects of the Exclusionary Rule in Seven Jurisdictions," that appeared in the Journal of Criminal Law and Criminology in 1991. The authors undertook a review of data from 2,115 search warrant applications and interviews with 187 individuals from seven jurisdictions around the country. They studied the effects of the exclusionary rule on search warrant-based cases.

I draw your attention to their conclusions. They found that the exclusionary rule served as an incentive to law enforcement officials to comply with constitutional provisions regarding searches and seizures. The also found from their interviews that:

> (p)olice were willing to follow guidelines established by the Constitution, the district attorney's office, and the courts when writing search warrants. . . Police wanted to insure that warrants met the standards of probable cause and that evidence seized would not later be suppressed.

(81 Journal of Criminal Law and Criminology, pages 1065-1066)

The authors also found that the costs of the exclusionary rule in terms of lost cases were limited and that the critics of the exclusionary rule were inaccurate in their claims as to the high costs imposed on society by the exclusionary rule.

In light of this study which demonstrates that there are tangible benefits to society, through proper police procedure, from adherence to the exclusionary rule, and minimal

costs in terms of lost cases, it would appear that there is no factual justification for weakening the exclusionary rule. There is no compelling reason for abandoning the protections provided to Pennsylvanians by Article I, Section 8.

At the outset of my testimony I mentioned that the ACLU is concerned by a tendency on the part of some legislators to propose constitutional amendments to override decisions of the Pennsylvania Supreme Court. We think that both the United States Constitution and the Pennsylvania Constitution represent the collective wisdom of many generations as to how our government should function. Those documents provide certain powers to government and offer citizens significant protections against powerful government.

Many of the provisions in those constitutions are more than 200 years old. Most of them have been subject to interpretation by our courts, interpretations which have changed over the course of time.

While the ACLU certainly does not take the position that the constitution should never be amended, we are skeptical about amendments which are drafted with the intention of overruling court decisions regarding constitutional provisions. When such amendments are offered, we think that this legislature should act with great care. Questions should be asked as to whether substantial harm will actually occur if the constitution

is not amended. Consideration should be given to waiting for the outcome of further litigation and interpretation by the courts. The proposed amendment should be analyzed to determine whether it expands our freedom or restricts our liberty.

Constitutions are meant to be enduring documents, not the product of transient political pressures. They should not be viewed as vehicles for expressing and imposing the will of the majority. Rather they should be understood as the fundamental bases for protecting individual rights. Each of you has taken an oath in which you promised to uphold the Pennsylvania Constitution. We urge you to remain true to that oath and to resist the temptation to tinker with the work of those who produced that fine document.

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SEARCH WARRANTS, MOTIONS TO SUPPRESS AND "LOST CASES:" THE EFFECTS OF THE EXCLUSIONARY RULE IN SEVEN JURISDICTIONS*

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I. INTRODUCTION

Empirical studies that examine the effects of the exclusionary rule on search warrant cases are few and far between. Only a handful of researchers have studied the use of search warrants by law enforcement officers, and even fewer have looked systematically at the effects of the exclusionary sanction on their use.

Search warrants have become an important tool in law enforcement efforts to curtail illegal drug trafficking. During the late 1980s, a number of police agencies have increased their use of warrants. For example, Minneapolis narcotics detectives executed 123 warrants in 1987, 383 in 1988 and 425 in 1989. In San Diego, "crack abatement" detectives executed 143 warrants in 1989, compared to 67 in the previous year. In Denver, a "crack" task force of sixteen detectives executed 246 search warrants in 1988 and 350 in 1989.[1] However, little is known about the results of these warrants generally, in terms of arrests, prosecutions, motions to suppress, or "lost cases" due to the exclusionary sanction.

Questions about the effectiveness and necessity of the exclu-

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[1] Private memoranda from the Minneapolis Police Department, San Diego Police Department, and Denver Police Department, on file at the offices of the *Journal of Criminal Law and Criminology*.

sionary rule continue to be raised outside scholarly circles and police agencies. Members of Congress continue to express interest in the rule—some wish to broaden its exceptions, while others try to maintain the status quo. Congressional interest is particularly evident in the "good faith exception,"[2] as both the House and Senate recently debated whether to expand the good faith notion to warrantless situations.[3] The United States Supreme Court continues to rule on fourth amendment cases as well.[4]

The use of search warrants and the exclusionary rule intersect when, during pretrial proceedings and courtroom arguments, motions to suppress evidence are raised to challenge both the methods and the results of searches conducted by police. Additionally, questions about a search's appropriateness are sometimes raised by defense counsel. At times, judges sustain these motions, but we do not know with precision how often and under what circumstances those rulings are made.

Given these compelling interests, the primary focus of this Article is to analyze systematically the effects of the exclusionary sanction on cases that emerge through search warrant applications. We examine the following research questions: Under what situations and circumstances are search warrants used? What are the outcomes? How often are motions to suppress physical evidence made by defendants? What is the success rate of the motions and what are the outcomes? To address these questions, we use data from 2,115 search warrant applications and interviews with 187 individuals from seven major criminal justice systems across the country. More specifically, to determine the effects of the exclusionary rule on search warrant-based cases, we examine and discuss the number of

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[2] Debate over the definition and interpretation of the "good faith" exception has been as heated as debate over the exclusionary rule itself. For the most part, however, the good faith exception means that evidence obtained with a reasonable or good faith belief that the challenged search or seizure was consistent with the fourth amendment should not be excluded. For a more detailed discussion, see *infra* notes 40-41 and accompanying text.

[3] In October 1990, the House of Representatives approved a resolution that broadened the good faith exception to the exclusionary rule to cover warrantless searches as well as searches in which warrants are used. However, because a compromise could not be reached with the Senate, the exception was not included in the omnibus crime bill for fiscal year 1991. DRUG ENFORCEMENT REPORT, Oct. 30, 1990, at 1.

[4] Recent Supreme Court decisions on fourth amendment issues include United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (fourth amendment not applicable to search by United States authorities in Mexico); Maryland v. Buie, 110 S. Ct. 1093 (1990) (fourth amendment permitted limited "protective sweep" in conjunction with in-home arrest); and Smith v. Ohio, 110 S. Ct. 1288 (1990) (warrantless search of suspect's bag not justified as search incident to lawful arrest).

arrestees, defendants, and "lost cases" as a result of successful motions to suppress evidence because of search and seizure problems.

II. Legal Background

The fourth amendment guarantees the protection of individuals against unreasonable search and seizure.[5] These constitutional protections have traditionally been assured through the exercise of the exclusionary rule. Since the 1914 Supreme Court decision in *Weeks v. United States*,[6] evidence ruled to be seized in violation of the fourth amendment has been excluded from use in criminal prosecution in federal cases.

In 1949, the Supreme Court, in *Wolf v. Colorado*,[7] declared that the fourth amendment binds state and local law enforcement officers through the due process clause.[8] Despite the rationale of *Weeks*, however, the Court declined to extend the exclusionary rule to the states, thus leaving the states to fashion for themselves remedies for violations of the rule.[9] However, only twelve years later, in *Mapp v. Ohio*,[10] the Court overruled *Wolf* and extended the exclusionary rule to the states. In so ruling, the Court took into account: (1) the "imperative of judicial integrity;"[11] (2) a trend among states following *Wolf* to adopt the *Weeks* rule on the grounds that alternative remedies were inadequate;[12] (3) an assumption that states that admit illegally seized evidence encourage fourth amendment violations;[13] and (4) the absence of evidence, based on both the experience of the United States under *Weeks* and the states who voluntarily adopted *Weeks*, that the exclusionary rule impaired the effectiveness of law enforcement.[14]

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5 U.S. Const. amend IV.

6 232 U.S. 383 (1914).

7 338 U.S. 25 (1949).

8 *Id.* at 27-28.

9 Several factors underlay the Court's decision in *Wolf*. First, the Court deferred to the principles of federalism. *Id.* at 28. Second, the Court believed that the rule excluded logically relevant evidence. *Id.* Third, 30 states had refused to extend *Weeks* to fourth amendment violations by state law enforcement officers, while only 17 had done so. *Id.* at 29. Finally, a number of alternative remedies to the rule were available in those states rejecting *Weeks*—remedies that, in the Court's view, were "equally effective" in discouraging fourth amendment violations "if consistently enforced." *Id.* at 31.

10 367 U.S. 643 (1961).

11 *Id.* at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

12 The Court observed that "[w]hile in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule." 367 U.S. at 651.

13 *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217).

14 *Id.* at 659-60.

Over the past thirty years, the appropriate application of the exclusionary rule and its rationale have been vigorously debated. Critics of the exclusionary rule maintain that its application has been too rigid and that substantial modifications are in order.[15] The critics believe that continuing court interpretations of the exclusionary rule have become increasingly complex and confusing. They further argue that the rule works to preserve the fourth amendment's guarantees only by imposing a high cost on society; specifically, by depriving the courts of reliable, and often direct evidence, a criminal is freed. Finally, they argue that there are few benefits to the rule: it assists those accused of crimes but does not deter police from unconstitutional conduct.

In contrast, proponents of the rule continue to argue that its preservation is essential to the protection of due process and individual rights.[16] Furthermore, they argue that evidence tends to show that exclusion does have a deterrent effect. Supporters point to the dramatic increase in the number of search warrants issued in the years after the *Mapp* decision as evidence of the tremendous impact that the Court's decision has had on police practices. Finally, they argue that police departments have increased the amount of training provided to their officers on how to comply with fourth amendment rulings.

Since the *Mapp* decision, the Supreme Court has continued to operationalize the exclusionary rule through a series of cases specifying the conditions and situations in which the rule does and does not apply. As Mertens and Wasserstrom point out, "exclusionary rule litigation provides the principal occasion for the articulation of fourth amendment standards. Without such litigation, it is unlikely that many of these fourth amendment issues would have been resolved."[17] The Court has carved out exceptions to the rule with regard to searches conducted incident to arrest,[18] in hot pursuit,[19] and

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15 *See, e.g.*, S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); M. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE (1982); and Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982).

16 *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); and Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 CRIM. JUST. ETHICS 28 (1982).

17 Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 402 (1981).

18 *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

19 Warden v. Hayden, 387 U.S. 294, 299 (1967).

seizure of items in plain view.[20] The Court has also refined the application of the exclusionary rule in grand jury and habeas corpus proceedings.[21] Additional decisions have further refined the search warrant procedure when informants are used.[22]

Since *Mapp*, the rationale for the rule has changed direction. In *Alderman v. United States*,[23] the Court, for the first time, suggested that the determination of whether to apply the exclusionary rule would turn on a balancing of the costs and benefits of exclusion. Justice White, writing for the majority, said:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.[24]

The Court's decision in *United States v. Calandra*[25] further

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20 Ker v. California, 374 U.S. 23, 34 (1963).

21 In United States v. Calandra, 414 U.S. 338, 349 (1974), the Court declared that the exclusionary rule did not apply to the presentation of illegally obtained evidence at grand jury proceedings. In Stone v. Powell, 428 U.S. 465, 494 (1977), the Court announced that state prisoners who had allegedly been convicted and imprisoned on illegally obtained evidence could no longer pursue their constitutional rights through the use of habeas corpus.

22 In Illinois v. Gates, 462 U.S. 213, 230 (1983), the Court abandoned the "two-pronged" test of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). The "two-pronged" test required officers to establish either that their informant was credible (*i.e.*, generally trustworthy) or that the information was reliable (the "veracity" prong) *and* that the informer obtained the information in a reliable way ("the basis of knowledge" prong). In its place, the *Gates* Court adopted the "totality of the circumstances" standard to decide whether probable cause existed to issue a search warrant based on information provided by confidential or anonymous informants. Under the totality of circumstances approach,

> the task of the issuing magistrate is simply to make a practical, common-sense decision, whether given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gates, 462 U.S. at 238.

23 394 U.S. 165 (1969). The Court ruled that defendants whose fourth amendment rights were not violated lacked standing to move to suppress evidence obtained in violation of the fourth amendment rights of others. *Id.* at 171.

24 *Id.* at 174-75.

25 414 U.S. 338 (1974). Both Canon, *Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559 (1982), and Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 3 AM. B. FOUND. RES. J. 585 (1983), have commented that the Burger Court believed that the principal rationale for the rule was its value in deterring the police from the type of illegal behavior in

changed the basis for the exclusionary rule. In *Calandra*, the Court concluded that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[26] Thus, the Court articulated that the exclusionary rule was not a right conferred by the fourth amendment, but rather a remedy to effectuate fourth amendment rights. In addition, the *Calandra* Court all but abandoned the other bases for exclusion, emphasizing that the "rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[27] The Court thus weighed the costs of exclusion in a particular context—the loss of highly probative evidence—against the likely benefits of exclusion—an increased deterrence of unlawful police behavior.

In subsequent cases, the Court has applied this cost-benefit/deterrence analysis to refuse to extend the scope of the exclusionary rule. In *United States v. Janis*,[28] the Court concluded that the rule's deterrent purpose would not be served by excluding evidence illegally seized by a state police officer from a federal civil tax proceeding. Similarly, in *Stone v. Powell*,[29] the Court held that where a state has provided a full and fair opportunity to litigate a fourth amendment claim, a state prisoner may not receive federal habeas corpus relief on the basis that illegally obtained evidence was introduced at his or her trial. In *Powell*, the Court further limited the "judicial integrity" justification for the exclusionary rule: "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[30] Finally, in

Calandra. Furthermore, Canon noted that "[b]y portraying the rule as a pragmatic social policy rather than a basic constitutional principle, its critics have shifted the scope of the debate from arguments about constitutional law and judicial integrity (where they lost) to arguments about the empirical data." Canon, this note, at 563. Potter Stewart has claimed that *Calandra* was "perhaps the most significant post-*Mapp* decision on the scope of the exclusionary rule." Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1390 (1983).

26 414 U.S. at 348. Commentators have pointed out that "the Court ruled that the accused has no personal constitutional right to have unlawfully-seized evidence excluded at trial. Therefore, because the Court commits no constitutional violation by admitting illegally seized evidence, judicial integrity comes into play only when the Court "encourages" constitutional violations." Mertens & Wasserstrom, *supra* note 17, at 386 n.100.

27 414 U.S. at 349-52.

28 428 U.S. 433 (1976).

29 428 U.S. 465 (1976).

30 *Id.* at 485.

United States v. Havens,[31] the Court held that illegally obtained evidence could be used to impeach the testimony of the victim of the illegal search on the ground that the purpose of the exclusionary rule was adequately served by excluding the evidence from the case-in-chief.[32]

In *United States v. Leon*,[33] *Massachusetts v. Sheppard*,[34] and *Illinois v. Krull*,[35] the Supreme Court applied the good-faith exception to the exclusionary rule. In *Leon* and *Sheppard*, the Court permitted the admission of evidence secured through a search warrant even though the search warrant was faulty. The Court ruled that the officers who obtained the warrants had done so in "good faith," and thus the exclusionary rule should not apply.[36] Writing for the majority in *Leon*, Justice White first justified the Court's holding by concluding that the exclusionary rule was neither a "necessary corollary of the Fourth Amendment" nor "required by the conjunction of the Fourth and Fifth Amendments."[37] Justice White then weighed the costs and benefits of preventing the use of "inherently trustworthy tangible evidence." On the costs-side of the equation, the Court referred to the "substantial social costs of the exclusionary rule in terms of its interference with the criminal justice system's truth-finding function" and the result that "some guilty defendants may go free or receive reduced sentences."[38] On the benefits-side, the Court considered the deterrent effect of the exclusionary rule and found that it was "marginal or nonexistent in cases where evidence was obtained in objectively reasonable reliance on a subsequently invalidated search warrant . . . ."[39]

In *Illinois v. Krull*,[40] the Court ruled that the exclusionary rule did not apply to evidence seized during a warrantless search where the police conducted the search pursuant to, and with good faith reliance upon, a statute that authorized the warrantless administrative search, but which was later held unconstitutional. Justice Blackmun, writing for the majority, again used the cost-benefit rationale coupled with the deterrence argument as the basis for the decision. He wrote,

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31 446 U.S. 620, 627 (1980).
32 *Id.* at 627-28.
33 468 U.S. 897 (1984).
34 468 U.S. 981 (1984). *Sheppard* is the companion case of *Leon*.
35 480 U.S. 340 (1987).
36 *Leon*, 468 U.S. at 905.
37 *Id.* at 906.
38 *Id.* at 907.
39 *Id.* at 922.
40 480 U.S. 340 (1987).

> Application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. . . . The Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process.[41]

By employing a cost-benefit approach, the Burger and Rehnquist Courts have not only changed the focus of their holdings on the exclusionary rule, but have also changed the focus of empirical research. The following sections take a closer look at the prior research in this area. We begin by focusing on studies that examine the impact of the exclusionary rule, and then discuss the research that analyzes the costs and benefits of the exclusionary sanction. Thereafter, we consider the importance of this Article within the context of search warrants and the exclusionary rule.

III. Prior Research

A. The Impact of the Exclusionary Rule

The focus of early research concerned the impact of the *Mapp* decision. Of specific interest in these studies was the implementation of search warrant procedures, the degree of compliance with the provisions of the *Mapp* decision, and the impact of the rule on case dispositions.

Columbia University Law School students provided the first empirical assessment of the effect of the exclusionary rule.[42] Specifically, they were interested in determining whether the *Mapp* decision altered police search and seizure practices. Using a before-after research design, the students examined the frequency of New York City misdemeanor narcotics offenses.

The authors expected to observe a change in the case disposition and frequency of arrest for narcotics in the post-*Mapp* period. Their data showed that the number of post-*Mapp* arrests declined by fifty percent for detectives in the Narcotics Bureau, but increased for arrests by uniformed officers and other detectives. The authors could not find a clear explanation for the differences within the police department. They could only speculate that the character of the Narcotics Bureau's duties differed from patrol or plainclothes officers.[43] Overall, although police practices did not change substantially as a result of *Mapp*, the authors suggested that the situation

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41 *Id.* at 347.

42 Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 Colum. J.L. Soc. Probs. 87 (1968).

43 That is, the authors attributed the decrease in arrests to the specialized nature of

improved after *Mapp* because search and seizure practices were more strictly controlled.[44]

A broader effort to assess the deterrent effect of the exclusionary rule was conducted by Dallin Oaks,[45] who analyzed misdemeanor and felony arrests and convictions in Cincinnati, Chicago, and Washington, D.C. He determined that the exclusionary rule was applicable primarily in certain types of cases, particularly those involving narcotics, weapons, and gambling offenses. Oaks compiled arrest statistics from Cincinnati for the 1956-67 period and concluded that the imposition of the exclusionary rule in 1961 had virtually no effect on the propensity of the police to make arrests for narcotics and weapons offenses, though he conceded that the number of gambling arrests were affected. Oaks found differences between Chicago and Washington, D.C., in the proportion of cases where motions to suppress evidence due to search and seizure problems were brought (40% versus 16%, respectively); in the percent of motions granted (87% versus 20%); and in the percent of cases where a successful motion resulted in dismissal of the case (100% versus 50%). The primary reason for these differences was the more rigorous screening of cases in Washington, D.C. Oaks concluded that the filing of motions was not indicative of the actual impact of the exclusionary rule on case dispositions. He suggested, however, that these figures show that the rule had no deterrent effect on police practices; the data indicated that illegal search and seizures occurred quite frequently despite the rule.

Following in Oaks' footsteps, James E. Spiotto[46] studied motions to suppress to determine the impact of the exclusionary rule

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the narcotics bureau, the "close-knit" character of the bureau, and the nature of the narcotics offenses themselves.

44 To assess the effect of *Mapp* on narcotics case dispositions, the authors examined court records for guilty pleas, dismissals, and motions to suppress evidence. In general, the authors found "the data indicate that defendants have fared better since *Mapp*." Comment, *supra* note 42, at 96. A sharp decrease occurred in guilty pleas, while increases occurred in successful motions to suppress and in "dismissals without explanation." These patterns led the authors to conclude that the changes since *Mapp* showed "the beneficial effects of greater respect for the civil liberties of criminal defendants . . . and represented a new obstacle to effective enforcement of narcotics laws." *Id.*

45 Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

46 Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973). Thomas Y. Davies, who critiqued Spiotto's work, noted that "in many respects James E. Spiotto's work was a continuation of that begun by Oaks." Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740, 741 (1974). Davies pointed out that Spiotto used the Oaks data set from Chicago, that they worked together, and that both received grants from the Department of Justice.

on case processing over a twenty-year period. Using data from the Chicago courts, Spiotto argued that the best measurement of the impact of the exclusionary rule on police behavior was to observe the frequency of motions made before and after the introduction of the rule. If the rule had an apparent impact, he reasoned, then one would expect a decrease in the number of motions to suppress.[47] The results indicated a significant increase in motions to suppress for narcotics and weapons offenses, though gambling offenses experienced a substantial decline. A more important finding was that seventy-eight percent of the defendants who made a motion to suppress had a criminal record. Spiotto concluded that the rule had no deterrent effect on illegal search practices and that it exacted a high societal cost by freeing dangerous or guilty criminals.

Soon after Spiotto's work appeared, however, a critique written by Thomas Y. Davies warned that Spiotto's results should be viewed with caution for a variety of reasons.[48] First, the data were collected in a "haphazard fashion" and interpreted selectively.[49] Second, the research design contained a "critical" mistake regarding the date of the rule's introduction in Chicago: Illinois adopted the exclusionary rule in 1923, thirty-eight years prior to *Mapp*, not during the 1950-70 period that Spiotto claimed.[50] Third, Davies criticized the use of motions to suppress as valid indicators of illegal searches for the type of research question posed by Spiotto. Specifically, Davies argued that

> [m]otions to suppress cannot be used because they do not measure illegal searches prior to the introduction of the exclusionary rule. Although a form of the motion to suppress existed prior to the advent of the rule, the scope of cases where a motion to suppress could be raised increased dramatically following the introduction of the rule.[51]

Given his careful review of the data, Davies warned that "Spiotto's research . . . does not demonstrate the ineffectiveness of the exclu-

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47 In his analysis, Spiotto employed four different measures: (1) the number of defendants appearing in court; (2) the percentage of those defendants making motions; (3) percentage granted; and (4) the percentage of defendants with granted motions. Spiotto used data from 1950, 1969, and 1971 in Chicago, and focused on gambling, narcotics and weapons charges.

48 Critique, *supra* note 46, at 762.

49 Spiotto failed to control for population trends and increases in crime rates. During the twenty-year span of the study, the crime trends drastically increased, resulting in an increased number of motions to suppress.

50 Clearly, this is an important error, for without data from the period prior to the implementation of the exclusionary rule, one cannot make inferences about its impact, particularly as Spiotto suggests.

51 Critique, *supra* note 46, at 755.

sionary rule."[52]

In 1974, Bradley Canon reached different conclusions than Spiotto in his analysis of arrests, issued search warrants, changes in search and seizure policies, and successful motions to suppress evidence.[53] Canon found that changes in search and seizure practices could be attributed to *Mapp* and demonstrated that police compliance with search warrant procedures increased significantly between 1967 and 1973. He concluded that the exclusionary rule was more effective at the time of his study (1974) than it was shortly after the *Mapp* decision in 1961.

B. THE COST OF EXCLUSION

More recently, the focus of research on the exclusionary rule has shifted to its "cost" in terms of lost cases. Because the Supreme Court changed its exclusionary rule rationale in 1974,[54] researchers began to shift their emphasis to cost-benefit analyses and an examination of the deterrent effects of the rule. This change in emphasis is exemplified by research conducted by the General Accounting Office,[55] the National Institute of Justice,[56] Nardulli,[57] Davies,[58] and Orfield.[59]

The General Accounting Office study focused upon exclusion of cases in federal courts through declinations by United States Attorneys' Offices.[60] The GAO Report found that:

Of the 2,804 cases analyzed during the period July 1 through August

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52 *Id.* at 763.

53 Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). Canon collected crime data from 14 cities, sent questionnaires pertaining to search and seizure practices to police departments, prosecutors, and public defenders in over 130 cities, and interviewed police, prosecutors, and public defenders in 10 cities.

54 *See supra* text accompanying notes 25 to 41.

55 GENERAL ACCOUNTING OFFICE, REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979) [hereinafter GAO REPORT].

56 NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982) [hereinafter NIJ REPORT].

57 Nardulli, *supra* note 25.

58 Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 3 AM. B. FOUND. RES. J. 611 (1983).

59 Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987).

60 GAO REPORT, *supra* note 55. The GAO received data from a national, stratified sample of 42 United States Attorney's Offices. Using the individual defendant as the sampling unit, cases were drawn from the period July 1 through August 31, 1978. In addition, questionnaires were sent to personnel in United States Attorneys Offices responsible for the cases to determine the role of the fourth amendment in decisions to

31, 1978, 16% of the defendants whose cases were accepted for prosecution filed some type of suppression motion, 11% cited the fourth amendment. However, only 0.4% of declined defendants' cases were declined due to fourth amendment search and seizure problems.[61]

In addition, the study found that successful motions were made in only 1.3% of prosecuted cases. Thus, the report concluded that the exclusionary rule had a minimal impact.

In contrast, three years later, an in-house research study conducted by the National Institute of Justice (NIJ) found that the rule had a major impact on the disposition of felony arrests.[62] A principal finding from this analysis indicated that 4.8% of all felony arrests rejected for prosecution were rejected because of search and seizure problems. In addition, 32.5% of all felony arrests for narcotics offenses were rejected for prosecution in one of the Los Angeles County District Attorney's Offices due to search problems, and 29% of similar cases were rejected in the other office studied. The NIJ Report also noted that about one-half of those defendants freed because of the exclusionary rule were subsequently arrested within two years of their release. The study concluded that the exclusionary rule is a major factor in the processing of felony cases and implied that it exacts a significant cost to the justice system in terms of lost arrests and cases.

Davies re-analyzed the NIJ data and reached different conclusions.[63] Davies severely criticized the NIJ study because it "suffers from inappropriate samples, from the omission of readily available

prosecute or not, the frequency of motions to suppress, and the impact of fourth amendment motions on criminal justice system resources and the disposition of defendants.

61 *Id.* at 1.

62 NIJ REPORT, *supra* note 56. In this analysis, the authors examined all California felony arrests that were rejected for prosecution for search and seizure problems between 1976 and 1979; all felony cases rejected in San Diego County in 1980; and a sample of cases rejected in two branches of the Los Angeles County District Attorney's Office. The authors also examined the prior and subsequent criminal activity of the defendants whose cases were excluded.

63 Davies, *supra* note 58, at 611. Davies contested two major findings of the NIJ Report: (1) that 4.8% of arrests rejected by prosecutors were rejected because of illegal searches; and (2) that 30% of drug arrests were rejected by prosecutors because of illegal searches. In his re-analysis, Davies used a different baseline than the NIJ Report to determine the percentage of "lost arrests." The NIJ Report calculated that 4.8% of the declined cases (4,130 arrests rejected divided by 86,033 declined by prosecutors) were rejected because of the exclusionary rule. Davies found that only 0.8% (4,130 arrests rejected divided by 520,993 total arrests) of felony arrests were declined because of illegal search problems.

The NIJ Report estimated that 30% of drug arrests were rejected in California, based on data from two local prosecutor's offices in the Los Angeles area. Davies contends that the number of arrests (114 in one jurisdiction and 145 in another) was too small to represent a general estimate of the effects of the exclusionary rule in drug arrests. Davies used statewide data from the California Bureau of Criminal Statistics to

and highly pertinent data, and from a variety of analytical choices that produce a slanted interpretation of the data."[64] In his reanalysis, Davies found that prosecutors rejected only 0.8% of felony arrests because of illegal searches. Davies' reassessment also discovered that in felony drug arrests, the prosecutors rejected 2.4% of the arrests (not 30% as suggested by the NIJ study), the rejection rate for non-drug arrests was less than 0.3%, and the rate was even lower for violent crimes.[65] In addition, Davies found that by looking at the cumulative effect of the rule through all stages of the felony process in California, "only about 2.35% of felony arrests are lost because of illegal searches" and "[this estimate] is almost certainly somewhat inflated."[66] Finally, he concluded that available data showed that the cost of the exclusionary rule was marginal, especially in view of the ambiguous nature of the lost arrests.

Recent studies tend to agree with Davies' conclusions. Peter F. Nardulli's examination of the filing and outcomes of motions to suppress provided similar evidence that the rule exacted only marginal societal costs.[67] In his nine-county study of 7,500 felony court cases in Illinois, Michigan, and Pennsylvania, Nardulli analyzed the incidence of motions to suppress physical evidence, and for comparative purposes, motions to suppress confessions and identifications. The results showed that motions to suppress physical evidence were filed in less than 5% of all felony cases. Further, he noted that the success rate of such motions was quite marginal (only 0.69% of cases filed). Even when motions to suppress were successful, a number of defendants were still convicted without the excluded evidence. Nardulli concluded that the "cost" of the exclusionary rule was quite minimal in that less than 0.6% of all cases were lost due to the exclusion of evidence, and that most of these cases involved minor offenses and offenders.

Finally, one recent study concentrated solely on the deterrence rationale. Myron W. Orfield, Jr.,[68] interviewed narcotics detectives in Chicago and found that the exclusionary rule had "significant deterrent effects . . . [it] changed police, prosecutorial, and judicial procedures . . . it educated police officers in the requirements of the fourth amendment and punished them when they violated those

show that only 2.3% of drug arrests were rejected by prosecutors because of illegal searches over a five-year period.

64 *Id.* at 619.

65 *Id.* at 679-80.

66 *Id.* at 655.

67 Nardulli, *supra* note 25.

68 Orfield, *supra* note 59.

requirements."[69]

These empirical studies have proven to be important in the ongoing debate over the exclusionary rule. Both proponents and opponents of the rule, as well as members of the Supreme Court, have used these data in various ways.[70] Questions remain unanswered, however, particularly when we turn to the costs of exclusion using search warrants. In the next section, we briefly examine two prior studies of warrants that have a direct bearing on the current Article.

C. SEARCH WARRANT STUDIES

Richard Van Duizend and his colleagues at the National Center for State Courts[71] examined the search warrant process in seven cities across the country, and both dispelled and confirmed a number of myths associated with that process. For example, the researchers found that (1) search warrants were sought in relatively few cases; (2) warrants were diverse in their types of cases; (3) judge-shopping occurred by some law enforcement applicants; (4) warrant applications were rarely rejected by judges or magistrates; and (5) warrant applications were often based on unsworn hearsay from anonymous informants.

The study also attempted to determine whether issued warrants would be the subject of successful motions to suppress, and thus, constitute "lost" prosecutions. Examining 350 cases that resulted from issued warrants, the study reported that motions to suppress were filed in 40% of the cases, but only 5% (seventeen) of those motions were granted either fully or in part. Of particular importance was the finding that twelve of these seventeen cases still resulted in a conviction. The study concluded that search warrants

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69 *Id.* at 1017. Orfield based his study on one research question based on *Calandra* and three other court cases: Does the exclusionary rule deter unlawful police behavior? To answer this question, Orfield interviewed 26 Chicago narcotics officers in 1986 using a structured questionnaire. Questions were asked of officers regarding their views on training, experiences in court, their opinions of the exclusionary rule, and how it affects their work.

70 For example, in United States v. Janis, after reviewing the various empirical studies of the rule's deterrent effects and criticisms of those studies, Justice Blackmun, writing for the Court, wrote: "The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect." 428 U.S. 433, 450 n.22 (1976)

Additionally, Davies reported that the Solicitor General's Amicus Curiae Brief for the United States in Illinois v. Gates cited the GAO Report and the NIJ Report. Davies, *supra* note 58, at 615. Justice White, concurring in *Gates*, adopted the NIJ Report's findings. 462 U.S. at 257 n.13 (White, J., concurring).

71 R. VAN DUIZEND, L. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES (1986).

> properly administered and supervised . . . can protect privacy and property rights without significantly interfering with the ability of police officers to conduct thorough and effective investigations of criminal activity. . . . Moreover, it was evident to us that the exclusionary rule, though seldom invoked, serves as an incentive for many police officers to follow the limits imposed by the Fourth Amendment as defined in their jurisdiction.[72]

The Van Duizend study raised important questions about the use of search warrants. Yet, it also issued methodological cautions that make general acceptance of the results somewhat problematic:

> The archival data were used principally to facilitate the exploration of significant patterns or the conspicuous absence of certain events (*e.g.*, successful suppression motions), and to be modestly demonstrative of overarching patterns. Owing to the fact that the cities used in this study are not necessarily representative of all cities and that the cases included in each city sample were not selected in strictly random fashion, statistical reliability of the archival data is not claimed.[73]

At six of seven sites, sixty-five to seventy-five search warrant applications were selected by the researchers on an *ad hoc* basis rather than through a systematic sampling procedure. This case selection bias leads to serious problems of interpretation. Another problem involves the unit of analysis. Because the primary concern was to examine search warrant applications, the researchers did not focus on individuals or their cases. For example, in the one intensively examined site, River City, 405 search warrant applications were examined, but a careful analysis of the persons involved in the cases was not conducted.

As the Van Duizend study neared completion, the United States Supreme Court released its decisions in *Leon* and *Sheppard*. The NIJ then commissioned the Police Executive Research Forum (PERF) to conduct an impact study.[74] In that project (conducted by the authors of this Article), the researchers used the same seven jurisdictions as the Van Duizend study and also conducted an intensive review of search warrant practices. The primary concern was the degree of change in such practices since the *Leon* decision.[75] Overall, the study found that the search warrant process did not change in the seven sites and across the country; that the number and con-

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[72] *Id.* at 119.

[73] *Id.* at 10.

[74] *See* C. UCHIDA, T. BYNUM, D. ROGAN & D. MURASKY, THE EFFECTS OF UNITED STATES V. LEON ON POLICE SEARCH WARRANT POLICIES AND PRACTICES, FINAL REPORT (monograph prepared for Police Executive Research Forum 1986); *see also* Uchida, Bynum, Rogan & Murasky, *Acting in Good Faith: The Effects of United States v. Leon on Search Warrant Policies and Practices*, 30 ARIZ. L. REV. 467 (1988).

[75] We examined search warrant applications prior to and after *Leon*.

tent of warrants did not change from 1984 to 1985; and that the impact on judicial suppression of evidence was virtually non-existent. Because the focus of the study was the impact of the *Leon* ruling, the researchers did not carefully examine the cost of the exclusionary rule on search warrant activity. Like the Van Duizend *et al.* work before it, individual defendants and important research questions were all but ignored.

IV. Research Design

Using the data from the *Leon* study, we now examine the following questions: Under what situations and circumstances are search warrants used? What are the outcomes? How often are motions to suppress physical evidence made by defendants? What is the success rate of the motions and what are the outcomes?

To answer these questions, we developed a research process that enabled us to focus on both the aggregate cost of the exclusionary rule and the rationale of the individual "lost" cases.

Unlike a number of previous empirical research efforts, we examined cases that resulted from search warrant applications. Our data included all search warrant applications for six months of 1984 and 1985 in seven sites (January through March of each year).

Second, most studies of the impact of the exclusionary rule only note whether a case was excluded and do not include any information regarding the seriousness of the violation itself. For example, we need to know why the exclusion occurred. A simple empirical tally of cases excluded tells us little of the police search process or the reasons behind a "lost case." Our purpose is to describe the "lost case" and to examine the rationale behind its exclusion.

Third, we distinguish this Article from Van Duizend *et al.* and our own previous work by focusing on individual cases and by avoiding case selection bias through the inclusion of all warrants in each of the seven sites for a six-month period.

A. THE SITES

We returned to the seven sites previously used in the Van Duizend *et al.* study in 1985. We agreed to allow the seven intensively studied sites anonymity.[76] They are referred to as Border City, For-

76 While we recognize that the study is weakened somewhat by making these sites anonymous, the trade-off was not to conduct research in these settings at all. While members of four departments did not indicate a problem with disclosure, the others did, and we respect their decisions. We were given complete access to police and court

est City, Harbor City, Hill City, Mountain City, Plains City, and River City.

Border City, located in the western United States, is a large urban center with a diverse population. Forest City is characterized as a commercial center on the west coast, while Harbor City is a major eastern industrial city. Hill City is part of a large metropolitan area in the west. Mountain City, Plains City, and River City are the largest cities in their respective states, and serve as hubs of commercial activities.

Table 1 provides a comparison of the project sites regarding population and crime characteristics. In Table 1, we note the relative independence of city size, crime rate, and size of police force. Although Plains City, River City, and Border City all have similarly-sized police departments, they have widely different crime rates and populations. Interestingly, the smaller cities appear to have the higher rates of reported crime while the larger cities have among the lower rates of crime.

Table 1
CHARACTERISTICS OF PROJECT SITES

Site	Geographic Location	Population[1]	Index Crime Rate[2]	Number of Sworn Officers[3]
Border City	West	1,000,000	75	1500
Harbor City	Northeast	750,000	85	3000
River City	South	500,000	85	1500
Plains City	Midwest	500,000	105	1500
Forest City	Northwest	500,000	130	1000
Hill City	West	350,000	120	600
Mountain City	West	175,000	115	350

Source: FBI, CRIME IN THE UNITED STATES: 1985 (1986).

[1]1985 estimate based on UCR.
[2]Rate is per 1,000 people.
[3]Numbers are based on 1985 estimate from UCR.

B. THE DATA

The data analyzed in this article were collected in 1985 and 1986. The principal data collection strategy consisted of an intense, in-depth study of search warrant activity in seven cities located throughout the country. In addition, interviews with key personnel throughout each criminal justice system were undertaken (N=187).

records and files, and personnel were willing to provide open interviews knowing that their statements would be held in confidence. As a result, we believe that the data we obtained are highly reliable and valid.

At each site, we reviewed all search warrant applications made during two three-month periods in 1984 and 1985. These applications were then tracked through the criminal justice system to their disposition, thus yielding a complete picture of warrant activity in these jurisdictions. A total of 2,115 warrant applications were examined, coded, keypunched, and analyzed. From these search warrants and the tracking of individual cases in each of the seven criminal justice systems, we were able to determine whether arrests occurred, cases were filed, motions were made, how courts ruled on motions, and the outcomes of the cases.

For this Article, we use two units of analysis—the primary warrant and the individual suspect. Primary search warrants are a subset of the total number of actual search warrant applications. Primary warrants were used because law enforcement officers, at times, wrote multiple warrants for the same case. On a number of occasions, officers were required to search more than one person, place, or vehicle. As a result, a number of search warrant applications were linked to the same case. When multiple warrants were related to one investigation, a "primary" warrant was selected to avoid overcounting and misrepresentation of warrant activity.[77]

To examine the effects of the exclusionary rule on individual cases, we used the individual suspect, arrestee, and defendant as our baseline. To determine how policies and practices regarding search warrants, motions to suppress, and lost cases were dealt with, we relied on information garnered through structured interviews with key personnel at each location. Police, prosecutors, defense attorneys, and judges were among those interviewed.

V. FINDINGS

A. SEARCH WARRANT ACTIVITY: A BRIEF OVERVIEW

Table 2 shows the warrant-based case flow or pipeline in each of the seven sites for the six month period of 1984 and 1985. As we discussed above, the unit of analysis is the "primary search war-

[77] Primary warrants were selected by the two Principal Investigators based on the warrant applications and affidavits. Where two or more warrant applications applied to the same individual, house, or vehicle, we examined both warrants or multiple warrants carefully, prior to coding information. All of the primary warrants were identical to the "secondary" or "tertiary warrants," except for the place to be searched. That is, the statements of probable cause, the type of informant, the officers writing the warrants, and the judges who signed the warrants were identical. This was a commonality among all sites. All warrants were coded and keypunched with the ability to determine during the data analysis how warrants might be linked to each other. This allowed us to validate the initial selection of primary warrants.

Table 2
PIPELINE OF SEARCH WARRANT ACTIVITY, SEVEN SITES
JANUARY TO MARCH, 1984 & 1985
(NUMBER OF WARRANTS & PERCENT OF PRIMARY WARRANTS)

	River	Mount	Plains	Border	Hill	Forest	Harbor	Totals
Total Warrants	234	85	300	310	254	208	724	2,115
Primary Warrants	191	70	264	265	233	182	543	1,748
Executed Warrants	141	68	253	234	198	176	511	1,511
	74%	97%	96%	88%	85%	97%	94%	86%
Warrants with at least 1 arrest	131	55	219	173	133	122	325	1,158
	69%	79%	83%	65%	57%	67%	60%	66%
Warrants with at least 1 case filed by D.A.	93	41	170	150	88	82	315	939
	49%	59%	64%	57%	38%	45%	58%	54%
Warrants with at least 1 motion to suppress	55	4	29	11	43	24	59	225
	29%	6%	11%	4%	18%	13%	11%	13%
Warrants with at least 1 successful motion to suppress	5	0	5	0	0	3	2	15
	3%	—	2%	—	—	2%	.4%	.9%

rant." Percentages within each of the columns are based on the number of primary warrants rather than the total number of warrants. For example, in River City, police officers wrote 234 total warrants, but conducted only 191 unique investigations (primary warrants), so these 191 primary warrants were used as the baseline.

Harbor City police officers wrote the highest number of warrant applications during this period, followed by officers in Border and Plains Cities. On average, 86% of all primary warrants were executed or served, ranging from a low of 74% in River City to a high of 97% in Mountain City. Similarly, warrant-based investigations led to an arrest almost two-thirds of the time, with Plains City officers (83%) making the most arrests. Offices of the district attorney filed cases in almost 54% of the warrants. The relatively low percentages of cases filed in Hill City (38%), Forest City (45%), and River City (49%) reflect the stringency of review and screening conducted in each of the offices of the district attorney.

Table 2 also shows the number and percentage of primary search warrants that were contested through motions to suppress. Overall, 225 primary warrants (13%) were contested by defendants. River City had the highest percentage of warrants challenged (29%), followed by Hill City (18%) and Forest City (13%). These

motions were granted in 15 primary warrants (0.9%) and in only four of the seven sites (River City, Plains City, Forest City, and Harbor City).

Table 3 describes the overall situation further, by detailing individual-level information. Within the 1,748 primary warrants, police detained or arrested 2,276 total suspects. Of these, 1,672 were formally arrested by police and 1,355 (or 81%) became defendants (charged by the district attorney). Charging practices differed across sites. Harbor City, Mountain City, and Border City prosecutors accepted over 90% of the cases brought to their attention via arrest. Plains City, Forest City, Hill City, and River City district attorneys accepted fewer than 76% of the cases. Unfortunately, we do not know how many times prosecutors refused to file charges because there was a "bad" or faulty warrant, as opposed to other reasons for not prosecuting. Thus, we cannot assess the loss of arrestees where cases were never filed.

Table 3
PIPELINE OF SUSPECTS, ARRESTEES, AND DEFENDANTS SEVEN SITES

	Total	River	Mount	Plains	Border	Hill	Forest	Harbor
# Suspects	2276	303	94	317	352	301	240	669
# Arrestees	1672	253	65	270	254	200	180	450
# Defendants	1355	155	63	204	234	128	132	439
Defendants as % of Arrestees	81.0	61.3	96.9	75.6	92.1	64.0	73.3	97.6
Defendants as % of Suspects	59.5	51.2	67.0	64.4	66.5	42.5	55.0	65.6

In terms of dispositions of search warrant-based cases, on average, 70% of the defendants were convicted of their crimes (Table 4). Mountain City and Forest City prosecutors convicted 82% and 81% of their defendants, respectively. Hill City and Harbor City had lower conviction rates (59% and 62%, respectively) and higher dismissal rates (29% and 24%) than the other cities. Acquittals by jury trial or bench trial averaged 3% across the sites, ranging from a low of 1% in Hill City to a high of 5% in River City.

In general, search warrant cases were subject to the exclusionary rule if the warrant did not meet the legal standard of probable cause. Supreme Court decisions in *Gates*,[78] *Leon*,[79] and *Sheppard*[80] provided the police with less rigid requirements to follow and more

78 462 U.S. 213 (1983).
79 468 U.S. 897 (1984).
80 468 U.S. 981 (1984).

Table 4
DISPOSITIONS OF DEFENDANTS
SEVEN SITES

	Total	River	Mount	Plains	Border	Hill	Forest	Harbor
# Defendants	1355	155	63	204	234	128	132	439
# Convicted[a]	839	113	45	127	155	57	80	262
	70%	75%	82%	75%	76%	59%	81%	62%
# Dismissed	238	25	8	32	28	28	17	100
	20%	17%	15%	19%	14%	29%	17%	24%
# Acquitted	38	8	2	6	5	1	2	14
	3%	5%	4%	4%	2%	1%	2%	3%
# Other[b]	78	3	0	5	16	10	0	44
	7%	2%	—	3%	8%	10%	—	10%
Missing cases	135	4	8	34	30	32	33	19

[a] includes those who pled guilty and those found guilty through trial
[b] includes defendants who were diverted for treatment or received a pre-trial "sentence" (e.g., probation before judgement in Harbor City)

incentives to seek more warrants. For example, in *Gates*, the Court established the "totality-of-circumstances" test, which directed the magistrate to "make a practical common-sense decision whether given all the circumstances set forth in the affidavit . . . [that] there is a fair probability that contraband or evidence of a crime will be found in a particular place."[81] Prior to *Gates*, police were required to describe both how the informant learned where the items were located and a basis for believing that the informant was credible or the information supplied was reliable.[82] Nonetheless, law enforcement officers are still required to provide the basis for using informants (*i.e.*, whether anonymous or confidential) within their warrants. In our interviews, police detectives and patrol officers indicated that they still followed the "two-pronged" test of *Aguilar-Spinelli* because it was well-defined and they were accustomed to writing warrants that laid out specific needs.

Leon and *Sheppard* theoretically provide police officers with added incentives to secure warrants. These incentives stem from the Court's ruling that evidence seized during a search conducted in objective, good-faith reliance on a warrant will be admitted at trial, even if the warrant is later found to be defective. Yet, even with the protection from subsequent motions to suppress, warrant activity did not increase; nor was *Leon* raised by prosecutors or judges when

81 *Gates*, 462 U.S. at 238.

82 *See supra* note 22 and accompanying text for a discussion of the *Aguilar-Spinelli* two-pronged test.

warrants were questioned post-*Leon*.[88]

To meet the probable cause standard in search warrants, law enforcement officers at each site recognized that they needed to follow certain procedural and substantive guidelines set by their respective state supreme courts as well as the United States Supreme Court. While these guidelines varied by site on specific dimensions, they were generalizable to a certain extent. For example, the warrant application usually consisted of two items: first, the formal search warrant, which had to be signed by a magistrate or judge and had to indicate the person, place, or vehicle to be searched and the types of items to be seized; and second, the affidavit, which provided more detailed support of the search warrant.

In preparing the affidavit, law enforcement officers provided information that established their credibility and veracity to the court. Officers included information about their background, the steps taken in the investigation, a description of the person or place to be searched and the items to be seized, and if necessary, information provided by informants.

Confidential informants were used over half of the time in Harbor, Hill and Border Cities, but less than a quarter of the time in Forest, Plains, and Mountain Cities. Table 5 shows the level of use

Table 5
USE OF CONFIDENTIAL INFORMANTS, SEVEN SITES
JANUARY TO MARCH, 1984 & 1985

	River	Mount	Plains	Border	Hill	Forest	Harbor
Primary Warrants	191	70	264	265	233	182	543
# Warrants with CI	90	12	67	141	140	42	326
Crime corroborated?	72	11	56	124	65	1	263
	80%	92%	84%	88%	46%	2%	81%
Site corroborated?	77	11	66	124	64	28	299
	86%	92%	99%	88%	46%	67%	92%
Material Seized	64	12	63	103	106	39	281
	71%	100%	94%	73%	76%	93%	86%
Arrest Made?	73	9	53	76	79	32	203
	81%	75%	79%	54%	56%	76%	62%
Case Filed?	56	9	37	69	49	19	198
	62%	75%	55%	49%	35%	45%	61%

of confidential informants (CIs) by site. Using the number of warrants with a CI as the unit of analysis, the data indicate that the quantity and quality of material within the affidavit varied by site and

[88] Uchida, Bynum, Rogan & Murasky, *supra* note 74, at 494.

by agency. In Forest City, police almost never corroborated information regarding the type of crime. Hill City officers did so less than 50% of the time, whereas, in the remaining five sites corroboration of the crime occurred in over 80% of the warrants using informants. The use of CIs, the levels of corroboration of the crime, and the location of the crime varied across the jurisdictions.

The outcomes of informant-based warrants also varied, but less dramatically than the corroboration of crime element. In Forest City, where crimes were least likely to be corroborated, an arrest took place in 93% of the warrants with CIs. At the same time, however, prosecutors were willing to file cases in only nineteen of thirty-two arrests (59%). In contrast, in Harbor City, officers made arrests in 203 of 326 warrants with CIs (62%) and prosecutors filed cases in 198 of the 203 arrests (98%).

In two jurisdictions, Border City and Mountain City, officers used standardized forms for their affidavits. In Border City, a district attorney developed five such forms, one each for homicide, narcotics, sex offenses, burglary, and auto theft. For the most part, these were "fill-in-the-blank" affidavits. Police simply filled in information about their background (*e.g.*, "I am a peace officer currently assigned to the —— division and have been so assigned for —— years"); the confidential informant (*e.g.*, "I have known the CI for about —"); the items to be seized; and the person or location to be searched.

In Mountain City, a detective developed a form that allowed officers not only to fill-in-the-blanks, but also provided a check-list for the evidence to be seized and the reliability of the confidential informant. Police in that jurisdiction explained that these standardized forms helped them to be more efficient and precise than is possible when writing new affidavits on each occasion. While some judges we interviewed expressed concern over the use of such forms because of problems in determining the truthfulness of the affidavits, others said that they were no different from the standardized language in affidavits generally. Furthermore, motions to suppress evidence based on a standardized form never appeared in any of the jurisdictions under scrutiny.

To ensure further that probable cause was established, in two sites, Plains and Border Cities, a member of the district attorney's staff reviewed and approved search warrant applications before they were submitted to a judge or magistrate. This arrangement was supported by formal agreements between the prosecutor's office and the police department, and by the twenty-four hour-a-day availability of a designated attorney. These full-time district attorney li-

aisons, whose offices were located within police headquarters, not only screened but also signed the warrant applications. Our interviews with police indicated that these district attorney liaisons provided assistance in determining probable cause and gave them confidence that evidence seized as a result of the warrant would not be suppressed at trial. In both sites, the police were enthusiastic about the support provided by the district attorney's offices.

In the other sites, a prosecutor was available to review a warrant application if desired by the officer. In Forest City, for example, the district attorney's office actively encouraged the police department to have its warrants reviewed by an assistant prosecutor. Moreover, if an assistant approved a warrant application, then it was the policy of the prosecutor's office to defend it in court from any challenges that may arise and to prosecute the case more vigorously. In contrast, in River City, we found that the police and prosecutor's office had very little contact regarding search warrants. In fact, police said that they seldom, if ever, asked the prosecutor's office for assistance.

In Mountain City, the police viewed district attorney input as "unnecessary." On occasion, however, an investigator would call the prosecutor's office for a cursory review. When they did call an attorney, detectives admitted to "attorney shopping;" that is, contacting a prosecutor whom they know would be less stringent in his or her review. In Hill City, where official departmental policy dictated that detectives call the district attorney's office for assistance and approval, detectives readily admitted that doing so "slowed the process" and did not follow that policy.

Once an internal and/or external review was completed, the officer usually presented a judge with the warrant and affidavit. The judge examined the documents and sometimes questioned the officer. Some police officers said that judges took, on average, about fifteen minutes to review the application. Others said that judges would spend five to thirty minutes reviewing a warrant, depending upon the length of the affidavit and also whether the judge knew the officer personally. Familiarity with the law enforcement officer sped up the process. According to officers in Harbor City, the credibility of the individual officer was of central importance to judicial review. They noted that it was imperative that the detective establish himself or herself as having credibility and reliability in court. Providing the judge with positive feedback about the execution of the warrant as well as being consistent and honest in situations not affiliated with warrant activity (*e.g.*, as a witness in a court case) established a "good" reputation with judges. In so doing, the police were confident that warrants would be approved.

In almost all of the applications, the judge, upon his or her determination of probable cause, signed the warrants. In only one instance did we find a rejected warrant application (out of 1,748 warrants). Rejected applications usually were either destroyed or revised by the police, and thus were not available for scrutiny. However, in Border City, where telephonic warrant applications are used, a transcript of one rejected warrant was on file.

Once the warrant was approved by a judge, the police had three to ten days to execute it. In most jurisdictions warrants were served within a day or two, but in Border City, detectives often waited the full length of time (ten days in this case) before serving the warrant. After executing the warrant, the officer had another ten days to file a "return" with the court. The return indicates whether the warrant was executed, the date and time of the execution, and an inventory of the items seized. In six of seven intensively studied jurisdictions, returns were filed regularly by the police. In River City, however, returns were often missing, resulting in problems for tracking cases.

Following the execution and filing of a search warrant, police often reported that arrests were usually made and criminal cases filed. According to our data, however, on average, only 54% of the primary warrants were actually filed for prosecution.

Once an individual was charged, the case fell within the guidelines of the criminal justice system. Arraignments, preliminary hearings, motion hearings, plea bargaining, trials (if necessary), and sentencing were conducted by the courts.

B. MOTIONS TO SUPPRESS PHYSICAL EVIDENCE

At least one motion to suppress physical evidence was filed in 13% of all primary warrants.[84] River City defense attorneys filed motions in 29% of the primary warrants. Border City and Mountain City defendants were least likely to file motions, with Hill, Forest, Plains, and Harbor Cities falling within the ten and twenty percentiles (see to Table 2).

Motions to suppress physical evidence were raised as early as the preliminary hearing in most jurisdictions. These motions ranged from lengthy, detailed explanations to one-page "boiler plate" forms signed by a defense attorney. They also varied across and within jurisdictions. In River City, where defendants filed motions to suppress 57% of the time (Table 6), the motion itself was often only three paragraphs long, noting the name of the defendant,

84 This figure is considerably lower than the 40% found by Van Duizend, *supra* note 71. This shows the selection bias within the Van Duizend study.

the grounds for the motion, and a request that an evidentiary hearing take place. At the evidentiary hearing, arguments would be raised by both the prosecution and defense counsel, and the judge would make a determination.

Table 6
DEFENDANTS AND MOTIONS TO SUPPRESS
SEVEN SITES

	Total	River	Mount	Plains	Border	Hill	Forest	Harbor
# Defendants	1355	155	63	204	234	128	132	439
# Defendants Who File MTS	317	88	7	35	14	57	37	79
% Defendants Who File MTS	23.4	56.8	11.1	17.2	6.0	44.5	28.0	18.0
# Defendants w/MTS Granted	27	12	0	7	0	0	6	2
% Granted (Defendants as base)	2.0	7.7	0	3.4	0	0	4.5	0.5
% Granted (Motions filed as base)	8.5	13.6	0	20.0	0	0	16.2	2.5

Mountain and Border Cities had the least amount of activity with regard to motions to suppress physical evidence. In Mountain City, defense attorneys claimed that trial court judges "always upheld searches regardless of what errors or lack of probable cause were found." As a result, members of the defense bar rarely made search and seizure an issue. The district attorney agreed with this attitude and further claimed that the judicial climate and legal community were "quite conservative." By this, he meant that both the prosecutors and defense attorneys were conservative in their political beliefs and presumed that search warrants were valid. In Mountain City, four warrants were challenged by seven defendants; two involved burglaries and two involved drugs. All seven defendants were denied their motions to suppress.

In Border City, the work of a district attorney liaison virtually assured that warrants would not be questioned regarding the probable cause standard. The district attorney liaison, permanently assigned to the police department, assisted the police by writing and processing warrants himself, thus reducing the likelihood of successful motions.[85] Defense attorneys were aware of this involve-

[85] Officers would seek assistance from the district attorney liaison as an investigation unfolded. Once the need for a warrant was immediately apparent, the liaison and police officers would sit down together and write the warrant. The district attorney liaison

ment and were not likely to file motions to suppress (only 6% of the defendants file), which the judges, in turn, did not sustain.

Plains City, Forest City, and Hill City defense attorneys wrote lengthier, detailed briefs describing the reasons for the motions. At these sites, a number of motions cited a lack of probable cause in the warrant either because the police did not adequately corroborate the information provided by anonymous or confidential informants or because the "totality-of-circumstances" as articulated by the *Gates* decision was not met. A Hill City public defender related that he filed motions if he could "determine that the judge was misled or somehow deceived by the police officer in the written affidavit and/or if there was an inadequate description of the items to be seized."

In Hill City, the public defender's office was particularly active in filing motions to suppress physical evidence—defendants filed motions 45% of the time. However, judges did not grant the exclusion of the evidence in any of the cases. In Plains and Forest Cities, motions were successful on seven and six occasions, respectively.

To obtain an idea of the characteristics of the cases in which a motion to suppress evidence was made, the incidence of motions was examined by type of offense. Table 7 shows that motions were

Table 7
MOTIONS TO SUPPRESS BY TYPE OF OFFENSE
SEVEN SITES

	% of cases involving motions to suppress physical evidence						
Offense Type	River	Mount	Plains	Border	Hill	Forest	Harbor
Violent Crime	4.5	0	4.0	0.4	2.3	8.9	1.6
Property Crime	1.3	3.2	1.5	0.4	0	4.9	1.6
Drug Offense	31.6	3.2	7.4	1.3	32.0	18.0	9.8
Other	18.1	3.2	3.4	3.8	5.5	3.3	4.6
	N=155	N=63	N=204	N=234	N=128	N=132	N=439

filed most often in drug offenses[86] in six of the seven sites. The lone exception is Border City, where motions were more likely to be filed

would use a word processor with "boiler plate" language to assist in writing the warrant.

Plains City, which also had district attorney review, did not achieve similar results. However, in Plains City, the assistance of the district attorney liaison was less direct. Here, the police would seek advice after they had written the warrants themselves. The liaison would review the warrant for probable cause and then recommend changes or give approval through his or her signature.

86 Drug offenses included both felonies and misdemeanors and involved possession and/or distribution of heroin, cocaine, marijuana, and other illicit drugs.

for "other" crimes.[87]

C. SUCCESSFUL MOTIONS AND CASE DISPOSITIONS

Motions to suppress were successful in only 0.9% of the primary warrants (15 of 1,748).[88] On an individual level, judges sustained motions for twenty-seven defendants, or 2% of all defendants. These figures varied across sites. In three locations, Mountain, Border, and Hill Cities, no motions were successful. River City had the most successes (twelve defendants), followed by Plains (seven), Forest (six) and Harbor Cities (two).

Table 8 provides a breakdown of the primary warrants, the defendant or co-defendant, the charges made by the prosecutor, and the dispositions of the defendants who were successful in suppressing evidence seized by police in four sites. As can be seen from the table, twenty-seven defendants were involved in the fifteen primary warrant cases.

In River City, twelve defendants successfully challenged the search warrants: five defendants were charged with obscenity;[89] five defendants were charged with possession of marijuana; and two were accused of fencing less than $25 worth of stolen property. The court dismissed eleven of the twelve cases as a result of the suppression of evidence. One individual was found guilty of possessing marijuana. His sentence included a fine of $500 and three years probation.

In Plains City, five defendants charged with cocaine possession in three separate cases (#134, #160, and #300) and two robbery defendants (cases #163 and #254) were successful in suppressing evidence. In case #134, involving three defendants, the defense counsel argued that the totality-of-circumstances test had not been fulfilled and that the information from a first-time confidential informant was not corroborated by police. The counsel also claimed that even under *Leon*, the good faith doctrine did not apply because of the reckless preparation of the warrant and the absence of a basis for an objective believe that probable cause existed. The judge agreed with the defendants and dismissed the case. In the two remaining cases of cocaine possession, the defendants successfully

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87 "Other" crimes included firearms possession, gambling, pornography, petty larcenies, and the like.

88 In contrast, Van Duizend, *supra* note 71, found that motions to suppress were granted in 17 of 350 search warrant cases (5%).

89 In case #89, three defendants were charged with producing a pornographic movie, while in case #227, two defendants were accused of operating a movie house that showed a pornographic film.

Table 8
SUCCESSFUL MOTIONS TO SUPPRESS & THEIR OUTCOMES (BY SITE)

Primary Warrant #	Defendant	Charge	Disposition
River City			
89	#1	Obscenity	Dismissed
	#2	Obscenity	Dismissed
	#3	Obscenity	Dismissed
96	#1	Fencing	Dismissed
	#2	Fencing	Dismissed
149	#1	Marijuana	Dismissed
	#2	Marijuana	Dismissed
217	#1	Marijuana	Found guilty
	#2	Marijuana	Acquitted
	#3	Marijuana	Acquitted
227	#1	Obscenity	Dismissed
	#2	Obscenity	Dismissed
Plains City			
134	#1	Cocaine poss	Dismissed
	#2	Cocaine poss	Dismissed
	#3	Cocaine poss	Dismissed
160	#1	Cocaine poss	Dismissed
163	#1	Robbery	Pled Guilty
254	#1	Robbery	Pled Guilty
300	#1	Cocaine poss	Dismissed
Forest City			
34	#1	Marijuana	Dismissed
	#2	Marijuana	Dismissed
65	#1	Marijuana	Pending
	#2	Marijuana	Pending
80	#1	Marijuana	Dismissed
	#2	Marijuana	Dismissed
Harbor City			
45	#1	Marijuana	Dismissed
529	#1	Burglary	Pled Guilty

filed suppression motions based on a lack of corroboration of evidence provided by the confidential informant.

In the two warrants that were robbery-related (#163 and #254), even though the evidence seized was not allowed, because of lack of corroboration of the informants, eyewitness testimony and co-conspirator statements led the defendants to plead guilty.

In Forest City, the defendants who succeeded were all involved in marijuana "grow farms." Police had sought warrants for residences where defendants were allegedly growing marijuana in their basements. In cases resulting from primary warrants #34 and #65, judges ruled that the information obtained by police through confidential informants did not meet the *Aguilar-Spinelli* two-pronged

test.[90] In case #80, the search warrant was not signed by a "neutral and detached magistrate" but by a judge pro tempore, who did not have the authority to issue a warrant. Four of the six defendants in these three distinct cases were released outright, while the other two (case #65) had their cases pending at the time of the data collection.

In Harbor City, two defendants succeeded in suppressing the evidence seized in two separate search warrant raids. A judge released one defendant (case #45, which involved a marijuana possession charge) after determining that the information from a CI was not sufficiently corroborated. The second defendant (case #529) pled guilty to a burglary charge despite having the evidence suppressed, for reasons not recorded by the court.

D. "LOST CASES"

Lost cases are those in which the court granted a motion to suppress and dismissed the case. Based on this definition, nineteen individual defendants were allowed "to go free" based on an exclusionary rule problem. This represents 1.4% of all defendants in our sample of search warrant-based cases (n=1,355). If we add the two acquittals from River City case #217, then the percentage increases to 1.5%.

Table 9 shows the numbers and percentages of lost cases by site. River City has the highest number of lost cases (eleven) and the leading percentage based on defendants (7.1%). Plains City has the highest percentage of successful defendants based on those who file a motion to suppress (20%).

In most of these "lost cases," the trial court judge determined that a police officer had not been able to properly establish probable cause. In one instance, the court ruled that a judge *pro tempore* was not a "neutral and detached magistrate" and thus did not have the authority to sign a warrant. Despite the ruling in *Leon*, which allowed for the good faith exception in search warrant situations, judges were willing to suppress the use of such evidence. "Technicalities," such as the lack of an inventory, or "return" sheet, were not part of the motions to suppress, nor were they incorporated into any decisions by judges.

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[90] In this jurisdiction, the state supreme court had not yet incorporated Illinois v. Gates, 462 U.S. 213 (1983). As a result, the *Aguilar-Spinelli* two-pronged test controlled probable cause determinations for search warrants.

Table 9
'LOST CASES'
SEVEN SITES

	River	Mount	Plains	Border	Hill	Forest	Harbor
Number of Lost Cases	11[a]	0	5	0	0	4	1
As % of defendants	7.1	0	2.5	0	0	3.3	0.2
As % of defendants who filed motions	12.5	0	20.0	0	0	10.8	1.3
As % of successful motions to suppress	91.7	0	71.4	0	0	66.7	50.0

[a] Includes 2 acquittals

VI. CONCLUSIONS

Our analysis has shown that motions to suppress were successful in only 0.9% of the primary warrants (15 of 1,748). Judges sustained motions for 2% of all defendants (27 of 1,355) in our warrant-based sample. Few cases were "lost" as a result of the exclusionary rule in seven jurisdictions when police used search warrants. Twenty-one of 1,355 defendants (1.5%) were "allowed to go free" as a result of a successful motion to suppress physical evidence. The most serious offenders who were released were those charged with possession of cocaine, a felony in Plains City. Others with successful motions were charged with obscenity (operating a pornographic movie house or producing a pornographic movie), fencing less than $25 worth of stolen property, and possessing less than an ounce of marijuana—clearly not major crimes.

Our results are consistent with the findings reported by Nardulli, Davies (in his re-analysis of the NIJ data), and the GAO Report. Nardulli indicated that motions were filed in about 5% of the 7,500 cases he studied, and were granted in 52 cases (or 0.7% of all cases). He also reported that convictions still occurred in some of these cases and that only 40 (of the 52) ended in nonconviction; accordingly, only 0.6% of all cases appeared to be "lost" because of the exclusionary rule. In addition, he reported that 80% of the lost cases involved non-serious crimes: 37% were drug related, 22% involved possession of a weapon, and 24% were for miscellaneous non-violent offenses. Similarly, the GAO Report found that 0.8% of arrests were lost because of illegal searches,[91] while Davies found a "cumulative loss" of 2.35% of arrests in his analysis of the NIJ Re-

[91] This figure is based on Davies' estimate of lost arrests. Davies, *supra* note 58, at 611.

port's California data. Our figure of 1.5% lost cases falls within the range of the Nardulli study (0.6%) and the Davies re-analysis (2.35%). Note, however, that our data reflect only search warrant based cases, not all cases filed within the jurisdictions.

We found other important results within the sites:

(1) In three of seven sites—Mountain, Hill, and Border Cities—defendants were not successful in their challenges to evidence seized by police as a result of search warrants.
(2) In Border City, the work of a district attorney liaison in writing search warrants with police officers reduced the chances that warrant-based evidence would be suppressed at trial.
(3) In Harbor City, we found that police were accomplished at writing warrant applications and conducted high quality investigations. As a result, only two motions were successful and only one case "lost" out of 439 search warrant applications during the six-month period of the study.
(4) Though Plains City officers worked with a district attorney liaison to meet the standards of the state courts, defendants had the highest percentage of successful motions to suppress (seven out of thirty-five, or 20%).
(5) River City's law enforcement and criminal justice communities were not aligned when it came to search warrants and the exclusionary rule. A poor and often antagonistic relationship existed between the police and the prosecutor. The police did not seek assistance in writing warrants. In our interviews, we found that police accused the district attorney's office of not prosecuting enough cases, while the district attorney accused the police of poor investigations. Defense attorneys filed a large number of motions to suppress (57% of defendants filed). Fourteen percent of those filing motions (or 8% of defendants) were successful in suppressing evidence. Of the twelve defendants who won, eleven were freed. At the same time, however, River City still maintained a high percentage of convictions (75% of defendants within our sample).

Given these findings, it is not surprising that we agree with the Van Duizend *et al.* conclusion that search warrants provide "clear and tangible records that facilitate *post hoc* evaluation of the original search."[92] We also agree with their finding that the "exclusionary rule, though seldom invoked, serves as an incentive for many police officers to follow the limits imposed by the Fourth Amendment as defined in their jurisdiction."[93] Our interviews indicated that police were willing to follow guidelines established by the Constitution, the district attorney's office, and the courts when writing search warrant applications. The willingness of officers in Border, Plains, and

92 Van Duizend, *supra* note 71, at 106.
93 *Id.* at 119.

Forest Cities to have warrants reviewed by prosecutors was a response, in part, to the exclusionary sanction. Police wanted to insure that warrants met the standards of probable cause and that evidence seized would not be later suppressed.

Our study also provides further evidence that the "cost" of the exclusionary rule in lost cases is slight when the police obtain a search warrant. While critics of the exclusionary rule argue that it imposes a high cost on society by depriving the courts of reliable evidence and allowing criminals freedom, we have found that, in fact, few criminals are freed, and when they are, their crimes are not serious. Thus, the cost to society is limited.