MEMORANDUM

TO: Rep. Paul Stam
FROM: Hal Pell, Staff Attorney
RE: *State v. Carter* and the Good Faith Exception
DATE: Feb. 25, 2003 (Revised Feb. 6, 2009)

A. The federal good faith exception.

The United States Supreme Court, in *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984), held that the Fourth Amendment of the U.S. Constitution did not require the suppression of evidence that had been obtained by law enforcement officers who had acted in good faith. In *Leon*, law enforcement officers, seeking a search warrant, had provided an affidavit to a state court judge. The judge issued the warrant upon a finding of probable cause to search.

An appellate court later ruled that the information provided to the judge was not, as a matter of law, sufficient to establish probable cause. Consequently, the appellate court ruled that the Fourth amendment's prohibition against unreasonable searches and seizures required the trial court to exclude the evidence that had been obtained by the search warrant.

Upon review, the U.S. Supreme Court discussed the premise behind the exclusionary rule: the deterrence of police misconduct. The Court stated that there was no evidence that neutral and detached magistrates, who rule on the issuance of search warrants, are inclined to ignore or subvert the Fourth Amendment. *Leon*, 468 U.S. at 916. The Court saw no basis for believing that exclusion of evidence seized pursuant to a facially valid warrant would have a significant deterrent effect on the issuing judge or magistrate.

The Court stated that if evidence excluded due to a subsequently invalidated warrant was to have any deterrent effect, it must alter the behavior of individual police officers or the policies of their departments. *Leon*, 468 U.S. at 918. However, the Court noted that "assuming" that the exclusionary rule deters police misconduct and provides incentives for the law enforcement profession to conduct itself in accordance with the Fourth Amendment, "it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

B. No "good faith exception" in North Carolina.

In *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), the North Carolina Supreme Court considered whether there was a "good faith" exception to Art. I, § 20, of the North Carolina Constitution. Carter, a prisoner on work release, had failed to report back to a prison van after working at a sawmill. He had broken into the seventy-eight year old victim's home and forced her into a field. The defendant then raped the victim, and beat her face until she was unconscious. He was found some thirty yards from the victim, smelling of alcohol and disheveled. The next day, the victim's eyeglasses were found under the defendant's hat in a trailer where the defendant had been taken.

Three days after the assault, an SBI agent made application for a non-testimonial identification order requesting that a blood sample be taken from the defendant. The order was issued, and the sample taken. At the trial, the defendant moved to suppress evidence that blood on his clothes was consistent with the victim's and did not match his own. He relied upon North Carolina case law, which held that drawing blood from an in-custody defendant without first obtaining a search warrant violated the fourth and fourteenth amendments to the U.S. Constitution, and the North Carolina Constitution. The motion to suppress was denied.

The North Carolina Supreme Court held that the trial court had erred in allowing the evidence. The Court discussed the history of the exclusionary rule, and voiced its concerns that exceptions would overcome the rule itself. The Court stated that "[t]he framers of our constitution sought to check the tendency of government to overreach by placing a constitutional mantle around the right to privacy in one's person, home, and effects." The Court believed that the "exclusionary rule [was] indispensable to achieve the purposes for which prohibitions against unreasonable search and seizure were written into the constitutions of the revolutionary era." *Carter*, 322 N.C. at 716.

The Court relied on the fact that North Carolina had been among a handful of states that had adopted an exclusionary rule by statute, rather than by judicial creation. North Carolina passed, in 1937, a law requiring the suppression of evidence obtained under an illegal search warrant. The law was amended in 1951 to apply to unlawful warrantless searches. The

amended statute was repealed in 1969, and replaced in 1975 by N.C.G.S. § 15A-974.

The Court noted that, since 1937, the expressed public policy was to exclude evidence obtained by unreasonable searches and seizures, and that "[t]he clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution," citing N.C.G.S. § 15A-974(1). The Court went on to hold:

> This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy.

Carter, 322 N.C. at 724. Thus, the Court declined to adopt a good faith exception to the exclusionary rule under the state constitution, and ordered a new trial.

C. The *Carter* dissent.

In dissent to the *Carter* decision, Justice Mitchell (joined by Justice Meyer), quoted the United States Supreme Court: "We refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Carter*, 322 N.C. at 724 (Mitchell, J., dissenting), *quoting* Massachusetts v. Sheppard, 468 U.S. 981, 989-90. The dissent notes that the "high-minded quotations relied upon by the majority" warn against permitting courts to be used to assist officers who "*intentionally* break the law to gather evidence against criminals." *Carter,* 322 N.C. at 726 (original emphasis).

The dissent notes that the good faith exception to the exclusionary rule applies *only* in situations where officers have acted under the objectively reasonable belief that their actions were lawful. Consequently, "[a]lthough the majority implies that [the use of exclusionary rule] somehow protects our privacy, the majority completely fails to tell us how exclusion of evidence seized by officer in good faith reliance upon a court order will further [the] noble purpose" of protecting our privacy from invasion. *Id*. The dissent concludes that the failure of the majority "is quite understandable," because the exclusion of evidence is such cases serves no

valid purpose and will greatly harm the innocent public. *Id.*, citing *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677.

The dissent does note that even the undesirable result of preventing criminal prosecutions would be an acceptable price to pay "*if it would have any substantial deterrent effect* on violations of constitutional liberties." *Id.* at 727. However,

> It should be obvious to anyone that excluding this evidence will not deter other officers from making similar mistakes in good faith as to the legal validity of court orders upon which they rely. When following judicial orders in the future, the officers will still not know they are doing anything wrong. Therefore, unlike punishment of intentionally unlawful conduct by officers, which the exclusionary rule arguably deters, punishment of an officer's good faith reliance on a judicial order cannot deter future similar conduct.

Id. Justice Mitchell concluded that the majority had "tilted the scales of justice in favor of criminal defendants for no good or beneficial reason, whatsoever . . . ."

Justice Meyer concurring in the dissent, noted that the Court, in *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986), had recently adopted the *Leon* holding and had extended it to the identical facts in the Carter case. In *Welch*, officers had obtained a blood sample from an in-custody defendant by use of a non-testimonial order. In *Welch*, the Court held that the evidence should not be suppressed because the blood sample was taken in good faith reliance on the order.

The sample in the Carter case had been obtained prior to the *Welch* decision being released. Consequently, Judge Meyer reasoned that the "failure of the majority to give this case the same treatment as *Welch* is the worst sort of judicial arbitrariness." *Carter,* 322 N.C. at 731 (Meyer, J., dissenting).

Justice Meyer was adamant that the Court should not reject, on state constitutional grounds, the good faith exception to the federal exclusionary rule. He noted that Article I, section 20 of the State Constitution had generally been read to be the functional equivalent of the fourth

Amendment, and that the Court had relied on United States Supreme Court decisions on the fourth Amendment as persuasive authority. *Id*. at 732, citing *State v. Arrington*, 311 N.C. 633. He stated that

> The law of search and seizure under the North Carolina Constitution *should be interpreted as being no more restrictive than the fourth amendment* to the United States Constitution.

Id. at 732 (emphasis added), and that

> There is no reason, compelling or otherwise, for this Court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution. A dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives of the fourth amendment or [A]rticle I, section 20 of the North Carolina Constitution.

Id. at 732-733. Justice Meyer concluded that the Court had "grievously erred" in ignoring United States Supreme Court precedent, and creating different rules depending upon whether the state or federal Constitutions were invoked by a defendant making a suppression motion.

D. *State v. Pearson—Carter* considerations.

In 2001, the North Carolina Court of Appeals stated:

> In *State v. Carter*, our Supreme Court held that where the police relied on an NIO [Non-testimonial Identification Order] to take a blood sample from a suspect in custody, there is no good faith exception to the exclusionary rule and the taking of a blood sample necessitates a search warrant.

State v. Pearson, 145 N.C.App. 506, 517-518 (2001), *affirmed,* 356 N.C. 22 (2002), *cert. denied,* 123 S.Ct. 856, 71 USLW 3472 (U.S.N.C. Jan 13, 2003) (NO. 02-7164). In *Pearson*, the defendant had been convicted of multiple rape charges. During the investigation of the crimes, a judge had signed an NIO, and blood, public hair and saliva had been taken while Pearson was in custody. The trial court *had granted the motion to suppress the blood*

sample obtained pursuant to the NIO, but denied the motion to suppress the hair and saliva samples.

On appeal, Pearson argued that there had been violations of various statutory provisions that are necessary prerequisites to the issuance of an NIO. He also argued that the State substantially violated other procedures required upon the issuance of an NIO. Consequently, he alleged that N.C.G.S. § 15A-974 required the suppression of any evidence obtained by the NIO. Pearson also argued that the taking of his pubic hair and saliva violated his rights under the fourth Amendment and Art. I, section 20 of the North Carolina Constitution.

The N.C. Court of Appeals held that although law enforcement officers may have committed some violations of statutory provisions, the violations were not substantial. It also found that the taking of blood and saliva samples was not as intrusive as a blood sample, and, therefore, declined to extend Carter to such samples. *Id*. at 518. The court held that a later blood test, taken pursuant to a search warrant, was not illegally obtained—as the NIO (upon which the warrant was based) had been properly issued. *Id*. at 520. The court found no error.

There was, however, a dissenting opinion. Judge Biggs found that the NIO was facially inadequate, and that the affidavit in support of the NIO application had false and misleading information. Judge Biggs found that the "State committed numerous statutory violations, the cumulative effect of which was to deprive the defendant of a fair trial." *Pearson*, 145 N.C.App. at 523 (Biggs, J., dissenting). The dissent concluded that the trial court erred in denying the motions to suppress the evidence obtained from the NIO and a later search warrant; that the decision should be reversed; and that a new trial should be ordered.

Upon further review, the North Carolina Supreme Court affirmed. *State v. Pearson*, 356 N.C. 22 (2002). The Court found that the officer making the affidavit for the NIO did not act in reckless disregard of the truth: "Defendant failed to produce evidence that Agent Suttle made his allegations in bad faith such that they were knowingly false or in reckless disregard of the truth. The trial court correctly issued the NIO." *Id*. at 30. The Court also found that there were no substantial statutory violations, such that the evidence should have been suppressed under N.C.G.S. § 15A-974(2).

E. *State v. Peterson – N.C. Court of Appeals Bound by Carter*

In *State v. Peterson*, 179 N.C.App. 437 (2006), *affirmed*, 361 N.C. 587 (2007), a recent case before the North Carolina Court of Appeals, the State urged the court to adopt the dissenting opinion in *State v. Carter*. The appellant argued that evidence obtained by a warrant should have been suppressed, because of a problem with the warrant. The trial court had found that the detective who obtained the warrant had acted in good faith. The court stated:

> Notwithstanding the State's argument, our Supreme Court clearly rejected the good faith exception in *State v. Carter,* 322 N.C. 709, 732, 370 S.E.2d 553, 561 (1988), as inapplicable to violations of the North Carolina Constitution and chapter 15A of the North Carolina General Statutes. As this Court must follow the law of *stare decisis,* we are bound by prior decisions of our Supreme Court. *Dunn v. Pate,* 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Therefore, we must apply the majority view in *Carter* that a good faith exception is inapplicable.

Peterson, 179 N.C.App. at 473. [Note: The court went on to find that the erroneous admission of evidence was harmless beyond a reasonable doubt].

Consequently, in its review of N.C. Court of Appeals decision, the Court could have reconsidered its decision in Carter. However, it rested its decision to affirm the lower court's ruling that the error was harmless beyond a reasonable doubt. It would only be speculation as to whether the Court would have taken up the good faith issue if the legislature had previously requested it to do so. However, it may have presented a "golden" opportunity for this Court to either affirm or reject *Carter* in a high profile case where the admission or suppression of the evidence on the warrant issue was not essential to the Court's ultimate ruling, due to its finding of harmless error in the admission of the evidence.

F. *Herring v. United States*

In January, 2009, the United States Supreme Court released its latest decision relating to the good faith exception to the exclusionary rule. In *Herring v. United States*, the defendant had driven to the county Sheriff's Department to retrieve something from his impounded truck. A law enforcement officer asked a neighboring county office to check whether there were any outstanding warrants on the defendant. Based on a computer

check, the officer was told there was an outstanding warrant for the defendant based on failure to appear on a felony charge. *Herring v. United States,* ___U.S.___ , Dkt. No. 07-513 (Jan. 14, 2009). The officer immediately followed the defendant and placed him under arrest. A search incident to arrest revealed methamphetamine in the defendant's pocket, and a pistol—which he could not possess as a felon—in this vehicle.

There was, however, a mistake. When an officer went to the files, the warrant was not there. Further checking revealed that the warrant had been recalled some five months earlier, but the information about the recall had not been entered into the database. The all occurred within 10 to 15 minutes, but by the time the information was relayed, the officer had already place the defendant under arrest.

Initially, the Court emphasized its holding in *United State v. Leon*, that "the exclusionary rule is not an individual right and applies only where it "result[s] in appreciable deterrence." *Herring*, slip op. at 5. The Court noted that the officers themselves were not careless or reckless. The Circuit Court had found that the failure to update the data base was a "negligent failure to act, not a deliberate or tactical choice to act." The Circuit Court also concluded that the benefit of suppressing the evidence "would be marginal or nonexistent," and therefore the evidence was admissible under the good faith exception.

The Supreme Court then reiterated that although the search with actual probable cause was "unreasonable," not all unreasonable searches required the application of the exclusionary rule. It cited a previous holding: "[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." The Court then stated what is required to trigger the rule: (1) the police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and (2) sufficiently culpable that such deterrence is worth the price paid by the justice system. The Court stated that its cases provide that the exclusionary rule "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring,* slip op. at 9.

The Court stated that if the police had been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, then exclusion would have been justified. If a recordkeeping system was unreliable, and routinely led to false arrests, then it would not be reasonable for police to rely on such a

system. *Herring*, slip op. at 11. In this case, the record showed no such systemic problems, or that the recordkeeping was generally unreliable.

The Court rejected the principle that police negligence should automatically trigger suppression:

> In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, . . . we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." . . . In such case, "the criminal should not go free because the constable has blundered."

Herring, slip op. at 12-13 (cits. Omitted)(Quot. omitted)

G. Summary

The *Pearson* case, in part, shows a fairly recent application of the *Carter* decision. Blood sample evidence, drawn pursuant to a judicial order, was ruled inadmissible at trial. Perhaps the most significant aspect of the *Pearson* case was the appellant's argument that evidence should have been suppressed on statutory grounds. Evidence must be suppressed if it is obtained as a result of a substantial violation of the provisions of Chapter 15A. N.C.G.S. § 15A-974(2). At least one of three appellate court judges hearing the case would have suppressed the evidence based, in part, upon statutory violations. The Peterson case reflects that the issue of the "good faith" exception is not an academic one. In a murder case, the State sought to have the court overrule *Carter,* due to important evidence that could have been suppressed in a ruling by an appellate court.

In summary, under current North Carolina law (1) evidence may be suppressed where officers have acted under the objectively reasonable belief that their actions were lawful, and (2) evidence that is otherwise admissible under both the federal and state Constitutions may be held inadmissible due to violations of North Carolina procedural statutory provisions.