STATE V. CARTER AND THE NORTH CAROLINA EXCLUSIONARY RULE*

MOLLY S. PETREY & CHRISTOPHER A. BROOK**

The North Carolina Supreme Court's decision in State v. Carter *stands apart from modern federal jurisprudence in holding that Article 1, Section 20 of the North Carolina Constitution—North Carolina's analog to the Fourth Amendment—does not permit a good-faith exception to the exclusionary rule. In other words, evidence collected in violation of North Carolina's constitutional search and seizure protections is excluded from criminal proceedings, regardless of the good faith of the judicial officials and law enforcement officers involved in the case. In so holding,* Carter *exemplifies North Carolina's general approach when interpreting state constitutional provisions with federal analogs—the persuasive lockstep. The persuasive lockstep approach considers federal jurisprudence highly persuasive but does not mechanically follow it, on occasion affording more robust constitutional protections pursuant to the state constitution. Controversial since its publication in 1988,* Carter *has been increasingly criticized over the past decade, from legislative calls for its reversal to recent North Carolina Court of Appeals opinions unpersuasively contending that it has been superseded by statute. Though its constitutional force remains plain for the moment, these recent developments call into question the fate of* Carter *as well as the means of constitutional interpretation it represents.*

** Molly Petrey is a staff attorney at North Carolina Prisoner Legal Services, Inc. Christopher Brook is a partner at Patterson Harkavy LLP, having served on the North Carolina Court of Appeals in 2019 and 2020. The authors thank Emily Coward, Andrew DeSimone, and Jonathan Holbrook for their sage editorial feedback, which vastly improved early drafts of this Article.

INTRODUCTION

After over thirty years, the North Carolina Supreme Court's opinion in *State v. Carter*[1] remains a point of controversy. The controversy has evolved over the past decade into a discussion about whether its principal holding—that the North Carolina analog to the Fourth Amendment to the U.S. Constitution does not permit a good-faith exception to the exclusionary rule—continues to hold sway.

The exclusionary rule bars the State from admitting unconstitutionally acquired material into evidence in its case against a criminal defendant. The rule initially sought to give meaning to the prohibition on unreasonable searches and seizures and to protect the integrity of the judiciary by excluding evidence seized in violation of the Fourth Amendment.[2] However, constitutional jurisprudence shifted toward another motivating principle: deterring law enforcement misconduct.[3] This shift paved the way for an exception to the exclusionary rule allowing for the admission of evidence seized in violation of the Fourth Amendment but in good faith and in reasonable reliance on a defective warrant.[4]

This Article shows how *Carter* stands out jurisprudentially, both in its constitutional approach and criminal defendant-friendly outcome, as well as the responses it has engendered, in three parts. Part I briefly sets the stage for *Carter* by laying out the federal exclusionary rule and the good-faith exception thereto. Part II then explores the various lenses through which states interpret their own constitutions in light of similar provisions of the Federal Constitution, with a specific focus on North Carolina's analog to the Fourth Amendment. Section II.A articulates the deference North Carolina appellate courts often afford federal interpretations of similar constitutional provisions[5] and explores one notable exception: North Carolina's rejection of the federal good-faith

1. 322 N.C. 709, 370 S.E.2d 553 (1988).

2. *See* JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 43–44 (2018).

3. *See infra* Part I.

4. Elizabeth Phillips Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 963.

5. Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. CENT. L. REV. 145, 155 (2014).

exception. Section II.B discusses *Carter*, in which the Supreme Court of North Carolina held that the state constitution does not permit such a carve-out to the exclusionary rule, explicitly addressing the motivating principle of judicial integrity as an integral part of North Carolina constitutional jurisprudence.[6] Section II.B also examines *Carter*'s enduring influence on North Carolina search and seizure jurisprudence, exploring opinions that solidify its constitutional heft.

Finally, Part III explores the post-*Carter* landscape, including the explicit and seeming implicit hostility to *Carter* and, thus far, its durability in the face of criticism. Section III.A chronicles legislative hostility to *Carter*; Section III.B explores opinions that avoid *Carter* and its attendant controversy in favor of applying only federal constitutional principles; and Section III.C reviews recent North Carolina Court of Appeals opinions that unpersuasively seek to diminish *Carter* by skating around its constitutional foundation.

I. HISTORICAL BACKGROUND OF THE EXCLUSIONARY RULE

To understand the underpinnings of *Carter*, we first examine the U.S. Supreme Court's jurisprudence regarding the exclusionary rule and the development of the federal good-faith exception. The Fourth Amendment provides for, among other things, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[7] Notably missing from this clause is any remedial instruction should the protection be violated. Thus, for over a century, those subjected to illegal searches did not have a constitutional remedy but could bring a trespass action to seek damages and return of the property.[8]

The U.S. Supreme Court introduced the exclusionary rule in its 1914 decision *Weeks v. United States*.[9] *Weeks* declared that a federal court commits a prejudicial error when it admits evidence seized in violation of the Fourth Amendment over a criminal defendant's objection.[10] The *Weeks* Court found that the taking of certain letters from the defendant's house violated the Fourth

6. *Carter*, 322 N.C. at 719, 370 S.E.2d at 559 ("We are persuaded that the exclusionary rule is the only effective bulwark against governmental disregard for constitutionally protected privacy rights. Equally of importance in our reasoning, we adhere to the rule for the sake of maintaining the integrity of the judicial branch of government."); *id.* at 724, 370 S.E.2d at 562 ("We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution.").

7. U.S. CONST. amend. IV.

8. SUTTON, *supra* note 2, at 43–44.

9. 232 U.S. 383, 391–93 (1914).

10. *Id.* at 398; *see also* J. Donald Hobart, Jr., Illinois v. Krull*: Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized by Statute*, 66 N.C. L. REV. 781, 787–88 (1988) (noting *Weeks* "clearly marked the start of a suppression doctrine that had not previously existed at common law").

Amendment and that the trial court "should have restored these letters to the accused" upon application rather than allowing them into evidence.[11] In so holding, the Court relied heavily on two principles: giving tangible meaning to the protections promised by the Fourth Amendment and upholding the integrity of the judiciary. Notably, the Court did not yet include deterring wrongful conduct by law enforcement as part of its reasoning.

To the *Weeks* Court, without a corresponding doctrine of exclusion, the prohibition in the Fourth Amendment against warrantless searches and seizures would hold no meaning and "might as well be stricken from the Constitution."[12] Such a framework provides no meaningful protection to the victim of an illegal government search. Furthermore, the Court believed that the federal courts could have no part in such violations:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution . . . .[13]

Indeed, "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[14]

Deterrence only came to the fore six years after the seminal *Weeks* decision[15] in *Silverthorne Lumber Co. v. United States*.[16] There, the government made photographs and copies of illegally seized materials upon which they based an indictment of the defendants after the trial court ordered the return of the original documents to the defendants.[17] In suppressing the copied documents, the Court took a more expansive view of the exclusionary rule, rejecting the *Weeks* reasoning "that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."[18] The Court reasoned that the exclusionary rule must have some deterrence rationale; otherwise, the rule would "mean only that two steps are required [to introduce ill-acquired

11. *Weeks*, 232 U.S. at 398 (holding that the trial court erred when it did not return the letters to the defendant despite the fact that the letters were taken "by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant").

12. *Id.* at 393.

13. *Id.* at 392.

14. *Id.* at 394.

15. SUTTON, *supra* note 2, at 56.

16. 251 U.S. 385 (1920).

17. *Id.* at 391.

18. *Id.*

evidence] instead of one."[19] In addition to this deterrence rationale, the Court again noted that the exclusionary rule was necessary to give the Fourth Amendment tangible effect: "[I]f the government could circumvent the exclusionary rule so easily, that would 'reduce[] the Fourth Amendment to a form of words.'"[20]

However, for several decades, the Court grappled with these rationales for the exclusionary rule only in the context of federal action. *Wolf v. Colorado*[21] was the first case to address the incorporation of the Fourth Amendment to the states.[22] While the Court held that the Fourth Amendment applied to state prosecutions, it declined to incorporate the exclusionary rule, noting that the courts of thirty-one states had rejected the *Weeks* doctrine.[23] In rejecting incorporation of the exclusionary rule, the Court focused on its deterrence-based rationale:

> Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.[24]

The Court noted that many jurisdictions, both domestic and foreign, rely on other methods to safeguard the right of privacy protected by the Fourth Amendment and that the exclusionary rule was therefore not "an essential ingredient of the right."[25]

Mapp v. Ohio[26] found *Wolf* lacking just over a decade later.[27] The Court was troubled by the growing inconsistency between federal and state cases under the *Wolf* doctrine: "In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence."[28] To prevent further disparities between state and federal prosecutions, the *Mapp* Court overturned *Wolf* and extended the exclusionary rule to the states.[29] In

19. *Id.* at 392.

20. SUTTON, *supra* note 2, at 56 (quoting *Silverthorne Lumber Co.*, 251 U.S. at 391).

21. 338 U.S. 25 (1949).

22. *Id.* at 28.

23. *Id.* at 29.

24. *Id.* at 31.

25. *See id.* at 29, 30 n.1 (noting, by way of example, that the common law provides for a damages claim against: the searching officer, "one who procures the issuance of a warrant maliciously and without probable cause," a magistrate acting without jurisdiction in issuing a warrant, and any person who assists in the unlawful execution of a search).

26. 367 U.S. 643 (1961).

27. *See id.* at 655.

28. *Id.* at 658.

29. *Id.* at 654–55.

doing so, the Court once again emphasized the deterrence rationale over judicial integrity, noting "that the purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[30] Thus, judicial integrity was relegated to "another consideration,"[31] though the Court did note its importance: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[32]

As the Warren Court gave way to the more conservative Burger Court, the Court stepped back from many of its rulings deemed overly solicitous to criminal defendants.[33] Exemplifying this trend was *United States v. Leon*,[34] which introduced the good-faith exception seventy years after the establishment of the exclusionary rule.[35] Utilizing a cost-benefit analysis, the Court held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[36] Noting that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands,"[37] the Court asserted that the purpose of the judicially created exclusionary rule is deterring bad behavior by law enforcement.[38] The Court went further, explicitly rejecting the necessity for an absolute exclusionary rule under a judicial-integrity rationale.[39] In adopting the good-faith exception, the Court distanced itself from its original rationale for the exclusionary rule—judicial integrity—to fully embrace deterrence as *the* rationale for exclusion.[40]

30. *Id.* at 656 (citation omitted).

31. *Id.* at 659 (citation omitted).

32. *Id.*

33. This trend continued into the Rehnquist Court as well. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 600 (Stevens, J., dissenting) ("In the years [from 1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure.").

34. 468 U.S. 897 (1984).

35. *Id.* at 913.

36. *Id.* at 922.

37. *Id.* at 906.

38. *Id.* at 916 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.").

39. *See id.* ("[T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. . . . [A]nd most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.").

40. *See id.*

Since establishing the good-faith exception to the exclusionary rule in cases of factual mistake in *Leon*, the Court has applied this exception to several other circumstances. Just three years later in *Illinois v. Krull*,[41] the Court expanded the good-faith exception to cover scenarios in which an officer acts in reasonable reliance on a statute subsequently deemed unconstitutional.[42] Highlighting again that the rule was "judicially developed,"[43] the Court found that "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant."[44] Underlining the shifting rationale animating exclusion, the Court did not address the judicial-integrity rationale.

More recently, the Court has held that the good-faith exception also applies to procedural mistakes. In *Herring v. United States*,[45] the Court applied the good-faith exception when "an officer reasonably believe[d] there [wa]s an outstanding arrest warrant, but that belief turn[ed] out to be wrong because of a negligent bookkeeping error by another police employee."[46] Relying heavily on the cost-benefit deterrence rationale employed in *Leon*, the Court noted:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[47]

The Court went on to conclude that for less egregious Fourth Amendment violations, "any marginal deterrence [provided by the exclusionary rule] does not 'pay its way.'"[48] Justice Ginsburg, joined in dissent by Justices Stevens, Souter, and Breyer, noted that the Court had departed from other rationales for the exclusionary rule, particularly that it "enables the judiciary to avoid the taint of partnership in official lawlessness, and it assures the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[49]

41. 480 U.S. 340 (1987).
42. *Id.* at 342.
43. *Id.* at 347.
44. *Id.* at 349.
45. 555 U.S. 135 (2009).
46. *Id.* at 137.
47. *Id.* at 144.
48. *Id.* at 147–48.
49. *Id.* at 152 (Ginsburg, J., dissenting).

Most recently, in *Davis v. United States*,[50] the Court held that objectively reasonable reliance on binding appellate precedent by law enforcement officers also falls under the good-faith exception.[51] The conduct in question was a search conducted in compliance with binding precedent at the time but later found to be improper when the precedent was overruled.[52] Because the conduct was lawful at the time of the search, the Court reasoned that "[e]xcluding evidence in such cases deters no police misconduct and imposes substantial social costs."[53]

In dissent, Justice Breyer, joined by Justice Ginsburg, criticized the Court's reasoning "that the 'sole purpose' of the exclusionary rule 'is to deter future Fourth Amendment violations.'"[54] Instead, he noted that throughout the history of the exclusionary rule, from its establishment in *Weeks* and incorporation in *Mapp*, "[t]he Court has thought of that rule not as punishment for the individual officer or as reparation for the individual defendant but more generally as an effective way to secure enforcement of the Fourth Amendment's commands."[55] Despite challenging the majority's narrowed view of the purpose of the Fourth Amendment, notably absent from the critique is any reference to the judicial-integrity rationale. By the early days of the Roberts Court, the good-faith exception dialogue between judicial conservatives and liberals had moved beyond this consideration.

II. INTERPRETING THE NORTH CAROLINA CONSTITUTION VIS-À-VIS ANALOGOUS CONSTITUTIONAL PROVISIONS IN GENERAL AND IN *STATE V. CARTER*

While the text of the Fourth Amendment and Article 1, Section 20 of the North Carolina Constitution read differently, the general purpose and intent are similar. Compare:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[56]

50. 564 U.S. 229 (2011).

51. *Id.* at 249–50.

52. *See id.* at 232 (concluding that although the search in question was unconstitutional under *Arizona v. Gant*, 556 U.S. 332, 343 (2009), which forbade the warrantless search of a car when its occupants had been removed from it and placed in a squad car, the officer was complying with then-binding circuit precedent, and so there was no culpable police conduct to deter).

53. *Id.* at 249.

54. *Id.* at 256 (Breyer, J., dissenting) (citation omitted).

55. *Id.* at 257.

56. U.S. CONST. amend. IV.

with:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.[57]

Both constitutional provisions prohibit unreasonable searches and seizures, and North Carolina has long applied federal jurisprudence in interpreting Article I, Section 20.[58] That being said, North Carolina's approach to search and seizure law did not develop strictly alongside federal jurisprudence; indeed, North Carolina legislatively adopted a statutory exclusionary rule twenty-four years before *Mapp* extended the exclusionary rule to the states.[59]

This section will briefly outline the ways in which states generally interpret provisions of state constitutions that are similar to provisions of the Federal Constitution and, specifically, how North Carolina has interpreted its constitution in light of the Federal Constitution. It will then discuss how *State v. Carter* exemplifies North Carolina's prevailing means of state constitutional interpretation, which takes into account but does not automatically defer to federal interpretations of analogous constitutional provisions.

A. *Modes of Interpretation and North Carolina's Persuasive Lockstep Approach*

When reviewing a state constitutional provision with a federal analog, state courts generally use one of four approaches—primacy, dual-sovereignty, interstitial, and lockstep.[60] These methods represent a continuum ranging from least to most deferential to federal interpretations of analogous constitutional provisions. North Carolina generally employs a persuasive lockstep approach that is deferential but not mechanically so.

57. N.C. CONST. art. I, § 20.

58. *See, e.g.*, State v. Arrington, 311 N.C. 633, 642–43, 319 S.E.2d 254, 260–61 (1984) (adopting the totality of the circumstances test of *Illinois v. Gates*, 462 U.S. 213 (1983), to interpret Article I, Section 20, while noting that the decision is "not binding upon us with regard to [the North Carolina Constitution,] which is exclusively a question of State law, even though we accord such decisions great weight"); State v. Ellington, 284 N.C. 198, 201–02, 200 S.E.2d 177, 179 (1973) (noting that both the U.S. Constitution and the North Carolina Constitution contain guarantees against unlawful searches and seizures and limitations on the right of the courts to issue search warrants).

59. *See* State v. Vestal, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971) (pointing out that N.C. GEN. STAT. § 15-27(a), as enacted in 1937 and rewritten in 1969, prohibited "evidence obtained or facts discovered by means of an illegal search" from being admitted "in any trial" (quoting N.C. GEN. STAT. § 15-27(a) (1969))); State v. Colson, 274 N.C. 295, 306, 163 S.E.2d 376, 384 (1968) ("The federal exclusionary rule . . . became statutory law in North Carolina long before *Mapp* . . . , which provides . . . that 'no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence.'" (quoting N.C. GEN. STAT. § 15-27(a) (1951))).

60. *See* Buckner, *supra* note 5, at 153.

The primacy, or "self-reliant"[61] approach, "focuses on the state constitution as an independent source of rights and relies on it as the fundamental law."[62] Federal law and analysis interpreting the analogous constitutional provision become no more than persuasive authority—this approach "relegates federal law to a secondary position."[63] If the state constitutional doctrine resolves the presented issue, the analysis ends; interpretation turns to federal law only "in the event that a case is not decided on state grounds."[64]

The interstitial or "supplemental"[65] approach is a hybrid model: "[S]tate courts recognize the federal doctrine as the floor and focus the inquiry on whether the state constitution offers a means of supplementing or amplifying federal rights."[66] It allows states to rely on federal precedent while also reaching state constitutional issues[67] in order to "raise[] the federal floor of protection . . . where appropriate."[68] The approach is flexible; state courts may "choose either to ignore federal law or to use it as persuasive only, developing a completely independent doctrine based on the state constitution."[69]

In practice, the interstitial approach functions similarly to the third method: the dual-sovereignty approach. Under the dual-sovereignty approach, "both constitutions are analyzed more or less simultaneously."[70] The court decides "the case based on the provision that offers the greatest protection."[71] Because this approach requires that courts always evaluate both federal and state provisions to reach a decision, it has been criticized for generating "advisory" opinions that critics view as "dicta, unnecessary and superfluous."[72] "The perceived virtue" of the method, however, is that it recognizes the federalist nature of our system of government and "the policies underlying our federal

61. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027 (1985).

62. *Id.* at 1027–28; *see also* Mark D. Martin & Daniel F.E. Smith, *Recent Experience with Intermediate Scrutiny Under the North Carolina Constitution*: Blankenship v. Bartlett *and* King ex rel. Harvey-Barrow v. Beaufort County Board of Education, 59 KAN. L. REV. 761, 770–71 (2011).

63. Utter, *supra* note 61, at 1028.

64. James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1316–17 (1989).

65. *Id.* at 1317.

66. Utter, *supra* note 61, at 1028; *see also* Martin & Smith, *supra* note 62, at 771 ("The interstitial model views U.S. constitutional rights as minimal and seeks supplementation from the interstices when the federal right does not resolve the claim or where the state constitution has more expansive language.").

67. *Id.* at 1029.

68. Buckner, *supra* note 5, at 154.

69. Utter, *supra* note 61, at 1029.

70. Martin & Smith, *supra* note 62, at 771.

71. Buckner, *supra* note 5, at 154.

72. Utter, *supra* note 61, at 1029–30; *see also* Acker & Walsh, *supra* note 64, at 1319.

system by making available the maximum protections both levels of government offer to citizens."[73]

North Carolina generally employs a variant of the final approach: the lockstep.[74] Under this method, courts heavily rely upon interpretations of the Federal Constitution in assessing the meaning of analogous state constitutional provisions.[75] The approach can be divided into two subcategories: binding (or strict) lockstep and persuasive lockstep.[76] As the name suggests, state courts that adhere to the strict lockstep approach absolutely defer to federal court interpretations of the Federal Constitution in interpreting analogous state constitutional provisions.[77] The persuasive lockstep approach, by contrast, acknowledges federal precedent as persuasive but reserves the right to deviate from it.[78] Persuasive lockstep escapes the criticism of binding lockstep, namely that—and ironically given our system of federalism—it "'submerges' state constitutional adjudication 'utterly into federal jurisprudence'" and that it "fail[s] to provide the 'double security' for rights' that is part of our federal system."[79] Put differently, persuasive lockstep preserves flexibility for independent judicial judgment. Where the state court is persuaded by the approach adopted in federal jurisprudence, it can conclude there is no need for further analysis.[80] But, as we show below, persuasive lockstep adherents such as North Carolina courts[81] "leave[] the door open . . . to diverge from federal jurisprudence" they find unpersuasive.[82]

73. Acker & Walsh, *supra* note 64, at 1319; Utter, *supra* note 61, at 1029.

74. Buckner, *supra* note 5, at 154; Martin & Smith, *supra* note 62, at 771.

75. *See* Acker & Walsh, *supra* note 64, at 1316.

76. Martin & Smith, *supra* note 62, at 773; Buckner, *supra* note 5, at 154.

77. Buckner, *supra* note 5, at 154.

78. *See id.*

79. Martin & Smith, *supra* note 62, at 772 (first quoting Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are a Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1550 (1998); then quoting G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 181 (1998)).

80. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1061 (2003).

81. Buckner, *supra* note 5, at 154. While the predominant approach in North Carolina is the persuasive lockstep approach, different Supreme Court justices have employed or expressed a preference for different means of interpreting the state constitution through the years. *See, e.g.*, State v. Cofield, 320 N.C. 297, 308, 357 S.E.2d 622, 628–29 (1987) ("We therefore find that defendant's rights under the Equal Protection Clause of the Fourteenth Amendment are coextensive with his separate and independent equal protection rights under Article I, sections 19 and 26 of the North Carolina Constitution."); *id.* at 310, 357 S.E.2d at 629–30 (Meyer, J., concurring) ("The United States Constitution dictates the minimum . . . rights of individuals in the sense that an individual's . . . rights may be greater under a state constitution, but his rights under the federal constitution may not be diminished thereby. Thus, I find it unnecessary and unwise to . . . analy[ze] . . . under the state constitution."); *id.* at 311, 357 S.E.2d at 630 (Mitchell, J., concurring) ("The Court should decide the issue before it on the basis of article I, section 26 of the Constitution of North Carolina and go no further.").

82. Martin & Smith, *supra* note 62, at 773.

B. *The Persuasive Lockstep Exemplar:* State v. Carter *and Its Progeny*

Carter is perhaps the quintessential example of North Carolina's persuasive lockstep approach. In *Carter*, the Supreme Court of North Carolina acknowledged the good-faith exception doctrine—already well established in federal jurisprudence—and then independently assessed whether it comported with the state constitution.[83]

The defendant in *Carter* was convicted of first-degree rape, first-degree kidnapping, and misdemeanor assault.[84] Investigating officers applied to the court for a nontestimonial identification order requesting that a blood sample be taken from the defendant; the order was issued, and blood was forcibly taken from him.[85] At trial, the State's expert testified that a blood smear on the defendant's underwear was consistent with the victim's blood type but "definitely was not defendant's blood type."[86]

On appeal, the defendant argued that taking his blood without a search warrant violated his rights under both the federal and state constitutions.[87] The State contended that if a blood draw required a search warrant, the Supreme Court of North Carolina should adopt a good-faith exception to North Carolina's "long-standing" exclusionary rule.[88] The Supreme Court of North Carolina first concluded that the withdrawal of a blood sample from a person is a search implicating the state constitution and its warrant requirement.[89] It then ruled—in a bold and controversial deviation from the jurisprudential and political trends of the late 1980s[90]—that the good-faith exception to the Fourth Amendment exclusionary rule established by *Leon* does not exist under the state constitution.[91]

In describing its jurisprudential approach and animating concerns, the *Carter* majority spoke in terms of announcing a constitutional rule. The *Carter* court explicitly recognized its persuasive lockstep approach, noting that "[e]ven were the two provisions identical, we have the authority to construe our own

83. *See* State v. Carter, 322 N.C. 709, 710, 370 S.E.2d 553, 554 ("This case presents us with the question of whether there is a good faith exception under article I, section 20 of the North Carolina Constitution . . . . We hold that there is no good faith exception to the requirements of article I, section 20 . . . .").

84. *Id.*

85. *Id.* at 711, 370 S.E.2d at 554.

86. *Id.* at 711–12, 370 S.E.2d at 555 ("Defendant's blood type had been determined through analysis of the blood sample obtained on the authority of the contested nontestimonial identification order.").

87. *Id.* at 710, 370 S.E.2d at 554.

88. *Id.* at 714, 370 S.E.2d at 556.

89. *Id.*

90. *See* MARK A. DAVIS, A WARREN COURT OF OUR OWN: THE EXUM COURT AND THE EXPANSION OF INDIVIDUAL RIGHTS IN NORTH CAROLINA 65 (2020) (noting that "the law enforcement community was up in arms about the court's ruling").

91. *Carter*, 322 N.C. at 723–24, 370 S.E.2d at 561–62.

constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."[92] Consistent with *Silverthorne Lumber Co.*, it then based its decision on both deterrence *and* judicial-integrity rationales:

> In determining the value of the exclusionary rule, we regard the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the *constitutional values* thereby safeguarded are so precious.
>
> . . .
>
> North Carolina, however, justifies its exclusionary rule not only on deterrence but upon the preservation of the integrity of the judicial branch of government and its tradition based upon fifty years' experience in following the expressed public policy of the state. Under the judicial integrity theory, *our constitution demands* the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others. Although the United States Supreme Court applied a cost-benefit analysis in *Krull*, the basis of our exclusionary rule is not suited to such simplistic resolution of the issue.[93]

Of course, if this were a statutory interpretation case, as opposed to one interpreting North Carolina's constitution, then the above discussion would not be necessary. Indeed, much as the dissenting justices maligned its reasoning and outcome, it was beyond controversy that the majority's decision was rooted in the state constitution.[94]

92. *Id.* at 713, 370 S.E.2d at 555.

93. *Id.* at 722–723, 370 S.E.2d at 560–61 (emphasis added). This emphasis on the importance of judicial integrity is not limited to *Carter*. *See, e.g.*, State v. Cofield, 320 N.C. 297, 304–05, 357 S.E.2d 622, 626–27 (1987) (noting concern not only for "the reliability of the conviction obtained in a particular case," but also "the appearance of justice," the destruction of which "casts doubt on the integrity of the judicial process").

94. *Carter*, 322 N.C. at 729, 370 S.E.2d at 565 (Mitchell, J., dissenting) ("I recognize that it is within the power of the majority to give criminal defendants greater protections under our State Constitution than those given them by the Constitution of the United States . . . ; I simply think the majority is wrong to do so in the context of this case."); *id.* at 732, 370 S.E.2d at 567 (Meyer, J., dissenting) ("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.").

As indicated above, the *Carter* majority also noted that this constitutional rule was in line with the "expressed public policy of the state"—that all unconstitutionally acquired evidence shall be suppressed—citing Section 15A-974(a) of the General Statutes of North Carolina as evidence of that public policy.[95] Certainly, the fact that North Carolina employed an exclusionary rule long before *Mapp* reinforced *Carter*'s approach to the state constitutional issue.

Though its constitutional dimension is plainly stated in the majority opinion and accepted by those in dissent, *Carter* also closed cryptically by stating that "[i]f 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."[96] Considering this invocation of the legislature alongside the court's emphasis on judicial integrity suggests this is a reference to the General Assembly's power to revise the constitution.[97] Indeed, the North Carolina Constitution had been amended in the years prior to *Carter* through such a process of judicial call and legislative response.[98] Stated another way, this line from *Carter* is perhaps a simple acknowledgment of the means of squaring the court's interpretation of a constitutional provision with the legislative power to express a new public policy: namely, by amending the constitution with the ratification of the voters.

Irrespective of any ambiguity in the original opinion, fourteen published state appellate court opinions have held that *Carter*'s roots are in constitutional law, not statutory law.[99] Most recently, the Supreme Court of North Carolina observed that "in *State v. Carter* this Court declined to adopt a good faith

95. *Id.* at 723, 370 S.E.2d at 561 (majority opinion).

96. *Id.* at 724, 370 S.E.2d at 562.

97. N.C. CONST. art. XIII, § 4 ("A proposal of a new or revised Constitution or an amendment or amendments to this Constitution may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection.").

98. *See* Stephenson v. Bartlett, 355 N.C. 354, 366–67, 562 S.E.2d 377, 386–87 (2002) (discussing the General Assembly's proposed amendments to the North Carolina Constitution's redistricting and reapportionment provisions subsequent to the U.S. Supreme Court's 1966 affirmance of a federal three-judge panel holding that "the General Assembly's legislative redistricting plans violated the 'one-person, one-vote' requirement").

99. State v. Romano, 369 N.C. 678, 694 n.11, 800 S.E.2d 644, 655 n.11 (2017); State v. Allman, 369 N.C. 292, 293 n.1, 794 S.E.2d 301, 303 n.1 (2016); State v. Garner, 331 N.C. 491, 505–06, 417 S.E.2d 502, 510 (1992); State v. Thomas, 329 N.C. 423, 438, 407 S.E.2d 141, 151 (1991); State v. Hyleman, 324 N.C. 506, 510, 379 S.E.2d 830, 833 (1989); State v. Parson, 250 N.C. App. 142, 156, 791 S.E.2d 528, 539 (2016); State v. Elder, 232 N.C. App. 80, 91, 753 S.E.2d 504, 512 (2014), *vacated and remanded*, 367 N.C. 323, 755 S.E.2d 607 (2014), *aff'd as modified*, 368 N.C. 70, 773 S.E.2d 51 (2015); State v. Verkerk, 229 N.C. App. 416, 433 n.3, 747 S.E.2d 658, 671 n.3 (2013); State v. Cline, 205 N.C. App. 676, 679, 696 S.E.2d 554, 557 (2010); State v. McHone, 158 N.C. App. 117, 123, 580 S.E.2d 80, 84 (2003); State v. Smith, 124 N.C. App. 565, 576, 478 S.E.2d 237, 244 (1996); *In re* Freeman, 109 N.C. App. 100, 104 n.2, 426 S.E.2d 100, 102 n.2 (1993); State v. Harris, 111 N.C. App. 58, 70, 431 S.E.2d 792, 799 (1993); State v. Cornelius, 104 N.C. App. 583, 589, 410 S.E.2d 504, 508 (1991).

exception to the state constitution's exclusionary rule."[100] This was the stated consensus for three decades after its publication.[101]

III. THE POST-*CARTER* LANDSCAPE

Speaking to its controversial nature, *Carter* engendered an array of responses, both legislative and jurisprudential. Section III.A explores the legislative reaction to *Carter* and that reaction's lack of import on the constitutional stage. Section III.B considers jurisprudential avoidance of *Carter*; that is, opinions that specifically avoid deciding exclusionary questions on state constitutional grounds. And finally, Section III.C analyzes recent North Carolina Court of Appeals opinions that rely on a statutory good-faith exception in lieu of binding constitutional case law.

A. *Legislative Hostility and the Majority View of Its Impact*

As previously noted, the exclusion of unlawfully seized evidence in North Carolina was already required by statute long before *Mapp* required its exclusion by the states.[102] First, by Section 15-27(a) of the General Statutes of North Carolina,[103] as recognized by *State v. Vestal*,[104] and then by Section 15A-974,[105] as recognized by *State v. Williams*.[106] The version of Section 15A-974 adopted in 1973 mandated the suppression of evidence "obtained as a result of a substantial violation of the provisions of this Chapter," or whose "exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina."[107] Section 15A-974 did not initially include a good-faith exception to the statutory exclusionary rule, even after the 1984 decision in *Leon*.[108]

In 2011, however, the General Assembly responded to *Carter* and its progeny by amending Section 15A-974 with Session Law 2011-6, Section 1,

100. *Romano*, 369 N.C. at 694 n.11, 800 S.E.2d at 655 n.11; *see also Allman*, 369 N.C. at 293 n.1, 794 S.E.2d at 303 n.1.

101. *See, e.g.*, *Thomas*, 329 N.C. at 438, 407 S.E.2d at 151; *Cline*, 205 N.C. App. at 679, 696 S.E.2d at 557; *McHone*, 158 N.C. App. at 123, 580 S.E.2d at 84; *Smith*, 124 N.C. App. at 576, 478 S.E.2d at 244; *In re Freeman*, 109 N.C. App. at 104 n.2, 426 S.E.2d at 102 n.2; *Cornelius*, 104 N.C. App. at 589, 410 S.E.2d at 508.

102. *See supra* Section I.A.

103. N.C. GEN. STAT. § 15-27(a) (repealed 1973).

104. 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971) ("[The exclusion of evidence unlawfully obtained] was the law in North Carolina long before the Mapp decision. G.S. 15-27(a), as rewritten in 1969, provides: 'No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial.'").

105. § 15A-974(a) (2021) (LEXIS through Sess. Laws 2021-106 of the 2021 Reg. Sess. of the Gen. Assemb.).

106. 31 N.C. App. 237, 238–39, 229 S.E.2d 63, 65 (1976).

107. § 15A-974(a) (1973).

108. *See* State v. Hyleman, 324 N.C. 506, 510, 379 S.E.2d 830, 833 (1989) (noting that the good faith exception was inapplicable where the exclusion of evidence was based on a violation of Section 15A-974).

titled "An Act to Provide for the Adoption of the Good Faith Exception to the Exclusionary Rule into State Law."[109] This session law amended Section 15A-974 to include the following language: "Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful."[110] Section 2 of the session law proposing the inclusion of the good-faith exception also included the following request:

> SECTION 2. The General Assembly respectfully requests that the North Carolina Supreme Court reconsider, and overrule, its holding in *State v. Carter* that the good faith exception to the exclusionary rule which exists under federal law does not apply under North Carolina State law.[111]

North Carolina criminal procedure scholars Samuel J. Randall, IV, and Ryan D. Stump have noted this apparent "displeasure" by the General Assembly but caution that this request can only be read as an "invitation" to revisit *Carter*, not a declaration of its invalidity.[112] After all, "North Carolina courts recognized nearly sixteen years before *Marbury v. Madison* . . . that it is the duty of the judicial branch to interpret the law, including the North Carolina Constitution."[113] As noted in *State v. Elder*,[114] then, the good-faith exception in Section 15A-974, as amended, only applies "in certain situations regarding statutory [(as opposed to state constitutional)] violations."[115]

On balance, the state's appellate courts have agreed. Notably, the North Carolina Court of Appeals explicitly addressed the addition of the statutory good-faith exception:

> The legislature specifically adopted a good faith exception in certain situations regarding statutory violations, but did not address constitutional violations, instead deferring to the Supreme Court in its session laws. At this time, our Supreme Court has not overruled *Carter*, and "[w]e are bound by precedent of our Supreme Court[.]" . . .

109. Ch. 15A, 2011 N.C. Sess. Laws 10 (codified as amended at N.C. GEN. STAT. § 15A-974 (2021)).

110. *Id.* § 1.

111. *Id.* § 2.

112. SAMUEL J. RANDALL, IV & RYAN D. STUMP, CRIMINAL PROCEDURE IN NORTH CAROLINA § 8.10 (4th ed. 2020) (noting that, because *Carter* is "a constitution-level edict, the General Assembly can only" invite the Supreme Court to reconsider).

113. Comm. To Elect Dan Forest v. Emps. Pol. Action Comm. (EMPAC), 376 N.C. 558, 2021-NCSC-6, ¶ 14 (citing Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787)).

114. 232 N.C. App. 80, 753 S.E.2d 504 (2014).

115. *Id.* at 91, 753 S.E.2d at 512.

> Accordingly, there is no good faith exception to the exclusionary rule as to violations of the North Carolina State Constitution.[116]

The *Elder* court agreed that the officers in question acted in good faith such that exclusion would not have been required had their search only been challenged pursuant to the Federal Constitution or on statutory grounds.[117] However, the defendant also challenged the search under the North Carolina Constitution, and *Carter* compelled exclusion of the tainted evidence.[118] The *Elder* court also noted that "it is possible that the [Supreme] Court has not yet had an appropriate opportunity to address" whether overruling *Carter* was appropriate but that this case "could potentially present such an opportunity, should the State petition for discretionary review of this ruling."[119]

The State did petition for discretionary review of *Elder*, requesting that the Supreme Court of North Carolina reconsider *Carter* in light of shifting trends in interpreting the exclusionary rule and the good-faith exception, including their rationales and purposes.[120] The Supreme Court of North Carolina denied the State's petition for discretionary review, requiring that the State limit its arguments to the issues presented in the dissenting opinion to the North Carolina Court of Appeals' opinion.[121] These arguments did not touch upon the good-faith doctrine and, as such, *Elder*'s determination that Section 15A-974 had no force over *Carter*'s constitutional foundation was left untouched[122] and became binding precedent at the Court of Appeals.[123]

B. *Jurisprudential Avoidance*

While *Carter* and its progeny established no good-faith exception to the exclusionary rule in the North Carolina Constitution, and *Elder* confirmed that

116. *Id.* at 92, 753 S.E.2d at 512 (citations and footnote omitted) (quoting State v. Pennell, 228 N.C. App. 708, 723, 746 S.E.2d 431, 441, *rev'd in part*, 367 N.C. 466, 758 S.E.2d 383 (2014)); *see also* State v. Gerard, 249 N.C. App. 500, 501, 790 S.E.2d 592, 593 (2016) ("The trial court erred in basing its [denial of the motion to suppress] upon the good faith exception under North Carolina General Statute § 15A-974.").

117. *Elder*, 232 N.C. App. at 91, 753 S.E.2d at 512.

118. *Id.* at 84–92, 753 S.E.2d at 508–13 (reversing denial of motion to suppress because, though officers relied in good faith on provisions of domestic violence protective order, such an order could not serve as probable cause justifying general search of defendant's house).

119. *Id.* at 92, 753 S.E.2d at 512.

120. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31 as to Additional Issues at 15, State v. Elder, 368 N.C. 70, 773 S.E.2d 51 (2015) (No. 41A14), 2014 WL 936753, at *15.

121. State v. Elder, 367 N.C. 503, 758 S.E.2d 863 (2014).

122. *Elder*, 232 N.C. App. at 93–94, 753 S.E.2d at 513–14.

123. *In re* Appeal from Civ. Penalty Assessed for Violations of the Sediment Pollution Control Act, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

the revised Section 15A-974 did not create one, another category of post-*Carter* cases simply avoids this issue.

The first such example was *State v. Witherspoon*,[124] a 1993 North Carolina Court of Appeals case predating legislative action pertaining to *Carter*. *Witherspoon* held no error in the denial of a motion to suppress evidence because the magistrate had a substantial evidentiary basis for concluding that probable cause existed when the search warrant was issued.[125] After reaching this conclusion, the court in dicta noted that the good-faith exception would apply even if the warrant were defective.[126] Citing the North Carolina Supreme Court decision in *State v. Welch*,[127] which was decided two years before *Carter* and cited *Leon*, the *Witherspoon* court found that "the officers reasonably relied on the search warrant that was issued by a detached and neutral magistrate and took every reasonable step to comport with the fourth amendment requirements."[128] Despite the defendant's arguments to exclude evidence pursuant to the state constitution and its publication five years after *Carter*, the opinion makes no mention of *Carter* or its progeny.[129]

Nearly twenty years later, in *State v. Perry*,[130] the North Carolina Court of Appeals again sidestepped *Carter* in holding that law enforcement officers obtaining historical cell site location information ("CSLI") does not constitute a search under the Fourth Amendment.[131] Similar to *Witherspoon*, *Perry* addressed the good-faith exception question in dicta in which it accepted for the sake of argument that "a search warrant based upon probable cause was required."[132] Despite acknowledging that the defendant raised arguments under both the Fourth Amendment and the North Carolina Constitution,[133] Judge Tyson, joined by Judge Dietz, only addressed the federal good-faith exception.[134] Chief Judge McGee, while parting from the majority's conclusion that a search had not occurred, similarly stated that "the good-faith exception to the Fourth Amendment warrant requirement would allow the challenged evidence to stand."[135]

124. 110 N.C. App. 413, 429 S.E.2d 783 (1993).
125. *Id.* at 420, 429 S.E.2d at 787.
126. *Id.* at 421, 429 S.E.2d at 787.
127. 316 N.C. 578, 588, 342 S.E.2d 789, 794–95 (1986).
128. *Witherspoon*, 110 N.C. App. at 421, 429 S.E.2d at 787–88 (citing *Welch*, 316 N.C. at 589, 342 S.E.2d at 795).
129. *See id.* at 416–17, 429 S.E.2d at 785.
130. 243 N.C. App. 156, 776 S.E.2d 528 (2015).
131. *Id.* at 178, 776 S.E.2d at 542.
132. *Id.* at 175, 776 S.E.2d at 541.
133. *Id.* at 161, 776 S.E.2d at 532.
134. *Id.* at 175–76, 776 S.E.2d at 541–42.
135. *Id.* at 183, 776 S.E.2d at 545 (McGee, C.J., concurring).

Most recently, the North Carolina Court of Appeals avoided a state good-faith exception decision in *State v. Gore*,[136] in which the court held that a warrantless search of a defendant's CSLI was, in essence, *not* a warrantless search because it was supported by probable cause.[137] In *Gore*, the court reviewed the denial of a motion to suppress historical CSLI accessed without a warrant.[138] The trial court determined that the court order allowing the search was supported by probable cause and was therefore equivalent to a warrant, so it denied the defendant's motion.[139]

Assessing the defendant's rights under the federal and state constitutions, Judge Arrowood, joined by Judge Berger, held that the trial court correctly concluded that probable cause existed to access the defendant's CSLI.[140] This access, therefore, did not violate the defendant's Fourth Amendment rights as interpreted by the U.S. Supreme Court's decision in *Carpenter v. United States*,[141] which was decided after *Perry* but before *Gore* and held such conduct constituted a search and required a warrant supported by probable cause.[142]

Further, the court, again in dicta, determined that "even assuming law enforcement did conduct a warrantless search in violation of defendant's Fourth Amendment rights," the fruits of the CSLI search were admissible under the federal good-faith exception.[143] Because the State accessed the defendant's CSLI two years before the U.S. Supreme Court's decision in *Carpenter*, the majority reasoned that "[i]n light of the prevailing law at the time, it was reasonable for [law enforcement] and the judge who approved the application to access defendant's CSLI to believe that" this conduct did not require a warrant.[144] Intriguingly, though the defendant also preserved a challenge to the search of his CSLI under the North Carolina Constitution, the court did not engage in a parallel state analysis. The court instead explicitly avoided considering "whether there exists any good faith exception to the exclusionary rule in North Carolina, such as that which exists in the federal courts."[145]

C. *Jurisprudential Hostility*

Going further than avoiding the issue, two recent North Carolina Court of Appeals opinions have raised questions, for the first time, about *Carter*'s

136. 272 N.C. App. 98, 846 S.E.2d 295, *discretionary review denied*, 376 N.C. 546, 851 S.E.2d 380 (2020) (mem.).

137. *Id.* at 108–09, 846 S.E.2d at 301–02.

138. *Id.* at 101, 846 S.E.2d at 297.

139. *Id.*

140. *Id.* at 101–04, 846 S.E.2d at 297–99.

141. 128 S. Ct. 2206 (2018).

142. *Id.* at 2213.

143. *Gore*, 272 N.C. App. at 102, 846 S.E.2d at 298.

144. *Id.* at 102–03, 846 S.E.2d at 298.

145. *Id.* at 109, 846 S.E.2d at 302.

precedential value in light of the 2011 legislative amendment to Section 15A-974.

The first is an unpublished opinion,[146] *State v. Foster*,[147] authored by Judge Berger, with Judges Stroud and Dietz concurring. The defendant raised two arguments on appeal.[148] First, he contended that the trial court erred in denying his motion to suppress because the application for the search warrant did not establish probable cause.[149] Second, citing *Carter*, the defendant argued that if the court agreed that the warrant was defective, the evidence must be suppressed because no good-faith exception would allow the admission of the illegally seized evidence.[150]

The North Carolina Court of Appeals affirmed the denial of the motion to suppress, determining that the search warrant was supported by probable cause.[151] Because it rejected the defendant's first argument, the panel did not need to reach whether *Carter* necessitated the suppression of the evidence.[152] The court, however, stated the following in dicta in a footnote:

> We note that Defendant argues *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988) stands for the proposition that there is no good faith exception to the exclusionary rule. However, the language in *Carter* detailing the good-faith exception has been superseded by Section 15A-974 of the North Carolina General Statutes: "Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful." N.C. Gen. Stat. § 15A-974 (2018).[153]

The court cited no authority for this assertion that Section 15A-974 superseded *Carter*, nor did it grapple with *Elder* and other cases to the contrary.[154]

A concurring judge in the aforementioned *Gore* picked up this thread left by *Foster* and pulled it further.[155] In a concurrence in part and concurrence in the result in part, Judge Dillon disagreed with the majority's conclusion that the order allowing retrieval of the defendant's CSLI complied with the Fourth

146. Unpublished opinions do not have precedential value. N.C. R. APP. P. 30(a)(e)(3).

147. 264 N.C. App. 135, 823 S.E.2d 169, 2019 WL 661571 (2019) (unpublished table decision).

148. *Id.* at *2.

149. *Id.*

150. *Id.*

151. *Id.* at *5.

152. *Id.*

153. *Id.* at *4 n.2.

154. *See id.*

155. *See* State v. Gore, 272 N.C. App. 98, 114, 846 S.E.2d 295, 305 (2020) (Dillon, J., concurring in part, concurring in result in part), *discretionary review denied*, 376 N.C. 546, 851 S.E.2d 380 (2020) (mem.).

Amendment warrant requirement.[156] He instead would have found that the order at issue did not establish probable cause to search the defendant's CSLI.[157] The concurrence, however, arrived at the same result as the majority by holding that the good-faith exception applied to the defendant's federal *and* state constitutional claims.[158]

Central to Judge Dillon's assertion is *Carter*'s curious aside that "[i]f 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."[159] From this, the concurrence contended that

> a closer reading of *Carter* reveals that our Supreme Court did not hold that the absence of a good faith exception under state law at that time (in 1988) was a constitutional matter which could only be changed by constitutional amendment. Rather, the Court held that the recognition or non-recognition of a good faith exception is a matter of public policy within the purview of our General Assembly's lawmaking authority. And, at that time, the General Assembly had provided that there was no good faith exception; and the Supreme Court merely held that the General Assembly's law was not unconstitutional, that our North Carolina Constitution required the recognition of a good faith exception.[160]

Given the legislative amendment to Section 15A-974 in 2011, the concurrence announced: "We [now] have a good faith exception under North Carolina law."[161]

As discussed above, the views of *Carter* expressed in *Foster* and the concurring opinion in *Gore* swim against the tide. The former does so in a conclusory fashion while the latter reads a sentence in *Carter* as washing away its constitutional foundation. Referencing the fact that his concurrence in *Gore* is an outlier, Judge Dillon contends the legislature's 2011 call for the Supreme Court of North Carolina to overrule *Carter* that accompanied its Section 15A-974 statutory amendment is emblematic of the mistaken "belief that North Carolina does not recognize the good faith exception."[162] But it is not just legislative opinion running to the contrary; scholarly commentary[163] and fourteen published state court appellate opinions also conclude that *Carter* held that the state constitution does not permit a good-faith exception to the

156. *Id.* at 109, 846 S.E.2d at 302.

157. *Id.* at 110–12, 846 S.E.2d at 302–03.

158. *See id.* at 109, 846 S.E.2d at 302.

159. *Id.* at 114, 846 S.E.2d at 305 (quoting State v. Carter, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988)).

160. *Id.* at 112–13, 846 S.E.2d at 304 (footnote omitted).

161. *See id.* at 112, 846 S.E.2d at 303–04.

162. *See id.* at 114, 846 S.E.2d at 305.

163. Buckner, *supra* note 5, at 164; DAVIS, *supra* note 90, at 65.

exclusionary rule.[164] Perhaps underlining this point, the Supreme Court of North Carolina did not take the opportunity to consider Judge Dillon's novel assessment of *Carter*, instead dismissing the defendant's petition for discretionary review for lack of a substantial constitutional question.[165] But, of course, tides can change over time.

CONCLUSION

Carter is a quintessential and important example of North Carolina's persuasive lockstep approach that seeks to vindicate judicial-integrity interests central to the original understanding of the exclusionary rule through the state constitution. Though firmly established as a constitutional decision over the decades, cracks—perhaps owing in part to the original construction—have emerged in recent years in the form of legislative calls for reconsideration as well as judicial avoidance of, or hostility to, its full force.

In some ways, this backlash is no surprise given that *Carter* stood apart from the judicial and political trends at its publication and for the majority of the three decades that followed. Indeed, in its petition for discretionary review in *Elder*, the State summoned arguments that have prevailed in the federal context over the decades, namely that exclusion should be a "last resort" applied only where its deterrent effect on improper law-enforcement conduct makes exclusion worthwhile.[166] This "pay its way" logic has made exclusion the exception rather than the rule in the federal context,[167] perhaps owing in part to the fact that it has been and remains fraught to rule for criminal defendants. Ironically, at the moment *Carter* has come in for renewed skepticism in our state courts, Justice Ginsburg's earlier admonition—that this and other criminal-justice jurisprudential debates are not just about the case at hand, but also about "popular trust in government"[168]—finds greater purchase nationally.[169]

164. Prior decisions from the Supreme Court of North Carolina and, as noted above, the North Carolina Court of Appeals constitute binding precedent on subsequent panels of the North Carolina Court of Appeals. *See supra* notes 99–101 and accompanying text; State v. Davis, 198 N.C. App. 443, 447, 680 S.E.2d 239, 243 (2009) (noting that the Court of Appeals' "responsibility is to follow established precedent set forth by our Supreme Court" (citation omitted)); *In re* Appeal from Civ. Penalty Assessed for Violations of the Sediment Pollution Control Act, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). And decisions of the Supreme Court of North Carolina have repeatedly noted that it "has never overruled its decisions lightly. No court has been more faithful to *stare decisis*." Rabon v. Rowan Mem'l Hosp., Inc., 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967).

165. State v. Gore, 376 N.C. 546, 546, 851 S.E.2d 380, 380–81 (2020) (mem.).

166. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31 as to Additional Issues, *supra* note 120, at 25–26.

167. *See, e.g.*, Herring v. United States, 555 U.S. 135, 147–48 (2009).

168. *Id.* at 152 (Ginsburg, J., dissenting).

169. *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (arguing that constitutional sanctioning of an unlawful search due to an intervening event "implies that you are

For the moment, *Carter* remains an exemplar of persuasive lockstep and the power of state constitutions. Given the perpetually controversial nature of *Carter* and the ever-changing composition of state appellate courts, time will tell whether its approach to state constitutional interpretation and attendant rejection of the good-faith exception holds.[170]

not a citizen of a democracy but the subject of a carceral state"); James A. Wynn, *As a Judge I Have To Follow the Supreme Court. It Should Fix This Mistake*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ [https://perma.cc/YX5H-8X55 (dark archive)] ("But when the judiciary strips individuals' constitutional rights of legal protection . . . it can be expected that the public will take matters into its own hands."); Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2202–08 (2015) (arguing that judges are willing "to subvert the law in criminal cases in order to thwart application of the exclusionary rule" (quoting Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1796 (2007))).

170. *Compare* State v. Grady, 372 N.C. 509, 541, 831 S.E.2d 542, 566 (2019) (writing for the majority, Justice Earls reverses entry of satellite-based monitoring ("SBM") order as "the efficacy of the [SBM] solution need[s] to be demonstrated by the government"), *with* State v. Hilton, 2021-NCSC-115, ¶ 63 (Earls, J., dissenting) (dissenting from affirmance of SBM order as "there is not actually any evidence in the record demonstrating the efficacy of SBM").