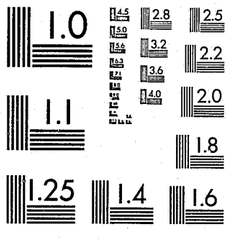

Department of Justice

CBC, etc.

STATEMENT

OF

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U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE OPERATION OF THE EXCLUSIONARY RULE

APRIL 20, 1983

I am pleased to be here today to present the views of the Department of Justice on the Fourth Amendment "exclusionary rule," a topic of critical import for the enforcement of criminal law in this country. As you will recall, I testified before the Subcommittee on this same subject during the last Congress on June 2, 1982 and detailed a legislative proposal to limit, but not eliminate, the application of the rule. Our proposal was and is, simply, that the exclusionary rule would not be applied in cases in which the law enforcement officers conducting the search acted in a reasonable and good faith belief that their actions were lawful. Unfortunately, although several hearings were held in both the House and Senate, no legislation relating to the exclusionary rule was passed in the 97th Congress. Since that time, however, the Supreme Court heard reargument on March 1, 1983 in the case of Illinois v. Gates, No. 81-430, in which both sides were asked to address the question of whether the Fourth Amendment exclusionary rule should be applied in cases where the police acted in reasonable good faith. Moreover a study by the National Institute of Justice has been recently completed which sheds new light on the deleterious effects of the present application of the rule. Finally, new legislation has been introduced at the request of the Administration in the present Congress which would restrain the exclusionary rule within rational boundaries. It is contained in Title III of H.R. 2151, The Comprehensive Crime Control Act of 1983. I will be discussing the NIJ study, and this

legislative proposal in greater depth, but permit me to outline for the Subcommittee the various issues I would like to cover today:

1) What the exclusionary rule is and how it has developed;
2) Specific cases which illustrate contemporary implementation of the rule; and
3) Proposed legislative changes in the rule that we believe will restore common sense to the federal criminal justice process and eliminate unjust results in the implementation of the rule.

The Rule and Its Developments

It is important at the outset to recall the specific words of the Fourth Amendment upon which the rule is based: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

It is apparent that the "exclusionary rule" itself is not articulated in the Fourth Amendment or, for that matter, in any part of the Constitution, the Bill of Rights, or the federal criminal code. The exclusionary rule is, rather, a judicially declared rule of law created in 1914, when the United States Supreme Court held in Weeks v. United States, 232 U.S. 383, that evidence obtained in violation of the Fourth Amendment is inadmissible in federal criminal prosecutions.

This doctrine was criticized by many commentators from the start, but the rule became firmly implanted in the federal criminal justice system. The states, however, were divided in their opinion of the rule. In the three decades following Weeks, sixteen states adopted the rule while thirty-one states refused to accept it.

It was not until 1949 that the Supreme Court was squarely confronted with the question of whether the exclusionary rule should be applied to state criminal prosecutions. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court held that although the guarantees of the Fourth Amendment applied to the states through the due process clause of the Fourteenth Amendment, the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. Later, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court reversed its decision in Wolf and held that because the Fourth Amendment right of privacy was enforceable against the states through the Fourteenth Amendment, "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

Before I discuss the purpose of the exclusionary rule and the problems posed by its present application, I think it is important to address some of the misplaced arguments raised in the current debate over the rule. It is my opinion that the issues discussed in these arguments are, upon proper analysis, non-issues.

One of these non-issues relates to the impact of the rule on the crime rate. Supporters of the rule claim that advocates for modification of the present rule argue incorrectly that reforming the rule will reduce the crime rate. The fact, however, is that advocates for reform do not claim that any such change is a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there are no panaceas. On the other hand, advocates for reform do point out that the rule operates to free known murderers, robbers, drug traffickers and other violent and non-violent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.

Another non-issue relates to the impact of the rule on criminal cases. Supporters of the rule cite a 1979 General Accounting Office report which found that evidence was actually suppressed in only 1.3% of a sample of federal criminal cases and argue that modification or abolition of the exclusionary rule is, therefore, not a significant criminal justice issue. Aside from the inevitable analytic flaws in the GAO report -- for example, it did not consider cases not ever presented to United States Attorneys because the law enforcement agency involved felt they presented Fourth Amendment problems -- any common sense perspective on the criminal justice world must take note that the exclusionary rule is a necessary consideration of every police arrest and of every seizure of physical

evidence, that the rule is the overwhelming component of drug case litigation, and that the appellate court overload which faces every judicial system in this country is due in no small measure to appeals of exclusionary rule issues.

Indeed, with respect to the drug area, results of a recent study by the National Institute of Justice demonstrate that search and seizure law has a significant impact on drug law enforcement. The study found that nearly three thousand felony drug cases were rejected for prosecution in California between 1976-1979 because of search and seizure problems. The study also focused on rearrests during the years 1976-77, finding that: "For most defendants arrested and later freed because of the exclusionary rule, that arrest was only a single incident in a longer criminal career." Forty-six percent of the 2141 defendants not prosecuted in California in 1976 and 1977 because of the rule were rearrested within two years of their release, many of them more than once. These 981 persons accounted for 2713 arrests, 1270 of which were for felonies. While 2141 defendants not prosecuted because of the exclusionary rule in a state as large as California over a two year period may not seem significant, a rule of evidence that allows this number of criminals to escape probable conviction and commit further crimes without having a reasonable purpose or producting a corresponding benefit creates an intolerable burden for society to continue to bear. Although the study did not attempt to establish what percentage of those searches and seizures would

have been upheld under a good-faith test, the results do show that the argument that, somehow, the exclusionary rule has an insignificant impact is totally disingenuous.

Judicial Rationale of the Exclusionary Rule

Discussion of the true issues pertaining to the exclusionary rule must begin with an examination of the purpose behind the rule. When the exclusionary rule was first articulated in Weeks, supra, the Court justified its holding on two grounds: deterrence of unlawful police conduct and maintenance of judicial integrity. In Elkins v. United States, 364 U.S. 206 (1960), the court stated the deterrence ground as follows:

> Its purpose is to deter -- to compel respect for the Constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.

The judicial integrity rationale was based on the notion that courts should be prevented from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Early exclusionary rule cases mentioned both rationales. However, over time, as the rule has been explicated, the asserted rationale of judicial integrity essentially has been abandoned.

The emergence of deterrence as the reason for the rule is aptly illustrated by the Court's opinions in Fourth Amendment retroactivity cases. In Linkletter v. Walker, 381 U.S. 618 (1965), the court, considering the issue for the first time, refused to apply Mapp v. Ohio retroactively. The Linkletter Court observed that the basis for Mapp's application of the exclusionary rule to the states was its finding that the rule

"was the only effective deterrent to lawless police action." Applying that premise to the Linkletter case, the court noted that it "cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved." Id. at 637. Likewise, in Desist v. United States, 394 U.S. 244 (1969), the Court observed that "[t]he exclusionary rule 'has no bearing on guilt' or the fairness of the trial.'" Id. Accordingly, it "decline[d] to extend the court-made exclusionary rule to cases in which its deterrence purpose would not be served." Id.

More recently, in United States v. Peltier, 422 U.S. 531 (1975), the Court held that the policy underlying the exclusionary rule did not require the suppression of evidence seized in searches which were clearly unlawful under standards established before the trial of Peltier in the case of Almeida-Sanchez, 413 U.S. 266 (1973), but were lawful at the time they were actually carried out, which was before Almeida-Sanchez was decided. The Court observed that although Supreme Court decisions applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," the Court has relied principally upon the deterrent purpose served by the exclusionary rule. The Court further noted that the lesson to be learned from the retroactivity cases is that "the 'imperative of judicial integrity' is . . . not offended if law enforcement officials reasonably believed

in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." Id. at 537-38. Focusing specifically on the deterrence purpose, the Court concluded that "evidence obtained from a search 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." Id. at 542.

In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court held that the rule should not be applied to exclude evidence when it has been seized during an arrest for violation of a statute valid at the time of the arrest but which is subsequently declared invalid. The Court stated:

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule. Id. at 38 n.3.

The declaration in the retroactivity cases of the deterrence rationale for the exclusionary rule is also apparent in the Court's approach to determining whether the rule should be applied in a variety of other circumstances. In United States v. Calandra, 414 U.S. 338 (1974), the Court held that a witness before a grand jury could not refuse to answer questions based

on evidence obtained in violation of the Fourth Amendment. In that case, the Court stated that the

> purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, 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.

In United States v. Janis, 428 U.S. 433 (1976), the Court refused to exclude from a federal civil proceeding evidence seized unconstitutionally but in good faith by state law enforcement officers. The court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." Id. at 454. Because the evidence in both Calandra and Janis had been obtained unlawfully, application of the judicial integrity rational would have required suppression of the evidence. However, as noted above, the Court considered the deterrent purpose of the exclusionary rule as its primary rationale and concluded that the evidence should not be suppressed.

The deterrence rationale was also used as the basis of exclusionary rule analysis when the Court held that unlawfully seized evidence is admissible to impeach the defendant's testimony at his criminal trial, United States v. Havens, 446 U.S. 620 (1980) and that no person other than the defendant has standing to ask for the invocation of the exclusionary rule.

See Rakas v. Illinois, 439 U.S. 128 (1978). In sum, the judicial integrity rational has essentially been abandoned by the Court as a factor in its exclusionary rule analysis.

Problems with the Rule

As the above cases demonstrate, the Court has clearly established that the true purpose behind the exclusionary rule is the deterrence of police misconduct. The heart of the problem with the exclusionary rule lies in its application: the courts have gradually expanded its application to situations in which the rule cannot possibly serve as a deterrent. This expansion has distorted the preeminent purpose of the rule with the result that the truth finding process is impeded, and society is done a grave and unnecessary injustice.

The clearest example of misapplication of the exclusionary rule arises when courts suppress evidence seized by police in executing a duly authorized search warrant. In that type of case a second or third judge, in disagreement with judge who issued the warrant, invalidates the search despite the absence of any police misconduct. Consider in this regard United States v. Alberto Antonio Leon (9th Cir. Mar. 4, 1983). In that recent case, an informant advised police officers that he had seen two named persons selling drugs from their residence five months before. On the basis of that tip, the police conducted a one-month surveillance of the two people and their residence. The surveillance eventually expanded to cover two other residences and other persons with whom the two earlier

identified people had been associating, strongly suggesting that all persons and residences were involved in narcotics trafficking. After consulting with three assistant district attorneys, the police obtained warrants from a state court judge for the search of the residences and various automobiles belonging to the suspects. The searches produced narcotics and narcotics paraphernalia.

The defendants were charged with various drug violations but a district judge ruled that the search warrants were defective because the informant's information was probably stale. Much of the evidence obtained by the search was suppressed. The Ninth Circuit affirmed over the objection of Justice Kennedy, who observed in his dissenting opinion that the affidavit in support of the warrants "sets forth the details of a police investigation conducted with care, diligence, and good-faith."

United States v. Shorter, 600 F.2d 585 (6th Cir. 1979), is another example of the exclusionary rule being applied where an authorized search warrant is invalidated by a second judge or court. In that case, local police and agents of the Federal Bureau of Investigation (FBI) arrested a suspected Ohio bank robber at his home. After the arrest, the FBI agent telephoned a federal magistrate and stated his grounds for a search warrant which was then issued by the magistrate as permitted by law. The subsequent search produced incriminating evidence, including bait bills and a firearm. The trial judge ruled the

search lawful, but the conviction was reversed on appeal. The appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the application Federal Rule requires that the oath be obtained "immediately."

These cases involve disagreements between judges about judicial conduct -- there is no police misconduct involved. The police were carrying out their duties as society expects them to do: the officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the purpose of the exclusionary rule, the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the premise that they have violated the Constitution. Proper police conduct is thereupon falsely labeled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused or even in situations where the cases are in flat contradiction. Police often are confronted with the

question of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

Last term, the United States Supreme Court decided two cases that aptly illustrate this point, New York v. Belton, __ U.S.__, 101 S. Ct. 2860 (1981), and Robbins v. California, __ U.S.__, 101 S. Ct. 2842 (1981). The cases are remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in Robbins, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In Belton, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required an analysis of the "automobile exception" cases which pertain to the validity of warrantless searches of cars and their contents (see, e.g., Carroll v. United States, 267 U.S. 132 (1925); the doctrine of "search incident to arrest" as defined by Chimel v. California, 395 U.S. 752 (1969); and the watershed case of United States v. Chadwick, 433 U.S. 1 (1977), in which the Court held that police must obtain a warrant to open a closed container in an automobile where the possessor of the container has exhibited a

"reasonable expectation of privacy" in that particular container.

When the Supreme Court decided Belton and Robbins, three justices opined that both searches were legal; three justices opined that they were both illegal; and three justices controlled the ultimate decision that Robbins was illegal and Belton legal. To add to the confusion, the Robbins search now said to be illegal had been found to be legal by the California courts and the Belton search now said to be legal had been found to be illegal by the New York courts. When Robbins was finally decided, 14 judges had reviewed the search: seven found it valid; seven, invalid. Now that Robbins and Belton have been decided, do we know the law which governs police conduct in similar searches? Justice Brennan offers this comment in his Belton dissent:

> The Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifications underlying Chimel, it offers no guidance to the police officer seeking to work out these answers for himself.

To the same end, Justice Rehnquist dissented in Robbins by citing the language for Justice Harlan in his concurring opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an every day question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.

It was not surprising, therefore, that the whole field of law involved in these cases was again before the United States Supreme Court less than a year later in United States v. Ross, __ U.S. __. 102 S. Ct. 2157 (1982). In that case, which involved the search of a brown paper bag containing heroin found in a car's truck, the Court repudiated the holding in Robbins and held that the "automobile exception" to the Fourth Amendment allows police who have lawfully stopped a vehicle which they reasonably believe to contain contraband to conduct a warrantless search of any part of it, including all containers and packages, in which the contraband may be concealed.

Thus, the rule of law with respect to container searches in automobiles has apparently been finally made clear. Meanwhile, however, the defendant in Robbins who possessed thirty pounds of marijuana, went free because the police at the time of the search did not apply the law as it would be applied at the moment the Supreme Court considered the Robbins case. It is probably a small consolation for the police in that situation that their view of the law was ultimately borne out in a subsequent case. To say that the suppression of reliable, trustworthy, evidence in such a case helps to prevent police "misconduct" is absurd.

As we reflect upon the rule of law resident somewhere within these decisions, let us also consider an important fact which is often overlooked in exclusionary rule discussions. The search in Robbins actually took place on January 5, 1975,

long before Chadwick was decided on June 21, 1977. At the very least, it is fair to say that the applicable rule at the time of the search was even more elusive at that time than it is today, and yet we have imposed the final definitive sanction of suppression of reliable, trustworthy evidence in such a situation on the assumption that this judicial act will deter police misconduct.

With respect to this typical exclusionary rule analysis, it is instructive to note that the standard to which police are held in Fourth Amendment cases is stricter than that to which attorneys must comply when they are judged under the Sixth Amendment guarantee that criminal defendants to be represented by competent counsel. Consider in this regard, People v. Russell, 101 Cal. App. 3d 665 (1980), an automobile stop/closed container case decided by a California appellate court in 1980.

In Russell, once again there was a lawful stop, lawful opening of the car trunk, and police discovery of marijuana when they unzipped a flight bag. At trial the search was uncontested, and the defendant convicted. On appeal it was contended that his counsel at trial was incompetent under the Sixth Amendment when judged against the California standard announced in People v. Pope, 23 Cal. 3d 412 (1979), which requires that an appellant "show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." In support of this position, the defendant argued that counsel had not asserted that opening

the flight bag required a search warrant under the requirement of People v. Dalton, 24 Cal. 3d 850 (1979), a California search and seizure case in which the court had applied the holding in Chadwick, supra, despite the fact that the search took place prior to the Chadwick decision.

The Court rejected the defendant's contention that the attorney was incompetent, stating:

> It was first noted that the hearing on Russell's motion to suppress evidence occurred February 13, 1979. The opinion of People v. Dalton was filed six months later, August 16, 1979. It is doubtful that Pope requires, under pain of being held to have furnished constitutionally inadequate representation, such prescience on the part of a lawyer for one criminally accused.

Implicit in that language is a conclusion that the state of the law of search and seizure was such that a criminal defense attorney, when confronted with the issue in the courtroom, was not expected to be aware that there was a Fourth Amendment violation on those particular facts. Indeed, the court found that a reasonably prepared attorney was not expected to anticipate that a future search and seizure decision, People v. Dalton, supra, would hold similar police conduct unlawful. Yet as was illustrated in the Dalton and Robbins decisions, there is no such hesitation in requiring "such prescience" on the part of police officers faced with precisely the same problem of legal analysis which confronted the attorney in Russell.

Retroactive application of the exclusionary rule represents still another instance in which the rule's deterrent

purpose is not served. In the past, the United States Supreme Court itself has established that courts should decline to apply the exclusionary rule in many cases expanding the scope of Fourth Amendment rights. See United States v. Peltier, supra; Linkletter v. Walker, supra. In Peltier, for example, the Court noted that neither of the purposes served by the exclusionary rule -- deterrence of unlawful police conduct and preservation of judicial integrity -- would be served by giving retroactive effect to decisions announcing new search and seizure rules. Law enforcement officers can hardly be deterred from breaking a "rule" that did not exist at the time of the activity in question.

However, despite the fact that the deterrent purpose is not furthered in retroactive use of the rule, last year a divided Court in United States v. Johnson, __ U.S. __ (1982), held that the Fourth Amendment standard established in Payton v. New York, 445 U.S. 573 (1980) is to be applied retroactively. As a basis for its conc usion, the Court noted that Payton "resolved a previously unsettled point of Fourth Amendment law," unlike the Peltier case, which involved the overturning of a longstanding practice supported by continuous judicial approval by a lower court. Unfortunately, the standard established in Johnson leaves the police officer in both of those situations in the same predicament: he or she is still held to know a law which does not exist in the present and will only exist if a future court recognizes and declares it.

The consequence of apply_ing the exclusionary rule in the cases discussed above is two-fold. First, the purpose of the exclusionary rule is not served when the officers believe, in good faith, that they are performing a lawful search. When law enforcement officers obtain a warrant in good faith or when they make a reasonable, good faith attempt to predict the decisions that future courts will make, there exists no logical basis for excluding the evidence they have gathered. Applying the rule in these cases fails to further in any degree the rule's deterrent purpose, since conduct reasonably engaged in, in good faith, is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Second, application of the exclusionary rule when the police have acted reasonably and in good faith results in attaching a false label to proper police conduct. This adversely affects the criminal justice system by fostering the public perception that police are engaged in lawless, improper conduct when that is simply not the case. The Supreme Court recognized these effects in Stone v. Powell, 428 U.S. 465 (1976), in which it stated:

> The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice.

The unjustified acquittals of guilty defendants due to application of the exclusionary rule has resulted in a growing concern by our citizens that our system of justice is lacking in sense and fairness. Unfortunately, it seems unlikely that any of these conceptions by the public will change as long as the exclusionary rule remains in its present form and courts continue to expand its application to situations where law enforcement conduct has been manifestly reasonable.

Proposed Legislation Modification

The specific action we suggest in the area of legislative limitation of the rule, as contrasted to legislative abolition of the rule, is based upon a recent significant opinion on the rule rendered by the Fifth Circuit. In United States v. Williams, 622 F.2d 830 (5th Cir. 1980), the Fifth Circuit, after an exhaustive analysis of the relevant Supreme Court decisions, announced a construction of the exclusionary rule that would allow admission at trial of evidence seized during a search undertaken in a reasonable and good faith belief on the part of a federal officer that his conduct was lawful. A majority of the 24 judges of that court, sitting en banc, concurred in an opinion that concluded as follows (Id. at 846-847):

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

In justification of this conclusion, the court first noted that the exclusionary rule is not a constitutional requirement. Rather, the court described it as "a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct." The Court determined that the deterrent purpose was the preeminent purpose behind the rule and further noted that this purpose was not served when the improper police actions were taken in reasonable, good faith. Accordingly, there was no compelling reason to apply the exclusionary rule in such cases.

The reasonable good faith rule announced by the Fifth Circuit is the same rule urged by the Attorney General's Task Force on Violent Crime. If implemented, we believe that this restatement of the exclusionary rule would go a long way towards insuring that the rule would be applied only in those situations in which police misconduct logically can be deterred. Law enforcement officers will no longer be penalized for their reasonable, good faith efforts to execute the law. On the other hand, courts would continue to exclude evidence obtained as a result of searches or seizures which were performed in an unreasonable manner or in bad faith, such as by deliberately misrepresenting the facts used to obtain a warrant. Thus, the penalty of exclusion will only be imposed when officers engage in the type of conduct the exclusionary rule

was designed to deter -- clear, unreasonable violations of our very important Fourth Amendment rights.

It should be noted that the reasonable, good faith rule requires more than an assessment of an officer's subjective state of mind and will not, as is sometimes argued, place a premium on police ignorance. In fact, the rule requires a showing that the officer's bona fide good faith belief is grounded in an objective reasonableness. As the Williams court explained, the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe he was acting lawfully." Accordingly, an arrest or search that clearly violated the Fourth Amendment under prior court decisions would not be excepted from the rule simply because a police officer was unaware of the pertinent case law. Thus, there would remain a strong incentive for law enforcement officers to keep abreast of the latest developments in the law.

Constitutionality of Congressional Modification

The Department of Justice has suggested specific legislation to implement the reasonable, good faith exception to the rule. Our proposal was introduced in the Senate last year as S. 2231, which is based on the language in United States v. Williams enunciating the reasonable good faith exception. We recommend that identical or similar language be adopted by this Subcommittee in any legislation that seeks to modify the exclusionary rule. We believe that Congressional legislation

which embodies the Williams case's reasonable, good faith exception to the exclusionary rule would be held to be constitutional.

Indeed, Congressional action in this area was explicitly invited by Chief Justice Burger in his dissenting opinion in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), in which he stated that "the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." Id. at 424. As a possible alternative to the rule, the Chief Justice suggested that Congress develop a new statutory remedy for victims of unconstitutional searches and seizures. However, the tort remedy was not offered as the exclusive acceptable substitute. Supreme Court decisions during the past decade support the conclusion that the Court today would sustain reasonable congressional action limiting the rule without the substitution of a new remedy, so long as the modified rule furthered the purpose of the exclusionary rule as articulated by the Court.

As I have already demonstrated, there is legal precedent for adoption of a reasonable, good faith exception. The exception is primarily grounded on Supreme Court cases such as United States v. Peltier, supra and Michigan v. DeFillippo, supra, in which the Court emphasized deterrence as the exclusionary rule's primary basis and refused to apply the rule when the conduct of the law enforcement officer was not capable of being

deterred. The good faith exception is also consistent with any notions of "judicial integrity" to the extent that such a concept remains as a rationale for retaining the rule in some form. As the Supreme Court stated in Peltier, supra, "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law . . . ."

Finally, it is important to remember that the reasonable, good faith exception already has undergone constitutional scrutiny and been upheld in both federal and state jurisdictions. The Fifth Circuit found the exception to be constitutional in United States v. Williams, which has already been discussed. In addition, the Williams holding has been followed by the highest appellate courts in New York and Kentucky. See People v. Adams, 442 N.E. 2d 537 (N.Y. Ct. App. 1981) and Richmond v. Commonwealth, 29 Cr. L. 2529 (Ky. Ct. App. 1981). It has also been codified by at least two state legislatures. See Colo. Rev. Stat. § 16-3-308 (1981); Ariz. Ch. 161 (1982). Thus, the exception already has established a solid basis of constitutional and legislative support.

Conclusion

I would like to emphasize that legislation adopting a reasonable, good faith exception to the exclusionary rule should be viewed as a measure that simply states the true scope of the rule. Given that deterrence is the rationale for the rule, the situations where law enforcement officers have performed a

search or seizure reasonably and in the good faith belief that their conduct comports with the law are precisely the ones in which it seems indefensible to exclude the evidence they have gathered. When a court does order suppression of evidence in such circumstances, it imposes a label of police misconduct when in fact there is none. The result is that law enforcement officers must suffer the personal indignity of being branded as lawbreakers, while at the same time the public is misled into thinking that there is widespread police abuse when it does not actually exist. Moreover, indiscriminate application of the exclusionary rule allows the determination of guilt or innocence to be made without assessment of all the probative and trustworthy evidence available, thereby rendering the criminal justice system unreliable and impotent.

Implementation of the reasonable, good faith exception would limit application of the exclusionary rule to furtherance of its original purpose of deterrence. As a result, the focus of criminal proceedings would remain directed to the process of determining the truth in order to convict the guilty and acquit the innocent. Faith in the criminal justice system would be strengthened because the police and public would no longer be penalized by the unnecessary suppression of reliable evidence. This common sense limitation of the exclusionary rule would return integrity to our judicial system and law enforcement programs. We strongly urge that legislation to this effect be adopted by this Subcommittee.

Mr. Chairman, that concludes my prepared testimony. I would be pleased to answer any questions the Subcommittee might have.

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