97th Congress, 2d Session - - - - - - - House Document No. 97-234

CRIMINAL JUSTICE REFORM ACT OF 1982

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A PROPOSAL FOR LEGISLATION TO REFORM THE USE OF THE INSANITY DEFENSE IN FEDERAL CRIMINAL CASES, TO ENSURE THE ADMISSIBILTY OF EVIDENCE WHEN OBTAINED BY LAW ENFORCEMENT AUTHORITIES ACTING IN GOOD FAITH, AND TO DEFINE CIRCUMSTANCES JUSTIFYING FEDERAL INTERVENTION IN STATE CRIMINAL PROCEEDINGS

3, 1982.—Message and accompanying papers referred to the Committee on the Judiciary and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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To the Congress of the United States:

I am herewith transmitting proposed legislation entitled the Criminal Justice Reform Act of 1982. This Act—plus other proposals now pending in Congress—would strengthen society's defenses against the continuing and pervasive menace of crime.

Crime is clearly one of the most serious problems we face today. Crime—and the fear of crime—affect the lives of most Americans. Government's inability to deal effectively with crime diminishes the public's confidence in our system of government as a whole. Last year alone, one out of every three households in the country fell victim to some form of serious crime. By 1981, according to one survey, nearly eight of ten Americans did not believe that our system of law enforcecent discouraged people from committing crimes—a fifty percent increase in just the last fifteen years.

As the threat of crime has become clearer to all Americans, so too has the need for improving our defenses against crime. As my Attorney General said only a few weeks ago:

> In recent years, through actions by the courts and inaction by Congress, an imbalance has arisen in the scales of justice. The criminal justice system has tilted too decidedly in favor of the rights of the criminal and against the rights of society.

It is time to restore the balance—and to make the law work to protect decent, law-abiding citizens.

To protect the rights of law-abiding citizens, the Administration has previously announced its strong support for a comprehensive law enforcement measure, the Violent Crime and Drug Enforcement Improvements Act of 1982, introduced in the Congress as S. 2572 and H.R. 6497. That important legislative initiative addresses many of our most pressing needs: bail reform, victim-witness protection, strengthened drug penalties, protection of federal officials, sentencing reform, expanded criminal forfeiture, donation of surplus federal property to State and local governments for needed correctional facilities, and a series of miscellaneous improvements in federal criminal laws.

The attached legislative proposal that I am now submitting would reform three additional areas of federal law affecting the criminal justice system. First, it would limit the insanity defense so that only those who did not have the mental state which is an element of their crime would escape responsibility for their acts. Second, the proposal would reform the exclusionary rule to prevent the suppression of evidence seized by an officer acting in the reasonable, good faith belief that his actions complied with law. Although the argument for retaining the exclusionary rule in any form is, at best, tenuous, this proposal eliminates application of the rule in those cases in which it most clearly has no deterrent effect. Finally, the bill would reform federal habeas corpus review of the State adjudications to ensure greater deference to full and fair State judicial proceedings and to limit the time within

which habeas corpus proceedings may be initiated. Habeas corpus reform would conserve scarce federal and State judicial and prosecutorial resources.

This new proposal and the Violent Crime and Drug Enforcement Improvements Act of 1982 represent a legislative program to protect all our citizens. These are not partisan initiatives. They are far too important to the Nation's well-being. In my view, they provide the basis for a renewed effort against the menace of crime. They will help restore the balance between the forces of law and the forces of lawlessness. I join with all Americans in urging the Congress to give both these legislative proposals its immediate attention and to begin the process of reclaiming our communities from criminals.

RONALD REAGAN.

THE WHITE HOUSE, *September 13, 1982.*

A bill to reform the use of the insanity defense in federal criminal cases, to ensure the admissibility of evidence when obtained by law enforcement authorities acting in good faith, and to define circumstances justifying federal interventiion in State criminal proceedings.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Criminal Justice Reform Act of 1982."

TITLE I—OFFENDERS WITH MENTAL DISEASE OR DEFECT

SEC. 101. This title may be cited as the "Insanity Defense Reform Act of 1982."

SEC. 102. (a) Chapter 313 of title 18, United States Code, is amended to read as follows:

"CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

"4241. Determination of Mental Competency to Stand Trial

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause

to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

"(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until—

"(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

"(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

"(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance

of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"4242. Determination of the Existence of Insanity at the Time of the Offense

"(a) INSANITY DEFENSE.—It is a defense to a prosecution under any Federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) MOTION FOR PRETRIAL PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense set forth in subsection (a), the court, upon motion of the attorney for the government, may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty;

"(3) not guilty only by reason of insanity.

"4243. Hospitalization of a Person Acquitted by Reason of Insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (d).

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The existence of clear and convincing evidence that a person's release would create a substantial risk of bodily injury to another person or serious damage to property of another shall be presumed, subject to rebuttal by the acquitted person, where the person has been found not guilty only by reason of insanity of an offense involving bodily injury or serious damage to property of another, or a substantial risk of such injury or damage. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to

determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from this mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"4244. Hospitalization of a Convicted Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the

present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

"(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

"4245. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT.—If a defendant serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant may be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of his sentence of imprisonment, whichever occurs earlier.

"(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned until the expiration of his sentence of imprisonment.

"4246. Hospitalization of a person due for release but suffering from mental disease or defect

"(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person

whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a

State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to

a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

"4247. General Provisions for Chapter—

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'rehabilitation program' includes—

"(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

"(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

"(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

"(D) organized physical sports and recreation programs; and

"(2) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—A psychiatric or psychological examination ordered pursuant to this title shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243,

or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

"(c) PSYCHIATRIC OR PSYCHOLOGICAL REPORTS.—A psychiatric of psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

"(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

"(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

"(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evi-

dence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is hospitalized pursuant to—

"(A) section 4241 shall prepare semiannual reports; or

"(B) sections 4243, 4244, 4245, or 4246 shall prepare annual reports; concerning the mental condition of the person and containing recommendations concernig the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(2) The director of the facility in which a person is hospitalized pursuant to sections 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

"(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

"(g) ADMISSIBILITY OF A DEFENDANT'S STATEMENT AT TRIAL.—A statement made by the defendant during the course of a psychiatric or psychological examination pursuant to sections 4241 or 4242 is not admissible as evidence against the accused on the issue of guilt or punishment in any criminal proceeding, unless the defendant waived his privilege against self incrimination, but is admissible on the issue whether the defendant suffers from a mental disease or defect.

"(h) HABEAS CORPUS UNIMPAIRED.—Nothing contained in sections 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

"(i) DISCHARGE.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of sections 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hopitalized and to the attorney for the government.

"(j) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

"(A) may contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

"(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

"(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

"(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

"(k) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.".

(b) The item relating to chapter 313 in the chapter analysis of Part III of title 18, United States Code, is amended to read as follows:

"313. Offenders with mental disease or defect.".

SEC. 103. Rule 12.2 of the Federal Rules of Criminal Procedure is amended—

(a) by deleting "crime" in subdivision (a) and inserting in lieu thereof "offense";

(b) by deleting "mental state" in subdivision (b) and inserting in lieu thereof "state of mind";

(c) by deleting "by a psychiatrist designated for this purpose in the order of the court" in subdivision (c) and inserting in lieu thereof "pursuant to 18 U.S.C. 4242"; and

(d) by deleting "mental state" in subdivision (d) and inserting in lieu thereof "state of mind".

SEC. 104. Section 3006A of title 18, United States Code, is amended—

(a) in subsection (a), by deleting "or, (4)" and substituting "(4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5)"; and

(b) in subsection (g), by deleting "or section 4245 of title 18".

TITLE II—APPLICATION OF THE EXCLUSIONARY RULE

SEC. 201. This title may be cited as the "Exclusionary Rule Application Act of 1982."

SEC. 202. (a) Chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"3505. Application of the Fourth Amendment Exclusionary Rule

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.".

(b) The table of sections of such chapter is amended by adding at the end thereof the following item:

"3505. Application of the Fourth Amendment Exclusionary Rule.".

TITLE III—FEDERAL INTERVENTION IN STATE CRIMINAL PROCEEDINGS

SEC. 301. This title may be cited as the "Federal Intervention Reform Act of 1982."

SEC. 302. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed,

where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 303. Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 304. Federal Rule of Appellate Procedure 22 is amended to read as follows:

"Rule 22.

"HABEAS CORPUS AND § 2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to 28 U.S.C. § 2255, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and

shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

SEC. 305. Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)" respectively, and is further amended—

(a) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.";

(b) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings."; and

(c) by redesignating subsection "(d)" as subsection and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence.".

SEC. 306. Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SECTION-BY-SECTION ANALYSIS

Title I—Insanity defense reform

Title I of the bill amends various provisions of title 18, United States Code, and of the Federal Rules of Criminal Procedure, relating to the procedure to be followed in Federal courts with respect to offenders who are or have been suffering from a mental disease or defect. Among the matters provided for by these amendments are the determination of mental competency to stand trial, the determination of the existence of insanity at the time of the offense, a limitation of the scope of a separate insanity defense, and the post-trial hospitalization of defendants suffering from a mental disease or defect.

Section 102 of the bill provides a comprehensive amendment of current chapter 313 of title 18, United States Code. Proposed section 4241 deals with the determination of mental competency to stand trial. Section 4242 relates to the determination of the existence of insanity at the time of an offense, and limits the separate insanity defense to a "mens rea" test of criminal responsibility. Section 4243 provides for the hospitalization of a person acquitted by reason of insanity. Section 4244 deals with the hospitalization of a convicted person who is suffering from a mental disease or defect. Section 4245 covers the hospitalization of an imprisoned person who suffers from a mental disease or defect. Section 4246 deals with the situation of such a person who is scheduled to be released. Section 4247 contains general provisions for chapter 313.

Section 4241, Determination of Mental Competency to Stand Trial, contains five subsections which deal exclusively with the determination of the mental competency of the defendant to stand trial or to enter a plea. Subsection (a) permits either the defendant or the government to move for a hearing to determine the defendant's mental competency, and requires the court to order a hearing if there is reasonable cause to believe that a mental disease or defect renders the defendant unable to understand the proceedings or to assist in his defense Subsection (b) permits the court to order a psychiatric or

psychological examination of the defendant prior to the hearing. Subsection (c) requires that the hearing be conducted pursuant to the provisions of section 4247 (i.e., the defendant shall be represented by counsel, afforded an opportunity to testify, etc.). Subsection (d) provides that a defendant found by a preponderance of the evidence to be mentally incompetent shall be hospitalized for treatment in a suitable facility for a reasonable period of time to determine whether there is a substantial probability that he will attain the capacity to permit the trial to proceed. If the defendant appears unlikely to improve sufficiently, he is to be treated in accordance with the provisions of section 4246. Subsection (e) provides for the discharge from the hospital of a defendant who has recovered sufficiently to stand trial. Subsection (f) specifies that a court finding of competency to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the crime charged, and shall not be admissible as evidence at trial.

Section 4242, Determination of the Existence of Insanity at the Time of the Offense, specifies the extent to which a defendant's mental disease or defect constitutes a defense to prosecution, provides for an examination of a defendant who intends to rely on such a defense, and sets forth the types of verdicts to be rendered in such cases.

Subsection (a) states that it is a defense to prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged, and specifies that mental disease or defect does not otherwise constitute a defense. By limiting the separate, judicially-developed, insanity defense, this statutory approach to the issue of the criminal responsibility of a person suffering from a mental disease or defect focuses on two critical questions: did the defendant act with the state of mind required for the offense charged and, if he did so act but was suffering from a mental disease or defect, should he be imprisoned, hospitalized, or otherwise treated.

Subsection (b) provides for the psychiatric or psychological examination of a defendant who files a notice of intent to rely on the defense set forth in subsection (a). Subsection (c) specifies that in a case involving such a defense the trier of fact is to return a verdict of guilty, not guilty, or not guilty only by reason of insanity.

Section 4243, Hospitalization of a Person Acquitted by Reason of Insanity, sets out the procedure to be followed when a person is found not guilty solely by reason of insanity at the time of the offense. Subsection (a) requires that such a person be committed to a suitable facility until he is eligible for release pursuant to subsection (d). Subsection (b) requires that the person undergo a psychiatric or psychological study, while subsection (c) mandates a hearing on his present mental condition within forty days following the verdict. Subsection (d) provides that if, after the hearing, the person is found by clear and convincing evidence to be then suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, he shall be committed to the custody of the Attorney General for treatment, preferably in a state facility. The fact that the person was found not guilty only by reason of insanity of an offense involving bodily injury or serious damage to property, or an offense

involving substantial risk of such injury or damage, is to give rise to a rebuttable presumption that the dangerousness element of subsection (d)'s test for commitment is met. If the person is able to rebut or neutralize this presumption, the government will be required to come forward with other facts to meet its burden of clear and convincing evidence of the person's present dangerousness resulting from a mental disease or defect. Subsection (e) provides for the absolute or conditional release of such a person pursuant to a medical certification and a court finding that such release will no longer create a substantial risk to the person or property of others. Subsection (f) permits revocation of a conditional release order if such a risk is created anew by the person's failure to comply with the conditions of release.

Section 4244, Hospitalization of a Convicted Person Suffering From Mental Disease or Defect, sets forth procedures new to Federal law, to be followed when there is reasonable cause to believe that a recently convicted defendant may be suffering from a mental disease or defect and in need of care or treatment in a suitable facility. Subsection (a) permits court, shortly after a guilty verdict and before sentencing, on motion of the defendant or the government or on its own motion, to order a hearing on the defendant's present mental condition if there is reasonable cause to believe he is suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. Under subsection (b), the court may order a psychiatric or psychological examination of the defendant. If, after a hearing provided for by subsection (c), the court determines by a preponderance of the evidence pursuant to subsection (d) that the standard set forth in subsection (a) has been met, the defendant is to be committed to the custody of the Attorney General for hospitalization in a suitable facility, in lieu of being imprisoned. Subsection (e) permits the discharge and final sentencing of a hospitalized defendant when the director of the facility certifies that he is no longer in need of custody for care and treatment.

Section 4245, Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect, deals with the hospitalization of an imprisoned person who is suffering from a mental disease or defect for which he is in need of custody for care or treatment, if the person objects to being hospitalized. Unlike current federal law, subsection (a) provides that, when a defendant who is imprisoned objects to being transferred to a suitable facility for care and treatment of a mental disease or defect, the court shall, on the government's motion, order a hearing on the defendant's present mental condition if there is reasonable cause to believe that the defendant may be suffering from a mental disease or defect for the treatment of which he is in need of custody or care for treatment in a suitable facility. Subsections (b) and (c), respectively, provide for the psychiatric or psychological examination of the defendant, and for the conduct of the hearing. Subsection (d) provides that a defendant who is found by a preponderance of the evidence to be suffering from a mental disease or defect and in need of custody for care and treatment shall be hospitalized in a suitable facility until he is no longer in need of such care or treatment, or until his prison sentence expires. Subsection (e) provides for the defendant's discharge from the hospital and return to prison upon the certification of the director of the facility that he is no longer in need of custody for care and treatment.

Section 4246, Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect, covers those circumstances where State authorities will not institute civil commitment proceedings against a hospitalized defendant whose federal sentence is about to expire, who is mentally incompetent to stand trial, or against whom all criminal charges have been dropped solely for reasons related to his mental condition, and who is presently mentally ill. Subsection (a) requires the court to order a hearing if the director of the facility in which the person is hospitalized certifies that he is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available. Subsections (b) and (c), respectively, provide for the psychiatric or psychological examination of the person and for the conduct of the hearing. Subsection (d) provides that if the facts certified are found by the court by clear and convincing evidence, the person is to be committed to the custody of the Attorney General for treatment, preferably in a State facility. Subsection (e) provides for the absolute or conditional release of such a person pursuant to a medical certification and a court finding that such release will no longer create a substantial risk to the person or property of others. Subsection (f) permits revocation of a conditional release order if such a risk is created anew by the person's failure to comply with the conditions of release. Subsection (g) deals with mentally ill persons who have been hospitalized and against whom all charges have been dismissed for reasons not related to their mental condition. If the director of the hospital certifies that the release of such a person would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General is required to release the person to appropriate State officials for the institution of State civil commitment proceedings. If the appropriate State will not assume responsibility, and so informs the Attorney General, the person must be released.

Section 4247, General Provisions for Chapter 313 contains a definition of terms used in chapter 313, as well as other provisions generally applicable to sections 4241–4246. Subsection (a) defines the terms "rehabilitation program" and "suitable facility". Subsections (b) and (c), respectively, set forth requirements for court ordered psychiatric or psychological examinations and reports. Subsection (d) enumerates the rights a person has at a hearing to determine his mental condition. Subsection (e) pertains to reports by mental facilities, and contains a requirement that a hospitalized person be informed of the availability of rehabilitation programs. Subsection (f) permits the court to order and examine a videotape record of a defendant's testimony or interview which forms a basis of a periodic report of his mental condition. Subsection (g) concerns the admissibility in evidence of statements made by a defendant during the course of a psychiatric or psychological examination. Subsections (h) and (i), respectively, preserve the availability of the writ of habeas corpus, and permit a hospitalized person to move for a hearing to determine whether he should be released. Subsection (i) sets forth the authority and responsibility of the Attorney General under chapter 313. Subsection (k) provides that chapter 313 does not apply to a prosecution

under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

Section 103 of the bill amends Rule 12.2 of the Federal Rules of Criminal Procedure to conform with chapter 313 of title 18 as amended by section 102.

Section 104 of the bill amends section 3006A of title 18, United States Code, to conform with chapter 313 of title 18 as amended by section 102.

Title II—Exclusionary rule reform

Title II of the bill would add a new section 3505 to title 18 of the United States Code governing the Fourth Amendment exclusionary rule. It would provide that except as specifically provided by statute, evidence obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a federal court if the search or seizure was undertaken in a reasonable and good faith belief that it was in conformity with the Fourth Amendment. It would also provide that a showing that the evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief unless the warrant was obtained through intentional and material misrepresentation.

Initially, although the Fourth Amendment secures the right of persons to be free of "unreasonable" searches or seizures it should be noted that there are no constitutional or statutory provisions which specifically set limits on what it meant by an "unreasonable" search or seizure. Instead, the law in this area is an amalgam of cases dealing with a vast range of issues relating to the undertaking of searches and seizures. The crux of the present problem which would be overcome by the new section 3505 is that as courts have continued to develop the law of search and seizure they have continued to apply the exclusionary rule in situations where it could not possibly deter unlawful police conduct, the foremost rationale for the rule.

The new section 3505 deals with this situation by providing that evidence obtained as a result of a search undertaken in reasonable good faith as to its lawfulness shall not be excluded since actions undertaken in reasonable good faith are not susceptible of being deterred. The often highly probative evidence found during a search undertaken by the officers in reasonable good faith would be admitted and the attention of the court in a criminal case would remain focused on the question of the defendant's guilt or innocence, not diverted to a consideration of possible police error in applying the ever evolving law of search and seizure. Section 3505 would still allow consideration of police conduct but the issue would be whether the actions of the law enforcement officers were undertaken in a reasonable and good faith belief that they were lawful.

Such good faith is clearly shown when an officer makes an arrest in reliance on a statute that is later found to be unconstitutional or relies on a duly authorized search warrant, a judicial mandate to search which he has a sworn duty to carry out. Hence, the section specifically provides that a showing that evidence was obtained pursuant to and in the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief. However, a search pursuant to a warrant would not constitute such evidence if the warrant were obtained through intentional and material misrepresentation. This standard is

derived from *Franks* v. *Delaware*, 438 U.S. 154 (1978) where the Court emphasized the presumption of validity with respect to an affidavit offered in support of a warrant but held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155–156. If at the hearing the defendant establishes that perjury or reckless disregard for the truth was present, and with the affidavit's false material set aside the remaining material is insufficient to establish probable cause for the warrant's issuance, it must be voided and the fruits of the search excluded.

The section is not, however, limited to searches executed pursuant to a warrant. An officer may in good faith make a reasonable interpretation of a statute which a court determines to be inconsistent with the legislative intent, or may reasonably and in good faith conclude that a particular set of facts and circumstances gives rise to probable cause to conduct one of the types of judicially sanctioned warrantless searches, or that a warrant is not required. The proposed legislation would cover such situations as well.

Although intended primarily to apply in criminal proceedings brought in federal court, the proposal is drafted so that the same reasonable good faith test would apply to the obtaining of evidence offered in all types of proceedings in federal courts such as applications for federal habeas corpus petitions filed by State prisoners and federal civil cases. Indeed these are the types of cases where the deterrent effect of the rule has already been found to be minimal at best and greatly outweighed by the societal cost of excluding the evidence. In *Stone* v. *Powell*, 428 U.S. 465 (1976), the Supreme Court held that where a State has provided a full and fair opportunity for litigation of Fourth Amendment claims, a State prisoner may not be granted federal habeas corpus relief on the grounds that evidence obtained by an unlawful search and seizure was introduced at trial.

In *United States* v. *Janis*, 428 U.S. 433 (1976), the Court held that the exclusionary rule should not be applied to forbid the use in federal civil proceedings of evidence seized by State officers in good faith reliance on a search warrant that proved to be defective. While the *Janis* holding (the scope of which would not be affected by section 3505) related specifically to the use in the courts of one sovereign of evidence obtained by law enforcement agents of another sovereign, the lack of any deterrent effect of applying the rule would be analogous in the case of a search by federal officers who were acting in good faith.

Under section 3505 law enforcement officers would still be required to keep abreast of the complex law of search and seizure because the conduct of an officer will have to be informed to be reasonable. The section would not reward ignorance on the part of the police. It simply restraints the rule to its proper boundaries where it will remain as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Thus the proposal would not eliminate the exclusionary rule but rather will eliminate the disrespect for the law that its application often engenders in the minds of the

police and the public alike. Moreover, when the rule is applied in the case of a trivial violation or mistake by the police as to whether the requirements of the law have been complied with, and results in the acquittal of a criminal guilty of a serious crime or alters the result in a significant civil proceeding, the lack of proportionality of the sanction applied to the officer's mistake is so great that the confidence of the public in our system of justice cannot help but be eroded. In cases of this nature, where the police have reasonably tried to apply the complex law of search and seizure, the rule has a grossly distorting effect on our system of justice where the central purpose is to search for the truth and, in criminal cases, ensure that the guilty are convicted and the innocent are acquitted.

A suggestion that Congress should act to restrict the scope of the exclusionary rule was made over ten years ago by the Chief Justice in his dissent in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 422–424 (1971). Since section 3505 is grounded primarily on the cases decided since that time in which the Supreme Court has emphasized the deterrence of unlawful conduct as the sole or primary purpose of the rule, the section's modification of the rule is constitutionally permissible. Moreover, the substance of section 3505 is very similar to that already adopted by the Fifth Circuit *en banc* in *United States* v. *Williams*, 622 F. 2d 830 (1980), *cert. denied*, 449 U.S. 1127 (1981) in a decision based on a thorough analysis of relevant Supreme Court cases, and it basically follows the recommendation of the Attorney General's Task Force on Violent Crime which conducted hearings on the issue around the country and received the opinions of distinguished citizens and jurists of all points of view.

Title III—Federal intervention in State criminal proceedings

Title III of the bill would amend various provisions of title 28, United States Code, and a related Rule of Appellate Procedure, concerning the availability of collateral relief in the federal courts for State and federal prisoners. Among the matters addressed by these amendments are the standard of review in habeas corpus proceedings, the effect of procedural defaults on the subsequent availability of collateral relief, the time within which collateral relief may be sought, the requirement of exhaustion of State remedies, and the procedure on appeal in collateral proceedings.

Section 302 of the bill would add two new subsections to section 2244 of title 28, United States Code. Proposed section 2244(d) relates to the effect of a State prisoner's failure to raise a claim properly in State proceedings on the subsequent availability of federal habeas corpus. Proposed subsection (d)(1) of section 2244 sets out a general standard under which such a procedural default would bar access to federal habeas corpus unless it was the result of State action in violation of federal law. The main practical significance of this standard is that attorney error or misjudgment in failing to raise a claim properly would excuse a procedural default if it amounted to constitutionally ineffective assistance of counsel, since in such a case the default would be the result of the State's failure, in violation of the Sixth Amendment, to afford the defendant effective assistance of counsel. *See Cuyler* v. *Sullivan*, 446 U.S. 335, 342–45 (1980). But lesser degrees of attorney error or misjudgment would not excuse a default. This would

adopt as the uniform rule the approach of the Second Circuit Court of Appeals in the case of *Indiviglio* v. *United States*, 612 F.2d 624, 631 (1979), eliminating the great uncertainties that currently exist in this area. Proposed section 2244(d)(2)–(3) further provides for excuse of a procedural default where a claim raised in a habeas corpus proceeding asserts a new, retroactive right subsequently recognized by the Supreme Court, or where the factual predicate of the claim could not have been discovered prior to the default through the exercise of reasonable diligence.

Proposed new section 2244(e) in section 302 of the bill would establish a one year time limit on application for federal habeas corpus, normally commencing at the time State remedies are exhausted. This would provide State defendants with ample time to seek federal review following the conclusion of State proceedings, but would avoid the acute difficulties of proof that currently arise when federal habeas corpus is sought by a prisoner years or decades after the State trial. The proposed limitation rule may be compared to various existing time limits on seeking review or reopening of criminal judgments in the federal courts, such as the normal ten day limit on appeal by federal defendants under Fed. R. App. P. 4(b); the normal ninety day limit on a State defendant's application for direct review in the Supreme Court under Sup. Ct. R. 11, 22; and the two year limit on motions for new trials based on newly discovered evidence under Fed. R. Crim. P. 33. Proposed section 2244(e) further provides for deferral of the start of the limitation period in appropriate cases, such as assertion of newly recognized rights or newly discovered claims.

Section 303 of the bill would amend section 2253 of title 28, United States Code, so as to vest in the judges of the courts of appeals exclusive authority to issue certificates of probable cause for appeal in habeas corpus proceedings. It would also create an identical certificate requirement for appeals by federal prisoners in collateral relief proceedings pursuant to section 2255 of title 28, United States Code. This would implement recommendations of Judge Henry Friendly of the Second Circuit Court of Appeals. See Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 144 n.9 (1970). The reform would correct inefficiencies of the current system under which an appellate court is obliged to hear an appeal on a district court's certification, though it may believe that the certificate was improvidently granted, and under which a prisoner is afforded duplicative opportunities to persuade first a district judge and then an appellate judge that an appeal is warranted. Section 304 of the bill would amend Fed. R. App. P. 22 to conform it to the amendments of section 303.

Section 305 of the bill would make various changes in section 2254 of title 28, United States Code. Section 305(a) would amend current section 2254(b) to clarify that a habeas corpus petition can be denied on the merits notwithstanding the petitioner's failure to exhaust State remedies. This would implement a recommendation of Professor David Shapiro. See Shapiro, "Federal Habea Corpus: A Study in Massachusetts," 87 Harv. L. Rev. 321, 358–59 (1973). It would avoid the waste of State and federal resources that presently results when a prisoner presenting a hopeless petition is sent back to the State courts to exhaust State remedies.

Section 305(b) of the bill would add a new subsection (d) to section 2254, United States Code. Proposed subsection (d) would accord deference to the result of full and fair State adjudications. This would establish a standard similar to that stated by the Supreme Court in the case of Ex Parte Hawk, 321 U.S. 114, 118 (1944), prior to the unexplained substitution of the current rules of mandatory re-adjudication by the decision in *Brown* v. *Allen*, 344 U.S. 443 (1953). To be full and fair in the intended sense the State court determination must be reasonable, and must be arrived at by procedures consistent with applicable federal law, including the constitutional requirement of due process. In addition, re-adjudication by the federal habeas court would be allowed in cases in which new evidence of substantial importance came to light or a retroactive change of law of substantial importance occurred after the State proceedings. The general sense of the proposed reform is that reversal of a State conviction after a lapse of years and affirmance by the appellate courts of the State should rest on a finding by the habeas court of a significant error or deficiency in the State proceedings. A mere reasonable difference of opinion in a case in which the proper disposition is unclear should not be grounds for disturbing a State judgment in a habeas corpus proceeding.

Section 305(c) of the bill would simplify current section 2254(d), which is verbose, confusing, and obscure, redesignate it as section 2254(e), and bring its formulation into conformity with that of proposed new section 2254(d). This provision would be of minor practical significance, coming into play only when the general standard governing deference to State determinations in proposed new section 2254(d) was found by the habeas court to be unsatisfied.

Section 306 of the bill would amend section 2255, 28 United States Code. It would carry out reforms in the collateral remedy for federal prisoners comparable to the rules proposed in section 302 of the bill governing excuse of procedural defaults and time limitation in habeas corpus proceedings.

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END