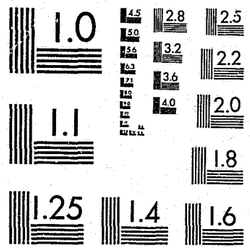

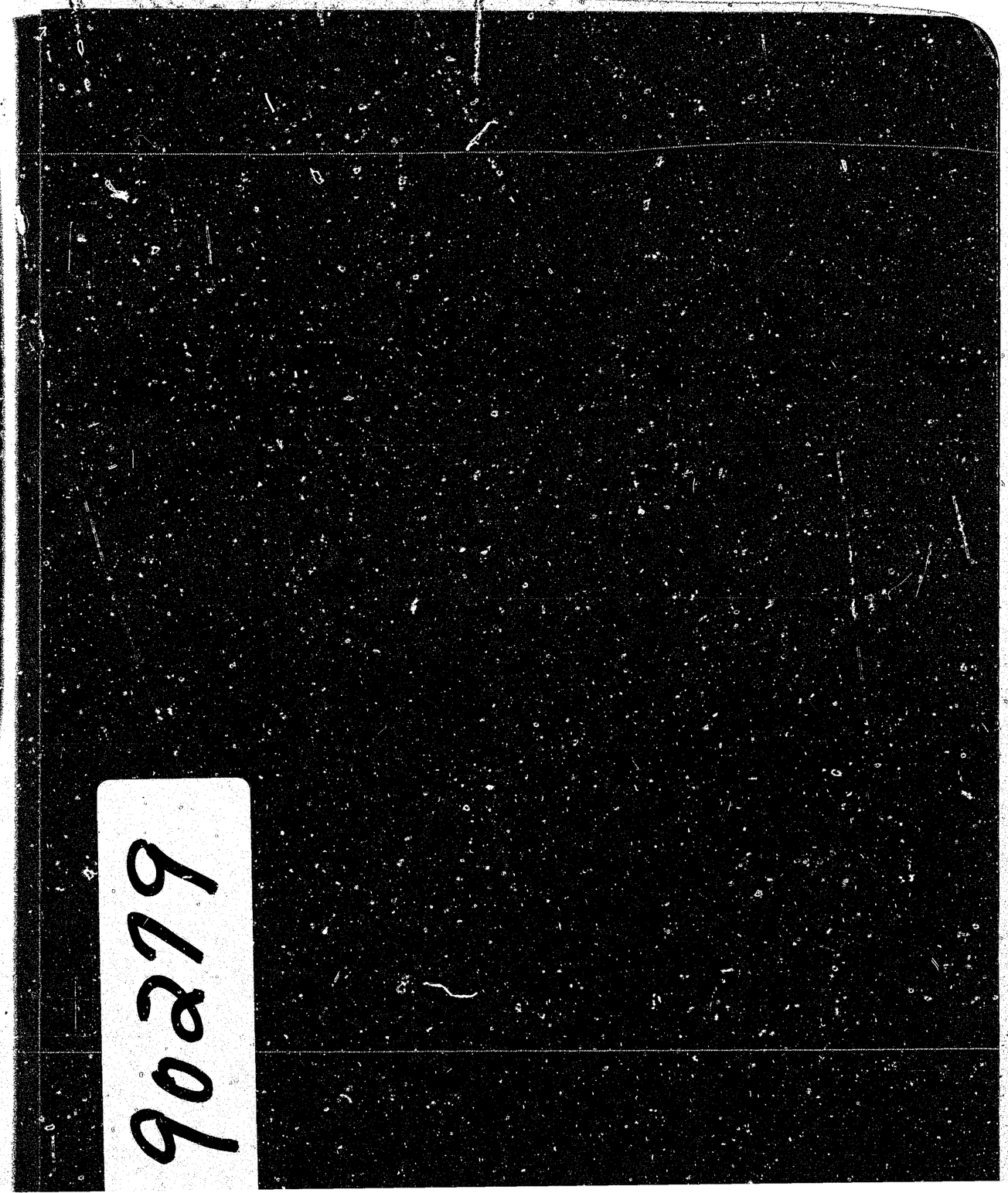

Department of Justice

EMBARGOED FOR RELEASE
UNTIL 8:00 P.M. E.D.T.
TUESDAY, MAY 24, 1983

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

AT THE

ARREST, SEARCH AND SEIZURE:
A SYMPOSIUM ON THE STATE OF THE LAW

SPONSORED BY:

THE FEDERAL BUREAU OF INVESTIGATION
NATIONAL ASSOCIATION OF STATE DIRECTORS
OF LAW ENFORCEMENT TRAINING
AND
CRIMINAL JUSTICE DEPARTMENT OF ST. ANSELM COLLEGE

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MANCHESTER, NEW HAMPSHIRE

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Thank you, Professor Hammond. And thank you also for inviting me to Saint Anselm College, to this symposium on the status of the law regarding search and seizure. I am pleased to see that your programs are focusing on both federal and state law enforcement standards. And I am pleased to see that police officers, prosecutors, and judges -- all three -- are participating. Criminal justice questions often involve all levels of government, and typically they require the attention of a variety of public officials. More workshops like this one should be held in other parts of the nation.

Like many Americans, and like many of you here tonight, I have asked myself where indeed our criminal justice system has been going. To some extent, we have needlessly allowed our historic concern for the rights of the accused to overwhelm the even more historic first principle of government: providing for the defense of society. More and more Americans now recognize that an imbalance has arisen in the struggle between the forces of law and those of lawlessness. Tonight, I want to speak in some detail about one weight that contributes to the imbalance, the exclusionary rule.

Beginning in its 1914 decision in Weeks v. United States, the U.S. Supreme Court has declared that evidence obtained in violation of the fourth amendment to the Constitution is inadmissible in federal criminal prosecutions. The exclusionary rule is thus a judicially created rule of law. It is not articulated in the fourth amendment itself. Indeed, the exclusionary rule is not to be found

anywhere in the Constitution, the Bill of Rights, or the federal criminal Code. It was also not inherited from English law. To this day, neither English law nor the law of any other civilized country requires the exclusion of such evidence.

Although this court-created doctrine has been criticized from its inception, it has gradually become a very significant feature of our federal criminal justice system. In the three decades following the Weeks decision, only sixteen states adopted the exclusionary rule, with thirty-one states refusing to do so. But in 1961, in Mapp v. Ohio, the Supreme Court held the rule enforceable against state criminal prosecutions.

Thus, for more than two decades now, the exclusionary rule has been applicable to all state and federal criminal prosecutions -- with the effect predicted by Justice Cardozo long ago: "The criminal is to go free because the constable has blundered."

Plainly, the most disturbing feature of the exclusionary rule is just this -- that its invocation can result in the freeing of a demonstrably guilty criminal. No matter how technical a mistake an officer makes -- even if he is acting in reasonable good faith, for example, by obtaining a warrant that is only subsequently held to be technically incorrect -- an illegal search results in the exclusion of any evidence resulting from the search. There is no weighing by the court of the seriousness of the crime or the significance of the evidence. Even a good faith attempt by a law enforcement officer to ensure the legality of the search will not -- if a technical flaw is uncovered -- save the evidence of crime.

The question arises as to how such a rule of evidence could ever be justified. As originally enunciated by the Supreme Court, the rationale was twofold: to deter unlawful police conduct and to preserve judicial integrity by preventing courts from becoming "accomplices in the willful disobedience of a Constitution they are sworn to uphold." In recent years, however, the Court has refused to cite the judicial integrity rationale. This is not surprising. After all, what good does it do to judicial integrity to enforce a court-made rule that requires the release of clearly guilty criminals on the most technical of grounds? In recent years, the Court has instead emphasized deterrence. This rationale, however, cannot survive scrutiny either. A substantial body of evidence has grown up questioning the efficacy of the exclusionary rule in achieving the goal of deterrence.

In 1970, Utah Supreme Court Justice Dallin Oaks -- then a professor at the University of Chicago Law School -- reported the results of his exhaustive study for the American Bar Foundation. He concluded:

"Today, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness."

Associate Justice William Rehnquist has stated that the exclusionary rule "unrealistically requires that policemen investigating serious crimes make no errors whatsoever." Often placing impossible burdens on police officers, the rule is invoked

for the most technical of violations even when the officer could not have reasonably been expected to have acted differently -- and the rule is invoked inconsistently, with the result that police officers must understand better than judges what the law will be. Simply put, the law of the fourth amendment is today so uncertain and so constantly changing that police officers cannot realistically be expected to know what judges themselves do not yet know, and indeed cannot agree upon.

Let me illustrate this point with several cases that have reached the United States Supreme Court in just the last two terms. In 1981, the United States Supreme Court decided the cases of New York v. Belton and Robbins v. California. 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. In the Robbins case, an officer then 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 the Belton case, an officer then found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required a technical analysis of several complicated doctrines: the "automobile exception" cases concerning the validity of warrantless searches of cars and their contents; the doctrine of "search incident to arrest" defined by Chimel v. California; and the watershed case of United States v. Chadwick, in which the Court held that police must obtain a warrant to open

a closed container in an automobile when its possessor has exhibited a "reasonable expectation of privacy" in it.

In the two cases of Belton and Robbins, three justices held both searches legal. Three justices held both illegal. And three justices controlled the ultimate decision that the Robbins search was illegal but the Belton search was legal. Not surprisingly, after Robbins and Belton, the law governing police conduct in similar searches remained uncertain. In less than one year after these decisions the Supreme Court asked both sides to address whether Robbins should be reconsidered. In its 1982 decision in United States v. Ross, the Court reconsidered the holding in Robbins and reversed itself.

To understand fully what confronts a police officer who attempts in good faith to comply with the fourth amendment, one need only consider these three cases. The search that the Supreme Court held illegal in the Robbins case had been found to be legal by the California courts. The search that the Supreme Court held to be legal in the Belton case had been found illegal by the New York Court of Appeals. The searches that the Supreme Court held lawful in the Ross case had been held unlawful by the D.C. Circuit en banc. Of the fourteen judges that considered Robbins seven found the search lawful, seven found it unlawful, and the Supreme Court held it unlawful. In Belton although eight judges considered the search unlawful, fourteen judges and the Supreme Court found the search lawful. In Ross, fifteen judges found at least one of the two searches unlawful, thirteen found at least one of the searches lawful, and the Supreme Court held both searches lawful.

In just these three cases, there were thirty votes that at least one of the searches was unlawful, but thirty-four that at least one of the searches was lawful. In spite of this judicial disagreement, the Supreme Court would today apparently hold all of these searches lawful. Is it really any wonder that police officers attempting to observe the strictest requirements of the fourth amendment may sometimes guess wrong? With so much uncertainty in the law, however, why should society "punish" a wrong guess by letting a criminal go free? Just who, indeed, is punished?

The goal of deterrence is not served when courts apply the exclusionary rule to situations in which appellate cases are unclear, confused, and contradictory. Yet courts do apply it in those circumstances. And police 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. How can the courts deter police from acting illegally when the courts have not decided what illegality, in these instances, actually means?

Supporters of the exclusionary rule are simply wrong when they say that the rule effectively deters illegal conduct. And they do not help their argument when they assess the rule's other effects. Typically they argue that the rule does not have any significantly adverse effects on the criminal justice system. They claim that it is infrequently invoked and even less frequently applied. Proponents of the rule often rely upon a 1978 study by the General Accounting Office, which found that evidence was actually

suppressed at trial, because of the exclusionary rule, in only 1.3 percent of federal criminal cases. But the GAO study was based on data collected over a six-week period. The data base thus was small -- too small to yield confident conclusions. And indeed what the GAO did conclude is open to serious question -- it is worth noting that our U.S. Attorneys list modification of the exclusionary rule at the top of their priorities for change in the federal criminal justice system.

The most serious difficulty with the GAO study is that it is irrelevant to the issue of the rule's impact at state and local levels. By focusing only on federal criminal cases, the GAO study neglected the cases in state and particularly local jurisdictions, where the overwhelming majority of cases involving the exclusionary rule are found. As you know, arrests at the federal level typically are by warrant and follow intensive investigation that often has the benefit of legal counseling. At the local level, the law enforcement officers -- the police -- make almost all arrests at the scene of a crime without the luxury of legal counsel or a warrant.

Not surprisingly, the empirical studies of state criminal systems have shown a much higher percentage of successful suppression motions than the GAO study found in the federal system. For example, in a 1971 study of the Chicago Circuit Court, thirty percent of the defendants charged with gambling, narcotics, or concealed weapons offenses successfully moved to suppress evidence of their crimes.

More recently, the National Institute of Justice found "a major impact" of the rule on state prosecutions in California.

The National Institute study examined all felony arrests in the nation's most populous state, for the years 1976 through 1979. According to the study, more than 4,000 of all felony cases declined for prosecution were rejected because of search and seizure problems. Almost three-quarters of these involved drug charges. In the offices studied, approximately one-third of all felony drug arrests were declined on Fourth Amendment grounds.

The study thus found the most pronounced impact of the exclusionary rule in narcotics cases. But the study also revealed information about the broader effect of the exclusionary rule on society by examining the prior and subsequent arrest histories of defendants whose cases were dismissed for search and seizure problems. "For most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a longer criminal career. About half of those freed were rearrested during the (two-year) follow-up period; they averaged approximately three arrests each." These rearrests "included many drug crimes, but the majority were for crime against persons or property, or for other felony offenses." The National Institute study is thus consistent with other evidence showing that many drug offenders do not confine their criminal activity to drugs alone, or even primarily; their crimes against society are many and serious. Successful use of the exclusionary rule unfortunately facilitates their reentry into an active life of crime.

This much is then clear. The exclusionary rule does result in the release of guilty criminals. It denigrates the truth-finding process in criminal trials; consumes a tremendous

amount of our scarce judicial and prosecutorial resources; contributes to the public perception of inefficient and ineffective justice; and discourages the police from making many searches that are perfectly valid.

The exclusionary rule is simply not needed in its present form. Other mechanisms now exists to deter violations of the Fourth Amendment by law enforcement officers. As Justice Rehnquist observed three years ago, changes in the law since the Supreme Court's extention of the exclusionary rule to the states in 1961 have made "redress more easily available by a defendant whose constitutional rights have been violated." There now exists, for example, "a private cause of action for redress of constitutional violations by state officials." Furthermore, "many states have set up courts of claims or other procedures so that an individual can as a matter of state law obtain redress for a wrongful violation of a constitutional right through the state mechanism."

The availability of other means of deterring police misconduct and the deficiencies of the exclusionary rule provide substantial support for the proposition that the rule should either be abolished or modified.

To promote needed change as soon as possible, the Administration has at this time proposed only modification of the exclusionary rule. Although the modifications we seek would have a positive effect on our criminal justice system, they are not revolutionary. We have not proposed abolition of the exclusionary rule. Our proposal would govern only federal courts. The proposed legislation would eliminate the rule -- and its absurd consequence

of releasing the guilty -- only in those circumstances in which the rule could not possibly have its intended deterrent effects.

Our legislative proposal would create a reasonable good faith exception to the exclusionary rule. Specifically, it would allow the admission of evidence whenever an officer either obtains a warrant or conducts a search or seizure without a warrant but with a reasonable, good faith belief that he was acting in accordance with the fourth amendment.

The term "reasonable" in this formulation is important. For contrary to what some supporters of the rule in its present form have assumed, the test of a good-faith belief would not be whether the police officer merely believed his search was legal but rather whether his belief was objectively reasonable.

This modification would prevent the release of criminals when an officer commits at most a technical violation that he could not reasonably be expected to have avoided. The effect of the rule on our criminal justice system -- and the public's perception of that system -- is so substantial that I cannot understand why any reasonable person would oppose this modification. It would retain the putative deterrent value of the rule -- if any exists -- but would allow a greater number of guilty individuals to be sent where they clearly belong -- to jail -- when no deterrent value could be served.

The approach we are suggesting is already the law in the Fifth and Eleventh Circuits. It is now time for Congress to make this reasonable modification applicable in all federal courts. Clearly, Congress has the power to act in this way. As the Supreme

Court itself stated: "The Federal Exclusionary Rule is not a command of the fourth amendment but is a judicially created rule of evidence which Congress might negate." It is time for Congress at least to modify this rule and to bring a new degree of reason to the federal criminal justice system. We have been handicapped in the fight against crime for too long by the most stringent form of the exclusionary rule.

The Attorney General's Task Force on Violent Crime -- chaired by former Attorney General Griffin Bell and Governor Jim Thompson of Illinois -- endorsed the idea of a reasonable, good faith exception. "If this rule can be established," the Commission concluded, "it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees."

This is a goal I trust all of us here tonight can share.

END