HJR

29

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: HJR 29 Date on Bill: 2-11-83
Title: Proposing an amendment...to limit...exclusionary rule
Sponsor: Pestinger
Requestor:

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital								
Operating								
Total			-0-	-0-	-0-	-0-		

b. Revenues:

Revenue								

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

No Fiscal Impact

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Francis C. Allan Phone: 269-5691
Division: Alaska State Troopers Date: 2-16-83

Approved by Commissioner: [signature] Date: 2/25/83
Department: Public Safety

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/15/83

MEMORANDUM

March 10, 1983

TO: Joe ("Judge") Brewer
FROM: Steve Cramer
SUBJECT: HJR 29 (Exclusionary Ruling); Constitutional Research of the States

1. All State's Constitutions were researched to ascertain if under the Search and Seizure rights they contained any provision for non-suppressing of evidence obtained under that particular section.

2. I delimited the search and seizure language into three (3) sub-headings:

   [a] people to be secure in persons,houses,papers and effects from unreasonable searches and seizures

   [b[warrants not to issue to search any place or to seize any person or thing without probable cause supported by oath or affirmation

   [c] particularly describing the place to be searched and the person or thing to be seized

   Fourty eight (48) of the states contained language similar to all three (3) sub-headings.

   Alabama did not cover item [c] above.

   Washington did not cover items [b] nor [c] above.

   Michigan added an additional statement:

   > ". . . the provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug,firearm,bomb,explosive or any other dangerous weapon seized by a peace officer outside the curtilage of any dwelling house in this state."

Definition of "Exclusionary Rule:

Evidence obtained in violation of the Fourth Amendment is inadmissible in a criminal prosecution.

"Fourth Amendment" refers to the federal constitution, as well as article 1, section 14 of the Alaska Constitution.

Evidence can also be exluded for violations of other federal and state constitutional rights:

1. 5th am. privilege vs. self incrimination; e.g.s., Mirande & forced confessions.

2. 6th am. right to counsel.

3. Due process - right to not be convicted on unreliable identification.

4. Rights created by federal statutes.

5. Rights created by state constitution and statutes which go beyond federal constitutional protections.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

EVIDENCE RULES

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights. (Added by Supreme Court Order 364 effective August 1, 1979)

ISSUE: Is 2/3 majority vote of legislature required to enact legislation limiting or amending the "exclusionary rule"?

Rule of Evidence - 412 is the actual "exclusionary rule".

Rule of Criminal Procedure - 37 (c) (copy attached) sets forth the procedure whereby the exclusionary rule can be invoked by motion to suppress.

Alaska Constitution, Article IV, Section 15, provides that court rules may only be changed by the legislature by a 2/3 vote

TEST: Is proposed limitation or amendment substantive or procedural?

HOUSE JUDICIARY SUBCOMMITTEE WEIGHS PROPOSED CHANGES TO EXCLUSIONARY RULE

Witnesses give Reagan Adminstration's "good-faith" exception little encouragement.
▸350.03 ▸100.05

In early September Congress received President Reagan's draft of proposed changes in the field of criminal law. The proposals, embodied in S 2903 and HR 7117, are entitled the "Criminal Justice Reform Act of 1982" and, among other things, call for a change in the exclusionary rule. The Adminstration would like to amend chapter 223 of title 18 USC to establish a "good-faith exception" to the rule, allowing for the admission of evidence resulting from a search or seizure "undertaken in a reasonable, good faith belief that it was in comformity with the fourth amendment." 31 CrL 2540.

Additionally, just last week the Supreme Court called for reargument in Illinois v. Gates (No. 81-430, argued 10/13/82, 32 CrL 4069) and requested the parties to address the question of "whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, * * * should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." 32 CrL 4105.

Against this backdrop, on December 2 the House of Representantives' Judiciary Subcommittee on Criminal Justice continued its oversight hearings on the operation of the exlusionary rule. Subcommittee Chairman John Conyers, Jr. (D-Mich) characterized the issue before the subcommittee as whether or not forces were now moving against the Fourth Amendment itself. The first witness called was Silas Wasserstrom, Associate Professor of Law, Georgetown University Law Center, and former Chief of the Appellate Division of the Public Defender Service for the District of Columbia. He referred extensively to a recent article "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo L.J. 365 (1981), of which he was co-author.

FOURTH AMENDMENT STIFLED

Wasserstrom first addressed the potential outcome of the Gates v. Illinois reargument. He told the subcommittee that if the Supreme Court decides to adopt a good-faith exception to the exclusionary rule it would render any proposed legislation superfluous and any constitutional challenges moot. He predicted that it would not be unlikely for a limited version of this exception to be adopted in Gates. However, Wasserstrom continued, even this would be a "substantial inroad" on the exclusionary rule.

In an attempt to deter police misconduct, the Court may limit the exception to cases wherein police are acting pursuant to a warrant, Wasserstrom opined. But he quickly noted that then the question of judicial misconduct in issuing the warrant would arise. The result of any inquiry would be "odd" because the language of the Fourth Amendment makes clear that warrants shouldn't issue except on probable cause. Thus, if the Court decides to allow searches pursuant to illegal warrants, it would be circumventing the Amendment's very purpose, Wasserstrom declared.

He cautioned that if Congress attempts to promulgate its own exception to the rule, aimed at upholding the admission of any evidence seized in reasonable good faith, it might not only go beyond the future "Gates rule" but could make any search conducted pursuant to warrants "per se good faith."

Wasserstrom strongly objected to Conyers' observation that the issue really is "real world" law enforcement versus "whether an arcane constitutional provision is minutely enforced." The Fourth Amendment protects us from a police state, Wasserstrom declared, noting that criticism directed at the exclusionary rule may really be aimed at the Fourth Amendment itself. This prompted him to suggested that the subcommittee might want to consider repealing the Fourth Amendment. The exclusionary rule does not hamstring police, the Amendment does.

To what extent are police inhibited by the Fourth Amendment? Conyers asked. Only in the sense that the Amendment tells them what they can and cannot do, Wasserstrom replied. A civil remedy directed at an individual police officer would be a far more drastic deterrent to police misconduct than the exclusionary rule, he added. However, a tort remedy would be an inadequate substitute for the rule, Wasserstrom stressed. The reason for this brought him to the gist of his argument against adopting the good-faith exception - the exclusionary rule's importance in the development of Fourth Amendment law.

If the exclusionary rule is eliminated or even if the exception is adopted, Fourth Amendment doctrine will petrify, Wasserstrom explained. Courts will never reach the question of whether an officer violates the Fourth Amendment because they will stop at the good-faith issue. Once this is determined the case is over.

At this point subcommittee member Bill McCollum (R-Fla) interrupted. You have made an underlying assumption that good faith will always be found; this concludes that justice will always fall on the side of the police, McCollum pointed out.

If the good-faith exception is adopted, Wasserstrom answered, the law freezes. The defendant will be asking for a change in existing law while the prosecution will be claiming a good-faith reliance on that law; courts won't give into change. Therefore defendants will have no incentive to pursue novel Fourth Amendment claims and courts will, in effect, be choking off the development of Fourth Amendment law. The courts will actually be amending Fourth Amendment law because they will no longer be required to look for probable cause, Wasserstrom maintained.

At this juncture Wasserstrom turned his attention to the Fifth Circuit's holding in U.S. v. Williams, 622 F2d 830, 27 CrL 3293 (en banc 1980), that "reason [as well as authority] plainly demand[d] explicit recognition of a good faith exception" to the exclusionary rule. He took this decision to task, arguing that reasonableness and good faith are already built into existing Fourth Amendment law. In reality the exception changes and stifles existing law, he contended. The exclusionary rule should be supplemented, not changed or excepted to, Wasserstrom concluded; that is the only way it will grow.

BLAME POLICE ADMINISTRATORS

The next witness before the subcommittee was Sue Marie Johnson, Deputy Director of the Police Executive Research Forum, an organization of police executives from the nation's larger jurisdictions. She opened her testimony by stressing the organization's belief that the exclusionary rule, by itself, is not a sufficient deterrent on unconstitutional police actions. Like Wasserstrom Johnson rejected the good-faith exception to the rule, but she then proposed an an alternative — place the responsibility for police misconduct on police administrators and not on individual officers. This not only serves the rule's purpose, it also broadly influences the improvement of policing, she explained. The change in focus of the judicial sanction, from individual officers to their departments, will provide police agencies with the incentive to develop programs for effective deterrence of police misconduct. Additionally, police officers will be more willing to perform their duties in a constitutional fashion if they know that the regulations are internal.

This is a "risk free" proposal, Johnson claimed. It is limited only by the potential of police administrators to protect individuals' constitutional rights; if they fail then the exclusionary rule can be used. However, she added, the rule would not be applied if it is apparent that the police department in question had taken its responsibility to adhere to the Fourth Amendment seriously. Departments could show proof of such good faith by meeting three requirements: "1) publishing departmental rules and regulations that guide police on proper constitutional procedures; 2) instituting effective programs to train officers according to these rules and regulations; and 3) maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules."

The judge would then rule on whether or not the officer had committed a constitutional violation, Johnson continued. If the answer is yes then the prosecutor would ask the judge to review the three foregoing requirements. The prosecution would have the burden of proving that the requirements were met in a manner sufficient to ensure one of the following: that the failure to provide a rule was reasonable and that proper regulations would be forthcoming; or if the department already had a rule covering the circumstance involved, the officer would be disciplined for violating the rule unless he was acting reasonably and in good faith; or if the rule was found unconstitutional, it was promulgated in good faith, appeared reasonable at the time, and would be reissued in

proper form. Only if the prosecution's proof failed would the evidence would be excluded, Johnson said.

Johnson admitted that this proposal would lead to eventual replacement or ossification of the exclusionary rule. However, she noted, it also does away with all the problems the rule has engendered. She closed by stating that if the proposal was implemented on the federal level then states would soon follow suit, thus developing uniform guidelines and requirements.

NO CHANGE NEEDED

The final witness was the only member of the private criminal bar to address the Subcommittee thus far in its hearings. Alan Ellis, representing the Philadelphia Bar Association, appeared to voice that body's disagreement to any substantive change in the exclusionary rule. He contended that proposed legislation — HR 4259 (replacing the rule with a tort remedy), HR 4606, HR 5971, HR 6049, HR 4422 (all creating good faith exceptions) and S 101 (weighing intentional constitutional violations) — are not only of questionable constitutionality but also "would wreak havoc on the administration of criminal justice."

Focusing in particular on the proposed good-faith exception, Ellis said that "at a time when we are trying to reduce court costs and delays, introduction of a new * * * test will trigger years of litigation, as courts are forced to throw out well developed case law." Any change would also effect police department training programs and could eventually undercut the present extensive, high quality programs in constitutional rights that did not exist prior to Mapp v. Ohio, 367 U.S. 634 (1961), he added.

There is no need to change the rule, Ellis urged. Studies show that the rule actually has only an extremely minimal impact on criminal prosecutions, with eventual admission of most challenged evidence. Any change would just be an "unabated waste of criminal resources," he maintained. Already overworked judges and defense attorneys would have to delve into the subjective intent of police officers and perhaps even consider a department's entire training program. Lengthy litigation would revolve around the 'sole' issue of "good faith." Additional public defenders and judges would be needed. Also, it would impossible to develop a consistent, workable body of law because decisions would be made on a case-by-case basis.

In additional to this list of hazards, Ellis stressed the symbolic weakening or abandonment of the exclusionary rule. Police would conclude that the Fourth Amendment was not a serious matter. The present law already considers an officer's objectively reasonable factual mistakes, Ellis noted. Thus instead of adding to the law any change may just weaken it.

Ellis also argued that when the Supreme Court held in Mapp v. Ohio that the exclusionary rule was an essential part of the Fourth and Fourteenth Amendments, it constitutionally proscribed the Congress from revoking or rescinding the rule. Accordingly, Ellis emphasized, the subcommittee's ability to act is limited. Only the Supreme Court has the authority to reduce or remove the application of the exclusionary rule, he declared.

Testimony of

Sue Marie Johnson
Deputy Director
Police Executive Research Forum

before the

Subcommittee on Criminal Justice
Committee on the Judiciary
United States House of Representatives

Concerning

The Operation of the Exclusionary Rule

June 9, 1982

Mr. Chairman, thank you for providing to the members of the Police Executive Research Forum this opportunity to express our views on the exclusionary rule and certain proposed alternatives to it. The Forum is an organization of police chief executives from the nation's larger jurisdictions. Our goal is to improve the delivery of police services by promoting and bringing about the further professionalization of police executives and officers. We conduct research, engage in experimentation and provide a forum for debate on a wide range of criminal justice issues. It is our belief that, from these efforts, substantial improvement in the quality of law enforcement services will result.

Recently, several alternatives to the exclusionary rule have been proposed in response to dissatisfaction with the effects of the exclusionary rule. We in local law enforcement confront the effects of the exclusionary rule continually; how the rule now operates in criminal proceedings disillusions us. Still, we do not think that the alternatives suggested by critics of the exclusionary rule offer the best means of remedying the ill-effects of the rule, or of achieving the rule's primary objective: to deter unconstitutional police conduct.

What we would like to recommend is a substitute process, one that will not only serve the purposes of the rule but will also broadly influence the improvement of policing. We envision a process by which the responsibility for deterring police violations of citizens' constitutional rights is given to police administrators; they can carry

such responsibility most effectively; the judiciary can deter police violations only indirectly. The change in focus of the judicial sanction, from individual officers to their departments, will provide to police agencies the necessary incentive to institute programs for effectively deterring constitutional violations by their officers; that is because, if such programs are not implemented, the exclusionary rule will continue to be applied. If police administrators show that they can carry this responsibility, that they can execute it diligently, then the need to apply the exclusionary rule in individual cases will disappear, constitutional rights will be protected, reliable and relevant evidence will be used in trials, and the effectiveness of our criminal justice system will be enhanced.

Adopting our proposal to redirect responsibility for deterring police violations of constitutional rights from the judiciary to the police is risk free. In respect of those who believe that, to ensure true justice in criminal proceedings, the exclusionary rule must be eliminated or curtailed, our proposal provides satisfaction; it is limited only by the potential of police administrators to protect individuals' constitutional rights. Regarding those who believe that the elimination or curtailment of the exclusionary rule means more police violations of individuals' constitutional rights, our proposal guarantees that the exclusionary rule will be applied whenever the judiciary determines that police departments are not ensuring that individuals' constitutional rights will not be violated. Our proposal

guarantees that both agendas in the exclusionary rule debate will be accomplished. Each of the other proposed alternatives to the exclusionary rule forces an either-or choice: you are either for the exclusionary rule, or you are against it. Our proposal is better than the other alternatives, not only because it supports, at once, the interests expressed in both of these positions, but also because it more realistically provides for achievement of the judiciary's objectives in applying the exclusionary rule.

Objectives of the Exclusionary Rule and Problems Related to Its Application

The exclusionary rule was first enunciated in the 1914 Supreme Court decision, Weeks v. United States, 232 U.S. 383 (1914). The rule was devised as a remedy for violations of citizens' constitutional rights secured by the Fourth Amendment.

Initially, the Court held that this remedy applied only in federal prosecutions. Wolf v. Colorado, 338 U.S. 25 (1949). The Court left the states free to experiment with alternative sanctions for constitutional violations by law enforcement officers. Unfortunately, state and local officials, including those in law enforcement, did not heed the Court's warnings and failed to develop remedies that would secure compliance with the Fourth Amendment's provisions. The consequence of their inaction was the Supreme Court's 1961 decision in Mapp

v. Ohio, 367 U.S. 643 (1961), to extend the exclusionary-rule remedy to state courts.

The Rule's Objectives

The essence of the exclusionary rule is that evidence obtained in violation of Fourth Amendment requirements cannot be used against defendants in criminal proceedings. In Weeks and subsequent opinions, the Supreme Court offered a number of rationales for applying the rule, the major ones being, first, to maintain judicial integrity by removing the judiciary from the taint of partnership in unlawful behavior of law enforcement officers and, second, to deter future violations by prohibiting law enforcement officers from profiting by their lawless behavior. See, Weeks at 392 and Mapp at 648, 652, and 659-60.

Throughout the history of the exclusionary rule, the Court extended the rule's application beyond Fourth Amendment search and seizure violations to violations of the Fifth Amendment [United States v. Ade, 388 U.S. 218 (1967)], the Sixth Amendment [Miranda v. Arizona, 384 U.S. 436 (1966)] and the Fourteenth Amendment [Irvine v. California, 347 U.S. 128 (1954)]. While the sanction was being extended, however, the judicial integrity argument lost its force as an independent justification. Today, the deterrence rationale is the predominant consideration in courts' decisions regarding suppression motions; judicial integrity is a consideration that is secondary to

courts' assessments of whether or not the sanction will deter future violations. See, Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); United States v. Janis, 428 U.S. 423, 458-59 n.35 (1976); Dunaway v. New York, 442 U.S. 200, 218 (1979).

We believe that the deterrence rationale no longer provides a reasonable justification for the rule as the rule is currently applied. Though deterrence of unconstitutional police conduct is a goal we all seek to achieve, the exclusionary rule, by itself, does not constitute an appropriate means of achieving this goal.

By our criticism we are not suggesting that the rule has failed to assist in improving our system of justice. Two major benefits of the rule's application can be identified. The first benefit is that the rule has provided to defendants an incentive to challenge the propriety of conduct of law enforcement personnel; this has led to the judiciary's focusing on the requirements of constitutional behavior as these affect police. The second benefit is constituted by the indirect, long-range effects that these judicial rulings have had on police behavior; the educational aspect of decisions that have identified certain actions as improper have led police administrators to pay more particular attention to the requirements for constitutional procedure and, as a consequence, training of police officers has improved. Whether or not these two major benefits could have been realized without the rule, or under a different sanction, will never be

known. Notwithstanding the benefits, the current level of dissatisfaction with the rule and the problems it presents require us to heed now the Court's warnings and find new ways to serve the purpose of the rule.

Ascertaining a means of measuring the deterrent effect of the rule as the rule is currently applied has proven elusive; this condition has intensified debate about the point at which a balance, if any, can be struck between the benefits of the deterrent effect and the costs to the criminal justice system and society. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 University of Chicago Law Review 665 (1970); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 Journal of Legal Studies 243 (1973), Canon, Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Kentucky Law Journal 681 (1974); Comptroller General of the United States, Impact of the Exclusionary Rule in Federal Criminal Prosecution, Report Number GGD-79-45 (19 April 1979). Instead of further debating such issues, we want here to share our expertise as law enforcement administrators in the process of developing a suitable alternative to the rule. Abolishing the rule without substituting an effective mechanism for it amounts to a mere experiment, one in which we are not willing to engage. It is clear, however, that something must be done; the courts cannot do it themselves. We believe it is incumbent upon

the law enforcement community to work with the judiciary and the legislatures to devise a suitable alternative.

Disadvantages of the Rule

Apart from doubts about whether or not the rule has achieved its objective of deterrence, use of the rule has led to several problems, some of which are more burdensome than those that the rule was originally intended to remedy. From the many problems discussed by commentators, we have deducted seven major arguments.

In a first line of argument it is posited that the exclusionary rule interferes with justice by distorting truth. Reliable, relevant evidence that would be admitted if obtained legally is excluded from the fact-finding process when obtained in violation of constitutional commands.

A second line of argument stresses that endlessly litigating the validity of searches, seizures and other law enforcement procedures causes delays in the trial process and diverts attention from questions of guilt and innocence; focus shifts from alleged wrongdoings of defendants to allegations about police, vitiating attempts to provide swift and certain punishment for criminal activity.

A third contention is grounded in the following perception: respect that law enforcement personnel and citizens have for the law and our criminal justice system is destroyed by the rule. Instead of

operating as a deterrent, the rule encourages some police officers to twist facts and stretch the truth about searches; there is the spectacle, too, of the guilty going free because of technical errors.

A fourth line of argument is based on assertions that the rule protects only those who face criminal prosecution, and that the rule cannot deter violations of constitutionally guaranteed rights when the police have either no interest in prosecuting or are willing to forego successful prosecution in the interest of pursuing other goals.

In a fifth line of argument it is charged that the rule fails to discriminate degrees of misconduct by police officers and degrees of harm done to victims of such conduct; regarding punishments, no rational distinctions are made between minor offenses and serious crimes or between honest mistakes and deliberate, flagrant violations.

A sixth argument is that the rule discourages internal rule-making and inhibits disciplining of errant police officers because there is fear that the very fact of punishments' being administered because of rule violations can itself be used as evidence to bolster defendants' cases for suppressing evidence obtained by illegal methods.

In a seventh line of argument it is submitted that the exclusionary rule adds to the confusion about Fourth Amendment standards for

reasonable searches and seizures. Trial court judges often tortuously construe the definitions of the Fourth Amendment so they can find that searches and seizures were reasonable and avoid the harsh requirement of excluding evidence. This gives rise to minute and often bizarre gradations in legal and illegal conduct, eliminating incentives to improve police procedures: incentives that could be provided by pointing out errors and penalizing officers.

The Forum's Alternative to the Exclusionary Rule

If an alternative to the exclusionary rule is to be acceptable, it must meet two objectives. First, it must operate as a deterrent to police misbehavior by providing a clear and understandable guide to proper conduct under the Constitution and by further providing incentive to take immediate disciplinary actions in response to violations. Second, it must remove those obstacles created by the exclusionary rule, which obstacles now prevent the guilty from being convicted, so that evidence of guilt can be used in trials.

Though deterrence of unconstitutional police conduct is the main rationale for the exclusionary rule, the effectiveness of the rule, as it currently operates, in achieving the goal of deterrence is in serious question. The apparent lack of deterrence results, in plain terms, from a lack of communication: the courts, in their rulings on motions to suppress, fail to communicate to police

departments the specific requirements of the Fourth Amendment, and the police fail to educate the courts to the realities of law enforcement practices. Much of this owes to the fact that the exclusionary rule sanction is directed against individual officers.

Effective communication between the courts and the police is vital to making most productive our efforts to preserve constitutional rights. Abolition of the rule, a good faith exception to it, will not solve the problem of poor communication. A process must be devised to ensure that police awareness of constitutional restrictions and of the necessity of operating within those restrictions is increased. We believe that directing the judicial sanction of exclusion away from individual police officers to police administrators will accomplish that objective.

As law enforcement executives, we know best how to deter our officers from improper conduct. In areas of officer misconduct other than constitutional violations--one such area being the unauthorized use of deadly force--experience tells us that improper behavior can be curbed by putting to use three tools in combination: rule-making, training, and discipline. For example: in his study of shootings by officers from the New York City Police Department, Professor James Fyfe found that significant reductions in the amount of police use of deadly force were associated with the combined implementation of clear rules which guide officers in the use of force and of procedures to strictly enforce the rules. [See, Fyfe, Administrative Interventions on Police

Shooting Discretion: An Empirical Examination, 7 Journal of Criminal Justice, 309 (1979).] Currently, however, some police administrators fail to develop precise rules regarding Fourth Amendment procedures and fail to discipline officers for constitutional violations because they fear that such actions will be used against them in suppression hearings: the exclusionary rule as it is currently applied creates for police administrators a disincentive to accept responsibility for deterring constitutional violations.

What is needed is a process that eliminates disincentive and, simultaneously, provides to police administrators incentive to accept responsibility for deterring misconduct regarding Fourth Amendment procedures.

The process by which we propose to meet these needs, especially the need to provide incentive, is one in which application of the exclusionary rule would be dependent upon the performance of police departments themselves. The concept is that the exclusionary rule would not be applied if the police department in question had taken seriously its responsibility to adhere to Fourth Amendment procedures. Departments could demonstrate proof of such good faith by meeting the following three requirements:

1. Publishing departmental rules and regulations that guide police on proper constitutional procedures;

2. Instituting effective programs to train officers according to these rules and regulations; and

3. Maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules.

The procedure by which this alternative would be implemented is as follows:

1. The judge would rule on whether or not the officer had committed a constitutional violation.

2. If the judge rules, yes, the prosecutor could then undertake to have the evidence admitted according the following procedure: the prosecutor would ask the judge to review the police department's regulations, training programs and disciplinary history.

3. The prosecutor would have the burden of proving that the police met the three requirements (mentioned above) in a manner sufficient to ensure--

   -- that the failure to provide a rule was reasonable, and that regulations specifying, and training in, the proper methods for proceeding in the particular circumstances under review would be immediately forthcoming; or

   -- that, if the department already had a rule covering the circumstance, the officer would be disciplined for violating the rule unless the officer was acting reasonably and in good faith; or

   -- that, if the departmental rule was found to be unconstitutional, it was promulgated in good faith, appeared reasonable before it was applied to the particular facts under review, and would be reissued in proper form.

Should the prosecutor fail in an attempt to prove that the department met the above conditions, the judge would exclude the

evidence. [See, Kaplan, The Limits of the Exclusionary Rule, 26 Stanford Law Review, 1027, 1050-52 (1974) for a similar proposal.]

We believe that rule-making, training and discipline constitute the most appropriate means for deterring Fourth Amendment violations, and that the emphasis we place on such means is well founded. To justify to you our reliance, I would like to spend a few moments discussing the effectiveness of each of these three components.

Rules and Regulations

The exclusionary rule, insofar as it was justified as a deterrent to police misconduct, was designed to ensure police conformance with constitutional requirements. In some agencies, however, the officer rarely learns of or understands the reasons for the exclusion of evidence, so the sanction fails in such instances to fulfill its objective. It can even be said that the rule has inhibited proffering of effective guidance to police officers: judicial reliance on and belief in the efficacy of the rule have led to the development of intricate, little understood rules of constitutional procedure and, regarding responsibility for officer direction, have diverted attention from police management to the judiciary, though the judiciary does not have a clear understanding of the daily operations of police agencies.

Administrative rule-making, from which would flow policies, procedures, and rules and regulations for structuring and controlling police conduct, has been advocated by numerous prestigious organizations and prominent spokespersons, some of which include the following: the American Bar Association [ABA Project on Standards for Criminal Justice, Standards Relating to the Urban Police Function §6.2 (1976)]; The National Advisory Commission on Criminal Justice Standards and Goals [Report of the Task Force on Police, §1.3, Commentary (1973)]; The National Advisory Commission on Civil Disorders [Report, 310-11, 314 (1968)]; Chief Justice Warren Burger [Who Will Watch the Watchmen, 14 American University Law Review 1 (1976)]; Kenneth Culp Davis [Discretionary Justice-A Preliminary Inquiry (1971); Frank Remington, Herman Goldstein [Policing In a Free Society (1977)]; and Anthony Amsterdam [Perspectives on the Fourth Amendment, 58 Minnesota Law Review 349 (1974)]. In addition, the courts have frequently suggested the need for such rules. See, e.g., Delaware v. Prouse, 440 U.S. 648 (1979); Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 (1979); and South Dakota v. Opperman, 428 U.S. 364 (1976). Some police departments have attempted to develop and implement such rules, among which departments are the following: Boston, Massachusetts; Madison, Wisconsin; and Washington, D.C. The rules provide clear, affirmative guidance to officers as to how they may proceed in a wide variety of complex situations; such rules contrast court decisions that restrict discussions to what an officer cannot do and are rendered in a manner not usually understood by police

officers. These rules address such procedures as execution of search warrants, searches incident to arrest, motor vehicle searches, stop and frisk, and eyewitness identification.

The incorporation of administrative rule-making into our alternative procedure provides several advantages over the exclusionary rule, given the rule's current application. Courts would first focus on the procedures required by the rules and, second, on the past conduct of individual officers. This would redirect judicially-imposed responsibility for constitutional violations from officers to police administrators. Police officers, as with employees of any organization, are more likely to adhere to rules established by their agencies than to rules imposed from without by the courts. Developing clear, precise directives that are free of the legal terminology contained in many court opinions and that are written in language more easily understood by police officers could make the rules easier to understand and more likely to be followed.

Administrative rule-making would exert a broader influence on police operations than the exclusionary rule; its use within constitutional restraints would help in an array of law enforcement operations because police expertise would be utilized systematically and continuously. Judges, who lack law enforcement expertise, promulgate rules through an adversary process whose sole focus is on particular facts unique to individual cases. By contrast, police administrators, who understand the realities of police behavior, are able to fully grasp

the implications of promulgated rules for all law enforcement needs. In developing rules, administrators would be able to utilize procedures best suited to the realities of law enforcement, while remaining within the confines of constitutional requirements. In addition, because many police activities are currently unregulated by the courts, i.e., activities not directed toward gathering evidence or leading toward prosecution, rule-making can lead to full definitions of rights of criminal suspects and other persons coming in contact with police. Finally, the visibility of the rule-making process would compel police administrators to make conscious assessments of law enforcement practices insofar as the practices relate to constitutional and other legal requirements and would make administrators more accountable for decisions that should be based on such assessments.

The development of administrative rules regarding police procedure would have tremendous impact in helping to control police misconduct and in preserving constitutional values. Departmental rules governing activities of officers would be applauded by street officers; the rules would free officers from the vague and clouded language of court opinions; officers could look to police guidelines that set specific bounds of conduct. The courts could find either that officers were in violation of their departments' procedures or, in some instances, that the procedures at issue were unconstitutional, thereafter requesting that departments revise such procedures so that they meet constitutional requirements.

Police Training

Development of extensive rules guiding constitutional behavior will have little value if officers are not apprised of them. Publication of the rules, though an important first step in communication, is not sufficient. Officers must be taught how, and the circumstances under which, they may invoke police procedures. Training programs should be devised in such a manner that officers acquire not only the substantive information contained in departmental rules but also insight into ways in which they may, within constitutional limits, proceed with their tasks. The need for training is not limited only to police recruits. Continual revision of regulations, reflecting refinements in constitutional requirements, will necessitate that police officials develop in-service programs to re-train their officers in accordance with changes that are made. Finally, remedial training programs should be designed to reinforce proper procedures for those officers who have violated rules in the past.

Strict Police Discipline

Deterring unconstitutional violations requires that officers be made aware that illegal behavior will not be tolerated; to make this known, an effective system of discipline must be instituted. Though precise rules and regulations are essential to defining kinds of behavior that will be subject to discipline, rules alone are insufficient. If rules are not properly enforced, their objective to conform

police behavior to the provisions of the Constitution will not be achieved. A comprehensive system of internal police discipline, administered fairly and effectively, will promote observance of the rules.

Regarding deterrence, punishing officers for improper conduct has several advantages over the current exclusionary rule sanction. First, because of the relative immediacy and personal nature of disciplinary actions, officers would generally be aware that their conduct was in violation of constitutional requirements; given how the exclusionary rule is applied today (and depending on the agency), officers might not learn of or understand a court's rationale for excluding evidence; in any event, they would not be affected personally. Second, the publication of clearly defined rules, of penalties for violating them, and of the ramification of the disciplinary process would make it clear to the entire police force, as well as to the community, that certain behavior will not be tolerated. Third, police officer aversion to disciplinary action would cause officers to conduct themselves according to proper procedures. Fourth, a system of discipline could introduce the concept of gradations of improper behavior. The exclusionary rule operates uniformly and imposes an inflexible penalty for all violations, minor or major. An effective disciplinary system could apply a variety of penalties tailored according to the seriousness of misconduct. Finally, sanctions that result from enforcement of rules

and regulations could be applied with much greater frequency than the exclusionary rule sanction; only a small percentage of investigations, searches, arrests and interrogations now reach the trial stage.

Why the Alternative Process Proposed by the Forum Is the Most Effective Method to Deter Fourth Amendment Violations

The alternative the Forum proposes is a complete package that must be viewed as a whole: the components are interweaved; each one complements the others; implementation of one component alone will provide neither an adequate substitute for the exclusionary rule nor relief from the problems currently surrounding the rule's use.

The key to the Forum's alternative is placing with police administrators responsibility for ensuring police officer compliance with constitutional requirements. Internal regulation is the most effective means by which police misconduct can be deterred. Police managers, as opposed to persons outside the agency, have greater understanding of police officer behavior and of the culture of the law enforcement community and are, therefore, more effective in causing officers to understand and comply with constitutional procedures.

If police departments realize that their efforts are to be rewarded by the admission during trials of evidence that might previously have been excluded, they will be strongly motivated to formulate rules and to institute training and discipline. Departments that

develop rules and regulations in compliance with the Constitution will not be restrained by the straitjacket of suppression motions. An objective test for determining whether or not departments have developed internal regulatory mechanisms to deter police violations will be applied by the courts. Judges will simply look to departments' good faith efforts to establish effective rules and to institute training and disciplinary systems, allowing evidence into courtrooms if departments pass the objective test. In effect, the court will be turning over to police departments the responsibility for disciplining police officer misconduct, while holding departments responsible for their policies on constitutional rights.

The procedure for determining whether or not the exclusionary rule would be applied in an individual case involves the following steps:

1. If a department has a rule governing the practice under court scrutiny, which rule is found to be constitutional, and if an officer complied with the rule, the evidence obtained as a result of the procedure would be admitted in the case.

2. If an officer fails to comply with a department's constitutional rule, and if the department has a history of disciplining its officers for violations, the evidence would likewise be admitted. Under such circumstances, the officer would be disciplined directly by the department rather than indirectly by the court.

3. If a rule is found to be unconstitutional, the court would look at whether or not the rule was promulgated in good faith and in the reasonable belief that it complied with constitutional requirements. Furthermore, if a department has a history of training and

disciplining its officers for violations, that department would merely be required to re-promulgate its rule according to proper procedures, deterring future violations while providing the benefit of use of the evidence in the immediate trial. If a department failed to meet these tests, the evidence would be excluded from the trial.

To provide an example of how this process would operate in an actual case, I will use the facts of the case United States v. Adams, 621 F.2d 41 (1st Cir, 1980). In that case, FBI agents had information regarding the possibility that an escaped murderer was living in the house of a former cellmate. This information was corroborated on a Wednesday by a social worker who had visited the residence. On Thursday at 8:30 a.m. the agents again questioned the social worker to see if the escaped convict was still there and found out she was. At 9:50 a.m., seven FBI agents went to the house and, after searching the premises, arrested the fugitive without having obtained either an arrest or a search warrant.

In the trial of the former cellmate for harboring a fugitive, the court excluded the evidence that the fugitive was there. The court found that there were no exigent circumstances to justify a warrantless arrest or search, stating there was ample time to obtain a warrant.

As in the case of an officer's entry into the home of a suspect to make an arrest, the court found that, absent exigent circumstances or without consent, the Fourth Amendment requires that a

police officer must obtain a search warrant before entering the home of a third party to execute an arrest warrant. Thus, under the exclusionary rule as it currently operates, the evidence was excluded from the trial because of the FBI agents' failure to abide by the Fourth Amendment requirements.

Assuming for the moment that the Forum's proposed process were in place, the evidence in this case would not necessarily be excluded. The court would first find out whether or not the FBI had promulgated a rule covering an arrest in the home of a third person, i.e., whether or not a search warrant should first have been obtained. If the court found that the FBI had no rule, the evidence would be excluded. The Bureau, having failed to carry its responsibility for deterring constitutional violations by promulgating a rule, would be responsible for the possible lost prosecution were the evidence to be excluded.

If, however, the court found that the FBI had a rule calling for a search warrant in these circumstances and that the agents violated it, the court would ask the following two questions:

1. Does the FBI conduct a program to train its agents to follow the appropriate procedures for searches and seizures as outlined in its periodically updated rules?

2. In the past, has the FBI disciplined those officers who were found to have violated its search and seizure rules?

If the answers to these questions were, yes, the court would admit the evidence into the trial, stating for the record its reasons for doing so; the FBI would be found to have carried its responsibility for deterring agent misconduct; FBI-imposed discipline would have supplanted the utility of the exclusionary rule as the rule is currently applied.

Advantages of Internal Regulation Required in the Process Proposed by the Forum

In our alternative, the focus of attention shifts from individual officers to police departments. If departments make good faith efforts to define and enforce constitutional behavior, evidence resulting from investigations should not be suppressed. Use of evidence gathered in criminal proceedings will restore the confidence of the police and the public in the criminal justice system. A balance between rights of criminal suspects to be protected from intrusive police behavior and rights of citizens to be protected from criminal acts will be restored.

Once implemented, our comprehensive approach to handling constitutional violations by police officers should prove to be the most appropriate substitute for the exclusionary rule. Placing responsibility for constitutional violations on police administrators is the most logical method for deterring police misbehavior: rules and regulations will provide effective guidance to officers, while strict internal

disciplinary procedures will ensure that discipline is more frequently applied than is now possible under the exclusionary rule. With clear departmental rules there will be less question as to when officers are in the wrong so that administrators will feel more comfortable in applying discipline. Regarding punishment, our system will allow for distinguishing gradations of violations. The development of explicit, comprehensive rules and regulations by police departments will provide a way of clearly spelling out the meaning of constitutional requirements, taking into account the realities of law enforcement practices. The introduction during trials of evidence that might previously have been excluded will increase chances that criminals will be brought to justice. The focus of the trial will shift back to alleged wrongdoings of defendants, increasing the likelihood of swift and certain punishment for criminal activity. The police and the public's respect for the law and the criminal justice system will increase; and what is most important, citizens will be protected, before the fact, from illegal police conduct in all areas of law enforcement activities--even those areas not involving evidentiary matters--because of the deterrent effect of this approach.

Gradual Replacement of the Exclusionary Rule

Incorporating the three components of rule-making, training and discipline into a single, comprehensive alternative can lead to

eventual replacement of the exclusionary rule, eliminating the problems the rule has engendered. Immediate implementation of our alternative will provide partial relief from the exclusionary rule's disadvantages and, eventually, could completely supplant dependence on the rule as a means of deterring unconstitutional police behavior; use of the exclusionary rule, however, will continue until our alternative has proved itself worthy. Determining when to apply the rule will, nevertheless, become easier; using an objective test for determining departments' good faith efforts will simplify the rule's use. Only after our alternative has been proven to be an effective substitute for the rule will the rule be discontinued. In effect, the exclusionary rule simply will atrophy.

The exclusionary rule is an integral part of the Forum's alternative. The prospect of its elimination is an incentive for police departments to develop effective controls over unconstitutional behavior of officers. Use of the exclusionary rule as an incentive to develop internal regulation of unconstitutional behavior is similar to use of the bail-out provision in the Voting Rights Act extension. Under the bail-out provision, if a jurisdiction remains free from discriminatory violations for ten years, it will no longer be subjected to pre-clearance by the Department of Justice for its changes in election procedures. Similarly, under our proposed procedure, if a police department demonstrates a pattern of good faith efforts to deter

unconstitutional behavior, it will be freed from the constraints of the exclusionary rule.

As experienced law enforcement executives, we firmly believe that internal regulation of law enforcement practices is the best possible approach to deterring unconstitutional violations. We are not, however, unrealistic: our belief must not lead to overconfidence. Though the measure of professionalism in law enforcement has increased remarkably over the years since the Mapp decision, many more improvements must be made. The process of improvement will necessarily be gradual. At first, most police departments could not fully meet changed standards without making extensive changes. Developing rules and regulations for conforming police conduct to constitutional safeguards will be a monumental task. Some departments will have to restructure their disciplinary systems extensively.

Nontheless, police departments will gradually adopt extensive and comprehensive rules regarding constitutional procedures and will begin to take appropriate disciplinary action against officers who violate these rules. Some departments will initiate these modifications on their own; others will do so under pressure from prosecutors, the media and the public to lift the burden of the exclusionary rule.

Disadvantages of other Proposed Alternatives to the Exclusionary Rule

Though the underlying philosophy of current proposals to modify or abolish the exclusionary rule is that something must be

done about the current operation of the rule, we believe that none of these proposed alternatives will provide an effective solution to the problem. Before commenting on these proposed alternatives, however, one cautionary note should be raised: the ill effects of the rule should not be confused with the restrictions imposed by the Constitution. It is often argued that the rule handcuffs police in enforcing the law. It is not the rule but, rather, the Constitution itself that quite properly creates obstacles for overzealous police officers. The increased judicial scrutiny that followed the rule's introduction has created for some, the illusion that, if the exclusionary rule were abolished, many of the constitutional restrictions imposed on police would also be abolished. This is a gross misconception: abolishing the current rule would not do away with the constitutional provisions prohibiting illegal search and seizure. The fundamental principles of the Constitution must, of course, be preserved. An alternative's only function is to change the remedy used when violations occur, while providing a mechanism that promotes police adherence to constitutional requirements.

Provision of Civil Remedies

The primary goal of this alternative is to deter constitutional violations by providing for use of a civil damage action against

both the police officer and the government. Though well-intentioned, we believe this alternative will fail in practice. Like current civil remedies, we believe such a damage remedy will be mainly illusory. There are several reasons for this. First, few suits, especially in comparison to the number of violations, will likely be brought: bringing and maintaining a civil action is expensive, burdensome, and time consuming. Currently, overcrowding of court dockets delays the hearing of federal court cases by an average of 13 months and the hearing of state court cases by up to seven years. Victims of illegal practices, who are not themselves involved in criminal behavior, would consequently have less incentive to challenge the police than criminal defendants. Bringing suit would consume a vast amount of a plaintiff's time and could lead many to believe it would not be worth the effort. The infrequent bringing of such suits would result in less judicial review of police practices and, what is more, less guidance for police.

Second, often the only witnesses to an event are the plaintiff and the defendant officer; in such instances the issue becomes one of credibility. Because juries tend to be sympathetic toward police officers confronted with liability, awards against the police might be infrequent. Third, for those plaintiffs who do prevail, compensation will likely be pathetically meager. Because the measure of damages will be the extent of physical injury to the plaintiff or to property, the careful officer could avoid all but nominal damages. Fourth, the damage remedy provides little direct incentive for police to develop

internal rules. The deterrent effect would amount to little more than what is already provided by the rule applied today.

Though a new damage remedy might serve better to compensate victims of constitutional violations than current civil remedies, it would not satisfactorily replace the exclusionary rule. Because such civil actions would be infrequently brought, they would not serve to systematically highlight police misconduct. More importantly, the remedy comes after the fact of the violation; it does not provide adequate incentives for establishing means of deterring misconduct before it occurs.

Elimination of "Good Faith" Efforts from the Exclusionary Rule Sanction

The thrust of this alternative is to limit the application of the exclusionary rule to those instances in which it is believed that individual police officers will be deterred by its application. A similar purpose is found in the recommendation of the Attorney General's Task Force on Violent Crime to exclude "good faith" efforts from the rule. The rationale behind this proposed alternative is that, when a police officers make reasonable, good faith efforts to comply with the law but unintentionally fail to do so because of minor technical violations, it is difficult to find any deterrent effect in suppressing the evidence that was wrongfully obtained; under such circumstances, excluding the evidence from trial has little effect on

officers' future behavior; it merely allows defendants to benefit and undermines public confidence in the criminal justice process. This alternative, though sound in theory, will be cumbersome in practice; its effect will likely be to undermine the deterrent purpose behind the rule, possibly leading to an increase in constitutional violations.

This alternative suggests limiting application of the exclusionary rule to those cases in which it is shown that the officer knowingly intended to violate someone's constitutional rights or when the violation was substantial. "Good faith efforts" by the police officer and "honest mistakes" on the part of the officer would not be subject to exclusionary rule application. The essential component of this alternative is that the exclusionary rule would be applied only when the accused police officer has a specific intent to take away a right which has been established either by the express terms of the Constitution or by decisions interpreting them. Thus, when the officers have known or should have known their conduct was in violation of the Constitution, only then would the exclusionary rule be applied.

Determining how to apply the rule will require an extremely involved fact finding process, irrespective of whether the standard operates on intent, substance or good faith. Judges will be given the difficult task of examining the inner thought processes of officers to determine their true intent. Far from reducing the amount of

fact-twisting that is alleged now to take place during suppression motions, this alternative would promote officer dishonesty regarding what were their true motives for acting. Dependence on discerning the subjective intent of officers would lead to departmental toleration of officer ignorance and would inhibit development of procedures to guide officers regarding proper behavior.

In an attempt to provide an objective measure for determinating the application of the rule under this alternative, its proponents have suggested an added requirement that the officer's good faith belief be reasonable. We believe that such an objective measure is necessary to ensure law enforcement agencies' attention to constitutional requirements. The difficulty lies in the standards by which this reasonableness requirement is to be measured.

Some who advocate this good faith modification have stated that, to meet the reasonable requirement, an officer's police department must have promulgated rules and regulations outlining Fourth Amendment procedures, implemented programs to train the officers in those rules and regulations, and maintain a system for disciplining officers who violate their rules. These statements give us only moderate assurance, however; we are not confident that the judiciary will hold that these same standards are part of the reasonableness requirement. What is needed, instead, is explicit reference in the legislation itself that the test to determine whether an officer's good faith belief is reasonable depends upon whether the officer's

department has a program consisting of the three elements: rules, training and discipline. If these three elements are defined in the legislation as the test of reasonableness, then the Forum's objective of placing responsibility for deterring consitutitional violations upon police administrators will be met. Without such detail, we fear the nebulous standard of "reasonable" will be subject to ambiguous interpretation by judiciary. The result may lead to use of a subjective standard alone as the test of good faith. In that event, the focus of the exclusionary rule will remain upon the individual officer; the opportunity to increase law enforcement agencies' attention to proper Fourth Amendment procedures will be lost.

None of the alternatives to the exclusionary rule addresses what we believe is the most important consideration in devising a remedy for Fourth Amendment violations: law enforcement executives' assuming the responsibility for their officers' violations. This is the only way to ensure with certainty that constitutional violations are minimized. What is needed is a means of testing the good faith efforts of department administrators; such efforts are susceptible of objective measurement. Basing a test on individual officers' subjective intent in paticular cases is not likely to prove productive. The Forum-developed alternative includes the necessary means of testing police administrators' good faith efforts. Our substitute process provides for an objective test by which departmental efforts to eliminate unconstitutional behavior can be gauged. Once departments have passed muster under this objective test, the exclusionary rule will not be applied.

Conclusion

As law enforcement executives who are responsible for the actions of our officers, accountable to the public, and answerable to the law, we believe that our alternative will deter constitutional violations by police officers and enhance the effectiveness of the criminal justice system. Under the process we propose, replacement of the exclusionary rule would come gradually; as the effectiveness of our process was proved, its use would gradually increase. Critics would no longer be able to complain of an artificial rule handcuffing the police in their efforts to fight crime. The key to removing the handcuffs would be placed in the hands of the police themselves. The task of establishing this alternative means of controlling police misconduct would be a time-consuming and arduous one. Judicial hearings on departmental rules, training and discipline systems would be extensive, especially in the beginning. Once the internal control systems were in place in police departments and their effectiveness in deterring unconstitutional behavior by the police was demonstrated, we believe the rewards would prove to have been well worth the effort. The alternative we have devised will best satisfy the primary purposes of the exclusionary rule and most effectively counter problems stemming from the rule's current use. These effects will promote the ends of justice and help to preserve our Constitutional liberties.

HOUSE JUDICIARY COMMITTEE OBSERVER/WITNESS SIGN-UP SHEET

DATE: 3/10 SPONSOR:

SUBJECT(S):

NAME	REPRESENTING	ADDRESS	PHONE	OBSERVER	WITNESS	FOR	AGAINST
Tom Wagner	self	510 Kenedy	6-1786				X

HB 75

ANCHORAGE POLICE DEPARTMENT

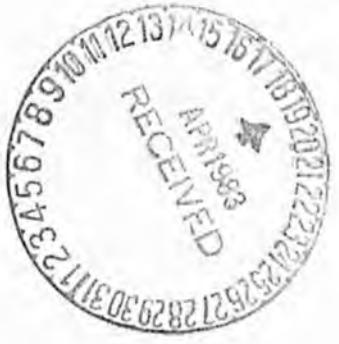
625 C STREET • ANCHORAGE, ALASKA 99501-3599
TELEPHONE (907) 279-1441

TONY KNOWLES
MAYOR

BRIAN S. PORTER
CHIEF

HJR 29
Judiciary Referral

April 14, 1983



Senator Vic Fischer
Senate State Affairs Committee
Pouch V
Juneau, Alaska 99811

RE: Senate Bill 49

Dear Senator Fischer,

Pursuant to your request, below is a list of cases where the Alaska Supreme Court or the Alaska Court of Appeals has invoked the Exlusionary Rule in order to suppress evidence which led to either the conviction of the defendant being reversed or evidence being considered inadmissable for purposes of trial. Time restraints prevent me from giving you a complete list of every case in Alaska where the Exclusionary Rule resulted in suppression of evidence. However, these cases are glaring enough to point up the need for revision of the "court adopted" rule of excluding evidence to prevent law enforcement "abuse."

Anderson v. State, 555 P.2d 251 (Alaska 1976)

Police officers entered defendant's apartment and conducted a search pursuant to a search warrant authorizing search for marijuana and related paraphernalia. While conducting a search, officers discovered on shelves in defendant's apartment, photographic negatives which had been mounted as slides, which depicted nude, male children. In order to discover what was on the slides, the officers had to hold them to the light. It was because of this latter act, "holding to the light," the Alaska Supreme Court reversed defendant's conviction for lewd and lascivious acts toward a child and suppressed the evidence. The Court held defendant had an expectation of privacy and the photos, since they had to be held to the light in order to veiw what was depicted on them, were not in plain view.

Zehrung v. State, 569 P.2d 189 (Alaska 1977)

Defendant was stopped by a State Trooper for excessive smoke. During the course of the stop, the trooper discovered two misdemeanor warrants existed for defendant. The trooper arrested the defendant

and transported him to the city jail. The booking procedure at the time, required complete processing of an arrestee, including inventory of his property, even if the arrestee is able to post bail at the time he arrives at jail. With Zehrung, jail personnel discovered two credit cards in his wallet during inventory search which did not belong to him. This evidence led to discovery that the credit cards were taken during a rape and robbery, which led to defendant's indictment and conviction. The Supreme Court reversed the conviction, holding there was an illegal search and seizure. The Court held that defendant should have been allowed to post bail rather than go through the regular booking procedure. Without evidence of the credit cards, the State was unable to prosecute Zehrung for the rape charge. One final note on Mr. Zehrung, he had been convicted of rape in 1972 and 1975. He subsequently was convicted of assault and battery and possession of narcotic drugs after he was released and prosecution dropped in the rape charge.

State v. Glass, 583 P.2d 872 (Alaska 1978)

This case involves the warrantless electronic surveillance of a narcotics transaction. The conversation of the transaction was electronically recorded by police officers stationed outside the home. The Court suppressed the conversation, which was in effect a new rule of law. It also applied a stricter construction of the Constitution of the United States Supreme Court. The Court held that a search warrant must be obtained before electronic monitoring of conversations should be allowed. Applying the Exclusionary Rule, all evidence of the tape recording was inadmissable in prosecution for possession and sale of a narcotic drug.

Anchorage v. Geber, et al., 592 P.2d 1187 (Alaska 1979)

Defendant, along with a number of other individuals, had been arrested for DWI and refused a breathalyzer. Defendant was transported to a local hospital where he submitted to a blood test, against his will. The Alaska Supreme Court, declining to follow the U. S. Supreme Court in Schmerver v. California and reversing itself in Layland v. State, 535 P.2d 1043 (Alaska 1975); held that once an individual refuses the breathalyzer, no additional chemical tests can be conducted. In their interpretation of A.S. 28.35.032(a) the Court held that the police were precluded from obtaining evidence even after obtaining a search warrant. Evidence of defendant's blood alcohol test was suppressed.

Lauderdale v. State, 548 P.2d 376 (Alaska 1976)

Defendant, along with many others, was arrested for driving while intoxicated. As part of their standard operating procedure, police officers, after administering a breathalyzer test, destroyed the test ampule. The Court held that there was plausible evidence that could

be derived from later testing of test ampule which could bear on the validity of the breathalyzer. The Court upheld the lower court's suppression of the breathalyzer. (Note: Testimony by experts from around the country on the Borkenstein breathalyzer, in proceedings in District Court on unrelated matters, have clearly shown that later testing of the test ampule is worthless.)

Anchorage v. Serrano, 649 P.2d 256 (Alaska Appellate 1982)

Defendant, along with many others, was arrested for driving while intoxicated. Law enforcement officers following procedures established by the Legislature and the Alaska Administrative Code, conducted breathalyzer tests in accordance with those procedures. The police officers, however, did not save a separate sample of defendant's breath for later independent testing. The Alaska Court of Appeals upheld the lower court's suppression of the breathalyzer, based on a finding that it was a violation of defendant's due process of rights of cross examination by not saving a separate sample of breath. Basically, the Court found that since it was inexpensive and reasonable to save a separate sample of breath, and it could easily verify the results of the breathalyzer, law enforcement officers should have done so.

Copelin v. State, Opinion No. 2617, February 18, 1983

The Alaska Court of Appeals in Copelin v. State, 635 P.2d 492 interpreting A.S. 12.25.150(b) and based on a prior Alaska Supreme Court decision held that an individual was not entitled to an attorney prior to taking a breathalyzer test or being placed on video to perform field sobriety tests. The date of the decision was 1981. Almost two years later, the Alaska Supreme Court reversed that decision, holding that A.S. 12.25.150(b) did require law enforcement to provide a defendant with access to an attorney, if defendant asks for one, prior to taking a breathalyzer or field sobriety tests on video. For two years, law enforcement officers, following the dictates of the Court of Appeals and the Alaska Supreme Court, denied drunk drivers the right to contact an attorney prior to taking the breathalyzer. If the decision is applied retroactively, which the Supreme Court did not reach, evidence in hundreds of drunk driving cases may be suppressed as a result of this decision. It should be noted that the application of the Exclusionary Rule resulted in a split decision in the Alaska Supreme Court itself.

Note: The last four cases led to evidence of the breathalyzer being suppressed in approximately 1,000 drunk driving cases. In many of these cases, without evidence of the breathalyzer, charges were dismissed or reduced.

Taylor v. State, 642 P.2d 1378 (Alaska Appellate 1982)

In January, 1979, defendant was wanted in connection with an armed robbery that had taken place the day before. Police thought they could locate defendant at a particular address. The reason they thought he might be there is that a month earlier defendant and another person were arrested for armed robbery; the other person had been arrested at that address, and papers and identification of the defendant had been found at that residence. One officer went to obtain an arrest warrant for defendant while the other officers went to the address.

When officers arrived there, another man answered the door. The description of this man did not match the description of the defendant (whom one of the officers knew) or the other suspect. Officers identified themselves, and asked the man for identification. He said he would have to go get it, and one of the officers followed him to a back bedroom ("protected search"). On the way to the bedroom, the officer saw defendant trying to hide under a bed. Defendant was arrested, and two important pieces of evidence which tied him to the robbery were found in the bedroom. Officers later obtained a search warrant and found even more evidence linking defendant to the robbery.

Holdings: (1) Testimony made it unclear whether the man who answered the door actually consented to let the officers in, or whether the statement that they "had a warrant for Ernie" influenced the man to allow them in. Since the burden of proof was on the State, and the evidence was 50-50, the State did not meet its burden. Unless, the entry into the home was illegal.

(2) The "protective search" conducted into the home and into the back bedroom, for the protection of the officers, cannot be justified without "compelling circumstances." Additionally, the Court found that the facts known to the police were not sufficient to justify the police intrusion into the home. (3) In order for the police to enter a home to make an arrest, the police need: (a) probable cause to believe the person committed a crime (i.e., an arrest warrant, if possible), and (b) probable cuase to believe that the suspect is at that particular residence. (4) Since the Court held the arrest was the result of the illegal entry into the home and the illegal act of following the other man to the bedroom, any evidence obtained by police as a result of the arrest should be suppressed.

Conviction reversed; searches and entry held illegal.

For your information, there is an excellent law review article on the good faith exception to the Exclusionary Rule. The article is dated in 1982 and can be found in 73 Journal of Criminal Law and Criminology 916.

Again, these are only a few cases in which the appellate courts have invoked the Exclusionary Rule to suppress evidence. The impact those decisions have on the trial courts can be devastating. For example, in Copelin and Serrano hundreds of suppression motions have been filed.

As you may be aware, the general provisions of Senate Bill 49 are supported by the Chief Justice of the U. S. Supreme Court. The rationale for excluding improperly obtained evidence can be found in U. S. vs. Calandra, 414 U.S. 338 (1974), where six members of the U. S. Supreme Court agreed that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ."

It would seem to follow that a law enforcement officer could not be deterred from making a good faith inadvertent error in the field by this remedy.

It should be noted that Senate Bill 49 does not expand police discretion and would not reduce the training and emphasis placed on the application of reasonable searches. It would provide the Courts with the ability to allow relevant evidence to be presented at trial if in its judgment any alleged error made by a police officer while obtaining the evidence was only technical in nature and made in good faith.

At least some of the above cited cases, in my opinion, would not have resulted in the dismissal were Senate Bill 49 in effect. It would appear to me that justice would have been better served.

Needless to say, we support the passage of Senate Bill 49 and urge your support.

Thank you for the opportunity of providing our thoughts.

Sincerely,

Brian S. Porter
Chief of Police

BSP:dl

cc: Anchorage Delegation