

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

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probate law of every state. However, wide variations in the organization and content of these laws discouraged immediate preparation of a single text of the new proposal that would work well in all states.

Therefore, ULC limited itself to proposing a text that would work well in UPC states. In non-UPC states, the Succession Without Administration amendments to UPC will serve to publicize and illustrate the new concept and will be useful as a model to be adapted to their statutes until a "free-standing" act can be developed.

States presently counted as enacting UPC or equivalent legislation are: Alaska, Arizona, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania and Utah.

Several other states — including Alabama, Hawaii, Maryland, Oregon and Wisconsin — that have accepted most of UPC's non-procedural provisions regarding intestate and testate succession probably would be classified as UPC states if they were to enact adaptations of the Succession Without Administration amendments.

## Notarial Acts

A Uniform Law on Notarial Acts has been developed to "define the content and form of common notarial acts."

The new Uniform Act replaces two earlier ULC proposals — the Uniform Acknowledgments Act (adopted in 1939 and revised in 1960), and the Uniform Recognition of Acknowledgments Act (completed in 1968). The first was adopted by 26 states and the latter by 18.

ULC urges every state to adopt the new proposal which represents "a consolidation, extension and modernization of the two previous acts."

"It consolidates the provisions of the two acts relating to acknowledgments of instruments," drafters said. "It extends the coverage of the earlier act to include other notarial acts, such as taking of verifications and attestation of documents. It also modernizes the law by recognizing contemporary practices. In addition, the act seeks to simplify and clarify proof of the authority of notarial officers."

The new act defines a notarial act as "any act that a notary public of this state is authorized to perform, and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or

attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument."

The new Uniform Act permits use of short, simple forms used as examples in the act as well as "the more elaborate forms" of the earlier ULC legislation.

## Conflict of Laws

In today's mobile society, many legal disputes that once would have been purely local in nature now involve contacts with two or more states. Contracts often involve a seller in one state dealing with a buyer in another.

An automobile accident may involve a driver from State A whose car — manufactured in State B and purchased in State C — collides with a car from State D on highways of State E. "Conflict of laws" ("conflicts" for short) is the area of law that deals with deciding which state's law to apply in such cases.

One of the difficult conflicts problems is deciding which state's statute of limitations to use. Some differences between the laws of different states may be minor, but the decision to apply one or another state's statute of limitations may mean life or death for a case.

A once common answer to the problem was to apply the statute of limitations of the state where the case was brought, regardless of where the dispute arose or what state's law would be applied to other issues in the case. The idea was that a statute of limitations was "procedural," and a court would always apply its own procedure, even when applying the substantive law of another state.

The procedural approach proved too simplistic, however, and most states adopted statutes that provided their own solutions to the problem. No two solutions were the same. Often drafters of statutes had not anticipated the variety of circumstances their statute might cover. Sometimes their wording produced unintended and unfair results.

ULC has drafted a new approach to the problem — a Uniform Conflict of Laws — Limitations Act.

The new Uniform Act offers a different sort of "limitations borrowing statute." It takes the general approach that when a court decides to apply the substantive law of another state, it should also apply that state's statute of limitations.

But the new act also provides an "escape clause" to the general rule in a section labeled "unfairness." When the limitations period of the

state law which is being used in a case "is substantially different" from that of the forum state "and has afforded no fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim" then the forum state's limitations period would be used. Drafters said this provision "is not designed to afford 'an easy escape,'" but will give reasonable assurance of a fair and just result, as far as the statute of limitations is concerned, in each individual case.

## Guardianship & Protective Proceedings

ULC believes state courts should "limit guardianships...to encourage the development of maximum self-reliance and independence" of incapacitated persons.

"Pressure to add 'limited guardianship' concepts to UPC (Uniform Probate Code) grew out of the recommendations of an American Bar Association project, the ABA Commission on the Mentally Disabled, which, in relation to guardianship other than for minors, recommended that state laws be changed to avoid an asserted 'overkill' implicit in standard guardianship proceedings," according to drafters of the Uniform Guardianship and Protective Proceedings Act. "In part, this occurs, it was asserted, because a finding of incompetence has been the traditional threshold for appointment of a guardian.

"Thus, in consequence of appointment of a guardian, all personal, legal autonomy is stripped from the ward and vested in the appointing court and guardian. The call for 'limited guardianships' was a call for more sensitive procedures and for appointments fashioned so that the authority of the protector would intrude only to the degree necessary on the liberties and prerogatives of the protected person."

### Incapacitated persons

When the commission released its report, UPC proponents maintained that the code which replaced the term "incompetence" with a more precise definition of an "incapacitated person" already provided for limited guardianship and conservatorship.

UPC defines an "incapacitated person" as anyone "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient under-

standing or capacity to make or communicate responsible decisions."

But when Idaho — the first state to adopt UPC — enacted a new limited guardianship statute without even repealing UPC guardianship provisions, ULC decided it must act to "include explicit language dealing with limited guardianship" in UPC before the situation became even more confused.

Therefore, drafters developed a Uniform Guardianship and Protective Proceedings Act — for adoption by non-UPC states — which also would amend Parts 1, 2, 3 and 4 of Article V of UPC to make it clear that it encouraged "limited guardianship."

### Clarifies authority

Like UPC, the free-standing act also encourages courts to appoint conservators — concerned solely with property management — instead of guardians. The new act makes it clear that courts have the authority to limit the powers of a conservator as well as those of a guardian. Also a court could appoint a conservator for particular property leaving other property in the control of a protected person.

Whether guardianship or conservatorship proceedings are involved, the proposal will facilitate court use of special competencies regarding how necessary state assistance for afflicted persons can be provided with least disturbance to normal independence.

The Uniform Act also authorizes parents and spouses to use a witnessed paper other than a will, as well as a will, to designate a guardian to replace themselves as protectors of their minor children or of the other spouse.

## Health Care Consent

Judges have made it clear that an adult with a "sound mind" has a right to consent to — or refuse — medical treatment.

"What if the human being is not of adult years and of sound mind or is otherwise unable to consent?" asked drafters of the Model Health-Care Consent Act. "These questions plague hospital administrators, physicians and surgeons daily. They are also of grave importance to patients, their families and friends. Some certainty in this area of the law is needed for all participants in the health care system, consumers as well as providers."

Certainty is the goal of the Model Health-Care Consent Act which focuses on "who" can consent.

"(It) is procedural in nature and is purposefully narrow in scope," drafters said. "Its primary aim is to provide authorization to consent to health care. It does *not* address the substantive issue of consent; for instance, what constitutes informed consent, whether informed consent is required or under what circumstances one has a right to refuse treatment..."

"(It) is drafted to provide answers for the cases that occur daily and routinely in medical practice. It is not designed to provide answers for the extraordinary cases, such as terminal illness, organ donation, and the treatment of mental illness. These extraordinary cases present separate and discrete problems involving not only issues of competency but of the authority of a substitute decision-maker as well. To force a uniform solution to these many problems would be at best a procrustean fit. To provide a statutory solution to the problem of the administration of antipsychotic medication - a noninstitutionalized incompetent person which is consistent with the due process clause would be completely unworkable if the problem to be solved is how to render treatment to a child with a broken arm while its parents are on an extended trip."

#### Provides a guide

Drafters tried to "replace the murkiness of custom with the clarity of legislation and to provide guidance for those involved daily with the problem of how medical decisions are to be made for an individual who cannot do so for himself."

The act is built on a definition of an "individual who may consent to health care." The definition includes adults and minors who were emancipated; had reached a recommended age of 14 and were living away from their parents and managing their own affairs; were or had been married; were in the military; or were authorized to consent under other state laws such as those permitting minors to consent to treatment for alcohol or drug dependency.

If a physician determined that a patient was capable of consenting, treatment decisions would be up to the patient. But if the patient was incapable of consent, then physicians would be required to find a proxy to "stand in his shoes."

If the patient incapable of consenting was an adult, the first choice would be a "health-care representative" who had been appointed by the patient when he was capable of consent. The act would require such appointments to be made in writing. Health care representatives would be required to "act (i) in the best interest of the appointor consistent with the purposes expressed

in the appointment; and (ii) in good faith."

ULC said providing for appointment of health-care representatives was consistent with the Uniform Durable Power of Attorney Act which has been adopted in about 30 states. In those states, the power to make such an appointment already exists. By incorporating the concept into the Model Health-Care Consent Act, ULC hopes to bring this power "to the attention of persons not aware of the Durable Power Act."

#### Priorities set

If there was no health-care representative, top priority would be given to a court appointed guardian or representative. Next in line would be a spouse, parent, adult child, or adult sibling. However, an adult who did not choose to appoint a health-care representative while capable of consent could disqualify a specific person from consenting to his health care. Such disqualifications also would be in writing.

If a patient was a minor not authorized to consent, the first priority again would be given to a court-appointed representative. The next priority would be given to a parent, or "an individual in loco parentis." Next physicians could look to a minor's adult siblings for consent. The act also would permit individuals "authorized to consent to health care for another" to delegate their consent authority if they were to be unavailable.

"This provision would be helpful in situations in which parents want to delegate health-care decision-making to a temporary custodian of their children, for instance when parents plan to be away or when a child is at camp."

#### Other laws stand

ULC made it clear that its proposal would not affect other state laws that might deal with such problems as withdrawal of life support systems or diagnosis and treatment of mental illness. For example, draftsmen commented:

"The law with respect to withdrawal of life support systems in the case of the terminally ill is changing rapidly. At least 10 states have Natural Death Acts and there have been several court decisions concerning the issue of termination of treatment. Nothing in this (proposal) changes existing law in that regard. All proxy decision-makers are charged with acting in the best interest of the patient who is incapable of consenting. If a patient had appointed a health-care representative and had made known his wish that life support systems be withdrawn in the event of terminal illness, many courts would consider that evidence conclusive of the patient's best interest. However,

this (proposal) does not provide an answer to the question of what is in the patient's best interest in such a circumstance."

## Transboundary Pollution

Pollution doesn't recognize state — or international — boundaries, but most legal procedures do. That means New Yorkers whose lakes or forests are damaged by pollution originating in Canada probably will find that they lack the legal tools to stop emission of offending toxic materials, or to recover their losses.

ULC and the Uniform Law Conference of Canada created a joint drafting committee to seek a solution to this problem. The result is a Uniform Transboundary Pollution Reciprocal Access Act.

The Uniform Act is designed to overcome what its drafters describe as "a generally recognized rule of law in the Anglo-American tradition that actions for damages for trespass, nuisance or negligent injury in respect to lands located in another state are local actions and may be brought only in the state where the land is situated."

The Uniform Act would eliminate this problem when both the state or province where the pollution originated and the state or province where

the damage was inflicted had adopted the proposed act or provided "substantially equivalent access to its courts and administrative agencies." Minnesota is an example of a jurisdiction that already provides access to its courts for non-resident pollution victims.

Substantive sections of the Uniform Act would permit alleged pollution victims to seek remedies in the courts of their state or province or in the U.S. or Canadian jurisdiction where the pollution originated. Victims or potential victims also could seek a remedy through administrative agencies — state environmental protection agencies, for example — of the states where the pollution originated.

Impetus for development of the proposal was provided by a 1979 report of the Canadian Bar Association and the American Bar Association on The Settlement of International Disputes Between Canada and the U.S. The report recommended creation of a liaison group of Uniform Law Commissioners of the U.S. and Canada. This evolved into a drafting committee on transfrontier pollution — one of the problems pointed up by CBA and ABA.

This is the first time that Uniform Law Commissioners of the U.S. and Canada have worked together to draft a proposal designed to be used in both the states and provinces.

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## Juries *from page 5*

that employers shall not fire, threaten or "otherwise coerce" an employee who is called or serves as a juror. Both monetary and criminal penalties are permitted for a violation. Discharged employees also may sue to recover lost wages and jobs.

Nine states have enacted the Uniform Jury Selection and Service Act in some form. Colorado, Idaho and North Dakota all enacted the complete act for all courts in their states in 1971. Maine adopted the bulk of the act in 1972. Michigan and Indiana adopted the act for their more populous counties in 1973. Mississippi adopted its version of the act in 1974. Minnesota adopted the act retaining an exemption only for legislators in 1977 and Utah adopted the complete act in 1979.

All nine states report that the act has been a success. For example, Lawson said that adoption of the act "has been very beneficial for Colorado."

"Prior to adoption of the Act, Colorado had almost as many ways of selecting jurors and grant-

ing excuses as it has counties," Lawson said in a letter to Judge Robert P. Fullerton who serves as a Colorado commissioner on uniform laws. "In many parts of the state, there was no way a challenge to the array — had the issue been raised — could be successfully defended. I hesitate to put on paper my recollections of how jurors were selected in some counties.

"The Uniform Act, as you know, eliminated exemptions, established grounds for excuses, and made the use of automation possible. The use of automation, in turn, made it possible to use additional source lists along with voter registration. It also provided the foundation for one day-one trial and similar reforms."

ULC legislative director John M. McCabe believes that more states should consider adopting the act.

"I've never heard of a challenge of an array being successful in any jurisdiction operating under the act," McCabe said. "And when it's coupled with computerization, it has saved money for court systems. If states want better juries for fairer trials, they should adopt it for all jurisdictions."

# Davis praises '81 MSAPA

In the 1982 supplement to his *Administrative Law Treatise*, Kenneth Culp Davis said the 1981 revision of the Model State Administrative Procedure Act "is all along the line much superior to the 1961 version. Indeed, although many positions taken are inescapably controversial, the new Model Act in general achieves the objective of being a model of what a state APA should be."

Davis — whose treatise was first published in 1958 and who is generally recognized as one of the leading authorities on administrative law — pointed to several provisions of the 1981 MSAPA as "outstanding," "superior," and "excellent." These included provisions:

- Mandating that state agencies codify in rules any principles of law or policy that it adopts through decisions in individual cases. Davis quoted the MSAPA commentary to this provision which said "law and policy expressed in rules gives (members of the public) fairer notice than case precedent... Law or policy expressed in rules is also frequently more easily understandable to laymen than case precedent, and is always more highly visible to those who monitor the performance of agencies... Only by the enactment of a statutory provision of the type recommended here, therefore, can agencies be *forced* to codify in rules principles of law or policy they may lawfully declare in decisions in particular cases, and may lawfully rely on a precedent... If an agency breaches... its duty... to issue such a rule displacing a line of its precedent, the agency may not subsequently rely on that line of precedent." Davis said this provision was "well ahead of federal law."

- Granting a governor the authority to "repeal or suspend all or a portion of a rule of an agency. In exercising this authority, the governor shall act by an order that is subject to all requirements applicable to the adoption and effectiveness of a rule." The provision does *not* give a governor authority to adopt agency rules.

- Creating some less-than-formal types of adjudicative procedure which agencies may use instead of the formal hearing in appropriate types of cases. Davis said that these less-than-formal procedures — the conference adjudicative hearing, the summary adjudicative proceeding and the emergency adjudicative proceeding — represent "clear advances." But in his opinion, MSAPA has one weakness. It gives an agency a choice as to whether to use the formal hearing or one of the less-than-

formal procedures in situations where "there is no disputed issue of material fact." According to Davis, formal hearings should never be used in these situations, although he concedes that the MSAPA approach probably conforms to "dominant assumptions and...practices" by giving an agency a choice. Davis recommends that MSAPA be amended to compel an agency to use one of the less-than-formal procedures in adjudication of any case in which there is no disputed issue of material fact. This could be accomplished simply by changing "may" to "must" in the provisions regarding use of less-than-formal procedures.

- Eliminating technicalities involved in judicial review. Davis said this made MSAPA superior to federal law which continues to include "technicalities about injunction, declaratory judgment, writs of mandamus, actions in the nature of mandamus, habeas corpus, and various other remedies."

Viewing MSAPA as a whole, Davis concludes:

"Although many refinements are susceptible of different opinions, the superiority of the new Model Act over the 1946 and 1961 versions fully reflects the advances in administrative law thinking, and in some respects the new draft is providing a leadership in the direction of a better system."

## Journal features A-V Act

An Ohio lawyer recommends the Uniform Audio-Visual Deposition Act as an "excellent source of help" when an opponent or trial judge has "little or no experience with video."

Thomas J. Murray, Jr., of Sandusky said in a November, 1982, *American Bar Association Journal* article on "Video Depositions: Putting Absent Witnesses in Court":

"The proposed act offers a step-by-step model for dealing with most of the procedural problems that might arise in a video deposition from notice to courtroom replay. In a jurisdiction without well-settled video rules, this procedure is helpful.

"Along with a standard deposition notice advising your opponent that the deposition will be recorded by videotape, send a letter to your adversary suggesting that the deposition be taken in accordance with the provisions of the act and include a copy of the proposed rules..."

North Dakota has adopted the act. Several other states are expected to consider it in 1983.

# Public hearing scheduled on Marital Property Act

A public hearing on a proposed state Marital Property Act has been scheduled for Feb. 18, 1983, in Washington, D.C.

The hearing will focus on a preliminary draft of the proposal. The new draft — scheduled for completion and distribution in late December — will incorporate more than two years of work by the committee and reflect comments and suggestions from Uniform Law Commissioners, advisors, legal and women's organizations and others interested in the problem.

The drafting committee must deal with such problems as:

- Defining marital and individual property, which can be as important to creditors — including former spouses and children of former marriages — as it is to marriage partners.

- Whether "interspousal remedies" should be available to help marriage partners enforce their marital property rights.

- Rights of surviving spouses.

- Should benefits of "pension plans" be considered property of the marriage partnership or the spouse who "earns" them.

The hearing is scheduled to begin at 9 a.m. in the Hyatt Regency on Capitol Hill. Copies of the

draft will be available for \$2 a copy from ULC headquarters by writing or calling: National Conference of Commissioners on Uniform State Laws, Suite 510, 645 North Michigan Ave., Chicago, IL 60611 (phone 312/321-9710).

William C. Hillman of Providence, R.I., chairman of the ULC Drafting Committee on Marital Property Act, urges those who want to suggest changes in — or support — the policies or details of his committee's work to submit their comments in writing to ULC headquarters before or after the public meeting. This will facilitate their consideration.

Other members of the drafting committee on the act include: George C. Berk, also of Providence; Peter J. Dykman, Madison, Wis.; Bion M. Gregory, Sacramento, Calif.; Linda Judd, Post Falls, Idaho; Henry D. Stratton, Pikeville, Ky.; and Richard V. Wellman, a law professor at the University of Georgia School of Law. Reporter-draftsman for the committee is William P. Cantwell, Denver.

The committee is expected to have a draft eligible for final "consideration" during next summer's annual meeting of ULC. If the proposal is completed and adopted as a ULC product, it will be promulgated to the states for their consideration.



ULC is a confederation of state commissioners on uniform laws. The first commissioners, appointed by seven of the then 24 states, met in Saratoga, N.Y., in 1892. Membership now consists of some 300 practicing lawyers, judges and law professors. They are elected by each of the 50 states, the District of Columbia and Puerto Rico to draft legislation addressing problems common to all states, and to bring about uniformity of the law across state borders where that is seen as desirable and practicable.

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# Exclusionary rule: help or hindrance?

by Timothy Harper  
Associated Press

**N**ew York — In these days of rising crime, public outrage boils and bubbles each time the courts dismiss charges against a criminal defendant or grant a convict a new trial because of a "legal technicality."

The "technicality" often is the exclusionary rule, which holds that evidence obtained illegally — when police violate someone's constitutional rights — cannot be used in court against the person.

The rule is under strong criticism from the Reagan Administration and others who see it as thwarting police investigations, hampering prosecution strategy and too often freeing convicted criminals.

Many ordinary citizens take a dim view, too. An Associated Press-NBC News national poll last month put this question: "The law now says that judges must throw out evidence which police obtain illegally. Would you favor a change so that more of this evidence can be admitted, or do you think the law should be kept as it is?"

Fifty-three percent of those polled favored a change, 41 percent opposed it, while 6 percent weren't sure.

Defenders of the rule, like the American Bar Association and the American Civil Liberties Union, argue that it is a free society's main guarantee against police harassment of innocent citizens.

Unlike most U.S. law, the exclusionary rule has never been approved by Congress. Instead, it is a creature of the judicial system, court-made law that was born and grew out of U.S. Supreme Court rulings interpreting the Constitution.

The court enunciated the rule, which is the only constitutional limitation common to all law enforcement investigations, for federal authorities in 1914. By the time the Supreme Court expanded it to cover all state and local police in 1961, the courts in most states had been following it for years.

The rule is most often applied to evidence police obtain in violation of the Fourth Amendment's prohibitions against unreasonable searches and seizures.

In the past 20 years, the U.S. Supreme Court has thrown out convictions in 70 Fourth Amendment exclusionary rule cases.

But those 70 Supreme Court precedents have led to reversals of certainly hundreds and probably thousands more convictions in state and lower federal courts, and kept prosecutors from filing charges in untold criminal investigations at all levels.

In a speech in New Orleans last September, President Reagan said: "This rule rests on the absurd proposition that a law enforcement error, no matter how technical, can be used to justify throwing an entire case out of court not matter how guilty the defendant or how heinous the crime."

Chief Justice Warren Burger has criticized the rule as a search for procedural purity rather than truth or justice. Dissenting in past court cases upholding the rule, he has called on Congress to change it so that more evidence will be admitted.



There are two proposals pending before the U.S. Senate to weaken the rule, and a presidential task force headed by Attorney General William French Smith has offered another.

But supporters echo past Supreme Court reasoning that the rule avoids the taint of collusion between police and the courts in gaining convictions, prevents the government from profiting from its misdeeds and ensures public trust in the fairness of the judicial system.

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence," the court said in the 1961 case.

A current case where the exclusionary rule is an issue is that of Lawrence and Judy Watson. The Watsons claim 10 police officers, acting on an informant's tip but without a warrant, broke into and ransacked

their suburban Dallas home last March. They say the officers shot their dog, beat Watson and forced his wife to stand naked while they cursed her.

Eventually, the Watsons were arrested for possession of lidocaine, a cocaine substitute. The charge is a misdemeanor.

The Watsons will argue that the Balch Spring, Texas, police violated the Fourth Amendment's guarantee against unreasonable searches and seizures because there was insufficient "probable cause" for the search.

If the judge hearing their case agreed, prosecutors would not be allowed to introduce evidence about the drugs that were found. No drug case, and the charges would almost surely be dismissed.

Even if the Watsons lost, however, they could appeal to a higher court to have their convictions overturned.

The exclusionary rule is the doctrine that says police cannot question people just because they are black or have criminal records. It is the doctrine that says police cannot arrest someone "for investigation."

It is the doctrine that says police cannot stop and search a car for no reason, and it is the doctrine that says police cannot kick down someone's door without a warrant showing why.

"The exclusionary rule protects the innocent as well as the guilty," says William Greenhalgh, a Georgetown University law professor who is writing a book about the subject. "It means the ordinary citizen walking down the street will not be annoyed, harassed or humiliated by police."

But critics argue that the truly innocent don't need protection, and answer the supporters' statistics and theories with specifics:

• Charges were dismissed last

from a car was ruled inadmissible because the search warrant did not list the car's correct license plate.

• A convicted murderer was released from prison in Illinois — after confessing not once but twice — because police could not show they had enough reason to question him in the first place.

• On the same day last year that the Supreme Court said it was legal for police to search for drugs in a jacket on the floor of a car, it overturned a drug conviction because police had searched a package found in a car trunk.

Adding to the controversy, the exclusionary rule is often a major defense tactic in highly publicized criminal proceedings.

For instance, defense lawyers in the Atlanta child slayings case tried but failed to suppress evidence of fibers found in Wayne Williams' home on the grounds that police did not

have probable cause to search for them.

And attorneys for John Hinckley Jr., accused in the attempted assassination of President Reagan, say they will try to exclude evidence from Hinckley's jailhouse diary because of his "reasonable expectation of privacy."

One of the proposed Senate bills, due for public hearings in Washington later this year, would abolish the exclusionary rule but allow people whose rights were violated to sue police for damages.

Anthony Amsterdam, a New York University law professor and highly regarded constitutional scholar, opposes this civil redress option for three reasons.

He says juries are rarely sympathetic to suits against police, people who have been illegally arrested are generally happy just to be set free and usually do not have the knowledge or the money to file a lawsuit.

The other Senate bill would exclude evidence only if the seizure were "intentional or substantial," which is similar to the presidential task force's recommendation that illegally obtained evidence be admitted if police acted "in good faith."

David Landau, an American Civil Liberties Union attorney, believes any congressional proposals to weaken the exclusionary rule will fail. He said that as part of the Constitution, it should take a full-fledged constitutional amendment — with approval by 38 states — rather than a simple law to change the rule.

The congressional proposals are similar to a new state law in Colorado which is still awaiting state and federal court tests.

Denver District Attorney Dale Tooley says the Colorado law, the only one of its kind in the nation, requires courts to admit illegally obtained evidence if police believed they were acting constitutionally and that belief was reasonable.

He says both the objective and subjective tests still protect the innocent, but prevent the guilty from escaping on a technicality.

"It's a more accurate search for truth, and you end up getting better justice," Tooley says.

But Greg Walta, Colorado's public defender, says the seven-month-old law encourages police to conduct illegal searches and seizures and then plead ignorance before judges who are under pressure from a crime-conscious public to admit evidence leading to convictions.

"It rewards careless police behavior. It rewards dishonest police behavior. Over the long haul, the honest citizen is going to be the loser," Walta says.

Historically, he says changes in the exclusionary rule or other judicial procedures have had little to do with the crime rate.

"I have not met one client nor has anyone else in this office met any clients who even knew the exclusionary rule had been changed on July 1," Walta says.

Many police officials say changes in the exclusionary rule would make no difference to them, either. "Cops aren't going to go up and down the street looking in houses or kicking down doors, no matter how the rule is changed," says Larry Layman, a Deoria, Ill. patrolman.

# The Anchorage Times

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## Legal loophole

**NOT TOO MANY** months ago the conviction of a man involved in a particularly awful rape and robbery case was reversed and he was set free.

The court held that his link to the crime had been discovered illegally. That link was a credit card belonging to the victim that was found in the man's wallet by a jailer.

The illegal aspect was that the man had been arrested on a traffic charge — not the rape. In the course of identifying his property before he was jailed, the stolen credit card was found. That represented, according to the courts, illegal evidence discovered through a search that was an infringement on the man's rights.

Alaskans were appalled and outraged.

The action by the court came in response to something in the law known as the "exclusionary rule."

This rule, which has been upheld by the U.S. Supreme Court, holds that evidence not legally obtained must be excluded from the case. In this particular instance, the man's conviction of rape was traced directly to the illegal discovery of the stolen credit card — and since that was improper, the whole conviction was improper, the judges said.

**ONE OF THOSE** outraged was Sen. Ed Dankworth, retired head of the Alaska State Troopers. This week in Juneau he moved to do something about it.

"Far too many criminal defendants avoid the consequences of their actions based on technicalities," the Anchorage Republican said. And to remedy that, he introduced a bill that would permit introduction of illegally obtained evidence if the trial judge decides the defendant's rights were not substantially violated.

The rape case cited above

would be one example where a person's rights were not substantially violated. No officer involved in that case was attempting to violate the man's rights. In fact, by taking an inventory of his possessions they were protecting him and themselves from any later charge that a piece of personal property might have been lost or stolen before the defendant was able to reclaim it after his discharge from jail.

One reads regularly about similar cases all over the country. Drugs uncovered in the trunk of a car stopped for a simple speeding arrest. Stolen goods found in a house when police enter to question a suspect about an unrelated incident. A murder gun found in the pocket of a person arrested for shoplifting. Those and more.

**NO ONE SHOULD** advocate a police-state mentality in the pursuit of those suspected of criminal activity.

But neither should criminals be turned free simply because of accidental or incidental discovery of evidence that by all common sense should be used against them.

In leaning over backward to protect the rights of the individual (a worthy and proper thing), the United States has let justice be denied by rigid adherence to the exclusionary rule.

Among the nations of the Western world, only the U.S. observes this rule. In Europe, the taking of illegal evidence indeed is punished — but the criminal does not escape.

There, the criminal goes to jail. And then the law enforcement officer who used illegal means to obtain the evidence likewise, in turn, pays a penalty for violating the law.

Sen. Dankworth's bill should be enacted by this legislature.

why should Rule 37 be  
amended at all

ALL IT DOES IS AUTHORIZE A MOTION  
TO SUPPRESS

All we need is to amend  
the evidentiary rule

focus on a narrow range of case

why amend at all

by adding to Rule 412 the following

and

(3)

451/570

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*If the search is unreasonable, is the evidence admitted?*

## PART II

GEE and VANCE, Circuit Judges: \*\*\*

Many of the thirteen judges who join in this opinion do not disagree with that prepared by Judge Politz for a different majority of the court; several formally concur in it. It is our view, however, that the drugs suppressed as evidence by the trial judge and by our panel should not have been and that to suppress them was wrong whether or not Williams' violation of a bond condition was such a crime as warranted her arrest and the consequent search of her person that revealed their presence.

The facts material to our view of this case are so simply stated that we reiterate them for the reader's convenience.<sup>1</sup> Special Agent Markonni, of the Drug Enforcement Administration, had previously arrested defendant Jo Ann Williams for running drugs. Pending her appeal from conviction of that offense, he knew that she was free on bond conditioned that she remain within the State of Ohio. While on duty at the Atlanta airport, he saw her deplane from an incoming, nonstop flight from Los Angeles. As she proceeded toward the departure gate for a flight to Kentucky on which she held a ticket, he arrested her for "bail jumping." A search pursuant to that arrest revealed that she was again running heroin.

Indicted for this second drug offense, committed while free on bail from the first, Williams moved to suppress the fruits of the search conducted pursuant to Markonni's arrest. The district court suppressed this evidence. On appeal from its ruling, a panel of our court affirmed. It reasoned that since violation of a bond condition was not a criminal offense such that a warrantless arrest could be made for it, both the arrest and the search pursuant to it were invalid. It therefore suppressed the heroin found as "fruit of the poisonous tree."

\*\*\* Concurred in by Chief Judge Coleman and Judges Brown, Ainsworth, Charles Clark, Rooney, Tjoflat, Hill, Fay, Garza, Reavley, and Sam D. Johnson.

In the panel's view, Agent Markonni's reasonable belief, held in an unquestioned good faith, that he was authorized to arrest Williams cut no figure in the analysis. Judge Charles Clark, dissenting, would have refused to apply the exclusionary rule in such circumstances. We took the case en banc to decide this question.

[9] Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where officers in the course of their duties are taken in good faith and reasonable belief, though mistaken, believe they are authorized. We do so because the exclusionary rule exists to deter willful, flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high—in this instance the release on the public of a recidivist drug smuggler—with few or no offsetting benefits. We are persuaded that both reason and authority support this conclusion.

*The "Good-Faith Exception"*

Analytically, it matters little whether reasonable, good-faith police actions be viewed simply as beyond the reach of the rule or as constituting an exception to its application. Since numerous writers and judges have employed the latter formulation, we shall do so here. One commentator defines the "exception" as follows: "when an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate." Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J.Crim.L. & Criminology 635, 635 (1978).

In fourth amendment cases, most good faith violations concern the failure to

1. Judge Politz' foregoing opinion, or that of the panel, 594 F.2d 86 (5th Cir. 1979), may be consulted for a more detailed account. No warrant is involved here, hence nothing that we say applies to factual situations where one has been obtained.

Cite as 622 F.2d 830 (1980)

meet the requirement of probable cause. Two basic types of violation are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of "good faith mistake." Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled. In each of these cases, the officer may be deemed to have committed a "technical violation."

*Id.* at 638-39 (emphasis added and footnotes omitted). The Supreme Court and the circuit have all but explicitly adopted the technical violation exception of the good-faith exception, and each has rendered several decisions that implicitly, at least, support the good-faith exception. We discuss these opinions in detail below. Many writers have advocated the exception; among them Professor Charles Alvin Wright, no minor authority on criminal procedure, who proposes modifying the rule so that "the criminal is to go free if the constable has flouted the fourth amendment but not if he has made an honest blunder."<sup>2</sup> Judge Henry Friendly has suggested limiting suppression to "the fruit of activity intentionally or flagrantly illegal."<sup>3</sup>

At least four current members of the United States Supreme Court have urged the adoption of a good-faith exception to the exclusionary rule.<sup>4</sup> Ball, *supra* at 635. *E.g., Stone v. Powell*, 428 U.S. 465, 558, 96 S.Ct. 3037, 3073, 49 L.Ed.2d 1067 (1976)

2. C. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 *Tex. L. Rev.* 736, 740 (1972).
3. H. Friendly, *Benchmarks*, 260-62 (1967).
4. Justice White stated:

[T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurring evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the

(White, J., dissenting);<sup>4</sup> *Brown v. Illinois*, 422 U.S. 590, 610-12, 95 S.Ct. 2254, 2265-66, 45 L.Ed.2d 416 (1975) (Powell, J., concurring). The Supreme Court, in a long series of recent decisions, has restricted its application of the rule so that it is not as broad as it ever was—coextensive with the fourth amendment. *E.g., Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 367 (1978); *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 218 (1978); *Stone v. Powell*, *supra*; *United States v. Junis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). We think that reason plainly demands explicit recognition of a reasonable good-faith exception as well.<sup>4a</sup>

*Justification for the Good-Faith Exception*

[10, 11] The exclusionary rule is now well settled, is not itself a requirement of the Constitution. *E.g., Stone v. Powell*, *supra*, 428 U.S. at 482, 96 S.Ct. at 3046; *United States v. Calandra*, *supra* 414 U.S. at 348, 94 S.Ct. at 620. Rather, it is a judge-made rule crafted to enforce constitutional requirements, justified in the context of the occurrence of

purposes of the rule, even though the trial will be seriously affected or the indictment dismissed. (Emphasis added.)

- 4a. We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast break-ins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.

future police actions.<sup>5</sup> The rule's application, moreover, must be considered in light of its direct effect of preventing the "whole truth" from being told and its by-products of freeing guilty criminals and endangering society.<sup>6</sup> Consequently, the rule is not applied in those contexts where it does not effectively deter official misconduct. E. g., *Stone v. Powell*, 428 U.S. at 486-87, 96 S.Ct. at 3048-49; *United States v. Calandra*, 414 U.S. at 348, 351-52, 94 S.Ct. at 620, 621-22; *United States v. Cruz*, 581 F.2d 535, 538 n.1 (5th Cir. 1978) (en banc). Such a context is that of technically improper police actions taken in a reasonable good faith, as is persuasively argued by Judge Clark in his dissent to the panel opinion:

No proper deterrent effect is accomplished by the suppression of the evidence in this case. Field officers are seldom trained as legal technicians. Even those who are may have mistakenly thought that Officer Markonni's arrest was proper. Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred. If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice. Unless an officer knows or should know his activities transgress the bounds of law, the evidence discovered by such activity ought not be suppressed.

5. E. g., *Michigan v. DeFillippo*, 99 S.Ct. at 2633 n.3; *United States v. Cruz*, 581 F.2d 535, 538 n.1 (5th Cir. 1978) (en banc).

*United States v. Williams*, 594 F.2d 86, 97-98 (5th Cir. 1979). It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all. The Supreme Court recognized this in *Janis* in admitting evidence obtained in good faith under a warrant later found defective. "[T]he officers here were clearly acting in good faith, . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion. See *Michigan v. Tucker*, 417 U.S., at 447 [94 S.Ct., at 2365]; *United States v. Peltier*, 422 U.S., at 539 [95 S.Ct., at 2118]." 428 U.S., at 459 n.35, 96 S.Ct., at 3034 n.35. Justice White as well has noted this lack of any deterrent effect:

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

*Stone v. Powell*, 428 U.S. at 540, 96 S.Ct. at 3073-74 (White, J.; dissenting). And again, Professor Wright has pithily observed that "the police officer will not be deterred from illegal search if he does not know that it is illegal." Wright, *supra* at 740.

Any slight deterrent effect excluding fruits of good-faith arrests is even less than the small deterrence from suppressing the fruits of illegal police actions that are attenuated in effect, that are challenged in habeas corpus petitions on fourth amendment grounds, that are used in grand jury

6. E. g., *Stone v. Powell*, 428 U.S. at 485-91, 96 S.Ct. at 3050-51; *Irvine v. California*, 347 U.S. 128, 136, 74 S.Ct. 381, 385, 98 L.Ed. 561 (1954), and especially *United States v. Lamas*, 608 F.2d 547, 550 (5th Cir. 1979).

deliberations, or that are used for impeachment. Yet the Supreme Court has found that the deterrent effect of exclusion in the examples listed and others does not justify the societal harm incurred by suppressing relevant and incriminating evidence. *United States v. Ceccolini*, 435 U.S. 368, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, *supra*; *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). The good-faith exception that we explicitly recognize today is of a kind with these.

*Support in Authority for the Technical Violation Facet of the Good-Faith Exception*

[2] The most common forms of ~~border~~ ~~violations~~ made in good faith are arrests made in good-faith reliance on a statute that is later declared unconstitutional or, as here, on a reasonable interpretation of a statute that is later construed differently. ~~Of course, the exception applies only if the police believe in both bona fide and reasonable. Suppression will result if officers allege a good faith belief in a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws or in a law that violated a controlling precedent that [it] was unconstitutional.~~ *Michigan v. DeFillippo*, 443 U.S. at 38, 99 S.Ct. at 2632.

In *DeFillippo* the Supreme Court admitted evidence seized in a good-faith arrest with probable cause (without a warrant) for violation of a law later declared unconstitutional. An officer arrested *DeFillippo* in good-faith reliance on such an ordinance, finding drugs in a search of *DeFillippo's* person made incident to the arrest. The Court ruled, in words that seem applicable

7. *Cert. denied*, 429 U.S. 848, 97 S.Ct. 134, 50 L.Ed.2d 121 (1976), *modified on other grounds sub nom. United States v. Ashley*, 569 F.2d 975,

to Officer Markonni's search of Williams' person and luggage:

[T]here was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

*Id.* 99 S.Ct. at 2632. This decision was rendered after the instant panel decision, so the panel did not have the benefit of the Supreme Court's disposition of this closely analogous fact situation.

In *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), the Supreme Court admitted evidence seized in a good faith border search without a warrant ~~under a statutory construction that was subsequently held unconstitutional.~~ Border patrol agents made a warrantless search of *Peltier's* automobile, in reliance on a longstanding administrative definition, continuously approved judicially, of a reasonable distance from the border for such searches as 100 miles; and *Peltier* was convicted on evidence seized during that border search. The Supreme Court later overturned that definition of a reasonable distance. The Court refused to exclude the challenged evidence and refused to apply that subsequent decision retroactively: "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542, 95 S.Ct. at 2320.

In *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976),<sup>7</sup> we sustained an arrest and search made in good faith under a statute later declared invalid. The *Cardens* were arrested and searched under an ordinance

979 (5th Cir.), *cert. denied*, 439 U.S. 853, 99 S.Ct. 163, 58 L.Ed.2d 159 (1978).

against loitering, and a large bag of coins found in the search was used to convict them of robbing a government building. The ordinance was subsequently found unconstitutional, but the evidence derived from the good-faith search was not excluded.

This Court has held more than once that an arrest made in good faith reliance on a statute not yet declared unconstitutional is valid regardless of the actual constitutionality of the ordinance. *Hamrick v. Wainwright*, 465 F.2d 940 (5 Cir. 1972); *United States v. Kilgen*, 445 F.2d 287 (5 Cir. 1971). See also . . . *Moffett v. Wainwright*, 512 F.2d 495, 502 n.6 (5 Cir. 1975). While appellants would be entitled to attack the constitutionality of any convictions under the Anniston ordinance, ~~there is no bar to the use of evidence~~ other crimes obtained during ~~investigation~~ for violation of a law which was ~~valid when the arrest was made.~~" 465 F.2d at 941-42.

[W]e have been reluctant to, and will not in this case, also require that [police officers] forecast future judicial decisions as to the constitutionality of the statutes under which they must make arrests. There is no evidence whatsoever in the record that the arresting officers did not believe that the Anniston loitering ordinance was constitutionally valid. No judicial decision existed, or now exists so far as we know, to negate that conclusion. Under such circumstances, we must reject the Cardens' attempt to assert the unconstitutionality of the ordinance to invalidate their arrest.

*Id.* at 445.

In *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971), this circuit admitted evidence obtained in good faith under a similar statute. Kilgen was arrested and charged in good faith with violation of a vagrancy ordinance, and he consented to the officer's opening an automobile trunk where the officer saw numerous postage stamps and money orders. Kilgen confessed to the crime of stealing these things. We sustained admission of the confession because the police had arrested Kilgen in good faith,

and hence exclusion would not deter any official misconduct, although the ordinance was later overturned.

But overturning a [vagrancy] conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good-faith belief in the validity of the statute. . . . There is no hint of any abusive police conduct in effecting the arrest or in obtaining the evidence used at the trial for another crime. . . . In short, this is a clear case of police officers who, with the utmost regard for the rights of the defendant, carried out their sworn duty to make an arrest and obtain evidence under the law as it then existed. No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid.

*Id.* at 289. See also *United States v. Warren*, 578 F.2d 1058, 1077 n.17 (5th Cir. 1978) (en banc), rehearing en banc granted, 589 F.2d 254 (5th Cir. 1979) ("The validity of an arrest depends upon the reasonableness of the officers' actions at the time of the arrest and not upon what a court may glean from a statute three and a half years later. This rule is well established even where the statute under which the arrest was made is after declared unconstitutional.").

*Support in Authority for the Good-Faith Mistake Facet of the Exclusionary Rule*

[13] If Officer Markonni was mistaken in his belief that Williams' violation of her bond conditions authorized him to arrest her, as the trial court and our panel both held he was, his mistake was one made in a manifest good faith. ~~Much authority also supports this facet of the exception that we reiterate: requires a reason; he belief, as well as a good-faith belief, on the part of law enforcement officials.~~

In *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the Supreme Court refused to exclude from a

Cite as 622 F.2d 830 (1980)

federal tax proceeding evidence that had been obtained by state police in good-faith reliance on a search warrant later found defective. State police had seized wagering records and cash from Janis under a search warrant issued on allegations of bookmaking. A state court, finding the officer's affidavit that supported the warrant defective, suppressed that evidence. The Internal Revenue Service assessed Janis for excise taxes on wagering and levied on the seized cash. Janis filed a refund suit in district court and moved to suppress that evidence. The Supreme Court stated the issue and then resolved it as follows: "Is evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, inadmissible in a civil proceeding by or against the United States?" *Id.* at 434, 96 S.Ct. at 3023 (emphasis added).

~~We conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion.~~ This Court, therefore, is not justified in so extending the exclusionary rule.

*Id.* at 454, 96 S.Ct. at 3032 (footnote omitted).

In *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Court declined to exclude the testimony of a witness located as the result of statements made by the accused during police interrogation administered "in complete good faith" but without proper *Miranda* warnings. The police questioned Tucker after his arrest for rape without giving full *Miranda* warning, and he voluntarily gave the alibi that he had been with Henderson. Henderson subsequently testified against Tucker, and Tucker moved to suppress his incriminatory statements on the ground that his identity was obtained in the im-

proper interrogation. The Supreme Court admitted Henderson's testimony.

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. ~~Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.~~

*Id.* at 447, 94 S.Ct. at 2365.<sup>8</sup>

In *United States v. Hill*, 500 F.2d 315, 322 (5th Cir. 1974), cert. denied, 420 U.S. 931, 95 S.Ct. 1135, 43 L.Ed.2d 404 (1975), this circuit admitted evidence obtained in a search although the warrant was technically improper. The search warrant was issued upon an insufficient affidavit of a law enforcement agent, and the subsequent search of Hill's residence yielded heroin. We admitted the heroin and affirmed Hill's conviction because we allowed the affidavit to be bolstered by the sworn testimony of the agent before the magistrate.

[T]his situation furnishes no occasion to apply the exclusionary rule to bar the evidence of Hill's criminality that was obtained in executing the warrant. Phillips acted properly in going to the magistrate and seeking a warrant. Magistrate Sear acted properly in calling for additional information to demonstrate credibility. Thus, the only error attributable to the procedure they followed is a technical one that would in no way serve the deterrent purposes of the rule.

*Id.* at 322 (alternative ground).

In *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), we refused to exclude evidence obtained through improper collabora-

8. Although the accused in *Tucker* had been questioned before *Miranda*, that does not distinguish the instant case, because *Miranda* has been held retroactive. *Johnson v. New Jersey*,

384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 862 (1966). See *Michigan v. Tucker*, 417 U.S. at 447-48, 94 S.Ct. at 2365.

tion of federal and state agents. Pugh, a member of the United States Army, arranged a marijuana purchase from Wolffs at the suggestion of a county sheriff. An Army investigator and some sheriff's office personnel arrested Wolffs and his accomplices and seized the marijuana, thus violating the Posse Comitatus Act, 18 U.S.C. § 1385. The panel, recognizing the agents' good faith in that this was an isolated act, refused to apply the exclusionary rule.

[A]ssuming without deciding that there was a violation, application of an exclusionary rule is not warranted. If this Court should be confronted in the future with widespread and repeated violations of the Posse Comitatus Act an exclusionary rule can be fashioned at that time.

594 F.2d at 85. See also *Leary v. United States*, 544 F.2d 1266, 1270-71 (5th Cir. 1977).

The recent decision of the Supreme Court in *Ybarra v. Illinois*, 444 U.S. 85, 96, n.11, 100 S.Ct. 338, 345 n.11, 62 L.Ed.2d 238 (1979), does not militate against the good-faith exception. The Court there held that a search of Ybarra and other patrons of a bar violated the fourth amendment because it was not authorized by a warrant to search the bartender and was not justified by probable cause to believe that Ybarra possessed heroin or a reasonable belief to anticipate that he was armed. ~~Exclusion of~~

~~evidence seized without any probable cause is an entirely different question from suppression of evidence seized upon a good-faith and reasonable belief in the existence of probable cause.~~

The Supreme Court in *DeFillippo, supra*, while refusing to exclude evidence seized in good-faith reliance on a subsequently invalidated statute, noted that "the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes . . . which purported to authorize the searches in question without probable cause." 99 S.Ct. at 2633. And the Court in *Ybarra* distinguished *DeFillippo* on precisely this basis when it em-

phasized that the "statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause." 444 U.S. 96 n.11, 100 S.Ct. 345 n.11.

*Application of the Good-Faith Exception to This Case*

[14] Officer Markonni recognized with certainty that Williams was in violation of her bail limitations and that she was arriving from the very city from which she had obtained the heroin that caused her first conviction, rendered on a guilty plea. He acted in a good-faith belief that Williams' conduct violated 18 U.S.C. § 3146. This circuit at the time of the arrest had not ruled that a person violating bail requirements, but not a court appearance date, could or could not be arrested on that basis, and the only circuit that had inferentially done so had sustained the conviction.<sup>9</sup> Officer Markonni also acted under a reasonable, whether or not mistaken, belief and should not be charged with knowledge that a future panel decision would construe section 3146 to apply only to bond jumping that involved missing a court appearance. This case presents the questions both of a "good-faith mistake," an action under a reasonable factual error about an element of the crime defined in section 3146, and a good-faith technical violation, an action under a reasonable interpretation of the arrest power under section 3146 that was subsequently reconstructed by our panel. Williams is not on trial for bail jumping. Williams is on trial for possession of a large quantity of heroin. A good-faith mistake about the legal intricacies of bail jumping would not require exclusion of that heroin found in an incidental search.

*Conclusion*

[15] Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evi-

9. *United States v. Avery*, 447 F.2d 978 (4th Cir. 1971), cert. denied, 405 U.S. 930, 92 S.Ct. 984,

30 L.Ed.2d 804 (1972).

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dence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence. Neither Markonni's good faith nor its reasonableness are questioned here, and a proper allocation of the burden of proof on this issue is therefore not squarely presented by the facts of this case. We therefore leave that matter to another day, going no further than to delineate the "exception" itself explicitly and to recognize that where the proponent establishes it, the evidence should be received if otherwise admissible.

Predictably, it will be argued that today's decision undercuts the fourth amendment. Not so; it concerns only the exclusionary rule, one device—but not the sole one—for enforcing the amendment, and a device that is already far from co-extensive with the amendment itself. As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad-faith police conduct.

Where the reason for a rule ceases, the rule should also cease—a familiar maxim carrying special force here. For here the cost of applying the rule is one paid in coin minted from the very core of our factfinding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth and censured if they do.

~~This is a high price indeed, and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had.~~

Such a continued wooden application of the rule beyond its proper ambit to situations that its purposes cannot serve bids fair to destroy the rule entirely in the long run. For the reasons we have stated, in addition to and independent of those given in Judge Politz' opinion, the decision of the district court excluding Williams' heroin and the panel opinion affirming it are

REVERSED.

JAMES C. HILL, Circuit Judge, with whom, FAY, Circuit Judge, joins, concurring specially:

I concur in the result reached in this case. I write briefly to explain why I agree with the approach proposed by Judges Gee and Vance.

Application of the Exclusionary Rule often requires us to set free the guilty because the constable, in good faith, blundered. In such cases, "[t]he temptation becomes great to round off the edges of the Fourth Amendment to avoid the drastic result which obtains when the Exclusionary Rule is applied." *United States v. Lamas*, 608 F.2d 547, 550 (5th Cir. 1979). The good faith exception articulated by Judges Gee and Vance provides a sensible approach to the problem. It allows us to come to a just result without cutting away at the Fourth Amendment and, at the same time, without removing the deterrent effect of the Exclusionary Rule.

I am intrigued, but not persuaded, by the new approach urged upon us by Judge Rubin. He suggests that because a majority can resolve the issue before us (admissibility of the evidence *vel non*) by deciding the constitutionality of the search, we should not address the admissibility of the evidence on other grounds. I believe the order of address is the other way around. If we find the evidence admissible without regard to the constitutional question, we should decline to reach and decide the latter. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936).

My brother Rubin's scholarly exposition of possible rationales for the exclusionary rule other than deterrence carries with it the implication that, if there be no other reason, the opinion authored by Judges Gee and Vance is correct. While other possible bases have been proffered from time to time, *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 persuades me that they do not survive. Justice Brennan's eloquent dissent, quoted by Judge Rubin (p. 850), reveals that the issue of their

survival was clearly before the court. Were the rule grounded upon the necessity of avoiding "the taint of partnership in official lawlessness," it would exclude all evidence obtained in contravention of the Fourth Amendment. However,

[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Aiderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Wong Sun v. United States* [371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441], *supra*; *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search. (414 U.S. at 348, 94 S.Ct. at 620)

The majority in *Calandra* says: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *Id.* at 348, 94 S.Ct. at 620.

Except that deterrence fails, *Asan and U.*

We seek to deter violations of constitutional guarantees, not just to deter action of a law enforcement officer contrary to his or her deficient understanding of the law. This requires that law enforcement personnel acquaint themselves with those guarantees (by being deterred from persistent ig-

norance) and be disposed towards respecting them. This is the reason for making it clear that subjective good faith will not, by itself, suffice. Judge Rubin, in his footnote 4 (p. 850), suggests that the thrust of the opinion by Judges Gee and Vance might just as well reach evidence obtained in subjective good faith alone. That reads the opinion beyond its logic. That would reward ignorance. The rule we announce encourages learning.

ALVIN B. RUBIN, Circuit Judge, with whom GODBOLD, KRAVITCH, FRANK M. JOHNSON, Jr., POLITZ, HATCHETT, ANDERSON, RANDALL, TATE and THOMAS A. CLARK, Circuit Judges, join, specially concurring.

The twenty-four of us are rarely unanimous. However, none of us has expressed any doubt about the validity of the arrest of Jo Ann Williams and the resultant search of her person or the subsequent admissibility of the evidence thus found. Yet many of my brethren have seized the occasion to discuss what they consider an alternative ground for decision, but what is to me purely a hypothetical: whether the evidence would have been admissible had the search been unconstitutional. Judicial self-restraint should command us to defer until another day the discussion of issues that might have been material had the arrest been improper. Only in that event would it be necessary to consider whether evidence unconstitutionally taken must be suppressed. Only in that event would it even be appropriate for us to do so. I submit that those of my brethren who have joined in the separate opinion authored by Judges Gee and Vance and published as Part II, are "reach[ing] out" for a vehicle to change a long line of precedent," *Crist v. Cline*, 434 U.S. 380, 981, 98 S.Ct. 603, 604, 54 L.Ed.2d 475 (1977) (Marshall, J., dissenting from order restoring case to calendar for oral argument), and that their doing so will have harmful results apart from the merit or lack of merit of their views.

In his dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Nat-*

Cite as 622 F.2d 830 (1980)

otics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), Chief Justice Burger traced the evolution, criticisms and weaknesses of the exclusionary rule.<sup>1</sup> No more complete critique can be desired. Yet, while the Chief Justice of the United States proposed some narrowing of the thrust of the rule, he said:

I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. . . . I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

403 U.S. at 421-22, 91 S.Ct. at 2017, 29 L.Ed.2d 641.<sup>2</sup>

~~Legislation was at one time introduced to limit the application of the rule and to provide for damage actions against the United States. See S. 881, 93rd Cong., 1st Sess., 119 Cong.Rec. 4195 (1973). Further congressional attempts to deal with the issue may be anticipated.~~

It is needless to catalog the many decisions and the extensive literature in support of the exclusionary rule.<sup>3</sup> My brethren find that four justices of the Supreme Court have written in support of some modification of the rule. However, five members of the Court up to now have not suggested its qualification, and they constitute a majority. No other circuit court has altered the rule. Consideration of these factors should make us hesitate to rush in with our own newly devised judicial solutions. Those who join in the opinion authored by Judges

1. The Chief Justice stated:

Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. See Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 Sup.Ct.Rev. 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Ch.L.Rev. 665, 667 (1970).

403 U.S. at 416, 91 S.Ct. at 2014, 29 L.Ed.2d at 636.

Geer and Vance can cite no direct precedent for their conclusions save dissents and law review articles, many of which are polemic. They advocate modification of the exclusionary rule solely because, as applied, they think it ineffective to deter police misconduct and because they consider deterrence its exclusive purpose.

~~Deterrence is an important reason for the rule. However, even the decision in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), did not consider it the only basis of the rule. Justice Day's opinion relies on the duty of the courts to support the Constitution and to refuse to sanction practices destructive of rights secured by it. As the Supreme Court later observed:~~

"[T]here is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

*Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081, 1092 (1961) (citation omitted).

Justice Brennan elaborated on this rationale for the rule in his dissent in *United States v. Calandra*, 414 U.S. 338, 357-58, 94 S.Ct. 613, 624-25, 38 L.Ed.2d 561, 576-77 (1971):

The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the

2. In his concurring opinion in *Stone v. Powell*, 428 U.S. 465, 497, 96 S.Ct. 3037, 3053, 49 L.Ed.2d 1067 (1976), the Chief Justice said that the time had come to modify the reach of the rule "even if it is retained for a small and limited category of cases."

3. See, e.g., Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing'*, 62 *Judicature* 337 (1979), cf. 1 W. LaFare, *Search and Seizure* § 1.2 (1978).

people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

That these considerations, not the rule's possible deterrent effect, were uppermost in the minds of the framers of the rule clearly emerges from the decision which fashioned it:

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law.

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

4. Part II does not make clear the scope of the shield of either good faith or of reasonableness. It raises many questions. For example, does the reasonable-good-faith doctrine permit introduction of evidence taken under an invalid search warrant because the policeman reasonably believed it to be valid? Does it shield only errors of fact or both errors of fact and errors of law?

While I do not consider this a proper occasion for discussion of the merits of the exclusionary rule either in general or as applied to this case, I must point out that the solution advocated by my brethren in Part II raises questions that warrant debate. When we are confronted with a case whose resolution truly turns on the exclusionary rule, I would consider all of the Supreme Court precedents. If they allowed us, as judges of an inferior court, sufficient latitude, I would consider all of the arguments for and against the rule and not merely its potential for deterring police misconduct. On that occasion, I would examine more closely the logic of the remedy proposed in Part II. My brethren reason that the exclusionary rule is

This protection is equal, extended to the action of the government and officers of the law acting under it . . .

To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks v. United States*, 232 U.S. 383, 391-392, 394, 34 S.Ct. 341, 344, 345, 58 L.Ed. 652 (1914).

The rule has also been justified, notably by the late Justice Hugo Black, on the basis that the relationship between the fourth amendment and the self-incrimination clause of the fifth amendment requires suppression. See *Mapp v. Ohio*, 367 U.S. 643, 661-666, 81 S.Ct. 1684, 1694-1698, 6 L.Ed.2d 1081, 1093-96 (1961) (concurring opinion). See also *Wolf v. Colorado*, 338 U.S. 25, 41-42, 48, 69 S.Ct. 1359, 1368-69, 93 L.Ed. 1782, 1793 (1949) (Rutledge, J., dissenting).

Whether or not the rule should be modified, these opinions warrant the full and direct consideration they have not received in Part II. The announcement of a radical change in the scope of the exclusionary rule creates a host of interpretative problems.<sup>4</sup> Its application presumably will require re-

"justified in the illegal search context only by its deterrence of future police misconduct." P. 841 *supra*. They say, "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all. . . . [A] police officer will not be deterred from an illegal search if he does not know that it is illegal." P. 842 *supra*.

If this is correct, it appears needless to require the police officer's subjective good faith also be objectively reasonable. A police man who is in complete subjective good faith is unlikely to stop to ask himself, "Am I also reasonable?" The additional criterion that the mistaken belief that the officer is acting correctly must also be reasonable suggests uneasiness with the reliability of a good faith test. It cannot be justified on the unsupported supposition that if the police know good faith alone will not suffice, they will also be encouraged to learn constitutional law and deterred from acting in either ignorance or unreasonableness.

trial of almost every motion to suppress in every criminal case now pending before us on appeal and in many cases now pending in district courts. In many trials, motions to suppress will be denied, defendants will be convicted, their convictions will be appealed and there will be no finality until the Supreme Court decides. The announcement of the rule as an alternative ground for decision in a case where all the court agrees on the result virtually immunizes this case from Supreme Court review. We must, therefore, await another case where the issue is directly raised and decide the question again before there can be reasonable hope that the Supreme Court will review what we do. I must, therefore, express my regret that this case has been utilized as a vehicle to disseminate a doctrine unnecessary to its decision. The merit or lack of merit of action that is so gratuitous need not at this time be further discussed.

the Eastern District of Louisiana, Morey L. Sear, J., found the carrier liable for the cargo damage but awarded no damages, finding that the shipper had presented insufficient evidence of damage. Carrier and shipper appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) the district court's findings that the carrier breached its duty to inspect the cargo of soybeans during a 74-day delay in shipping and that its negligent failure to inspect the soybeans resulted in their deterioration were not clearly erroneous, and (2) the proper measure of damages where the shipper blended the deteriorated beans with a higher grade of soybeans and sold the blend at a price equal to the original market value of the cargo was not the cost of blending the deteriorated soybeans with the higher grade beans, but was the usual measure of damages, the difference between the fair market value of the cargo at the place of destination, in like condition as when it was shipped, and its actual value at the place of destination.

Affirmed in part, reversed in part and remanded.

#### 1. Shipping ⇐ 131

Usual measure of damages for injury to goods in possession of carrier is difference between fair market value of cargo at place of destination, in like condition as when it was shipped, and its actual value at place of destination.

#### 2. Shipping ⇐ 132(5)

In action by shipper against carrier for injury to cargo of soybeans aboard carrier's vessel, district court's findings that carrier had duty to inspect cargo during 74-day delay in shipping and that its failure to do so caused deterioration of soybeans were not clearly erroneous.

#### 3. Shipping ⇐ 120

Common carrier is under continuing duty to protect shipper's cargo against damage while cargo remains in carrier's custody, including obligation to inspect cargo



COOK INDUSTRIES, INC., Plaintiff-Appellant Cross-Appellee,

v.

BARGE UM-308, her tackle, apparel, etc., in rem, Defendant,

Upper Mississippi Towing Corporation, in personam, Defendant-Appellee  
Cross-Appellant.

No. 78-2797.

United States Court of Appeals,  
Fifth Circuit.

July 31, 1980.

Shipper sued carrier for injury to a cargo of soybeans aboard the carrier's vessel. The United States District Court for

# Bill would water down state exclusionary rule

Times Juneau Bureau

**Juneau** — A bill that would let some evidence that was obtained illegally be used against suspects of major crimes has been introduced by Rep. Sam Pestinger, R-Anchorage.

The proposal would weaken the so-called exclusionary rule. Under the rule, evidence obtained illegally — when police violate a suspect's constitutional rights — cannot be used in court against the person.

Law-and-order advocates see the exclusionary rule as a legal technicality that can thwart police investigations, hamper prosecution strategy and sometimes free criminals who ought to be punished.

Pestinger said he is not seek-

ing a sweeping revision of the exclusionary rule.

"What I'd like to see is that a search based upon a warrant that contains a technical defect in the warrant, and the officer is acting in good faith on the warrant. We want that evidence to be introduced."

"We do have some basic civil rights here that we have to protect," he said. But evidence should not be withheld if a warrant lists the wrong color of a house to be searched and the rest of the case is valid, he said.

The exclusionary rule was established by a series of legal precedents, based on the constitutional prohibition of illegal searches and seizures.

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The Court found his statements concerning the bribe admissible although given after a request for counsel since they constituted an independent crime, declaring that "legal assistance does not give immunity for a new crime committed in the presence of police officers." Here, the bribe offer furnished a valid, independent basis for interrogation where defendant took the risk that his offer would be recorded.

A defendant who asks for counsel in one breath and in the next, without awaiting the arrival of counsel and in the absence of provocation, makes a bribe offer, shows that he views the need for legal assistance as limited to "legal proceedings that will ensue but considers himself quite competent to seek an illegal end to his predicament."

In denying suppression of the cocaine, the Court found defendant's conduct both uncoerced and so bizarre (\$10,000 bribe for a traffic offense) that a police officer offered such a bribe would quite naturally ask questions. No unfairness occurs in creating a further exception to the waiver of counsel rule only in the presence of counsel when a defendant attempts to subvert justice. Defendant's admissions were spontaneous in response to legitimate police inquiry, and, since they were related to his bribe offer, fell outside the protection of his right to counsel.

Defendant's admissions on possessing cocaine furnished probable cause for arrest. Not only was it seized after arrest but the information as to its location given as part of the bribe attempt, precluded any reasonable expectations of privacy.

In a dissent by Judge Jasen, a three-judge minority found admission of the cocaine offensive to the right to counsel. The dissent felt that the police are not relieved of their constitutional obligations to respect a defendant's request for counsel simply because during the course of prosecution, defendant commits another independent crime.

#### Search Warrant—Canine Reaction to Aroma of Contraband—Reliability of Dog's Senses (N.Y. Ct. of App.-12/22/81)

Suspicious of police at the Los Angeles airport were aroused by the profuse sweating and nervous behavior of defendants who displayed large sums of cash when they purchased tickets without reservations. A specially trained dog, Frog, was brought over to the baggage area and gave positive reactions, indicating the presence of drugs. Defendants were allowed to board the plane. State police in Buffalo, after securing a search warrant based upon these facts, found a substantial quantity of heroin in one of the defendant's suitcases.

The Court in *People v. Price* held that no warrant was required for Frog's initial activity, namely sniffing the air to determine if contraband was present in their luggage. Since there was no actual intrusion or search of the luggage, the defendant, who moved to suppress the seizure of the heroin on Fourth Amendment grounds, could not establish the clearly illogical proposition that he had a reasonable expectation "that the air surround-

ing his luggage and the odor apparent in that surrounding air will remain private."

Frog's 100% prior accuracy in over 700 drug detection cases and judicial notice of mankind's longtime use of the superior senses of dogs, precluded production of the "canine cannabis connoisseur" for in-court examination in the absence of any challenge to the dog's reliability.

*See* *Cul example of exclusionary rule problem*

#### Arrest Based on Erroneous Warrant Information—No Probable Cause

(N.Y. Ct. of App.-12/23/81)

A unanimous court in *People v. Jennings* reversed defendant's burglary convictions based on its finding that his arrest as a parole violator and the subsequent search and seizure of stolen items and defendant's palmprint incident to that arrest were not based on probable cause since the warrant relied on by the arresting officer had been vacated. A warrant for defendant's arrest was issued in November 1977 by the State Division of Parole and entered in the computerized records maintained by the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation's National Crime Information Center. The warrant was executed in January 1978 and a clearance form was filed with DCJS soon thereafter. A Supreme Court order vacated the parole violation warrant in June 1978. However, the warrant was maintained on DCJS files as an active violation warrant.

In September 1978 defendant's car was stopped for various traffic violations. In the course of writing tickets, the officer forwarded identifying information on defendant to local police headquarters for a standard warrant check with DCJS and the FBI via teletype. Within minutes the open warrant was reported back to headquarters which attempted, by teletype, to confirm the status of the warrant with the Division of Parole. Parole did not respond to the inquiry. Based on the open warrant, the officer arrested and searched defendant, discovering stolen jewelry on his person and other stolen goods in the trunk of the automobile. During processing at headquarters defendant's palmprint was taken and later matched with a print from a burglarized house. Defendant subsequently admitted that burglary.

In reversing defendant's conviction on the basis of his invalid arrest, the Court suppressed the items taken from his person and the trunk of the automobile as well as his palmprint and admission as "poisoned fruits" of the unlawful arrest. The Court rejected the prosecution's claim that the arresting officer's good faith reliance on the warrant information rendered the exclusionary rule inapplicable since "[a]n assessment of probable cause turns on what was reasonably and objectively in the mind of law enforcement authorities" and not subjective considerations such as absence of malice or lack of intent to violate constitutional rights. The Court also rejected the People's argument of inevitable discovery after an inventory search because the arresting officer had conceded that until he learned of the warrant he was only going to ticket defendant for the traffic violations.



## SUMMARY AND ANALYSIS

### Iowa Bar Can't Stop Lawyers From Direct Mail Advertising

The Iowa bar association cannot completely prohibit direct mail advertising by attorneys, nor can it prevent them from advertising their fees as "reasonable" or "moderate," the U.S. District Court for the Southern District of Iowa rules. It declares several Iowa disciplinary rules prohibiting such activities incompatible with the First Amendment. (*Bishop v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association*, 8/20/81).

In response to the approval of lawyer advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350, 45 LW 4895 (1977), the Iowa bar adopted rules prohibiting all forms of advertising not specifically listed. The list did not include direct mail advertising. In addition, the rules spelled out certain prohibitions, including any "subjective" characterization of fees as "cut-rate," "lowest," or "reasonable."

The court employs the test embodied in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 48 LW 4783 (1980), for determining the constitutional limits on commercial speech regulations. It concludes that while the state may have legitimate interests in regulating direct mail advertising, total prohibition is more extensive than necessary to serve those interests. Moreover, the court notes, direct mail advertising has received constitutional clearance in both Kentucky and New York.

As to the subjective characterization rule, the court approves the ban on "hucksterish" adjectives such as "cut-rate" and "give-away," but, it says, the First Amendment protects the "verifiable truthful use of restrained adjectives" such as "reasonable," "very reasonable," and "moderate." (Page 2161)

### Ky. Court Refuses To Suppress Drugs In Light Of Police Officers' Good Faith

The Kentucky Court of Appeals refuses to order the suppression of drugs whose seizure, while perhaps technically illegal, was accomplished by officers who acted reasonably and in complete good

faith. The court does not adopt a specific "good faith" exception to the exclusionary rule, as the Fifth Circuit appears to have done in *U.S. v. Williams*, 622 F2d 830, 49 LW 2161 (1980). But it does quote extensively from that case. Also cited is *People v. Adams*, 442 NE2d 537, 49 LW 2736 (1981), in which the New York Court of Appeals took a "good faith" approach to consent searches. (*Richmond v. Commonwealth*, 7/31/81, received 9/10/81)

The evidence in this case was seized pursuant to a warrant issued by a magistrate from another jurisdiction. The court doubts that such a warrant is legal, but it finds no controlling decisions on the matter and refuses to resolve the issue here. Instead it concludes that, regardless of the warrant's lawfulness, the fruits of the search should not be suppressed because neither the police nor the issuing magistrate had any reason to believe they were acting illegally.

"We simply hold here," the court says, "limited to the facts of this case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the reasonable and good faith belief that the conduct was legal." (Page 2162)

### Employer Must Prove Equal Pay Act Defense In Sex Bias Suit Under Title VII

In a suit under Title VII of the 1964 Civil Rights Act alleging pay differentials based on sex, the female plaintiff, of course, must persuade the trier of fact that females are paid less than males for doing the same work. But, the U.S. District Court for the Eastern District of California decides, once the plaintiff establishes that fact, the employer has the burden of proving, not just proffering evidence, that the pay differential is authorized by one of the four affirmative defenses contained in the Equal Pay Act. That's different, the court carefully explains, from Title VII litigation not involving sex-based pay differentials where the burden of persuasion always remains with the plaintiff. (*Kouba v. Allstate Insurance Co.*, 9/3/81)

A female insurance sales trainee alleged that her employer discriminated against females by setting

and the dispatcher's radio calls to the police cars were affirmative actions setting the emergency machinery in motion."

Although there is no direct evidence that the victim detrimentally relied on the assurance of police assistance, the court finds circumstantial evidence that "strongly suggests that she did so. She could have summoned help from police in the village where she lived or from her neighbors and she could have left her house, but instead she remained inside. (Page 2182)

### Costs Outweigh Benefits

#### EXCLUSIONARY RULE COMES UNDER FIRE IN WASHINGTON STATE

In a case that reflects the current ferment over the Fourth Amendment exclusionary rule, a majority of the Washington Supreme Court refuses to apply the rule to official actions that violated not the Constitution or Washington law but a neighboring state's law. Police officers from Washington arrested the defendant in Oregon and brought him back into their own jurisdiction, offending several Oregon statutes in the process. The defendant challenged the admission of a confession he subsequently gave as the fruit of the poisonous tree. Noting that this is a case of first impression in Washington, the majority employs a balancing test and determines that the exclusionary rule is not applicable to cases such as this one. (State v. Bonds, 11/10/82)

While the U.S. Supreme Court has seemingly limited the justifications for the exclusionary rule to deterrence only, the Washington majority takes a more expansive view, noting that the goals of the rule also include preservation of the judiciary's dignity and, "most important," protection of privacy interests. Even so, the costs of applying the rule in this case outweigh its benefits, the majority says. The arresting officers had probable cause to arrest the defendant and "fell short only of the Oregon rule that a private citizen may not arrest for a felony committed out of his presence. This rule goes beyond what we consider necessary to protect the privacy interests of individuals." Furthermore, there are plenty of deterrents for future misconduct of this kind — the officers could face criminal charges, state civil actions, and federal civil rights suits. In addition, judicial integrity would not be endangered by admission of the confession.

The exclusion of the defendant's confession would undercut the state's entire case against the defendant, "whose guilt is not questioned," the majority adds. The "improper" return of the defendant "was merely incidental to the arrest and represented no new intrusion into defendant's privacy. It represented more of an affront to the rights of the State of Oregon than of the defendant."

The majority warns, however, that it will use its supervisory power to exclude evidence obtained as a result of future unauthorized violations, if potential liability does not deter such conduct.

Justice Utter dissents on the ground that the rendition of the defendant into Washington, absent a judicial finding of probable cause, violated the Fourth Amendment. The arrest and rendition violated Washington as well as Oregon law, he adds. (Page 2183)

*Legislation* — The exclusionary rule is also undergoing close scrutiny in another arena — Congress. The House Judiciary Subcommittee, conducting a series of hearings into the operation of the rule, recently addressed the question of whether the rule should be qualified with a "good faith" exception. However, all three witnesses who testified at the hearing gave the idea very negative reviews.

The first witness, a law professor, focused his opening remarks on the possible implications of the Supreme Court's recent order of reargument in *Illinois v. Gates* (see 32 CrL 1033). He opined that the Court might be prepared to adopt a limited version of the good-faith exception in that case but expressed the view that such a course would stop the development of Fourth Amendment law.

This sentiment was echoed by the second witness, who represented an organization of police executives. She said the good-faith exception had little merit and in its place proposed a scheme whereby responsibility for unconstitutional police behavior would be placed on police administrators and not on individual officers. Under this system, if the prosecution showed that a police department met certain training and recording requirements the challenged evidence would be admitted.

The final witness appeared on behalf of the Philadelphia Bar Association and voiced that Bar's disagreement with any major change in the exclusionary rule. Change would require years of settled case law to be discarded and would be a waste of judicial resources, he said. The witness also told the subcommittee that it may not have authority to change the rule. (Page 2197)

### Comprehensive Review

#### LEGALITY OF ABORTION RESTRICTIONS ARGUED BEFORE U.S. SUPREME COURT

For the first time since the U.S. Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973), which most observers believe announced an unfettered right to abortion during the first three months of pregnancy, the Court is conducting a comprehensive review of state and local restrictions on abortion. The Court heard oral argument last week in cases that could refine the "compelling" state inter-

Riss. They distinguish *Schuster v. City of New York*, 5 NY2d 75, where the special relationship giving rise to liability was found in the obligation owed by the municipality to an informer who, at the risk of his life, had given information to the police.

The defendant's argument misses the mark. It is not the establishment of the emergency call system to serve the Village of Kenmore, standing alone, which creates the duty. It is the holding out of the 911 number as one to be called by someone in need of assistance, Amalia DeLong's placing of the call in reliance on that holding out, and her further reliance on the response to her plea for immediate help: "Okay, right away." This is not a mere failure to furnish police protection, owed to the public generally but a case where the municipality has assumed a duty to a particular person which it must perform "in a nonnegligent manner, [although without the] voluntary assumption of that duty, none would have otherwise existed" (*Florence v. Goldberg*, 44 NY2d 189, 196). The complaint writer's acceptance of the call, his transmittal of the complaint card to the dispatcher and the dispatcher's radio calls to the police cars were affirmative actions setting the emergency machinery in motion. This voluntary assumption of a duty to act carried with it the obligation to act with reasonable care \* \* \*. [End Text]

But, the city and county argue, failing to fulfill an undertaking to provide police protection does not result in liability unless it be shown that the police conduct in some way increased the risk. They maintain that the evidence does not establish that the conduct had gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury. In other words, they argue, although the hand may have been set to the task and withdrawn, it has resulted in no harm. We disagree.

[Text] While there could in this case be no direct evidence that Amalia DeLong relied to her ultimate detriment on the assurance of police assistance, the circumstantial evidence strongly suggests that she did so. Instead of summoning help from the Village police or from her neighbors \* \* \*, she waited for the response to her 911 call. Instead of taking her baby and going out the front door where she would have been safe, she remained defenseless in the house. [End Text]

Nor can we agree that the proof was insufficient to establish proximate cause. Where different inferences may reasonably be drawn from the evidence, the question is one for the jury. Here, the jury could have concluded that, without the critical mistakes in handling the initial transmission and the subsequent failure to conduct a follow-up, a village police car would have arrived in time to prevent the attack or to stop the intruder before he could inflict the final fatal wound to the neck - Hancock. J.

(*DeLong v. County of Erie*, NY Sup Ct, App Div, 4th Dept, 11/9/82)

#### WASHINGTON BALANCES COSTS, BENEFITS OF EXCLUSIONARY RULE

*Confession resulting from illegal arrest in neighboring state is admissible.* ▶20,520  
▶10,55 ▶30,15 ▶100,75,3

In a case of first impression in that state, a majority of the Washington Supreme Court declines to apply the exclusionary rule to the confession of a murder defendant whose arrest in Oregon by police officers from Washington violated Oregon law. The illegality of the arrest and return of the defendant to Washington falls short of a constitutional violation; it violated only the laws of a neighboring state, the court says. Such circumstances justify application of a balancing test to determine if the benefits of applying the exclusionary rule outweigh the costs of its application.

In this case, the cost of applying the rule is substantial, the majority declares; the state's case would be undermined. On the other hand, the protection of privacy interests of individuals, deterrence of police misconduct, and preservation of the judiciary's dignity would not be significantly endangered by the failure to apply the rule.

The majority also refuses to suppress the trial testimony of a psychiatrist who had been appointed to assist defense counsel at an earlier juvenile court jurisdictional hearing, but testified for the state, in rebuttal, at the trial itself. When the defendant raises the insanity defense, the majority says, statements uttered in the context of a psychiatric examination are not protected by the Fifth Amendment, and the attorney-client privilege does not cover the psychiatrist's testimony.

Justice Utter, dissenting, maintains that the rendition of the defendant into Washington, without a judicial finding of probable cause, violated the Fourth Amendment. Furthermore, the arrest and rendition violated both Oregon and Washington law, he says. He concurs with the majority's ruling that the psychiatrist's testimony was admissible, but disagrees with the majority's conclusion that the attorney-client privilege should not extend to a psychiatrist's testimony when the insanity issue is raised by the defense. (*State v. Bonds*, 11/10/82)

*Digest of Opinion* Defendant Dudley Mark Bonds lived in Vancouver, Washington. Bonds was 16 years old when, on the evening of November 14, 1978, he raped and murdered an elderly woman in her home. On November 21, two detectives from the Vancouver Police Department, acting on information that Bonds was employed by a Portland, Oregon, restaurant, went to the restaurant and then to a nearby shopping mall, where they located Bonds.

After Bonds confirmed his identity, he was told that he had been reported by his father as a runaway and that the officers wanted him to return with them to Vancouver. The detectives did not tell Bonds that he was a suspect in a homicide and burglary, that he was being arrested for these crimes, or that they intended to interrogate him regarding these crimes upon returning him to the Vancouver police station. Defendant asked the officers what would happen if he refused to return with them to Vancouver. They said he would be turned over to the Multnomah County, Oregon, juvenile authorities, who would detain him in their custody. Defendant then told the detectives that he would return with them to Vancouver.

As the detectives accompanied defendant from the shopping mall to their vehicle, they told him not to run from them, and one of the officers took him by the upper arm and led him to the car. The detectives then drove defendant to the Vancouver police station. They did not explain to him that he had a right to contest in an Oregon court his return to the state of Washington. The officers had no warrant for defendant's arrest and no attempt had been made to obtain a warrant.

At the police station, Bonds was read his Miranda rights and subsequently confessed. Bonds was charged with five felonies arising out of the events which culminated in the victim's death. A "juvenile decline hearing" was held to determine whether Bonds would be tried as an adult. To assist defense counsel in preparation for this hearing, the court ordered the appointment of Dr. Guy Parvaresh, a psychiatrist, and Dr. Dean Harris, a psychologist. At this time, Dr. Parvaresh interviewed Bonds and elicited incriminating statements from him. The juvenile court heard testimony and argument and declined jurisdiction. Bonds was remanded to Clark County Superior Court, where he was charged with first degree murder, first degree rape, and first degree burglary. He pleaded not guilty and not guilty by reason of insanity.

Prior to trial, hearing was held to determine the admissibility of Bonds' confession and other evidence obtained subsequent to his arrest in Portland. The evidence was ruled admissible. Also prior to trial, Bonds moved in limine against the state's using Dr. Parvaresh as a rebuttal witness; the motion was denied.

At trial, defendant presented an insanity defense. The jury convicted Bonds of first degree murder, first degree rape, and first degree burglary. He appealed to the court of appeals, and we accepted certification.

The Vancouver police officers violated Oregon law in arresting Bonds and removing him to Washington. First, Oregon statutes were violated by the arrest. The police officers were not Oregon peace officers (ORS 133.005(3)), or persons authorized by Oregon law to take juveniles into custody (ORS 419.569(1)). For purposes of Oregon law, they were only private citizens and could arrest only for offenses committed in their presence (ORS 133.225). The arrest of Bonds was not for an offense committed in their presence and therefore violated Oregon statutes. Second, the officers made no attempt to comply with Oregon extradition procedures, under the Interstate Compacts on Juveniles and Children, Juvenile Services (ORS 417), and the Uniform Criminal Extradition Act, (ORS 133.743-133.992).

It is not disputed that the officers had probable cause to arrest Bonds. Therefore, although no warrant for his arrest had been obtained, the arrest met the standards of reasonableness prescribed by the Fourth Amendment. There is therefore no Fourth Amendment violation to require or justify the exclusion of Bonds' confession.

In this state, we have not limited the exclusionary rule to protection of the constitutional immunity from unreasonable search and seizure. Instead, we have extended the rule beyond the original Fourth Amendment context to suppress evidence obtained pursuant to an unlawful misdemeanor arrest. The rule has also been applied when a statute is violated in the course of obtaining evidence.

[Text] We have not, however, previously had the opportunity to consider the application of the exclusionary rule where the arresting officers violate, not statutes of this state, but statutes of a neighboring state. Arguably, such an arrest is illegal and therefore justifies the application of the exclusionary rule without further discussion. . . . However, we decline to mechanically apply the exclusionary rule in this case without considering whether the benefits to be obtained from its application outweigh the costs imposed.

By balancing the competing costs and benefits in this case, we do not intend to suggest that such a balancing should be carried out whenever the operation of the exclusionary rule is an issue. When evidence is obtained in violation of the defendant's constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved. . . . Evidence obtained as a result of an unreasonable search or seizure must be suppressed. However, where evidence is obtained through an illegality which falls short of a violation of the defendant's constitutional immunity, and where no violation of this state's laws has occurred, we hold that balancing of the costs and benefits of exclusion is appropriate. See *Stone v. Powell*, 428 U.S. 465, 488 (1976). The illegally obtained evidence should be suppressed unless the costs of suppression in the particular case outweigh the benefits achieved by suppression. . . .

[T]he exclusionary rule should be applied to achieve three objectives: first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means. We now proceed to consider the extent to which these objectives would be attained by excluding the confession in the present case.

The privacy interests of individuals against unreasonable intrusions are protected in this state by the requirement that to be constitutionally valid an arrest must be reasonable. . . . In the present case, the police officers who arrested defendant had

probable cause to believe he had committed a felony in Washington. The officers fell short only of the Oregon rule that a private citizen may not arrest for a felony committed out of his presence. This rule goes beyond what we consider necessary to protect the privacy interests of individuals. Its violation therefore does not represent the kind of intrusion that the exclusionary rule is designed to prevent. Application of the rule in this case would therefore not advance the primary purpose which underlies the rule.

However, the second and third purposes of the rule might be served by application of the rule in this case. Unauthorized police excursions into neighboring states would certainly be deterred by a refusal to admit evidence obtained as a result of such activities. However, we feel that in this case alternative deterrents are available. The police officers concede that they were acting as private citizens in Oregon and therefore may well be exposed to civilian criminal or civil liability for unlawful arrest under Oregon law. Even police officers may suffer civil liability if the civil rights of the arrested person were violated. . . . If such potential liability does not constitute sufficient deterrence of police officers' making unauthorized excursions into another jurisdiction, let it be understood that we will not hesitate in the future to use our supervisory power to exclude the fruits of such unauthorized excursions. . . .

The final purpose of the rule, preservation of judicial integrity, would also be served by the application of the rule. However, this consideration is not absolute. . . . and in this case is mitigated somewhat by the arrest being consistent with standards recognized by this court.

We turn now to consider the costs of applying the rule. These are substantial. Defendant's confession was crucial to the State's case against him. It implicated him in three terrible crimes. It is not claimed that the illegality impaired the credibility of the confession. Suppression would threaten the State's entire case against defendant, whose guilt is not questioned. We have little hesitation in concluding that these costs clearly outweigh the limited benefits which would be obtained from excluding the confession because of the illegal arrest.

The second phase of the police officer's illegal conduct was the return of defendant to Washington. The officers cavalierly ignored Oregon extradition proceedings and summarily removed defendant across the Columbia River into Washington. However, such illegality does not constitute a violation of due process. . . . Nor, in our opinion, does it constitute reason for the operation of the exclusionary rule. The summary removal of defendant into Washington took only a few minutes and was accomplished peacefully, without threats and with defendant's concurrence. The improper interstate rendition was merely incidental to the arrest and represented no new intrusion into defendant's privacy. It represented more of an affront to the rights of the State of Oregon than of the defendant. Accordingly, we conclude that the fact that the arrest was followed by a violation of Oregon extradition procedures does not shift the balance of costs and benefits which we have already discussed. We therefore affirm the trial court's refusal to suppress defendant's confession.

We do not, by admitting defendant's confession, in any way condone the extraterritorial activities of the police officers in this case. . . . Although the blatant violation of Oregon laws did not warrant exclusion of the evidence in this case, we reiterate our determination to exercise our supervisory powers to exclude evidence for such violations in the future. [End Text]

Bonds argues that the attorney-client privilege precluded Dr. Parvaresh from testifying against him. He also argues that his Fifth Amendment privilege against self-incrimination was violated by the testimony of Dr. Parvaresh. Although Bonds contends that the two privileges are intertwined, we find that a rational resolution of the issue can be achieved only by disentangling them.

The Supreme Court recognizes that statements uttered in the context of a psychiatric examination are removed from the reach of the Fifth Amendment when the defendant raises the insanity defense. See *Estelle v. Smith*, 451 U.S. 454, 29 CrL

3031 (1981). We hold that Dr. Parvaresh's testimony was not protected by the Fifth Amendment.

[Text] A complete and convincing discussion of why full disclosure outweighs the benefits of the privilege is made in Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 Va. L. Rev. 597, 635-42 (1980). Briefly, Saltzburg argues that the defense psychiatrist's examination of defendant is likely to be more accurate on the issue of insanity than that of the prosecution's. The defense psychiatrist will generally examine defendant earlier than the prosecution. The examination will thus be closer to the time of the offense, when defendant's recollections are clearer and there is less likelihood that defendant's mental condition has changed. Moreover, a defendant might benefit by undergoing several psychiatric examinations, examining reports of psychiatrists unfavorable to his insanity defense, and tailoring his response in subsequent examinations more favorably to his defense. Defendant is also likely to be more cooperative with his own psychiatrist and give a more accurate impression of his mental condition. Saltzburg argues, and we agree, that for these reasons all available evidence of defendant's mental condition should be put before the jury. [End Text]

In *State v. Huson*, 440 P2d 192 (1968), this court noted that "because of defendant's special plea of mental irresponsibility, anything said or done by him was relevant to his mental condition and therefore admissible."

[Text] Therefore, the attorney-client privilege should not extend to the testimony of a psychiatrist when the issue of insanity is raised by the defense. [End Text]

The trial court did not err in admitting the testimony of Dr. Parvaresh — Pearson, J.

*Dissent.* By illegally rendering Bonds into Washington without benefit of a judicial finding of probable cause, the police officers violated the Fourth Amendment.

Even if I were to assume that the U.S. Constitution does not require this result, state law does. The arrest violates Washington as well as Oregon law. No Washington statute can or does authorize arrests outside of Washington. Furthermore, Bonds' extradition violated both states' laws. Both Oregon and Washington laws reflect the requirement of a charge filed against an individual before that individual may be legally extradited. Only where an out-of-state officer is in fresh pursuit of a suspect may he or she arrest outside state boundaries without a preexisting charge against the suspect. Bonds had not been charged with a crime nor had an arrest warrant issued at the time the officers unlawfully seized him. This unlawful seizure of Bonds dictates suppression of any evidence obtained as a result of these unlawful acts. Furthermore, Bonds' confession was not sufficiently attenuated from the illegality to justify denial of suppression.

While I concur with the majority's result in dealing with the admissibility of Dr. Parvaresh's testimony, I disagree with the majority's broad assertion that "the attorney-client privilege should not extend to the testimony of a psychiatrist when the issue of insanity is raised by the defense."

[Text] An attorney must have the freedom to consult with and the defendant must feel free to communicate with a psychiatrist retained for the purposes of facilitating the attorney-client relationship. If the prosecution could call such a psychiatrist when the defendant raises the insanity defense even when such psychiatrist is not called as a witness at any prior proceeding of the case, the attorney-client relationship would be substantially inhibited. [End Text] — Utter, J. (*State v. Bonds*; Wash Sup Ct, 11/10/82)

#### OREGON USES "REASONABLENESS" TEST FOR SEARCH INCIDENT TO ARREST

*Court rejects Supreme Court's approach in U.S. v. Robinson.* ▶15.431

A majority of the Oregon Supreme Court adopts a different, perhaps more restrictive, test for upholding a search incident to an arrest than the one adopted by the

U.S. Supreme Court in *U.S. v. Robinson*, 414 U.S. 218 (1973). In *Robinson*, the Court held that a law enforcement officer's authority to make a full search incident to a lawful custodial arrest requires no justification beyond the fact of the arrest itself. The Oregon high court followed *Robinson* in *State v. Florance*, 527 P2d 1202 (1974), but decides to stop doing so. Instead, after examining the state constitution's warrant requirement, the majority makes the validity of a search incident to an arrest turn on whether the search is relevant to the crime for which a defendant is arrested and on the reasonableness of the search under the circumstances.

After the defendant was arrested in this case, her purse was taken from her. She was handcuffed and placed in a police car with a barrier between the front and back seats. The arresting officer, who held the defendant's purse in the front seat, opened it, found a wallet inside, opened the wallet's coin compartment, and found pills that turned out to be amphetamines.

Based on the fact that the arrest was for possession of a controlled substance, it was reasonable to believe that the defendant would carry contraband in her purse, the majority says. The defendant's admission that she was selling drugs, her companion's statement to that effect, and the closeness of the search in time and space to the arrest demonstrate the reasonableness of the search.

Justice Campbell, joined by Justice Tanzer, concurs in the result, based on an analysis of *Robinson* and other cases. The defendant's purse was personal property "immediately associated with the person of the arrestee" and therefore subject to a search incident to an arrest.

Chief Justice Lent dissents on the ground that no exigent circumstances justified the warrantless search of the purse. (*State v. Caraher*, 11/2/82)

*Digest of Opinion.* [Text] The issue in this case is whether a search of defendant's purse, including the opening of the coin compartment of a wallet within that purse, conducted without a warrant, after defendant was arrested and placed in a police car and the purse had been taken from her, is a search incident to arrest and therefore an exception to the warrant requirement of the fourth amendment to the U.S. Constitution and article I, section 9 of the Oregon Constitution. [End Text]

Police, arriving at the scene of a reported street altercation in Portland, found defendant Lois Marie Caraher lying on the hood of a parked car in a semi-conscious state. After she was revived, police questioned her about her activity in the area and she said that she was selling "bunk." Caraher's companion said that she had cocaine on her person. On the basis of these statements, an officer searched Caraher before handcuffing her and taking her into what one officer termed "protective custody" and another termed a "civil hold."

In a pocket of the jacket Caraher was wearing the officer found paper "bundles" containing a white powder. The officer, suspecting the substance to be cocaine, placed Caraher under arrest for possession of a controlled substance. A search of Caraher's person uncovered no further contraband or weapons. Her purse was taken from her. She was handcuffed and placed in the back seat of a police car which had a barrier between the front and back seats. On the way to the booking facility, the police officer who had made the arrest and who had Caraher's purse in the front seat opened the purse, found a wallet inside, opened the coin compartment of the wallet and found a white piece of paper, inside of which was a white cross-top pill and chunks of a similar pill. Subsequent lab analysis revealed the pills were amphetamines.

The trial court and the court of appeals upheld the search.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.	5
CONCLUSION	43

TABLE OF CITATIONS

	<u>Page</u>
<u>Adams v. Williams,</u> 407 U.S. 143 (1972)	11
<u>Aquilar v. Texas,</u> 378 U.S. 108 (1964)	38
<u>Belton v. New York,</u> 453 U.S. 454 (1981)	36, 37
<u>Bivens v. Six Unknown</u> <u>Named Agents,</u> 403 U.S. 388 (1971)	24

<u>Bonner v. Prichard,</u> 661 F.2d 1206 (11th Cir. 1981) (en banc)	22
<u>Brewer v. Williams,</u> 430 U.S. 387 (1977)	7
<u>Brown v. Illinois,</u> 422 U.S. 590 (1975)	8, 33
<u>Commonwealth v. Sheppard,</u> N.E.2d _____, 32 Cr.L. 2158 (Mass., Opinion filed Oct. 26, 1982)	28
<u>Coolidge v. New Hampshire,</u> 403 U.S. 443 (1971)	28, 32, 33, 41, 42
<u>Desist v. United States,</u> 394 U.S. 244 (1969)	17
<u>Draper v. United States,</u> 358 U.S. 307 (1959)	39
<u>Drumheller v. Commonwealth,</u> 29 S.E.2d 602 (Va. 1982)	27
<u>Franks v. Delaware,</u> 438 U.S. 154 (1978)	31
<u>Gerstein v. Pugh,</u> 420 U.S. 103 (1975)	33
<u>Gifford v. State,</u> 630 S.W.2d 387 (Tex.Crim.App. 1982)	27
<u>Giordene v. United States,</u> 357 U.S. 480 (1958)	38

<u>Harris v. New York,</u> 401 U.S. 222 (1971)	19
<u>Holloman v. Commonwealth,</u> 275 S.E.2d 620 (Va. 1981)	27
<u>Johnson v. United States,</u> 333 U.S. 10 (1948)	31, 42
<u>Linkletter v. Walker,</u> 381 U.S. 628 (1965)	15, 16
<u>Mapp v. Ohio,</u> 367 U.S. 643 (1961)	i, 1, 16, 23, 31
<u>Michigan v. DeFillippo,</u> 443 U.S. 31 (1979)	13, 27, 40, 41
<u>Michigan v. Tucker,</u> 417 U.S. 433 (1974)	15
<u>Nathanson v. United States,</u> 290 U.S. 41 (1933)	38
<u>Oregon v. Hass,</u> 420 U.S. 714 (1975)	19
<u>Payton v. New York,</u> 445 U.S. 573 (1980)	35
<u>People v. Defora,</u> 242 N.Y. 13, 150 N.E. 585 (N.Y. 1926)	8
<u>Rakas v. Illinois,</u> 439 U.S. 128 (1978)	18
<u>Robberson Steel Co. v.</u> <u>Occupational Safety and</u> <u>Health Review Comm.,</u> 645 F.2d 22 (10th Cir. 1980)	28

<u>Robbins v. California</u> , 453 U.S. 420 (1981)	36, 37
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218, n.24 (1973)	5
<u>Smith v. Hoath</u> , 691 F.2d 220 (6th Cir. 1982)	25
<u>Spinelli v. United States</u> , 393 U.S. 410 (1969)	38
<u>State v. Harbaugh</u> , 326 A.2d 821 (Vt. 1974)	27
<u>State v. Lehnen</u> , 403 So.2d 683 (La. 1981)	27
<u>State v. Mincey</u> , 636 P.2d 637 (Ariz. 1981)	26
<u>Stone v. Powell</u> , 428 U.S. 465 (1976)	7, 8
<u>United States v. Calandra</u> , 414 U.S. 338 (1974)	20
<u>United States v. Havens</u> , 446 U.S. 620 (1980)	19
<u>United States v. Hill</u> , 500 F.2d 315 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975)	42
<u>United States v. Janis</u> , 428 U.S. 433 (1976)	19
<u>United States v. Johnson</u> , U.S. _____, 73 L.Ed.2d 272 (1982)	17

<u>United States v. Payner,</u> 447 U.S. 727, 735 (1980)	18
<u>United States v. Peltier,</u> 422 U.S. 531 (1975)	14, 17
<u>United States v. Ross,</u> U.S. _____, 72 L.Ed.2d 572 (1982)	36, 37, 38
<u>United States v. Ventresca,</u> 380 U.S. 102 (1965)	34, 35
<u>United States v. Williams,</u> cert. denied, 449 U.S. 1127 (1981)	21, 22, 26, 27, 28, 29, 41
<u>Walder v. United States,</u> 347 U.S. 62 (1954)	19
<u>Weeks v. United States,</u> 232 U.S. 282 (1914)	i, 23
<u>Other Authorities</u>	
42 U.S.C. §1983	25
Colo. Rev. Stat. § 16-3-308	2, 29
Ariz. Rev. Stat. Ann. § 13-3925	2, 28
Utah Code Ann. §§ 78-16-1 through 11 (Interim Supp. 1982)	2, 25, 28
Fla. Const. of 1968, Art. I, § 12 (1982)	1
Cal. Const. Art. I, § 28(d)	29

Fourth Amendment, United States Constitution	i, 1, 7, 8
<u>Oaks, Studying the Exclusionary Rule in Search and Seizure,</u> 37 U. Chi. L. Rev. 665 (1970)	10
J. Fennelly, <u>Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason</u> (to be published in Notre Dame Law Review, Spring 1983)	40

No. 81-430

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and  
SUSAN GATES,

Respondents.

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On Writ of Certiorari to the  
Supreme Court of Illinois

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This brief is submitted by the State of  
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and private organization:

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**HISTORY**

Americans for Effective Law Enforcement, Inc. (AELE) was founded in 1966 as a non-profit corporation for the purpose of establishing an "organized voice" for the law-abiding citizens regarding this country's crime problem, and to lend support to professional law enforcement. Its founders were Fred E. Inbau, now John Henry Wigmore Professor of Law Emeritus, Northwestern University; the late O.W. Wilson, then Superintendent of the Chicago Police Department; the late Harold A. Smith, a former President of the Chicago Bar Association; James R. Thompson, then on the Faculty of Northwestern School of Law and now Governor of Illinois; Alan S. Ganz and Daniel B. Hales, both Chicago attor-

neys; and Richard B. Ogilvie, then Chairman of the Cook County Board, and later Governor of Illinois.

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AELE became functional in early 1967 after having received a tax-exempt ruling from the IRS. The first project undertaken was the filing of a "friend of the court" (amicus curiae) brief in the United States Supreme Court in support of the constitutionality of the essential police practice of stopping a person reasonably suspected of having committed a crime or about to commit one, and then, for the police officer's protection, to frisk the person being stopped to insure the officer against being shot or otherwise physically harmed. That first case, *Terry v. Ohio*, decided in 1968, resulted in

judicial approval of "stop and frisk."

Since the *Terry v. Ohio* case, and up until late 1982, AELE has filed 79 "friend of the court" briefs in the United States Supreme Court and in other federal and state appellate courts. Of 74 completed cases, only 20 or 27.0 percent were decided unfavorably to the AELE supported law enforcement position.

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# Exclusionary-Rule Fight Moves to Supreme Court

By STUART TAYLOR Jr.

Special to The New York Times

WASHINGTON, Jan. 25 — Must criminals invariably be set free when the evidence of their guilt has been obtained through unconstitutional searches and seizures?

Emphatically not, says the Reagan Administration. And the Supreme Court, which has ruled since 1961 that the evidence must be suppressed in such cases no matter how heinous the crimes, how clear the guilt of the defendants, or how technical the police errors, may be changing its collective mind.

The issue, which has spurred popular outrage and scholarly debate for decades, is at the heart of a battle between the Administration and civil libertarians that is now being waged on two fronts, in Congress and in a potentially historic Supreme Court case. It involves what lawyers call the "exclusionary rule" — the judicial doctrine that evidence obtained in violation of the Fourth Amendment's ban against "unreasonable searches and seizures" cannot be used in criminal prosecutions.

Abolishing or cutting back the exclusionary rule has long been at the top of the conservative anticrime agenda, although not all critics of the rule consider themselves conservatives. President Reagan campaigned against the exclusionary rule in 1980 and denounced it as "absurd" in a speech to a group of police chiefs in 1981.

## 'Good Faith' Argument

The Administration is expected to ask Congress again this year to create a broad new exception to the exclusionary rule, requiring Federal judges to admit evidence seized in violation of the Fourth Amendment if the officers acted "in the good faith, reasonable belief" that the seizure was legal.

Further, the Justice Department, in response to an unusual invitation from the Supreme Court, asked the Justices in mid-January to create such an exception with respect to state court prosecutions as well as Federal court prosecutions. A Court decision resolving the issue could head off a stormy fight in Congress, which is likely to wait and see what the Court does.

The Administration had already spent more than a year urging Congress to impose new limitations on the exclusionary rule when suddenly, in November, the scene of combat shifted. The Court said it would, in a pending case, consider creating a "good faith, reasonable belief" exception even without Congressional prompting.



Drawings by Tom Bloom

This would be the most sweeping limitation of the exclusionary rule since the Court first required its use in the Federal courts in 1914.

Any such limitation is strenuously opposed by many members of Congress, liberals especially, as well as the American Bar Association, the American Civil Liberties Union, at least two Supreme Court Justices and even a few prosecutors. They say dilution of the rule would encourage police lawlessness and imperil the liberties of the innocent as well as the guilty, without affecting the crime problem.

## Some Propose Abolition

But the record suggests strongly that, with the addition of Sandra Day O'Connor to the Court's conservative wing in 1981, a majority of the Justices may now favor the Administration proposal.

Some judges, including Chief Justice Warren E. Burger, have said they would like to go well beyond the Administration proposal, abolishing the exclusionary rule entirely and developing other means of enforcing the Fourth Amendment. They say the rule does not produce benefits sufficient to justify its costs.

Many Administration officials share this view. But they do not think they could sell such a drastic step to a majority of the Supreme Court or of Congress.

Few issues in the criminal law have stirred such strong passions as the ex-

clusionary rule, or subjected the courts to such vilification for being soft on crime. Legal scholars have argued endlessly over the rule's history, rationale and effects. Mr. Reagan and many ordinary citizens have been baffled and outraged by reports of cases in which criminals were freed on "technicalities" that required suppression of evidence establishing their guilt.

Why would the courts free a criminal on a technicality in any case?

## 'An Empty Promise'

The Supreme Court gave some weighty reasons in 1961 in a famous decision, *Mapp v. Ohio*, when it extended the exclusionary rule from prosecutions in the Federal courts to the state courts, saying that otherwise the Fourth Amendment would be "an empty promise."

The Court said it was necessary to deter police misconduct by removing the incentive to use unconstitutional means in search of evidence of crime, and that as a matter of principle and "judicial integrity," judges must not become accomplices in official lawlessness by sanctioning its use to obtain convictions.

Another factor stressed by advocates of the rule is that other legal means of putting teeth in the Fourth Amendment, such as suits for damages against officers who violate the Fourth Amendment, have proven ineffective. Even the Justice Depart-

ment virtually concedes that its skillfully reasoned, 6-3 Supreme Court brief, while hopefully that better remedy developed.

There is some evidence that the exclusionary rule has spurred departments to train their officers to comply with the Fourth Amendment. But the Justice Department argued that "the deterrent effect of the rule is drastically reduced, not wholly eliminated, when invoked to suppress evidence by a reasonably well-trained officer in the belief that he did not violate the Fourth Amendment."

## Warrant Ruled Invalid

The brief also said that officers making on-the-spot decisions cannot be expected to apply all the fine points of Amendment law that judges have laid down in a host of complex precedents, let alone to 5-to-4 Supreme Court decisions setting new fine points.

In the case now before the Court, *Illinois v. Gates*, the courts suppressed evidence that had been involved in a marijuana transaction. The search warrant obtained by the police on the basis of an anonymous tip had been issued without "probable cause" and was thus invalid. The Supreme Court entered the case as a first-time test.

The department seems to have a sympathetic hearing for a majority of the nine Justices. The department has already held the exclusionary rule inapplicable in habeas corpus cases and some other proceedings in recent years, reasoning that the benefits outweighed its costs.

While only Chief Justice William H. Rehnquist called for abolishing the rule, Justices Byron R. White, F. Powell Jr. and Harry Blackmun have also expressed doubt. And Justice O'Connor has supported for a "good faith" exception in her Senate confirmation hearing.

SB41

Bill Bryson, Esq

912 W 6th Ave

Anchorage 99501

(907) 277-8611

VP of TLH;  $\frac{1}{2}$  exec  
director of State Bar  
Represents view of the  
defense bar

# Justice defends 'exclusionary rule'

by Ralph Nichols  
Times Writer

Supreme Court Chief Justice Edmund Burke said Wednesday the "exclusionary rule" probably will be experimented with in attempts to reduce instances where judges exclude illegally obtained evidence from use against criminal defendants.

But Burke said before the Alaska Press Club he doesn't anticipate radical changes in either state or federal court rulings protecting the rights of the accused.

He said this includes both the exclusionary rule and the Miranda Rule — which requires that defendants be read their rights and given the opportunity to consult with an attorney before making a confession.

Burke said later "the Legislature probably is a greater source of the answer than the courts. The courts don't have much latitude."

But, he added, the state Supreme Court would strike down any law amending the exclusionary rule if it failed to meet constitutional protections against unreasonable searches and seizures.

The Legislature currently is considering Senate Bill 713, sponsored by Sen. Ed Dankworth, R-Anchorage, which would allow illegally obtained evidence to be introduced in court unless "the violation was substantial." It would require a judge, before excluding such evidence, to



EDMUND BURKE  
'There are no easy answers'

consider:

— "the extent to which exclusion will tend to prevent future deviations (by the defendant) from lawful conduct;

— "the extent to which privacy was invaded (and) the extent of deviation from lawful conduct;"

— "whether the peace officer acted in good faith and in the reason-

able belief that his actions were legally authorized."

Burke didn't comment on Dankworth's bill because, he said, eventually he might have to rule on it.

Problems with the exclusionary rule usually arise because a law enforcement officer forgot part of his job or tried to shortcut it, Burke said. This usually happens with younger officers, since "no competent (experienced) officer ought to be ignorant of Miranda, of the exclusion rule and the warrants required," he added.

The exclusion of illegally obtained evidence, which sometimes results in criminals going free on "mere technicalities," upsets many, Burke said. But, he added, the rule is intended to prohibit unlawful conduct by (law enforcement officers) who have sworn to uphold the law.

"We don't want the police coming to our house in the middle of the night knocking down the door, and we don't want to allow torture, either physical or mental," he said.

Burke noted that the late U.S. Supreme Court Justice Louis Brandeis said society can't condone and utilize and thereby become a party to unlawful conduct by its officers.

U.S. Supreme Court Justice Warren Burger has harshly criticized the exclusionary rule, saying "there is something wrong with a system that allows a defendant to escape the con-

sequences of good, sound evidence," Burke continued. Yet even Burger doesn't favor abolishing the rule, he said.

The exclusionary rule — both in state and federal courts — is like an "unwanted child," Burke said. "It is unwanted by those who criticize it, yet it is needed . . . There are no easy answers," he added.

Alaska State Legislature

SENATOR  
FRITZ PETTYJOHN  
SRA BOX 2385 M  
ANCHORAGE, ALASKA 99510  
907/345-5174



Senate

LEGISLATIVE ADDRESS  
POUCH V - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Mr. Jim Kentch  
3411 W. 64th Avenue  
Anchorage, Alaska 99502

Dear Mr. Kentch:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Fritz Pettyjohn".

Senator Fritz Pettyjohn

Alaska State Legislature

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FRITZ PETTYJOHN  
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907/345-5174



Senate

LEGISLATIVE ADDRESS  
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JUNEAU, ALASKA 99801  
907/465-3473

February 8, 1983

Anchorage Police Department  
Municipality of Anchorage  
Pouch 6-650  
Anchorage, Alaska 99502

Dear Peace Officers:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

  
Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

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907/465-3473

February 8, 1983

Anchorage Bar Association  
Post Office Box 3715  
Anchorage, Alaska 99501

Dear Attorneys:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

  
Senator Fritz Pettyjohn

# Alaska State Legislature

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907 345-5174



Senate

LEGISLATIVE ADDRESS  
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JUNEAU, ALASKA 99811  
907 465-3473

February 8, 1983

Alaska State Troopers  
Department of Public Safety  
Post Office Box 6188 Annex  
Anchorage, Alaska 99502

Dear Troopers:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

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Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

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JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

American Civil Liberties Union  
Post Office Box 10-1226  
Anchorage, Alaska 99511

Dear Attorneys:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

# Alaska State Legislature

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907.345-5174



Senate

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JUNEAU, ALASKA 99811  
907.465-3473

February 8, 1983

Mr. Mike Spaan, Esq.  
Assistant Attorney General  
United States Court House  
Federal Building, Room 6252  
701 "C" Street  
Anchorage, Alaska 99501

Dear Mike:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

A handwritten signature in black ink, appearing to read "Fritz Pettyjohn", with a long horizontal flourish extending to the right.

Senator Fritz Pettyjohn

Alaska State Legislature

SENATOR  
FRITZ PETTYJOHN  
SRA BOX 2385 M  
ANCHORAGE, ALASKA 99510  
907/345-5174



Senate

LEGISLATIVE ADDRESS  
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JUNEAU, ALASKA 99811  
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February 8, 1983

Alaska Bar Association  
Post Office Box 279  
Anchorage, Alaska 99510

Dear Attorneys:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

Alaska State Legislature



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LEGISLATIVE ADDRESS  
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JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Peace Officers Association  
Post Office Box 2381  
Anchorage, Alaska 99510

Dear Peace Officers:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

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Senator Fritz Pettyjohn

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February 8, 1983

Mr. Vic Krumm, Esq.  
District Attorney  
Third Judicial District  
941 W. 4th Avenue  
Anchorage, Alaska 99501

Dear Vic:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

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Senate

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JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Anchorage Chamber of Commerce  
415 "F" Street  
Anchorage, Alaska 99501

Dear Chamber Members:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

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Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

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JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Alaska Crime Commission  
c/o Anchorage Chamber of Commerce  
415 "F" Street  
Anchorage, Alaska 99501

Dear Commissioners:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

Alaska State Legislature



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JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Mr. Ben Esch, Esq.  
3223 W. 31st Avenue  
Anchorage, Alaska 99503

Dear Ben:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

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Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

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JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Ms. Holly Ploog  
701 W. 58th Avenue  
Anchorage, Alaska 99502

Dear Ms. Ploog:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

LEGISLATIVE ADDRESS

POUCH V · STATE CAPITOL  
JUNEAU, ALASKA 99811  
907/465-3473

February 8, 1983

Mr. Bill Cook, Esq.  
1007 W. 3rd Avenue #304  
Anchorage, Alaska 99501

Dear Bill:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

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Senator Fritz Pettyjohn

TO:           Judiciary Committee Members  
FROM:         John Gabrielli, Counsel  
DATE:         Feb. 8, 1983  
RE:           SB 49 - Exclusionary Rule

Additional materials on the captioned subject, recently received from the U.S. House of Representatives and other sources, copies of which will be available to you on request, are as follows:

Statement of Professor William M. Greenhalgh, Chairperson of American Bar Association's Legislation Committee, Criminal Justice Section, June 2, 1982--3 pgs.

Statement of Stephen H. Sachs, Attorney General of Maryland, June 9, 1982--23 pgs.

Statement of D. Lowell Jensen, Asst. U.S. Attorney General, June 2, 1982--24 pgs.

NOTE: Is it Time For a Change in The Exclusionary Rule? United States v. Williams and The Good Faith Exception, 60 Wash. L. Q. 161 (1982)--pgs.

To: Members of Judiciary Committee

From: Committee Counsel

DATE: 2/4/83

RE: Senate Bill 49

In addition to the materials previously provided to you and included in your SB 49 file, I have obtained the following:

R. Posner, Rethinking The Fourth Amendment (unpublished article dated Sept. 22, 1981, on file with the Georgetown Law Journal)--37 pgs..

Government's Amicus Curiae brief in Illinois vs. Gates (the good faith exception to the Exclusionary Rules case currently pending before the U.S. Supreme Court)--34 pgs.

Research letter and attachments, dated 2/6/81, from Barry Stern to Senator Rodey, discussing alternatives to good faith exceptions to Exclusionary Rule--10 pgs.

Geller, Is the Evidence in on the Exclusionary Rules?, 67 A.B.A. Journ. 1642 (1981)--4 pgs.

Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L. J. 1361 (1981)--34 pgs.

Geller, Enforcing the Fourth Amendment: The Exclusionary Rules and its Alternatives, 1975 Wash. U.L.Q. 621--101 pgs.

Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978)--22 pgs.

Colorado's Good-Faith Exception to the Exclusionary Rule, 11 Colo. Law. 410 (1982)--6 pgs.

Good Faith Exception to the Exclusionary Rule: The Amendment is not a Technicality, 11 Colo. Law 704 (1982)-- 5 pgs.

These materials are on file in my office (Capitol Bldg., Rm 123--Ext. 4451); copies will be provided on request.

## ALASKA BRIEFS

### FAA conducts seminar

Medical aspects of flying, including the way over-the-counter drugs can affect aviation safety, will be discussed by Dr. Norm Wilder, former Air Force flight surgeon who now practices in Anchorage, at an aviation safety-education seminar at 7 p.m. Feb. 14.

The seminar is part of a series of safety meetings conducted the second Monday of each month by Tom Carter, Federal Aviation Administration accident prevention specialist.

All Alaskan pilots and student pilots are invited to attend the meeting which will be held at FAA's Anchorage Flight Service Station building on Merrill Field.

### Question-answer session

District H-14 legislators, including Sens. Rick Halford and Tim Kelly and Reps. Walt Furnace and Ramona Barnes, will have an informal question-and-answer session at 6 p.m. Thursday.

Persons interested in participating should meet at the Legislative Information Center, 1024 W. Sixth Ave. and at Chester Valley Elementary School, 1750 Patter-

son. For more information, call 278-3668.

### Legislators meet voters

Legislators representing South Anchorage and the Kenai Peninsula, including Sens. Don Gilman and P. Fischer and Reps. Hugh Malone, Milo Fritz, Bette Cato and Mike Szymanski, will meet their

constituents at 7 p.m. Thursday.

The meeting will be an open question-and-answer format held via the teleconference at sites in Anchorage, Homer, Seward, Soldotna and Valdez.

For more information, call 278-3668.

### Hearing to review bill

The Senate Judiciary Committee, chaired by Sen. Bill Ray, will have a public hearing on a bill limited the use of judicial exclusion at 11:30 a.m. Wednesday.

The bill would "limit application of the exclusionary rule when a good faith search only results in technical violation of the constitutional guarantee against unlawful search and seizure."

The public is encouraged to participate at the Legislative Teleconference Network, 1024 W. Sixth Ave.

For copies of the bill or more information, call 278-3668.

### Public to discuss issues

State Rep. Rick Uehling, R-Anchorage, will have a public meeting for constituents of downtown district 12-A at 7 p.m. Friday.

The meeting will be in the second-floor conference room of the Anchorage Legislative Information Office at 1024 W. Sixth Ave. Current issues of concern and the various bills introduced in the legislature will be the topics for discussion.

District 12-A includes Fairview, City View, Government Hill, Airport Heights, Inlet View and downtown proper.

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# The Exclusionary Rule

*Justices to take question of policemen's good faith*



On May 3, 1978, the Bloomingdale, Illinois, police department received an anonymous handwritten letter alleging that Susan Gates and her husband, Lance, were planning to travel to Florida in a few days to make a drug buy. The letter described in some detail the Gateses' travel plans, stating that they would be driving back with \$100,000 in drugs and that they already had that amount of drugs stored in their basement.

For several days, police worked practically round the clock, according to prosecutors, and were able to verify such information as flight numbers and a change of address. On May 6 the police got a search warrant for the Gateses' home and car. The next day, as the Gateses drove up to their home, police executed the warrant and found several bundles of marijuana in the trunk of their Mercury and more marijuana, weapons, ammunition, drug paraphernalia and several scales in the house. The Gateses were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance, cocaine. Lance Gates was indicted in addition for possession of an unlicensed firearm. Their motion to quash the warrant as based on inadequate underlying facts was granted by Du Page County Circuit Court, and the Illinois Supreme Court affirmed.

Since 1961, the judicial deterrent to unconstitutional police intrusions has been a rule requiring exclusion at trial of otherwise relevant evidence. The U.S. Supreme Court has whittled away at the exclusionary rule since then, and now the court appears ready to modify it substantially to allow an exception where police acted on a reasonable good faith belief that their conduct was legal. The case chosen by the court to consider the viability of that rule is *Illinois v. Gates* (No. 81-430).

When the case was first argued last year before the U.S. Supreme Court, it was noteworthy because it gave the justices the opportunity to determine for the first time when police may use an anonymous tip to establish probable cause for issuance of a search war-

rant. Police informants usually are merely confidential; courts regard an *anonymous* tip as inherently unreliable as a basis for a probable cause finding.

As the case awaited decision, that issue alone caused stirrings in the press and also among criminal procedure authorities. But when the Supreme Court restored the *Gates* case to its calendar for reargument later this year on the additional issue of the good faith exception, a tremor went through both sides of the criminal bar. It was the first time the court had agreed to confront the question squarely.

Fourth Amendment experts agree that some major modification of the exclusionary rule is in the offing, but they disagree about how far the court will go with the good faith exception. Some say any good faith exception would be a significant erosion of the Warren Court's landmark decision in *Mapp v. Ohio*, which applied the exclusionary rule to the states. "I'm personally against any modification of the exclusionary rule because, as a practical matter, there's not much left of it anyway," said Yale Kamisar, professor at the University of Michigan Law School. But Kamisar and others concur that because police in the *Gates* case took the trouble to get a warrant, a good faith exception would not lessen the rule's deterrent effect on police misconduct in executing warrantless searches and seizures. "It would be less disturbing to modify the exclusionary rule where the police did make the effort to get a warrant," Kamisar said.

The problem with the *Gates* warrant is that it might not satisfy the two-prong test for judging the adequacy of an informer's tip in establishing probable cause: that there be facts showing both the informer's veracity and the source of his knowledge. Illinois recognized that inadequacy in asking the Supreme Court last February to consider a reasonable good faith exception "assuming, *arguendo*, that the information used to obtain the search warrant" was insufficient. The court denied the motion. Later, in oral arguments, several justices seemed to indicate that the affidavit "shrieked with probable cause," according to Allan Ackerman, a Chicago attorney for the *Gates* couple.

Nevertheless, the "weakest link" in



Moylan: A good faith exception in all cases would be a "very messy thing."

the affidavit was the paucity of information about how the informer knew the drugs were in the home—raising serious questions about the probable cause for that search, he said.

### *Summers: Put the fault where it belongs— with the judge.*

The high court's change of mind in agreeing to address the good faith exception issue (three justices dissented from the order granting reargument) has puzzled many observers. Judge Charles Moylan Jr. of the Maryland Court of Special Appeals surmises that the justices might find less than probable cause on the face of the affidavit, but that reasonable good faith efforts by the police brought the warrant up to constitutional standards.

With the question squarely before the court, the state argues that the court

should "get back to basics" by abolishing the two-prong test in anonymous tip situations, said Paul Biebel, first assistant Illinois attorney general. The test should apply only to information from confidential police informers, he said. With anonymous tips, "thorough diligent police work over a short period of time"—as in the *Gates* case—should be allowed to support any deficient probable cause, Biebel contended. And at any rate, the great detail of the tip and the extent of police corroboration cured any deficiency under the two-prong test, he added.

The exclusionary rule loses its purpose—detering illegal police conduct—when police did everything they could to satisfy the Fourth Amendment, said William Summers, supervising attorney for the International Association of Chiefs of Police. If the *Gates* affidavit failed the two-prong test, fault should be placed with the judge in issuing the warrant, not with the police, Summers said.

The case cited for the reasonable good faith exception is *U.S. v. Williams* (622 F.2d 830), a 1980 decision in which the U.S. Court of Appeals for the Fifth Circuit noted two situations in which the exception might apply. The first—if an officer is mistaken about the existence of facts sufficient to establish probable cause—might apply to the *Gates* case. The other situation arises when an officer relies on a statute, warrant or precedent that is later ruled invalid. The *Williams* holding has been followed in certain contexts by the highest courts of Delaware, Illinois, Kentucky, Louisiana and New York, according to Norman Darwick, IACP executive director.

Fourth Amendment scholars have expressed major misgivings, however, about the practicalities of implementing a good faith rule. The exception would cause Fourth Amendment law to "ossify," said Silas Wasserstrom, associate professor at Georgetown University Law Center. Judges would no longer have any reason to decide if there was any illegal police conduct if a case could be decided on the basis of a good faith belief, he added.

The biggest problem concerning the good faith exception is that the legal definition of probable cause—a reasonable belief—"breaks down and you get an ambiguous standard like a 'reasonable

unreasonable belief," said William Mertens, assistant professor at the University of Oklahoma College of Law and author of the amicus brief in *Gates* for the American Bar Association. "What you're saying is the police had a reasonable belief to act unreasonably," said Kamisar.

The effect of a "more spongy standard" for probable cause, Kamisar said, is that judges will have more leeway in issuing warrants. A good faith exception will "confront judges with an impossible task" of determining probable cause, and "their natural tendency will be to defer to the police," said Wayne LaFave, professor at the University of Illinois College of Law. LaFave theorizes that the high court might want to announce a good faith exception rule before Congress acts on a Reagan administration criminal justice bill that contains a reasonable good faith provision. (S. 2903 was left on the Senate calendar at the end of the last session.) He said five justices have leaned toward a good faith exception, including Justice Sandra Day O'Connor, who expressed reservations about the exclusionary rule during her confirmation hearing in September 1981.

Judge Moylan predicts the court will

not apply a good faith exception to all cases. "It would be very difficult to administer since it would involve going into the police officer's mind in every case," which would be "a very messy thing" given overcrowded court dockets. Moreover, Moylan said a broad good faith exception also "puts a premium on police ignorance," because "the dumb cop comes off having acted in good faith and the good cop comes off having acted in bad faith—he of all people should have known better."

Thus, Moylan agrees that because *Gates* involves a warrant, adoption of a good faith exception in that case would not gut the exclusionary rule. The two-prong test for assessing probable cause based on an informer's tip would still be good law, he said. But, he added, "we won't police the judges with the exclusionary rule" and henceforth an affidavit that fails the test might be re-deemed if the police had a reasonable good faith belief that there was probable cause. Under this type of theory, Kamisar said the limited good faith exception would apply where police obtained a warrant with only "plausible" probable cause, didn't falsify or misrepresent facts, and gave the investigation "a fair and honest shot." —*Bill Winter*



Kamisar: Is a "reasonable belief" enough?



Cooke: An attractive supply to cope with a monstrous demand.

## Out of Mothballs

### *Why not use retired judges?*

As one approach to the huge backlog facing New York's civil and criminal courts, a committee headed by former New York City Mayor John Lindsay has proposed creating the posts of judicial hearing officers and appointing retired judges to fill them.

More than 90 percent of the retired judges responding to a questionnaire sent by the committee, set up by Chief Judge Lawrence Cooke, said they were interested in serving the court system again.

The hearing officers would perform some of the duties now handled by sitting judges and referees, including hearing certain matters in civil proceedings, hearing and reporting on pretrial motions in criminal cases and with the consent of the parties, hearing minor criminal trials that don't require a jury.

The committee said its proposal's success would rest on "the willingness of the sitting judges to . . . put judicial muscle behind" the new officers and on lawyers' use of them. The committee said only minor legislative changes would be necessary to enact its proposal, along with an appropriation that would pay the retired judges \$200 a day.

Cooke said the committee's report "offers an attractive and new item of supply to cope with the monstrous demand being imposed upon our judicial system and its components." He praised its members, urging them to continue "until the whole job is done."

—*Martha Middleton*

Sun. 1/24/83  
103

THE LEGISLATURE OF THE STATE OF ALASKA  
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB 49

Title "An Act relating to the exclusionary rule ...."

Requested by Senate Judiciary Committee Date 1/24/83

II. FISCAL DETAIL

Agency Affected Department of Law

Program Category Affected Administration of Justice

ERU, Program, Or Subprogram(s) Affected Prosecution

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
		-0-	-0-	-0-		
TOTAL						

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
		-0-	-0-	-0-		

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill creates a "good faith" exception to the exclusionary rule. It allows the use in court of "illegally seized" evidence if the officer who seized the evidence was acting on a good faith belief that his actions conformed to law. This bill is not expected to require the commitment of additional prosecution staff or resources. Defense motions to prevent the use at trial of allegedly illegally seized evidence are filed in many criminal cases now, and in most felonies. It is expected that the scope of these hearings might change somewhat under the provisions of this bill, and may focus more upon the reasonableness of the officers belief that his conduct was permissible under the law. It is possible that the bill could benefit prosecution efforts if it decreases the amount of evidence which is now lost to the prosecution through successful defense suppression motions.

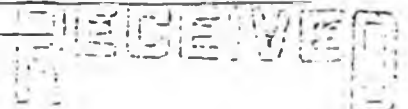
IV. DATE 1/28/83

PREPARED BY Daniel W. Hickey, Chief Prosecutor  
AGENCY Department of Law

Original: Legislative Finance PHONE 465-3428

cc: Budget and Management  
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)



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 disillusion 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 GGP-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, or 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 <sup>ford</sup> ~~Standard~~ 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 ramifications 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, 521 F.2d 41 (1st Cir, 1980). In that case, FBI agents had information regarding the possibility that an escaped murderer was living in the nouse 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?