MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 4, 1985

The twentieth meeting of the Senate Judiciary Committee was called to order at 10:03 a.m. on February 4, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 240: Chairman Mazurek stated Senator Lybeck, the principal sponsor of SB 240, had to attend a funeral; therefore, Representative Spaeth, an additional sponsor of the bill, agreed to present the bill for Senator Lybeck. Representative Spaeth stated in 1983, the legislature enacted blanket prohibition against use of polygraph examinations in district court. This bill carves out two exceptions: (1) If the parties stipulate to the use of the examination; and (2) in revocation proceedings. Representative Spaeth then presented written testimony from Senator Lybeck (see Exhibit 1). He stated the second part of the revocation would be the most controversial aspect of the bill and the main opposition will come in that particular area. People on probation do not have the same rights.

PROPONENTS: None.

OPPONENTS: Susan Cottingham, on behalf of the Montana Chapter of the American Civil Liberties Union, stated this bill represents some problems to them. They have no problem with the first section. The second part which allows a lie detector test to be entered into a revocation hearing does concern them. They question whether a parolee's refusal to take a test should be allowed into hearings. They question whether a lie detector test is credible at all.

QUESTIONS FROM THE COMMITTEE: Senator Blaylock asked Representative Spaeth if we were having a lot of trouble with the parolees that using the test would find they have violated their parole terms. Representative Spaeth responded he did not know. Senator Blaylock asked if there were a lot of problems with the parolees that the second section would solve. Charles F. Moses, an attorney from Billings, stated he started with the proposition of whether the first part were constitutional. It is his opinion that it probably is constitutional based upon the case of Hudson v. Palmer. The second issue was the question as to the effect of the second part of the bill. He doesn't see any merit to that. It is not a bad scheme, but you have to have the willingness

of the person to submit to that. Most parolees will not do that. The bill doesn't have any particular deterrent effect or any particular helpful effect, but it is a tool. Senator Pinsoneault told Ms. Cottingham that he was concerned about the issue she raised about whether or not that information would be available to the judge. He asked if it would be acceptable to them that refusal to take a polygraph examination would not be available to the judge. Ms. Cottingham responded if the refusal would not be admitted and the parties had agreed to the examination, that would be acceptable. Senator Towe asked if the parties stipulated, were examinations be admissible now. Representative Spaeth responded Senator Lybeck indicated there aren't any cases in Montana where stipulations have been entered into, and prosecutors feel this is an important tool. It has been utilized by some defense attorneys, but has had no credibility handed to it by the court itself. Senator Towe asked about the right to be free from comment to the jury or comment on evidence as to the refusal to take the test. Representative Spaeth thinks it is clear as to that. Senator Towe asked if the same answer applied to the second part. Representative Spaeth stated the second part is a little more controversial. In that instance, it is not in the option of the person involved, but is the option of the parole officer. Mr. Moses stated the American Polygraph Association has stated in its rules and regulations that a polygraph examination consists of three parts: prequestioning, actual examination, and the final determination if you lied. Senator Towe stated he still has some very serious reservations as to accuracy, as polygraph examinations may be accurate 80% of the time, but 20% of the time they aren't.

CLOSING STATEMENT: Representative Spaeth stated that as Senator Towe indicated, polygraph examination tests are given a great deal of weight, and their accuracy is not accepted clear across the board. This bill has two parts. He thinks that if the parties want to stipulate, they can set up the conditions under which they will stipulate. He believes the second part is the most controversial. His interpretation is it would be required if the probation officer wanted it to be required. Refusal or failure would be used in a revocation proceeding. Senator Lybeck feels it should be in there because parole officers are overworked, and they must take at face value whether the person is progressing through the system or not, since they do not have the time or the resources available to check on this. He agrees with Mr. Moses that it is probably technically constitutional; it is whether this committee wants it or not that is the question.

Hearing on SB 240 was closed.

CONSIDERATION OF SB 179: Senator Goodover, sponsor of SB 179, introduced the bill (see written testimony attached as Exhibit 2).

PROPONENTS: None.

OPPONENTS: Charles F. Moses, an attorney from Billings, appeared in opposition to this bill and submitted a written memorandum which is designed not to be an advocacy point of view, but merely to set forth the case law (see Exhibit 3). He stated he was not there to argue or make a strong appeal for the benefits of the exclusionary rule, but he was there to suggest this is a bad bill and suffers from legal infirmities. He believes the constitution of the United States, Article VI, contains the supremacy law which says the state cannot pass a law which would be contrary to the federal decisions in the Supreme Court of the United States. One of the problems we have is that when we are attempting to duplicate what the supreme court has done, that is a chancy business, because the law is volatile and it changes all of the time. The major problem the committee must address is the effect of the state constitution. The federal constitution says the state constitution cannot provide less protection than provided by the federal law, but it can provide more protection. The state constitution is self-executed in that a state legislature cannot alter, modify, amend, change, or in any way interpret it different from the plain language of the constitution. A state constitution is to be interpreted according to the law in effect at the time of the passage of the constitution. You don't interpret the constitution in the light of evidence after its passage. That involves a severe separation of power concept. It is safer from his experience to rely on the United States Supreme Court and not have intervening legislation. This bill does not address the issue of warrantless searches. Steve Unger, on behalf of the American Civil Liberties Union, stated they concur in the comments by Mr. Moses. (See witness sheet and written testimony attached as Exhibit 4.) They believe this bill is horribly unconstitutional and unwise from a policy standpoint. Our state constitution contains protections to all person's rights to privacy. The bill is unconstitutional as it is presented. The Supreme Court interprets the constitution and interprets legislation if it runs afoul of the constitution. The good faith exception, while phrased in a positive nature, is a rather tricky bit of language usage of the drafter of the bill. They perceive the following problems from a practical standpoint: (1) The only concern of the fourth amendment is whether or not there is probable cause to issue a search warrant. An unreasonable search is now turned into a reasonable search. (2) Probable cause as a concept is very flexible. (3) A most difficult area with this bill is the fact it will encourage police abuse. (4) It would dilute the already minimal review that judges have with arrest warrants. Not all justices of the peace are lawyers. (5) There are some administrative problems with this bill. Legislators hear about the floodgate of litigation over what is objectively reasonable. They also believe legislation of this sort which attempts to fine tune the fourth amendment and the fundamental guarantees of that amendment is not appropriate for the legislature but is appropriate for the supreme court.

QUESTIONS FROM THE COMMITTEE: Senator Pinsoneault asked Mr. Moses if a change would require some sort of constitutional review. Mr. Moses stated yes; it would have to be a constitutional revision rather than a legislative act. Senator Brown asked Mr. Moses if the federal constitution and the federal laws are the supreme law of the land and if the constitution meant something different prior to the Leon decision than it does now. Mr. Moses stated there has been a change in the interpretation of the constitution of the United States. But in the Leon decision, they did not address the issue of probable cause which is the first step. Senator Galt asked what Mr. Moses thought of the restitution part of the bill. Mr. Moses stated he thinks it is a good idea, but it has a very narrow effect. He believes the bill goes too far to put it into a fellow's estate. Senator Towe stated this bill does not have like the others have in the past the Harold Hanser provision which requires a penalty against law enforcement officers who violate the fourth amendment. Senator Goodover responded his experience shows if we find there is more police abuse, we could reconsider what we have done here. Senator Towe asked Senator Goodover how the restitution part of the bill worked in terms of an individual--can he file bankruptcy and be excluded from restitution? Senator Mazurek asked if he would want such a debt to be dischargeable in bankruptcy or not. Senator Goodover said personally, no. Senator Blaylock quoted Justice Holmes who said the only way to stop getting evidence illegally obtained is to make it illegal to do so.

CLOSING STATEMENT: Senator Goodover stated we have a message from the people of the state of Montana that what we are doing is wrong. He believes we need to let the people know we are concerned and we are not just accepting the status quo. He admitted the restitution is a probably pretty harsh, but it can be amended.

Hearing on SB 179 was closed.

ACTION ON SJR 7: Chairman Mazurek suggested that if we could not table SJR 7 in the Judiciary Committee, we should send it to Finance and Claims, as we shouldn't turn this into a fiscal debate here. Senator Towe moved SJR 7 be recommended DO NOT PASS. The motion carried with Senators Crippen, Galt, and Shaw voting in opposition. Senator Shaw requested a minority report.

ACTION ON SB 148: Senator Blaylock moved SB 148 be recommended DO NOT PASS. Senator Pinsoneault asked what the purpose of this was. Senator Mazurek responded the only purpose of this is to insert the mandatory two-year sentence and enhance the sentence. Senator Towe stated something that bothers him is there is a great deal of merit to the firearm and other destructive device definition, and he believes there should be a difference in punishment. The motion carried with Senators Brown, Galt, and Pinsoneault voting in opposition.

ACTION ON SB 149: Senator Crippen moved SB 149 be recommended DO NOT PASS. Senator Brown suggested the bill be amended to include persons with the aid of counsel who plead guilty in lower court. Senator Mazurek asked how you would know he has counsel; he has a right to counsel, but he may not have it. Senator Towe stated if you plead guilty in justice court, there is no appeal. Suppose he goes in without counsel, pleads guilty, then realizes he is not guilty, and talks to counsel, and his counsel goes in to change his plea and the judge says no. Senator Pinsoneault stated if the defendant were represented by counsel at the time the guilty plea were entered, he should be considered to have waived his right. Senator Towe asked how you would challenge the constitutionality of the statute. Senator Mazurek stated he has not heard a great hue and cry that this has been abused, and so believes it is not a concept that needs to be repaired. The motion to recommend SB 149 DO NOT PASS carried with Senators Brown, Galt, and Pinsoneault voting in opposition.

TABLING OF SB 150: It was brought up that Senator Himsl has a bill which will come before the committee on sentencing guidelines. Senator Mazurek stated that because of the problems, the county attorneys are taking a larger interest; they are appearing, and they are getting the judges to appear. Senator Crippen moved SB 150 DO NOT PASS. Senator Brown stated it is probably not a good idea to abolish the Sentence Review Board outright, but indicated Representative Gould has a bill in that the proceedings before the Sentence Review Board will be on the record. He wants to give a signal that there is no sentiment in the Senate for this. Senator Shaw moved as a substitute motion that SB 150 be TABLED. The motion carried with Senator Crippen voting in opposition.

ACTION ON SB 151: Senator Towe stated he feels we need more emphasis on restitution and financial obligation. Senator Pinsoneault moved that SB 151 be recommended DO PASS. The motion carried unanimously.

FURTHER CONSIDERATION OF SB 240: Senator Towe stated he has some amendments he would like Mr. Petesch to prepare. He will get together with Mr. Petesch to see that this is done before the committee again takes this bill up for consideration.

TABLING OF SB 179: Senator Shaw moved that SB 179 be TABLED. The motion carried with Senator Crippen voting in opposition.

FURTHER CONSIDERATION OF SB 240: Mr. Petesch stated the purpose for putting subsection 2 in the bill is that currently as part of a suspended sentence or probation, a condition imposed is the parolee must

submit to the polygraph examination, but when they go to revoke, they cannot use the results of those tests.

There being no further business to come before the committee, the meeting was adjourned at 12:07 p.m.

Committee Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE February 4, 1985

COMMITTEE ON Judiciary

SB 179+240

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Charles T. Moses	Moses Law Firm	179		X
Steve Unger	ACLU	179		X
Susan Cottingham	ACLU	240		X
Tony Smith	HP 84	240	X	
Richard Martin				

(Please leave prepared statement with Secretary)

SENATE BILL 240

1983 LEGISLATURE ENACTED A BLANKET PROHIBITION AGAINST THE USE OF POLYGRAPH EXAMINATION IN MONTANA'S COURTS.

THIS PROHIBITION WAS PART OF A MOVE-COMPREHENSIVE BILL GOVERNING THE TRAINING AND LICENSURE OF CERTIFIED POLY-GRAPH EXAMINERS, AND THAT THE BILL WAS WELL-TAKEN IN MANY RESPECTS, CONSIDERING THE PRIOR, RATHER LOOSE AND INFORMAL APPROACH TO EDUCATING AND CONTROLLING THIS SPECIALIZED AND EMERGING ASPECT OF THE LAW ENFORCEMENT PROFESSION.

THE PARTIES TO A CRIMINAL CASE MAY DISCUSS THE NEED FOR AND USE THE POLYGRAPH EXAMINATIONS AS A PART OF THEIR PLEA NEGOTIATIONS, PRIOR TO THE COMMENCEMENT OF ANY TRIAL.

PLEA BARGAINING CAN PLAY AN IMPORTANT ROLE IN THE RELATIONSHIP BETWEEN A COUNTY ATTORNEY'S OFFICE AND THE LOCAL DEFENSE BAR.

THESE NEGOTIATIONS, IF PROPERLY CONDUCTED, CAN BE VERY BENEFICIAL IN RELIEVING THE COURT'S AND COUNSEL'S VERY CROWDED SCHEDULES, WHILE AT THE SAME TIME EFFECTING AN APPROPRIATE MEASURE OF "JUSTICE" FROM THE PUBLIC'S VIEW-POINT.

SO, IT DOES HAPPEN FROM TIME TO TIME THAT A CRIMINAL DEFENDANT MAY AGREE IN THE NEGOTIATIONS TO TAKE A POLY-GRAPH EXAMINATION, WITH THE PRIOR UNDERSTANDING THAT A CHARGE OR CHARGES PENDING AGAINST HIM WILL BE DISMISSED BY THE PROSECUTION IF HE PASSES IT. HOWEVER, IT WOULD BE UNFAIR AND TOTALLY UNREALISTIC, TO EXPECT ANY PROSECUTOR TO AGREE TO SUCH A PROCEDURE IF THE RESULTS OF THE EXAMINIATION, WHERE UNFAVORABLE TO A DEFENDANT, COULD NOT BE USED AGAINST HIM AT TRIAL. YOU CAN SEE AT ONCE THAT, UNDER SUCH A PROCEDURE, A DEFENDANT WOULD HAVE ABSOLUTELY NOTHING TO LOSE BY TAKING A LIE-DETECTOR TEST, KNOWING AHEAD OF TIME THAT HE COULD AVOID PROSECUTION BY PASSING IT (IF THAT WERE THE AGREEMENT), BUT THAT HIS FLUNKING THE TEST COULD NOT BE MADE KNOWN TO A JURY LATER ON, AT TRIAL.

THE FIRST PART OF THE BILL WOULD MAKE AN EXCEPTION TO THE PRESENT RESTRICTION UPON THE ADMISSIBILITY OF POLYGRAPH EXAMINATION RESULTS IN THE FEW CASES WHERE THE PARTIES HAVE STIPULATED TO THEIR USE AS EVIDENCE, IN WRITING AND ON THE RECORD. AS LONG AS BOTH PARTIES TO THE CASE, IN AN INFORMED AND COMPLETELY VOLUNTARY FASHION, AGREE THAT THE REFERENCE TO A POLYGRAPH EXAMINATION WOULD BE APPROPRIATE UNDER THE PARTICULAR CIRCUMSTANCES OF THE CASE, SURELY THE LEGISLATURE

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 020485
BILL NO. SB 240

OUGHT NOT TO OBJECT, AND JURIES AND COURTS OUGHT TO BE ABLE TO MAKE WHATEVER GOOD USE THEY CAN OF THE FINDINGS. THE JURY, OR THE COURT ITSELF IN A BENCH TRIAL, IS NOT BOUND OR REQUIRED TO CONCLUDE THAT THE RESULTS ARE ACCURATE, OR TO RENDER A VERDICT WHICH IS CONSISTENT WITH THEM; HOWEVER, THEY OUGHT TO BE IN A POSITION TO CONSIDER THE TEST RESULTS, AND TO ACCORD TO THEM SUCH WEIGHT AS THEY BELIEVE IS RIGHT UNDER THE CIRCUMSTANCES.

THE BILL WOULD ALLOW THE ADMISSION OF POLYGRAPH EXAMINATION RESULTS IN REVOCATION HEARING. AN OFFENDER WHOSE SENTENCE IS DEFERRED OR SUSPENDED IS INVARIABLY PLACED ON PROBATION, AND UNDER THE CONTROL AND SUPERVISION OF AN OFFICER EMPLOYED BY THE MONTANA PAROLE AND PROBATION BUREAU. ONE VERY USEFUL TOOL IS THE ABILITY TO REQUIRE A PROBATIONER TO SUBMIT TO A LIE-DETECTOR TEST, IN ORDER TO DETERMINE WHETHER HE HAS BEEN LIVING UP TO THE OFFICER'S EXPECTATIONS AND REQUIREMENTS. IF THE RESULTS OF SUCH A TEST ARE INADMISSIBLE ALTOGETHER IN A COURT OF LAW (AS THEY ARE NOW), A PROBATIONER RISKS NOTHING IN TAKING AND FLUNKING THE TEST, AS HE CAN BE SURE THAT THE RESULTS CANNOT BE USED AGAINST HIM, EVEN AT A LATER HEARING ON A PETITION TO REVOKE HIS SUSPENDED SENTENCE AND PROBATION. THIS BILL WOULD CORRECT THAT, SIMPLY BY ALLOWING POLYGRAPH EXAMINATION RESULTS TO BE RECEIVED AND CONSIDERED BY THE COURT UNDER THESE LIMITED CIRCUMSTANCES. AGAIN, ANY SUCH RESULTS WOULD NOT BE CONCLUSIVE, NECESSARILY, OR IN ANY WAY BINDING UPON THE COURT.

THE EXCLUSIONARY RULE IN SB 179 AND BILLS FROM THE 1981 AND 1983 SESSIONS

On July 5, 1984, the United States Supreme Court adopted the "reasonable good faith reliance exception" to the exclusionary rule that the court had formerly held was required by the Fourth Amendment to the United States Constitution. The case was United States v. Leon, 104 S. Ct. 3405 (1984).

Therefore, as it is now interpreted by the United States Supreme Court, the United States Constitution now requires an exclusionary rule only to the extent that the new "reasonable good faith reliance exception" does not apply.

Section 1 of SB 179 amends 46-13-302, MCA, to insert in that section the "reasonable good faith reliance exception" adopted by the United States Supreme Court. The Leon case does not mandate that the states adopt the exception recognized by that case. Montana is thus free to either adopt or not adopt the exception. This bill adopts it. The only possible barrier to adoption of the exception is the Montana Supreme Court, which may rule that the Montana Constitution forbids the exception (assuming of course that the Governor does not veto the bill). The legislature would, then have to amend the state constitution to allow the exception.

In the 1983 session four bills addressing the exclusionary rule were introduced in the House. All four died in the House Judiciary Committee

HB 381 adopted a reasonable good faith belief exception.

HB 382 repealed the rule and provided a civil remedy for an illegal search and seizure.

HB 478 also adopted a reasonable good faith belief exception.

HB 816 restricted application of the rule, provided a civil remedy for illegal searches and seizures, and provided for

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020485
BILL NO. SB 179

disciplinary action against the peace officer involved.

In the 1981 session two bills addressed the exclusionary rule.

SB 224 altered the rule and granted a civil remedy for an illegal search and seizure. It failed to meet the transmittal deadline and thus died in the Senate.

HB 626 repealed the rule. It was vetoed. The House overrode the veto, but the Senate did not.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020485
BILL NO. SB 179

A cautious endorsement

As liberal and conservative commentators nationally continue to battle over the impact of the recent U.S. Supreme Court ruling allowing limited "good faith" exceptions to the exclusionary rule, some Montana developments can lend perspective to the debate.

The exclusionary rule, fashioned by the Supreme Court in 1914, bars prosecutors from using evidence in criminal trials if police gathered it illegally. The rule safeguards a person's constitutional right to be safe from illegal searches and seizures, but has been criticized in cases when charges are dropped against clearly guilty defendants.

The Supreme Court recently agreed to permit such evidence to be used if the police thought they were acting legally. The court limited its first "good faith" exception to situations in which police obtain a search warrant, seize the evidence and only later learn the search warrant was defective.

This ruling set off howls from liberal Justices William Brennan and Thurgood Marshall, who claimed in their dissent that "the court's victory over the Fourth Amendment (barring illegal search and seizures) is complete." The other dissenting justice, John Paul Stevens, said the court was about to convert "the Bill of Rights into an unenforced honor code" for police.

In Montana, meanwhile, a just-released Board of Crime Control study shows the notorious exclusionary rule actually does not come into play often. The study indicated the rule affected only 29 of 1,332 criminal cases, or 2.2 percent, during a six-month period last year.

In addition, two Montana prosecutors agreed the exclusionary rule isn't a significant factor, when law enforcement officers are doing their job right. Missoula County Attorney Robert L. Deschamps III said it has been 14 years since he's had to exclude evidence. Lewis and Clark County Attorney Mike McGrath, though supporting a "good faith" exception, said the exclusionary rule "has done wonders for the quality of law enforcement."

But most candidates in the recent primary election for Montana Supreme Court seats — including three of the most liberal — supported changes to the exclusionary rule.

Unsuccessful associate justice candidates Joe Roberts and Donald McIntyre endorsed "good faith" exceptions, while nominated chief justice candidate Daniel Kemmis supported giving the trial judge the right to weigh the importance of the evidence gathered and the seriousness of the search violation before deciding whether to exclude evidence.

So are the liberal howls at the "good faith" exception exaggerated? Or are they right in arguing that the exception is an ominous gap in a barricade protecting us from a society in which police can break down doors?

It depends. Horror stories are told about cases being thrown out because of innocuous mistakes, such as the numbers of the licence plate being tranposed on the search warrant. But horror stories about police abuse can be found, too. Bill Hunt, one of two state associate justice candidates advancing to the November general election, said that although sheriff and police officers are nice guys, some "see it as a war on crime and can get carried away."

We cautiously endorse good-faith exceptions, along the lines of concurring Supreme Court Justice Harry Blackmun. Blackmun wrote that he expects police to continue being careful in making constitutionally acceptable searches, but if experience shows more police abuse, "we shall have to reconsider what we have undertaken here."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020485
BILL NO. SB 179

MONTANA POLICE PROTECTIVE ASSOCIATION

OFFICE OF
Legislative
Chairman

DATE January 27, 1985

Bozeman MONT.

Senator Pat Goodover
Capitol Station
Helena, Montana 59620

Dear Senator Goodover:

I am writing this letter in regards to Senate Bill 179, "Adopting the U.S. Supreme Court good-faith reliance exception to exclusionary rule and making restitution, by criminals a mandatory lifetime obligation". I have not had a chance to read your bill, but from looking at this condensed portion, I don't believe I would be opposed to it.

It has been the position of the Montana Police Protective Association that we will support this type of legislation. Many times a police officer has to make a decision in a matter of seconds, and some times the court finds that although the action was made in a reasonable manner, some technicality occurred and therefore, the evidence is not admissible or the case is dismissed. Some bills is past legislation included some type of penality clause against the law enforcement officer. The Montana Police Association is opposed to that type of legislation.

Victims of criminal action should be pleased with the "mandatory lifetime obligation on restitution". I am in favor of restitution for a victim.

I appreciate your approach and consideration on Senate Bill 179. If you would like to discuss your bill with me, I can be reached at 586-3311 (work) or 587-0957 (home).

Sincerely,

Larry Conner

Larry Conner

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020485
BILL NO. SB 179

James Kilpatrick

Tinkering with criminal sentencing

WASHINGTON — Cicero said it in Latin, Gilbert and Sullivan said it in song, and various judges and legislators have been saying the same thing in their opinions and statutes. In any fair system of justice, the punishments imposed should fit the crimes committed.

Congress is grappling with this age-old problem in several bills that now are pending for reform of the Criminal Code.

Back in February the Senate passed a bill, 85-3, to create a commission to write new guidelines for sentencing in federal cases. The House is working on two bills that would provide a series of options that trial judges could exercise in punishing offenders.

Judges will tell you, if you ask, that no task is more agonizing than the task of fashioning a just sentence. In six states, according to the National Center for State Courts, juries have that responsibility.

IN THE REST OF the states and in all federal courts, the duty falls wholly upon the presiding judge. He has probation officers to assist him with pre-sentence investigations; he has the advice of counsel for both the prosecution and the defense; but in the end the fixing of a just sentence for a particular defendant is up to the judge alone.

Historically, a trial judge has had few options. He could impose a fine or a jail sentence (or both), or he could put the defendant on probation under various conditions.

Until quite recently, these conditions typically required the probationer only to stay out of trouble with liquor and drugs, and to report regularly to his probation officer.

All kinds of new ideas now are emerging in our trial courts. The National Law Journal recently looked at some of the alternatives that judges are experimenting with.

In Los Angeles, a metals company recently was found guilty of unlawfully dumping toxic wastes. The court's sentencing order requires the company to take an ad in The Wall Street Journal explaining its crime. In Nebraska, a construction company was convicted of bid-rigging on a highway job. The court ordered the company, in lieu of a fine, to endow a $1.4 million chair at the University of Nebraska.

In other cases involving corporate or white-collar defendants, courts have ordered contributions to charities. Often a defendant who is put on probation is ordered to perform hours of community service. In cases of theft, restitution may be part of a sentencing package.

Some alternatives are dramatic. A North Carolina judge last year offered an option to a man convicted of rape: He could serve a term in prison, or he could undergo castration. In Alexandria, Va., a judge proposed as a term of probation that a woman convicted of reckless driving watch the autopsy of a traffic victim. (The woman chose to ride for two nights with an emergency vehicle instead.)

The National Law Journal suggests several reasons for the trend toward "creative sentencing."

ONE REASON is wholly pragmatic: In many jurisdictions, jails are full to overflowing, and there may be no room for additional commitments. There are other reasons. The public seems to have soured on the whole idea of rehabilitation. Brief periods of incarceration are seen as ineffective punishments. Why not get some community service from the drunk driver or the petty thief?

All our Constitution says on the subject is that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

Some of these novel sentences plainly are unusual, but none of them seems to be cruel as well.

Appellate courts have been dealing tentatively with the matter. Sentences that involve restitution and community service generally are upheld. In the 10th U.S. Circuit, however, the court nullified a sentence that required a group of price-fixing liquor dealers to donate a large sum to a council on alcoholism.

Up to a point, these innovations are highly desirable. The law ought never to become incapable of experiment. ~~But when a bad check artist is sentenced to go to church once a week for three years, I would agree that the trial judge has abused his power.~~

~~Some people might be able to listen to 156 consecutive sermons with positive pleasure, but such a sentence walks to the very edge of the Eighth Amendment.~~

~~I'd let the fellow take leaves instead.~~

Murderers Are Being Freed for Silly Reasons — And It Must Stop

By U.S. Congressman WILLIAM CLINGER Jr. (R.-Pa.)

Our courts are playing into the hands of killers. Every day vicious criminals are set free by ~~weak-kneed judges~~ because of minor technicalities — and here are just a few ~~outrageous~~ examples:

A California court freed a triple killer because his confession to police was preceded by the comment that he was speaking "off the record." This vicious killer later admitted the brutal murders of his mother, father and grandmother on nationwide television!

In California, a 16-year-old confessed to two killings after being advised of his rights. But the State Supreme Court suppressed the confession because the boy had asked to see his mother — and police turned him down.

Nostalgia is when you live life in the past lane.
— The Comedy Center

~~Hearing about outrages like these makes my blood boil and it should make yours boil too.~~

The U.S. Senate has already passed a tough judicial reform bill that would set right some of these wrongs.

~~But when the bill was sent to the House of Representatives for its consideration, the reaction of the chairman of the House Judiciary Committee was that we weren't going to get into areas such as the death penalty, the bail law, etc. "because they're just too controversial."~~

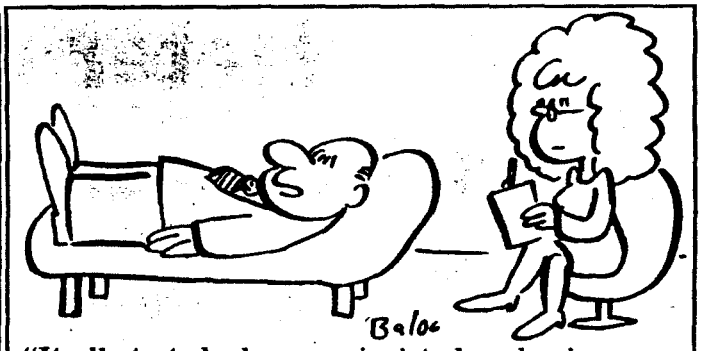
~~Controversial? For whom? The bums who might finally be put behind bars if such reforms were ordered by~~ Judges ~~Some people say~~ Congress. Here's what we need:

- A tough federal death penalty. The anticrime package already adopted by the Senate calls for the death penalty for treason, federal crimes that result in the death of another citizen and, in some instances, for attempts to kill the President.
- A relaxation of the exclusionary rule. This is the most common legal loophole. Simply put, it allows a judge to throw out any evidence he feels might have been collected improperly by police.

Congress could end this abuse of justice with a law that would force defense lawyers and judges to prove police had deliberately violated a criminal's rights before the evidence could be ignored. In a recent decision, the U.S. Supreme Court slightly relaxed the exclusionary rule, but the courts still have a long way to go.

- A more stringent federal bail law. It should be obvious even to the most naive person that dangerous criminals should be behind prison bars while they await trial.

It's time we put some backbone into our courts!



"It all started when you insisted on having a career of your own, dear . . ."

NATIONAL ENQUIRER

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020485
BILL NO. SB 179

(This sheet to be used by those testifying on a bill.)

NAME: Charles F. (Timer) Moses DATE: Feb 4 1985

ADDRESS: P.O. Box 2533 Billings Montana

PHONE: 248-7702

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: Senate Bill 179

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: See Prepared Statement

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

BEFORE THE SENATE JUDICIARY COMMITTEE

February 4, 1985

INTRODUCTION

The Senate Judiciary Committee has for consideration Senate Bill No. 179, which seeks to enact a State statute conformable with the good faith exception to the Exclusionary Rule. The value and propriety of such legislation is the focus of my testimony and is the focus of this discussion. I seek to place these issues that are involved in a proper perspective for fair consideration by this Committee.

It does express a point of view, but its more important feature is to aid and assist the Committee in knowing the present state of the law and the issues that are involved, so that a fair decision can be reached.

THE LAW

A. The Supremacy Clause

The Supremacy Clause in the United States Constitution provides as follows:

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB179

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."
> (Article VI, Constitution of the United States)

What this means in the most simple terms is that the Constitution of the State of Montana and the statutes of the State of Montana must give way to the supreme law of the land, which is the Federal Constitution and its interpretations by the Supreme Court of the United States. You cannot pass a law that offends the Constitution of the United States or is inconsistent with the rights guaranteed under our Bill of Rights. This obviously requires no citation of authority, but as a discussion for those interested see 16 C.J.S. 26, Constitutional Law, Section 3.

What this means is that when the Supreme Court has ruled upon an issue, it is binding upon the state courts in the interpretation of the law and that any

statute or constitutional provision limiting this construction cannot have any force and validity. From a lawyers point of view, it is safe to have the District Courts "follow the law as enunciated from time to time by the Supreme Court of the United States."

It goes without saying and examples are limitless that the Supreme Court may change, modify, amend, or alter a rule of law, but that to enact a statute which is consistent with the prevailing law may find that statute inoperative by subsequent decision.

So, it is the purpose and function of the Court under the division of powers of our Constitution for the courts to interpret and not the legislature to decide what should be the proper interpretation of the Constitution. The Committee might recall Marbury v. Madison, which is almost as old as the history of these United States. It would be my conclusion that the enactment of a statute by a state leg slative body, that seeks to interpret or understand the laws enunciated by the Supreme Court of the United States is "chancey at best". The interpretation may change and in the usual

case this is best left to the Supreme Court of the United States and the Supreme Court of the State of Montana to decide an interpretaion of Constitutional law. I bring this to your attention because it seems to me to be such a departure from our separation of powers doctrine that it should be considered with care and some trepidation.

B. Exceptions to the Supremacy Clause

The Constitution of the United States has always been interpreted by the courts as affording a right to the states to grant "greater protection" than that provided by the minimum standards of the United States Consitution. In other words, a state may provide greater protection but it may not provide less protection than that provided by the United States Constitution. See:

Oregon v. Hass,
420 U. S. 714, 43 L.Ed.2d 570,
95 S.Ct. 1215.

State v. Hyem,
630 P.2d 202 (1981).

State v. Van Haele,
649 P.2d 1311 (1982).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB 179

United States v. Henderson,
721 F.2d 662 (9th Cir. 1983).

If we accept this principal, which is surely the law in the State of Montana (and every other state in the union), then we know that the State Constitution can provide greater protection than that provided by the United States Constitution as interpreted by the Supreme Court of the United States. As an example, we can give greater protection to the freedom of speech, the right to bear arms, freedom of religion, the right of privacy, and other rights, which are deemed significant and vital for the interest of the citizens of the state.

I do not find any conflict as to this issue.

C. The Self-Executing Nature of the State Constitution

A State Constitution is "self-executing" in the sense that it is the duty of the legislature to obey the constitutional mandate and they cannot change, alter or amend its constitutional provisions, because the State Constitution would be otherwise "watered down"

by legislation without formal amendment. This has always been the law.

> "With reference to subjects on which the Constitution speaks, its declarations are binding upon the legislature and previous enactment of any law which extinguishes or limits powers conferred by the Constitution." Noll v. City of Bozeman, 166 Mont. 504, 534 P.2d 880.

> "With reference to the subjects upon which it assumes to speak, the Constitution is conclusive upon the legislature." State v. Toomey, 135 Mont. 35, 335 P.2d 1051.

See the following additional cases:

> Cottingham v. State Board of Examiners, 134 Mont. 1, 328 P.2d 907.
>
> O'Bannon v. Gustafson, 130 Mont. 402, 303 P.2d 938.
>
> State ex rel. Mitchell v. Holmes, 128 Mont. 275, 274 P.2d 611.
>
> State ex rel Bennett v. Bonner, 123 Mont. 414, 214 P.2d 747.

What we have, therefore, is a firm rule of law in the State of Montana that a legislative act cannot modify, change, or amend the State Constitution, and the

and the Constitution is conclusive on the legislature. To that extent it is beyond the authority of the legislature to change the Constitution.

D. Interpretation of the Constitution

One of the common rules of law, which requires no citation of authority is that the Supreme Court of the State of Montana, under the Separation of Powers Clause, is called upon to interpret the Constitution with respect to a given case. It is not the function or purpose of the legislature to have this authority or this prerogative.

The concept of creating a law which interprets our State Constitution is, therefore, a unique one and the question that is raised is the effectiveness and value of such a legislative enactment. There are problems here.

1. In the first place, the terms of a Constitution will be understood in the light of the statute existing at the adoption of the Constitution. See:

State v. Poland,
61 Mont. 600, 203 P. 352.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB179

Hinz v. Mussellshell County,
82 Mont. 502, 267 P. 1113.

Johnson v. City of Great Falls,
38 Mont. 369, 99 P. 1059.

Wells Fargo, Co. v. Harrington,
54 Mont. 235, 169 P. 463.

State v. Toomey,
135 Mont. 35, 335 P.2d 1051.

In other words at the time of the 1972 Constitution, "What was the law in effect at that time?" The Constitution is to be interpreted in light of the prevailing law and without question, the "good faith" exception to searches and seizures was not then in effect.

The legislature cannot interpret what was in effect at that time and cannot declare by state enactment that which was not intended by the constitutional provision enacted some thirteen years before.

2. The ex post facto legislative prohibition also comes into play. To declare some thirteen years later what the Constitution is supposed to mean is fraught with uncertainties and is a difficult proposition to sustain. A similar case in the Supreme Court of the United States is Bowie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697, where a statute that had

been in effect for many, many years was construed differently for the sake of the conviction and the Supreme Court held that the ex post facto laws of our Constitution apply not only to legislative enactments but to judicial interpretations as well.

3. The statutory enactment could "say" to the Supreme Court of the State of Montana, "This is what we want this constitutional provision to mean as of 1972" and such a directive by a state statute or legislative body not only invades the judiciary, but is a policy that has little logic or reasoning. To try and influence the Supreme Court by a legislative enactment does violence to our very system of justice as we know it.

D. The Exclusionary Rule

I have attached to this memorandum a memorandum about the Exclusionary Rule, which I believe has merit in setting forth the history and current status of the case decisions. It is helpful, I believe, as information which can be considered in passing any legislation by which the Exclusionary Rule is affected.

There is one anomaly and that is that Justice Berger has said that the Exclusionary Rule is a "court made rule". Now we see legislation that belies this conclusion. Justice Berger says that it is a matter for the judiciary and we are now making it legislative in scope.

In any event, the question to be resolved is whether under our right of privacy, under the State Constitution, under the commonly understood rules of law at the time our Constitution was adopted on searches and seizures we had a constitutional protection that could not be changed or altered by legislative enactment. If this view is rejected, then freedom of religion, freedom of press, and the right to bear arms can suffer a similar fate and our constitutional protections are subject to interpretation and delineation by a legislative body and this, in my view, is a dangerous precedent.

E. United States v. Leon

A brief comment is appropriate with respect to United States v. Leon, decided July 5, 1984, announcing a good faith exception. In that case the Government failed to appeal the lower court determination that the

warrant was issued without probable cause. Obviously, if there is no probable cause under the standards of United States v. Gates, then the search warrant is improperly issued. The focus of the Court's attention, therefore, was on the execution of the search warrant by the officers in "good faith" and there is no problem with this conclusion. That is, however, the narrow and limiting effect of the decision. It does not say, in our view, that a search is validated by good faith, when the warrant is invalid as showing no probable cause. It does not say that a warrantless search without probable cause is validated because there is "good faith" of the officer.

In our view, it is not all encompassing, as justifying good faith under any circumstances and a state statute which expands the law beyond that decided in United States v. Leon is not justified. There are two phrases, which I think make sense.

1. In a just society, those who govern, as well as those who are governed, must obey the law. See State v. Leon.

2. Good faith is never a substitute for probable cause. The Fourth Amendment does not substitute one for the other. See State v. Leon.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB179

CONCLUSION

I have not in this presentation argued the merits of the Exclusionary Rule or the "good faith" exception. I simply need quote Judge Webster of the F.B.I., who has statec that the Exclusionary Rule encourages professionalism. It also encourages the preservation of our freedoms and rights of privacy that will be slowly eroded in order to convict some criminal, but will remain to permit invasion of our house on any pre-text whatsoever. We never examine the law in the light of our own personal liberties and our own personal rights. The law is designed , according to most views, to have application only to that unknown criminal, in which we do not have the slightest interest. It does in fact discourage professionalism and makes "a dumb cop", forgiven for his violations of the law.

I suggest that "no man is above the law", United States v. Nixon , and that law enforcement officers are sworn to uphold the Constitution and to perform their duties according to the law and that expediency is not a justification for a statutory enactment. Finally, the implications of such legislation

are profound. Let me count the ways.

1. We object to the time consuming appeal process encouraged by defense lawyers. Everyone knows that such legislation will be appealed in every case, so that a defense is handed to the defendant on a silver platter by such legislation. Do not blame the defense lawyers when these appeals begin to take their toll, in the State and Federal Courts.

2. We have reached the age in law enforcement where by training and experience law enforcement, as professionals, should "know the law and mean to enforce it". We should not ask less of such officers, because to do otherwise would relegate them to a non-professional status.

3. We should be respectful of the Bill of Rights and our right of privacy, particularly in the Montana State Constitution and give it full meaning and not "water down" these rights simply by a statute directed to the Supreme Court to change the law in Montana.

4. If we "water down" these rights by legislative enactment, then the right to bear arms, the freedom of speech and freedom of religion and all of the rights that we hold dear can legally suffer a similar fate and

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB 179

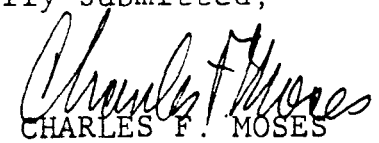
and this is a dangerous prededent. We should be ever vigilant against this process.

5. Law enforcement requires adequate funding, adequate personnel and adequate training, so that no case is brought before the Court without adequate and competent evidence to convict. Sloppy work will not be tolerated and as a practical matter, cases are usually won by failure of law enforcement to do what it is required to do to conform to the law and to have adequate evidence. We make poor witnesses of law enforcement officers when we do not demonstrate strict compliance with the law as applied to them as this is reflected in decisions by juries.

Obviously, this legislation cannot be supported in the name of law enforcement or striking a blow against an alleged criminal. If our system is so weak and our officers are so incompetent that they must be forgiven if they violate the law, then the end justifies the means and our system as we know it is destroyed. I approach this matter as a proposition where insofar as stating a rule of law is concerned is no "big deal" in and of itself. When, however, you examine the history of this Rule and its connection with our system of Government and when you

examine the proper scope of constitutional rights, both Federal and State, and when you examine the proper role of a legislature, the situation is profound in its implications. The best of intentions to "get them" is not a substitute for the preservation of the administration of justice, our Constitution, and the rights given to us by the people of the State of Montana. It seems to me we should be cautious, and not adopt a rule, subject to change or adopt a rule which seeks to amend the State Constitution and what our history deems important.

Respectfully submitted,



CHARLES F. MOSES

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB179

THE EXCLUSIONARY RULE

It is necessary to recite the principles that are involved in the growth and development of the Exclusionary Rule. The fact that certain principles have withstood the passage of time suggests that we must learn by what has happened before and the force and effect of these principles on humanity and liberty; and the change or abandonment of these principles should not be made without understanding of its effect on these principles. The history of our existence is represented by the principles that we have accepted, and clearly identified by references to the growth and development of the Exclusionary Rule.

I.

THE MAGNA CARTA (1215)

The history of the need for the Magna Carta is well known. The abuses of freedom and liberty which brought about such a document are acknowledged, but the language is worthy of careful study and thought. It provides as follows:

> "To none will we sell, to none will we deny or delay right or justice."
>
> "We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it."

It is difficult to imagine any language that could be more clear, more explicit, or more needful as a principle of freedom and liberty and observance of the law.

II.

BOYD VS. UNITED STATES (1886)

In Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746 (1886), the Supreme Court of the United States said:

> "The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'
>
> * * *
>
> 'Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB 179

cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no peculiar search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more prejudicial to the innocent than useful to the public, I will not say. It is very certain that the law obliges no man to accuse himself, because the necessary consequence of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.'"

In commenting on this decision, it has been stated:

"In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that 'independent tribunals of justice . . . will be naturally led to

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

> **resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' I Annals of Cong. 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as 'unconstitutional.'"** (Mapp v. Ohio, infra)

No clearer recognition of the law of Boyd and the understanding of the Amendments to the Constitution can be articulated. This case has been relied upon and quoted with approval in Payton v. New York, 63 L.Ed. 2d 639, decided April 15, 1980. It has been quoted with approval in Steagald v. United States, 68 L.Ed.2d 38, decided April 21, 1981.

The force and effect and the application of principles that we value in our society have a history of approval for nearly 100 years. It should give us pause before we seek to change this principle or the underlying protection of fundamental liberties that we value.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

III.

WEEKS VS. UNITED STATES (1914)

Some 30 years after Boyd, the Supreme Court in Weeks v. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341, specifically held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. At that time, the Court clearly stated that the use of such evidence involved "a denial of the constitutional rights of the accused."

In Byars v. United States, 273 U.S. 7, 71 L.Ed. 520, 47 S.Ct. 248 (1927), a unanimous Court declared that, "The doctrine of an illegal search cannot be tolerated under our constitutional system."

In Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564, the Court specifically held and restated the Weeks rule that a violation of the Fourth Amendment forbade the introduction of such evidence.

In McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943), the court said, "A conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

In Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359, the Court reaffirmed this position as it applied to federal courts. It relied upon Palko v. Connecticut, 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149 (1937) that "security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty."

IV.

MAPP VS. OHIO (1961)

In Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, the Supreme Court of the United States made application of this rule to the states under the Fourteenth Amendment. They had waited 35 years for the states to give protection of constitutional rights and stated that "other remedies have completely failed to secure compliance with the Constitutional provisions", citing People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513 (1955), which said that "other means of protection have been afforded the right to privacy, but that the experience of California that such remedies have been worthless and futile is buttressed by the experience of other states." It stated "no man is to be convicted on unconstitutional evidence", citing Rochin v. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952). It quotes Bram v. United States, 168 U.S. 532, 42 L.Ed. 568, 18 S.Ct. 183 (1897), and states that the "perpetuation of the principles of humanity and civil liberty was secured only after years of struggle", and this was done "to maintain inviolate large areas of personal privacy."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB 179

See also Feldman v. United States, 322 U.S. 487, 88 L.Ed. 1408, 64 S. Ct. 1082.

Mapp v. Ohio also quoted Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960), stating, "there is another consideration - the imperative of judicial integrity." The quotation reads as follows:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

In summary, the cases since 1886 have established the following:

1. The Exclusionary Rule is of constitutional dimensions from 1886 to the present time.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

2. It involves a right of personal privacy, explicit in our own Constitution as well as the United States Constitution, under Griswold.

3. It is a matter of judicial integrity.

4. The government should not be permitted to violate its own laws for this breeds contempt for the law, for "if gold tarnishes, what about brass?" (Remember Mr. Nixon?")

5. Finally, such a rule is explicit in our sense of liberty and justice and fundamental rights, and is a part of our heritage that cannot be taken away merely to make it more convenient to convict.

This, then, is the history of the Exclusionary Rule, that must be considered by those who seek to change a fundamental principle. To "water down" constitutional rights for the sake of law enforcement is a slender reed on which to argue or proceed for such a change. If this be so, it is but the beginning; since other rights such as freedom of speech, freedom of religion, freedom to a fair public trial, rights against self-incrimination, are simply subjected to the same concept that we can water down constitutional rights any way we please by Government decision.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

V.

BIVENS VS. SIX UNKNOWN AGENTS (1971)

The changes that are recommended for the Exclusionary Rule are simply to supplant that rule by a civil remedy or penalty to the law enforcement officers and permit the use of the tainted evidence even if obtained in violation of our Constitution. Reliance is placed upon Bivens v. Six Unknown Agents, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

This case was a civil action for damages filed in the U. S. District Court for violation of civil rights. The court held that a violation of the Fourth Amendment's command against unreasonable searches and seizures gave "rise to a federal cause of action for damages consequent upon the agent's unconstitutional conduct." Mr. Chief Justice Burger in his dissent suggested that a goal in criminal cases should be to overrule the Exclusionary Rule and provide civil relief by a tribunal, quasi judicial in nature. As can be seen, this was not germane to the decision. If a defense lawyer relied upon such a case, it would not be adequate authority; but this suggestion has been seized upon as a basis for elimination of

constitutional rights, and that people can be convicted by the use of unconstitutional testimony. It should be pointed out that Boyd and all subsequent cases say that the rule is identical for either violations of the Fourth or Fifth Amendments, so that to extend this argument, the right against self-incrimination under Escobido and Miranda would also have to be altered to carry the rule to its logical conclusion.

There are two statements that are significant in the dissent which are appalling to our sense of reason. These demonstrate the attitude and state of mind of the Chief Justice. He contends that the government can be allowed to profit from its own illegal acts, and obviously Olmstead, cited supra, and Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), must be overruled. To suggest that the government in all of its majesty plays by different rules and can perform acts illegally, demonstrates a point of view that in our democracy should not be tolerated. Six million Jews can't be all wrong, and the Gulag Archipelago stands against this proposition and what can happen by an unsupervised government acting on its own.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB 179

The most significant point, however, is his comment that the Exclusionary Rule involves "the release of countless guilty criminals." Think of the phrase for a moment. The Judge has predetermined guilt. There is no need for a jury; there is no need for a presumption of innocence; he has tagged them with being guilty. This is not consistent with constitutional history. Secondly, he has referred to them as criminals, as if we should have one rule for criminals and a different rule for the rest of us. The law simply does not work that way.

We do not believe there is any adequate authority to justify legally the position that the Exclusionary Rule should not have constitutional significance. In any event, this is the first obstacle to be overcome.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB 179

VI.

CHAPMAN VS. CALIFORNIA (1967)

Without speaking directly to the merits and value of the Exclusionary Rule, the Supreme Court of the United States decided Chapman v. California (1967), 386 U.S. 18, 7 L.Ed.2d 705, 87 S.Ct. 824. It enunciated the present harmless error rule. In essence it provides that the reviewing Court must be satisfied beyond a reasonable doubt that the error did not contribute to the Defendant's conviction. In this respect a Federal question is only presented when there is a claimed violation of a Federal constitutional provision and there is no issue where the claimed error involves state procedure or state law.

The significance of this case is that a judgment of conviction shall not be reversed for "errors or defenses which do not affect the substantial rights of the parties." Since this is a subjective judgment, based upon a review of the "totality of the circumstances" this often permits and authorizes the Court to simply deny relief where basic questions of search and seizure may be involved or implicated. Surely the rule finds no complaint for those insignificant errors that occur

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB179

during the course of a trial and we would agree whole-heartedly with this conclusion. Where,however, the "harmless error rule" is utilized simply on the basis of an ex post facto judgment that the Defendant was guilty and properly found guilty, it prevents the fair assessment of the constitutional standards under which cases are tried.

It is a process by which rules of evidence and the Exclusionary Rule can be effectively thwarted. So seems the trend.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020488
BILL NO. SB179

VII.

STONE VS. POWELL (1976)

Without diverting from the initial inquiry as to the basis for the Exclusionary Rule, it is appropriate to notice in Stone v. Powell (1976), 428 U.S. 465, 49 L.Ed 1067, 96 S.Ct. 3037, that review by habeas corpus, THE GREAT WRIT, has been limited where a person is restrained of his or her liberties in violation of the Constitution. Traditionally, prisoners through state court proceedings have had an available remedy to appeal to the Federal District Court to determine whether their rights under the Constitution had been violated in the state court proceedings. It was required, of course, that they exhaust the state remedies and raise the constitutional issue, so it was ripe for decision in the Federal jurisdiction. One of the great lessons in our history is that in areas of discrimination in the 1950's and 1960's, this method of relief was effectively utilized where states would not recognize basic constitutional rights. At times the courts have not been mindful of Article VI of the United States Constitution

which is otherwise known as the Supremacy Clause. Often times the only remedy was an appeal to the Federal court under a habeas corpus petition. The decision is significant in this discussion in that it provides generally as follows:

1. Where the State has provided a full and fair litigation of a Fourth Amendment crime, a state prisoner may not be granted Federal habeas corpus relief upon the grounds that evidence obtained in an unconstitutional search and seizure was introduced at his trial.

2. The prior justification for the Exclusionary Rule was the deterrence of police conduct and not a personal constitutional right.

3. The Exclusionary Rule was a judicially created right designed to safeguard Fourth Amendment rights.

VIII.

WALDER VS. UNITED STATES (1954)

Reliance upon Walder v. United States (1954), 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354, (use of illegally seized evidence for impeachment) and United States v Colandra, 414 U.S. 351, 38 L.Ed.2d 561, 94 S.Ct. 613, (use before grand juries) and "issues of standing", Alderman v. United States, 394 U.S. 165, 22 L.Ed.2d 176, 89 S.Ct. 961, points out the exceptions to the Exclusionary Rule. (There are many of them.)

The focus of my concern is to point out that even where a substantial issue with respect to the legality of the evidence is presented, the Federal Courts cannot be reached for relief as to issues of "evidence".

IX.

ILLINOIS VS. GATES (1983)

In Illinois v. Gates (1983), ___U.S.___, 76 L.Ed.2d 527, 103 S.Ct. ___, the decision was an effort by the prosecution to establish a "good faith exception" under the Exclusionary Rule. The case was not ripe for such a decision because it involved application for a search warrant and a determination as to whether the underlying circumstances justified probable cause for issuance of the warrant. The Court addressed its attention to the basis upon which a magistrate could issue a warrant and determine probable cause.

The Court was confronted with Aguilar v. Texas (1964), 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509, and Spinelli v. United States (1969), 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 These cases clearly identified the standards upon which probable cause was to be measured by the independent magistrate. It was a two-prong test, in the sense that the credibility of an unknown informant must be established in some fashion. As other courts have stated, an ordinary citizen, who is an eye-witness is not

required to have such credibility, or other situations or other people where the information is not patently hearsay. In this sense the reliability of the person can be established by information of previous dealings with the informant which establish reliability. On the other hand, further police investigation corroborating the information submitted is a further and acceptable test of reliability.

The Court in reversing the decision then held that such tests as were articulated in Aguilar and Spinelli would be abandoned and a totality of the circumstances approach be substituted in its place to determine probable cause to issue a warrant.

In addition, the Court stated that a de novo determination of probable cause was not required, so that no independent judgment was impressed upon the appellate Court to determine probable cause, but only to determine whether there was "substantial evidence" in the evidence supporting the magistrate's decision.

In Massachusetts v. Upton, 35 Cr.L. 4044, decided May 9, 1984, the Court confirmed the abandonment and rejection of previous law as reflected in Aguilar and

Spinelli and confirmed the totality of the circumstances test. It also confirmed the substantial evidence rule and a "fair probability that contraband or evidence of crime would be found." This is currently the law.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB 179

X.

SEGURA VS. UNITED STATES (1984)

At the end of the last current term of the Supreme Court, Segura v. United States (July 5, 1984), 468 U.S. ___, 82 L.Ed.2d 599, 104 S. Ct. ___, was decided in the Supreme Court of the United States. The Court expanded upon the rule previously stated by the Court that:

> "'The Exclusionary Rule has no application where the Government learned of the evidence from an independent source.' Wong Sun, supra, at 487, 9 L.Ed.2d 441, 83 S.Ct. 407 (quoting Silverthorne Lumber Co., supra, at 392, 64 L.Ed. 319, 40 S.Ct. 182, 24 A.L.R. 1426; see also United States v. Crews, 445 U.S. 463, 63 L.Ed.2d 537, 100 S.Ct. 1244 (1980); United States v. Wade, 388 U.S. 218, 242, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); Costello v. United States, 365 U.S. 265, 278-280, 5 L.Ed.2d 551, 81 S.Ct. 534 (1961)."

In this case the distinction was made between a seizure, which did not affect privacy interest and a search which did. It was to societies interest to seize the property and temporarily secure it to prevent the removal or destruction of the evidence. This does not

violate the Fourth Amendment.

Obviously, this case involves an emasculation of the Exclusionary Rule by its heavy reliance upon the doctrine of independent source.

Much claim is made about the expectation of privacy and the difference between search on the one hand and seizure on the other. A recent decision of the Supreme Court of the United States made this position clear. In Oliver v. United States (April 17, 1984) ___U.S.___, 80 L.Ed.2d 214, 104 S.Ct. ___, the Court confirmed the rule of Hester v. United States, 265 U.S. 59, 68 L.Ed. 898, 44 S.Ct. 445, which announced the "open fields" doctrine. They simply ruled that despite "no trespassing" signs there was no reasonable expectation of privacy under the history and development of our law and that the Constitution applied only to the curtilage.

XI.

NIX VS. WILLIAMS (1984)

The case of Nix v. Williams (June 11, 1984), ___U.S.___, 81 L.Ed.2d 377, 104 S.Ct. ___, established once again the inevitable discovery rule and made it an exception to the Exclusionary Rule. In this case the Defendant led police to the body of his victim after a police officer had urged him to allow the victim to have a "Christian burial". The Court rejected a showing of good faith on the part of the police, saying they would have been in a worse position than they would have been if there had been no unlawful conduct. The Court spoke of the societal costs of excluding testimony and where by a preponderance of the evidence the prosecution can establish that ultimately or inevitably the evidence would have been discovered by lawful means, then the deterrence rationale that justifiable application of the Exclusionary Rule has so little basis that the evidence should be received. Such rule is now firmly established.

Of related interest is Hudson v. Palmer (July 3, 1984), 82 L.Ed.2d 393, 104 S.Ct. ___, in which the Court held that in a prison setting, an

inmate does not have a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable search and seizure. This is particularly true where the action is intentional, but that common law remedies are available by property law and where employees of the state do not enjoy sovereign immunity for their intentional tort. This case advances the proposition that several remedies may form the law of the land and the Exclusionary Rule no longer has any force or validity.

XII.

IMMIGRATION AND NATURALIZATION SERVICE VS. ADAN LOPES-MENDOZA et al (1984)

In Immigration and Naturalization Service v. Adan Lopez-Mendoza, et al (July 5, 1984), 468 U.S. ___, 82 L.Ed.2d 778, 104 S.Ct. ___, the Court held that the Exclusionary Rule need not be applied in a civil deporta-tion proceeding. "The costs-benefit rule" was considered as being important and relevant. On the one hand the rule is deterring future unlawful police conduct and on the other hand it is loss of probative evidence. Again, there is the discussion of the scheme for deterring Fourth Amendment violation by its officers and provisions for investigation and punishment which reduces the likely deterrent value of the Exclusionary Rule.

One caveat was stated in the opinion that egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained are not to be condoned."

It is a "shock to the conscience of the Court" type of circumstance that would invoke the Exclusionary Rule only. Another possibility is where the evidence

is too weak to have any probative value.

We can best believe that these rules announced recently by the Supreme Court are designed ultimately to eliminate the Exclusionary Rule or simply to make it ineffectual and riddled with loopholes and exceptions.

XIII.

UNITED STATES VS. LEON (1984)

The Supreme Court of the United States in United States v. Leon (July 5, 1984), 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct.___, finally adopted the good faith exception in search and seizure cases. The Court held that where a defective warrant was issued but served in good faith by the law enforcement officer in reliance upon the judicial decision of the disinterested magistrate, the evidence could be used as an exception to the Exclusionary Rule. The argument of the Court is that the transgressions of law enforcement officers, who have acted in good faith ia minor compared to the magnitude of the benefits conferred on society as it applies to guilty defendants. This offends the basic concepts of our criminal justice system.

This, of course, would not apply to intentional conduct when law enforcement officers knowing of the transgression and the insufficiency of probable cause or willful and reckless execution of the search warrant that seemingly offend due process.

In Massachusetts v. Shepherd, 52 U. S. Law Weekly 5177, the Court held there was a defective search warrant which was considered invalid because the Court failed to specify what items were seized. This evidence was held to be admissible under the good faith rule of Leon.

XIV.

CONCLUSION

The Exclusionary Rule represents a fundamental part of our history. It represents the fundamental growth of our free society and our right to privacy. It was developed to deter Government from being oppressive, and to sustain the rights of individuals that represent the history of our society in this country. For that reason it is important.

If we believe that the history of this country and the Constitution itself was a limitation on the power of the Government, not just the police, and that people had certain rights, which would be faithfully observed by the Government, then the argument as to costs and benefits and deterring police action is without relevance and misses the point. If we enlarge the rights of the Government, we diminish the liberties of each individual in this country. A perfect example is that of a Communist state where the rights of the Government are <u>always</u> paramount to the rights of any one individual. The police, as an arm of the Government, are free and unfettered to exercise, in good faith, their interests

in protecting and preserving the rights of that society and thereby diminishing and eliminating the rights of any one individual. No amount of argument, no amount of justification and no subtle rule of law has met this challenge or can do so.

The Magna Carta, the Writs of Assistance, the men at Concord and the Revolutionary War were specifically designed to insure liberty to the people of this country. The Constitution and the Bill of Rights insured limitations upon the power of Government to overwhelm its people and we now stand on the threshold of total government control. The exceptions, the modifications, and the other legal theories which emasculate the Fourth Amendment simply give credence to this view. It is noteworthy that less than one percent of the cases in our criminal justice system involve the application of the Exclusionary Rule. It is not significant by those standards for the Government, through its agencies, to exercise total control. A fair trial is a proceeding by which the Government obeys the rules and if they do not obey the rules, then we have tyranny. We have not benefitted from the history of all countries nor have we learned from the history of the growth and development of this nation and what we

deem necessary for a citizen of this country. As Lincoln said, this country was conceived in liberty and afforded protections granted by the Constitution, and not a meaningless and ineffectual Bill of Rights.

In the most fundamental way, we have been drawn to the issue of whether the "end justifies the means". If we believe that a man is guilty prior to trial or in the appellate process, then to sustain such a conviction and to deprive him of his liberty, we change the laws to meet the objections raised by diligent defense counsel seeking to uphold and support the Constitution of the United States. It is a bloody battle, but we remain unbowed. The contest is between the power of the Government and individual liberty. One case does not affect an individual "criminal". It affects all of us and the rights that were originally insured by the Bill of Rights to our Constitution and the Revolutionary War. How soon we forget.

Respectfully submitted,

CHARLES F. MOSES

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB179

CHECK LIST

It might be appropriate to set forth certain exceptions to the Exclusionary Rule that will be of interest.

1. Standing

Rakas v. Illinois (1978),
439 U.S. 128, 98 S.Ct. 421,
58 L.Ed.2d 387.

2. Attenuation

Wong Sun,
371 U.S. 488, 9 L.Ed.2d 455,
83 S.Ct. 417.

3. Independent Source

Silverthorne Lumber Co. v. United States,
251 U.S. 392, 64 L.Ed. 321,
40 S.Ct. 183.

Costello v. United States,
365 U.S. 265, 81 S.Ct. 534,
5 L.Ed.2d 551.

4. Inevitable Discovery

Government of Virgin Islands v. Gereau (1974)
502 F.2d 914

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020485
BILL NO. SB179

5. Impeachment

Walder v. United States (1954),
347 U.S. 62, 98 L.Ed. 503,
74 S.Ct. 354.

Harris v. New York (1971),
401 U.S. 222, 28 L.Ed.2d 1,
91 S.Ct. 643.

6. Administrative Searchs

Marshall v. Barlow's Inc. (1978)
436 U.S. 307, 56 L.Ed2d 305,
98 S.Ct. 1816.

(Probable cause may be based on legislative or administrative standards, which are less than probable cause.)

7. Exigency

Vale v. Louisiana (1969),
399 U.S. 30, 26 L.Ed.2d 409,
90 S.Ct. 1969.

Warden v. Hayden (1967)
387 U.S. 294, 18 L.Ed.2d 782,
87 S.Ct. 1642.

8. Open Fields

Air Pollution Variance Board v. Western Alfalfa Corp. (1974),
416 U.S. 861, 40 L.Ed.2d 607,
94 S.Ct. 2114.

9. Abandonment

Beck v. Ohio (1964),
85 S.Ct. 233, 13 L.Ed.2d 142,
___U.S.___.

Abel v. United States (1960),
362 U.S. 217, 4 L.Ed.2d 668,
80 S.Ct. 683.

10. Plain View

Coolidge v. New Hampshire (1971),
403 U.S. 443, 29 L.Ed.2d 564,
91 S.Ct. 2022.

11. Border Searchs or Mail

United States v. Ramsey (1977),
431 U.S. 606, 52 L.Ed.2d 617,
97 S.Ct. 1972.

12. Bankers

California Banker's Association v. Shultz
(1974), 416 U.S. 21, 39 L.Ed.2d 812,
94 S.Ct. 1494.

13. Consent

Stoner v. California,
476 U.S. 483, 11 L.Ed.2d 856,
84 S.Ct. 889.

United States v. Matlock,
415 U.S. 164, 39 L.Ed.2d 242,
94 S.Ct. 988.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020985
BILL NO. SB179

14. Consent by Others

United States v. Matlock,
cited supra.

15. Search Incident to an Arrest

Cibron v. New York, (1968),
392 U. S. 40, 20 L.Ed.2d 917,
88 S.Ct. 1889.

16. Vehicles

United States v. Ross,
456 U.S. 798, 102 S.Ct. 2157,
72 L.Ed.2d 572.

17. Hot Pursuit

Warden v. Hayden,
cited supra.

18. Stop and Frisk

Terry v. Ohio (1968)
392 U.S. 1, 20 L.Ed.2d 889,
88 S.Ct. 1868.

Cibron v. New York,
cited supra.

19. Harmless Error

Chapman v. California,
cited supra.

20. Limitations on Federal Relief

Stone v. Powell,
cited supra.

21. Good Faith Exception

United States v. Leon,
cited supra.

(This sheet to be used by those testifying on a bill.)

NAME: STEVEN UNGAR DATE: 2-4-85

ADDRESS: 101 E. Mendenhall Bozeman

PHONE: 586-4341

REPRESENTING WHOM? American Civil Liberties Union

APPEARING ON WHICH PROPOSAL: ~~#~~ SB179

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: Desire to speak on bill.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 020485
BILL NO. SB 179

A.B.A. opposes modification of exclusionary rule

The American Bar Association has filed an amicus curiae brief in Illinois v. Gates, *No. 81-430, in the Supreme Court of the United States, on writ of certiorari from the Supreme Court of Illinois.*

Filing of the brief was approved by the A.B.A. Board of Governors on request of the Section of Criminal Justice. The brief is signed by Morris Harrell, as president of the A.B.A., and by William W. Greenhalgh, William J. Mertens, and Steven H. Goldblatt.

The Illinois Supreme Court affirmed (423 N.E. 2d 887) a trial court decision to suppress bundles of marijuana, weapons, and other evidence against the defendants, because there was a lack of probable cause to issue the search warrant executed by the police.

The U.S. Supreme Court requested argument on whether the exclusionary rule "should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."

The A.B.A. adopted a resolution in 1973 supporting retention of the Fourth Amendment exclusionary rule in criminal cases and since then has opposed efforts in Congress to modify or abolish the rule.

Excerpts from the A.B.A. brief, which supports affirmance, follow:

I. A "good faith, reasonable mistake" exception to the exclusionary rule will necessarily increase the incidence of Fourth Amendment violations.

Because a "good faith, reasonable mistake" exception to the exclusionary rule would weaken the people's security by encouraging the commission of a greater number of violations of the Fourth Amendment, it must be rejected.

In *Beck* v. *Ohio*, 379 U.S. 89, 97 (1964), the Court said, "We may assume that the officers acted in good faith in arresting the petitioner. But 'good faith on the part of the arresting officer is not enough.' *Henry* v. *United States*, 361 U.S. 98, 102 (1959); 'If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Coupling a "good faith" standard with the further requirement that the officer's conduct be "reasonable" would not avoid this dire prediction. And the same can be said of the proposal of the United States to employ a wholly objective "reasonableness" test. A "reasonableness" requirement either would be meaningless—since a search or seizure that is unreasonable violates the express terms of the Fourth Amendment whether the officer's faith is good or bad—or it would substitute ad hoc assessments of "general reasonableness" for the more exacting inquiries that the Fourth Amendment reasonableness requirement is now thought to produce.

Further, there is also evidence that the warrant requirement may best protect Fourth Amendment values by forcing the police themselves (sometimes with the assistance of the prosecutors) to review the strength of their evidence before presenting their applications to the magistrate. . . . A "good faith" exception would destroy any incentive to continue this important internal review process. . . .

A "good faith" exception could . . . result in making the magistrates themselves more lax. Now the probability that the decision to issue a warrant will be scrutinized later, with the success of a criminal prosecution perhaps turning on the outcome, motivates issuing magistrates to perform more conscientiously and to become better informed on Fourth Amendment law.

A "good faith, reasonable mistake" exception would also mean the diluting of the very aspect of Fourth Amendment protections that the framers likely deemed the most crucial for preservation of a free society—the requirement that no warrants be issued except on probable cause.

A "good faith" exception, especially one resembling the proposal of the United States, would not entirely moot the question whether the police had probable cause to act but would soften it. The courts would ask if it was reasonable for the police to think that they had probable cause—regardless of whether they had in fact or not. Aside from the linguistic and logical complexities that would be generated by such an inquiry, the practical consequence would be to weaken the probable cause standard. . . .

II. This court's prior decisions do not support creation of a new exception to the exclusionary rule.

The "good faith exception" could immediately be perceived by law enforcement authorities as a relaxation of the restrictions of the Fourth Amendment. Unfortunately, their reasoning would be correct.

. . .The recent case that most clearly precludes creation of a "good faith" exception to the exclusionary rule is *United States* v. *Johnson*, 102 S.Ct. 2579 (1982). A decision allowing admission of unconstitutionally obtained evidence if the offending officer can somehow be deemed to have acted in "good faith" would necessarily repudiate the view that the Court took in *Johnson*, in regards to both the retroactivity doctrine and the deterrent function of the exclusionary rule.

III. A "good faith, reasonable mistake" exception to the exclusionary rule would weaken respect for the Fourth Amendment.

Permitting more illegally obtained evidence to be used in court will inevitably weaken the belief that Fourth Amendment violations are inherently wrong and they should be avoided for reasons independent of later tactical advantages or disadvantages at trial.

The creation of "good faith" exception will also surely be interpreted as a statement that the criminal justice system can no longer stand the cost of excluding evidence of guilt, even if the evidence was obtained in violation of Fourth Amendment rights. It is but a small step from this position to the dangerous view that we can no longer bear the cost of police compliance with constitutional standards.

STANDING COMMITTEE REPORT

February 4 19 35

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE JOINT RESOLUTION No. 7

first reading copy (white color)

JOINT RESOLUTION CALLING FOR A 10 PERCENT REDUCTION IN THE STATE BUDGET.

Respectfully report as follows: That JUDICIARY No. 7

~~DO PASS~~

DO NOT PASS

Senator Joe Mazurek Chairman.

STANDING COMMITTEE REPORT

February 4 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 151

first reading copy (white)
color

INCREASE SENTENCE DEFERRAL PERIOD IF A FINANCIAL OBLIGATION IS IMPOSED.

Respectfully report as follows: That SENATE BILL No. 151

DO PASS

XXXXXXXXXX

.....
Chairman.

STANDING COMMITTEE REPORT

February 4 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 149

first reading copy (white color)

GUILTY PLEA IN LOWER COURT WAIVES RIGHT TO APPEAL TO DISTRICT COURT.

Respectfully report as follows: That SENATE BILL No. 149

~~XXXXXX~~

DO NOT PASS

Chairman.

STANDING COMMITTEE REPORT

February 4 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 148

first reading copy (white color)

ADDITIONAL SENTENCE IF OFFENSE IS COMMITTED WITH ANY WEAPON.

Respectfully report as follows: That SENATE BILL No. 148

~~DO PASS~~

DO NOT PASS

Chairman.