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Department of Justice

STATEMENT

OF

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CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

EXCLUSIONARY RULE REFORM

ON

OCTOBER 2, 1985

Mr. Chairman and Members of the Committee, I am pleased to be here today to present the views of the Department of Justice and of the Administration on legislation to modify the exclusionary rule. As you know, the exclusionary rule is a device through which a court excludes otherwise admissible probative evidence solely because it determines that the evidence was obtained improperly. As such, as the Supreme Court itself has remarked, the rule "deflects the truthfinding process and often frees the guilty." 1/ Such a doctrine, when applied in such a way as not to produce any corresponding benefit for society, is intolerable. It hampers the police in honestly but aggressively seizing evidence of crime, and worse, it destroys the respect of our citizens for the law and the judicial system. This Administration regards legislation to restrict the application of the exclusionary rule to those cases where there has been real police misconduct as one of its most important goals in the criminal justice area.

Mr. Chairman, almost four years ago, on October 5, 1981, D. Lowell Jensen, my predecessor as head of the Criminal Division, had the privilege of appearing before the Subcommittee on Criminal Law to suggest legislation to provide that otherwise admissible evidence should not be excluded on the grounds that its seizure violated the Fourth Amendment if the search or seizure

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1/ Stone v. Powell, 428 U.S. 465, 490 (1976).

was undertaken in a reasonable good faith belief that it was in conformity with that amendment. A lot has happened since then.

In the last Congress, the Senate passed S. 1764, a bill that provided for a reasonable, good faith exception to the exclusionary rule by a vote of 63 to 24 on February 7, 1984. A few months thereafter the Supreme Court in the Leon and Sheppard cases [2/] in effect carved out such an exception for cases involving search warrants. The Court squarely held that the Fourth Amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by law enforcement officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is ultimately found to be invalid.

Although the Supreme Court has now effectively laid to rest any real argument that the exclusionary rule is constitutionally required, the House did not see fit to enact S. 1764 or any other exclusionary rule bill. It is therefore necessary that the Senate act again to codify the Leon and Sheppard holdings, and, even more important, to extend their limitation on the rule to search and seizure cases where search warrants are not involved. I will also suggest that the Congress should act to forbid courts from acting on their own volition and applying the exclusionary rule in contexts other than the Fourth Amendment.

2/ United States v. Leon, ___U.S.___, No. 82-1771 (July 5, 1984); Massachusetts v. Sheppard ___U.S.___, No. 82-963 (July 5, 1984).

Mr. Chairman, in the last Congress, the Committee produced an excellent report on S. 1764 which discussed the origin and development of the exclusionary rule in some detail. [3/] In light of that report, I will not go into the history of the rule in any great detail. But it must be remembered that the rule is merely a judicially created one. It is not set out anywhere in the Constitution or the Bill of Rights. It was not even stated by the Supreme Court until 1914 -- well over a century after the Constitution was adopted -- in Weeks v. United States. [4/]

Although the argument was sometimes raised in the past that the exclusionary rule was required by the Fourth Amendment, in the ten or twelve years before Leon and Sheppard, the Court made it increasingly clear that this was not the case. Leon and Sheppard then nailed down the point that the rule was not constitutionally mandated. Rather, the Court characterized it as "a judicially created remedy designed to safeguard Fourth Amendment Rights generally through its deterrent effect, rather than a personal right of the person aggrieved." [5/]

Thus, the question becomes one not of law but of policy. The Court in Leon stated -- as it had in a number of other recent cases -- that the question of whether evidence should be

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3/ Report No. 98-350, 98th Cong., 2d Sess.

4/ 232 U.S. 383 (1914).

5/ Leon, slip op., p. 7.

excluded must be resolved by weighing the costs and benefits of preventing the use in evidence of inherently trustworthy tangible evidence. Let's think for a minute about who benefits when the rule is applied and evidence is excluded. Pretty clearly, the defendant benefits because the jury never gets to see or hear about the very evidence that would in most cases prove his guilt -- the bag of cocaine, the gun used to murder a law enforcement officer, or the satchel of top secret documents destined for a Russian KGB agent. Just as clearly, society loses in a case such as this when a guilty person is returned to the streets, unless, somehow, excluding the evidence and freeing the criminal serves some even more important purpose like deterring misconduct on the part of the police.

Therefore, the question we have to ask is this: Does applying the exclusionary rule to keep out of evidence something that a court believes has been seized in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures deter police misconduct? The answer, of course, depends on the situation. If a law enforcement officer acts in an objectively reasonable belief that a particular search was proper, applying the rule to exclude the evidence he then seizes could not possibly have any deterrent effect because there is no misconduct and hence nothing to deter. I might also add that applying the rule in such a case results in attaching a false label of "police misconduct" to what is, in fact, proper and commendable police conduct. This adversely affects the whole criminal justice system by fostering the public's perception that

the police have engaged in lawless conduct when this is simply not the case.

As the Court in Leon summed it up: "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act under the circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty...'" 5/

While Leon was, as you know, limited to cases involving search warrants, its reasoning applies equally strongly in and should be extended to warrantless searches as well. Applying the exclusionary rule in cases in which a law enforcement officer has acted in a reasonable belief that a particular type of search -- typically a search incident to an arrest or a search of an automobile -- could be conducted without a warrant and was otherwise proper cannot possibly have any deterrent effect on misconduct because, by definition, there is no misconduct. What is really involved when such a search is ruled in violation of the Fourth Amendment is a determination by a court, usually years after the officer's confrontation with the criminal, that his actions did not quite comport with the requirements of the law of search and seizure as it has been developed by thousands of

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6/ Leon, slip op., pp 20-21.

appellate court decisions over the years. To exclude such evidence because a court finds the officer should have acted differently, even though it also finds he acted reasonably, can have but one result: the unjustifiable acquittal of a guilty defendant.

An acquittal in a case such as this is simply too high a price for society to pay. It is the elimination of this result that we seek to end by our legislation. It is important to keep this goal in mind because I know that certain groups have claimed that our proposals to restrict the application of the exclusionary rule would encourage police misconduct. That is simply not the case. We do not intend to use illegal methods to combat crime, but at the same time we cannot tolerate the freeing of guilty criminals without a valid reason.

Turning now to S. 237, this bill is identical to S. 1764 which the Senate passed in the last Congress before the Leon and Sheppard cases were decided. As you know, S. 1764 was drafted and strongly supported by the Department. Nevertheless, we would propose one minor amendment in light of the Leon case. S. 237 states that evidence will not be excluded on the grounds that the search or seizure was in violation of the Fourth Amendment if the search or seizure was undertaken in a "reasonable, good faith" belief that it was in conformity with that Amendment. The Committee's report on S. 1764 explained that this required that the conduct be found both objectively and subjectively to have

been undertaken in good faith. 7/ But in Leon, the Supreme Court determined that it was preferable and sufficient to rely solely on the concept of objective reasonableness and not try to plumb the officer's subjective belief in the legality of his actions. We agree and thus recommend that the phrase in the bill "a reasonable good faith belief" be replaced with the phrase "an objectively reasonable belief."

In addition, we think that legislation limiting the exclusionary rule should extend beyond just its application in the context of the Fourth Amendment. In contrast to its extensive consideration of the rule in cases involving the constitutional requirements of the Fourth Amendment, the Supreme Court has never given in depth consideration to whether evidence should be excluded if it was obtained in violation of a statute, rule, or regulation. However, the Court has held that suppression of evidence is not required for every statutory violation, even when the statute contains an exclusionary rule, and has declined to adopt an exclusionary rule for evidence obtained by an agency in violation of its own internal guidelines. 8/

On the other hand, some lower courts have invoked the exclusionary rule for non-constitutional violations, although the Second Circuit has cautioned that "courts should be wary in

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7/ Fn. 3, supra, p. 21.

8/ See United States v. Donovan, 429 U.S. 413, 432-434 (1977), and United States v. Caceres, 440 U.S. 741, 754-757 (1979).

extending the exclusionary rule ... to violations which are not of constitutional magnitude." 9/ Moreover, Rule 402 of the Federal Rules of Evidence, enacted in 1975, states: "All relevant evidence is admissible, except as provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Arguably, this would prevent the application of the exclusionary rule for a non-constitutional violation, although no court appears to have considered Rule 402 in this light.

In any event, given the heavy price in terms of the truth finding process exacted by an exclusionary rule, coupled with the Supreme Court's holding that the rule is not required even for constitutional errors, we think it is important for Congress to legislate the principle that when the underlying violation is not of constitutional magnitude, the exclusionary rule ought not to be invoked by a court unless a statute indicates that it should be so applied. Accordingly, we recommend that a new section be added to title 18 specifically stating that except as provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded or suppressed in a federal court proceeding on the ground that the evidence was obtained in violation of a statute, rule, or regulation.

9/ See United States v. Burke, 517 F. 2d 377, 386 (2d Cir. 1975). Our report on S. 237 dated August 20, 1985, discusses these cases and the entire question of eliminating the exclusionary rule for non-constitutional violations in greater detail.

If the Committee decides to adopt this proposal for limiting the exclusionary rule's application in non-constitutional situations, the limitation of the rule for constitutional violations, as set out in S. 237 needs to be modified by eliminating any reference to statutory authorization for the exclusion of evidence. For the sake of clarity, I have attached as a one-page appendix to this statement new sections 3508 and 3509 to reflect these changes. 10/ We urge the Committee to modify S. 237 so as to set out both of these new sections.

In sum, let me emphasize again that legislatively limiting the exclusionary rule so as to prevent its abusive application is critically important. Federal law enforcement efforts should not be hampered by an evidentiary rule that can operate to turn loose hoodlums and spies who belong in jail. Moreover, limiting the exclusionary rule would have the desirable affect of encouraging more of the states to do the same. Finally, limiting the rule would send a message to the law enforcement community and the public that the Congress will not stand idly by while courts throw out evidence by second-guessing the actions taken by reasonable police officers in obtaining it -- actions often taken during a sudden, dangerous confrontation with a criminal.

10/ We note that any new sections added should start with 3508, not 3505 as is set out in S. 237. Sections 3505-3507, dealing with foreign evidence, were added by the Comprehensive Crime Control Act of 1984.

Mr. Chairman, that concludes my prepared testimony and I would be pleased to answer any questions at this time.

§ 3508. Limitation of the fourth amendment exclusionary rule

Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the fourth amendment. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable belief, unless the warrant was obtained through intentional and material misrepresentation.

§3509. General limitation of the exclusionary rule

Except as specifically provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded or suppressed in a proceeding in a court of the United States on the ground that the evidence was obtained in violation of a statute or rule of procedure, or of a regulation issued pursuant thereto.

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