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Teh Exclusionary Rule

Assembly Committee on Criminal Justice

THE EXCLUSIONARY RULE

Hearing

Assembly Committee on Criminal Justice

Monterey, California
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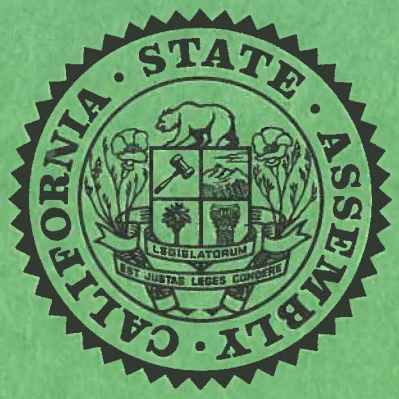

No. 843

MEMBERS PRESENT

Bill McVittie, Chairman

Jack Knox, Assemblyman

Elihu Harris, Assemblyman

Michael Ullman, Chief Consultant

Peter Jensen, Consultant

Darlene Fridley, Committee Secretary

I N D E X

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P R O C E E D I N G S

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CHAIRMAN McVITTIE: Good afternoon ladies and gentlemen. On behalf of the committee, let me apologize for our tardiness in starting. The Assembly Judiciary Committee heard various matters this morning, and they adjourned late, and then called the birthday of our senior member, Jack Knox. And there was a little going away party for him at a local restaurant. So I do apologize for having kept the members of the public here.

Today we have the interim hearing on the exclusionary rule. I'd like to introduce the members of the committee that are here, before we go further.

To my left is the person whom I referred to previously, senior member of the committee, in fact the dean of the Legislature who is retiring at the end of this session, Jack Knox from Richmond. To my right, in this location only, we have a first term member, Ellihu Harris from I guess it's Berkeley. We have our two consultants here, two of our three consultants, to the far right Michael Ullman, and to my far right Peter Jensen. And we have our committee secretary here as well, Darlene.

We have asked the witnesses to focus on a number of issues relative to the exclusionary rule. In particular, the alternatives to the rule, the basis of the decision

between the federal and the California standards, and whether as one commentary has suggested, the dissatisfaction with the exclusionary rule. It's really based on the discontent with the Fourth Amendment.

In addition, I would ask those persons who do testify to comment on the recent report of the Controller General of the United States to Senator Edward Kennedy, which included that, and I quote:

> "One four-tenths of one percent of the decline of the defendants' cases or studies were declined due to Fourth Amendment search and seizure problems."

Now as I understand it today, our first witness today is District Attorney John Van De Kamp.

JUDGE JEFFERSON: That's not the way it's listed in the --

CHAIRMAN McVITTIE: That's right.

JUDGE JEFFERSON: I'm Bernard Jefferson, and I see I'm listed first, and I'd like to be able to speak first.

CHAIRMAN McVITTIE: Absolutely.

John, we'll take Justice Jefferson.

Thank you, Judge.

JUDGE JEFFERSON: I hope am not keeping Mr. Jensen, putting him to too much trouble, but I also have other

things to do.

CHAIRMAN McVITTIE: That's fine. You're first on the agenda, as printed up.

JUDGE JEFFERSON: Let me address your first question:

> "Is the exclusionary rule constitutionally required, or is it a judicial procedure capable of abolition by the legislative branch?"

I don't think it's any doubt about the answer to that question. It's very obvious, and let me say it's obvious on the basis of my experience.

I recently retired as the presiding justice of Division I of the Second Appellate District Court of Appeal in Los Angeles. I have a record of 20 years on the bench, 15 of which is on the Superior Court of Los Angeles County; and the last five years, on the appellate court. So I speak from a background of my experience in the law of the 20 years of being a judge.

I don't think anybody can rationally read the decisions of the US Supreme Court, the decisions of the California Supreme Court, without concluding that the exclusionary rule is constitutionally required. And that being so, it is to say that it's capable of abolition by the Legislature as simply wishful thinking. The Legislature

may act, but there isn't any question in my mind that the California Supreme Court and the US Supreme Court would declare any attempt to modify the exclusionary rule as the courts have designed it as being contrary to law.

I note that your staff presentation is indicated. Well, there is nothing in the Fourth Amendment against unreasonable search and seizure and the requirement that warrant be issued upon probable cause to say what should be the remedy. It is true there is nothing that says that. There is nothing in the US Constitution that says there's a right of privacy, either. But nevertheless, the US Supreme Court has said it's in there. So the constitution is what our courts say it is. And they have said that. It's the constitutional requirement that if a defendant has been convicted through the use of illegally seized evidence, for example, that that is a violation not only of the Fourth Amendment, but a violation of the Fourteenth Amendment, if you're dealing with the states.

Let me -- I can just point out two cases fairly -- not all that recent, either, which makes it very clear to me that this is a constitutional interpretation. Let's take, for example, the case of Rochin vs. California in 1952 in which the police saw the defendant swallow some capsules, and then they proceeded to try to choke it out of him by the throat. They didn't succeed, they then carried

him to a hospital and asked the doctors there to pump his stomach out. The physicians did that, he vomited up the capsules which contained morphine. So he was convicted in the state court of illegal possession of morphine. And what did the US Supreme Court say? That that conviction had been obtained through the introduction of illegally obtained evidence. And what did it violate? The due process clause of the Fourteenth Amendment. Now that's something that you cannot overlook.

Initially, the Fourth Amendment against search and seizure was not looked upon as applicable to the states. But take the Rochin case. It makes it quite clear that a conviction now obtained by the use of evidence which is held to be in violation of the Fourth Amendment is now also in violation of the due process clause of the Fourteenth Amendment.

Now the Fourteenth Amendment doesn't say anything about what the remedies for violation of due process is. You read the Fourteenth Amendment. All it says is that:

> "No state shall deny to any person the right to life, liberty, or property without due process of law."

Now it doesn't tell us what is a remedy for a state's invasion of one's rights. But the decisions make quite clear that the remedy such as the Rochin case held

is that you simply must reverse the conviction, because it's a violation of the Fourteenth Amendment. So that the argument that there's nothing specific about a remedy is simply meaningless.

Take another case. I would refer briefly to a 1969 case. The Chimell vs. California which dealt with a search of the premises without a warrant in a house. The defendant had been arrested elsewhere. The police seized property which had been found to have been taken in a prior burglary. And he was prosecuted for this prior burglary. And again, we have the court declaring that that search and seizure of the fruits of a prior burglary, which the police didn't know anything about, constituted a violation of the Fourth Amendment, and it was also carried into the Fourteenth. And I quote specifically what the court had to say. The supreme court said:

> "The scope of the search was therefore unreasonable under the Fourth and Fourteenth Amendments. And the petition of this conviction cannot stand."

I call your attention to the case similar to Chimell, Vail vs. Louisiana, 1970 case in which the heroin -- the narcotic was seized in the defendant's house and declared to be an unlawful search. The Louisiana courts also considered that there was no invalidity with respect to this particular

search. But the US Supreme Court did not go along with all the courts of Louisiana. And there again, what the US Supreme Court said in this case was:

> "The Louisiana courts committed constitutional error --" and I'm quoting. "-- in admitting into evidence the fruits of the illegal search."

On the face of those cases, I simply see no basis for anyone saying the legislature can adopt an alternative solution such as some sort of civil action against the police officers who engaged in this illegal conduct.

Now I'm not discussing at all, and I don't think the comittee should be concerned with what constitutes illegal search. It seems to me what you're concerned with here is assuming that the courts say that a particular search and a particular seizure of evidence which forms the basis of the exclusionary rule, once it's decided to be illegal, then what is the remedy? And the remedy, as I say, is quite clear. The California courts are no different from the US Supreme Court.

CHAIRMAN McVITTIE: May I interrupt?

JUDGE JEFFERSON: Yes.

CHAIRMAN McVITTIE: You say the remedy is clear, and that is to exclude the evidence --

JUDGE JEFFERSON: No, I'm going beyond that.

The remedy is clear that the conviction based upon that illegal evidence must be reversed. That's exactly what they said in the three cases I've mentioned to you.

CHAIRMAN McVITTIE: The purpose, then, in keeping out the evidence, then, is to deter this type of conduct in the future.

JUDGE JEFFERSON: Oh, that's one purpose. But you cannot single out, as far as I am concerned, the one purpose. The courts have said to justify their interpretation of the constitution as one of the reasons that it will deter illegal conduct by the police. Now clearly, the Supreme Court of the United States, California Supreme Court, could have interpreted the constitution otherwise. But they didn't see fit to do so. But that's not the only reason I think, and this one, the California Supreme Court has made quite clear, that they are equally concerned with the reason that the courts should not be a partner in illegal conduct.

The integrity of the court is equally as important as the deterrent of illegal police conduct. So that when you have a court saying that the court should not sit idlely by, and when it sees that evidence has been obtained illegally, and you've got illegal police conduct, take for example the police conduct in Rochin. It was particularly obnoxious in the choking out or trying to choke out a man's material

that he swallowed. While you take conduct such as police beating a man and getting a confession out of him. If courts are going to sit back and say, "Well, there's a remedy like a civil lawsuit, but nevertheless we will permit and help his conviction along by letting this evidence in," then the very integrity of the judicial system is at stake.

CHAIRMAN McVITTIE: But isn't it a fact that many times the officer does not realize that his conduct amounts to an illegal act until after the court has reviewed that conduct?

JUDGE JEFFERSON: No doubt about that. And that is when the second reason is equally as important as the first. And that's why the California Supreme Court has said it does not consider the pure deterrence as the only reason for the constitutional interpretation.

CHAIRMAN McVITTIE: Peter Jensen has a question.

MR. JENSEN: Justice Jefferson, but to focus this, hasn't the US Supreme Court based its rationale for the exclusionary rule on a different basis in the California Supreme Court? I mean, you're focusing on both the integrity of the court and the deterrence of illegal police conduct. Hasn't the United States Supreme Court somewhat different than the California Court on that basis?

JUDGE JEFFERSON: The US Supreme Court, it is

true, has emphasized the deterrence. But nevertheless, it -- to me, the emphasis is immaterial. Once the court says, as it did in Vail vs. Louisiana, that a conviction that has been obtained by the use of illegal conduct, violates one's due process rights. So it doesn't make any difference what your analysis is as to what is back of it.

I personally feel that the California court is right in saying that the integrity of the court system of not being a party in illegal conduct is equally as important as the background of saying whether we deter police conduct. The fact remains that whether it's a deterrent or not, once a defendant's rights have been affected, if you were to permit this type of thing.

There is no doubt, I think, when the police tried, for example, in wholesale stopping of automobiles and searching. They in good faith could have believed, "Yeah, we should have been able to do that." I'm sure that when police will stop a black, say in Beverly Hills or in San Marino, and there's no basis other than blacks don't live there very much, and to stop him and want to search him so as to say, "You must be up to no good to be here in the first place," and want to search. And he can say, well, I'm in good faith. The blacks don't come to this section, they don't live here. So if I see a car riding around in a particular area that's lilly white, why can't I search?

Or at least I'm in good faith, and if I find, search the man, pat down for weapons, and otherwise find he's carrying some contraband, then on this theory of deterrence, he's acted in good faith. And you'd say then that man's conviction ought to stand. But look what it's doing to the rights of people.

If you don't have this exclusionary rule, the police could just decide we want to stamp out crime; the best way to do it is let's make a wholesale search of every house in the neighborhood. It doesn't make any difference. We know we say certain areas are called high crime areas. The supreme court has said well, that you cannot use to any great extent. If you see someone in the area, you have a right to search. But if you don't have the exclusionary rule, and police then feel they are acting in good faith, and the best way to stamp out crime is let's just search every automobile, every house.

And then this will bring me to the second, about the commentary. I have a hunch, I'm not sure, but it sounds like it could be a colleague of mine, Justice Flemming, who has written that. And I take total and complete issue with him on it. The theory that we pay a great price for people being turned loose. All these people aren't being turned loose, that's a lot of hogwash. It's not based upon facts, it's not based upon any legitimate study. Look

at the study that was made of the federal deal by the committee for Senator Kennedy. That study doesn't show that there is any wholesale violation of people's rights, and that they are being turned loose. I can't give you the figures, but over the last five years I wouldn't begin to say the number of cases that have come up to our courts, the appellate courts, in the way we have had to rule upon was there an illegal search and seizure? I would say probably in 95 percent of the cases in which the trial courts have said there's not illegality, we have sustained them. The ones that are declared to have been an illegal search are clearly in the minority. And that doesn't necessarily mean that a person is going to go free. I can remember three or four cases, as I think about it, in which we held it was an illegal search. The case went back, retried, and the man found guilty in legally obtained evidence. And in some cases, he entered a plea of guilty. And I just don't know what the figures are, but certainly I don't believe that there are any figures which will show that the majority of cases in which an illegal search had been held to be that way by the court. But the result has been that person goes free.

CHAIRMAN McVITTIE: Excuse me, Judge. Assemblyman Harris has a question.

JUDGE JEFFERSON: Yes.

ASSEMBLYMAN HARRIS: Yes. I want to ask, I understand your comments, Justice Jefferson, relative to the constitutional requirement of the exclusionary rule. But I was wondering if you could comment on whether or not you feel that the exclusionary rule is completely beyond the purview of the legislative process, or is the Legislature empowered in your opinion to define, or to narrow the scope of the exclusionary rule, or is it something that is completely within the purview of the judiciary, and beyond each case?

JUDGE JEFFERSON: I think it's completely within the purview of the judiciary, because we are dealing with the interpretation of the constitution.

ASSEMBLYMAN HARRIS: But it's not defined in the constitution.

JUDGE JEFFERSON: No, it's not defined.

ASSEMBLYMAN HARRIS: Couldn't the Legislature define it and the courts determine whether or not that defintion is constitutional?

JUDGE JEFFERSON: Oh, yes. You could do that, but all I'm saying is once you do it, I know the answer, I think. And that is the supreme court would say it's unconstitutional.

For example, suppose the Legislature were to say that we would consider any search by an officer who in good faith thinks he ought to search a man, whether

he has cause or not, should be deemed valid. Or for example, suppose you were to say if a man is arrested in Monterey and he lives in San Francisco, that the police would have the right, then, to search his residence no matter how far distant from that it is. Yet the courts have said that the only reasonable search that's incident to an arrest is of his person and within the area of his reach to get hold of a weapon, et cetera. That you simply cannot then go to his house a few miles away, 150 miles away and search.

Now suppose the Legislature were to say, "Well, we think there's nothing wrong with that." I would say the supreme court, the Supreme Court of California and the US Supreme Court would say that exceeds the province of the Legislature in trying to define what constitutes an unreasonable search, and so limit it.

ASSEMBLYMAN HARRIS: Can the Legislature at all impact, then, in your opinion on the exclusionary rule? Or -- in other words, I'm really trying to get at --

JUDGE JEFFERSON: I would say instead of impacting in the sense of trying to abolish it or modify it, that you can make additional remedies available.

ASSEMBLYMAN HARRIS: For example?

JUDGE JEFFERSON: In an effort to try to keep the police from violating that rule.

Well, it would not supplant it, but suppose you

give an additional remedy of, let's say, a civil lawsuit. That might then make police departments more careful in their training, because of the possibility of the additional liability apart from the exclusion.

There may be others. I wouldn't want to try to point out what could or could not be done, except I am sure that whatever is attempted, it still will be up to the court to determine what is unreasonable search and seizure, or what constitutes that kind of conduct which basically violates a sense of justice so as to constitute a violation of due process of law.

ASSEMBLYMAN HARRIS: One last question. Would you say in your opinion that the exclusionary rule is sufficiently well defined so that law enforcement personnel know when they are within or without the exclusionary rule?

JUDGE JEFFERSON: I think for the most part they do. Obviously they can make a mistake, everybody can. But I think the --

ASSEMBLYMAN HARRIS: But you mean the court has defined it to the extent it's clear?

JUDGE JEFFERSON: I believe the court has defined it to the extent that in most cases the police know what they are able to do. But what my experience indicates, as I read the transcripts, is the police can get lazy. And instead of getting a warrant, for example, take the

chance on making an arrest and saying, "Well, maybe the defendant won't attack it, or maybe it can be upheld." I believe the decisions have sufficiently clarified and defined when a warrant is necessary, when it isn't, or the exceptions so that for the most part they know.

Now there obviously are borderline cases in which the police can't tell, and nobody knows until the courts decide that particular case. But legislation can't solve that any more than the case-by-case method of the courts. So that your legislation would just simply open up another door for the courts to have to determine have you attempted by the legislation to get into and cross over into our division of powers.

ASSEMBLYMAN HARRIS: Thank you.

CHAIRMAN McVITTIE: Justice, if there was a, let's say, a statewide licensing system of peace officers so that there could be some type of a sanction against the officer who did improperly obtain evidence, then could there be greater consideration given to allowing the illegal evidence to be used at the criminal trial?

JUDGE JEFFERSON: I don't believe so, because I can go back and give you the instances. It wouldn't make any difference what the sanction is. If the evidence has been seized illegally, as the court has defined what constitutes a reasonable search, I don't believe the Supreme

Court of the US is going to back up from its idea, if that evidence has been illegally obtained, that then you have convicted a man in violation of his due process rights. And to me, it wouldn't make a bit of difference as to what the sanction against the police would be, because we are dealing with an invasion by the government on a defendant's right of privacy, which in California, and even more important, probably under the Federal Constitution, because California now has an explicit right of privacy to the individual. Whereas the US Supreme Court has simply had to read it into the Federal Constitution without regard to what the constitution says. And then you have to further consider that a state court -- and California has been one of the foremost -- is able to incorporate its constitutional provisions similar to the federal, and give any party greater rights under the State Constitution than what the US Constitution would give. And we have case after case in which our supreme court has said, "As far as we are concerned, our constitution is to be interpreted the way we see it, and if it gives greater rights, it is permissible under our dual federal and state system." So I just don't think you can get around the fact that we have tried to provide additional sanctions will in any way get our supreme court in California, or US Supreme Court to change its view.

Now I might -- or at least you cannot have -- the legislation by itself isn't going to solve it. If you are able to get the supreme court to back off and begin interpreting the constitution in a different way, then I think we can see a change. But I'm not sure that legislation by the Legislature will at all affect the way the US Supreme Court is going to look at the due process clause of the Fourteenth Amendment, nor do I believe that legislature will affect the way our California Supreme Court will look at an interpretation of its own constitution with respect to the exclusionary rule.

One of the reasons I am going back to the first point as to what the exclusionary rule is founded upon, is we do have in California specific instances where the California Supreme Court has said we are adopting this exclusionary rule out of our powers of concern, and our powers of direction over the lower court system. Now they have said that in several instances. But when it comes to the exclusionary rule for excluding illegally obtained evidence, they have not said that they based it specifically on the constitutional provisions, Federal Constitution, and the State Constitution.

CHAIRMAN McVITTIE: Thank you, Justice. Thank you very much.

JUDGE JEFFERSON: Thank you very much for permitting

me to appear.

CHAIRMAN McVITTIE: Next we do have District Attorney John Van De Kamp from Los Angeles County.

MR. VAN DE KAMP: Mr. Chairman, members of the committee, first of all let me just express my thanks to you for holding this hearing. The exclusionary rule is a hot topic today. I think discussions of this nature tend to bring to the fore many problems that prosecutors are having with it, and I think to generate the kind of controversy that hopefully will boil out of itself some changes.

I think you postulated the question to us today in a rather ball form. That is, you talk about whether or not it's capable of abolition. I think most of us who work as prosecutors understand the value of the rule in some instances, in that we see it on a day to day basis, and we find that the rule has been used in a meat axe approach, and it needs some substantial change. And that's why I'm here today representing not only myself at my office, but also the California DA's Association.

As to your first question, "Is the exclusionary rule constitutionally required?" I think there's a simple answer to that. And that is as long as the courts say so. Twenty-five years ago in our state, or thereabouts, we did not have an exclusionary rule. A number of years

later of course, it was mandated by federal court developments, and yet at the same time as Justice Jefferson has just so well articulated, we have substantial differences between the California Supreme Court and that of the United States Supreme Court. And indeed if there's one thing that brings us here today, it's the fact how the exclusionary rule is being implemented. Differences vary substantially from state to state, and from federal jurisdiction to local jurisdiction.

Indeed, one of the cases that you will hear quoted today is Williams, a case out of the Fifth Circuit, where just the other day a majority of the appellate court in that Fifth Circuit voted for a good faith exception to the exclusionary rule by a vote of 13 to 11.

The second question: "Is the judicial procedure capable of abolition by the legislative branch?" Well, I think Justice Jefferson probably put his finger on it. I think the reaction that he says would occur probably will occur, certainly in the California Supreme Court today, given the present situation. Yet I would refer this body to the well known dissent by Justice Burger in Bivens vs. Six Unknown Federal Narcotic Agents, written a number of years ago, but it's often cited in this debate in which he said, page 641:

"That reasonable and effective

substitutes can be formulated if Congress would take the lead," as for example in 1946 in the Federal Tort Claims Act. He said:

"I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials."

CHAIRMAN McVITTIE: But John, even if Congress did take action, as Justice Jefferson pointed out, you would still have to have the majority of the supreme court to uphold that Congressional action.

MR. VAN DE KAMP: Absolutely. And that's where I think he's right, and I'm not quarreling with him. Because I think the court will have the final say. And yet, I tend to think that the United States Supreme Court, given the right kind of substitute or alternative, today might find a majority that will approve the Williams good faith test, or it might approve a level of sanctions that might provide a capable alternative.

I come here today to talk to you about an alternative which is not really an ultimate panacea for the exclusionary rule, but is an attempt to try to bring a greater level of certainty to the rule in California. Our rule, of course, is adopted in People vs. Cahan many, many years ago. And

it's very interesting, and I will get to this in a second, how many of the hopes of Cahan decision writers have simply not been met in the State of California. They set in writing their opinion many years ago, Justice Trainer wrote that opinion, in a case which I might say was a flagrant violation of the defendant's rights where there were unauthorized forcible entries into homes, and it's one of those cases, sort of like Rochin, which insults I think the mentality and humanity of most people. But in adopting the exclusionary rule in this case, the court said:

> "We are not unmindful of the contention of the federal exclusionary rule has been arbitrary in its application, and has introduced needless confusion into the law of criminal procedure."

They went on to say that that would not happen here. They said we don't have to follow the federal cases. And they said that:

> "The federal cases indicate needless limitations on the right to conduct needless searches and reject them. Further, the development of the exclusionary rule need not introduce confusion into the law. Instead, it opens the door into the development of workable rules governing searches

seizures."

I think this is where Justice Jefferson and I part company. I would suggest that we might have a neutral law school professor prepare a car procedure situation. An area where I think most of those who practice in the area of criminal law know is fraught with all kinds of complexities where you have decision after decision, change after change coming from our appellate courts, and see whether or not given a spot situation whether he or anyone else, I'm not singling him out, could deal with a decision in a fairly constitutional way to make sure that that search and seizure would be upheld. I don't think he could, because the cases are just too numerous, and the problems are simply too complex in that area. I think anybody who saw 60 Minutes a number of months ago and saw that little car search that they simulated there gets an idea of how technical our rules have become.

Cahan also predicted that where the search and seizure may involve only minor intrusions of privacy, are a result of good safe mistakes in judgment on the part of the police officer, there is no reason why if the exclusionary rule is adopted, appropriate exceptions could not be made to govern these latter situations.

Well, I just have to tell you that I don't think the goals of Cahan, which were aimed primarily at detterence,

have been met. All one has to do is take a look at Art Bell's Compendium, go to some of the seminars, you go to the classes that are put on for defense lawyers and prosecutors, you look at our search warrant manual, you get an idea of how complex this situation is.

It is my opinion, and that of many prosecutors in California, that the goals simply have not been met, and that here in California the exclusionary rule has failed to live up to the expectations of those who framed it. It is and has been of questionable effectiveness in deterring unreasonable police conduct, the rules governing search and seizure have become so complex and change so frequently that no law enforcement officer can reasonably be expected to know them in their entirety. That's also true with respect to the laws governing arrests, confessions, line ups, where the exclusionary rule also comes into play.

CHAIRMAN McVITTIE: Excuse me, Mr. Jensen would like to ask a question.

MR. VAN DE KAMP: Yes.

MR. JENSEN: I'm wondering, you're starting to focus on a little different area than Justice Jefferson did. Is that the only basis for the exclusionary rule, is deterring illegal police conduct? We haven't clearly drawn that distinction. Apparently there is a difference in the rule between the US Supreme Court and California.

MR. VAN DE KAMP: That's right.

MR. JENSEN: Do you ascribe to it, the only purpose of the exclusionary rule is to deter illegal police conduct? There is no sense of the integrity of the court in accepting this illegally seized evidence?

MR. VAN DE KAMP: I think there have been decisions from both the supreme court of the earlier days and from the California Supreme Court which point to the standpoint of judicial integrity as one of the bases for the exclusionary rule. But I would just have to suggest that if you're talking about judicial integrity, you're also talking about fording into the development of truth, which has always been an important function of the taking of testimony at a criminal trial. And indeed, you are obviously closing the door to truthful probative testimony when you do it. And what I'm saying today is suggesting that there are very significant offsetting reasons why we should return to truth, and why indeed what we've done in the past 25 years has to a certain extent brought our courts into certain disrepute.

MR. JENSEN: Even if the truth is arrived at through the seizure of evidence illegally? The truth is more important?

MR. VAN DE KAMP: I think it depends on the situation. I just want to point out that I am not here to support

the notion of pumping out stomachs of people, taking those kinds of activities. But I am talking about the overwhelming number of cases which are borderline cases, gray area cases where there has been a technical distinction which has robbed the court of getting at the truth in particular cases. And I want to make one point --

CHAIRMAN McVITTIE: All right. Mr. Knox and Mr. Harris, if you're through, Peter.

MR. JENSEN: Thank you, Mr. Chairman. Yes.

ASSEMBLYMAN KNOX: What about the situation where the officer plants the stuff on the defendant while illegally breaking into the house?

MR. VAN DE KAMP: Where he plants it on the defendant?

ASSEMBLYMAN KNOX: Yeah. There have been a lot of cases like that.

MR. VAN DE KAMP: Well, I don't know what advantage that kind of evidence can be used. I mean I --

ASSEMBLYMAN KNOX: Well, if the officer can break into your house or break into a car without a search warrant, and then you know, the reason I raise the question, as you said, we are searching for the truth. But the way you frame it, the truth is always what the officer says, it's never what the defendant says; isn't that true?

MR. VAN DE KAMP: No, no. And I can see -- I

point to jurys, courts,that everyday have to make those decisions to who's telling the truth. And there are cases I can show you --

ASSEMBLYMAN KNOX: The contest isn't really equal, is it Mr. Van De Kamp?

MR. VAN DE KAMP: Not completely equal, but it's not as one sided or black/white as you might suggest. And I can take you into our court system and watch in a daily basis about some of the decisions that are made by jurors and judges on that score where policemen are disbelieved.

Again, let me get back to this. I am not -- in the case you have framed, you see, that would be I think a bad faith intentional violation which would be unreasonable on its face which should relate in exclusion. I would suggest if that somebody had followed in the Williams case. But I'm not talking about cases like that. Obviously, if you had that kind of case, you couldn't get a conviction anyway.

ASSEMBLYMAN KNOX: What's a typical fact situation you would like to see removed by the Legislature?

MR. VAN DE KAMP: The usual traffic stop where they perhaps open a container, issue where you make a certain type of an arrest where I think you should be able to search the body of the particular person. I can go through a whole series of federal/state distinctions which I would

like to address for a second, because it gets me to the point I would like to make.

ASSEMBLYMAN KNOX: What's the language you would like to see inserted in the code?

MR. VAN DE KAMP: What I would like to do, and I'm late in getting there, is suggest an amendment to the California Constitution which says that:

> "Notwithstanding any other provision of this Constitution or California Penal Code Section 1538.5, evidence shall not be excluded or limited for any purpose in any legal proceeding except as provided by other statute."

That is, the Legislature after a sense of rulemaking like hearing or whatever, could set rules that go beyond the Federal Constitution, or as required by the United States Constitution. The point being to get away from the variation between federal and state law, and the needless complexity that that tends to bring. And to give the rule setting authority to the State Legislature if it wishes to use it.

ASSEMBLYMAN KNOX: Well, if your amendment passed, what kind of a bill would you like to see adopted by the Legislature?

MR. VAN DE KAMP: Well, first of all, we would

like to see that to get out of the Legislature and go on the ballot here in California.

ASSEMBLYMAN KNOX: No, but let's say that's now the Constitution of the State of California. What kind of language would you like to see in the code? What sort of pass would you give the police to search people's --

MR. VAN DE KAMP: I would think the language in the Williams case, which provides a good safe reasonable belief test to take you out from under.

For example, I'll just give you a hypothetical, we have had cases in California which say that if an officer goes out and makes an arrest and seizure as a result of an ordinance then in effect, and the ordinance is found to be unconstitutional, though he may have acted entirely appropriately, then the evidence has to be thrown out. Now what kind of deterrent value that has, I don't know. I would like to see that good safe rule apply to a situation like that. I'd like to see that rule apply to search warrant situations. And Lowell Jensen who will speak after me has some proposed legislation. He is going to talk more about legislation than I am, that would say that where a search warrant has been issued, and the officer goes out and properly executes it, then that evidence shall not be withheld, even though there may be a question as to whether or not the judge or magistrate who issued the

warrant might have been in error in issuing the warrant. Clearly in that kind of a case, the officer acted appropriately in going to that magistrate, in getting the warrant, and I assume what he has said is honest and reliable, not falsified. Why should he be penalized because he did the right thing? We are trying to encourage officers to get search warrants. And over the years, that's one thing that's happened. More and more warrants are being obtained through our court system than ever before. It makes no sense, does it, to impose the exclusionary rule in that kind of case except on the quote, judicial integrity doctrine. But certainly, on the detterence doctrine it does not.

Getting back to the judicial integrity doctrine, I think there's a balance issue, truth versus the integrity of the court. And I think you also have to throw into that will the refusal to place that evidence into court really cast the courts into even greater disrepute, because I think the exclusionary rule and what it has done in some outlandish cases has probably done more than anything else in this state to bring political pressures on the court. Because the rule has become almost Alice in Wonderland like.

CHAIRMAN McVITTIE: Mr. Harris?

ASSEMBLYMAN HARRIS: Would you add to that equation, Mr. Van De Kamp, the rights of individuals in terms of

the Fourth Amendment, and then you are basically saying overall you would in fact add to the rights of the defendant in terms of privacy, and then of course the Fourth Amendment, due process and protection types of arguments that we can in fact do a balancing act relative to the probative value of getting at the truth, and the extent to which individuals' rights have been violated in the course of a criminal investigation, arrest, or whatever.

MR. VAN DE KAMP: I would hope that's the direction we move in, because we find that there's a disproportionate sanction.

ASSEMBLYMAN HARRIS: You're saying the right of privacy is not absolute?

MR. VAN DE KAMP: No. I don't think so. And I think in this area we need to start talking much more about balancing than we have before in the past. And again, I want to make it clear I am exempting any bad faith unreasonable types of searchs at the outset. But we are talking, as I say, in many areas. Search warrants are a good example, the unconstitutional ordinance where it has -- should not be utilized as it has.

ASSEMBLYMAN HARRIS: Well, if you agree with Justice Jefferson, and I am inclined to do so, that if the exclusionary rule is constitutionally required, then it would seem to me that the real problem you have is probably

much more political than legal. I mean, you're talking about changing the court, you're talking about trying to get some interpretation that will allow you to bypass this constitutional requirement. And you know, you have either that or as you suggest, a constitutional amendment. But I still think it's questionable in terms of its impact.

I just don't know how you get beyond the constitutional requirement to the point that you're trying to get to, and I am wondering what you are talking about in terms of legislative remedies. I don't know how you can get there. I know where you're trying to go, but I'm not sure you can get there from here.

MR. VAN DE KAMP: Well, Lowell has some ideas on that. I'm not going to steal all --

ASSEMBLYMAN HARRIS: That's not what I'm getting at.

MR. VAN DE KAMP: Again, I want to emphasize the one thing we can do is a constitutional amendment here that makes -- that provides recourse strictly to the Federal Constitution and the United States Supreme Court.

ASSEMBLYMAN KNOX: And the State Legislature.

MR. VAN DE KAMP: Yes, that's right.

ASSEMBLYMAN KNOX: What they want to do is they figure they can stampede the State Legislature.

ASSEMBLYMAN HARRIS: They probably can.

ASSEMBLYMAN KNOX: They can raise all this gun money and defeat judges with deputy DA's, and they figure they can control the Legislature. That's what it's all about.

ASSEMBLYMAN HARRIS: Very reasonable argument.

ASSEMBLYMAN KNOX: I can understand that. I can understand their point of view. I just want to make it clear there are enough people around to prevent them from doing it.

CHAIRMAN McVITTIE: Mr. Van De Kamp, if the proposed constitutional amendment were enacted, it would require the courts, then, to follow the rulings of the federal courts in terms of search and seizure. But times do change, and supposing the federal court then became a liberal court once again? Granted, now it's more conservative, perhaps in the California court. But suppose we return again to a Warren era and the federal rulings were more liberal than the California court?

MR. VAN DE KAMP: That couldn't happen, because the California court would have to follow suit. We are bound by federal law today. The California Supreme Court can beyond, as they have in our cases that I have cited in the testimony that I will turn in to you for filing, which I have not read in haec verba today. But they cannot undercut the United States Supreme Court, because if they

do, that case is going to go up there and they will get reversed.

CHAIRMAN McVITTIE: So if the federal court became more liberal, would that liberalize the rules of the California court otherwise established?

MR. VAN DE KAMP: Yes, that's right.

CHAIRMAN McVITTIE: So there's two edges to the knife, then.

MR. VAN DE KAMP: No, I think that edge is already there. No question about it.

CHAIRMAN McVITTIE: All right. You're saying the probability of the Supreme Court of the United States being more liberal than the California Supreme Court is very remote?

MR. VAN DE KAMP: Yes.

ASSEMBLYMAN KNOX: The next president will appoint probably five members of the Supreme Court of the United States.

ASSEMBLYMAN HARRIS: He's right.

MR. VAN DE KAMP: I think the present court, with this Williams case would be a good example, or one of the cases that comes up in the Fifth Circuit rule, is very apt to be taken by the court, and we are apt to have a substantial modification of the exclusionary rule because of it.

You know, we often talk as liberal activists about experience lighting the way towards you know, wisdom and sound judgment. And yet, you know, what I would really like to ask you to do, and the supreme court, is to start focusing in and ask whether it really works. There is an old adage I learned long ago, "Nothing is so practical as good theory." And you test what has happened in the last 25 years in terms of what Cahan suggested would happen: all wrong. It does not work that way. You are having a patchwork rule system made up by the different appellate districts, and even divisions of those districts. Something that is now unlearnable, and that has to be turned around. Somehow we have to have -- and the supreme court set about it in California itself, to set out really black letter rules. That might be a step forward. But they have never considered doing that. And I don't think they really understand the dilemma posed by most law enforcement people working in our streets.

Now let me just respond to one other thing. I know others wish to speak. You asked about the Controller General's report with respect to the impact of the search and seizure law. Let me just say a couple of things about that. First of all, that was a federal report dealing with federal cases. And while there are some federal drug cases, most federal violations are not apt to involve quite

as many search and seizure problems as you might find at the state or local level.

Second, we took a look at it in conjunction with our own office to try to figure out whether or not the study made a lot of sense. We ran it through our so called "Promise System" which is computerized management information system which attempts to give -- provide immediately the reasons for dismissals of cases, as well as tracking cases through. The best information that we could record is that it applied to about seven percent of the cases in some way or another. However, what the federal report did not do, nor can our "Promise System" do, is deal with the number of situations on the street where let's say the defendant was released because someone made a judgment, there may be an illegal search and seizure problem, or where an office in command might say "we are not going to send that case to the DA," because of that. There's a lot of activity which is effected at that level before you can even get into the process. On top of that, our people came to the conclusion that there are probably a lot of other cases that don't get recorded. Where search and seizure cases do not get recorded, but where other codes are being used.

In short, the estimate that they -- again, that's a very wide ballpark -- is that from one-third to one-half

the cases we handle have search and seizure issues. Not all the cases get litigated, but it's to a far greater extent than was indicated in this federal report. And I would hope somebody sometime, and perhaps your committee may wish to fund a study to see what the real impact is at the local level. That might be very worthwhile.

CHAIRMAN McVITTIE: Yes, Peter?

MR. JENSEN: Mr. Van De Kamp, to have one-third to one-half as an issue, the issue is how many are adversely affected from, say your position because of the Fourth Amendment exclusionary rule? I think even the Controller's report indicated there were much larger number than one-fourth to one percent that had an issue. But what they said was when you filter that down, really very few of them were successful. You know, the issue was raised and it had no merit.

MR. VAN DE KAMP: Well, there are different ways that it can have an impact. And I don't think this was studied. I am not saying I have the final answer on it, except I know they had undercounted and not done a complete and thorough job. Cases get reduced. An issue may not be complete dispositive, but it may result in a plea to a lesser charge, or it may result in a dismissal on other grounds. There are a lot of permeations to the problem which need to be studied, and again as I say, that's one

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thing you might take a look at, as a couple committees have tried to do, just to see what the real impact is.

MR. JENSEN: May I follow up, Mr. Chairman?

CHAIRMAN McVITTIE: Yes.

MR. JENSEN: One last question. In the case decided in Bivens, didn't the supreme court, Justice Burger indicate that it would be a mistake to abrogate the exclusionary rule without a good alternative, because that would give the indication to the police that we were going to check this kind of conduct? So he suggested he would support an abrogation of the exclusionary rule if there was a viable alternative.

MR. VAN DE KAMP: That's right. I mentioned that because Justice Jefferson I think pointed out, maybe not intentionally so, that some of this is written on tablets in stone. That it's constitutionally required perhaps for all time. Justice Burger I think makes it very clear that there are adequate alternatives, that it would not be. Now that gets in a very difficult area, and I think you have touched on some of those in your discussion with him. What kind of sanctions, licensing, sanctions against the officer, sanctions against the department. There are great variations, and all of them have political problems.

MR. JENSEN: Thank you.

CHAIRMAN McVITTIE: Mr. Ullman?

MR. ULLMAN: John, the committee has been told before that when in doubt, the police should get a warrant in order to get around some of those search and seizure problems. And Justice Jefferson alleged that part of the problem was just laziness in policework.

How do you factor that into this good faith exception, when the police officer could have gotten around the problem by getting a warrant?

ASSEMBLYMAN KNOX: It was one of the leading cases, I think it was in Alhambra, where they had him cold, and they had the time to get the warrant, and they were just too lazy to get it. And could have arrested some very serious drug dealers, and they all got off because of just sloppy policework. That happened before you took office, but in your jurisdiction.

MR. VAN DE KAMP: I appreciate that.

ASSEMBLYMAN KNOX: No, I mean we heard that case years ago. It's just frightening. These are real hard drug dealers that were doing some terrible things, and they had plenty of time, and the cops just wouldn't take the effort to get this jurisdictional thing, which they easily could have done. There was plenty of time to do it.

MR. VAN DE KAMP: But you see, that takes you back to the good safe test. And that if they acted with

questionable faith but unreasonably, and certainly if they had time to get a warrant in a situation like that, that would be unreasonable. There is always that problem, and there is overwork. They have tremendous street problems to deal with in terms of volume. But there is a light year difference in the number of warrants that are obtained today, versus 10 to 20 years ago.

MR. ULLMAN: So what you're saying is the ability to get a warrant is unreasonable per se, as far as the good faith test?

MR. VAN DE KAMP: I'm not sure I understand the way you have postulated it.

MR. ULLMAN: Assuming there is enough for probable cause for a search warrant, and the police officer searches without a warrant, the ability to get a warrant on time, would that make it in itself an unreasonable search under your good faith test?

MR. VAN DE KAMP: Possibly, as long as it was clear that a warrant was obtainable and you should do it in that situation. I mean, you get into these closed container cases where you can search inside a car and where you cannot. Whether you should be able to search a person physically after an arrest, and how far you can go. Clearly, black letter laws are needed in those areas, and then if they don't comply, I think you could say that it's unreasonable.

ASSEMBLYMAN KNOX: Could I ask one final question?

CHAIRMAN McVITTIE: Yes.

ASSEMBLYMAN KNOX: How many of these motions to suppress evidence succeed in your jurisdiction?

MR. VAN DE KAMP: My guess is, and this is a recollection from figures I have seen months ago, is perhaps in a month you may get 25 to 30.

ASSEMBLYMAN KNOX: Out of how many?

MR. VAN DE KAMP: These are the ones reported, I believe, in superior court.

ASSEMBLYMAN KNOX: I mean those that are successful.

MR. VAN DE KAMP: I think of those that I saw reported, and I cannot say all of those are being reported, because of recordkeeping problems. But I would say it came out to somewhere between 35 and 45 percent.

ASSEMBLYMAN KNOX: Are successful?

MR. VAN DE KAMP: Yes.

ASSEMBLYMAN KNOX: Now out of how many prosecutions?

MR. VAN DE KAMP: In a year, we will dispose of 15 to 17 thousand, 18,000 cases.

ASSEMBLYMAN KNOX: So 45 to 30 a month for what?

MR. VAN DE KAMP: Well, you can figure it out yourself.

ASSEMBLYMAN KNOX: So very small -- this is not a --

MR. VAN DE KAMP: Yes, sir. These are in superior court.

ASSEMBLYMAN KNOX: This is not a serious cancer on prosecution in Los Angeles County?

MR. VAN DE KAMP: The problem is in underreporting, though. It does not cover -- I'm talking about superior court. You still have motions that have been made in municipal court, or prelims that are not recorded in the sense that I am talking about. Those cases that get up, there has already been some suppression.

ASSEMBLYMAN KNOX: Do you think this is a very serious disease of prosecution, that the public are not being protected in a significant way, because of this rule? I am willing to concede that probably some guilty people go free as a cause of sloppy policework.

MR. VAN DE KAMP: I think there are cases where clearly justice is done.

ASSEMBLYMAN KNOX: How many cases?

MR. VAN DE KAMP: I am not going to give you a shotgun figure, because I cannot state it.

ASSEMBLYMAN KNOX: I am not demanding a shotgun figure. But it's obviously not the majority of cases, or even 10 percent of the cases?

MR. VAN DE KAMP: No. But they -- it has an impact, of course as I said. I believe other ways on cases,

and that's --

ASSEMBLYMAN KNOX: Well those cases get the notice of the media, and then the DA takes a shot, and the police department takes a shot, and the court system and the Legislature and everybody else takes a shot when somebody has pled guilty, right? Even though it might be less than one percent of the cases. So it's a political problem.

MR. VAN DE KAMP: No, no.

ASSEMBLYMAN KNOX: It's not a judicial problem, it's not a problem of protecting the public, it's a political problem.

MR. VAN DE KAMP: That's where we disagree, because the overwhelming majority of these cases never see the light of prison. Occasional aboration of, you know. A clearly bad call and well publicized case does.

ASSEMBLYMAN KNOX: No, I disagree with the supreme court on that one where the lady opened the trunk of the car, and what was that case? Agreed to open the trunk? Where it was her car and she clearly had the right to do it and allow the officers in, and they found other contraband not related to the arrest. I disagree with that case. But after all, I am not on the supreme court, and these cases I am going to disagree with now and then. But I thought that was a little far out, to be perfectly candid. But that's just ongoing work of the court. But the heat

is taken by committees such as this, DA's, police, and the courts. But it's not a significant cancer on law enforcement in the state, in my judgment.

MR. VAN DE KAMP: I think you can ask law enforcement about that, and I think they will disagree with you. And I am going to ask you, because I have not, for reasons of time, gone through my testimony at a glance through it, because there are some cases cited that point out this distinction between federal and state decisionmaking, I think is an important notion that we are proposing today.

CHAIRMAN McVITTIE: Fine. Thank you very much, John.

Now according to the agenda we next have City Attorney Burt Pines from the City of Los Angeles.

MR. ULLMAN: He's not here.

CHAIRMAN McVITTIE: All right. Burt's not here.

Next we have Mr. Lowell Jensen, District Attorney in and for the County of Alameda.

For the record, we will take Mr. Van De Kamp's prepared remarks into the record as an exhibit in the brochure that will be published later.

MR. LOWELL JENSEN: Thank you, Mr. Chairman. I have some remarks, also, that I would like to have handled the same way.

CHAIRMAN McVITTIE: Yes. For the purpose of

expediting the hearing today, since we did get started late, we will also take your prepared remarks and incorporate them into the record so that when the booklet is prepared, they will be in the booklet in full form and in its entirety.

ASSEMBLYMAN KNOX: In haec verba.

CHAIRMAN McVITTIE: In haec verba? Fine.

MR. LOWELL JENSEN: I am going to try to be mercifully brief. I appreciate the opportunity. The last time we talked about this was in Sacramento, and it's more benign in here. I appreciate the fact you have decided to have me here.

I am going to pick up a little bit. Obviously, I agree with John Van De Kamp in toto, and I would -- I'm picking out a little bit on what we are talking about. I think it's interesting to --

CHAIRMAN McVITTIE: Excuse me. Do you support the concept of adopting the federal rule? Because if we did have a constitutional amendment in the California Constitution, I assume we will be following the federal rules established by the federal courts.

MR. LOWELL JENSEN: I think, as John says, I think that's a given, that the Fourth Amendment will be required in California regardless of what the Supreme Court of California or the Legislature does. So we just operate on the fact that that's a given. The issue is what we

do as a legislature. But I think that it's important to observe that -- we're really not talking about doing away with the exclusionary rule. Maybe there are persons who talk about that, but the abrogation of the exclusionary rule, and I am sure there are some exponents of that, that you may hear from them. I don't come before you asking you to do that. I don't say that we are going to do away with the exclusionary rule. While I would tend to state it would not occur, that the courts would see to it that the exclusionary rule would remain.

I think the real issue is the sweep of the exclusionary rule. What is it, rather than the fact that it's here. I think it is here, and I have no disagreement with that. I think the issues get down to what is the scope of it. And there are very significant differences between the US -- the present US Supreme Court interpretation of the Fourth Amendment exclusionary rule and that which we see in California. And I think that's what we are really talking about.

I was going to be more specific in saying that I think that the Legislature could pass laws and specifically amend 1538.5 and then realistically, what we're saying is if the courts will look and see whether they agree with it.

ASSEMBLYMAN HARRIS: That's subsequent to a consti-

tutional amendment?

MR. LOWELL JENSEN: No, not at all. I think you can do that without a constitutional amendment.

CHAIRMAN McVITTIE: He's saying raise the issue and present it to the courts.

MR. LOWELL JENSEN: Let me give you a specific example of maybe how you get through that. That there are areas we are talking to. John has mentioned the notion of the good faith circuit as an exception to the exclusionary rule. It's probably correct to say in California that's not in existence now. A good faith search is a violation of the exclusionary rule. And the question is could you pass -- amend 1538.5 to say that good faith searches are permitted in California? The issue would come down to whether or not the Fourth Amendment permitted that. And at least in the Fifth Circuit it would. And then would it be in violation of the California Constitution, or the interpretation of the California Constitution in effect on independent state grounds?

To give you a specific example of an area where I think you could consider it as a subject matter of legislative wisdom, the sweep of the exclusionary rule is different in California in the sense that a vicarious exclusionary rule available in California, which is not available in the federal courts. That is, that a person may claim

the right that has been violated on another and be effective in terms of implementing the exclusionary rule in California. That's a very rare thing. I think there are only two states that have the so called vicarious exclusionary rule, and it's been pointed out, it's essentially a rule of standing. Do you have standing to raise the exclusionary rule? But that's essentially a very, very important part of the implementation of the exclusionary rule in California.

ASSEMBLYMAN KNOX: Mr. Jensen, I want to make sure I understand the fact situation you are talking about.

That's where I own property that is identifiable to me, and it's in your house, and your house is unreasonably searched, and they find contraband?

MR. LOWELL JENSEN: No. I will give you an example of what I mean. There could be fact situations that meet that standard area, but here's an example we had recently for a burlary: The police stopped a couple of young girls on the theory they are prostitutes one night, and then they go on and talk to them for awhile, and they are taken into custody, and they are found to be juvenile runaways. And it turns out they are prostitutes, and as a result of the questioning the pimp who got them started on this business, and engaged in some sexual conduct with them, some sexual abuse, is identified and picked up and prosecuted and we convicted him. And it goes on, and he goes over

and he says, well, the police were unlawful in their stopping of those girls, that that detention was an unlawful detention. The court says, yes it was an unlawful detention, and that you may raise this. You have the standing to do so. You wouldn't have the standing in federal court, but you do have it in California under the interpretation of the exclusionary rule. So the case was thrown out. They are not permitted to testify. So the exclusionary rule is worked in a fashion that the victim is not permitted to testify against this particular pimp, because of the implementation of the exclusionary rule through a vicarious process.

Now can you do something about that? That's the question to my mind. There is obviously a question: should you?

ASSEMBLYMAN KNOX: I don't want to get into your case completely, but they were read their Miranda rights, or were they put in an accusatory position, or were they just talking to them?

MR. LOWELL JENSEN: They stopped them to find out what they were doing, and it was an unlawful detention. Because they didn't have a reason, or the court felt after looking at it, that it was an unlawful -- you can argue looking at it that it wasn't a lawful -- you could argue --

ASSEMBLYMAN KNOX: That poisoned everything after

that?

MR. LOWELL JENSEN: Yes.

ASSEMBLYMAN KNOX: I see. How about the case I suggested where I have some contraband that I store at your house that's clearly identifiable with me, and they unreasonably search your house? Do I have, then, standing to say that your house was unreasonably searched?

MR. LOWELL JENSEN: The question is whose right is violated, and the vicarious exclusionary rule would give you standing to raise the issue of the violation of another person's rights. So under that sequence, it may very well be that you have good standing to raise that other rights.

Now -- so my question is do you have the ability as legislatures to change that if you wanted to? Could you amend 1538.5 to take out the vicarious exclusionary rule? Now there is a case that does address this, and that's the Kaplan case. And the Kaplan case was -- the issue involved was the notion of the exclusionary rule and whether or not the evidence code had changed that in some fashion. And the vicarious exclusionary rule in California generally, the basic case is the Martin case, and when the court considered this, they decided that the issue was not directly before them. But in a footnote, they said this conclusion makes it unnecessary for us to reach

defendants constitutional arguments, that the Martin rule as required by the search and seizure clause of the California Constitution. Nothing we say here, however, is meant to foreclose consideration of those issues when it is appropriate to do so. The issue's open. So the issue is open as to whether or not something could be done about this issue of vicarious exclusion.

To me, that raises the question should the Legislature take this on? That's a question of legislative judgment, or legislative wisdom as to whether or not you agree that the system in California should permit that kind of an exclusionary rule implementation. And as the Legislature, if you decide that is not a wise kind of way of implementing this exclusionary rule, I say pass an amendment to 1538.5 and then we will find out whether or not the supreme court agrees with that, or not. As it has been pointed out, you will never find out unless the law comes into existence by legislative action. That addresses your wisdom.

ASSEMBLYMAN KNOX: Do you have language to suggest --

MR. LOWELL JENSEN: We have some language. There is a bill, AB 3339, I think was the number that the bill came under.

CHAIRMAN McVITTIE: Peter, do you have a question?

MR. JENSEN: Well, it goes back to this fundamental

constitutional question. The California Supreme Court is saying there are two phases for excluding this. The integrity of the court, we are sworn to uphold the constitution. This was gathered in violation of the constitution; therefore, we won't admit it. And it goes back to that issue of is the constitutional rule constitutionally mandated, and if it is, both rationale are supported. And you are saying we ought to test that.

MR. LOWELL JENSEN: I'm saying it doesn't make any difference to the extent that you use the notion of the integrity of the judiciary as a basis for the exclusionary rule, and in effect an independent kind of ground in California. You still haven't solved the problem as to whether or not any specific implementation of the exclusionary rule is constitutionally mandated.

One of the cases that dealt with that just recently, I think that has been alluded to a couple times, is the notion that the officer makes an arrest based upon what is subsequently held to be unconstitutional ordinance. This case in San Francisco where this occurred, the Jennings case, I believe, and in that case the court specifically said that this is the integrity of the judiciary we are dealing with, because there were other cases that had discussed it in deterrence terms. And they said, "No, we think the integrity of the judiciary is involved here."

Now the federal rule is directly contra. Under a circumstance like that, it is no violation of the exclusionary rule. And to the extent the federal people feel that their integrity is involved, they are not offended by that. But the California Court of Appeals said that "we think that this violates the integrity of the court, and we are going to say exclusion." I think that's just a question of what the courts feel about it. Just like saying, "What is the constitution?" They are saying, "What is our integrity?" And I think that's an issue for the courts to make up their own mind.

The interesting thing is in that case they went on to say that the real misconduct, if there is some misconduct they are getting at, was legislative. The Legislature, if you really want to get down to it, misconducted themselves by passing this defective ordinance. And so that the exclusionary rule is used to deter legislative misconduct in that sense, if you want to carry it through that kind of analysis. That's gone a long way from the original notion of the exclusionary rule of deterring unlawful police conduct. We have come a long way. And I may ask you what are the sanctions you are going to put up for the licensing for that.

MR. JENSEN: Mr. Jensen, to follow up on my question, though. On that issue, if you focus only on the police --

deterring illegal police conduct, one of the comments written on this recently is suggesting that what we are doing is saying to the police, "If you can demonstrate we are not deterring your conduct, we will repeal the exclusionary rule. So every time you make a search that exceeds the bounds of the constitution, you are demonstrating that the exclusionary rule doesn't work, and therefore encouraging its repeal." Does that persuade you at all?

MR. LOWELL JENSEN: I can't really accept that reasoning, if I understand it. I'm not sure I have got it all fixed in my mind. But I don't think that reasoning is such that it would be a valid argument to the notion we should abdicate the exclusionary rule. I just don't see it.

CHAIRMAN McVITTIE: Michael?

MR. ULLMAN: If you state the courts still say that the integrity of the court is still a reason for the exclusionary rule in California, why do you think if the Legislature amended 1538.5 to allow for a vicarious exclusionary rule, why do you think the courts would buy that? Isn't that still --

MR. LOWELL JENSEN: I don't know. I don't know that they would.

MR. ULLMAN: A violation of the integrity of the courts?

MR. LOWELL JENSEN: That's up to them.

MR. ULLMAN: Do you have any prognosis?

MR. LOWELL JENSEN: I have no idea. It seems to me that at some point --

MR. ULLMAN: Educated guess?

MR. LOWELL JENSEN: Well, I give you one. There was a case, there was a kind of a furor about the mock notice of the burglar having the rights of the policeman on the mock notice, and that came through the court of appeal, and when it came to the supreme court, it was thrown out.

I don't see an awful lot of difference between that kind of concept, and the victim being able to have the rights -- or the pimp being able to use the rights of the girl who was his victim. I don't really think that that's a lot different.

MR. ULLMAN: Isn't the integrity of the court process that we are not going to be a party to the introducing of unlawful evidence? And the case Mr. Knox cited, his hypothetical, isn't that a clear violation --

MR. LOWELL JENSEN: It may be. But I think to me, in a way, it's baiting your question, because the decision that is it legal comes afterwards. There are situations where it doesn't make sense to retroactively make up a rule and then be worried about the integrity of the court

where there is no unlawful conduct at all. I don't see how the integrity of the court is offended by that.

If you want to make up a rule that you feel is a rise now for the police to follow, that's fine. But it doesn't mean you have to --

MR. ULLMAN: What about Mr. Knox's example where the police break down a friend's house and discovery Mr. Knox's contraband? Do you think there is any problem as far as the integrity of the court, or the unlawfulness of the police conduct in that example?

MR. LOWELL JENSEN: I think there could be, I think there could be. But that gets into the notion about the sweep of all these. It may very well be, but what we are really talking about is getting back to good faith and reasonable kind of approaches to this. I think if you were to pose a good faith and reasonable conduct kind of implementation, that you are going to take care of the judicial integrity problem.

Let me just pick up on one thing I think is important. Your question about search warrants, I think, is an important one. There are increasingly search warrants in use. And this is because the rules that are being posed are becoming more clear that the courts expect the police to get search warrants. Police will do that if they feel that is what is necessary. If they feel they are required

to do so. What's really gone on in the past, that they really didn't know they were expected to get search warrants. There were situations where it was somewhat vague and ambiguous as to whether you were, and those you might say they were lazy. There were other situations where they had no idea they were supposed to get a search warrant. We had one case where it's in violation because the police held some evidence in a police locker after an arrest. And they looked in the police locker, and then the courts afterwards said you're supposed to get a search warrant for that. The police had no idea they were supposed to do that. Now if you put out a rule that said you got to have a search warrant for that, they will go get a search warrant. But let me say this: There is an easy kind of assumption that getting search warrants is relatively simple. That the courts are in session quote unquote. The search warrant is a relatively complicated process. It takes a little while. And the courts are in session doing a lot of other things in addition to issuing search warrants. There is court time involved, there is police time involved. We are talking about a good deal of an investment of time and resources against that. I am not arguing against it, but you have to be rational, and you have to be realistic when you say we need a search warrant every time we have either booked in or we have done something

else. You are imposing a real burden on the system. And if you want to do that, fine. But you do it with your eyes open.

ASSEMBLYMAN KNOX: Well, review for me what you need. Say you're looking through a telescope and you see what you think are marijuana plants in somebody's house. Do you have to get a search warrant? You have seen the contraband, right?

MR. LOWELL JENSEN: If you want to, you have to get a search warrant, I will go get a search warrant. The issue is --

ASSEMBLYMAN KNOX: No. The issue is under the present law, in your opinion.

MR. LOWELL JENSEN: Well, I think you'd get a search warrant. You'd definitely get a search warrant.

ASSEMBLYMAN KNOX: Why?

MR. LOWELL JENSEN: Because you're supposed to get a search warrant. And the rules that have been put down, if you don't get a search warrant, you are not going to be effective in prosecuting. It won't be used.

ASSEMBLYMAN KNOX: But you've seen them.

MR. LOWELL JENSEN: But that's -- if you want to go back --

ASSEMBLYMAN KNOX: Let's say you're looking through a window and you see somebody shoot somebody. Do you have

to get a search warrant to break in there?

MR. LOWELL JENSEN: Not under present law.

ASSEMBLYMAN KNOX: Well then, why do you need a search warrant if you see marijuana plants through a telescope?

MR. LOWELL JENSEN: The courts have said so. And what I am saying --

ASSEMBLYMAN KNOX: On what grounds do the courts insist on that?

MR. LOWELL JENSEN: They feel it's an appropriate kind of use of the warrant process. And going through the initial and detached judicial magistrate to find out whether or not you should intrude upon that particular household is something that ought to be done by the search warrant process. That's all right with me.

ASSEMBLYMAN KNOX: What court holds that? What case holds that?

MR. LOWELL JENSEN: There's a case -- I can't really give you the case numbers.

MR. ULLMAN: Just one on trial in Alameda County?

MR. LOWELL JENSEN: We got a search warrant.

Well, what I'm saying is there are four areas I would like you to consider under AB 3399. One was to amend 1538.5 to take out the notion of the retroactivity as far as the imposition of rules is concerned, the other

is good faith searches, the other is vicarious exclusions, and the fourth is that a search warrant that is to be obtained by an officer by making a complete disclosure of the information he has, and no misrepresentation, once a judge issues that, that should be a good search warrant. And if there is to be some kind of sanction on a judge, if he's willing to do it, it should not be exclusion to in fact come up with something else. That you are going to encourage search warrants, we also ought to encourage their utility by saying that a police officer goes in and gives the information to the judge, ought to be protected. And that's a good search warrant.

CHAIRMAN McVITTIE: One question so the public is not misled. Assuming the Legislature amended Section 1538.5 along the lines you suggest. Then wouldn't you agree that it's quite questionable as to whether the present California Supreme Court would uphold that statute?

MR. LOWELL JENSEN: Perhaps so.

CHAIRMAN McVITTIE: That's the point I want to make.

MR. LOWELL JENSEN: But I think it's a matter of legislative wisdom. And I think that you can change the total percentage when the court is ruling on something specific.

CHAIRMAN McVITTIE: Without arguing, you say

legislative wisdom. You know, it's really popular to put these bills in, because the society today is very conservative. But I think it's unfair sometimes to mislead the p u b l i c to think the Legislature can change things.

In terms of our division of power, the supreme court has taken upon itself, and I suppose rightfully so, the ability to construe the constitution, the California Constitution. And they are bound by the federal rules as well. And it's very questionable, based on current law, as to whether they are going to uphold a statute adopted by the Legislature which flys in the face of the prior rulings interpreting the constitution.

MR. LOWELL JENSEN: Perhaps I was a little hasty. I don't think it really is that questionable. I think if it were narrowly drawn and specifically directed to the issues I spoke to, there is a very good chance the supreme court would say that's a valid and kind of expression of the exclusionary rule in California.

CHAIRMAN McVITTIE: I appreciate that.

Peter?

MR. JENSEN: Mr. Chairman, my question -- Mr. Jensen, relating to the vicarious standing rule, is it your position that no matter how outrageous the search, no matter how gross the violation of the constitutional rights, if it

wasn't your rights that were violated, you should not be able to raise the issue? I mean, if you follow the line of reasoning in the courts, and I'm not saying you do or you don't, but it's inconsistent to say it matters whose rights were violated. If they kicked in the door and grabbed the material without a warrant, because it wasn't your right, you can't raise that issue.

MR. LOWELL JENSEN: As I said, I am perfectly willing to have a good faith law on that. I see no reason why you can't use that as a modification of the notion of what's standing, ought to be provided.

CHAIRMAN McVITTIE: Thank you very much, Mr. Jensen.

MR. ULLMAN: Can I ask one question?

CHAIRMAN McVITTIE: Yes, Mr. Ullman.

MR. ULLMAN: You alluded to the last part of the bill which was if the magistrate signs the warrant, it's good for all purposes. Would you have any thoughts if 11 magistrates turned it down, saying obviously that's against the law, and the 12th magistrate signed it, should that also not be reversible on appeal?

MR. LOWELL JENSEN: Well, perhaps the judicial counsel could have training sessions for them.

MR. ULLMAN: What about some large jurisdictions where the magistrates just sign these warrants? You do agree that when a warrant is taken to a magistrate, it

is not an adversary process. He is basically told --

MR. LOWELL JENSEN: By definition, I agree.

MR. ULLMAN: -- and there be some sort of provision, at least, where the other side could present cases as to why the warrant isn't justified.

MR. LOWELL JENSEN: Without being too facetious, you could do that by way of a response mechanism that isn't the exclusionary rule. You could address that kind of problem --

ASSEMBLYMAN KNOX: What's the penalty if an officer makes a false affidavit to get a search warrant under the present law?

MR. LOWELL JENSEN: Well now it -- well, it could be criminal. And it is not a good search warrant.

MR. ULLMAN: In California it is not a good --

ASSEMBLYMAN KNOX: I was going to suggest there might be a tradeoff, here, for some of these things where the officer serves the term instead of the alleged burglar or something.

MR. LOWELL JENSEN: The CPOA may be opposed to that.

MR. ULLMAN: Mr. Van De Kamp and Justice Jensen have advocated going to the federal process. And do you agree in the federal if the officer makes a false statement in the warrant, the federal process would just exorcise

that statement, and the warrant would still be good? But under the California rules, the whole warrant could go?

MR. LOWELL JENSEN: That's right.

MR. ULLMAN: And you would advocate that the warrant should still be valid if all the other statements in the warrant are valid?

MR. LOWELL JENSEN: Well, I don't know that I -- we didn't put that in the bill against it. The bill that we suggested is if there's a misrepresentation, it's not a good warrant.

MR. ULLMAN: As I understand Mr. Van De Kamp, he wants to go to the federal rules. Whatever the federal courts would say, would be good for California.

MR. LOWELL JENSEN: That may be. I'm not sure.

Thank you.

CHAIRMAN McVITTIE: You're welcome.

Next we have Mr. John Cleary, who is with the California Attorneys for Criminal Justice.

MR. CLEARY: I would ask permission, if I could of the committee, a written statement will be filed later. I realize the time is getting short, and you have heard quite a bit, and I am hoping that somewhat with equal opportunity to respond to the rather lengthy and informative remaks of the two district attorneys that preceded me.

CHAIRMAN McVITTIE: Surely. When we receive

receive your remarks, they will also be made a part of the record, as have the remarks of the previous district attorneys.

MR. CLEARY: Thank you very much.

I would indicate I am representing not only the California Attorneys for Criminal Justice, but the California Public Defender's Association, and to show you some types of confusion that can exist not only among the poor police officer, but sometimes among legislatures as to the exclusionary rule.

The case you mention in California about going into the trunk and into the box that the woman permitted was not dictated by California law, but rather dictated by federal law. The Chadwick Saunders case. And so hence, that was the situation that wouldn't change, no matter what you would do, and your unhappiness, perhaps, with Justice Burger who wrote Saunders. So I can't say that we know what they are.

Basically, search and seizure questions are factual. And I am here to kind of expouse the echo of Mr. Van De Kamp's, "There is nothing practical as good theory." And if you go back to where we are as persons, and think about why we have the Fourth Amendment, it's turned out the police in their unabated desire to seize contraband that had not been taxed, wanted the open-ended writ: "trust us," you

know? Give us this open-ended writ. And the English system, provided with the English judgment in this country, granted it.

Famous stakes from James Otis came before the English judges and he said, "Can't fly. It's against fundamental fairness. Invade the man's cast. These things don't work." What do you think the English judges said? "Right on, brother." What the crown needs, the crown gets. And so away they went and had to live. But if you study the history of this country, that was one of the basic seed bed concerns in the revolt against the English constabulary and the English Crown. And if you think this is clear unhistorical reference, I only direct your attention to the words of Justice Bradley and the great opinion of Boyd vs. United States. And the point he makes here is advice not only projected for the Legislature. He says: Obsta Principiis, "Adhere to principle." Because what has happened is we see an erosion of principle, and instead of a fundamental principle, we hear the pious platitudes of unprincipled pragmaticism. "What the cops need, the cops should get." This is not what you take an oath to uphold, because you, too, take an oath to uphold the constitution.

In 1914 we had Weeks. What were the two basic grounds? Was police deterrence in Weeks? Was it to deter

the constable who's blundered? No. Who wrote that? How many Bolsheviki pinkos were on the Supreme Court in 1914? The point was the two basic arguments: one, if you don't have the exclusionary rule, you might as well strike the Fourth Amendment from the Constitution. The second is kind of a morality, and maybe morality has gone out of fashion these days. And that is, "The end does not justify the means." That if we allow police officers to use illegally seized evidence, we have a judicial proceeding, a concept that infects the whole process. And that we are ratifying after the fact.

Now I heard Chief Justice Burger quoted here, and I think he's a distinguished judicial authority. And if you notice in Bivens, the thing you forget about it was when he wanted to provide an alternative such as fining officers, or having pecuniary damages, he dissented on that issue. And they provided in that opinion an alternative. So I think the Chief Justice spoke out of both sides of his mouth.

But there is another jurist in American history that some of us respect and admire, one who adheres to judicial integrity opinions in a case not often cited. Silverthorne vs. United States. The justice was Oliver Wendell Holmes, and Holmes said, "You can't use this evidence at all. It corrupts the whole system." So you have proponents

on either side. Nevertheless to say, the California Supreme Court has adopted the Bradley baked Holmes Brandeis view vis a vis the burglar or Powell, more recent interpretation views. And so that seems to be the philosophy. But I would dare to say like, you know, the old quote about there's more in reality than in philosophies, that there are at least three other grounds for the exclusionary rule. One, protection of the fundamental right of privacy; another very important ground that's often neglected is the concept that government is subject to the rule of law. Don't you have its minions? The front line officer is subject to the law. Or do you want an unlimited police force? When you start raising some of these questions, say to yourself if you had to compare the American police in their nice spiffy uniforms against a kind of rough hewn Soviet minitzia (ph) or their KGB, how would you define the techniques of the indifferent? Well you say, "Under ours, they are under the rule of law. There's restraint." And people come in and say we want to take away those restraints. Aren't they really getting at the bedrock of democracy? Isn't our principle of government the fact that you're here listening to this as a diffusion of power? The supremes are not supreme in California, they have got to deal with the Governor and the Attorney General, the executive, and they have got to deal with you, the Legislature. Because we don't

trust anybody. And when a police officer says, "Trust me", we say, "It's nothing personal." But it's our way of government that we don't trust any executive. We don't trust anyone anywhere along the line.

You are right now in a posture of asking what can we do to take the handcuffs off the police? Dribble, I say. The thing should be turned around the other way. What are we doing to protect the Constitution? When I say constitution, I say the Federal Constitution, because that's part of your oath. And that, of course, is the Fourteenth Amendment, incorporating the Fourth Amendment due process clause. And we get the search and seizure requirements under that. But what about Article I, Section 1, fundamental right of privacy, Justice Jefferson? Article I, Section 13, the California equivalent of the Fourteenth Amendment; Article I, Section 24, "all rights not previously ennumerated are in the people." So what are their representatives to protect those collective rights? I say to you that we don't see it.

Now I would commend to your attention, and I hate to say it, since I know that both of you are wishing farewell to the Legislature, for the record anyway, who is now permitting that, Judge Oaks, not the professor, wrote an excellent work called, "Constitutional Government in America." It came out of the Carolina Press this year,

1980, and he covers a lot of these things in a much more elaborate facing than I can do here. Let me just quickly describe the alternative. My father was a Chicago police officer for 27 years, and I have a kind of vicarious understanding of the police system. Some might say not the best, but it has given me some insight in my 20 years of criminal law practice, and how the system really functions. And this is where the con job comes down. Meaning that you're lawyers, I'm a lawyer, we're practicing in the criminal justice system. What the people know, and what we know is two different things. I would like to see the people know as much about the system, and I think they would be champions for the exclusionary rule. But they're given only little glimpses of what occurs. First, criminal actions which we have touched on already. What about criminal actions? You've got a one, 146 of the California Penal Code, misdemeanor offense. But if the officer wanted to, you could have some strong, courageous US attorney charge them under 18 USC 241 and 242, violation of constitutional rights. Can you tell me how many cases you have that have been brought, how many have been successful? We hear another one, contempt. Dean Wigmore said, the great leader, not a fan of the exclusionary rule by any means, but he didn't want hearsay, either. And he said with a truth seeking system, maybe hearsay gets in the way. Why not add just

quadruple hearsay? It's truth. Everything for the truth. Who's truth? Well, he said what you should have is this type of situation, the man comes in, a burglary, and the officers busted into his house and found the stolen TV set and dragged the culprit into the court. And the judge says very simply, "Okay, 16 months. Send him away to the joint. You officer Jones, for your disobedience of the Constitution of the Federal Government and the California, 30 days. Take him away."

Now, for those who live in the real world, that's ridiculous. It doesn't work. And to say that such a remedy, which is now in the books, and the judges have that power, it's facetious. We heard about the internal police discipline. I won't bother you with the fact that the police have a big image media concern these days, and their battle with civilian review boards and many others, I am not troubled. And one jurisdiction I know they allowed officers to take away breaks if they took a bribe and give them a character reference. So it's not the image -- injury -- the image of the police department.

But take the other situation about you have this conduct of going out and getting things, putting those crooks away. Don't worry about the means, just get them, put them away. You have this large scale activity. Even when it's reviewed inhouse, don't you have -- Saint Paul's

adage, "There but for the grace of God go I"?

Jack Muller, a Chicago police detective said, when he asked about internal investigation division, how effective and thorough they were, he said, "They are like a great big washing machine. Everything you put in them comes out clean." He was disciplined for that, and got his letter of reprimand removed after a court action on the Seventh Circuit. Civil action.

CHAIRMAN McVITTIE: There are other problems with it, too. His conduct was sometimes outrageous in terms of traffic tickets, and all.

MR. CLEARY: He had outrageous traffic tickets. He was a little bit ink hungry, I think is the term, and I think that's a very fair assessment.

In civil action, this is where the action is right now. And it's ironic that the officers are now protected in civil actions by good faith, and they are asking this Legislature to do something which I don't think it can, is to give good faith insulation on criminal actions. But take a look at what is good faith, or where it came about.

I happen to come from a county where we have a nominee for Congress from the Klu Klux Klan, and the ironic statute that preserves the citizens rights these days, is the Klu Klux Klan Act of 1871, which we now know as 42 USC 1983. The Civil Rights statute. And under

Monroe vs. Pace, as you remember where the Chicago police lieutenant, rather enthusiastic, had a unique way of interrogating when he'd break into a house, stand everybody up against the wall, whole family naked, and when the person didn't talk, grabbed the suspect, hauled him down to the police station, interrogated him for two more days and let him go. He was the wrong guy. And then when he filed a suit, what suit did this individual, this obstreperous citizen file against this officer? He filed the Civil Rights Act, the Klu Klux Act of 1871. And when the -- what did the officer say? Boy, they're quick. "Hey, if this was so outrageous, I couldn't be under color of law. I was ultra vires." And the local judge said, "Right on, brother. I'm not going to hit any police officer with any suit up to the supremes." Justice Douglas said, "Hey, that can't fly. Your apparent authority is therefore under color of law, and you can get money damages."

Now interestingly enough we have seen a tremendous expansion, two years ago when Monell vs. The Department of Social Services, this is something the Legislature had to respond to the public. Money damages can now be laid at the doors of the Legislature. In Monroe vs. Pate, you can sue the officer, but not the government instrumentality. Now under Monell, you can sue the government instrumentality. So you can get these damages against the unit of government.

Then take it one step further. We had two more cases came down this year that's just going light years expansion. Owen vs. The City of Independence. What did they say there? The good faith defense of the officer, which he still preserves in the civil suit, is not available to the instrumentality. And then we had Gonzales vs. Toledo where the court held that the burden of pleading is upon the officer to show good faith, not the plaintiff to show the absence of good faith.

I don't want to bore you with all of this, but under California law you have government code 995. If I'm a police officer and I kick the daylights out of somebody, I can go down and county counsel could represent me. And you can get a judgment, and they will be secured. I am suggesting a legislative alternative, and that is my specific proposition. That in the case where motion to suppress is granted in whole or in part, a judge has or should have discretion to appoint counsel much in the same way as you would under the criminal proceeding to pursue civil administrative remedies. You are no longer making illusory, but we don't have that now on the books.

I think another problem we don't understand is the real world of how the system functions. There is a symbiotic relationship between the police, the prosecutors, and the courts. And it's unhealthy. I think if I stood

on the bench someplace I'd be proprosecution and not think of my orientation, possibly, but systematically would be forced to go. Cops make the cases, prosecutors have unfettered discretion to bring about and file charges in any cases they determine to be appropriate. And the third, the judges, is have to move those cases up and out. What is the most agreegeous sin of a judge? Having a backlog. So there you have an interrelationship. It is not there deliberately, but there is this hint of a relationship that means more than the theoretical announcement that this is the independence of the judiciary.

I'd like to also speak about the practical concerns when we deal in good faith. I've heard good faith here until I'm sick of it. What is good faith? Well, first of all the Williams case has been brought up and has been criticized, and I won't bore you with the details here. But I'll start off first with is good faith is no more than the subjective belief of the officer. And there you're going to be in a courtroom examining whether the officer knew -- deliberately busted into the house, or gee whiz, he just walked by and fell into the door and here he was. What you're going to do to explain that conduct where the physical conduct will remain the same is allow the suppression issue to be determined on the mental state of the officer. So that you are going right back to where the Fourth Amendment

was not, the writ of assistance, and the good faith you are now putting back, you find a conjunction for the two. Second is when will you be able to detect a lack of good faith? I commend to your attention a reading of a case written by the former US Attorney of Chicago, now a circuit judge, in US vs. Cortina. There an agent lied in the preparation of a search warrant. The only reason it ever came up was that the FBI, which has these tremendous 302 Statements in the file, he had recorded all of his source information. And what happened was the prosecutors came to the court and said, "Well, Your Honor, we feel that maybe defense counsel would want to review their motion to suppress in light of this additional evidence that we have." In essence, the prosecutor voluntarily gave over evidence for which the judge said this officer, when you compare his statements and compare what the informant said under oath, and what the other parties testified as to what occurred, was a liar, and such a liar that J. Edgar Hoover would be rolling over in his mausoleum if he had understood the nature. And they quote both the district court and the appellate court in describing the conduct. US vs. Cortina indicates how difficult it was to surface -- this was unique, this case in which it surfaced.

Another factor that you have to deal with when a factual dispute occurs, and again I am dealing with experts

in this issue, what do you tell my client? You're my client, and you say the officers kicked in your door. And Officer Googenheim is going to say, "No way. He knocked 12 minutes before he entered. Notice police, please open up, the house is surrounded." And then after waiting, you know, 50 seconds, he kicks in the door and there you are. And you are charging that he just said, "Cops," and the door came off the hinges. Well who -- what I mean, as a lawyer, what would you say? Ironically I had a case exactly like this. And when the agent came back in and he asked after there was a quick witness put on the stand, he thought it was the defendant, because no one entered the courtroom.

"Now officer, you have testified it was 40 seconds before you make the announcement. What if a person testified that your knocking off the door was contemporaneous with your hollering out 'cops,' or not more than two seconds thereafter?"

"That person would be a liar."

It turned out to be one of the senior assistants of the US Attorney who happened to be jogging by at the time. The judge said, "Well, maybe you want to reconsider this case." And it was, you know, dismissed out. But these are, you know, where it is ever detected, because when it comes down to the courtroom, I think any judge would be sitting there would have to follow the officer.

I think that also the other one you are dealing with is putting a premium on ignorance. You are saying now -- and one of the things about the officers, and the difficulty is this: If you operate with common sense, and the common sense is I don't get into areas unless I think that there is some basis, if I am invading someone's privacy, I want some overview, et cetera. And I think as we take that approach, the need for warrants and examination of exigencies will work out. The search warrant process itself, if you try to rely on good faith, you are going to run right into the second clause of the Fourth Amendment, and my second one is that first of all, look at the real world of issuance of search warrants. I was at a program where a judge in LA, a senior criminal judge, indicated that it even helps police officers properly phrase the warrants for their issuance. This is a neutral detached magistrate. I am suggesting that the Legislature should create a public privacy ombudsman, not someone connected with the defense, because people are being searched. They are not yet defendants or suspects. They might have probable cause to believe that there's something out there. So that you can have this third party examined. You have telephonic warrants in California. So all you got to do is just hook them onto the telephone and have some comments, and then you can start to implement the spirit of what

all of our legislation is, rather than giving them open tickets.

The last two things I'd like to touch on very briefly, and I know you're very busy and you have to hear from others, and that is this need for empirical data. And I can only echo Mr. Van De Kamp's concern, you would ask about the survey. That survey came out, there was only 2800 federal cases. Now I do have to admit with Mr. Van De Kamp, the sensitivity of the federal courts is admittedly much lower than that of the California courts. In fact, ironically when you get one of our attorneys, a federal defender goes into state court, even the worst over there is considerably better than our best by comparison. So I have to admit that that's something you don't want to really cut down on. You really want to give accolade that California has come so far forward. In that survey of 2800 cases, the motions suppressed that were granted were in 1.3 percent of the cases. In the 1.3 percent of the cases in which it was granted, 50 percent were still convicted. And how often do we see a judge who, when a defense lawyer says, you know, last time you granted a motion to suppress was 10 years ago, he quickly says, "What do you mean? I gave it in that case --" Yeah, he kicked out the two bags of marijuana, but the one kilo of cocaine comes in. Whomp, your client goes off for 15 years. He

granted a motion to suppress. Well, this is the real world, and I find it very difficult. So what I would suggest is that you commission that survey, in fact, I thought some of your questions were very excellent, Mr. Van De Kamp was very honest about the lack of data, and I think we should have an objective, if you will, not just solely your prosecutors determining what the nature of evidence might be. I'd like the comptroller general, I don't know the equivalent in California, but whatever the body might be to conduct that.

The last thing that I'd like to do is I'd like to see us avoid demagogy, and you know someone said here, throw strikes at one another. I think that law enforcement officers are doing a very fine job in the state. I don't think they are as dumb as a lot of people would attribute them. In fact, my experience is that an attorney of a few years' experience can't even come equal to an officer with 10 years' experience, especially if that officer has worked in narcotics or some specialized division. They are cagey, smart, they know the groundrules, they know the judges, they know the players, they do a superb job. And I don't discount it. I think that encouragement to follow the constitutional mandates upgrades the profession, instead of bringing on criticism of law enforcement apparatus that we saw in another state, Florida, have really dire

consequences where they felt their officers could, with impunity, beat a man to death. And ironically the jury in that case, which I don't find any fault with their verdict, turned on the fact that they gave too much immunity to the wrong people. And so the people didn't understand when they were rioting in Miami what the problems of the case. Well, we in the system have a duty to educate the public, and if we run around with this political rhetoric, to slam bang one another, we not only undermine the very basis of our society, but we antagonize one another until we can no longer deal with one another in an intelligent fashion.

The only thing I would end on is Justice Bradley's comments, Obsta Principiis, Adhere to principle and follow your oath.

CHAIRMAN McVITTIE: Thank you very much, Mr. Cleary.

Next we have Mr. Michael McClure of the California Trial Lawyers Association.

I am going to ask Mr. McClure and the other speakers to submit the written statements later on, and they will be incorporated as part of the record. And I'd like them to try and summarize their testimony as best they can so we can finish at a relatively early hour this evening.

We have got five more witnesses, Mr. McClure.

MR. McCLURE: Thank you. I'll try to limit

it, Mr. Chairman, and perhaps respond to some of the things that have been said previously, as well as cover the questions that were raised.

Let me start where in a sense Mr. Cleary stopped, and that was with the idea that the good faith reliance in connection with search warrants that was recommended, and also the situation change 1538.5 that perhaps Mr. Jensen and Mr. Van De Kamp suggested, and take your chances. You are already taking your chances, because each decision decides itself on the factual basis presented on the particular search that takes place in a particular case.

I think that one of the things that, you know, are asked to make a change in 1538.5 and see what the results are, I think you should stay consistent with the situation that we have now, and consider the fact that although probably every police officer in the State of California carries a little reminder in his pocket when he stops you and pulls out a card that has the Miranda decision very well typed on it, the same response is not true in the connection with the search and seizure situations where he doesn't have the latest decision of the California Supreme Court or the appellate district in which he is working to respond to. Perhaps a little additional information in that area to police officers might be of assistance, although it's not been mentioned here today.

It is quite consistent that the statistical information that you should have which is not before you, and was the last thing Mr. Cleary suggested, is probably true. You should know how many cases are really thrown out as a result of an unlawful search and seizure. I agree with Mr. Cleary there are a number of officers who have had vast experience, and who are probably entirely more experienced than two-year lawyers out of law school. But the vast majority of search and seizures result in an officer who may be simply, as Assemblyman Knox mentioned earlier, making a routine stop and a public situation, and conducting a search based upon initial information. But if you have the statistics in California, not only the federal phases as to how many cases are really excluded, or how many cases result as Mr. Jensen indicated, in being completly thrown out as a result of the search and seizure. That statistics are very limited, and I speak only from experience, not from what occurs in Alameda or Los Angeles County, but I know in my own trial practice experience, that the amount of time that you have a search warrant sustained, or a search sustained as a result of it being unlawful, it's very limited. Very few times do you ever have a judge acknowledge that there is an unlawful search and seizure based upon case law. And I think that the important thing is that the exclusionary rule is constitutionally required.

You must maintain it. And modification of 1538.5, I don't think will assist at all in this area. I think it will start a new plethora of cases which will come down to determine what that modification of 1538.5 means.

And just to step over for the moment in the search warrant area, an officer comes in and says, "Mr. Magistrate, trust me." We've seen probably the most recent results of that is where the judge testified that actually some of the police report that -- in the most recent case -- some of the police report he read was completely -- he was unable to read it because the Xeroxing copy attached to the search warrant, he couldn't read. But instead, he relied upon the good faith affidavit of the police officer and said, "Fine, I will issue the search warrant." That was suppressed, of course. I think the important part is not that you can follow the federal situation and say we have some bad language contained in the affidavit, therefore we just excise the bad language or excise the cancer, and we maintain the search warrant. You have to, as we do, reverse the search warrant and see whether or not the officer has stated in this affidavit as truly correct, or whether what he has stated is maybe based upon some very laudatory language, but a lot of which is untrue, or may have come from sources which are not totally true. If you change 1538.5, then you are left with a situation

of not being able to go in and totally traverse that warrant and find out what in fact did this officer rely on when he made the statement, so I don't think you can totally get good faith.

Mr. Van De Kamp said something in the early part of his testimony that I think is essential in the idea of statistics, and I think really what happens in the search warrant case, and that is he stated a phrase, "It depends on the situation of each particular case." And I think that's what you see on a constant basis. Trial lawyers in this state in any event are constantly reading the Advance Sheets. That's the Bible. When it comes in on Monday morning, you read through it, and you find out what is my situation, what now, if I receive a call this afternoon, what does my client have to establish, or not have to establish in connection with having his house searched. As Assemblyman Knox said, whether it's a vicarious situation or something else, you go to the book to find out what is the latest situation. I think we find too often than not that perhaps the officer, whether it be a street officer, does not really know what that situation is. So it's left for the lawyers, the judges, and all of us at the time of hearing on a 1538.5 motion to make that decision at that time. Perhaps a little additional information to officers would assist in avoiding that particular situation. We have to face it constantly,

the court has to face it constantly as to the changing situation with searchs and seizures in this state, as well as in the Federal Constitution. But we are obligated to stick up with it, and sometimes we get a feeling that the law enforcement people are not totally keeping up to date on what's happening yesterday, or the day before yesterday.

I will be happy to supplement this with the written report, too, but I know you are pressed for time today.

CHAIRMAN McVITTIE: Thank you very much, Mr. McClure.

Next we have Clifford Thompson from the Attorney General's Office.

MR. THOMPSON: Mr. Chairman, actually I didn't come today to present any pious unprincipled platitudes of pragmatism, or even an attempt to stampede the Legislature. I regret that I feel a need to begin with that disclaimer, because I believe that however highly you prize the right to privacy, protecting that by expressing the truth, freeing the guilty, frustrating the victims, and punishing society ought wholly to be a legitimate, debated question.

Twenty-five years ago in Cahan our court adopted the exclusionary rule, deciding to pay that price, because they had in their view no alternative to try and -- law enforcement of the law. I would suggest to the committee that the rule becomes intolerable where today you pay the

price without getting the benefit of the deterrence. Since Cahan, our courts have forgotten the purpose of that decision, which was to deter police misconduct, and broken its promise, which was to develop a workable rule as described by District Attorney Van De Kamp.

Since Cahan, in fact our courts have transformed criminal courtrooms into police schoolrooms. Schools in which the test comes first, and the lesson afterwards. Instead of the workable rules promised by Justice Cahan, we have gone to what Justice Gardner has so colorfully described as a:

> "kind of encrusted ritual of rigid, almost Byzantine in its frozen formality and labyrinthine protcol."

Or a little more comprehensively, in the words of Justice Grodin in the People against Rodriguez:

> "For sure doctrinal obscurity, few areas of the law can compete with the quote rules governing the warrantless searches of automobiles."

Now instead of workable rules, police have been required to anticipate the future course of search and seizure law; not what happened yesterday, but what's going to happen tomorrow. How can they do that? To understand the real extent of that difficulty, you have to have in

mind that one appellate California court has held that a nonlawyer magistrate cannot issue search warrants, because the law of search and seizure is beyond the comprehension of the layman. And another California appellate court has held that although the police should have foreseen the situation in Dalton that an attorney need not -- a trained attorney practicing criminal law need not have foreseen that the supreme court would condemn the search of boxes found in a stolen automobile.

Well, how did we come to this state of affairs? It's a result of two state judicial trends. One: is abandonment of the concept of deterrence which prompted the adoption of the exclusionary rule in the first place; and the second: less important in this case, is the resort to the State Constitution to avoid Burger court limitations on Warren court decisions. And it's also true in Mapp vs. Ohio. Deterrence. What it means was the exclusion was a substitute for the punishment of the offending officer. Deterrence meant that the cop wouldn't have acted the way he did if he knew the court stood ready to exclude unlawfully obtained evidence. The critical element was his state of mind. He should have known better. Of course, as pointed out by a California appellate court in People against Moore, where the cop acts in good faith on the facts as they appear to him, no deterrent effect is involved. Why? Because

he's willing and presumably will act that way in the future.

Now over the last six or seven years there has been one decision practically every term from the United States Supreme Court seeking to bring the aberration of the exclusionary rule into alignment with its deterrent purpose. Now it's clear that judicial integrity is going to abandon as a basis for the federal exclusionary rule, it's been done so explicitly in Michigan against Tucker, United States against Calandra. You can't fail to argue about that. The court has said the purpose of the rule is deterrence. And we are not going to -- all these cases are summed up, I think, in one. United States against Calandra, which says:

> "We decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served."

That's what's going on in the federal one, and I think probably next term, or possibly, very possibly next term, we are going to have the landmark decision. It's going to come in United States against Williams. Where the Fifth Circuit, sitting en banc, 24 federal judges in one of the most prestigious courts in America, a majority of them held good faith. Reasonable good faith, not a peer subjective test. We are not saying, and AB 3399 did not say that the police should be permitted to expand the

scope of searching by maintaining ignorance. Reasonable good faith. That's how it's -- stop and be reasonable. If 11 magistrates say the warrant's bad, and the 12th one says that it's good, that's not reasonable. I think they are going to decide that, that case, and that question of the Williams case. And any prediction about what the California Supreme Court would do to a statute that you might enact has to be understood, and has to be made in light of the Williams case. I mean, the premises are going to be changed fairly shortly.

Now California, however, is headed in somewhat of a different direction. What has happened is deterrence has come to mean motivation of law enforcement as a whole, not the aberrant individual officer to formulate and pursue procedures which will avoid violation of privacy in the future. In short, the exclusionary rule is a technique whereby the court simultaneously gives new content to constitutional rights, and advises other branches of government of new limitations on their powers. And therefore, the rule -- the evidence is suppressed to teach them a lesson. It doesn't matter whether the cop acted in good faith, bad faith, he may have been in good faith, he may have acted reasonably. In fact, as in one case, the California Supreme Court, People against Scott, he may have acted in the court's words with the quote discretion, even compassion.

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So individual sensitivity on the part of the police officer doesn't matter, because the idea we have got to teach everybody a lesson.

Now we have come so far from Cahan, we have just turned our back to Cahan, that excluded evidence in our courts not because the policeman has erred, or even the executive. But because there has been a judicial error, or a legislative error. The footwork of the Fourth Amendment is a warrant requirement, and the thrust of the exclusionary rule cases is to encourage resort to warrants. So what do you accomplish by suppressing evidence which the police find pursuant to a warrant? You discourage the police from going to the magistrate. Tremendous. Nevertheless, we apply the exclusionary rule in that context. Why? It's not the constable that's blundered, it's the magistrate who's miscalculated. No one has ever explained why. You can't find the decision that tells you the answer to that question. There can only be one reason in California, and that is that our magistrates who are lawyers by training, who are judges by profession, who are independent by constitutional design, are either corrupt or incompetent. Now in either case, one would think the higher courts would have a moral obligation to tell the people that the magistrates are untrustworthy guardians of their rights of privacy. But that's not the case, and the Attorney General doesn't

think it is. They have an equal obligation to stop acting as if it were.

It's quite well summed up, I think, in a case, California Intermediate Appellate case, People against Kirk. It says that the exclusionary rule:

> "has no rational application where the police officers in good faith submit the question of whether they have probable cause to a judicial officer."

But we keep doing it. And that's a rule which -- I don't want to digress in detail now -- but that began life as an accident, and matured into an unexplained assumption, and it now survives as an obstacle to the essential purpose of the Fourth Amendment, which is to encourage the use of warrants, and to the central purpose of criminal trials, which is to determine the truth. Now if any rule could be more self defeating than that, it would have to be the one adopted by the majority of the California court of appeal panel, Jennings against Superior Court. In Jennings, the police officer arrested a man pursuant to a San Francisco municipality ordinance which prohibited obstruction of public passageways. They put him in the police car and took him to the station. While that happened, he secreted in the rear seat of the police car 20 balloons of heroin. The court suppressed the evidence. They say they agree,

nothing wrong with what the police officer did, he acted unlawfully. Unfortunately, the San Francisco Board of Supervisors didn't. The ordinance was unconstitutional as enacted, and therefore the evidence goes out. Why? Impairs judicial integrity. Unbelievable. The court thinks the enchanced judicial integrity by suppressing the truth. I mean, it's almost incomprehensible.

Only last term the US Supreme Court reached the exact opposite conclusion on the exact same question. But the California court says aha, the California State Constitution describes a more exacting standard. That's true so far as the right of privacy is concerned. But the imperative judicial integrity doctrine is not a constitutional doctrine in the first place. It's got nothing -- it has no constitutional face, and the guys that invented it, Justice Brandeis and Justice Holmes and Olmstead, expressly said it was not a constitutional document. That's why Holmes could use it in Silverthorne because Silverthorne was not a constitutional case. It was a federal case involving federal supervisorial powers.

Well, apart from that, Jennings has -- some of it's guarded, because the imperative judicial integrity referred to was it was not judges self respect. It refers to public respect for the courts. And Brandeis said that and Holmes said, and Trainer said that, and Cahan, right?

And as I've suggested to this committee before, anybody who thinks that public respect for the courts is enhanced by expressing the truth in courtrooms ought to be willing to put the exclusionary rule on the ballot. But you won't find one of them that will. And the reason is simple: As Professor Kaplan down at Stanford pointed out, people reject it. They reject it. Because one of the essential elements of our sense of justice is portionality. And the rule offends that. Because the most reliable and the most incriminating evidence is excluded. And the most good faith, most reasonable intrusion is minimal intrustion into privacy. And in California, because of the vicarious exclusionary rule, often enough the privacy invaded is not even the defendant's.

ASSEMBLYMAN KNOX: How often?

MR. THOMPSON: No one knows statistically. And it doesn't really matter. I can give you plenty of examples, but time doesn't permit. But instead of that, I want to take exception to the notice -- obviously, we are getting comparative arguments all the time. But what about the statistics? Nobody had those statistics when Mapp vs. Ohio was announced, or when the Cahan rule was imposed. No one had produced those statistics for charging the law then. What we do now remains something of a mystery to me. But I don't think -- I agree with one thing that has

been said by one of my predecessors. There's a difference between the reality of the administration of the criminal justice system and the public reception. And the public reception does not depend upon the run of the mill cases. The public perception, which I think is important to maintenance of the administration of criminal justice depends on visible cases on the tip of the iceberg. And the tip of the iceberg is the Corona case with their 25 bodies, and evidence has been suppressed. It was no answer to say, "Well, wait a minute. You don't have enough cases."

Well, it's more than that, I suppose. Not only is there a disproportionality of the rule, but this Berkeley law dean, Barrett, once put it very simply: It's not the court which excludes evidence to avoid condoning the acts of the officer; by the same token, not condoning the illegal acts of the defendant. That's not a -- in a sense, that's a rhetorical question. Any answer that you get, no matter how unpalatable that answer may be, that answer is yes.

Now I'm really troubled by this imperative, because you are not being told where it leads. It leads to a rule. That it doesn't matter that the illegal search was made by the police. It could be made by you or you or you or me. If we illegally detain somebody right now, out from our neighbor's house, where we hear we crash, bang, and the elderly lady is there, and we grab the guy, if you

believe the integrity of the judiciary is the bottom of the exclusionary rule, then you must exclude evidence in that case. Because it is absolutely no deterrent, and we are practically inviting and immunizing people by having their friends search their houses. Now if you think that's far fetched, I invite your attention to the dissenting opinion written by the first witness here today, and in re. Brian S. That's too new to give you a citation to it, but it's in these slip sheets. And that's exactly what it concludes. That's exactly what it concludes. The problem with the imperative is that it confuses whether or not the courts are created for the judges, or for the litigants. Maxwell vs. Superior Court, 101 Cal. App. 3rd, happily they granted a hearing in this one. I want to quote one sentence which I think illustrates the problem and the imperative:

> "To reverse the trial court's order removing Maxwell's lawyers would elevate Maxwell's right to be represented by lawyers of his choice above the principle of the preservation of judicial integrity."

Can you imagine Maxwell's gall, thinking he should have a lawyer of his choice that he can pay for, when it would interfere with the judges' concept of their own self respect.

Well, California has gone so far. That we even applied the exclusionary rule where what the police have done is within the law. What they did no more than the law allows under the "think right" and as to the People against Miller. It's not enough that the police officer invade privacy only to the extent that the sentences permitted. His thought processes must be error free. If he has probable cause to arrest for one offense, but mistakenly arrests another one, the arrest is bad. And any incidental search is bad. Not surprisingly, the federal rule is different. And I want to mention one other thing that I mentioned to the committee one other time. I am troubled by the double standard the courts have applied in this respect to the cops and then to themselves. If the cop does the right thing for the wrong reason, he's wrong, and the evidence is inadmissible. If the trial judge admits evidence for the wrong reason, the evidence remains admissible, the ruling is upheld, if only the appellate court or the Attorney General's Office can think of a right reason. Now what kind of a rule is that? Why the distinction? And it's not academic. This case -- I want to end on this case, because it's another opinion by the first witness here today, called in re. Melvin L.. Officers patrolling a six square block area. There have been 25 to 30 burglaries in the last five days. They see a 15 to 16 year old juvenile

walking down the street with a suitcase. They know 15 to 20 percent of the burglaries, they do it with suitcases. So they stop their patrol car and say aha, let's go talk to him. As they approach the juvenile, they note protruding from the suitcase, fur. They see it sticking out of his jacket a camera. And ultimately they question him, get any incriminating information, and leads to his arrest. Bad arrest. Why? Well, the police could not consider the fur sticking out of the suitcase or the camera sticking out of the coat, because they had already decided to talk to the guy before they had seen him. Now the objective circumstances presented to the officers before they make any invasion into that juvenile's rights justified what they did. Oddly enough, what they found in there was jewelry, cameras, watches, and two handguns, one of which is loaded. Is that the kind of rule we want? I hope not. That's not the kind of rule I want to live with.

A couple of years after Cahan, Justice Traynor wrote in a famous law review article:

> "If we keep in mind the original detra of the Exclusionary Rule is a deterrence of law's enforcement of law, we can guard against the confusion in the attendant rules we develop."

We failed. Now I think that's within the province

of the Legislature to extricate us, I think, because when Justice Traynor adopted the exclusionary rule in Cahan, he did not do it as a matter of federal constitutional law, or a matter of state constitutional law, but as a rule of evidence. And he did that, that was no accident. He did not overlook the California Constitution, because 13 years earlier in Gonzales he had rejected the exclusionary rule saying at that time that California is of course free to construe its own constitution. He did it so it could be changed. You have that power. The court has never, never made the exclusionary rule a state constitutional requirement. Has not done that to date. And I think that in light of what we are going to have in the federal rule and the statute here, that it could change things. It's no answer to say that anything we did would be academic and moot, because the court has ultimate responsibility.

Mr. Chairman, rather than take other people's time, I would just tell you that if the committee desires, there are 13 different reasons why the GAO study is irrelevant in California, and I'm willing to --

CHAIRMAN McVITTIE: Why don't you send us a letter pointing out your reasons --

MR. THOMPSON: Thank you.

CHAIRMAN McVITTIE: -- it's going to be published and distributed throughout the state.

MR. THOMPSON: Thanks very much.

CHAIRMAN McVITTIE: Thanks very much for your testimony.

Next we have Jim Tucker from the American Civil Liberties Union.

MR. TUCKER: Mr. Chairman, members, my name is Jim Tucker from the American Civil Liberties Union. I will make my comments very brief. I just want to make a couple points.

Unfortunately, most of the witnesses, I think particularly those who seem to have some ill at ease with the Fourth Amendment, have not really approached the problem in terms of how they can make the Fourth Amendment more effective. In one way or another, they are really suggesting to you ways in which we can make the Fourth Amendment meaningless. It's not surprising that representatives of the executive, both the Attorney General and the prosecutors, would come forward and ask for more power. That's a general tendency that everyone has, is to expand their bailiwick and to get for themselves discretion that they sincerely believe in reasonable good faith that they will not abuse. Unfortunately, that is inconsistent with the kind of government we have chosen to adopt, and that we worked with now for 200 years.

Obviously, there are things about the exclusionary

rule that are unpopular. Particularly, I think, if you put to a vote the issue of whether certain racial groups, certain minority groups, certain economic groups, should be subject to more government power than other groups. I imagine a lot of people would say sure, go ahead and you can set up your government entities down there in Watts or East Los Angeles or whatever. But just don't do it in our back yard. And one of the purposes of an organization like ours, and unfortunately, I think, it should be a purpose of particularly prosecutors, but it's a function that they have chosen pretty much to ignore, is to instill in the public the importance of the kinds of checks that we have in the Fourth Amendment.

I think it's interesting if you follow the thread of the discussion so far, what you will see is that a strong man has been put up, and then a solution has been proposed. And what is that strong man? The strong man is that this rule is designed to punish someone. Well, it's not designed to punish someone. It's not designed to punish a police officer or police department or anybody else. It's designed as a limit on government power. It's a limit. So that that makes the good faith, or whatever, the state of mind of the police officer, of the executive, or anybody in the government, that's irrelevant. If they're standing in your front room one day, all those police officers,

and they said hey, you know, we're here. We have good faith. We're here and your neighbor said you have got some guns in the house. So we're here to search. One-hundred percent cross our hearts and hope to die, we're here based on reasonable good faith. We don't want to impinge on your rights. You don't care why they're there. And the constitution doesn't say your home should be subject to good faith kinds of intrusions. The whole purpose of the structure was to say look, these are limitations beyond which the government cannot intrude.

Now that distinction also is not understood by the prosecutors and the Attorney General when they talk about the trial. The trial is not a truth finding process. The trial is a process of determining within very specific limitations placed upon the government who committed a particular act. If we wanted a truth finding process, we could obviously think of a number of kinds of things that would get at the quote unquote truth, including monitoring people's homes, televisions on streetcorners, televisions in people's homes, et cetera. That would tell us what's going on. But we have never been willing so far to pay the price of that kind of loss of personal privacy to the government. So when they deposit this thing about the poor officer, he doesn't understand this and he doesn't understand that, and then he's being punished. It seems

to me that they're setting up an equation that obviously dictates one answer, when the real equation is not in terms of the personal officer's good faith or the good faith of the whole department. It's whether or not the government should have certain power and certain authority. And obviously we think that they should not. The prosecutors, of course, want to have such discretion, possibly.

Now in terms of the good faith proposal, I think that if you think about it for more than about two minutes, it's obvious that it's a ludicrous proposal. First of all, if the thing that it's supposed to cure is the complexity of the law, obviously it's not going to cure that. Every court is going to have to decide when is this officer acting in good faith, and when is he not. Now they have added the word, "reasonable good faith." So now all the courts are going to have to run around interpreting reasonable good faith.

Take Justice Jefferson's example. The officer who stops the black person and you know, the teenager who is not in school during the day. The police officer will tell you that now there's a candidate who is most likely to be a burglar. He's not in school, he's a truant, they can't pick him up for truancy anymore because their hands are tied. So they have no reason to pick him up, but they know he's a burglar. They have pretty good reason to believe

he's a burglar. So they stop him.

Now Justice Jefferson I think brought up this example because those officers are going to testify: Look, based on my experience and working in Watts for 20 years, I can tell you that guy looks like a crook. I mean, it's the way he walks, it's the way he talks, it's the bulges in his pockets, it's the way he has his hair, whatever you want to say. He says, I know, I've been there. I've worked there for 20 years.

Now again, we get back to this issue of well, are we going to punish that officer? No, we're not going to punish that officer. What we're going to say to him is look, this is probably the tip of the iceberg. In this case you have found out something. You searched him, you stopped him, you found some contraband, that's why this case is in court. How many other people have you stopped for the same reason and you never found anything on them? And ultimately, after keeping him for an hour or two hours on the street, and questioning him and running warrants on him and everything else you can think of, you let him go.

Now the reason for this kind of rule is to say look, we believe that this is probably -- and I think that any honest person who has worked in the criminal justice system would tell you that every one of these searches

that you see in court is the tip of the iceberg. It's an occasion of what that officer is doing in a number of other cases that never get to the courts. It's an occasion of the number of times they stop anybody they want to on the street, and the courts are saying in interpreting our constitution, they are saying, "Look, you are not supposed to do that. This is a limitation on you, as the representative of the executive and as the representative of the government. Time out, you can't go any farther. That's it." So you know, you hope that we are not misled when they keep suggesting this poor officer, whoever he may be, who is just trying to do his job. And that's fine. He may be the most well meaning person in the world, as were the British when they were trying to keep together their empire by requiring some people to pay their tax. I'm sure they're intentions were the best in the world. But we set up a system that said, "I don't care what their intentions are. They can't do this kind of thing."

Now if the good faith defense does not deal with the complexity of the law, and I submit that it will not, because the appellate courts are going to say, well this is unreasonable, that's reasonable, this officer was clearly lying, that officer wasn't lying. And then what is it really going to do? And I would submit to you that what the prosecutors are proposing to you is the only political

option, political option that they have. They can't take on the police. I mean, that's a political reality. And I'm sure they admit that privately, if they don't want to admit it publicly. The last thing a prosecutor wants, running for office, is to be opposed by every local police agency, okay? They can't take on the police. They can't take on the constitution, because they still have to at least maintain the appearance that they support the constitution. So that leaves one, only one alternative, and that's what they are suggesting. "Let's water it down. Let's make it as meaningless as possible," and that's the impact of the proposals that they have submitted. Is to make it as meaningless as possible. To extend the power of government to intrude in the lives of individuals, and if you notice as they present the factual situations, it's always that he turned out to be a pimp, and he had guns on him, and he did this and he did that. That's the case that they want to use to inflame the public. They don't want to talk about all the people out there that have been stopped by the police for no reason whatsoever, except the cop had this feeling in his stomach that that wasn't a nice person. They don't want to talk about those cases. And I just want to end with one thing that I think it's really unfortunate in these kinds of hearings, and it's probably the public climate in general. Hopefully someday

we will begin to have a discussion why aren't the prosecutors doing something about the problems of police abuse? Rather than coming forward and being the proponents of broader discretion for the police, where are the prosecutors in terms of dealing with those cases that they tell you privately and tell me privately. That is, they know there are certain officers that get in the stand and they lie every time. The cop that says, "Yeah, it was midnight, there were no streelights, and I could see his eyes were pinpointed from a hundred yards."

T#7 Now that officer is lying. And you tell me a prosecutor who has within his department a group set up to investigate police who lie in these cases. You point out to me one prosecution, or attempted prosecution of an officer who has lied in a case involving search and seizure. And I would submit to you I certainly have never heard of one, and I have never seen one, and I would suspect that they don't exist. And if they tried to form such an agency within their own group, the police again would be out picketing them and all the things the police do to keep it down. So I think that somewhere, and it's not going to happen now, it's not going to happen in the next couple of years, but obviously groups like ourselves are going to keep speaking out until someone begins to understand that the crisis here is not a crisis of the exclusionary

rule being abused, it's the crisis of police and prosecutors who have too much discretion already, and are attempting to seek more by generating, really, a publicity campaign. And that's the relevance of the factual things, and that's why they don't want to discuss it particularly, is because of course, actually speaking, if you look at the conviction rates, if you look at the number of times that exclusionary motions are granted, it's obviously not a big problem for prosecutors or police. Their hands aren't tied. But it's a convenient political issue that they are going to use as much as possible. And that's why it's interesting to see their proposal is, "Well, let's dump it in the supreme court. Let's do something." On the one hand, Mr. Van De Kamp was saying, "Well, we all know how liberal the State Supreme Court is, and we know how they are going to come out on these decisions." And then when he's asked, well how will they decide on the constitutionality of this bill as far as vicarious liability, all of a sudden they're saying, "Gee, I don't know," you know?

The court isn't their court, and they're going to listen to all these opinions and come up with a conclusion. Obviously, the political strategy is to dump this issue in the court. As soon as the court says, "Vicarious liability is out," bang. There goes Richardson, there goes the whole machinery, computers start whirring, and they start sending

this stuff out. There are the justices who knocked out vicarious liability so that the criminals can be running on the streets tomorrow. And I would hope that the committee, any members see the transcripts next year, are aware of the importance that they are performing in terms of not letting that kind of a political move, and I emphasize "political" occur in the guise of trying to bring about a reform in an area that I would submit that reforms need to be made in the other way.

One last comment. From the Los Angeles Times, November 30, 1979. They did an editorial defending the recent opinion of the United States Supreme Court applying the exclusionary rule, and they made one last point that I think emphasizes the point I am trying to make. They talk about the high standard that is being imposed on law enforcement. It says:

> "This is a high standard to impose, but if the balance and difficult cases involving the citizens' rights has to be tipped one way or the other, it's wise to tip it in favor of the Fourth Amendment, which stands as a barrier between the individual and the power of the state."

And I would hope that that barrier between the individual and the power of the state is not weakened,

which their proposals would do, but in fact is strengthened, and hopefully will reach a time in the Legislature where there is interest in strengthening that kind of bearing.

Thank you, Mr. Chairman.

CHAIRMAN McVITTIE: Thank you very much, Mr. Tucker.

We have two final witnesses. Next we have Mr. Maurice Oppenheim from the Criminal Law Section of the California State Bar.

MR. OPPENHEIM: Thank you very much, Mr. Chairman, members of the committee. Of course I will keep my remarks short.

I would like to say that I have been a prosecutor since 1960, and my views obviously are not going to be shared by the overwhelming majority of prosecutors, because I support the exclusionary rule. I want to indicate to you --

CHAIRMAN McVITTIE: Mr. Oppenheim, are your views with the intent to deal with the Section of the State Bar, or your own personal views?

MR. OPPENHEIM: These are the views of the State Bar, Criminal Law Section, which although I would assume, also it is fair to tell you that most of the prosecutors on the State Bar executive committee would probably be in favor of it. But less in terms of the overall membership

of the executive committee, we have taken positions supporting the exclusionary rule.

CHAIRMAN McVITTIE: Thank you.

MR. OPPENHEIM: I think you must understand that when people start talking about deterrence, that there should not be a period after that word in terms of the purpose of the rule. The purpose of the rule was quite clearly expressed in Weeks, and it's very, very simple. If letters and private documents can thus be seized and held and used in evidence against the citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so as far as those thus placed are concerned, might well be striken from the constitution. That's the ultimate purpose. And the rest of it is kind of intermediary kinds of purposes that are involved. So that's what you have to keep in mind. And that means that when you start talking about good faith, that doesn't count for anything. If the search is unreasonable, the Fourth Amendment demands the evidence be excluded.

I want to give you a very short history, very, very short. Weeks, as we know, held that illegally seized evidence was not admissible in the federal court. The next important decision was Wolf vs. Colorado, the finding in 1948, which refused to apply the rule to states, saying

to the states, "We will give you a little bit of time to clean up your act." Perhaps exclusion isn't the only remedy. And we want to see. What did the states do? Didn't do a damn thing. In Mapp vs. Ohio, 1961, the United States Superior Court finally blew the whistle, said, "You haven't done anything, it appears you are not going to do anything, and therefore we are going to apply the rule against states as well through the Fourteenth Amendment." So when you talk about giving people the chance, and other matters that are concerned, history has given them that chance. Where are we now?

I want to talk for a few minutes about why the proposal suggested concerning modification just won't work. And in a sense, what you are being asked to do is to say you are going to follow the rules of the United States Supreme Court, but the California Legislature also will take a part in it. I would suggest to you that for the California Legislature to try and define the term "reasonable" with regard to search and seizure, would be as successful as if the California Legislature tried to further define reasonable doubt. It is not the kind of issue that can be handled in a meaningful and intelligent manner by a legislative body any more than you could, for example, try and define all of the fact patterns that would constitute self defense. Well, some might say, "Okay, if that's true,

why doesn't California say, 'well, we'll get rid of our clause and we'll let the United States Supreme Court totally handle the situation.'"

Mr. Chairman, members of the committee, I think that is the worst possible exclusion that could ever have happened.

There is another constitutional principle that's involved here that really never gets talked about. That's the Doctrine of Federalism. When our constitution was adopted, and the Declaration of Independence in 1776 and 1787, the Doctrine of Federalism said that we are going to create, at that time, 13 independent laboratories which were to be the colonies. And by adopting various kinds of solutions to problems, that would be the best way to test of the long run, perhaps, what would be best. That's not a doctrine that ought to be abandoned. We now have 50 or 51 or whatever independent laboratories. The Doctrine of Federalism is one of the most fundamental doctrines that there is. And for California to abandon its rule as one of the independent laboratories, would indeed be a sorry, sorry day. I suggest to you, therefore, that the solution proposed ought to be rejected.

I want to make one or two or three more comments, if I could just have just a few more minutes.

CHAIRMAN McVITTIE: Sure.

MR. OPPENHEIM: About some of the other solutions that have been suggested.

The one mentioned by Chief Justice Burger, which in effect proposes some kind of compensation for such violations, I think that, too, ought to be asked, and let us see where it leads.

Does that mean, for example, we are now going to admit, because after all, the first departure from principle is the easiest one to take, and the one that really ought to be resisted with utmost vigor, because the second sin is much easier to commit than the first one. But does that mean that we are going to compensate people, for example, for search and seizure rules? The next step is to say that you are going to be able to beat a confession out of somebody so long as it is true, provided you pay his doctor bills. Or does it mean that you are going to be allowed to burn books, provided you pay for the cost of the paper? I think that the constitution ought to be treated very gingerly, and that these ideas ought to be thoroughly explored. And as therefore I do not think Chief Justice Burger's solution is a proper one, either.

Where does that leave us? Not in, perhaps, too good of shape, but after all, I think we must realize that regardless of the situation, that the search and seizure rule in terms of overall criminal justice and procedure,

doesn't mean that crimes are going to go unpunished or anything else. Indeed, I would suggest that in terms of a lot of things, it's very miniscule.

There is another side to the search and seizure thing, too. I would suggest to you that based on my experience, it has occurred that the requirements of search and seizure have actually produced better evidence and more evidence than can be used substantively. You won't find police officers, and you won't find district attorneys presenting that side of the argument to you, because oftentimes the necessary requirements to get search and seizure evidence, the police then come up with other things that can then be admitted upon the true issue of guilty or innocence. So there is that side, also.

In conclusion, I want to say that what I deem to be the real problem when you strip away the political rhetoric, when you strip away the adversary rhetoric, and when you strip away what everybody has come, the real problem they have presented to you today, when they suggest the various holdings of the cases, it really boils down to what's reasonable, and what's unreasonable. That's where it's all at. And in that sense, what you're talking about is certainly judicial opinions. And there isn't any system that's people proof. Whether it be the judiciary, whether it be the Legislature, whether it be the prosecution, or

whether it be the defense. And I do not know any solution to that particular problem.

One final comment, if the committee please, with regard to the idea of simply saying because a magistrate signed a piece of paper, that that automatically stamps it forever inviolate and unsalable, to me also ignores the problem involved with people and with the judicial selection system and everything else. Because I could go to the magistrate and the City of Los Angeles and the County of Los Angeles and sign almost anything for whatever reason. It may well be that some of them now feel and rely on what's known as the principle of collective non-responsibility, figuring it's easy to sign it and let the next guy up the line toss it out. And there is some of that that goes on. It's human nature. So that I don't suggest that that be a good approach. Indeed, I suppose I could cite a case that you folks remember up there in Sacramento where there was a 155 page affidavit submitted to some magistrate. Number one, he didn't read it all; and number two, some of the pages there wasn't any printing on them. And he signed it anyway. That's not to say that all magistrates are bad. Certainly they're not all bad; they are not all good. But they're people. And there just isn't any answer to it. And I suggest that in our democratic society there are some things we have to bear,

and that the price we pay for trying to change small things may be well too great, if what we're going to really destroy in the long run is the constitution that has held together for 200 years. Crime has been here for 200 years, it may well be here for the next 200 years. But I would like to see the constitution be there, also.

Thank you.

CHAIRMAN McVITTIE: Thank you very much, Mr. Oppenheim.

Our final witness today is Miss Judy Allen, from the State Public Defender's Office.

MS. ALLEN: Thank you very much. One of the benefits or the disadvantages of being last is that everybody has already said everything that you wanted to say, which is about where I find myself. So I would just like to say that the State Public Defender's position has been aptly presented by both Mr. Cleary and Mr. Tucker, and we are in total agreement with the remarks presented by both of those people.

There is just one small point I would like to reiterate, and that, as you know, our office does see the flow of criminal appeals to the appellate courts. And within those appeals, relatively few of those cases actually involve a search and seizure issue at all. And if a search and seizure issue has been litigated at the trial court

level, quite infrequently -- in fact, more frequently than not, it's not even raised on appeal, because it's clear the trial court's holding in the matter, which is generally a denial of the 1538 is correct. In those cases that it's raised by the defendant, it is extraordinarily unusual to have the case, or the denial of 1538 reversed. Occasionally it happens.

On the other side of that it is also the people who are appealing the granting of 1538.5, and on perhaps a similarly proportionate level, their appeals are reversed, which means of course that the 1538 was incorrectly granted.

Unless the committee has any questions regarding the appellate process or that area, I will close my remarks.

CHAIRMAN McVITTIE: Fine. Thank you very much.

Is there any member of the public who would like to testify here?

All right. Let the record show there are no further witnesses. Thank you very much for coming. The transcript should be ready within 60 to 90 days.

The meeting is adjourned.

(Thereupon this session before the Assembly Committee on Criminal Justice adjourned at 5:00 p.m.)

CERTIFICATE OF SHORTHAND REPORTER

I, GAIL BUELOW, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing Assembly Committee on Criminal Justice Hearing was reported in shorthand by me, Gail Buelow, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of November, 1980.

Gail A. Buelow

GAIL BUELOW
Certified Shorthand Reporter
License No. 4524

Remarks by
John K. Van de Kamp, District Attorney
Los Angeles County
Before the Assembly Committee on Criminal Justice
Hearings on the Exclusionary Rule
Monterey, California
Monday, September 29, 1980

MR. CHAIRMAN AND MEMBERS,

THANK YOU FOR THE OPPORTUNITY TO DISCUSS WITH YOU THE EXCLUSIONARY RULE -- A RULE ADOPTED 25 YEARS AGO BY OUR STATE. I WOULD LIKE TODAY BRIEFLY TO LOOK AT THE HOPES AND PURPOSES THAT OUR SUPREME COURT IN PEOPLE V. CAHAN, 44 C. 2d 434, HELD WHEN THEY ADOPTED THE EXCLUSIONARY RULE IN OUR STATE, TO SEE HOW CALIFORNIA HAS CARRIED OUT THE EXCLUSIONARY RULE IN COMPARISON WITH THE FEDERAL COURTS AND FINALLY TO SUGGEST AT LEAST ONE SOLUTION TO THE DILEMMA I FEEL WE ARE FACED WITH UNDER THE EXCLUSIONARY RULE IN CALIFORNIA.

AS YOU KNOW, IT WAS IN CAHAN THAT THE CALIFORNIA SUPREME COURT ADOPTED THE EXCLUSIONARY RULE. CAHAN, TOGETHER WITH 15 OTHER PERSONS, WAS CHARGED WITH BOOKMAKING AND RELATED OFFENSES. MUCH OF THE EVIDENCE AGAINST THE DEFENDANTS WAS OBTAINED, IN THE COURT'S WORDS, "IN FLAGRANT VIOLATION OF THE UNITED STATES CONSTITUTION . . ., THE CALIFORNIA CONSTITUTION . . ., AND STATE AND FEDERAL STATUTES." MOST OF THE INCRIMINATING EVIDENCE WAS OBTAINED BY NUMEROUS UNAUTHORIZED FORCIBLE ENTRIES INTO HOMES. DOORS WERE

KICKED DOWN AND WINDOWS WERE KNOCKED OUT IN ORDER TO GAIN ENTRY AT SOME LOCATIONS.

THE COURT FOUND THAT THE POLICE ". . . FRANKLY ADMIT THEIR DELIBERATE, FLAGRANT ACTS IN VIOLATION OF BOTH CONSTITUTIONS (U.S. AND CALIFORNIA) AND THE LAWS ENACTED THEREUNDER." IN CAHAN, THE COURT WAS CONCERNED THAT SUCH UNREASONABLE ACTS BY POLICE OFFICERS BE DETERRED AND THAT THE COURTS NOT BE REQUIRED TO PARTICIPATE IN AND, IN EFFECT, CONDONE SUCH LAWLESS ACTIVITY.

IN ADOPTING THE EXCLUSIONARY RULE, THE COURT IN CAHAN SAID, "WE ARE NOT UNMINDFUL OF THE CONTENTION THAT THE FEDERAL EXCLUSIONARY RULE HAS BEEN ARBITRARY IN ITS APPLICATION AND HAS INTRODUCED NEEDLESS CONFUSION INTO THE LAW OF CRIMINAL PROCEDURE."

BUT, THE CALIFORNIA SUPREME COURT SAID THAT WON'T HAPPEN HERE. WE DO NOT HAVE TO FOLLOW THE FEDERAL CASES. CAHAN SAID, AND AGAIN I QUOTE, "IF THE FEDERAL CASES INDICATE NEEDLESS LIMITATIONS ON THE RIGHT TO CONDUCT REASONABLE SEARCHES AND SEIZURES OR TO SECURE WARRANTS, THIS COURT IS FREE TO REJECT THEM." FURTHER, "THE ADOPTION OF THE EXCLUSIONARY RULE NEED NOT INTRODUCE CONFUSION INTO THE LAW OF CRIMINAL PROCEDURE. INSTEAD, IT OPENS THE DOOR TO THE DEVELOPMENT OF WORKABLE RULES GOVERNING SEARCHES AND SEIZURES . . ."

CAHAN ALSO PREDICTED THAT WHERE THE SEARCH OR SEIZURE MAY INVOLVE ONLY MINOR INTRUSIONS OF PRIVACY OR RESULT FROM GOOD FAITH MISTAKES OF JUDGMENT ON THE PART OF POLICE OFFICERS, "THERE IS NO REASON, OF COURSE, WHY, IF THE EXCLUSIONARY RULE IS ADOPTED, APPROPRIATE EXCEPTIONS COULD NOT BE DEVELOPED TO GOVERN THESE LATTER SITUATIONS."

HAVE THE GOALS OF CAHAN, SO ELOQUENTLY STATED BY JUSTICE TRAYNOR, BEEN MET? IN ANSWER TO THIS QUESTION, IT MAY BE APPROPRIATE TO ASK, WHY DOES ART BELL'S COMPENDIUM ON SEARCH AND SEIZURE HAVE SO MANY PAGES AND SUCH SMALL PRINT AND SUCH FREQUENT REVISIONS AND THREE DIFFERENT COLORS OF TYPE?

IT IS MY OPINION AND THAT OF MANY PROSECUTORS IN CALIFORNIA THAT THE GOALS OF CAHAN HAVE NOT BEEN MET, THAT ESPECIALLY IN CALIFORNIA THE EXCLUSIONARY RULE HAS FAILED TO LIVE UP TO THE EXPECTATIONS OF THOSE WHO FRAMED IT. IT IS, AND HAS BEEN OF QUESTIONABLE EFFECTIVENESS IN DETERRING UNREASONABLE POLICE CONDUCT: AND THE RULES GOVERNING SEARCH AND SEIZURE HAVE BECOME SO COMPLEX AND CHANGE SO FREQUENTLY THAT NO LAW ENFORCEMENT OFFICER CAN REASONABLY BE EXPECTED TO KNOW THEM IN THEIR ENTIRETY. THIS IS ALSO TRUE OF THE RULES GOVERNING ARREST, CONFESSION, LINE-UPS, ETC., WHERE THE EXCLUSIONARY RULE ALSO COMES INTO PLAY. IT IS MY BELIEF THAT THE EXCLUSIONARY RULE

ESPECIALLY IN CALIFORNIA, HAS IN MANY INSTANCES INFRINGED UPON THE PRIMARY GOAL OF A CRIMINAL TRIAL -- THE SEARCH FOR TRUTH -- FOR NO VALID REASON.

LET ME MAKE A BRIEF COMPARISON OF SOME CALIFORNIA CASES AND SOME FEDERAL CASES AND SEE WHICH SYSTEM, IN THE WORDS OF CAHAN, HAS BEEN ARBITRARY, WHICH SYSTEM HAS INTRODUCED NEEDLESS CONFUSION, WHICH SYSTEM HAS PLACED NEEDLESS LIMITATIONS ON THE RIGHT TO CONDUCT REASONABLE SEARCHES AND SEIZURES, WHICH SYSTEM HAS ATTEMPTED TO INTRODUCE WORKABLE RULES, WHICH SYSTEM HAS DEVELOPED EXCEPTIONS FOR MINOR INTRUSIONS OF PRIVACY AND GOOD FAITH MISTAKES OF JUDGMENT, AND FINALLY, WHICH SYSTEM HAS EXTENDED THE RULE FURTHEST BEYOND THE PURPOSE IT EXISTS TO SERVE.

ONE COMPARISON THAT COMES TO MIND IS THAT PRESENTED BY UNITED STATES V. CREWS, 63 L.Ed. 2d 537, AND PEOPLE V. TERESINSKI, 26 C.3d 457. (U.S. APP. PENDING)

IN CREWS, THE VICTIM WAS ROBBED. THE POLICE ILLEGALLY ARRESTED THE DEFENDANT, TOOK PHOTOS AND HAD THE VICTIM IDENTIFY THE DEFENDANT FROM THE PHOTOS. LATER, AT TRIAL, THE VICTIM IDENTIFIED THE DEFENDANT IN THE COURT. THE COURT, IN RESPONSE TO THE DEFENDANT'S MOTION TO SUPPRESS

ALL OF THE EVIDENCE, EXCLUDED ALL PRODUCTS OF THE ARREST -- NAMELY THE PHOTOGRAPHS AND THE IDENTIFICATION OF THE PHOTOGRAPHS. BUT, THE COURT DID NOT SUPPRESS THE IN-COURT IDENTIFICATION BECAUSE THE MERE PRESENCE OF THE DEFENDANT IN COURT AS THE RESULT OF THE ILLEGAL ARREST DID NOT JUSTIFY THE SUPPRESSION OF HIS FACE.

CONTRASTED TO CREWS IS TERESINSKI, WHERE THE DEFENDANT AND HIS COMPANIONS WHO HAD, LIKE CREWS, JUST COMMITTED A ROBBERY,WERE ILLEGALLY STOPPED BECAUSE THE POLICE THOUGHT THERE WAS A CURFEW VIOLATION. AFTER STOPPING THE DEFENDANTS, THE POLICE REALIZED THEY WERE NOT MINORS, BUT THEY SAW LIQUID IN THE CAR, MADE THEM EXIT AND FOUND EVIDENCE OF THE ROBBERY. THE DEFENDANT WAS PHOTOGRAPHED AND THE VICTIM IDENTIFIED HIM FROM THE PHOTOS AND LATER IDENTIFIED THE DEFENDANT IN COURT. AFTER THE COURT FOUND THE ARREST ILLEGAL, A MOTION WAS MADE TO SUPPRESS ALL OF THE EVIDENCE INCLUDING THE IN-COURT IDENTIFICATION. THE CALIFORNIA SUPREME COURT GRANTED THE MOTION TO EXCLUDE, INCLUDING THE SUPPRESSION OF THE IN-COURT IDENTIFICATION.

CALIFORNIA COURTS THUS SAY THAT A VICTIM'S MEMORY OF A CRIME AND OF THE CRIMINAL CANNOT BE PRESENTED IN COURT EVEN THOUGH THAT MEMORY WAS OBTAINED BEFORE THE DEFENDANT WAS ARRESTED AND WAS OBTAINED WITHOUT ANY POLICE ACTION

AT ALL. THE UNITED STATES SUPREME COURT DOES NOT ALLOW THE DEFENDANT TO PREVENT HIS VICTIM FROM IDENTIFYING HIM IN COURT UNDER THESE CIRCUMSTANCES BECAUSE THE VICTIM'S MEMORY OF THE CRIME AND THE VICTIM'S MEMORY OF THE DEFENDANT WERE NOT PRODUCED BY ANY ACTION ON THE PART OF THE POLICE.

ANOTHER AREA OF COMPARISON INVOLVES THE QUESTION OF WHETHER ILLEGALLY SEIZED EVIDENCE WILL BE EXCLUDED EVEN THOUGH ITS EXCLUSION ALLOWS THE DEFENDANT TO FREELY COMMIT PERJURY. IN HARRIS V. NEW YORK, 401 U.S. 222, THE COURT EXCLUDED THE USE OF STATEMENTS OBTAINED AS A RESULT OF A MIRANDA VIOLATION FROM THE PROSECUTION'S CASE IN CHIEF. BUT THE COURT DID ALLOW THE USE OF THE EVIDENCE TO IMPEACH THE DEFENDANT, STATING, AND I QUOTE, "EVERY CRIMINAL DEFENDANT IS PRIVILEGED TO TESTIFY IN HIS OWN DEFENSE OR TO REFUSE TO DO SO. BUT THAT PRIVILEGE CANNOT BE CONSTRUED TO INCLUDE THE RIGHT TO COMMIT PERJURY." THE PROSECUTION SHOULD BE ALLOWED TRADITIONAL TRUTH-TESTING DEVICES ON CROSS-EXAMINATION. QUOTING AGAIN, "THE SHIELD PROVIDED BY MIRANDA CANNOT BE PERVERTED INTO A LICENSE TO USE PERJURY BY WAY OF A DEFENSE FREE FROM THE RISK OF CONFRONTATION WITH PRIOR INCONSISTENT UTTERANCES." SIMILARLY, THE UNITED STATES SUPREME COURT IN UNITED STATES V. HAVENS, 64 L.Ed. 2d 559, STATED, "THERE IS NO GAINSAYING THAT ARRIVING AT THE TRUTH IS A FUNDAMENTAL GOAL OF OUR LEGAL SYSTEM . . . THE DEFENDANT'S OBLIGATION TO TESTIFY TRUTHFULLY IS FULLY

BINDING ON HIM WHEN HE IS CROSS-EXAMINED."

IN CALIFORNIA, THE LAW IS TO THE CONTRARY. DEFENDANTS ARE ALLOWED TO COMMIT PERJURY WITH IMPUNITY WITHOUT FEAR OF IMPEACHMENT BY EARLIER CONFLICTING STATEMENTS MADE AS A RESULT OF A TECHNICAL MIRANDA VIOLATION. EVEN THOUGH CALIFORNIA, IN PEOPLE V. NUDD, 12 C.3d 204, FOLLOWED HARRIS AND CONDEMNED THE USE OF PERJURY IN OUR STATE'S COURTS, IT WAS OVERRULED LESS THAN ONE AND A HALF YEARS LATER BY PEOPLE V. DISBROW, 16 C.3d 101. ESSENTIALLY, THE CALIFORNIA SUPREME COURT IN DISBROW ALLOWED A "LITTLE" PERJURY IN REFUSING TO ALLOW THE PROSECUTOR TO IMPEACH THE DEFENDANT BY THE USE OF MIRANDA VIOLATIVE STATEMENTS. (SEE CHIEF JUSTICE WRIGHT'S CONCURRING OPINION.)

IN ANOTHER CONTRAST TO THE FEDERAL CASES, THE CALIFORNIA SUPREME COURT HAS MADE IT MORE DIFFICULT FOR POLICE OFFICERS TO BE SECURE WHEN THEY ARE REQUIRED TO TRANSPORT DEFENDANTS. IN GUSTAFSON V. FLORIDA, 414 U.S. 260, AND UNITED STATES V. ROBINSON, 414 U.S. 218, THE COURT HELD THAT THE RIGHT TO SEARCH A DEFENDANT PURSUANT TO A LAWFUL CUSTODIAL ARREST WHILE BASED UPON THE NEED TO DISARM AND TO DISCOVER EVIDENCE DOES NOT DEPEND ON WHAT SOME COURT MAY LATER DECIDE WAS THE PROBABILITY IN A PARTICULAR SITUATION THAT WEAPONS OR EVIDENCE WOULD IN FACT BE FOUND

ON THE SUSPECT. THE COURT HELD THAT THE LAWFUL ARREST ESTABLISHES THE AUTHORITY TO SEARCH, AND IN THE CASE OF A LAWFUL CUSTODIAL ARREST, "A FULL SEARCH OF THE PERSON IS NOT ONLY AN EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT, BUT IS ALSO A REASONABLE SEARCH UNDER THE AMENDMENT."

CALIFORNIA DEPARTS FROM THE RULE OF THE UNITED STATES SUPREME COURT PROTECTING OUR POLICE OFFICERS IN THE FIELD AND IMPOSES MORE LIMITING RULES FOR SEARCHES AND SEIZURES BASED UPON THE CALIFORNIA CONSTITUTION. PEOPLE V. BRISENDINE, 13 C.3d 528, AND PEOPLE V. NORMAN, 14 C.3d, 929, HOLD THAT IN A TRAFFIC ARREST A MERE PAT-DOWN OF THE SUSPECT FOR WEAPONS IS ALL THAT IS ALLOWED AND OBJECTS IN THE ARRESTEE'S POSSESSION MAY NOT BE SEARCHED UNLESS PROBABLE CAUSE EXISTS THAT WEAPONS MAY BE FOUND THEREIN.

JUSTICE BURKE'S DISSENT IN BRISENDINE BRINGS HOME THE DANGERS OF THIS CALIFORNIA DECISION. "ROBINSON AND GUSTAFSON MANIFESTLY AFFORD GREATER PROTECTION TO LAW ENFORCEMENT OFFICERS THAN DO SIMON AND THE MAJORITY OPINION." THE JUSTICE POINTS OUT, AND I QUOTE, "FOR EXAMPLE, UNDER ROBINSON AND GUSTAFSON, AN OFFICER MAY MAKE A FULL SEARCH OF A PERSON WHO IS PLACED UNDER CUSTODIAL ARREST, WHEREAS UNDER NEITHER SIMON NOR THE INCIDENT MAJORITY OPINION CAN AN OFFICER INVESTIGATE

THE CONTENTS OF A CIGARETTE BOX OR BOTTLE THAT IS IN THE POCKET OF SUCH A PERSON UNLESS THE OFFICER IS ABLE TO POINT TO SPECIFIC FACTS THAT SUPPORT A BELIEF THAT THE ARRESTEE IS ARMED WITH AN ATYPICAL WEAPON (E.G., RAZOR BLADES OR ACID) AND OFFICERS UNDOUBTEDLY OFTEN WILL HAVE NO KNOWLEDGE OF FACTS INDICATING ONE WAY OR THE OTHER ON THE SUBJECT. ALSO, ACCORDING TO THE MAJORITY, IF A FULL CUSTODY ARREST HAD BEEN MADE IN CALIFORNIA FOR THE OFFENSE INVOLVED IN ROBINSON, THE OFFICER WOULD HAVE BEEN LIMITED TO A PAT-DOWN PRIOR TO TRANSPORTING THE DEFENDANT IN THE PATROL VEHICLE. A PAT-DOWN, HOWEVER, MIGHT NOT HAVE REVEALED A CAREFULLY CONCEALED WEAPON (E.G., A KNIFE BLADE SECRETED IN A BELT OR UNDER THE ARCH PRESERVER IN A SHOE)."

BECAUSE THE PRIMARY PURPOSE OF THE EXCLUSIONARY RULE IS TO DETER UNREASONABLE POLICE CONDUCT, THE UNITED STATES SUPREME COURT HAS HELD THAT SEARCHES BY PRIVATE INDIVIDUALS ARE NOT THE BASIS FOR SUPPRESSING EVIDENCE. BURDEAU V. MC DOWELL, 256 U.S. 465. BUT CALIFORNIA HAS RECENTLY TAKEN ANOTHER POSITION AND AGAIN DEPARTED FROM ITS PRIOR RULES AND FROM THE CASES HANDED DOWN BY THE UNITED STATES SUPREME COURT. IN PEOPLE V. ZELINSKI, 24 C.3d 357, A SHOPLIFTER AT ZODY'S WAS OBSERVED PUTTING A BLOUSE IN HER PURSE. SHE LEFT WITHOUT PAYING FOR THE BLOUSE. EMPLOYEES OF ZODY'S THEN STOPPED THE DEFENDANT AND REMOVED THE BLOUSE AND A VIAL,

WHICH WAS ON TOP OF THE BLOUSE, FROM HER PURSE. THE EMPLOYEES THEN EXAMINED THE VIAL, REMOVED A BALLOON FROM THE BOTTLE, EXAMINED THE SUBSTANCE IN THE BALLOON AND THEN WAITED FOR THE POLICE. THE COURT FOUND THAT THE SEARCH WAS ILLEGAL AND, EVEN THOUGH CONDUCTED BY PRIVATE PERSONS, IT EXCLUDED THE EVIDENCE OF THE SEARCH. HENCE, THE STATE COULD NOT PROSECUTE THE DEFENDANT BECAUSE SOMEONE BEYOND ITS CONTROL TOOK EVIDENCE IN A MANNER THAT CALIFORNIA'S SUPREME COURT DID NOT AGREE WITH.

SIMILARLY, IN THE AREA OF QUESTIONING BY DIFFERENT OFFICERS AS TO DIFFERENT CRIMES, THE CALIFORNIA AND FEDERAL CASES AGAIN SPLIT. IN MICHIGAN V. MOSLEY, 423 U.S. 96, THE DEFENDANT WAS ARRESTED IN CONNECTION WITH CERTAIN ROBBERIES, TAKEN TO THE POLICE STATION AND GIVEN HIS MIRANDA WARNINGS BY A ROBBERY DETECTIVE. THE DEFENDANT REFUSED TO DISCUSS THE ROBBERIES AND THE QUESTIONING CEASED. LATER, A HOMICIDE DETECTIVE TOOK THE DEFENDANT TO THE HOMICIDE BUREAU, MIRANDIZED HIM, AND THE DEFENDANT MADE A STATEMENT IMPLICATING HIMSELF IN A MURDER. THE UNITED STATES SUPREME COURT REAFFIRMED MIRANDA AND ADOPTED A FACTUAL TEST, STATING, "THE ADMISSIBILITY OF STATEMENTS OBTAINED AFTER THE PERSON IN CUSTODY HAS DECIDED TO REMAIN SILENT DEPENDS UNDER MIRANDA ON WHETHER HIS 'RIGHT TO CUT OFF QUESTIONING' WAS 'SCRUPULOUSLY HONORED'." THE UNITED STATES SUPREME COURT FOUND THAT THE QUESTIONING CEASED IMMEDIATELY AND RESUMED

ONLY AFTER THE PASSAGE OF A SIGNIFICANT PERIOD OF TIME AND THE PROVISION OF A FRESH SET OF WARNINGS AND FOUND THAT THE SECOND INTERROGATION WAS RESTRICTED TO A CRIME THAT HAD NOT BEEN A SUBJECT OF THE EARLIER INTERROGATION.

CONTRARY IS PEOPLE V. PETTINGILL, 21 C.3d 231, WHERE THE DEFENDANT IN CUSTODY IN EUREKA FOR BURGLARY HAD REFUSED TO DISCUSS THE BURGLARY. BECAUSE EVIDENCE TIED THE DEFENDANT TO BURGLARIES IN SANTA BARBARA, SANTA BARBARA POLICE WENT TO EUREKA AND RE-MIRANDIZED THE DEFENDANT. AS A RESULT, THE DEFENDANT CONFESSED TO THE SANTA BARBARA BURGLARIES. THE CALIFORNIA SUPREME COURT CONCEDED THAT THE FACTS OF MOSELY AND PETTINGILL WERE "ESSENTIALLY THE SAME" AND REFUSED TO DISTINGUISH THEM. IN RULING ON ESSENTIALLY SIMILAR FACTS, THE CALIFORNIA SUPREME COURT RULED THAT THE CONFESSION TO THE SANTA BARBARA POLICE OFFICERS WAS INADMISSIBLE BECAUSE IT VIOLATED MIRANDA. THUS, A FREE AND VOLUNTARY WAIVER WAS OF NO VALUE. THE RIGID CALIFORNIA RULE ALLOWS NO EXCEPTION EVEN THOUGH THE PURPOSE OF MIRANDA IS NOT VIOLATED.

CALIFORNIA LAW HAS EVEN BROUGHT INTO DOUBT WHAT TYPE OF WARNING IS REQUIRED UNDER MIRANDA. IN IN RE MICHAEL C., 21 C.3d 471, THE CALIFORNIA COURT RULED THAT A CONFESSION TO MURDER AND ROBBERY SHOULD BE SUPPRESSED BECAUSE THE JUVENILE HAD ASKED TO SEE HIS PROBATION OFFICER. THE UNITED STATES SUPREME COURT REVIEWED THE CASE IN FARE V. MICHAEL C., 442

U.S. 707, BECAUSE THE CALIFORNIA COURT HAD BASED ITS DECISION ON FEDERAL CONSTITUTIONAL LAW. IN FARE, THE COURT REVERSED STATING THAT THE DENIAL OF A REQUEST TO SEE A PROBATION OFFICER IS NOT A PER SE VIOLATION OF MIRANDA. PERHAPS WHEN THE ISSUE ARISES AGAIN, OUR COURT WILL BASE THE ALTERATION OF MIRANDA ON STATE CONSTITUTIONAL GROUNDS AND THEREFORE PRECLUDE A REVERSAL BY THE UNITED STATES SUPREME COURT. TO ILLUSTRATE THE CONFUSION THAT SUCH OPINIONS BY OUR STATE SUPREME COURT ENGENDER, LOOK AT IN RE PATRICK W., 104 CA 3d 615 (ACCEPTED FOR HEARING BEFORE THE CALIFORNIA SUPREME COURT). IN IN RE PATRICK W., THE COURT SUPPRESSED A MURDER CONFESSION DESPITE THE FACT THE JUVENILE HAD BEEN READ AND FREELY WAIVED HIS MIRANDA RIGHTS. WHY WAS THE CONFESSION SUPPRESSED? BECAUSE THE POLICE DID NOT ADVISE THE JUVENILE THAT HE HAD A RIGHT TO SEE HIS GRANDPARENTS PRIOR TO ANY QUESTIONING. IN FACT, THE JUVENILE IN PATRICK DID NOT EVEN ASK TO SEE HIS GRANDPARENTS.

ANOTHER AREA OF CONCERN IS WHAT HAPPENS WHEN AN OFFICER ACTS IN REASONABLE GOOD FAITH RELIANCE IN ENFORCING A STATUTE THAT IS LATER DECLARED UNCONSTITUTIONAL. IN CALIFORNIA THE COURTS HAVE SUPPRESSED THE EVIDENCE RESULTING FROM AN ARREST MADE BY THE POLICE WHEN THE COURT LATER FOUND THE STATUTE, WHICH WAS THE BASIS OF THE ARREST,

UNCONSTITUTIONAL. JENNINGS V. S. COURT 104 C.A.3d 50. UNDER MICHIGAN V. DE FILLIPPO 443 U.S. 31, THE UNITED STATES SUPREME COURT RULED THAT AN ARRESTING OFFICER, ACTING IN GOOD FAITH, CAN ENFORCE ORDINANCES AS THEY ARE WRITTEN. WHAT SOME APPELLATE COURT MAY LATER DO TO THAT ORDINANCE IS IRRELEVANT AND DOES NOT SOMEHOW MAKE THE DEFENDANT LESS GUILTY OR THE POLICE CONDUCT "ILLEGAL." IT ALSO BEARS ASKING WHAT PURPOSE IS SERVED TO EXCLUDE EVIDENCE UNDER THESE LAST MENTIONED CASES. WOULD THE POLICE IN ANTICIPATION THAT SOME COURT SOMEWHERE MAY STRIKE DOWN ANY STATUTE BE DETERRED FROM ENFORCING EVERY STATUTE? IS THAT A GOAL OF THE EXCLUSIONARY RULE? CERTAINLY NOT ONE ENUNCIATED BY THE U.S. SUPREME COURT.

THE COMPARISONS MADE IN THE AFORMENTIONED CASES COMPEL ME TO CONCLUDE THAT THE CALIFORNIA SUPREME COURT HAS TO AN EVEN GREATER DEGREE THAN THE UNITED STATES SUPREME COURT, FAILED TO DEVELOP WORKABLE RULES AND HAS EXCLUDED EVIDENCE IN CASES OF MERE TECHNICAL VIOLATIONS WHERE THERE IS VIRTUALLY NO DETERRENT EFFECT FROM THE RULING. AND SO IN CALIFORNIA WE ARE HOLDING TRIALS IN WHICH THE TRUTH IS SUPPRESSED AND IN WHICH THE WITNESSES, IN SPITE OF THEIR OATHS, ARE FORBIDDEN TO TELL THE TRUTH EVEN WHEN DECISIONS OF THE U.S. SUPREME COURT DO NOT COMPEL SUCH A RESULT.

IT APPEARS THAT BECAUSE OF A MISPLACEMENT OF THE EXCLUSIONARY RULE'S PURPOSE IN CALIFORNIA, TRUTHFUL, PROBATIVE AND RELIABLE EVIDENCE IS EXCLUDED. SOMETIMES UNQUESTIONABLY GUILTY PERSONS GO FREE, SOME NEVER GET CHARGED. SOMETIMES EXCLUSION RESULTS IN A REDUCTION IN CHARGES. THE DIFFICULTY I HAVE WITH THE ABOVE RESULT IS THAT IN CALIFORNIA IT OCCURS TOO OFTEN IN CASES WHERE THERE IS NO BENEFIT SUCH AS THE DETERRENCE OF UNREASONABLE POLICE CONDUCT -- WHERE THE EXCLUSION APPEARS TO RESULT MERELY FROM AN OVERLY RIGID AND UNNECESSARILY TECHNICAL APPLICATION OF THE RULE.

WITH REFERENCE TO THE PURPOSE OR PURPOSES OF THE EXCLUSIONARY RULE, IT IS OFTENTIMES ALLEGED THAT EVEN THOUGH IN A PARTICULAR FACTUAL SETTING, EXCLUSION WOULD HAVE NO DETERRENT EFFECT AND THE CONDUCT WAS A MERE TECHNICAL VIOLATION THAT NONETHELESS THE EXCLUSION IS JUSTIFIED AS UPHOLDING THE INTEGRITY OF THE COURT. YET THE "INTEGRITY" PURPOSE IS VALID ONLY WHEN APPLIED IN A CASE SUCH AS CAHAN (OFFICERS KICKING DOWN DOORS, ETC.) AND TO OTHER SUCH CASES WHERE THE EXCLUSION OF EVIDENCE COULD DETER SUCH UNREASONABLE POLICE CONDUCT. CERTAINLY A COGENT ARGUMENT CAN BE MADE THAT TO ALLOW THE INTRODUCTION OF EVIDENCE OBTAINED IN SUCH A FLAGRANT AND DETERRABLE MANNER COULD IMPUGN THE COURT'S INTEGRITY. BUT WHEN THE EXCLUDED EVIDENCE

IS OBTAINED AS, IN THE COURT'S WORDS IN CAHAN, AS A RESULT OF A MINOR INTRUSION OF PRIVACY OR AS THE RESULT OF A GOOD FAITH MISTAKE OF JUDGMENT ON A POLICE OFFICER'S PART, ITS EXCLUSION WHICH CAUSES NO DETERRENCE OF UNREASONABLE POLICE CONDUCT DOES NOT AID THE COURT IN UPHOLDING ITS INTEGRITY -- RATHER SUCH EXCLUSION OFTEN RESULTS IN A LOSS OF PUBLIC SUPPORT AND PERCEIVED INTEGRITY.

CONSIDER, IF YOU WILL, THE INTEGRITY ARGUMENT ESPECIALLY IN LIGHT OF CHIEF JUSTICE WRIGHT'S REFERENCE TO A "LITTLE" PERJURY IN DISBROW. HOW MUCH IS THE CALIFORNIA SUPREME COURT REALLY CONCERNED ABOUT ITS INTEGRITY WHEN IT ALLOWS ITS COURTROOMS TO OPENLY ALLOW INTO EVIDENCE PERJURED TESTIMONY? IT IS MY POSITION THAT THE INTEGRITY PURPOSE HAS VALIDITY ONLY WHERE THE DETERRENCE PURPOSE VALIDLY APPLIES. TO ALLEGE INTEGRITY AS A PURPOSE FOR EXCLUSION WHERE DETERRENCE IS NOT PRESENT RESULTS IN A SHAM REASON FOR EXCLUSION. IF THERE IS NO UNREASONABLE VIOLATION AND THERE IS NO CONDUCT THAT CAN BE DETERRED, IT IS MY BELIEF THAT THERE IS ALSO NO HARM TO THE COURT'S INTEGRITY IF THE EVIDENCE IS ADMITTED. INDEED, THE PUBLIC BLAMES THE COURTS FOR RELEASING CRIMINALS ON TECHNICALITIES. THE PUBLIC DOES NOT BLAME THE POLICE. THE PLAIN AND SIMPLE FACT IS THAT A SIGNIFICANT REASON OUR CRIMINAL COURTS ARE IN SUCH DISREPUTE

TODAY IS THAT THE PUBLIC PERCEIVES THEM AS A PLACE WHERE GUILTY PEOPLE ARE OFTEN FREED ON TECHNICALITIES RATHER THAN BEING HELD RESPONSIBLE FOR THEIR CRIMES.

CALIFORNIA HAS LOST SIGHT OF THE GOALS LAID DOWN IN CAHAN. CALIFORNIA COURTS HAVE CARRIED TO THE EXTREME WHAT CAHAN ACCUSED THE FEDERAL COURTS OF DOING WITH THE EXCLUSIONARY RULE. THE COURT IN CAHAN STATED WHEN OVERRULING THE PRIOR CASES REJECTING THE EXCLUSIONARY RULE, "SINCE EXPERIENCE IS OF ALL TEACHERS THE MOST DEPENDABLE, AND SINCE EXPERIENCE IS A CONTINUOUS PROCESS, IT FOLLOWS THAT A RULE OF EVIDENCE AT ONE TIME THOUGHT NECESSARY TO THE ASCERTAINMENT OF TRUTH SHOULD YIELD TO THE EXPERIENCE OF A SUCCEEDING GENERATION WHENEVER THAT EXPERIENCE HAS CLEARLY DEMONSTRATED THE FALLACY OR UNWISDOM OF THE OLD RULE." IN THE 25 YEARS SINCE CAHAN THE EXPERIENCE REQUIRES ANOTHER CHANGE. A COMPARISON OF THE FACTS IN CAHAN AND ITS FLAGRANT AND DETERRABLE CONDUCT WITH MANY OF THE CALIFORNIA SUPREME COURT CASES FOLLOWING CAHAN IN WHICH CASES THE CONDUCT OF THE POLICE IS NEITHER FLAGRANT NOR DETERRABLE CAN LEAD ONE TO BELIEVE THAT THERE HAS BEEN A CLEAR INABILITY OR REFUSAL OF OUR COURT TO FOLLOW THE PURPOSE OF CAHAN.

I SUGGEST FOR YOUR CONSIDERATION THE FOLLOWING

PROPOSED CONSTITUTIONAL AMENDMENT:

ARTICLE 1, SECTION 28

NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION OR CALIFORNIA PENAL CODE SECTION 1538.5, EVIDENCE SHALL NOT BE EXCLUDED OR LIMITED FOR ANY PURPOSE IN ANY LEGAL PROCEEDING EXCEPT AS PROVIDED BY OTHER STATUTE OR AS REQUIRED BY THE UNITED STATES CONSTITUTION.

BECAUSE THERE IS DOUBT SURROUNDING THE QUESTION WHETHER THE EXCLUSION OF EVIDENCE IS CONSTITUTIONALLY REQUIRED OR IS A JUDICIAL PROCEDURE CAPABLE OF ABOLITION BY THE LEGISLATURE, THIS PROPOSAL CLEARLY PLACES SUCH POWER IN THE HANDS OF THE REQUIREMENTS OF THE U.S. CONSTITUTION AS ENUNCIATED BY THE U.S. SUPREME COURT, AND PROVIDES THAT THE LEGISLATURE IF IT FINDS IT NECESSARY MAY EXPAND THE SITUATIONS IN WHICH EXCLUSION MAY OCCUR.

BY THIS AMENDMENT CALIFORNIA'S LEGISLATURE, IN OPEN PUBLIC DEBATES, WILL DETERMINE AFTER EXTENSIVE HEARINGS WHAT, IF ANY, RESTRICTIONS SHOULD BE PLACED UPON THE ADMISSION OF EVIDENCE BEYOND THOSE PROVIDED FOR BY THE UNITED STATES CONSTITUTION.

I WISH TO MAKE CLEAR THAT I DO NOT OFFER THIS PROPOSED AMENDMENT AS A TOTAL PANACEA TO THE PROBLEMS OF THE RULE. NOR DO I CONTEND THAT THE UNITED STATES SUPREME COURT HAS SUFFICIENTLY DEALT WITH ALL OF THE SHORTCOMINGS ASCRIBED TO IT IN CAHAN. WHAT I AM SAYING IS THAT IT'S TIME THAT WE STATED, THROUGH CONSTITUTIONAL AMENDMENT, THAT IT IS OUR INTENTION IN THIS STATE TO HAVE AN APPLICATION OF 4TH AMENDMENT PRINCIPLES CONSISTENT WITH THOSE OF THE UNITED STATES SUPREME COURT AND TO LEAVE QUESTIONS OF EXPANSION OF THE RULE TO OUR STATE LEGISLATURE.

September 26, 1980 Alameda County District Attorney's Office (Lowell Jensen)

The California Exclusionary Rule - 1980

"The Exclusionary Rule" is a judicially declared rule of law which implements the prohibition of the Fourth Amendment against "unreasonable searches and seizures" and holds that contraband or other forms of incriminating evidence must be suppressed and must not be admitted against a defendant in a criminal trial when such evidence was obtained by unlawful police activity. The Rule was first expressed by the United States Supreme Court in 1914 in Weeks v. U.S.; was introduced to California by the 1954 decision of the California Supreme Court in People v. Cahan; and was extended to all the states of the union in obedience to the Fourteenth Amendment by the 1961 decision of the United States Supreme Court in Mapp v. Ohio. The Rule is implemented in California procedure through the statutory framework of Penal Code Section 1538.5.

The purpose of the Rule is to provide an effective deterrent to illegal police action. As stated by the U. S. Supreme Court in Elkins v. U.S.,

> "Its purpose is to deter — to compel respect for the Constitutional guaranty in the only effectively available way — by removing the incentive to disregard it",

and in Terry v. Ohio, that the Rule's "major thrust is a deterrent one".

It is also said (by the Elkins Court) that another purpose of the Rule is to prevent Courts from being, "accomplices in the wilful disobedience of a Constitution they are sworn to uphold". This purpose is described as "the imperative of judicial integrity".

The Rule and its continued elaboration is the subject, it is fair to say, of significant controversy. Some propose to totally eliminate the Rule by creating a "meaningful alternative". It is my position that the rule should be retained but legislatively modified. Why? Because the Rule has been distorted in practice and is now being used to suppress evidence which has been obtained by completely lawful police conduct. In case after case evidence is suppressed not because of unlawful police conduct, but because the Court has changed the law after the search was conducted. Law enforcement frustration in these cases is exacerbated when public confidence in the police is eroded by reports of evidence lost due to "illegal" police conduct. The latest development, due to an increasingly intense and sophisticated public scrutiny of the judiciary, seems to be a loss of public respect for the Courts themselves. (See attached S.F. Examiner editorial of February 17, 1980). When California adopted the Exclusionary Rule the Cahan Court expressed concern over the possibility of "arbitrary" application of the Rule producing "needless confusion", but at the same time expressed confidence that California Courts would instead create "workable rules". Unfortunately, confusion now reigns and it is time that the Legislature take remedial action.

Legislation should address these basic issues:

1. Retroactivity. Searches conducted in conformity to existing law ought not to be suppressed.

2. "Good faith" police searches. Where the existing law is not clear, suppression should be limited to those cases where the officer acts in bad faith.

3. Search warrant validity. Where the officer honestly and completely discloses all information to the Judge there should be no suppression.

4. The "Vicarious Exclusionary Law". There should be no such standing rule in California.

There are recent cases which illustrate the problems in contemporary Exclusionary Rule interpretation in each of these areas.

1. Retroactivity.

People v. Smith. A Berkeley police officer investigating a car theft learned that the mother of suspect Smith was in the Berkeley jail having been arrested on a warrant the night before. The officer examined property, held in a police locker, which had been taken from her when she had been booked the night before and found a set of keys to another stolen car and an address written on the back of a driver's license. The car which had been stolen in Berkeley was recovered at that address, but Smith's conviction was reversed when the Appellate Court held that it should have been suppressed as evidence because the officer should have obtained a search warrant before looking at the property in the police locker. The same month that this search took place (February 1979) in another Court of Appeal District, in People v. Remiro, the Court had decided that it was proper for Oakland police to take a set of keys, without a search warrant, from the personal property of the defendant taken from him earlier by Concord police at the time he was booked. In Remiro, the Court cited previous cases which had validated warrantless searches in these circumstances. In one of these cases decided in 1966, People v. Rogers, the Court had stated,

> "During their period of police custody an arrested person's personal effects, like his person itself, are subject to reasonable inspection, examination, and test. (Citations). Whatever segregation the police make as a matter of internal police administration of articles taken from a prisoner at the time of his arrest and booking does not derogate the fact of their continued custody and possession of such articles."

As the Berkeley police search in the Smith case was lawful when conducted, suppression of the evidence seized in order to "deter" that conduct makes no sense.

The United States Supreme Court has held that the Exclusionary Rule is not to be applied retroactively. The case of U.S. v. Peltier involved a seizure of 270 pounds of marijuana by Border Patrol agents. The conduct of the officers was clearly lawful at the time the seizure was accomplished, but some 4 months later, in the Almeida-Sanchez v. U.S. case, such conduct was declared to be unlawful. In Peltier, the Court rejected the defense contention that the Almeida-Sanchez rule should be applied retroactively and that the evidence should be suppressed, holding that,

> ". . . we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. (Citations). If the purpose of the Exclusionary Rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Shortly after its watershed Cahan decision the California Supreme Court held, in People v. Kitchens, that the new Exclusionary Rule was to be applied retroactively to searches conducted before Cahan was decided. It was clear,however, that at that time the Court contemplated application of the Rule to illegal searches and did not deal with the issue of suppression in the context of lawful searches. From time to time, later California cases have denied retroactive application to new rules. In People v. Kaanehe, the Supreme Court considered whether or not the recently decided rule of People v. Burrows (requiring search warrants to examine bank records) should be applied retroactively and decided that it should not be so applied. The Court opined that retroactivity is generally reserved for those cases where the right vindicated is one essential to the integrity of the fact-finding process and that Burrows was not such a case, stating:

> "Exclusion is not necessary to ensure the reliability of the fact finding process at trial. No compulsion is present and the evidence seized is entirely trustworthy. As the purpose of the Exclusionary Rule in those circumstances is to deter illegal conduct by law enforcement officials, exclusion of evidence seized prior to the pronouncement of a decision does not further compliance with that decision."

It may be argued, then, that upon proper analysis, California law already recognizes that the Exclusionary Rule should not be applied where the existing law is changed by a new decision. But that analysis is not required. Legislation should condition suppression on conduct unlawful at the time of the search, protect searches conducted in conformance to prevailing law, and thereby adhere to the true rationale of the Exclusionary Rule.

2. "Good faith" searches.

People v. Pace. In March 1977 Union City police arrested Pace in a city park and opened the lunchbox he carried to find some identification. Instead they found a quantity of PCP, marijuana, and cocaine. A Court of Appeal decided in April 1979 that the conviction should be reversed because the police had not obtained a search warrant before opening the lunchbox. Now compare People v. Flores decided by another division of the same Court of Appeal District in December 1979. Flores was arrested by Fremont police who searched the canvas shoulderbag he was carrying and found PCP and marijuana. This search was found to be lawful and the conviction was affirmed. This division of the Court knew about Pace but just plain disagreed with that opinion, stating,

> "In view of its overbroad analysis, we find the reasoning in Pace to be unpersuasive."

The San Francisco case celebrated in the attached Examiner editorial involved a January 1980 arrest and subsequent warrantless search of a brief case carried by the defendant which produced incriminating evidence. The case was thrown out after the evidence was suppressed by a trial court using the Pace decision as precedent. Why was this not a lawful search on the basis of the Flores decision? We simply do not know. The trial Court did not discuss Flores. In fact we do not know what would happen tomorrow in another trial court. All we know is that the

law on the subject, is, to say the least, unclear.

In another area of the law where the question is search warrant or no search warrant, a recent case casts doubt on present decisional law which clearly permits police to open the trunk of a car without a warrant where they have probable cause to do so. In People v. Rodriguez, decided in February 1980, the Court decided that new and different rules obtained and suppressed evidence found in such a search because the police did not obtain a search warrant. The Court hastened to add, however,

> ". . .it is not surprising, under the circumstances, that Officer Kingsley should be uncertain as to what the law required him to do. (Citation). We ourselves are hardly in a position to act with absolute certainty."

The Court had earlier described its analytic problem in these terms,

> "Indeed, for sheer doctrinal obscurity few areas of the law can compete with the 'rules' governing warrantless searches of automobiles."

We say that, under such circumstances, the honest and reasonable conduct of Officer Kingsley is not, "unlawful", and does not warrant Exclusionary Rule nullification.

Legislation should hold that the conduct of an officer which is subjectively in good faith and objectively reasonable, in a legal context where there is no fixed decisional or statutory norm, is not within the prohibition of the Exclusionary Rule. There are existing decisions which lend support to this concept. In Peltier the United States Supreme Court reviewed cases which had involved retroactivity analysis and stated:

> "The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of this material even if decisions subsequent to the search and seizure have broadened the Exclusionary Rule to encompass evidence seized in that manner."

The California case of People v. Newell is to the same effect. In this case a Contra Costa County Sheriff's detective responded to a reported burglary of a store in a shopping center. At the scene he found that a hole had been cut through the store wall. He climbed through the hole, found that the premises were vacant, found a paper bag on the floor, and a sales receipt in the bag which led to the defendant. The Court affirmed the conviction rejecting a defense contention that the officer should have had a search warrant to go through the hole, pick up the bag, and look at its contents. In its Exclusionary Rule analysis the Court says:

> "But perhaps the most important consideration of all in determining whether otherwise admissible

> evidence shall be suppressed is the purpose, or intent, or good or bad faith of the government agent in searching for, and seizing it."

and further:

> "His conduct throughout disclosed nothing other than a conscientious 'good faith' purpose to enforce the law and to bring the vacant store's burglars to justice . . . And were we to assume, which we do not, that under the complex rules and divergent views and interpretations of the law of 'search and seizure', the detective had erred, it may not reasonably be said that he was negligent. For on a subject where judges and scholars disagree a policeman's good faith decision may not rationally be faulted."

Newell, is, however, clearly exceptional. The recent Supreme Court decision in People v. Teresinski illustrates the present approach in California. In that case a Dixon police officer stopped a car in the belief that the occupants were in violation of a local curfew law. The Court found the detention unlawful and suppressed the testimony of the victim of a Woodland robbery committed by the driver of the car less than an hour before the car stop because that identification was achieved by "exploitation" of the illegality. To the contention that the officer's conduct was a "reasonable mistake of law", the Court responded:

> "Courts on strong policy grounds have generally refused to excuse a police officer's mistake of law. . . . We need not decide, however, whether under exceptional circumstances an officer's reasonable mistake of law might validate police conduct because in this case the officer's mistake cannot be found reasonable."

There is strong support in the Federal law, however, for exempting "good faith" searches from the Exclusionary Rule.

In an important recent (July 31, 1980) decision, (U.S. v. Williams), the U.S. Court of Appeal for the 5th Circuit considered a search incident to an arrest by a DEA agent for "bail jumping" which revealed that the defendant was again running heroin. To the contention that the arrest was unlawful the Court held:

> Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, it application must cease also. The costs to society of applying

> the rule beyond the purposes it exists to serve are simply too high — in this instance the release on the public of a recidivist drug smuggler —with few or no offsetting benefits."

The view from the 8th Circuit is apparently different. In U.S. v. Schleis, it is held that

> While the meaning of the Court's language is not entirely clear, we do not read United States v. Peltier (citation), as reflecting a new approach that an Exclusionary Rule would only be applied in bad faith violations of the Fourth Amendment. (citation). We cannot believe that the Court means that an application of the Exclusionary Rule is to turn on the subjective state of mind of the officer conducting the challenged search."

One is moved to ask, why not? We seem to have no difficulty in probing other states of mind and assessing the reasonableness of past conduct. Consider, in this regard, People v. Russell, decided in January 1980. Here police had opened a car trunk, unzipped a flight bag and found some marijuana. On appeal it was contended that trial counsel was incompetent under People v. Pope, which requires that counsel, "act in a manner to be expected of reasonably competent attorneys", because he had not asserted that opening the flight bag required a search warrant as held in People v. Dalton. The Court rejected the contention that the attorney was incompetent, as follows:

> "It is first noted that the hearing on Russell's motion to suppress evidence occurred February 13, 1979. The opinion of People v. Dalton was filed six months later, August 16, 1979. It is doubtful that Pope requires, under pain of being held to have furnished constitutionally inadequate representation, such prescience on the part of a lawyer for one criminally accused."

Eminently reasonable you say. How then do we possibly justify maintaining a system where we do require "such prescience" on the part of a police officer, faced (under far more pressing circumstances) with precisely the same question as the defense lawyer, and blithely suppress the evidence of crime he has seized? We say eminently unreasonable. Legislation should remedy this state of affairs, to permit "good faith" searches, and, once again, limit the Exclusionary Rule to its true rationale.

3. Search Warrant Validity.

People v. Schmidt, decided in February 1980. An affidavit executed by a Eureka police officer in December 1977 supported the reliability of an informant by reference to previous reliable information supplied by him in 1970 and 1971 in another County. The Judge read the affidavit, issued the search warrant, and the evidence leading to conviction was seized. On appeal, the case was reversed because the Appellate Court decided that in cases where a once credible informant ceases to be an informant for a long period of time his credibility must

be re-established before his new information can be used. The Appeals Court acknowledged that this is a new rule, there being no previous decisions on the question. There is not the slightest hint of police misconduct in this case. Upon issuance, the search warrant imposes a duty on the police to carry out a judicial order. Surely we do not intend to deter the police conduct in this case by suppression of the evidence. As a general rule we can say that police ought to be encouraged to seek "neutral and detached" judicial review of contemplated searches, that is what search warrants are all about. On the other hand, no one has suggested that a potential purpose of the Exclusionary Rule is to deter judicial misconduct, although that is the only apparent rationale for use in cases like this. Suppression should never be used in search warrant cases where there has been no police misconduct by misrepresentation or by withholding information necessary for the judicial decision. Cahan and Mapp were warrantless searches and the extension of the Exclusionary Rule to warrant searches has happened gradually and essentially without an articulated rationale. In an early Federal case, U.S. v. Soyka, Circuit Judge Friendly spoke of "grotesquely inappropriate" applications of the Exclusionary Rule. People v. Schmidt qualifies.

4. The Vicarious Exclusionary Law.

People v. Dunn. Late one night Berkeley police stopped and questioned two young women on University Avenue on the belief that they were prostitutes. It turned out that they were 15 years old, they were prostitutes, and that the defendant was their pimp, and that he had engaged in sexual intercourse with the girls. His subsequent conviction was reversed. The Court first acknowledged that California allows vicarious claims of suppression via the Exclusionary Rule, next,

> the Court holds that the "investigatory stop" was an unlawful detention because the officers had,
>
> > "no objectively reasonable basis for their belief that the women were prostitutes. . ."
>
> The stage is now set for the coup de grace, to wit: "the Exclusionary Rule is triggered by the illegality . . . evidence obtained as a result of the unlawful detention, here the incriminating testimony of the young women could not be admitted against him." The mind boggling result is that the 15 year old sexually abused victim is not permitted to testify against the pimp who committed the crimes upon her. The Exclusionary Rule remedy of suppression should be available to the offended person only, it should not be possible for a person to claim that the rights of another person were violated.
>
> Vicarious suppression is not permitted in Federal courts (Alderman v. U.S.), and is therefore a matter for individual State decision. To our knowledge, at the present time, 48 states and the Federal courts do not permit vicarious suppression and it is permitted in 2 states only, California and Michigan. Is this rule compelled by the California Constitution? There appears to be no definitive answer. The Supreme Court has raised and avoided the question in Kaplan v. Superior Court. In that case the Court considered the possible application of newly enacted Evidence Code Section 351 on the "rule of standing" (a.k.a. the vicarious exclusionary rule) previously stated in People v. Martin, if that rule was deemed to be Constitutionally compelled. The Court held that:

> "It follows that even though the Martin rule may not be 'required by' the prevailing federal interpretation of the Fourth Amendment . . . it is at least 'based on' the Constitutionally compelled Cahan and Mapp principles.
>
> "By the very terms of the comment to Section 351, therefore, it is exempt from the operation of that section",

and in an explanatory footnote:

> "This conclusion makes it unnecessary for us to reach defendant's Constitutional arguments that . . . the Martin rule is required by the search and seizure clause of . . . the California Constitution. . . Nothing we say here, however, is meant to foreclose consideration of those issues when it is appropriate to do so."

In pragmatic terms then legislative action on this issue is not foreclosed. True enough the Supreme Court will, as always, have the final say. It is, however, a matter of legislative wisdom whether or not the Court is given the opportunity to decide the final question. It seems clear to us that the present Martin "rule of standing" is a terrible rule which the Legislature should repeal and thereby force Supreme Court consideration of the issue.

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Ordered non published 8/28/80.

☆☆☆ Feb. 17, 1980 S.F. Sunday Examiner & Chronicle

Reg Murphy / *With liberty and injustice for all*

At midnight John Molinari was heading home after a long evening of political campaigning with then-candidate Dianne Feinstein. His headlights picked out a man standing at a city parking meter.

Molinari thought it odd, flicked his bright beams, saw the man holding a sack in his hands, and watched the man run away.

Suspicious, but unable to give chase, Molinari proceeded on his way. A police car rounded the corner. Molinari flagged the officers. They patrolled, saw the man, found he had flung the bag into bushes, and arrested him.

In his possession were five keys, each one of which fit one or another lock on the parking meters of The City. He had been draining them of coins.

The officers found the bag, looked into it and found some $300. They took him down to jail, made the case and turned him over to Municipal Court.

On trial day, Molinari was full of enthusiasm. He had spotted the culprit, found the officers, gotten interested in the case and taken care to be ready to testify.

The case came to trial, the president of the Board of Supervisors took the stand and told what he knew. So did the officers. The public defender moved to have the case thrown out of court because the officers had improperly looked to see what was in the bag.

To the consternation of Molinari and presumably the entire justice system, the judge threw out the case. The man with the five parking meter keys was set free. No conviction. No realization that he would be punished for theft. Nothing.

John Molinari is a gregarious man by nature, generally optimistic. He is a native, and he seems to love his town. He obviously likes his role in public affairs, and goes about it with zest.

But rarely has a citizen or public official been more downcast than he after that encounter with the courts. What he had seen was incredible. He began to match stories with other people, and found that they have had the same experiences — or worse.

The point is that the legal system is at war with itself. It wants to use the finest computers to analyze crime, it wants to make streets safe, and it desires to be respected.

But it cannot cope successfully with the alarming increase in urban crime, never mind violence. The system has locked itself into a system of intellectual niceties that aren't able to cope with the innovative crime of urban America.

Judges say, rightly, that they have to follow the precedents of the higher courts. They say the higher courts have created standards that make them throw out the evidence of crime unless it is compiled in just the proper way. They argue that they are to be pitied, rather than blamed.

But is that right? Has the justice system so lost its common sense that it no longer can arrive at a reasonable punishment for an obviously guilty person?

If so, there is a graver danger than a man going free after having taken silver from parking meters. There is a danger that street-tough people are going to walk all over the courts until the fabric of this society unravels.

Ask John Molinari about that. And be prepared to listen to a chagrined citizen who saw his duty, did it, and found the courts couldn't accommodate themselves to punish the guilty.