10-1986

Illinois v. Krull

Lewis F. Powell Jr.

January 17, 1986

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 85-608

Submitted ....., *19*... *Announced* ....., *19*...

ILLINOIS

vs.

ALBERT

Denied

Relist

C.J.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓	+	Rev	or	Dism							
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓	✓										

February 21, 1986

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 85-608

Submitted ....., 19... *Announced* ....., 19...

ILLINOIS

vs.

KRULL

Relist
for
CJ.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.		✓		+ Rev or Dism									
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 16, 1987

85-608 - Illinois v. Krull

Dear Harry,

I agree.

Sincerely yours,

Byron

Justice Blackmun

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice Scalia

L.F.P.

From: **Justice O'Connor**

Circulated: FEB 17 1987

Recirculated: _____

Well written & persuasive

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-608

ILLINOIS, PETITIONER *v.* ALBERT KRULL, GEORGE LUCAS AND SALVATORE MUCERINO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[February ——, 1987]

I am joined the Court opinion.

JUSTICE O'CONNOR, dissenting.

The Court today extends the good-faith exception to the Fourth Amendment exclusionary rule, *United States* v. *Leon*, 468 U. S. 897 (1984), in order to provide a grace period for unconstitutional search and seizure legislation during which the State is permitted to violate constitutional requirements with impunity. *Leon*'s rationale does not support this extension of its rule and the Court is unable to give any independent reason in defense of this departure from established precedent. Accordingly, I respectfully dissent.

The Court, *ante*, at ——, accurately summarizes *Leon*'s holding:

> "In *Leon*, the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective."

The Court also accurately summarizes the reasoning supporting this conclusion as based upon three factors: the historic purpose of the exclusionary rule, the absence of evidence suggesting that judicial officers are inclined to ignore Fourth Amendment limitations, and the absence of any basis for believing that the exclusionary rule significantly deters Fourth Amendment violations by judicial officers in the search war-

rant context. *Ibid.* In my view, application of *Leon*'s stated rationales leads to a contrary result in this case.

I agree that the police officer involved in this case acted in objective good faith in executing the search pursuant to Ill. Rev. Stat., ch. 95½, ¶5–401(e) (1981) (repealed 1985). *Ante*, at ——. And, as the Court notes, *ante*, at ——, n. 13, the correctness of the Illinois Supreme Court's finding that this statute violated the Fourth Amendment is not in issue here. Thus, this case turns on the effect to be given to statutory authority for an unreasonable search.

Unlike the Court, I see a powerful historical basis for the exclusion of evidence gathered pursuant to a search authorized by an unconstitutional statute. Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. This Court has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance, 7 & 8 Wm. III, c. 22, § 6 (1696), was the moving force behind the Fourth Amendment. *Payton* v. *New York*, 445 U. S. 573, 583–584, and n. 21 (1980); *Stanford* v. *Texas*, 379 U. S. 476, 481–482 (1965); *Boyd* v. *United States*, 116 U. S. 616, 624–630 (1886). James Otis' argument to the royal Superior Court in Boston against such overreaching laws is as powerful today as it was in 1761:

> ". . . I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villany on the other, as this writ of assistance is. . . .
>
> . . . . . .
>
> ". . . It is a power, that places the liberty of every man in the hands of every petty officer. . . .
>
> ". . . No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void." 2 Works of John Adams 523–525 (C. Adams ed. 1850).

See *Paxton's Case*, Quincy 51 (Mass. 1761). James Otis lost the case he argued; and, even had he won it, no exclusionary rule existed to prevent the admission of evidence gathered pursuant to a writ of assistance in a later trial. But, history's court has vindicated Otis. The principle that no legislative act can authorize an unreasonable search became embodied in the Fourth Amendment.

Almost 150 years after Otis' argument, this Court found it necessary, in order to effectively enforce the constitutional prohibition, to hold that evidence gathered in violation of the Fourth Amendment would be excluded in federal criminal trials. *Weeks* v. *United States*, 232 U. S. 383 (1914). In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the rule was further extended to state criminal trials. This exclusionary rule has, of course, been regularly applied to evidence gathered under statutes that authorized unreasonable searches. See, *e. g.*, *Ybarra* v. *Illinois*, 444 U. S. 85 (1979) (statute authorized search and detention of persons found on premises being searched pursuant to warrant); *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979) (statute authorized search of luggage of persons entering Puerto Rico); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973) (statute authorized search of automobiles without probable cause within border areas); *Sibron* v. *New York*, 392 U. S. 40 (1968) (statute authorized frisk absent constitutionally required suspicion that officer was in danger); *Berger* v. *New York*, 388 U. S. 41 (1967) (permissive eavesdrop statute). Indeed, *Weeks* itself made clear that the exclusionary rule was intended to apply to evidence gathered by officers acting under "legislative . . . sanction." *Weeks* v. *United States*, *supra*, at 394.

Leon on its face did not purport to disturb these rulings. "'Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment.' *Michigan* v. *DeFillippo*, 443 U. S., at 39. The substantive Fourth

Amendment principles announced in those cases are fully consistent with our holding here." *United States* v. *Leon*, 468 U. S., at 912, n. 8. In short, both the history of the Fourth Amendment and this Court's later interpretations of it, support application of the exclusionary rule to evidence gathered under the 20th century equivalent of the act authorizing the writ of assistance.

This history also supplies the evidence that *Leon* demanded for the proposition that the relevant state actors, here legislators, might pose a threat to the values embodied in the Fourth Amendment. Legislatures have, upon occasion, failed to adhere to the requirements of the Fourth Amendment, as the cited cases illustrate. Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate. In stark contrast, the Framers did not fear that judicial officers, the state actors at issue in *Leon*, posed a serious threat to Fourth Amendment values. James Otis is as clear on this point as he was in denouncing the unconstitutional Act of Parliament:

> "In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search." 2 Works of John Adams 524 (C. Adams ed. 1850).

The distinction drawn between the legislator and the judicial officer is sound. The judicial role is particularized, fact-specific and nonpolitical. Judicial authorization of a particular search does not threaten the liberty of everyone, but rather authorizes a single search under particular circumstances. The legislative act, on the other hand, sweeps broadly, authorizing whole classes of searches, without any particular-

ized showing. A judicial officer's unreasonable authorization of a search affects one person at a time; a legislature's unreasonable authorization of searches may affect thousands or millions and will almost always affect more than one. Certainly the latter poses a greater threat to liberty.

Moreover, the *Leon* court relied explicitly on the tradition of judicial independence in concluding that, until it was presented with evidence to the contrary, there was relatively little cause for concern that judicial officers might take the opportunity presented by the good-faith exception to authorize unconstitutional searches. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *United States* v. *Leon*, *supra*, at 917. Unlike police officers, judicial officers are not "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). The legislature's objective in passing a law authorizing unreasonable searches, however, is explicitly to facilitate law enforcement. Fourth Amendment rights have at times proved unpopular; it is a measure of the Framers' fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself. *Bram* v. *United States*, 168 U. S. 532, 544 (1897). Legislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers.

Finally, I disagree with the Court that there is "no reason to believe that applying the exclusionary rule" will deter legislation authorizing unconstitutional searches. *Ante*, at ——. "The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals." Stewart, 83 Colum. L. Rev. 1365, 1393 (1983). Providing legislatures a grace period during which the police

may freely perform unreasonable searches in order to convict those who might have otherwise escaped creates a positive incentive to promulgate unconstitutional laws. Cf. *Weeks* v. *United States*, 232 U. S., at 392–393. While I heartily agree with the Court that legislators ordinarily do take seriously their oaths to uphold the Constitution and that it is proper to presume that legislative acts are constitutional, *ante*, at ——, it cannot be said that there is no reason to fear that a particular legislature might yield to the temptation offered by the Court's good faith exception.

Accordingly, I find that none of *Leon*'s stated rationales, see *ante*, at ——, supports the Court's decision in this case. History suggests that the exclusionary rule ought to apply to the unconstitutional legislatively authorized search and this historical experience provides a basis for concluding that legislatures may threaten Fourth Amendment values. Even conceding that the deterrent value of the exclusionary rule in this context is arguable, I am unwilling to abandon both history and precedent weighing in favor of suppression. And if I were willing, I still could not join the Court's opinion because the rule it adopts is both difficult to administer and anomolous.

The scope of the Court's good-faith exception is unclear. Officers are to be held not "to have acted in good faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. Cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)." *Ante*, at ——. I think the Court errs in importing *Harlow*'s "clearly established law" test into this area, because it is not apparent how much constitutional law the reasonable officer is expected to know. In contrast, *Leon* simply instructs courts that police officers may rely upon a facially valid search warrant. Each case is a fact-specific self-terminating episode. Courts need not inquire into the officer's probable understanding of the state of the law except in the extreme instance of a search warrant upon which

no reasonable officer would rely. Under the decision today, however, courts are expected to determine at what point a reasonable officer should be held to know that a statute has, under evolving legal rules, become "clearly" unconstitutional. The process of clearly establishing constitutional rights is a long, tedious and uncertain one. Indeed, as the Court notes, *ante*, at ——, n. 13, the unconstitutionality of the Illinois statute is not clearly established to this day. The Court has granted certiorari on the question of the constitutionality of a similar statutory scheme in *New York* v. *Burger*, 479 U. S. —— (1986). Thus, some six years after the events in question in this case, the constitutionality of statutes of this kind remains a fair ground for litigation. Nothing justifies a grace period of such extraordinary length for an unconstitutional legislative act.

The difficulties in determining whether a particular statute violates clearly established rights are substantial. See 5 K. Davis, Administrative Law Treatise §27:24, p. 130 (2d ed. 1984) ("The most important effect of [*Davis* v. *Scherer*, 468 U. S. 183 (1984)] on future law relates to locating the line between established constitutional rights and clearly established constitutional rights. In assigning itself the task of drawing such a line the Court may be attempting the impossible. Law that can be clearly stated in the abstract usually becomes unclear when applied to variable and imperfectly understood facts. . ."). The need for a rule so difficult of application outside the civil damages context is, in my view, dubious. Fairness to the defendant, as well as public policy, dictates that individual government officers ought not be subjected to damages suits for arguable constitutional violations. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982) (citing *Butz* v. *Economou*, 438 U. S. 478, 506 (1978)). But suppression of illegally obtained evidence does not implicate this concern.

Finally, I find the Court's ruling in this case at right angles, if not directly at odds, with the Court's recent decision in *Griffith* v. *Kentucky*, 479 U. S. —— (1986). In *Griffith*,

the Court held that "basic norms of constitutional adjudication" and fairness to similarly situated defendants, *id.*, at ——, require that we give our decisions retroactive effect to all cases not yet having reached final, and unappealable, judgment. While the extent to which our decisions ought to be applied retroactively has been the subject of much debate among members of the Court for many years, *id.*, at —— – ——, there has never been any doubt that our decisions are applied to the parties in the case before the Court. *Stovall* v. *Denno*, 388 U. S. 293, 301 (1967). The novelty of the approach taken by the Court in this case is illustrated by the fact that under its decision today, no effective remedy is to be provided in the very case in which the statute at issue was held unconstitutional. I recognize that the Court today, as it has done in the past, divorces the suppression remedy from the substantive Fourth Amendment right. See *United States* v. *Leon*, 468 U. S., at 905–908. It must be acknowledged also that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Moreover, the exclusionary remedy is not made available in all instances when Fourth Amendment rights are implicated. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465 (1976) (barring habeas review of Fourth Amendment suppression claims); *United States* v. *Janis*, 428 U. S. 433 (1976) (no suppression remedy for state Fourth Amendment violations in civil proceedings by or against the United States). Nevertheless, the failure to apply the exclusionary rule in the very case in which a state statute is held to have violated the Fourth Amendment destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights. In my view, whatever "basic norms of constitutional adjudication," *Griffith* v. *Kentucky*, *supra*, at ——, otherwise require, surely they mandate that a party appearing be-

fore the Court might conceivably benefit from a judgment in his favor. The Court attempts to carve out a proviso to its good faith exception for those cases in which "the legislature wholly abandoned its responsibility to enact constitutional laws." *Ante*, at ——. Under what circumstances a legislature can be said to have "wholly abandoned" its obligation to pass constitutional laws is not apparent on the face of the Court's opinion. Whatever the scope of the exception, the inevitable result of the Court's decision to deny the realistic possibility of an effective remedy to a party challenging statutes not yet declared unconstitutional is that a chill will fall upon enforcement and development of Fourth Amendment principles governing legislatively authorized searches.

For all these reasons, I respectfully dissent.

March 7, 1986

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 85-608

Submitted ....., *19*... *Announced* ....., *19*...

ILLINOIS

vs.

ALBERT

Rehnt
C. J.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Burger, Ch. J.													
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White, J.													
Marshall, J.													
Blackmun, J.			✓										
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ILLINOIS *v.* ALBERT KRULL, GEORGE LUCAS AND SALVATORE MUCERINO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85–608. Decided March ——, 1986

THE CHIEF JUSTICE, dissenting.

On July 5, 1981, Officer McNally of the Chicago Police Department conducted a search of the premises of the Action Iron and Metal Company which revealed the presence of several motor vehicles that had been reported as stolen. The officer proceeded pursuant to Illinois Vehicle Code § 5–401(e), Ill. Rev. Stat. ch. 95 ½, § 5–401(e) (1981), which at the time authorized warrantless "examination[s]" of the business premises of automotive parts dealers, scrap processors and parts recyclers. The next day the statute was declared unconstitutional by a Federal District Court in a wholly unrelated case on the ground that it vested overbroad discretion in the police. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981).

As a result of this discovery of the stolen cars respondents were charged with various counts related to the possession of stolen vehicles and false vehicle identification number plates. The trial court initially granted respondents' motion to suppress the evidence after finding that the cars had been discovered without a warrant, probable cause or consent, and concluding that the inspection statute was unconstitutional on the basis of the District Court's holding in *Bionic Auto Parts*.

During the pendency of an appeal by the State to the Illinois Appellate Court, the Illinois legislature revised the statute to conform with Fourth Amendment standards. Because of this revision, an injunction issued in *Bionic Auto Parts* against enforcement of the statute was rendered moot

and was subsequently vacated. 721 F. 2d 1072 (CA7 1983). The Illinois Appellate Court thereafter remanded this case to the trial court to reconsider the constitutionality of § 5–401(e) prior to its revision and to consider whether the good-faith reliance on the statute by Officer McNally was relevant to whether the evidence should be suppressed. On remand, the trial court again ruled that former § 5–401(e) was invalid, and further ruled that the officer's good-faith reliance on the statue was irrelevant.

The State took a direct appeal to the Illinois Supreme Court, which affirmed. 107 Ill. 2d 107, 481 N. E. 2d 703 (1985). That court agreed that the statute was unconstitutional because it "vested State officials with too much discretion to decide who, when, and how long to search." *Id.*, at 116, 481 N. E. 2d, at 707. It then rejected the State's claim that evidence from a search made in good-faith reliance on § 5–401(e) prior to any ruling that the statute was invalid should not be suppressed. In so holding, the court relied on *Michigan* v. *DeFillippo*, 443 U. S. 31, 35–38 (1970), where this Court held that an arrest made in good-faith reliance on a Detroit ordinance was valid, together with a search incident to that arrest, despite the subsequent determination that the ordinance itself was unconstitutional. See 107 Ill. 2d, at 117–119, 481 N. E. 2d, at 708. The Illinois court reasoned that

> "the Supreme Court in *DeFillippo* distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law, like the Detroit ordinance, will be upheld, provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though

> the arrest and search were made in good-faith reliance on the statute." *Id.*, at 118, 481 N. E. 2d, at 708.

The Illinois court assumed that this Court "continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid." *Ibid.* (citing *United States* v. *Leon*, 468 U. S. —— (1984)).

It is true that we have carved out a forbidden "category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Ybarra* v. *Illinois*, 444 U. S. 85, 96, n. 11 (1979). See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). Moreover, our opinions in *Leon* and *DeFillippo* further intimated that an officer's good-faith reliance on such procedural statutes would be irrelevant in determining whether to suppress the evidence of a search under this line of precedent. See *Leon*, 468 U. S., at ——, n. 8; *DeFillippo*, 443 U. S., at 39.

None of these cases, however, squarely addressed that issue, which is presented in this case. No one disputes that such statutes may no longer be relied upon by police once they are declared constitutionally infirm. But noticeably absent from the Court's discussions in *Leon* and *DeFillippo* of this string of cases is any reference to the only case directly on point, *United States* v. *Peltier*, 422 U. S. 531 (1975).

In *Peltier*, Border Patrol agents conducted a warrantless search of an automobile pursuant to a procedural statute and supporting regulations subsequently held invalid by this Court in *Almeida-Sanchez*, *supra*. Nevertheless, we refused to apply *Almeida-Sanchez* retroactively to suppress the evidence of the search when the Border Patrol agents had acted in good-faith reliance on the statute and regulations before they were declared invalid. The Court's reasoning was based principally on recognition that suppression of the evidence would serve no valid purpose of the exclusionary rule:

> "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." 422 U. S., at 542.

In reaching this holding, the Court explicitly noted that *Almeida-Sanchez* did not control because in that case the issue of good-faith reliance had never been raised by the Government. *Id.*, at 542, n. 12.

Nor should *Peltier* be read as some aberration from precedent as to good-faith reliance on a statute and the propriety of suppression generally. For example, despite the dicta in *Leon* to the contrary, the Court's reasoning there clearly supports our holding in *Peltier*. In *Leon* we refused to suppress evidence seized in good-faith reliance on a warrant later held to be invalid. We observed that the principal purpose behind the exclusionary rule is to deter unlawful police conduct. 468 U. S., at ——. And in order for exclusion of evidence to have a deterrent effect, "it must alter the behavior of individual law enforcement officers or the policies of their departments." *Id.*, at ——.

Indeed, *Leon* quoted the language from *Peltier* quoted above, see 468 U. S., at —— (quoting 422 U. S., at 542), and further quoted the following passage from *Michigan* v. *Tucker*, 417 U. S. 433 (1974), which was reiterated in *Peltier*, 422 U. S., at 439:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official con-

duct was pursued in complete good faith, however, the deterrence rational loses much of its force." *Leon*, 468 U. S., at —— (quoting 417 U. S., at 447).

In recognition of this central purpose, no Fourth Amendment interests would be advanced by suppressing evidence when the deterrent value from such suppression would be nil. As in *Leon*, suppressing evidence seized by officers relying in good faith on what they reasonably believed to be a valid procedural statute could hardly alter their behavior in any desirable fashion.

The dicta in *Leon* and *DeFillippo* conflicts directly with the Court's holding in *Peltier*, and accordingly clarification for the benefit of other courts is called for. Because this case squarely presents the issue, I would grant the State's petition for certiorari and clarify the relevant law.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1986

RE: No. 85-608 - Illinois v. Krull

Dear Lewis:

My notes reflect that your vote at Conference was to "grant and reverse or deny" this case. Would the attached dissent from denial persuade you to change your vote to a "grant?"

Regards,

WEB

Justice Powell

P.S. I'm not having sent to Conference until I hear from you

WEB

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: MAR 20 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

ILLINOIS *v.* ALBERT KRULL, GEORGE LUCAS AND SALVATORE MUCERINO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85–608. Decided March ——, 1986

THE CHIEF JUSTICE, with whom JUSTICE POWELL joins, dissenting.

On July 5, 1981, Officer McNally of the Chicago Police Department conducted a search of the premises of the Action Iron and Metal Company which revealed the presence of several motor vehicles that had been reported as stolen. The officer proceeded pursuant to Illinois Vehicle Code §5–401(e), Ill. Rev. Stat. ch. 95½, §5–401(e) (1981), which at the time authorized warrantless "examination[s]" of the business premises of automotive parts dealers, scrap processors and parts recyclers. The next day the statute was declared unconstitutional by a Federal District Court in a wholly unrelated case on the ground that it vested overbroad discretion in the police. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (ND Ill. 1981).

As a result of this discovery of the stolen cars, respondents were charged with various counts related to the possession of stolen vehicles and false vehicle identification number plates. The trial court initially granted respondents' motion to suppress the evidence after finding that the cars had been discovered without a warrant, probable cause or consent, and concluding that the inspection statute was unconstitutional on the basis of the District Court's holding in *Bionic Auto Parts*.

During the pendency of an appeal by the State to the Illinois Appellate Court, the Illinois legislature revised the statute to conform with Fourth Amendment standards. Because of this revision, an injunction issued in *Bionic Auto*

Parts against enforcement of the statute was rendered moot and was subsequently vacated. 721 F. 2d 1072 (CA7 1983). The Illinois Appellate Court thereafter remanded this case to the trial court to reconsider the constitutionality of § 5–401(e) prior to its revision and to consider whether the good-faith reliance on the statute by Officer McNally was relevant to whether the evidence should be suppressed. On remand, the trial court again ruled that former § 5–401(e) was invalid, and further ruled that the officer's good-faith reliance on the statue was irrelevant.

The State took a direct appeal to the Illinois Supreme Court, which affirmed. 107 Ill. 2d 107, 481 N. E. 2d 703 (1985). That court agreed that the statute was unconstitutional because it "vested State officials with too much discretion to decide who, when, and how long to search." *Id.*, at 116, 481 N. E. 2d, at 707. It then rejected the State's claim that evidence from a search made in good-faith reliance on § 5–401(e) prior to any ruling that the statute was invalid should not be suppressed. In so holding, the court relied on *Michigan* v. *DeFillippo*, 443 U. S. 31, 35–38 (1970), where this Court held that an arrest made in good-faith reliance on a Detroit ordinance was valid, together with a search incident to that arrest, despite the subsequent determination that the ordinance itself was unconstitutional. See 107 Ill. 2d, at 117–119, 481 N. E. 2d, at 708. The Illinois court reasoned that

> "the Supreme Court in *DeFillippo* distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law, like the Detroit ordinance, will be upheld, provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though

the arrest and search were made in good-faith reliance on the statute." *Id.*, at 118, 481 N. E. 2d, at 708.

The Illinois court assumed that this Court "continues to utilize the 'substantive-procedural dichotomy' in determining whether a search conducted pursuant to a statute was valid." *Ibid.* (citing *United States* v. *Leon*, 468 U. S. —— (1984)).

It is true that we have carved out a forbidden "category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Ybarra* v. *Illinois*, 444 U. S. 85, 96, n. 11 (1979). See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). Moreover, our opinions in *Leon* and *DeFillippo* further intimated that an officer's good-faith reliance on such procedural statutes would be irrelevant in determining whether to suppress the evidence of a search under this line of precedent. See *Leon*, 468 U. S., at ——, n. 8; *DeFillippo*, 443 U. S., at 39.

None of these cases, however, squarely addressed that issue, which is presented in this case. No one disputes that such statutes may no longer be relied upon by police once they are declared constitutionally infirm. But noticeably absent from the Court's discussions in *Leon* and *DeFillippo* of this string of cases is any reference to the only case directly on point, *United States* v. *Peltier*, 422 U. S. 531 (1975).

In *Peltier*, Border Patrol agents conducted a warrantless search of an automobile pursuant to a procedural statute and supporting regulations subsequently held invalid by this Court in *Almeida-Sanchez*, *supra*. Nevertheless, we refused to apply *Almeida-Sanchez* retroactively to suppress the evidence of the search when the Border Patrol agents had acted in good-faith reliance on the statute and regulations before they were declared invalid. The Court's reasoning was based principally on recognition that suppression of the evidence would serve no valid purpose of the exclusionary rule:

Is this true of Leon? I'll be interested in BRW's views. He wrote Leon

Peltier – only case directly on point. We refused to apply Almeida-Sanchez retroactively

> "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." 422 U. S., at 542.

In reaching this holding, the Court explicitly noted that *Almeida-Sanchez* did not control because in that case the issue of good-faith reliance had never been raised by the Government. *Id.*, at 542, n. 12.

Nor should *Peltier* be read as some aberration from precedent as to good-faith reliance on a statute and the propriety of suppression generally. For example, despite the dicta in *Leon* to the contrary, the Court's reasoning there clearly supports our holding in *Peltier*. In *Leon* we refused to suppress evidence seized in good-faith reliance on a warrant later held to be invalid. We observed that the principal purpose behind the exclusionary rule is to deter unlawful police conduct. 468 U. S., at ——. And in order for exclusion of evidence to have a deterrent effect, "it must alter the behavior of individual law enforcement officers or the policies of their departments." *Id.*, at ——.

Indeed, *Leon* quoted the language from *Peltier* quoted above, see 468 U. S., at —— (quoting 422 U. S., at 542), and further quoted the following passage from *Michigan* v. *Tucker*, 417 U. S. 433 (1974), which was reiterated in *Peltier*, 422 U. S., at 439:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official con-

duct was pursued in complete good faith, however, the deterrence rational loses much of its force." *Leon*, 468 U. S., at —— (quoting 417 U. S., at 447).

In recognition of this central purpose, no Fourth Amendment interests would be advanced by suppressing evidence when the deterrent value from such suppression would be nil. As in *Leon*, suppressing evidence seized by officers relying in good faith on what they reasonably believed to be a valid procedural statute could hardly alter their behavior in any desirable fashion.

The dicta in *Leon* and *DeFillippo* conflicts directly with the Court's holding in *Peltier*, and accordingly clarification for the benefit of other courts is called for. Because this case squarely presents the issue, I would grant the State's petition for certiorari and clarify the relevant law.

See first memo

Supplemental Preliminary Memo

January ~~19~~ 17, 1985 Conference
List 1, Sheet 2

No. 85-608

Illinois v. Krull et al. (junkyard operators who bought stolen cars)	Cert to S.Ct. of Illinois (Moran, J., for a unanimous court) State/Criminal	 Timely

OK

This case was CFR'ed, and a response is now in. This supplemental memo is not primarily designed to summarize the reply, which is largely a repetition of the reasoning in the opinion below.[1] The reason for this supplemental memo is that,

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[1]The reply, which largely tracks the reasoning of the Ill. S.Ct., does not directly rebut petr's argument as to why United States v. Peltier, 422 U.S. 531 (1975), should be controlling. Resps simply cite to the dicta from United States v. Leon, 104
(Footnote continued)

having looked at the petition again, I wish to suggest a possible way of distinguishing United States v. Peltier, 422 U.S. 531 (1975), and answering petr's argument that the good faith exception should apply in this case involving an officer's reliance on a defective procedural statute.

The Court's opinion in Peltier emphasizes the fact that the holding in Almeida-Sanchez v. United States, 413 U.S. 266 (1976), was unexpected, in that the INS regulation held unconstitutional in Almeida-Sanchez had been in place over twenty years and had been uniformly upheld in the Courts of Appeals prior to being struck down in Almeida-Sanchez. See 422 U.S. at 540-541. Although Peltier contains some fairly broad language to the effect that suppression is proper "only if it can be said that the law enforcement officer had knowledge, or may properly be

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(Footnote 1 continued from previous page)
S.Ct. 3405, 3415 n. 8, and Michigan v. DeFillippo, 443 U.S. 31, 39, that the Ill S.Ct. relied on in its opinion. (For detail on the Ill. S.Ct.'s opinion and petr's argument, please see the original pool memo.)
The only point in the reply that is other than wholly predictable is resps' assertion that at the original suppression hearing, the trial court held that the detective who searched resps' premises exceeded his authority under the statute. Resps argue that this holding precludes this Court from reaching the issue of good faith reliance on the statute. I disagree. The Ill. S.Ct. opinion in this case in no way relies on any holding that the officer exceeded his statutory authority, and doesn't even mention that the issue was argued. As noted in the original pool memo at page 8, it probably is true that if this case is granted, and if the Ill. S.Ct.'s holding that the "good faith" exception doesn't apply is reversed, a remand will be necessary on the issue of whether the record supports a finding of good faith. But that's not a reason not to grant, since the issue of the officer's good faith in this case is of no general interest anyway.

charged with knowledge, that the search was unconstitutional under the Fourth Amendment," 422 U.S. at 542, the holding in Peltier can be seen simply as a refusal to retroactively apply a "new" Fourth Amendment rule. See 422 U.S. at 535-539 (extensive discussion of retroactivity doctrine in cases involving the exclusionary rule).

When the Court says in United States v. Leon, 104 S.Ct. 3405, 3415 n.8, that "the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants," 104 S.Ct. at 3415 n.8, the cases cited as supporting authority are, with the exception of Almeida-Sanchez, not cases involving new Fourth Amendment rules. Since there's no indication in Leon that the Court considered Peltier questionable, I would conclude that what the Court had in mind in footnote 8 was the usual situation where overturning an unconstitutional procedural statute does not involve retroactive application of a new Fourth Amendment rule. In that case, Almeida-Sanchez shouldn't have been cited, in the interest of avoiding possible confusion.[2] (The same is true of the citation of Almeida-Sanchez in DeFillippo, 443 U.S. at 39.)

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[2]While the holding in Almeida-Sanchez at first glance fits the language of the Leon footnote, Peltier makes clear that the holding in Almeida-Sanchez wasn't required on the grounds that any reliance on the invalid INS regulation automatically required application of the exclusionary rule. In Peltier, 422 U.S. at 542 n. 12, the Court notes that in Almeida-Sanchez the government did not argue for a good-faith exception to the exclusionary

(Footnote continued)

A rule reconciling the holding in Peltier and the language quoted supra from Leon's footnote 8 (and the virtually identical language from DeFillippo) would go as follows: The officer's good faith reliance on a procedural statute is only relevant if the invalidation of the statute involves application of a new Fourth Amendment rule announced by this Court after the date of the search in question. The question is whether such a rule makes sense as a matter of policy. Two possible rationales occur to me:

1) The rule can be seen as making the officer who relies on an invalid procedural statute show that his reliance was not only reasonable, but that no matter how diligently he had considered the matter, he still would have concluded, on the basis of controlling law at the time of the search, that the search was legal. This "super good faith" requirement can be explained on the theory that it gives the officer an incentive to be especially sure before he bypasses the magistrate and searches without a warrant. Alternatively, the rule can be seen as based on the fact that if the officer had applied for a warrant, the magistrate would almost certainly have granted it, in which case the good faith exception would have applied.

(Footnote 2 continued from previous page)
rule. The Court also implies that application of a good-faith exception in Almeida-Sanchez might have created an advisory opinion problem. Ibid. In Leon, 104 S.Ct. at 3422, the Court's opinion has language rejecting the idea that announcing a Fourth Amendment ruling but applying the good faith exception to the exclusionary rule creates advisory opinion problems. For purposes of considering the present case, it makes no difference whether or not the holding in Almeida-Sanchez was required by Article III considerations.

A possible rejoinder would be that this rationale doesn't work especially well in the context of this case. The officer who searched resps' premises didn't suspect that a crime had been committed; he was carrying out a routine administrative search. Since the officer had no probable cause to believe a crime had been committed, he couldn't go to a magistrate for a warrant; his only choices were to act pursuant to the administrative search statute or not act at all. Given that a) a properly drafted administrative search statute could constitutionally authorize searches of junk yards on less than probable cause, b) the statute under which the officer acted wasn't clearly unconstitutional, and c) not acting at all would give "chop shops" unwarranted freedom to ply their trade, it was (arguably) not unreasonable for the officers to act pursuant to the statute.

2) Another argument in favor of the rule I described is that in cases involving invalid procedural statutes, deterrence can operate not only with respect to the officer, but also with respect to the legislature. It is reasonable to expect much more of a legislature than of an officer, and just because the officer acted in good faith is not a reason to uphold searches pursuant to a statute the legislature should have drafted better, or not at all.

A possible rejoinder would be that, as a practical matter, legislatures aren't likely to write invalid procedural statutes with any greater frequency just because the Leon standard will apply in those cases involving searches made pursuant to such statutes prior to their invalidation. Most procedural statutes

probably are (were) constitutional at the time they are (were) written (which in the case of older statutes may have predated incorporation of the Fourth Amendment). If deterrence of legislatures is what is intended, the cost of the suggested rule outweighs any benefit.

Conclusion: If the rule that I have suggested as a possible way of reconciling Peltier and the relevant passages from Leon and DeFillippo is acceptable to the Court, there's no reason to grant in this case. In holding that exclusion was required in this case, the Illinois S.Ct. did not rely on any new Fourth amendment doctrine announced subsequent to the search of resps' junkyard. (The controlling case, in the Ill. S.Ct's view, is Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), which was decided over three years prior to the search of resps' premises.)

On the other hand, Justices who favor narrowing the exclusionary rule may still consider this case a potential candidate for a grant.

January 6, 1986 Dimon Opinion in petn

CFR - Could grant & Reverse Summarily

1/11/2

1/9/86

Response in ?

officers made warrantless admin. search of a junk yard - relying on a statute that was presumptively valid. (actually the statute was invalidated in an unrelated case the next day!)

January 17, 1986

Preliminary Memo

November 27, 1985 Conference
List 3, Sheet 2

No. 85-608

Illinois v. Krull et al. (junkyard operators who bought stolen cars)	Cert to S.Ct. of Illinois (Moran, J., for a unanimous court) OK State/Criminal	Timely

1. SUMMARY: Petitioner challenges lower court's decision that good faith exception to exclusionary rule does not apply where officers are alleged to have acted in good-faith reliance on unconstitutional statute authorizing warrantless administrative searches of junk yards.

2. FACTS AND DECISION BELOW: On July 5, 1981, a detective from the Chicago Police Department entered the premises of Action

CFR

A New wrinkle on Leon.

Mike

Iron and Metal Company for the purpose of performing a records inspection pursuant to §5-401(e) of the Illinois Vehicle Code (Ill. Rev. Stat. 1979, ch. 95 1/2, §5-401(e)).[1] Upon entering the premises and identifying himself as a police officer, the detective asked if he could see the yard's license and the records of vehicles that had been purchased by the yard, and also if he could examine vehicles in the yard. Told by resp Lucas to "go right ahead," the detective proceeded to discover stolen vehicles on the premises, which led to the arrests of the three resps. Charges were brought against resps for possessing stolen vehicles and possessing false vehicle ID number plates.

The day after the search in question, a federal DC hearing an unrelated case declared §5-401(e) unconstitutional. Bionic Auto Parts et al. v. Tyrone C. Fahner, 518 F.Supp. 582 (N.D. Ill. 1981). The Bionic Auto court held that §5-401(e) did not meet the standard for statutes authorizing warrantless administrative searches set out in Donovan v. Dewey, 452 U.S. 594.[2] . Although

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[1] At the time of the search in question, Section 5-401(e) provided that:
"Every record required to be maintained under this Section [governing, inter alia, auto "wreckers" and rebuilders] shall be opened to inspection by the Secretary of State or any peace officer for inspection at any reasonable time during the night or day. Such examination may include examination of the licensee's established place of business for the purpose of determining the accuracy of required records."
The statute has since been amended by the Illinois legislature.

[2] In Dewey, the Court upheld as reasonable warrantless administrative searches of mines authorized by the Federal Mine Safety and Health Act of 1977 (FMSHA). The Court emphasized "the substantial federal interest in improving the health and safety conditions in the Nation's ... mines," 452 U.S. at 602, and found that Congress could reasonably conclude that a system of
(Footnote continued)

warrantless searches may be necessary to deal with the problem of "chop shops" dealing in stolen vehicles, §5-401(e) vests overmuch discretion in inspectors as to "when to search and whom to search." 518 F.Supp. at 585 (quoting Dewey, 452 U.S. at 601). The Bionic Auto court noted the evidence of administrative abuses, such as searches not aimed at verifying proper record-keeping, stating that while administrative abuses are not per se a reason to invalidate §5-401(e), they do point to the existence of overbroad discretion on the part of inspectors. 518 F.Supp. at 586.

The state TC in the present case granted resp's suppression motion relating to evidence seized during the search of July 5, basing suppression upon the holding in Bionic Auto, supra. The subsequent history of the case is summarized by petr as follows:

(Footnote 2 continued from previous page)
warrantless searches was necessary if the law was to be properly enforced, 452 U.S. at 602-603. The Court distinguished the authorization for warrantless OSHA searches declared unconstitutional in Marshall v. Barlows, Inc., 436 U.S. 307. The OSHA search statute "'devolve[d] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to whom to search and when to search.'" Dewey, 452 U.S. at 601 (quoting Marshall, 436 U.S. at 601). By contrast, FMSHA effectively informed mine operators that they would be subject to mandatory administrative searches at least twice annually for surface mines and four times annually for underground mines. The Court also noted that the standards with which mine operators are expected to comply are specifically set forth in administrative regulations, so that mine operators are not left wondering about the purposes of an inspector or the limits of his task. 452 U.S. at 604. Furthermore, FMSHA specifically forbids forcible entries. Administrative inspectors refused entry must file an injunctive action to bar future refusals, thus giving operators a chance to show that proposed searches are outside the inspector's regulatory authority or infringe overmuch on "unusual privacy interests." 452 U.S. at 605.

> [On appeal from the TC suppression order,] the Appellate Court of Illinois, First Judicial District, vacated the judgment of the trial court and remanded the cause with the suggestion that the trial court reconsider the constitutionality of section 5-401(e). In so doing the Appellate Court specifically directed that the trial court reconsider this case in light of the evolving considerations of good faith in cases before this Court at that time.
>
> ...
>
> [O]n remand ..., the state trial judge reiterated his declaration the section 5-401(e) was unconstitutional as it existed in July 1981. The trial court held that the issue of good faith had no applicability to reliance on an unconstitutional statute and reaffirmed his earlier decision suppressing the evidence. ... [Petr] appealed this decision directly to the Illinois Supreme Court.

Petn at 9, 10.

The Ill.S.Ct. affirmed, finding that the unamended version of §5-401(e) vested excessive discretion in enforcement officers and did not define regular enforcement procedures, thus failing the test for administrative search statutes established in Donovan v. Dewey, supra. The court rejected petr's argument that the search in this case is valid even if §5-401(e) is not, because the search was made in good-faith reliance on the statute. This Court's cases distinguish between good-faith

reliance on a substantive law and good-faith reliance on a procedural statute which authorizes unconstitutional searches. See, e.g., Michigan v. DeFillippo, 443 U.S. 31, 39 (exclusionary rule not applied to search accompanying arrest for violation of unconstitutionally vague substantive statute; prior cases involving searches pursuant to unconstitutional procedural statutes distinguished). See also United States v. Leon, 104 S.Ct. 3405, 3415 n.8 (reaffirming the teaching of prior cases that "the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants.")

The Ill.S.Ct. also rejected petr's argument that resp Lucas validly consented to the search of the Action Iron premises. Petr does not challenge this holding in its cert petn.

3. CONTENTIONS: A search conducted pursuant to a procedural statute later held unconstitutional is nevertheless valid where the search is undertaken in good faith reliance on the statute. In United States v. Peltier, 422 U.S. 531, this Court refused to suppress evidence seized by border patrols acting pursuant to an INS regulation authorizing warrantless searches within 100 miles of the border, despite the fact that the regulation in question had been declared unconstitutional in Almeida-Sanchez v. United States, 413 U.S. 266. This Court's rationale for refusing to apply Almeida-Sanchez retroactively was that "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." 422 U.S. at 542. Thus, in Peltier (and numerous other cases, such as United States v. Leon, supra) this Court has characterized the purpose of the exclusionary rule as deterrence of police misconduct. Petr argues that here, as in Peltier, exclusion of evidence seized in good-faith reliance on a facially constitutional procedural law cannot be justified as serving a rational deterrent purpose.

4. DISCUSSION: Petr makes a poor choice of words in arguing that a search pursuant to an unconstitutional procedural statute is nonetheless "valid" if made in good-faith reliance on the statute. This Court did not hold that the search in Peltier was valid; rather, accepting the Government's concession that the search was unconstitutional, the Court refused to apply the exclusionary rule. Clearly, though, both petr and Ill.S.Ct. understood the issue of "validity" to be another way of considering whether the exclusionary rule should apply. Ill.S.Ct. variously phrased the issue as whether the search should be "upheld," petn app. at 19-20, whether the search was "valid," id. at 21, and whether good-faith reliance on the statute could "cure an otherwise illegal search," id. Since the only issue before the court was whether the evidence seized pursuant to the search was properly suppressed, it is probably overly formalistic to refuse to reach the substantive issue presented by this petn on account of petr's poor phrasing. Accordingly, from this point on I will consider the petn as

presenting the issue of whether the exclusionary rule was properly applied in this case.

Petrs have a persuasive point in arguing that Peltier implies that a good-faith rule should apply in cases of reliance by law enforcement officers on a facially constitutional procedural statute subsequently declared unconstitutional. On the other hand, Ill.S.Ct. also has a persuasive point in noting that other of this Court's cases, such as DeFillippo and Leon, seem to imply that reliance on an unconstitutional procedural statute is subject to more searching scrutiny than reliance on an unconstitutional substantive statute or reliance on facially valid warrant. I find it particularly puzzling that this Court in both DeFillippo, 443 U.S. at 39, and Leon, 104 S.Ct. at 3415 n.8, cited Almeida-Sanchez, supra, for the proposition that the exclusionary rule will apply when the search in question is carried out pursuant to an invalid procedural statute not previously declared unconstitutional. While it is true that the exclusionary rule was so applied in Almeida-Sanchez, Peltier would seem to indicate that, had the government argued for a good-faith exception in ALmeida-Sanchez, this Court would have agreed. One way to deal with the language from DeFillippo and Leon on which the Ill.S.Ct. relied is to note neither case specifically excludes the possibility that a good-faith exception could apply to reliance on a procedural statute. Also, the language in question can be characterized as dicta, although its repetition in two cases weighs against dismissing it casually.

Fairly good arguments could be made both pro and con on the issue of the officer's objective good faith in this case. The statute authorizes a narrower range of searches than OSHA did, and serves a more pressing governmental interest, cf. Marshall, supra, but lacks several of the redeeming features of FMSHA, cf. Dewey. However, the question of the objective good faith of the officer in this case is not specifically raised in the petn, presumably because that question (as opposed to the generic question of whether a good-faith exception should apply) was not presented to the Ill.S.Ct. Thus, were the Court to take the case and find that a good-faith exception should apply, I assume that the case would have to be remanded for a hearing on the question of whether the officer's reliance on §5-401(e) was objectively reasonable. That does not weigh against taking the case, in my opinion, since it is the issue of whether a good-faith exception should apply, and not its application in this particular case, which is of general interest.

Since the decision below is difficult to reconcile with Peltier, and since the question presented seems likely to recur, this case may be worth plenary review. Petr's poor phrasing of the question presented, both in the lower court and in the petn, is conceivably a reason to deny cert, though this approach strikes me as formalistic. I would assume that if the case is CFRed and resps treat the question presented as whether the exclusionary rule was properly applied in this case, there would be no reason for this Court not to consider this the question presented.

5. RECOMMENDATION: CFR with a view to a possible grant.

There is no response.

November 20, 1985 Dimon Opinion in petn

March 18, 1986

85-608 Illinois v. Krull

Dear Chief:

Although I still would prefer to reverse summarily, in view of your request, I will vote to grant if you circulate your proposed dissent from denial of cert.

Sincerely,

The Chief Justice

lfps/ss

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: MAR 20 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

ILLINOIS *v.* ALBERT KRULL, GEORGE LUCAS AND SALVATORE MUCERINO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85-608. Decided March ——, 1986

THE CHIEF JUSTICE, with whom JUSTICE POWELL joins, dissenting.

On July 5, 1981, Officer McNally of the Chicago Police Department conducted a search of the premises of the Action Iron and Metal Company which revealed the presence of several motor vehicles that had been reported as stolen. The officer proceeded pursuant to Illinois Vehicle Code §5–401(e), Ill. Rev. Stat. ch. 95½, §5–401(e) (1981), which at the time authorized warrantless "examination[s]" of the business premises of automotive parts dealers, scrap processors and parts recyclers. The next day the statute was declared unconstitutional by a Federal District Court in a wholly unrelated case on the ground that it vested overbroad discretion in the police. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (ND Ill. 1981).

As a result of this discovery of the stolen cars respondents were charged with various counts related to the possession of stolen vehicles and false vehicle identification number plates. The trial court initially granted respondents' motion to suppress the evidence after finding that the cars had been discovered without a warrant, probable cause or consent, and concluding that the inspection statute was unconstitutional on the basis of the District Court's holding in *Bionic Auto Parts*.

During the pendency of an appeal by the State to the Illinois Appellate Court, the Illinois legislature revised the statute to conform with Fourth Amendment standards. Because of this revision, an injunction issued in *Bionic Auto*

Parts against enforcement of the statute was rendered moot and was subsequently vacated. 721 F. 2d 1072 (CA7 1983). The Illinois Appellate Court thereafter remanded this case to the trial court to reconsider the constitutionality of § 5–401(e) prior to its revision and to consider whether the good-faith reliance on the statute by Officer McNally was relevant to whether the evidence should be suppressed. On remand, the trial court again ruled that former § 5–401(e) was invalid, and further ruled that the officer's good-faith reliance on the statue was irrelevant.

The State took a direct appeal to the Illinois Supreme Court, which affirmed. 107 Ill. 2d 107, 481 N. E. 2d 703 (1985). That court agreed that the statute was unconstitutional because it "vested State officials with too much discretion to decide who, when, and how long to search." *Id.*, at 116, 481 N. E. 2d, at 707. It then rejected the State's claim that evidence from a search made in good-faith reliance on § 5–401(e) prior to any ruling that the statute was invalid should not be suppressed. In so holding, the court relied on *Michigan* v. *DeFillippo*, 443 U. S. 31, 35–38 (1970), where this Court held that an arrest made in good-faith reliance on a Detroit ordinance was valid, together with a search incident to that arrest, despite the subsequent determination that the ordinance itself was unconstitutional. See 107 Ill. 2d, at 117–119, 481 N. E. 2d, at 708. The Illinois court reasoned that

> "the Supreme Court in *DeFillippo* distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law, like the Detroit ordinance, will be upheld, provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though

> the arrest and search were made in good-faith reliance on the statute." *Id.*, at 118, 481 N. E. 2d, at 708.

The Illinois court assumed that this Court "continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid." *Ibid.* (citing *United States* v. *Leon*, 468 U. S. —— (1984)).

It is true that we have carved out a forbidden "category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Ybarra* v. *Illinois*, 444 U. S. 85, 96, n. 11 (1979). See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). Moreover, our opinions in *Leon* and *DeFillippo* further intimated that an officer's good-faith reliance on such procedural statutes would be irrelevant in determining whether to suppress the evidence of a search under this line of precedent. See *Leon*, 468 U. S., at ——, n. 8; *DeFillippo*, 443 U. S., at 39.

None of these cases, however, squarely addressed that issue, which is presented in this case. No one disputes that such statutes may no longer be relied upon by police once they are declared constitutionally infirm. But noticeably absent from the Court's discussions in *Leon* and *DeFillippo* of this string of cases is any reference to the only case directly on point, *United States* v. *Peltier*, 422 U. S. 531 (1975).

In *Peltier*, Border Patrol agents conducted a warrantless search of an automobile pursuant to a procedural statute and supporting regulations subsequently held invalid by this Court in *Almeida-Sanchez*, *supra*. Nevertheless, we refused to apply *Almeida-Sanchez* retroactively to suppress the evidence of the search when the Border Patrol agents had acted in good-faith reliance on the statute and regulations before they were declared invalid. The Court's reasoning was based principally on recognition that suppression of the evidence would serve no valid purpose of the exclusionary rule:

> "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." 422 U. S., at 542.

In reaching this holding, the Court explicitly noted that *Almeida-Sanchez* did not control because in that case the issue of good-faith reliance had never been raised by the Government. *Id.*, at 542, n. 12.

Nor should *Peltier* be read as some aberration from precedent as to good-faith reliance on a statute and the propriety of suppression generally. For example, despite the dicta in *Leon* to the contrary, the Court's reasoning there clearly supports our holding in *Peltier*. In *Leon* we refused to suppress evidence seized in good-faith reliance on a warrant later held to be invalid. We observed that the principal purpose behind the exclusionary rule is to deter unlawful police conduct. 468 U. S., at ——. And in order for exclusion of evidence to have a deterrent effect, "it must alter the behavior of individual law enforcement officers or the policies of their departments." *Id.*, at ——.

Indeed, *Leon* quoted the language from *Peltier* quoted above, see 468 U. S., at —— (quoting 422 U. S., at 542), and further quoted the following passage from *Michigan* v. *Tucker*, 417 U. S. 433 (1974), which was reiterated in *Peltier*, 422 U. S., at 439:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official con-

duct was pursued in complete good faith, however, the deterrence rational loses much of its force." *Leon*, 468 U. S., at —— (quoting 417 U. S., at 447).

In recognition of this central purpose, no Fourth Amendment interests would be advanced by suppressing evidence when the deterrent value from such suppression would be nil. As in *Leon*, suppressing evidence seized by officers relying in good faith on what they reasonably believed to be a valid procedural statute could hardly alter their behavior in any desirable fashion.

The dicta in *Leon* and *DeFillippo* conflicts directly with the Court's holding in *Peltier*, and accordingly clarification for the benefit of other courts is called for. Because this case squarely presents the issue, I would grant the State's petition for certiorari and clarify the relevant law.

exclusionary rule applies:

Ybarra v. Ill. - stat. auth. searching any person found on premises being searched pursuant to warrant

Torres v. Puerto Rico — stat. auth. search of luggage of any person arriving from US.

Almeida-Sanchez - warrantless search of auto "w/in reasonable distance of border"

Reties - not applied retroactively

Sibron v. New York - "stop and frisk" law "reasonable suspicion" of committing crime

Berger v. New York - installation of recording device in attorney's office

—

Diff from Krull?

zlfp/ss 09/17/86 ILLINOIS SALLY-POW

85-608 Illinois v. Krull

(Supreme Court of Illinois)

MEMO TO FILE:

Section 5-401(e) of the Illinois Code as of July 5, 1981, that provided that "every record required to be maintained [by businesses under other sections of the code] shall be open to inspection . . . by any peace officer at any reasonable time. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records." Acting pursuant to this statute, Detective McNally of the Chicago police force made a warrantless entry, during the daytime at a reasonable hour, of the business premises of an automobile scrap dealer.

The officer identified himself to respondent Lucas who stated that he was in charge. The officer requested that he be allowed to inspect the company's license and records contained in what was known as the "police book". R. 26. Lucas stated that he could not locate the documents but did produce a yellow pad describing five vehicles that had been purchased. According to the

state's brief, the officer asked Lucas if he objected to an inspection of the vehicles in the junk yard. Lucas replied "go right ahead". R. 26. Officer McNally noted the serial numbers of the vehicles, checked those on his mobile computer, and discovered that three of them had been reported stolen. He then seized the vehicles and arrested Lucas. Although respondent Mucerino was present he was not arrested until a later date. Respondent Krull, a licensee of the business, was not present and could not be located at that time.

The only question presented, according to the state's brief, is as follows:

> "Whether the exclusionary rule was properly invoked in the lower court where the predicate search was authorized by a presumptively valid statute later found to violate the Fourth Amendment?"

The respondent's brief presents different and more complex questions, at least one of which does not seem to me to be within the scope of our grant. See p. (i). Indeed, the briefs of the parties seem, at times, to be arguing different cases.

* * *

Our file on this case already is substantial. It includes a cert memo and a supplemental cert memo, both well written. In addition, it includes a printed opinion by the Chief Justice, in which I joined, dissenting from the denial of cert - the first vote of the Conference. Following circulation of the Chief's dissent, the case was granted - I do not recall by what vote.

I may not have mentioned above (I have been interrupted in dictating this memo) that a federal district court subsequently held, in a different case, that theIllinois statute was invalid because it conferred unnecessarily broad discretion on officers to conduct administrative searches. The trial court, following the decision of the federal DC, granted respondent's motion to suppress the evidence. On a second appeal (the first appeal now being irrelevant), the Illinois Supreme Court agreed that the evidence should be suppressed. It rejected the state's argument that the search had been made in good faith reliance on a presumptively valid statute prior to any ruling that the statute was invalid. The Illinois court distinguished Michigan v. DeFillippo, 443 U.S. 31, 35-38, that sustained the validity of an arrest made in good faith on a presumptively valid Detroit

ordinance even though the ordinance subsequently was declared invalid. The Illinois court made a distinction between "substantive laws" (e.g., a criminal statute) and "procedural laws" (such as a statute authorizing searches). See the discussion of this distinction in the Chief Justice's opinion last Term. I am not persuaded that such a distinction makes sense in the context of whether the exclusionary should be applied.

The CJ's opinion, and the briefs of the parties, debate the decisions, dicta, and relevance of several important cases including: United States v. Leon (Justice White's good faith decision); Almeida-Sanchez v. United States (with which I am quite familiar); and United States v. Peltier, 422 U.S. 531 (1975). The problem presented by this case is that as recently as Leon, 468 U.S., at 912, fn. 8, this Court recognized that the exclusionary rule may require suppression of evidence obtained in searches carried out pursuant to statutes subsequently declared unconstitutional. Respondent relies heavily on this dicta in Leon, and on similar statements - all or most of which are found in cases that I believe can be distinguished.

The Chief's opinion last Term identifies United States v. Peltier as the "only case directly on point".

As I well remember, border patrol agents conducted warrantless searches of an automobile pursuant to a procedural statute and regulations that were subsequently held invalid in Almeida-Sanchez. Nevertheless, we declined to apply Almeida-Sanchez retroactively, reasoning that suppression of the evidence would serve no valid purpose of the exclusionary rule.

This is an exclusionary rule case, and I am influenced substantially by what I wrote in Calandra (the rule is judge-made not a constitutional mandate), and in Stone v. Powell, emphasizing that the purpose of the rule is to deter police misconduct. There is no other rational reason for a rule that suppresses - as Justice Black said in one of his dissents that I cited in Stone - evidence that often is the most reliable evidence that can be presented in a criminal prosecution.

There is one point argued in respondent's brief that is not mentioned, as I recall, in either the state's brief or the amicus brief of the SG. Respondent repeatedly says that the trial court found that the officer's search exceeded the "bounds of the unconstitutional statute". Even assuming that the officers in good faith could rely on the statute at the

time of the search, by its terms the statute was limited to the "verification of the records". Thus, the argument is made that we do not need to reach the question upon which we granted certiorari.

I am not yet persuaded there is any merit to this contention. The state's brief points out that the police officer asked Lucas (who had stated he was in charge) whether he objected to the officer's inspecting the vehicles in the junk yard, and that Lucas responded "go right ahead". R. 29. It is true that the trial court ruled that respondent Lucas had not given effective consent to the search (JA 19, 20), but the TC also found that the inspection was "permissible activity under the statute". The motion to suppress was based by the TC solely on the ground that the statute was unconstitutional.

Subject to my clerk make a more careful examination of the question, I would read the TC's ruling that Lucas had not given effective consent to mean that Lucas' consent was limited to the response he gave Officer McNally as to inspecting the vehicles. His consent therefore was limited to that extent, and did not embrace

the officer's warrantless authority to enter the records that pertain the vehicles.

I will welcome the views of my law clerk in a brief bench memo.

L.F.P., Jr.

ss

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 85-608

Submitted ....., *19*... *Announced* ....., *19*...

ILLINOIS

vs.

ALBERT

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.			✓										
.....													

March 19, 1986

85-608 Illinois v. Krull

Dear Chief:

Please add my name to your dissent from denial of cert.

Sincerely,

The Chief Justice

cc - To the Conference

LFP/vde

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAR 19 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ILLINOIS *v.* ALBERT KRULL, GEORGE LUCAS AND SALVATORE MUCERINO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85-608. Decided March ——, 1986

THE CHIEF JUSTICE, dissenting.

On July 5, 1981, Officer McNally of the Chicago Police Department conducted a search of the premises of the Action Iron and Metal Company which revealed the presence of several motor vehicles that had been reported as stolen. The officer proceeded pursuant to Illinois Vehicle Code § 5–401(e), Ill. Rev. Stat. ch. 95 ½, § 5–401(e) (1981), which at the time authorized warrantless "examination[s]" of the business premises of automotive parts dealers, scrap processors and parts recyclers. The next day the statute was declared unconstitutional by a Federal District Court in a wholly unrelated case on the ground that it vested overbroad discretion in the police. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981).

As a result of this discovery of the stolen cars respondents were charged with various counts related to the possession of stolen vehicles and false vehicle identification number plates. The trial court initially granted respondents' motion to suppress the evidence after finding that the cars had been discovered without a warrant, probable cause or consent, and concluding that the inspection statute was unconstitutional on the basis of the District Court's holding in *Bionic Auto Parts*.

During the pendency of an appeal by the State to the Illinois Appellate Court, the Illinois legislature revised the statute to conform with Fourth Amendment standards. Because of this revision, an injunction issued in *Bionic Auto Parts* against enforcement of the statute was rendered moot

and was subsequently vacated. 721 F. 2d 1072 (CA7 1983). The Illinois Appellate Court thereafter remanded this case to the trial court to reconsider the constitutionality of § 5–401(e) prior to its revision and to consider whether the good-faith reliance on the statute by Officer McNally was relevant to whether the evidence should be suppressed. On remand, the trial court again ruled that former § 5–401(e) was invalid, and further ruled that the officer's good-faith reliance on the statue was irrelevant.

The State took a direct appeal to the Illinois Supreme Court, which affirmed. 107 Ill. 2d 107, 481 N. E. 2d 703 (1985). That court agreed that the statute was unconstitutional because it "vested State officials with too much discretion to decide who, when, and how long to search." *Id.*, at 116, 481 N. E. 2d, at 707. It then rejected the State's claim that evidence from a search made in good-faith reliance on § 5–401(e) prior to any ruling that the statute was invalid should not be suppressed. In so holding, the court relied on *Michigan* v. *DeFillippo*, 443 U. S. 31, 35–38 (1970), where this Court held that an arrest made in good-faith reliance on a Detroit ordinance was valid, together with a search incident to that arrest, despite the subsequent determination that the ordinance itself was unconstitutional. See 107 Ill. 2d, at 117–119, 481 N. E. 2d, at 708. The Illinois court reasoned that

> "the Supreme Court in *DeFillippo* distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law, like the Detroit ordinance, will be upheld, provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though

the arrest and search were made in good-faith reliance on the statute." *Id.*, at 118, 481 N. E. 2d, at 708.

The Illinois court assumed that this Court "continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid." *Ibid.* (citing *United States* v. *Leon*, 468 U. S. —— (1984)).

It is true that we have carved out a forbidden "category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Ybarra* v. *Illinois*, 444 U. S. 85, 96, n. 11 (1979). See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). Moreover, our opinions in *Leon* and *DeFillippo* further intimated that an officer's good-faith reliance on such procedural statutes would be irrelevant in determining whether to suppress the evidence of a search under this line of precedent. See *Leon*, 468 U. S., at ——, n. 8; *DeFillippo*, 443 U. S., at 39.

None of these cases, however, squarely addressed that issue, which is presented in this case. No one disputes that such statutes may no longer be relied upon by police once they are declared constitutionally infirm. But noticeably absent from the Court's discussions in *Leon* and *DeFillippo* of this string of cases is any reference to the only case directly on point, *United States* v. *Peltier*, 422 U. S. 531 (1975).

In *Peltier*, Border Patrol agents conducted a warrantless search of an automobile pursuant to a procedural statute and supporting regulations subsequently held invalid by this Court in *Almeida-Sanchez*, *supra*. Nevertheless, we refused to apply *Almeida-Sanchez* retroactively to suppress the evidence of the search when the Border Patrol agents had acted in good-faith reliance on the statute and regulations before they were declared invalid. The Court's reasoning was based principally on recognition that suppression of the evidence would serve no valid purpose of the exclusionary rule:

> "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." 422 U. S., at 542.

In reaching this holding, the Court explicitly noted that *Almeida-Sanchez* did not control because in that case the issue of good-faith reliance had never been raised by the Government. *Id.*, at 542, n. 12.

Nor should *Peltier* be read as some aberration from precedent as to good-faith reliance on a statute and the propriety of suppression generally. For example, despite the dicta in *Leon* to the contrary, the Court's reasoning there clearly supports our holding in *Peltier*. In *Leon* we refused to suppress evidence seized in good-faith reliance on a warrant later held to be invalid. We observed that the principal purpose behind the exclusionary rule is to deter unlawful police conduct. 468 U. S., at ——. And in order for exclusion of evidence to have a deterrent effect, "it must alter the behavior of individual law enforcement officers or the policies of their departments." *Id.*, at ——.

Indeed, *Leon* quoted the language from *Peltier* quoted above, see 468 U. S., at —— (quoting 422 U. S., at 542), and further quoted the following passage from *Michigan* v. *Tucker*, 417 U. S. 433 (1974), which was reiterated in *Peltier*, 422 U. S., at 439:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official con-

duct was pursued in complete good faith, however, the deterrence rational loses much of its force." *Leon*, 468 U. S., at —— (quoting 417 U. S., at 447).

In recognition of this central purpose, no Fourth Amendment interests would be advanced by suppressing evidence when the deterrent value from such suppression would be nil. As in *Leon*, suppressing evidence seized by officers relying in good faith on what they reasonably believed to be a valid procedural statute could hardly alter their behavior in any desirable fashion.

The dicta in *Leon* and *DeFillippo* conflicts directly with the Court's holding in *Peltier*, and accordingly clarification for the benefit of other courts is called for. Because this case squarely presents the issue, I would grant the State's petition for certiorari and clarify the relevant law.

ral 10/01/86 Reviewed 10/1 - Fine memo. with which I am strongly inclined to agree.

Police officer, pursuant to an Ill. statute authorizing administrative search of auto "wrecking yards", examined several wrecked autos & found from serial numbers the autos were stolen. Rest + other owners (officers?) of the wrecking yard were arrested.

The statute was held invalid the next day (!) in a different case.

The Ill. T.C. & S/Ct held the "search" was under an invalid statute & suppressed the evidence.

Bob concludes that the police acted in "objective good faith" & under Leon the ev. should not have been suppressed.

An incomplete summary. Reread before I go to Conference. See also my memo.

BENCH MEMORANDUM

To: Justice Powell October 1, 1986

From: Bob

No. 85-608, Illinois v. Krull

Cert. to Ill. Sup. Ct. (Moran, J.)
Wednesday, November 5, 1986 (1st case)

Question Presented

Does the good faith exception to the exclusionary rule apply to evidence seized in reasonable reliance upon a statute subsequently found to be unconstitutional?

I. BACKGROUND

The Illinois legislature has enacted a comprehensive statute aimed at trafficking in stolen automobile parts. Persons who operate wrecking yards, among others, must obtain a license from the Secretary of State, and must maintain records of the identification numbers of all automobiles and automobile parts they purchase or sell. Ill. Ann. Stat. ch. 95 1/2, §5-301, 401.2 (Smith-Hurd Supp. 1986). When the search and seizure at issue in this case occurred, the statute provided that:

> Every record required to be maintained under this Section shall be open to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

Id. §5-401(e) (Smith-Hurd Supp. 1984-1985).

At about 10:30 am on July 5, 1981, Detective McNally of the Chicago Police Department visited a wrecking yard operated by resps. McNally identified himself to resp Lucas and asked to see the record of the yard's automobile purchases. Lucas answered that he did not know where to find the formal records, but gave McNally a pad of yellow paper that Lucas said was a record of vehicles purchased by the yard. McNally examined the paper and asked Lucas if he "had any objection to my looking at the cars in the yard." Lucas told McNally to "go right ahead." Petn app. 5-6. McNally noted the serial numbers of several cars in the yard. He found that three of the cars were stolen, and that the identification number had been removed from a fourth automobile.

He seized all four automobiles and arrested Lucas. The other resps were arrested later.

On July 6, 1981, one day after the seizure, a federal court held that the administrative search statute was unconstitutional because it failed to impose sufficient limitations on the discretion of law enforcement officers. Bionic Auto Parts & Sales, Inc. v. Fahner, 518 F. Supp. 582 (N. D. Ill. 1981), vacated on other grounds, 721 F. 2d 1072 (CA7 1983). After the DC issued its ruling, but before CA7 heard the appeal, the Illinois legislature amended the statute to require that inspections be made during business hours, that they not last longer than 24 hours, and that they not occur more than six times in any six-month period. CA7 addressed only the amended statute and found it constitutional.

The state tc granted resps' motion to suppress the evidence. The tc concluded that the DC's holding in Bionic Auto Parts applied to all "pending prosecutions." The tc also found that Lucas did not consent to the search of the yard because Lucas believed he had no right to refuse permission. The Ill. Ct. App. remanded to allow the tc to consider whether the officer acted in good faith, and to consider the effect of CA7's decision. On remand, the tc stated that the officer's good faith is relevant only when the officer acts pursuant to a warrant. The tc reaffirmed its decision to suppress the evidence. The State appealed directly to the Ill. Sup. Ct., which affirmed. The Sup. Ct. agreed that the statute was unconstitutional because it "vested State officials with too much discretion to decide

who, when, and how long to search." Petn app. 16. The Sup. Ct. cited statements by this Court to support its holding that "a search made pursuant to a procedural statute, not yet declared unconstitutional, . . . which authorizes unlawful searches, will not be upheld, even though the . . . search [was] made in good-faith reliance on the statute." Petn app. 20.

III. DISCUSSION

A. Was the search permissible under the statute? Resps contend that the Court should not consider the possibility of a good-faith exception because Detective McNally's search exceeded the bounds of his authority under §504(e). Resps several times assert that the tc made a finding of fact to this effect.

It is undisputed that: (1) the only "record" shown to Detective McNally prior to the search was the yellow pad listing the identification numbers of five vehicles; and (2) that McNally checked the identification numbers of automobiles on the lot in addition to the five listed on the yellow pad. Resps assert that §504(e) authorized only an inspection of the serial numbers on the five listed vehicles.

I had overlooked this

Resps rely on the following statement of the tc, made from the bench:

TC's op.

> Had [McNally] only verified the four or five vehicles that were indicated on this particular sheet of paper, I think he would have been within his statutory authority; because the statute says first you check the records, then you have the opportunity to verify the records are accurate. It's a two-step process, Now, he didn't do that.

J.A. 29-30. Although the tc's statements are troubling, I would conclude that the good-faith issue is properly presented, for three reasons. First, the tc did not make an explicit finding that the officer exceeded the bounds of the statute. If the tc had made such a finding, neither the tc nor the Ill. Sup. Ct. should have reached the constitutional question. Both state courts did reach the constitutional question, however. Second, the tc's interpretation of the statute seems unreasonable, and does not appear to be supported by any other authority. Unannounced warrantless searches of wrecking yards are permitted only because "chop-shop" operators will conceal the evidence of their wrongdoing if searches are announced in advance. Permitting "chop shop" operators to delay a search by "temporarily misplacing" their records would defeat the whole purpose of warrantless searches. Third, if the Court holds that the good-faith exception applies, the case will be remanded to the state court for a determination whether the officer acted in good faith. The state courts will then have an additional opportunity to determine whether the search was permissible under the statute.

B. Does the good-faith exception apply? The reasoning of United States v. Leon, 468 U.S. 897 (1984), and United States v. Calandra, 414 U.S. 338 (1974), strongly supports extension of the good-faith exception to cases in which the law enforcement officer acts in objectively reasonable reliance on a statute subsequently held unconstitutional.

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." Calandra, 414 U.S., at 348. "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. Id. The decision whether to apply the exclusionary rule in a given context turns on "weighing the costs and benefits" of withholding reliable evidence obtained in violation of the Fourth Amendment. Leon, 468 U.S., at 907.

In Leon the Court stated that the purpose of the exclusionary rule is to "deter police misconduct." 468 U.S., at 916. If a police officer reasonably believes that a statute is constitutional, the officer cannot be deterred from conducting a search authorized by the statute because the officer has no reasonable basis for believing that the evidence will be suppressed. As in Leon, "'[e]xcluding the evidence can in no way affect [the officer's] future conduct unless it is to make him less willing to do his duty.'" 468 U.S., at 919-20. Once the statute has been held unconstitutional, of course, reliance on the statute is no longer "objectively reasonable." If the statute were "flagrantly abusive of Fourth Amendment rights," the police officer's reliance on it might be objectively unreasonable even before a court has passed on the constitutional question. See Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (POWELL, J., concurring).

And in Stone v. Powell

The Court observed in Leon that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or

subvert the Fourth Amendment." 468 U.S., at 916. There is no reason to believe that state legislators have any such inclination either. Legislators, including state legislators, are required by Article VI to take an oath to support the federal Constitution. Even if legislators were inclined to pass statutes that violate the Fourth Amendment, application of the exclusionary rule would have a negligible "incremental deterrent effect." Judicial review of the constitutionality of statutes authorizing searches is sufficient to deter legislators from exceeding constitutional bounds. In many cases individuals may bring a pre-enforcement action seeking a declaration that the statute is unconstitutional and an injunction prohibiting searches pursuant to the statute. (Illinois wrecking yard operators mounted such a challenge in the Bionic Auto Parts case.) Application of the exclusionary rule would increase the level of detrrence hardly at all.

Probably not at all

The Court has already held that a law enforcement officer's good-faith reliance on a "substantive" criminal ordinance later held unconstitutional does not justify application of the exclusionary rule. Michigan v. DeFillippo, 443 U.S. 31 (1979). DeFillippo suggests that the exclusionary rule "would" apply to a "procedural" statute subsequently held to violate the Fourth Amendment, however. DeFillippo, 443 U.S., at 39. The suggestion is repeated in Leon, 468 U.S., at 912 n. 8. Strictly speaking, however, these statements are only dicta. In an earlier case, moreover, the Court declined to exclude evidence obtained in reliance on a subsequently-invalidated border search statute.

Their dicta is the problem

United States v. Peltier, 422 U.S. 531 (1975). Although the precise question decided in Peltier was whether to apply retroactively the decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the reasoning of Peltier supports a reversal in this case. The Court said: "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 unconstituional under the Fourth Amendment." Id., at 542.

There is no serious doubt that Detective McNally's reliance on §5-401(e) was objectively reasonable. At the time of the search, the statute had not been held unconstitutional. The courts, including this Court, have upheld similar statutes authorizing warrantless administrative searches. Donovan v. Dewey, 452 U.S. 594 (1981). Section 5-401(e) clearly satisfied two of the three constitutional requirements set out in Dewey before it was amended: the statute is directed at an industry subject to pervasive regulation, and there is a compelling public interest in performing inspections without a warrant. The courts later held that the statute did not place adequate limitations on law enforcement officers' discretion to search, the third requirement under Dewey. The statute came close, however. CA7 upheld statute after the state legislature made fairly minor amendments. It seems likely that the search was authorized even under the amended statute. (It occurred during business hours; it lasted less than 24 hours; the yard had not been searched more

than six times in the preceding six months.) At most Detective McNally committed a merely "technical" violation of the Fourth Amendment. See Brown v. Illinois, 611 U.S., at 610-11 (POWELL, J., concurring).

C. Does this case present a question of retroactivity? no

Resps argue that this case presents that question whether Leon should be applied retroactively. The question is not within the Court's grant of cert. Moreover, the question whether Leon should be extended to this statutory context is simply not the same as the question whether Leon should apply retroactively to this case.

In any event, resps retroactivity arguments are misguided. The Court has held that a construction of the Fourth Amendment that is not a "clear break with the past" applies to all convictions that are not yet final. United States v. Johnson, 457 U.S. 537 (1982). The Court reasoned that "[f]ailure to accord any retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.'" Id., at 561, quoting Desist v. United States, 394 U.S. 244, 277 (Fortas, J., dissenting). The Court's opinion in Leon notes that "nothing in Johnson precludes adoption of a [limited] good-faith exception." 468 U.S., at 912 n. 9.

III. CONCLUSION

The deterrent effect of applying the exclusionary rule in cases such as this does not outweigh the cost of excluding

evidence that it "typically reliable and often the most probative evidence bearing on the guilt or innocence of the defendant." Stone v. Powell, 428 U.S. 465, 490 (1976), citing Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J. dissenting).

I recommend that you vote to reverse the judgment of the Ill. Sup. Ct. and remand for further proceedings.

I am inclined to agree. See my memo to file

ral 10/30/86

To: Justice Powell
From: Bob

SUPPLEMENTAL MEMORANDUM

Helpful

No. 85-608, Illinois v. Krull
No. 85-759, Maryland v. Garrison
No. 85-1027, Arizona v. Hicks

} Three cases to be argued Nov 5th (Wed)

Each of these three cases presents questions about the application of the good faith exception to the exclusionary rule announced in United States v. Leon, 468 U.S. 897 (1984). This supplemental memorandum is an attempt to set out a unified approach to these questions.

You will recall that Illinois v. Krull involves an officer's good faith reliance on a statute authorizing warrantless administrative searches. The statute subsequently was held unconstitutional. Maryland v. Garrison is the case in which the officers obtained a valid warrant to search an apartment, but searched the apartment next door by mistake. In Arizona v. Hicks, the officers entered the apartment under exigent circumstances and then moved stereo components in order to read the serial numbers and determine whether the equipment was stolen.

As I read Leon, the good faith exception should apply when, and only when, application of the exclusionary rule would not deter law enforcement officers from the illegal search or

seizure at issue. This focus on deterrence is consistent with your opinion in Stone v. Powell. yes

I now consider, briefly, four possible applications of Leon to these cases in light of the deterrent purpose of the exclusionary rule.

1. Leon applies only when the officers reasonably rely on a warrant, and the warrant authorizes their action. This, it seems to me, is the narrowest plausible reading of Leon. It has the advantage of establishing a bright-line rule, but at the cost of excluding evidence in cases such as Krull, Garrison, and Hicks. It seems to me that the exception can be extended to permit the jury to consider the evidence in at least some of these cases without any appreciable reduction in the deterrent effect of the exclusionary rule.

2. Leon applies only when the officers reasonably rely on a warrant, even if the warrant does not authorize their action. This approach would expand the exception to include Garrison. Of course, the magistrate did not authorize the search the officers actually made, and the officers lacked probable cause to conduct that search. Still, it is clear that the officers would not have acted any differently had they known the evidence would be excluded. If the focus is on deterrence, it seems pointless to exclude probative evidence because of this mistake.

3. Leon applies only when the officers reasonably rely on a warrant or on a statute authorizing warrantless searches. If the officer is entitled to rely on the magistrate, I see no reason why he should not be entitled to rely on the legislature, yes

so long as the statute does not clearly violate the Fourth Amendment. There is no reason to think that legislatures are inclined to pass statutes that exceed the bounds of the Fourth Amendment. This approach would extend the exception to include Illinois v. Krull.

4. Leon applies whenever the officer's behavior is objectively reasonable. This seems to me to be the broadest reading of Leon that is consistent with a focus on deterrence of police misconduct. As a practical matter, this approach would extend the exception to cases in which the officer relies on a judicial decision that subsequently is reversed or, at the extreme, conducts a warrantless search that is likely to be constitutional in light of prior judicial decisions. This approach might allow the evidence obtained in Hicks to be admitted even if the officer's action is held to have violated the Fourth Amendment. Although this approach may be sound in theory, I am uncomfortable with its practical effect. First, it is unrealistic to expect police officers to acquire a detailed knowledge of the vast body of Fourth Amendment decisions. Second, I am afraid this approach may be quite open-ended. Because Fourth Amendment decisions often turn on their particular facts, even a well-trained officer must often be in doubt whether a particular search or seizure requires a warrant. If the officer knows that the evidence will be excluded if his action is held unconstitutional, the officer is more likely to go to a magistrate. If the officer knows that the evidence will be admitted if his action

was "reasonable" at the time, the officer is more likely to proceed without a warrant.

I therefore recommend that you apply Leon only when the officer acts pursuant to a warrant or a statute that the officer reasonably believes authorizes the search or seizure. Ronald has authroized me to say that he joins in this recommendation.

85-608 ILLINOIS v. KRULL Argued 11/5/86

Search of "auto wrecking yard" acting under a statute subsequently invalidated

Angarola (for State's Atty, Cook County)

Trial court made no finding of "good faith" because it didn't think there was an issue in light of the TC's view of the case.

Statute had been on books since 1933

SCt asked about footnote 8 in Leon

Larkin (Asst SG)

Both courts below thought Leon did not apply. Therefore neither made a finding of subjective good faith.

Would agree that a police officer is presumed to know when a statute is declared invalid.

As to note 8 in Leon, 11th Cir noted that none of cases cited is relevant to this case

Ms. Miquelon (Resp)

Both DC & 9th S/Ct rejected the view that there was "good faith" search. (Q: so why did courts go on to consider const. issue?)

Angarola (Rebuttal)

TC made no finding as to whether the officer acted in "good faith"

(We could remand on this Q)

No Lee

85 [redacted]-08 Ill. v. Krull (Ill. S/Ct)

Reverse (10/31)

1. The Ill statute: To aid in tracking stolen autos, Ill. statute authorized adm. "inspection" of all records required to be maintained by "auto wrecking yards." The inspection, for purpose of "determining accuracy of the required records".

2. On day after search at issue, Ill Ct invalidated the statute.

3. TC found no consent, as search included inspection of autos not on the yellow pad list give the officer by Lucas, who appeared to be in charge.

4. But TC made no finding that search exceeds bounds of the statute

5. Ill S/C rejected argument that since search was made in good faith, it was not invalid.

6. Reverse. I'd apply to Leon good faith exception where officer relies on a statute later reversed.

The test of good faith exception is whether the deterrence rationale of the E/Rule would be furthered. When officer relies on a facially valid statute, warrant of a statute later invalidated.

(11/6/86)

85-608 Ill v. Krull (S/Ct-Ill)

Reverse & Remand

1. Ill Statute - validity not questioned - on books many years. Only minor amendments since invalidated.

2. Reasonable good faith. No explicit finding by either court.

3. Ambiguous statement by TC: Suggests reach exceeded scope of statute. But neither TC nor Ill S/C relied on this. Both relied on invalidity of statute.

4. Apply Leon's rationale

An officer may rely on a presumptively valid statute just as on a warrant.

Purpose of E/R is to deter police misconduct

5. Remand - on Q of good faith.

No. 85-608 . Illinois v. Krull Conf. 11/7/86

The Chief Justice Rev & Remand.

S/Ct Ill. invalidated search on basis of *De Fluppins* on basis of distinction between procedural & substance. Does'nt make sense, & should be abandoned

The Ill. statute is procedural & so do not need to reconcile the distinction

Would allow good faith exception here. Ill courts did not address this Q. Remand on this Q

Justice Brennan Aff in part but also Remand.

Read a statement.

We have a neutral & detached magistrate issued the warrant. Here a legislatrual body enacted the statute.

No finding of good faith

Justice White Reverse

Agree with WHR.

(BRW said nothing else)

Justice Marshall Affirm

Would not apply a good faith analysis

Justice Blackmun Reverse + Remand

Leon is on books. Would make similar analysis as in warrant cases

Statute was presumptively valid

Fn 8 in Leon is troublesome but not controlling.

Justice Powell Reverse + Remand

Agree with CJ + HAB.

See my notes.

JUSTICE STEVENS Aff'm.

Under Harlan's view, the D should be entitled to benefit of holding of ~~validity~~ invalidity on direct appeal

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JUSTICE O'CONNOR Aff'm

Agree with J.P.S.

Agree ~~=~~ with Fn. 8 in Leon. ~~T~~

JUSTICE SCALIA Reverse

for reasons stated by B R W + H A B.

lfp/ss 11/14/86 ILL SALLY-POW

85-609 Illinois v. Krull

MEMO TO FILE:

I happen to be looking at my opinion in Brown v. Illinois - an opinion concurring in part with the Court opinion. At page 611, I stated:

> "At the opposite end of the spectrum lie 'technical' violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional. See United States v. Kilgen, 445 F.2d 280 (CA5)."

I mention this merely to note that my view with respect to "good faith" where officers rely on a statute subsequently invalidated has not changed.

L.F.P., Jr.

cc: Bob

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Blackmun**

Circulated: JAN 29 1987

Recirculated: _____

Bob - How does this look to you? -

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–608

ILLINOIS, PETITIONER *v.* ALBERT KRULL, GEORGE LUCAS AND SALVATORE MUCERINO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[January ——, 1987]

JUSTICE BLACKMUN delivered the opinion of the Court.

In *United States* v. *Leon*, 468 U. S. 897 (1984), this Court ruled that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was ultimately found to be unsupported by probable cause. See also *Massachusetts* v. *Sheppard*, 468 U. S. 981 (1984). The present case presents the question whether a similar exception to the exclusionary rule should be recognized when officers act in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment.

I

The State of Illinois, as part of its Vehicle Code, has a comprehensive statutory scheme regulating the sale of motor vehicles and vehicular parts. See Ill. Rev. Stat. ch. 95 1/2, ¶¶5–100 to 5–801 (1985). A person who sells motor vehicles, or deals in automotive parts, or processes automotive scrap metal, or engages in a similar business must obtain a license from the Illinois Secretary of State. ¶¶5–101, 5–102, 5–301. A licensee is required to maintain a detailed record of all motor vehicles and parts that he purchases or sells, including the identification numbers of such vehicles and parts, and the

Received Jan 29

I have read this unnecessarily long opinion once, & it seems to be consistent with my views. HAB properly relies on Calandra & Stone v Powell as to purpose of E/R.

dates of acquisition and disposition. ¶5–401.2. In 1981, the statute in its then form required a licensee to permit state officials to inspect these records "at any reasonable time during the night or day" and to allow "examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records." Ill. Rev. Stat. ch. 95 1/2, ¶5–401(e) (1981).[1]

Respondents in 1981 operated Action Iron & Metal, Inc., an automobile wrecking yard located in the city of Chicago. Detective Leilan K. McNally of the Chicago Police Department regularly inspected the records of wrecking yards pursuant to the state statute. Tr. 12.[2] On the morning of July 5, 1981, he entered respondents' yard. *Id.*, at 7. He identified himself as a police officer to respondent Lucas, who was working at the yard, and asked to see the license and records of vehicle purchases. Lucas could not locate the license or records, but he did produce a paper pad on which approximately five vehicle purchases were listed. *Id.*, at 25–26. McNally then requested and received permission from Lucas to look at the cars in the yard. Upon checking with his mobile computer the serial numbers of several of the vehicles, McNally ascertained that three of them were stolen. Also, the identification number of a fourth had been removed. McNally seized the four vehicles and placed Lucas under arrest. *Id.*, at 8–9, 16–17. Respondent Krull, the holder of the license, and respondent Mucerino, who was present at the yard the day of the search, were arrested later. Respondents were charged with various criminal violations of the Illinois motor vehicle statutes.

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[1] Paragraph 5–401 of the 1981 compilation was repealed by 1983 Ill. Laws No. 83–1473, § 2, effective Jan. 1, 1985. Its current compilation replacement bears the same paragraph number.

[2] Citations to the transcript refer to the Sept. 21, 1985, hearing on respondents' suppression motion held in the Circuit Court of Cook County. 2 Record 24.

The state trial court (the Circuit Court of Cook County) granted respondents' motion to suppress the evidence seized from the yard. App. 20–21. Respondents had relied on a federal court ruling, issued the day following the search, that § 5–401(e), authorizing warrantless administrative searches of licensees, was unconstitutional. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (ND Ill. 1981), aff'd in part, vacated in part, and remanded in part, 721 F. 2d 1072 (CA7 1983). The Federal District Court in that case had concluded that the statute permitted officers unbridled discretion in their searches and was therefore not "'a constitutionally adequate substitute for a warrant.'" 518 F. Supp., at 585–586, quoting *Donovan* v. *Dewey*, 452 U. S. 594, 603 (1981). The state trial court in the instant case agreed that the statute was invalid and concluded that its unconstitutionality "affects all pending prosecutions not completed." App. 20. On that basis, the trial court granted respondents' motion to suppress the evidence. *Id.*, at 20–21.[3]

The Appellate Court of Illinois, First Judicial District, vacated the trial court's ruling and remanded the case for further proceedings. *Id.*, at 22. It observed that recent developments in the law indicated that Detective McNally's good faith reliance on the state statute might be relevant in assessing the admissibility of evidence, but that the trial court should first make a factual determination regarding McNally's good faith. *Id.*, at 25. It also observed that the trial court might wish to reconsider its holding regarding the unconstitutionality of the statute in light of the decision by the United States Court of Appeals for the Seventh Circuit upholding the amended form of the Illinois statute. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F. 2d 1072 (CA7 1983).[4] On remand, however, the state trial court

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[3] The trial court also concluded that Lucas had not consented to the search. App. 20. That ruling is not now at issue here.

[4] Following the decision of the District Court in *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (ND Ill. 1981), the Illinois Legisla-

adhered to its decision to grant respondents' motion to suppress. It stated that the relevant statute was the one in effect at the time McNally searched respondents' yard, and that this statute was unconstitutional for the reasons stated by the Federal District Court in *Bionic*. It further concluded that because the good faith of an officer is relevant, if at all, only when he acts pursuant to a warrant, Detective McNally's possible good-faith reliance upon the statute had no bearing on the case. App. 32–35.[5]

The Supreme Court of Illinois affirmed.[6] 107 Ill. 2d 107, 481 N. E. 2d 703 (1985). It first ruled that the state statute, as it existed at the time McNally searched respondents' yard, was unconstitutional. It noted that statutes authorizing warrantless administrative searches in heavily regulated industries had been upheld where such searches were necessary to promote enforcement of a substantial state interest, and where the statute "'in terms of [the] certainty and regularity of its application, provide[d] a constitutionally adequate substitute for a warrant.'" *Id.*, at 116, 481 N. E. 2d, at 707, quoting *Donovan* v. *Dewey*, 452 U. S. 594, 603 (1981). Although acknowledging that the statutory scheme authorizing warrantless searches of licensees furthered a strong public interest in preventing the theft of automobiles and the trafficking in stolen automotive parts, the Illinois Supreme

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ture amended the statute to limit the timing, frequency, and duration of the administrative search. 1982 Ill. Laws No. 82–984, codified, as amended, at Ill. Rev. Stat., ch. 95 1/2, ¶5–403 (1985). See n. 1, *supra*. On appeal, the Court of Appeals for the Seventh Circuit did not address the validity of the earlier form of the statute, for it held that the amended statute satisfied the requirements of the Fourth Amendment. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F. 2d 1072, 1075 (CA7 1983).

[5] The trial court also indicated that McNally may have acted outside the scope of his statutory authority when he examined vehicles other than those listed on the pad offered by Lucas. App. 29; 5 Record 2, 8.

[6] The State bypassed the Illinois intermediate appellate court and appealed directly to the Supreme Court of Illinois pursuant to Ill. S. Ct. Rule 603.

Court concluded that the statute violated the Fourth Amendment because it "vested State officials with too much discretion to decide who, when, and how long to search." 107 Ill. 2d, at 116, 481 N. E. 2d, at 707.

The court rejected the State's argument that the evidence seized from respondents' wrecking yard should nevertheless be admitted because the police officer had acted in good-faith reliance on the statute authorizing such searches. The court observed that in *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979), this Court had upheld an arrest and search made pursuant to an ordinance defining a criminal offense, where the ordinance was subsequently held to violate the Fourth Amendment. The Illinois court noted that this Court in *DeFillippo* had contrasted the ordinance then before it, defining a substantive criminal offense, with a procedural statute directly authorizing searches without a warrant or probable cause, and had stated that evidence obtained in searches conducted pursuant to the latter type of statute traditionally had not been admitted. 107 Ill. 2d, at 118, 481 N. E. 2d, at 708. Because the Illinois statute did not define a substantive criminal offense, but, instead, was a procedural statute directly authorizing warrantless searches, the Illinois Supreme Court concluded that good-faith reliance upon that statute could not be used to justify the admission of evidence under an exception to the exclusionary rule. *Id.*, at 118–119, 481 N. E. 2d, at 708.

We granted certiorari, —— U. S. —— (1986), to consider whether a good-faith exception to the Fourth Amendment exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional.

II

A

When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usu-

ally precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The Court has stressed that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). Application of the exclusionary rule "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" *United States* v. *Leon*, 468 U. S., at 906, quoting *Stone* v. *Powell*, 428 U. S. 465, 540 (1976) (WHITE, J., dissenting). Rather, the rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *Ibid.*, quoting *United States* v. *Calandra*, 414 U. S., at 348.

As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. Thus, in various circumstances, the Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process. See, *e. g.*, *United States* v. *Janis*, 428 U. S. 433, 454 (1976) (evidence obtained by state officers in violation of Fourth Amendment may be used in federal civil proceeding because likelihood of deterring conduct of state officers does not outweigh societal costs imposed by exclusion); *United States* v. *Calandra*, 414 U. S., at 351–352 (evidence obtained in contravention of Fourth Amendment may be used in grand jury proceedings because minimal advance in deterrence of police misconduct is outweighed by expense of impeding role of grand jury).

In *Leon*, the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective. On the basis of three factors, the Court concluded that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants. First, the exclusionary rule was historically designed "to deter police misconduct rather than to punish the errors of judges and magistrates." 468 U. S., at 916. Second, there was "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Ibid.* Third, and of greatest importance to the Court, there was no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Ibid.* The Court explained: "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.*, at 917. Thus, the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective was sufficient to inform the judicial officer of the error made.

The Court then considered whether application of the exclusionary rule in that context could be expected to alter the behavior of law enforcement officers. In prior cases, the Court had observed that, because the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence 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." *United States* v. *Peltier*, 422 U. S. 531, 542 (1975); see also

Michigan v. *Tucker*, 417 U. S. 433, 447 (1974). Where the officer's conduct is objectively reasonable, the Court explained in *Leon*,

> "'[e]xcluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" *United States* v. *Leon*, 468 U. S., at 920, quoting *Stone* v. *Powell*, 428 U. S., at 540 (WHITE, J., dissenting).

The Court in *Leon* concluded that a deterrent effect was particularly absent when an officer, acting in objective good faith, obtained a search warrant from a magistrate and acted within its scope. "In most such cases, there is no police illegality and thus nothing to deter." 468 U. S., at 920–921. It is the judicial officer's responsibility to determine whether probable cause exists to issue a warrant, and, in the ordinary case, police officers cannot be expected to question that determination. Because the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it, applying the exclusionary rule in these circumstances could have no deterrent effect on a future Fourth Amendment violation by the officer. *Id.*, at 921.

B

The approach used in *Leon* is equally applicable to the present case. The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is

subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon*: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." 468 U. S., at 921.[7]

Any difference between our holding in *Leon* and our holding in the instant case, therefore, must rest on a difference between the effect of the exclusion of evidence on judicial officers and the effect of the exclusion of evidence on legislators. Although these two groups clearly serve different functions in the criminal justice system, those differences are not controlling for purposes of this case. We noted in *Leon* as an initial matter that the exclusionary rule was aimed at deterring police misconduct. 468 U. S., at 916. Thus, legislators, like judicial officers, are not the focus of the rule. Moreover, to the extent we consider the rule's effect on legislators, our initial inquiry, as set out in *Leon*, is whether there is evidence to suggest that legislators "are inclined to ignore or subvert the Fourth Amendment." *Ibid.* Although legislators are not "neutral judicial officers," as are judges and magistrates, *id.*, at 917, neither are they "adjuncts to the law enforcement team." *Ibid.* The role of legislators in the criminal justice system is to enact laws for the purpose of

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[7] Indeed, the possibility of a deterrent effect may be even less when the officer acts pursuant to a statute rather than a warrant. In *Leon*, the Court pointed out: "One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or 'magistrate shopping' and thus promotes the ends of the Fourth Amendment." 468 U. S., at 918. Although the Court in *Leon* dismissed that argument as speculative, *ibid.*, the possibility that a police officer might modify his behavior does not exist at all when the officer relies on an existing statute that authorizes warrantless inspections and does not require any pre-inspection action, comparable to seeking a warrant, on the part of the officers.

establishing and perpetuating that system. In order to fulfill this responsibility, legislators' deliberations of necessity are significantly different from the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). Before assuming office, state legislators are required to take an oath to support the Federal Constitution. See U. S. Const., Art. VI, cl. 3. Indeed, by according laws a presumption of constitutional validity, courts presume that legislatures act in a constitutional manner. See *e. g.*, *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 808–809 (1969); see generally 1 N. Singer, Sutherland on Statutory Construction § 2.01 (4th ed. 1985).

There is no evidence suggesting that Congress or state legislatures have enacted a significant number of statutes permitting warrantless administrative searches violative of the Fourth Amendment. Legislatures generally have confined their efforts to authorizing administrative searches of specific categories of businesses that require regulation, and the resulting statutes usually have been held to be constitutional. See, *e. g.*, *Donovan* v. *Dewey*, 452 U. S. 594 (1981); *United States* v. *Biswell*, 406 U. S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970); *United States* v. *Jamieson-McKames Pharmaceuticals, Inc.*, 651 F. 2d 532 (CA8 1981), cert. denied, 455 U. S. 1016 (1982); see also 3 W. LaFave, Search and Seizure § 10.2, pp. 132–134, n. 89.1 (Supp. 1986) (collecting cases). Thus, we are given no basis for believing that legislators are inclined to subvert their oaths and the Fourth Amendment and that "lawlessness among these actors requires application of the extreme sanction of exclusion." *United States* v. *Leon*, 468 U. S., at 916.

Even if we were to conclude that legislators are different in certain relevant respects from magistrates, because legislators are not officers of the judicial system, the next inquiry necessitated by *Leon* is whether exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional

will "have a significant deterrent effect," *ibid.*, on legislators enacting such statutes. Respondents have offered us no reason to believe that applying the exclusionary rule will have such an effect. Legislators enact statutes for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations. Thus, it is logical to assume that the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute, as happened in this very case. There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent.[8] Moreover, to the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against the "substantial social costs exacted by the exclusionary rule." *Id.*, at 907.[9] When we indulge in such weighing,

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[8] It is possible, perhaps, that there are some legislators who, for political purposes, are possessed with a zeal to enact a particular unconstitutionally restrictive statute, and who will not be deterred by the fact that a court might later declare the law unconstitutional. But we doubt whether a legislator possessed with such fervor, and with such disregard for his oath to support the Constitution, would be significantly deterred by the possibility that the exclusionary rule would preclude the introduction of evidence in a certain number of prosecutions. Moreover, just as we were not willing to assume in *Leon* that the possibility of magistrates' acting as "rubber stamps for the police" was a problem of major proportions, see 468 U. S., at 916, n. 14, we are not willing to assume now that there exists a significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact. If future empirical evidence ever should undermine that assumption, our conclusions may be revised accordingly. See *United States* v. *Leon*, 468 U. S., at 927–928 (concurring opinion).

[9] In *Leon*, the Court pointed out: "An objectionable collateral conse-

we are convinced that applying the exclusionary rule in this context is unjustified.

Respondents argue that the result in this case should be different from that in *Leon* because a statute authorizing warrantless administrative searches affects an entire industry and a large number of citizens, while the issuance of a defective warrant affects only one person. This distinction is not persuasive. In determining whether to apply the exclusionary rule, a court should examine whether such application will advance the deterrent objective of the rule. Although the number of individuals affected may be considered when "weighing the costs and benefits," *ibid.*, of applying the exclusionary rule, the simple fact that many are affected by a statute is not sufficient to tip the balance if the deterrence of Fourth Amendment violations would not be advanced in any meaningful way.[10]

We also do not believe that defendants will choose not to contest the validity of statutes if they are unable to benefit directly by the subsequent exclusion of evidence, thereby resulting in statutes evading constitutional review. First, in *Leon*, we explicitly rejected the argument that the good-faith exception adopted in that case would "preclude review of the constitutionality of the search or seizure" or would cause defendants to lose their incentive to litigate meritorious

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quence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Id.*, at 907.

[10] Moreover, it is not always true that the issuance of defective warrants will affect only a few persons. For example, it is possible that before this Court's rather controversial decision in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), see *Illinois* v. *Gates*, 462 U. S. 213, 238, and n. 11 (1983), a number of magistrates believed that probable cause could be established solely on the uncorroborated allegations of a police officer and a significant number of warrants may have been issued on that basis. Until that view was adjusted by this Court's ruling, many persons may have been affected by the systematic granting of warrants based on erroneous views of the standards necessary to establish probable cause.

Fourth Amendment claims. We stated that "the magnitude of the benefit conferred on defendants by a successful [suppression] motion makes it unlikely that litigation of colorable claims will be substantially diminished." *Id.*, at 924 and n. 25. In an effort to suppress evidence, a defendant has no reason not to argue that a police officer's reliance on a warrant or statute was not objectively reasonable and therefore cannot be considered to have been in good faith. Second, unlike a person searched pursuant to a warrant, a person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation. Indeed, that course of action was followed with respect to the statute at issue in this case. Several businesses brought a declaratory judgment suit in federal district court challenging § 5–401(e) of the Illinois Vehicle Code, and the provision was declared unconstitutional. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp., at 585. Subsequent to that declaration, respondents, in their state-court criminal trial, challenged the admissibility of evidence obtained pursuant to the statute. App. 13–17.[11]

The Court noted in *Leon* that the "good-faith" exception to the exclusionary rule would not apply "where the issuing

[11] Other plaintiffs have challenged state statutes on Fourth Amendment grounds in declaratory judgment actions. See *California Restaurant Assn.* v. *Henning*, 173 Cal.App. 3d 1069, 219 Cal. Rptr. 630 (1985) (organization of restaurant owners challenged constitutionality of state statute vesting authority in State Labor Commissioner to issue subpoenas compelling production of books and records); *Hawaii Psychiatric Soc.* v. *Ariyoshi*, 481 F. Supp. 1028 (Haw. 1979) (action to enjoin enforcement of state statute that authorized issuance of administrative inspection warrants to search records of Medicaid providers); *Bilbrey* v. *Brown*, 738 F. 2d 1462 (CA9 1984) (parents sought declaration that school board guidelines authorizing warrantless searches by school principal and teacher were unconstitutional); see also *Mid-Atlantic Accessories Trade Assn.* v. *Maryland*, 500 F. Supp. 834, 848–849 (Md. 1980) (challenging constitutionality of Maryland Drug Paraphernalia Act as violative of the Fourth Amendment and other constitutional provisions).

magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319 (1979)," or where the warrant was so facially deficient "that the executing officers cannot reasonably presume it to be valid." 468 U. S., at 923. Similar constraints apply to the exception to the exclusionary rule we recognize today. A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. Cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982) ("government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").[12]

[12]The Illinois Supreme Court did not consider whether an officer's objectively reasonable reliance upon a statute justifies an exception to the exclusionary rule. Instead, as noted above, the court rested its holding on the existence of a "substantive-procedural dichotomy," which it would derive from this Court's opinion in *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979). See 107 Ill. 2d 107, 118, 481 N. E. 2d 708, 708 (1985). We do not believe the distinction relied upon by the Illinois court is relevant in deciding whether the exclusionary rule should be applied in this case.

This Court in *DeFillippo*, which was decided before *Leon*, drew a distinction between evidence obtained when officers rely upon a statute that defines a substantive crime, and evidence obtained when officers rely upon a statute that authorizes searches without a warrant or probable cause. The Court stated that evidence obtained in searches conducted pursuant to the latter type of statute traditionally had been excluded. 443 U. S., at 39. None of the cases cited in *DeFillippo* in support of the distinction, however, addressed the question whether a good-faith exception to the exclusionary rule should be recognized when an officer's reliance on a statute was objectively reasonable. Rather, those cases simply evaluated the constitutionality of particular statutes, or their application, that authorized searches without a warrant or probable cause. See *Torres* v. *Puerto Rico*, 442 U.S 465 (1979) (statute that allowed police to search luggage of any

III

Applying the principle enunciated in this case, we necessarily conclude that Detective McNally's reliance on the Illinois statute was objectively reasonable.[18] On several occasions, this Court has upheld legislative schemes that authorized warrantless administrative searches of heavily

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person arriving at an airport or pier in Puerto Rico, without any requirement of probable cause, violated Fourth Amendment); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973) (search pursuant to statute that allowed United States Border Patrol to conduct warrantless searches within a "reasonable distance" from border, and regulation that defined such distance as 100 air miles, and without any requirement of probable cause violated Fourth Amendment); *Berger* v. *New York*, 388 U. S. 41 (1967) (statute that authorized court-ordered eavesdropping without requirement that information to be seized be particularized violated Fourth Amendment). See also *Sibron* v. *New York*, 392 U. S. 40 (1968) (search pursuant to statute that allowed officers to search an individual upon "reasonable suspicion" that he was engaged in criminal activity was unreasonable because it was conducted without probable cause). See *United States* v. *Leon*, 468 U. S., at 912, n. 8.

For purposes of deciding whether to apply the exclusionary rule, we see no valid reason to distinguish between statutes that define substantive criminal offenses and statutes that authorize warrantless administrative searches. In either situation, application of the exclusionary rule will not deter a violation of the Fourth Amendment by police officers, because the officers are merely carrying out their responsibilities in implementing the statute. Similarly, in either situation, there is no basis for assuming that the exclusionary rule is necessary or effective in deterring a legislature from passing an unconstitutional statute. There is no basis for applying the exclusionary rule to exclude evidence obtained when a law enforcement officer acts in objectively reasonable reliance upon a statute, regardless of whether the statute may be characterized as "substantive" or "procedural."

[18] The question whether the Illinois statute in effect at the time of McNally's search was, in fact, unconstitutional is not before us. We are concerned here solely with whether the detective acted in good-faith reliance upon an apparently valid statute. The constitutionality of a statutory scheme authorizing warrantless searches of automobile junkyards will be considered in No. 86-80, *New York* v. *Burger*, cert. granted, —— U. S. —— (1986).

regulated industries. See *Donovan* v. *Dewey*, 452 U. S. 594 (1981) (inspections of underground and surface mines pursuant to Federal Mine Safety and Health Act of 1977); *United States* v. *Biswell*, 406 U. S. 311 (1972) (inspections of firearms dealers under Gun Control Act of 1968); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970) (inspections of liquor dealers under 26 U. S. C. §§ 5146(b) and 7606 (1964 ed.)). It has recognized that an inspection program may be a necessary component of regulation in certain industries, and has acknowledged that unannounced, warrantless inspections may be necessary "if the law is to be properly enforced and inspection made effective." *United States* v. *Biswell*, 406 U. S., at 316; *Donovan* v. *Dewey*, 452 U. S., at 603. Thus, the Court explained in *Donovan* that its prior decisions

> "make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id.*, at 600.

In *Donovan*, the Court pointed out that a valid inspection scheme must provide, "in terms of the certainty and regularity of its application . . . a constitutionally adequate substitute for a warrant." *Id.*, at 603. In *Marshall* v. *Barlow's Inc.*, 436 U. S. 307 (1978), to be sure, the Court held that a warrantless administrative search under § 8(a) of the Occupational Safety and Health Act of 1970, was invalid, partly because the "authority to make warrantless searches devolve[d] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to

search and whom to search." *Id.*, at 323.[14] In contrast, the Court in *Donovan* concluded that the Federal Mine Safety and Health Act of 1977 imposed a system of inspection that was sufficiently tailored to the problems of unsafe conditions in mines and was sufficiently pervasive that it checked the discretion of government officers and established "a predictable and guided federal regulatory presence." 452 U. S., at 604.

Under the standards established in these cases, Detective McNally's reliance on the Illinois statute authorizing warrantless inspections of licensees was objectively reasonable. In ruling on the statute's constitutionality, the Illinois Supreme Court recognized that the licensing and inspection scheme furthered a strong public interest, for it helped to "facilitate the discovery and prevention of automobile thefts." 107 Ill. 2d, at 116, 481 N. E. 2d, at 707. The court further concluded that it was "reasonable to assume that warrantless administrative searches are necessary in order to adequately control the theft of automobiles and automotive parts." *Ibid.* The Court of Appeals for the Seventh Circuit, upholding the amended version of the statute, pointed out that used-car and automotive-parts dealers in Illinois "are put on notice that they are entering a field subject to extensive state regulation." See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F. 2d, at 1079. The Illinois statute was thus directed at one specific and heavily regulated industry, the authorized warrantless searches were necessary to the effectiveness of the inspection system, and licensees were put on

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[14] The Court expressly limited its holding in *Barlow's*, to the inspection provisions of the Act. It noted that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute," and that some statutes "apply only to a single industry, where regulations might already be so pervasive that a *Colonade-Biswell* exception to the warrant requirement could apply." 436 U. S., at 321.

notice that their businesses would be subject to inspections pursuant to the state administrative scheme.

According to the Illinois Supreme Court, the statute failed to pass constitutional muster solely because the statute "vested State officials with too much discretion to decide who, when, and how long to search." 107 Ill. 2d, at 116, 481 N. E. 2d, at 707. Assuming, as we do for purposes of this case, that the Illinois Supreme Court was correct in its constitutional analysis, this defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable. The statute provided that searches could be conducted "at any reasonable time during the night or day," and seemed to limit the scope of the inspections to the records the businesses were required to maintain and to the business premises "for the purposes of determining the accuracy of required records." Ill. Rev. Stat. ch. 95 1/2, ¶5–401(e) (1981). While statutory provisions that circumscribe officers' discretion may be important in establishing a statute's constitutionality,[15] the additional restrictions on discretion that might have been necessary are not so obvious that a reasonably objective police officer would have realized the statute was unconstitutional without them.[16] We therefore conclude that Detective McNally

[15] For example, the amended version of the Illinois statute, upheld by the Court of Appeals for the Seventh Circuit, incorporated the following: (1) the inspections were to be initiated while business was being conducted; (2) each inspection was not to last more than 24 hours; (3) the licensee or his representative was entitled to be present during the inspection; and (4) no more than six inspections of one business location could be conducted within any six-month period except pursuant to a search warrant or in response to public complaints about violations. Ill. Rev. Stat., ch. 95 1/2, ¶5–403 (1985).

[16] Indeed, less than a year and a half before the search of respondents' yard, the Supreme Court of Indiana upheld an Indiana statute, authorizing warrantless administrative searches of automobile businesses, that was similar to the Illinois statute and did not include extensive restrictions on police officers' discretion. See *State* v. *Tindell*, 272 Ind. 479, 399 N. E. 2d 746 (1980).

relied, in good faith, on a statute that appeared legitimately to allow a warrantless administrative search of respondents' business.[17]

Accordingly, the judgment of the Supreme Court of Illinois is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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[17] Respondents also argue that Detective McNally acted outside the scope of the statute, and that such action constitutes an alternative ground for suppressing the evidence even if we recognize, as we now do, a good-faith exception when officers reasonably rely on statutes and act within the scope of those statutes. We have observed, see n. 5, *supra*, that the trial court indicated that McNally may have acted outside the scope of his statutory authority. In its brief to the Illinois Supreme Court, the State commented that "[McNally's] search was properly limited to examining the records and inventory of the Action Iron and Metal Company." 1 Record, Brief for Appellant 26. The Illinois Supreme Court, however, made no reference to the trial court's discussion regarding the scope of McNally's authority; instead, it affirmed the suppression of the evidence on the ground that a good-faith exception was not applicable in the context of the statute before it.

We anticipate that the Illinois Supreme Court on remand will consider whether the trial court made a definitive ruling regarding the scope of the statute, whether the State preserved its objection to any such ruling, and, if so, whether the trial court properly interpreted the statute. At this juncture, we decline the State's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute. Not only would such a ruling be premature, but it does not follow inexorably from today's decision. As our opinion makes clear, the question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence. The answer to this question might well be different when police officers act outside the scope of a statute, albeit in good faith. In that context, the relevant actors are not legislators or magistrates, but police officers who concededly are "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 29, 1987

Re: No. 85-608-Illinois v. Krull

Dear Harry:

I await the dissent.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 30, 1987

Re: 85-608 - Illinois v. Krull

Dear Harry:

Please join me.

Sincerely,

WEB

Justice Blackmun

cc: The Conference

ral 01/30/87

File

I've read HAB's op. Agree

January 30, 1987

To: Justice Powell
From: Bob

No. 85-608, Illinois v. Krull

This opinion is so long, and makes remarks about so many issues unnecessary to the decision, that I have read it over twice in hopes of "catching" any potential problems.

There is no doubt that the opinion reaches the right result: evidence obtained from searches and seizures made in objectively reasonable reliance on a statute subsequently held unconstitutional is admissible. JUSTICE BLACKMUN's basic reasoning also is correct, from your perspective: the exclusionary rule serves a deterrent purpose, and excluding this evidence is unlikely to deter unconstitutional behavior. As you noted, the opinion relies on Calandra and Stone v. Powell.

The opinion makes the excellent point that deterrence is even less likely here than in Leon, because there is no possibility of "magistrate shopping" by police. Also, persons who may be subject to search have an incentive to seek a declaration that the statute is unconstitutional, whereas a person searched pursuant to a defective warrant may have less incentive to challenge it.

A minor point: You would perhaps prefer that footnote 8, p. 11, be omitted, since it discusses the possibility that legislators may knowingly enact unconstitutional statutes out of "zeal" and for "political purposes." Perhaps JUSTICE BLACKMUN would re-

phrase one or two sentences to say that the Court is unwilling to assume that legislators routinely disregard their oath to uphold the federal Constitution.

I would omit footnote 10, p. 12, because I do not think it is convincing. A decision of this Court is likely to affect many individuals; a single warrant will not affect so many. The text contains a sufficient argument: although the number of persons affected by an unconstitutional statute is entitled to some weight, it does not "tip the balance of deterrence."

The discussion of the limits to the good faith exception on p. 14 appears to track Leon exactly. The long footnote on the distinction between "substantive" and "procedural" statutes boils down to a simple statement, with which I agree, that there is no meaningful basis for this distinction. Note 12, pp.14-15.

The discussion of the application of the exception to this case in Part III looks fine to me. As you know, the Court will hear arguments in New York v. Burger, No. 86-80, in February. This case presents the question whether a similar statute authorizing warrantless searches of automobile "chop shops" in New York is valid. I think you will be of the opinion that the statute is valid. If so, JUSTICE BLACKMUN's language may be helpful.

I recommend a join.

January 30, 1987

85-608 Illinois v. Krull

Dear Harry:

I am sending you a separate join note.

This is merely to mention a couple of points for your consideration. Footnote 8 discusses the possibility that legislators may knowingly enact unconstitutional statutes out of "zeal", and for "political purposes". It seems to me that this is rather unlikely. Perhaps it would be better to say that we are unwilling to assume that legislators would disregard their oath to act in accord with law in this respect.

I would prefer to omit footnote 10, p. 12, because I do not think it is entirely convincing. A decision of this Court could affect many individuals, whereas a single warrant is likely to have only a limited effect. I think your text is entirely adequate.

The foregoing are quite minor, and my join is unconditional. I think you opinion is quite excellent.

Sincerely,

Justice Blackmun

lfp/ss

January 30, 1987

85-608 Illinois v. Krull

Dear Harry:

Please join me.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 30, 1987

Re: No. 85-608, Illinois v. Krull

Dear Lewis:

Thank you for your letter of January 30 with its suggestions. I purposefully inserted the material to which you make reference because of our anticipation as to what Sandra will say in dissent. The "scuttlebutt" has it that she had it in mind to say something about the motivation of legislators. For now, I would prefer to let matters lie quiet until we see the dissent.

Sincerely,

Harry

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 30, 1987

No. 85-608 Illinois v. Krull

Dear Harry,

I plan to circulate a dissent in this case.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 9, 1987

Re: 85-608 - Illinois v. Krull

Dear Harry:

I shall await Sandra's dissent.

Respectfully,

John P.

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

February 19, 1987

Re: No. 85-608 - Illinois v. Krull

Dear Harry:

I would be pleased to join your opinion in the above case. I have one suggestion which may forestall future litigation.

As I understand our holding, here, as in Leon (see 468 U.S., at 897-898, n.20), we are applying an objective test: If a reasonable police officer would have considered the statute valid, the product of the search is admissible. We do not conduct an inquiry into the subjective knowledge and belief of the particular officer involved. It seems to me that some explicit indication of that (along the lines of the first two sentences of the cited footnote in Leon) would be helpful. At a minimum, the last sentence of the penultimate paragraph of the opinion should be revised to read somewhat as follows:

> We therefore conclude that, since Detective McNally was objectively reasonable in acting under a statute that appeared legitimately to allow a warrantless administrative search of respondents' business, the product of that search was admissible.

Sincerely,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

February 23, 1987

Re: Illinois v. Krull - No. 85-608

Dear Harry:

Thank you for considering my suggestions. Your revised opinion fully meets my concerns.

Sincerely,

Justice Blackmun

Copies to the Conference

85-608 Illinois v. Krull (Bob)

HAB for the Court 11/17/86
1st draft 1/29/87
2nd draft 2/23/87
Joined by LFP 1/30/87
CJ 1/30/87
BRW 2/16/87
AS 2/19/87

SOC dissenting
1st draft 2/17/87
2nd draft 2/20/87
3rd draft 3/2/87
3rd draft 3/6/87
Joined by JPS 2/18/87
WJB 2/23/87

TM dissenting
1st draft 2/27/87

TM awaiting dissent 1/29/87
SOC will dissent 1/30/87