The Seventh Circuit Adopts a Good Faith, Reasonable Belief Exception to the Exclusionary Rule in OSHA Proceedings, Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982)

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THE SEVENTH CIRCUITadopts a GOOD FAITH, REASONABLE BELIEF EXCEPTION to the EXCLUSIONARY RULE in OSHA PROCEEDINGS

Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982)

In Donovan v. Federal Clearing Die Casting Co.,¹ the United States Court of Appeals for the Seventh Circuit extended the “good faith exception” to the exclusionary rule² to federal administrative agency proceedings by refusing to suppress evidence obtained from a reasonable and good faith Occupational Safety and Health Administration (OSHA) inspection conducted under authority of a search warrant subsequently declared invalid.³

Following an accident to an employee of Federal Clearing Die Casting Company (Federal) on Federal’s premises,⁴ OSHA compliance officers sought to conduct a safety inspection of the company’s workplace.⁵ Although the officers possessed a search warrant,⁶ Federal

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1. 695 F.2d 1020 (7th Cir. 1982).
2. One common definition of the good faith exception reads as follows: “[W]hen an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate.” Ball, Good Faith and the Fourth Amendment: The “Reasonable” Exception to the Exclusionary Rule, 69 J. CRIM. L. & CRIMINOLOGY 635, 635 (1978).
3. 695 F.2d at 1022-25. The Eleventh Circuit arrived at the opposite conclusion in Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982), issued one week after the Seventh Circuit’s decision in Federal Die. See infra notes 41-45 and accompanying text.
4. 695 F.2d at 1021.
5. Id. Federal statute authorizes OSHA officials to enter private commercial premises for the purpose of conducting inspections to ascertain the existence of safety and health violations. 29 U.S.C. § 657(a) (1982). If an employer refuses to admit OSHA inspectors, the inspectors may procure a search warrant and return to the worksite to conduct the investigation. See 29 C.F.R. § 1903.4 (1985).
refused entry, claiming that the magistrate improperly issued the warrant. After a federal district court found the warrant valid, OSHA compliance officers inspected Federal's premises and issued a number of safety citations. On appeal, the Seventh Circuit invalidated the search warrant, and Federal subsequently moved in administrative proceedings to suppress all evidence obtained through the use of the invalid warrant. An administrative law judge of the Occupational Safety and Health Review Commission (OSHRC) granted Federal's motion and dismissed the proceedings. On appeal, the Seventh Cir-
cuit reversed and held: (1) evidence gathered through OSHA's reasonable and good faith inspection pursuant to a warrant upheld by the district court should not be suppressed under the exclusionary rule because a reviewing court subsequently invalidated the warrant; and (2) a good faith, reasonable belief exception to the exclusionary rule is appropriate in OSHA proceedings.\textsuperscript{15}

The exclusionary rule\textsuperscript{16} generally prohibits the use of evidence seized in violation of the fourth amendment\textsuperscript{17} in criminal proceedings.\textsuperscript{18} To

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  \item \textsuperscript{14} 695 F.2d at 1021.
  \item \textsuperscript{15} Id. at 1021-25.
  \item \textsuperscript{16} The Supreme Court first employed the exclusionary rule in the seminal case of Weeks v. United States, 232 U.S. 383 (1914), in which the Court held that evidence seized in violation of an individual's fourth amendment rights was inadmissible in federal criminal trials. Id. at 398. The Court extended the rule to state criminal prosecutions in Mapp v. Ohio, 367 U.S. 643 (1961). For a concise history of the rule’s development, see Stone v. Powell, 428 U.S. 465, 482-83 (1976); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. U.L.Q. 621, 625-40.
  \item \textsuperscript{17} Courts historically have advanced three theories justifying the exclusionary rule: (1) the enforcement of a personal constitutional right, (2) the maintenance of judicial integrity, and (3) the deterrence of official misconduct. See generally Trant, OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer has Blundered?, 1981 DUKE L.J. 667, 676-87. Presently, courts invoke the exclusionary rule primarily, if not exclusively, to deter government officials from committing fourth amendment violations. See, e.g., Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979) (“purpose of exclusionary rule is to deter unlawful police conduct”); Stone v. Powell, 428 U.S. 465, 486 (1976) (“the primary justification for the exclusionary rule then is the deterrence of police conduct that violates fourth amendment rights”); United States v. Janis, 428 U.S. 433, 446 (1976) (“prime purpose of the rule, if not the sole one, is to deter future unlawful police conduct”); Brown v. Illinois, 422 U.S. 590, 599-600 (1975) (“purpose is to deter—to compel respect for the constitutional guarantee”).
  \item \textsuperscript{18} Under the personal right theory, the exclusionary rule vindicates personal constitutional rights. Note, supra note 10, at 1019 n.2. Failure to suppress evidence obtained in violation of the Constitution, according to this theory, is a “denial of the constitutional rights of the accused.” Weeks v. United States, 232 U.S. 383, 398 (1914); see also Mapp v. Ohio, 367 U.S. 643, 656 (1961); Olmstead v. United States, 277 U.S. 438, 462 (1928); Byars v. United States, 273 U.S. 28, 29-30 (1927); Gouled v. United States, 255 U.S. 298, 303-06 (1921).
  \item The fourth amendment provides:
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    \item The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
  \end{itemize}
  \end{itemize}
date, however, the Supreme Court has not directly addressed the issue of whether the exclusionary rule is applicable to civil and administrative proceedings.\textsuperscript{19} In the absence of a definitive pronouncement by the Court, lower federal and state courts have reached conflicting results.\textsuperscript{20}

Prior to 1967, courts generally did not extend the fourth amendment’s proscriptions against unreasonable searches and seizures to administrative inspections.\textsuperscript{21} In the companion cases of \textit{Camara v.}

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18. \textit{Weeks v. United States}, 232 U.S. 383, 398 (1914). The Supreme Court has fashioned several exceptions to the rule, narrowing its scope. \textit{See United States v. Havens}, 446 U.S. 620, 628 (1980) (evidence seized in violation of a defendant’s fourth amendment rights may be used for impeachment if he takes the stand at trial); \textit{United States v. Janis}, 428 U.S. 433, 454 (1976) (unlawfully obtained evidence may be used in federal civil tax cases); \textit{United States v. Calandra}, 414 U.S. 338, 354 (1974) (unlawfully obtained evidence may be used in grand jury hearings); \textit{Burdeau v. McDowell}, 256 U.S. 465, 476 (1921) (evidence unlawfully obtained by private individuals is admissible in criminal cases).

19. \textit{See United States v. Janis}, 428 U.S. 433, 447 (1976) (the Supreme Court has never applied the exclusionary rule to exclude evidence from a federal or state civil proceeding); \textit{Savina Home Indus. v. Secretary of Labor}, 594 F.2d 1358, 1362 (10th Cir. 1979) (general applicability of the exclusionary rule to noncriminal contexts has not been decided by the Supreme Court).


In \textit{Frank v. Maryland}, 359 U.S. 360 (1959), for example, the Supreme Court refused to set aside the defendant's criminal conviction for not permitting a warrantless inspection of his home by a Baltimore health inspector. In concluding that the search did not violate the fourth amendment, the Court noted that the defendant's privacy interests were on the “periphery” of the fourth amendment protection against official intrusion. \textit{Id.} at 367. The decision in \textit{Frank}, however, was overruled by \textit{Camara v. Municipal Court}, 397 U.S. 523 (1967).
Municipal Court\textsuperscript{22} and See v. City of Seattle,\textsuperscript{23} the Supreme Court held that the fourth amendment's search warrant requirement applies to administrative searches of private and commercial dwellings.\textsuperscript{24} Nevertheless, courts continued to assume that the fourth amendment did not apply to OSHA inspections.\textsuperscript{25} Consequently, they never fully addressed the issue of applying exclusionary sanctions to OSHA inspections.\textsuperscript{26}

In 1978, however, the Supreme Court definitively established that fourth amendment protections apply to OSHA compliance inspections in Marshall v. Barlow's, Inc.\textsuperscript{27} The Court held that the fourth amendment prohibits nonconsensual warrantless inspections of businesses by OSHA compliance officers.\textsuperscript{28} The Court did not, however, determine the extent to which courts must apply exclusionary sanctions in OSHA proceedings.\textsuperscript{29} Subsequent judicial and OSHRC decisions similarly failed to delineate the exclusionary rule's applicability to OSHA proceedings.\textsuperscript{30}

\textsuperscript{22} 387 U.S. 523 (1967).
\textsuperscript{23} 387 U.S. 541 (1967).
\textsuperscript{24} See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); see Cochell, supra note 2, at 5. In Camara, the Supreme Court held that administrative searches of private dwellings must be conducted pursuant to a valid search warrant based on a relaxed showing of probable cause in the absence of voluntary consent. 387 U.S. at 539-40. The Court in See extended the Camara premise to commercial dwellings, holding that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 387 U.S. at 543.
\textsuperscript{25} See, e.g., Hoffman Constr. Co. v. OSHRC, 546 F.2d 281, 282-83 (9th Cir. 1976) (evidence discovered in the course of an illegal inspection not suppressed in the absence of fourth amendment prejudice); Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 833-34 (5th Cir. 1975) (minor non-prejudicial violations by OSHA compliance officers do not violate the fourth amendment), cert. denied, 425 U.S. 903 (1976).
\textsuperscript{26} Trant, supra note 16, at 687.
\textsuperscript{27} 436 U.S. 307, 311-13 (1978). In Barlow's, an OSHA inspector requested permission to conduct a routine inspection of the work area in Barlow's electrical and plumbing plant to ensure compliance with safety and health regulations. Id. at 309-10. When informed that the inspector did not possess a search warrant, Barlow refused to admit him and subsequently sought and obtained injunctive relief against the warrantless search. Id. at 310.
\textsuperscript{28} Id. at 312-13.
\textsuperscript{29} Because no "search" had yet taken place, and because the suit sought to prevent a warrantless search from ever occurring, no "fruits" of a warrantless search could be objected to at the OSHRC hearing.
\textsuperscript{30} Post-Barlow's decisions in which the applicability of exclusionary sanctions to illegal OSHA searches was at issue uniformly held that because the effect of Barlow's was prospective only, the question of the exclusionary rule did not require immediate resolution. See Robberson Steel Co. v. OSHRC, 645 F.2d 22 (10th Cir. 1980); Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979); Todd Shipyards Corp. v. Secretary of Labor, 587 F.2d 683 (9th Cir. 1978).
Although the Supreme Court has not adopted a good faith exception to the exclusionary rule,31 a number of Justices have expressed dissatisfaction with the rule's undesirable effects32 and have urged adoption of


While these courts reached similar results, their analyses of related issues often varied considerably. Compare Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978) ("[because] the Supreme Court has never applied the exclusionary rule in a civil proceeding . . . the rule should not be applied to OSHA proceedings.") (citing United States v. Janis, 425 U.S. 433, 447 (1976)) with Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979) ("the exclusionary rule would be applicable to OSHA proceedings involving inspections violative of the warrant requirements announced in Barlow's.").


In certain instances, the Supreme Court has recognized a "technical good faith" exception to the exclusionary rule. See Michigan v. DeFillippo, 443 U.S. 31, 37-40 (1979) (evidence seized in good faith reliance on an ordinance later declared unconstitutional should not be suppressed); United States v. Peltier, 422 U.S. 531, 532-33 (1975) (fourth amendment violation does not require application of the exclusionary rule where officers rely on a statute subsequently declared unconstitutional); Michigan v. Tucker, 417 U.S. 433, 436-47 (1974) (exclusionary rule not applied where police questioned a criminal suspect in violation of fifth amendment rights subsequently announced in Miranda v. Arizona, 384 U.S. 436 (1966)). Express support for a "good faith mistake" exception to the exclusionary rule in criminal cases has appeared in three Court opinions. In Brown v. Illinois, 422 U.S. 590 (1975), Justice Powell argued that the courts should not suppress reliable evidence which is not the product of willful or negligent police misconduct. Id. at 611-12 (Powell, J., concurring). Similarly, in Stone v. Powell, 428 U.S. 465 (1976), Justice White argued in dissent that police officers cannot be expected to conform to fourth amendment requirements when they are not aware that their actions are unlawful. Id. at 537-40 (White, J., dissenting). Finally, in Illinois v. Gates, 103 S. Ct. 2317 (1983), Justice White reiterated his concerns first expressed in Stone and argued that the exclusionary rule is inappropriate where government officials act in the reasonable belief that a search and seizure is consistent with the fourth amendment. Id. at 2336 (White, J., concurring). See generally Note, Is it Time for a Change in the Exclusionary Rule? United States v. Williams and the Good Faith Exception, 60 WASH. U.L.Q. 161, 169-71 (1982).

32. See, e.g., Illinois v. Gates, 103 S. Ct. 2317, 2336-51 (1983) (White, J., concurring). Justice White, the Court's most outspoken critic of the exclusionary rule, observed that the primary cost of the rule is its interference with the "truthseeking function of a criminal trial by barring relevant and trustworthy evidence." Id. at 2342 (White, J., concurring). He noted that the rule discourages police from reasonable and proper investigative actions and places an extreme burden on state and federal judicial systems. Id. (White, J., concurring). In addition, Justice White found that indiscriminate application of the exclusionary rule generates disrespect for the law and undermines public confidence in the criminal justice system. Id. (White, J., concurring).
such an exception. In the absence of definitive Supreme Court action, however, courts and legislatures have joined in a growing movement toward acceptance of some form of good faith exception to the exclusionary rule in criminal cases. In *United States v. Williams*, the Fifth Circuit held that it would not apply the exclusionary rule in criminal proceedings where officers mistakenly, though reasonably and in good faith, believed that they acted lawfully. Several other federal and state courts have similarly adopted good faith exceptions to the exclusionary rule. In addition, several bills have been introduced in

33. Four current members of the Supreme Court, Chief Justice Burger and Justices Rehnquist, Powell, and White, have openly supported adoption of a good faith exception to the exclusionary rule in criminal cases. See *Stone v. Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); *id.* at 538-39 (White, J., dissenting); *Brown v. Illinois*, 422 U.S. 606, 616 (1975) (Powell, J., concurring); *Peltier v. United States*, 422 U.S. 531, 531-42 (1975) (Rehnquist, J.); *supra* note 31; see also *United States v. Williams*, 622 F.2d 830, 841 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *Ball*, *supra* note 2, at 635, 652-53; Note, *supra* note 2, at 1617. In addition, Justices O'Connor and Blackmun seem in favor of reducing the scope of the exclusionary rule. *Id.*

34. See *Note*, supra note 2, at 1617; see also *infra* notes 35-39 and accompanying text.

35. 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981). In *Williams*, the Fifth Circuit refused to suppress two packets of heroin seized illegally by drug enforcement officials who thought that they had conducted a lawful search and arrest. *Id.* at 833-36.

36. *Id.* at 840.

37. In *United States v. Nolan*, 530 F. Supp. 386, 396-400 (W.D. Pa. 1981), the Western District of Pennsylvania refused to suppress evidence gathered in an illegal house search where the police officer acted in a manner consistent with the law, the intrusion on the defendant's right was minimal, and no deterrent effect existed for future police conduct. In *United States v. Wyler*, 502 F. Supp. 959, 973-74 (S.D.N.Y. 1980), the Southern District of New York refused to suppress documents found in a good faith, but unlawful, house search that led to the identity of a victim in a previously undiscovered crime, holding that neither the purposes of the exclusionary rule nor the public interest would benefit from exclusion of the evidence. In *State v. Mincey*, 130 Ariz. 389, 402, 636 P.2d 637, 650 (1981), cert. denied, 455 U.S. 1003 (1982), the Arizona Supreme Court applied a *Williams*-type test when a police officer illegally seized photographs of a murder scene in good faith reliance on state law as he understood it on the advice of a legal expert. In *People v. Eschelberger*, 620 P.2d 1067, 1071 n.2 (Colo. 1980) (en banc), the Colorado Supreme Court cited *Williams* and noted that the exclusionary rule penalizes willful or flagrant police actions, not reasonable actions. In *People v. Pierce*, 88 Ill. App. 3d 1095, 1110, 411 N.E.2d 295, 307 (1980), the police obtained a confession in a search pursuant to a quashed warrant. The Illinois Appellate Court refused to exclude the confession because it found that the police officers satisfied the *Williams* test of "reasonable and good faith belief . . . in the propriety of their conduct." *Id.* In *Richmond v. Commonwealth*, 50 U.S.L.W. 2162, 2162-63 (Ky. Ct. App. 1981), aff'd, 637 S.W.2d 642 (Ky. 1982), the Kentucky Court of Appeals held that evidence seized in good faith reliance on an invalid warrant should not be suppressed when suppression would have no deterrence effect. Finally, in *People v. Adams*, 53 N.Y.2d 1, 9-11, 422 N.E.2d 537, 541-42, 439 N.Y.S.2d 877, 881-82 (1981) the New York Court of Appeals found that when officers rely in good faith on the apparent capability of an individual to consent to a warrantless search, and the circumstances reasonably indicate that the individual possesses the authority to consent, evidence obtained as the result of such a search should not be suppressed because the individual lacked authority to consent.
Congress to modify or eliminate the exclusionary rule. At least one state has specifically enacted legislation creating a good faith exception to the exclusionary rule.

No parallel movement toward adoption of a good faith, reasonable belief exception to the exclusionary rule in civil and administrative proceedings had begun until Donovan v. Federal Clearing Die Casting Co. One week after the decision in Federal Die, the Eleventh Circuit explicitly refused to adopt such an exception to the exclusionary rule in OSHA proceedings in Donovan v. Sarasota Concrete Co. In Sarasota, an administrative law judge invalidated a search warrant that had served as the basis for a good faith OSHA business inspection and suppressed evidence seized by OSHA officials under the invalid war-


Section 3505. Limitation of the Fourth Amendment Exclusionary Rule

Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable, good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

Id.

The Department of Justice has similarly advocated modification of the exclusionary rule. See Attorney General's Task Force on Violent Crime, U.S. Department of Justice, Final Report 55 (1981). Recommendation 40 provides that "evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution." Id. See also Hearings on the Report of the Attorney General's Task Force on Violent Crime Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 8 (1981) (statement of William French Smith, Attorney General of the United States) (evidence obtained by officers in the good faith belief that they were acting in accordance with the fourth amendment should not be excluded from a criminal proceeding).


[e]vidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer . . . as a result of a good faith mistake or of a technical violation.

40. 695 F.2d 1020 (7th Cir. 1982); see infra notes 46-73 and accompanying text.

41. 693 F.2d 1061 (11th Cir. 1982).

42. Id. at 1063-64. A former employee of Sarasota alleged that the company improperly maintained its cement trucks. Id. Six months after the original complaint was issued, a United States magistrate granted a warrant authorizing an inspection of Sarasota's entire workplace. Id. OSHA compliance officers sought, received and executed the search warrant in good faith. Id. As a result of the investigation and inspection, OSHA cited Sarasota for twelve "non-serious" violations of OSHA regulations. Id. at 1064. None of the violations cited, however, related to Sarasota's cement trucks. Id.
rant. On appeal, the Eleventh Circuit distinguished *United States v. Williams*, a criminal case, and held that the exclusionary rule is generally available in OSHA proceedings.

In *Donovan v. Federal Clearing Die Casting Co.*, the Seventh Circuit accepted a good faith, reasonable belief exception to the exclusionary rule in civil proceedings. The court devoted its entire analysis to a consideration of the good faith exception in OSHA proceedings. The majority of the court looked to *United States v. Williams* as its primary source of authority. Recognizing that the *Williams* court relied on the exclusionary rule's underlying purpose of deterring unlawful police conduct, the Seventh Circuit reasoned that the rule does not serve

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43. *Id.*. The administrative law judge held that the employee's complaint concerning the company's cement trucks did not constitute sufficient probable cause to support an investigation of the company's entire workplace. *Id.*

44. *Id.* at 1070-73. The Eleventh Circuit refused to extend the good faith exception enunciated by the Fifth Circuit in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), to OSHA proceedings. The court of appeals argued that *Williams* was factually dissimilar and concluded that OSHRC was not bound to adhere to the *Williams* analysis. *Id.* at 1072. In particular, the Eleventh Circuit noted that the *Williams* court prefaced its discussion of the good faith exception with a clear statement that its holding would not apply to situations involving a search warrant. *Id.* (citing United States v. Williams, 622 F.2d at 840 n.1).

45. 693 F.2d at 1070-71.

46. 695 F.2d 1020, 1022-25 (7th Cir. 1982).

47. The Seventh Circuit reached, but did not resolve, the issue of the exclusionary rule's applicability to OSHA inspections conducted pursuant to search warrants subsequently declared invalid. Cf. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982); supra notes 40-45. In its haste to discuss the good faith, reasonable belief exception to the exclusionary rule, the court of appeals failed to devote any of its analysis to the problem of the rule's general availability in OSHA proceedings. This oversight is especially surprising because the court realized that the issue before it was "one of first impression." 695 F.2d at 1021. This omission is also curious given that logic dictates that a court must first establish a general rule before testing a specific exception to it.

The court's failure to consider the rule's applicability renders its holding ambiguous because it is not apparent whether the court tacitly recognized the rule's general availability in this area or merely refused to apply the rule within the circumstances of the instant case. Arguments can be made to support both positions. The court prefaced its discussion of the good faith exception by suggesting that the exclusionary rule should not be applied. *Id.* at 1023 (citing Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978)). In contrast, the court twice stated that its holding was limited to the "circumstances of this case," 695 F.2d at 1023 & n.6, suggesting that the court did not intend to establish a general rule.

48. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981); see supra notes 35-36 and accompanying text.

49. 695 F.2d at 1023-24.

50. The deterrence theory is based upon the common sense notion that the suppression of illegally seized evidence deters official misconduct. Note, supra note 10, at 1020 n.3; see supra note 16. The court in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*,
its basic deterrent purpose when applied to evidence that was gathered mistakenly, but in good faith and on reasonable grounds. A good faith, reasonable belief exception to the exclusionary rule in civil proceedings, the court argued, would not detract from the rule's deterrence function. Moreover, the court noted that employers have access to remedial deterrents other than the exclusionary rule when they believe OSHA has violated their constitutional rights.

In further support of its position, the Federal Die court relied upon two Tenth Circuit cases, Robberson Steel Co. v. OSHRC and Savina Home Industries v. Secretary of Labor. Noting that in both cases the Tenth Circuit refused to apply the exclusionary rule to warrantless searches where the rule’s deterrent purpose could not be served, the Federal Die majority concluded that the Tenth Circuit recognized a reasonable, good faith exception to the exclusionary rule.

The court argued additionally that suppression of the evidence uncovered by the OSHA inspection would result in “substantial societal harm.” In particular, the court contended that application of the exclusionary rule to the facts of the case would preclude OSHRC from issuing an order requiring prompt abatement of hazardous working conditions at Federal and would preclude the issuance of subsequent citations with enhanced penalties to ensure Federal’s compliance with OSHA provisions. The court concluded that because the OSHA compliance officers acted both reasonably and in good faith in inspect-

449 U.S. 1127 (1981), like most modern courts, followed the deterrence theory, holding that the exclusionary rule deters willful or flagrant police misconduct, not reasonable, good faith actions. Id. at 840.
51. 695 F.2d at 1023.
52. Id.
53. Id. at 1024. The court specifically mentioned two such deterrents. First, an OSHA official must obtain the approval of a neutral magistrate before conducting an inspection over an employer’s objection. Id. Second, an employer may still move to quash a warrant prior to its execution or refuse entry pursuant to a warrant unless the OSHA official prevails in civil contempt proceedings. Id.
54. 645 F.2d 22 (10th Cir. 1980).
55. 594 F.2d 1358 (10th Cir. 1979).
56. Though both cases dealt with the applicability of the exclusionary rule to OSHA proceedings involving warrantless inspections occurring prior to Marshall v. Barlow’s Inc., 436 U.S. 307 (1978), the court in Robberson noted that the reasoning of the Fifth Circuit in United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981), is “equally applicable to civil OSHA enforcement proceedings.” 645 F.2d at 22.
57. 695 F.2d at 1024.
58. Id.
59. Id. The court also expressed concern that an OSHA official would not be able to rein-
ing Federal’s workplace, evidence gathered pursuant to that inspection should not be suppressed.\(^{60}\)

Judge Pell in dissent criticized the majority’s reliance on *Williams.*\(^{61}\) He noted that the *Williams* good faith exception requires both objective reasonableness and subjective good faith\(^{62}\) and concluded that the OSHA officials did not act reasonably or in good faith in their inspection of Federal’s premises.\(^{63}\) Judge Pell argued that the majority’s reliance on *Robberson* and *Savina* was similarly unfounded. Both cases involved only the retroactive application of the *Barlow’s* warrant requirement;\(^{64}\) the Tenth Circuit therefore did not decide the issue of the good faith exception to the exclusionary rule in either case.\(^{65}\)

Judge Pell cited legislative sources\(^{66}\) and OSHRC decisions\(^{67}\) in sup-

\(^{60}\) *Id.* at 1025. The majority noted that the inspection of Federal’s premises did not commence until after the district court issued an order of civil contempt against Federal and ordered Federal to cooperate in the inspection of its premises. *Id.* The majority concluded that the district court’s approval of the OSHA officials’ actions demonstrated that they acted reasonably, cautiously, and in good faith in executing the search warrant. *Id.* See *supra* note 8.

\(^{61}\) *Id.* at 1030 (Pell, J., dissenting).

\(^{62}\) *Id.* (Pell, J., dissenting). "[In addition to being held in subjective good faith, [the officer’s belief] must be grounded in objective reasonableness. It must therefore be based upon articulate premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully."

\(^{63}\) *Id.* (Pell, J., dissenting) (quoting *United States v. Williams*, 622 F.2d 830, 841 n.4a (5th Cir. 1980) (en banc), *cert. denied.* 449 U.S. 1127 (1981)).

\(^{64}\) *Id.* at 1026-27, 1029-31 (Pell, J., dissenting). Judge Pell explained that OSHA regulations require an OSHA inspector to make a “thorough evaluation of all complaints” of OSHA violations prior to deciding whether or not to inspect. *Id.* at 1031 (Pell, J., dissenting). Judge Pell stated that an OSHA official could not reasonably believe that an OSHA violation existed on the basis of two newspaper articles describing a work accident and an old citation of dubious reliability. *Id.* (Pell, J., dissenting). He expected a conscientious OSHA official to make preliminary inquiries regarding a newspaper account of an accident before seeking a search warrant. *Id.* (Pell, J., dissenting). Furthermore, Judge Pell noted that the inspection of Federal’s premises was plant-wide and not concerned merely with the operation which caused the employee’s injury. *Id.* at 1029 (Pell, J., dissenting). He therefore concluded that the actions of the OSHA inspectors in *Federal Die* “could hardly be regarded as objectively reasonable.” *Id.* at 1031 (Pell, J., dissenting).

\(^{65}\) See *supra* note 30.

\(^{66}\) 695 F.2d at 1032 (Pell, J., dissenting).

\(^{67}\) *Id.* at 1028 (Pell, J., dissenting). Judge Pell noted that Congress provided numerous requirements for the conduct of a lawful inspection, specifying that OSHA citations may only be issued "upon inspection or investigation" conducted pursuant to law. *See,* e.g., 29 U.S.C. §§ 657(a), 658(a) (1982). In addition, he observed that the legislative history makes clear that "in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable constitutional protections." 116 *Cong. Rec.* 38,709 (1970) (statement of Rep. Steiger).
port of his contention that courts should suppress evidence obtained by OSHA compliance officers during an illegal inspection of an employer’s workplace. He alleged, contrary to the majority’s opinion, that the suppression of unlawfully obtained evidence would have an “appreciable deterrent effect” on the subsequent conduct of OSHA officials. 68

In addition, Judge Pell denied the majority’s assertion that the exclusion of evidence uncovered by an illegal OSHA inspection would result in “substantial societal harm.” 69 Administrative searches differ fundamentally from criminal searches, he argued, in that the object of the administrative search does not disappear without some affirmative action. 70 Because no specific time limits govern OSHA inspections, 71 OSHA officials may reinspect business premises upon the issuance of a second valid warrant. 72 If OSHA officials return to a work site to find that alleged hazardous conditions have disappeared, the agency has achieved its statutory purpose of abating such conditions. 73

67. 695 F.2d at 1028 (Pell, J., dissenting); see, e.g., Secretary of Labor v. Genesee Valley Indus. Packaging, 8 O.S.H. Cas. (BNA) 1509, 1510 (Rev. Comm’n 1980) (remedy for fourth amendment violation is suppression of evidence gained by that violation); Secretary v. Hendrix, 2 O.S.A.H.R.C. 1005, 1022 (1973), aff’d on other grounds sub nom. Brennan v. OSHARC, 511 F.2d 1139 (9th Cir. 1975) (OSHA citation must be vacated where not preceded by valid inspection).

68. 695 F.2d at 1028 (Pell, J., dissenting).

69. Id. at 1032-33 (Pell, J., dissenting).

70. Id. at 1033 (Pell, J., dissenting). Judge Pell found that the exclusion of evidence has a lesser impact in administrative hearings than in criminal cases:

There is less impact from evidence suppression in such administrative hearings than in criminal cases because the inspector can return and reinspect, employing proper procedures. The Secretary argues that return inspections impose an unreasonable strain on the agency’s already limited manpower . . . . The best solution is to follow proper procedures the first time, but lack of personnel certainly should be no justification for riding rough shod over employer rights. The fault for delay lies with the agency; the remedy lies there also.

Id. at 1032 (Pell, J., dissenting) (quoting Marshall v. C.F. & I. Steel Corp., 576 F.2d 809, 819 (10th Cir. 1978) (McKay, J., dissenting)).

71. 695 F.2d at 1032 (Pell, J., dissenting). Judge Pell rejected the majority’s contention that in certain instances OSHA may not be able to obtain a second warrant because of staleness: “[T]he statutory provision governing time of inspections sets no specific time limits. Rather, it requires the Secretary to inspect ‘at reasonable times’ . . . or ‘as soon as practicable’ after receipt of a complaint . . . .” Id. at 1032-33 (Pell, J., dissenting) (emphasis original) (quoting Donovan v. Metal Bank of America, 516 F. Supp. 674, 679 (E.D. Pa. 1981)).


73. 695 F.2d at 1033 (Pell, J., dissenting). If hazardous conditions have not been improved, of course, OSHA may issue citations.
In Federal Die, the Seventh Circuit improvidently extended the good faith exception to the exclusionary rule from the criminal setting, where courts dispute the applicability of the exception, to the administrative setting, where courts question the applicability of the exclusionary rule itself. As Judge Pell explained in dissent, basic distinctions exist between criminal and administrative searches and seizures. In a criminal case, the loss of important evidence may seriously impair the ability of the prosecution to proceed against the defendant. In an administrative hearing, however, suppression of evidence under exclusionary sanctions results in minimal cost to society. The only conceivable harm to society in requiring a second inspection of an employer's workplace is in terms of delay and increased burdens on OSHA officials.

The Supreme Court requires a careful balancing of the potential benefits of exclusion against the potential harm of losing relevant evidence in all fourth amendment exclusionary rule decisions. The Court has refused to apply the exclusionary rule on several occasions where it determined that the social costs of suppressing relevant evidence outweighed the deterrent effect of exclusionary sanctions.
eral Die does not present, however, as strong a case for refusing to apply the exclusionary rule; the social costs of exclusion are negligible, 82 and the deterrent effect of the exclusionary rule on reasonable and good faith administrative inspections remains uncertain. 83 In the absence of a strong inclination against suppression of illegally obtained evidence, the Seventh Circuit improperly adopted, with minimum explanation, a good faith exception which is controversial in the criminal context and unestablished in the administrative context.

The Supreme Court has euphemistically described the judicial debate over the exclusionary rule and its good faith exception as "warm." 84 The conflict between the Seventh and Eleventh Circuits resulting from the Federal Die and Sarasota decisions should intensify the debate and place added pressure on the Supreme Court to resolve the good faith issue.

[Just prior to the publication of this Comment, the Supreme Court held in United States v. Leon and Massachusetts v. Sheppard that the fourth amendment does not require exclusion of evidence seized by police officers in objectively reasonable reliance on a search warrant that is subsequently invalidated by a reviewing court.

In adopting an objective good faith exception to the exclusionary rule, the Court addressed two distinct forms of invalid search warrants. In Leon, a district court found that probable cause did not support a search warrant issued by a magistrate. The Ninth Circuit affirmed the district court's finding and accordingly suppressed all evidence obtained in state courts eliminated); United States v. Janis, 428 U.S. 433 (1976) (evidence illegally seized by state criminal law enforcement agency not excluded in federal civil proceedings).

82. See supra notes 69-73 and accompanying text.

83. The Federal Die majority believed that the exclusionary rule could not deter OSHA officials acting in good faith and on reasonable grounds, albeit illegally. 695 F.2d at 1023; see supra notes 48-57 and accompanying text. Judge Pell argued, contrary to the majority, that the exclusion of unlawfully obtained evidence would have an "appreciable deterrent effect" on the conduct of OSHA officials. 695 F.2d at 1026, 1028 (Pell, J., dissenting).


tained pursuant to the invalid warrant. The Supreme Court reversed, refusing to suppress this "inherently trustworthy tangible evidence." The Court employed the same balancing test it has espoused on numerous occasions in recent years, carefully weighing the "costs and benefits" of suppression. Justice White, writing for the majority, concluded that the benefits of suppressing evidence obtained in objective reliance on a subsequently invalidated search warrant are "marginal or nonexistent" and that the suppression of such evidence will not deter future police misconduct.

In *Sheppard*, the Court held that evidence gathered in objectively reasonable reliance on a defective warrant may be admissible in the prosecution's case-in-chief. Justice White observed that the failure of the search warrant in question to specify with particularity the items to be seized was the fault of the issuing judge, not the police officers. In Justice White's opinion, the suppression of evidence merely because a judge failed to make necessary clerical corrections to a search warrant does not serve the exclusionary rule's deterrent function.

The Court in *Leon* and *Sheppard*, two criminal cases, did not specifically address the applicability of the good faith exception to the exclusionary rule to federal administrative agency proceedings. The language of the two decisions is vague in this regard and could support extension of the good faith exception to OSHA proceedings.

*R.H.S.*