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against him. These decisions recognize the importance of cross-examination in a criminal trial as a means of testing the evidence presented and establishing all the facts which might bear on the credibility of a witness.

G. *Sentencing*

Following conviction after trial or entry of a guilty plea, Rule 32 of the Alaska Rules of Criminal Procedure requires that a pre-sentence report be prepared prior to sentencing in all felony cases. The report may include references to arrests and charges which were not prosecuted if the defendant has an opportunity to explain such instances and present rebuttal evidence. In *Nukapigak v. State*,[216] the court held that mere police "contacts" which are not explained may not be used in the report or considered by the court in sentencing. When defense counsel believes that improper materials have been included in the pre-sentence report, a request may be made that a judge other than the sentencing judge review the pre-sentence report and delete improper items. This procedure avoids the possibility of the improper material tainting the sentencing judge's thoughts or attitude about the case.

In 1969, the Alaska Legislature granted to the Alaska Supreme Court the jurisdiction to hear and review appeals of sentences.[217] The expansion of the court's jurisdiction in this area was aimed at establishing guidelines to protect defendants against unsupportably harsh sentences and to achieve some measure of uniformity in sentencing in Alaska.

All sentences in excess of forty-five days may be appealed.[218] In examining the sentence imposed, however, the supreme court will not reverse a sentence unless it finds that the trial court was "clearly mistaken."[219] The appropriate factors to be considered by a trial court in imposing a sentence were articulated in *State v. Chaney*.[220] Alaska's new criminal code contains presumptive sentencing provisions which substantially alter the process by which sentences may be imposed and reviewed.[221]

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216. 562 P.2d 697 (Alaska 1977).
217. AS § 12.55.120.
218. ALASKA R. APP. P. 21.
219. McClain v. State, 519 P.2d 811 (Alaska 1974).
220. 477 P.2d 441 (Alaska 1970).
221. *See* AS § 12.55.125 et seq., *and particularly*, AS § 12.55.155, identifying factors in aggravation and mitigation to be considered by the court in applying the presumptive sentences set out in AS §§ 12.55.125, 12.55.135, 12.55.140. For a history of sentence appeals in Alaska, *see* Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALASKA L. REV. 1 (1975).

IV. Post-Conviction Rights

A. *Modification of Sentence*

Rule 35 of the Alaska Rules of Criminal Procedure permits the trial court to correct or reduce a sentence after it has been imposed. In addition to the authority of the trial court to modify sentences pursuant to Rule 35(a), Rule 35(b) permits convicted and sentenced persons to petition for relief where:

(1) The conviction or sentence was in violation of the State or Federal Constitution;
(2) The court was without jurisdiction to impose the sentence;
(3) The sentence imposed was not authorized by law;
(4) There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction in the interest of justice;
(5) The Defendant is unlawfully held in custody;
(6) The conviction or sentence is subject to collateral attack under any common law, statutory or other writ, proceeding, or remedy;
(7) There has been a significant change in law.

B. *Double Jeopardy*

Article I, Section 9[222] of the Alaska Constitution parallels the fifth amendment of the United States Constitution[223] and provides that no person shall be put in jeopardy twice for the same offense. In *Torres v. State*,[224] the Alaska Supreme Court followed the prevailing federal rule and held that jeopardy attaches when the trial jury is sworn. In a series of cases commencing with *Whitton v. State*,[225] the Alaska court has held that although defendants may be subjected to multiple charges arising out of a single course of conduct or action, a defendant may not be subjected to multiple punishments for the "same offense." In determining whether multiple charges constitute the "same offense" for purposes of punishment, the court must analyze whether the offenses involve differences in intent or conduct. Any such differences found must then be balanced against societal interests, taking into account whether the differences are substantial enough to warrant multiple punishments.[226] The Alaska Supreme Court stated in *Whitton* that the social interests to be considered include: "[t]he nature of personal, property or other rights sought to be protected, and the

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222. Alaska Const. art. I, § 9 provides: "No person shall be put in jeopardy twice for the same offense. No person . . shall be compelled in any criminal proceeding to be a witness against himself."

223. *See* note 132 *supra*.

224. 519 P.2d 788 (Alaska 1974).

225. 479 P.2d 302 (Alaska 1970).

226. *Id.* at 312.

broad objectives of criminal law such as punishment of the criminal for his crime, rehabilitation of the criminal, and the prevention of future crimes."[227] If the multiple charges do not reflect significant or substantial differences in intent or conduct in relation to the social interests involved, multiple punishments may not be imposed without violating the prohibition against double jeopardy contained in the State and Federal Constitutions.[228]

CONCLUSION

This article has attempted to identify the areas of criminal procedure where Alaska has departed from established lines of authority and has enhanced the procedural rights afforded an accused. The greatest expansion of rights has occurred in the investigative and pre trial stages of the proceedings. The procedural rights afforded an accused during a criminal trial and following his conviction do not significantly depart from those which are afforded by other states or the federal courts. Once formal charges have been initiated, and, more clearly, once an accused is brought to trial, he receives few benefits, rights, or protections not provided defendants in other jurisdictions.

In establishing the permissible limits of reasonable searches and seizures, the right to counsel, the right to fair and impartial grand jury proceedings, the right to discovery, and the right to a speedy trial, the Alaska Supreme Court has taken a more generous view of the rights of an accused. These five areas of procedure have an element in common. Each constitutes a point in the criminal process at which the prosecution has a clear advantage over the accused. The accused is not able to participate in or influence the acquisition of evidence, the conducting of a criminal investigation, and the initiation of charges. The protection of the individual during these stages of the criminal process can be viewed as an attempt by the Alaska Supreme Court to equalize the prosecution's procedural advantage over the accused. However, once formal charges are initiated and trial commences, the court has been reluctant to continue providing enhanced procedural protections to the accused.

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227. *Id.*
228. *Id.*

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ARTICLES

THE EXCLUSIONARY RULE REVISITED

*Senator Charles McC. Mathias, Jr.**

The fourth amendment of the Constitution reads as follows:

> 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.[1]

The right secured by the amendment is clear. So is the historical background that prompted the addition of the amendment to our organic law. As one commentator has written:

> Alone among those constitutional provisions which set standards of fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with

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1. U.S. CONST. amend. IV.

England.[2]

The notion of freedom from unreasonable searches and seizures was a matter of hot dispute both in Seventeenth and Eighteenth Century England and in America in the years leading up to the American Revolution. What really offended the colonists was the arbitrary invasions of homes and offices pursuant to the so-called "writs of assistance." James Otis called that writ "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book."[3] It is not surprising, therefore, that when the Bill of Rights was adopted the fourth amendment was one of its most prominent features.

Although we have extensive knowledge of both the character of the right protected by the fourth amendment and its historical underpinnings, we know little about what the Founding Fathers thought an appropriate penalty for a violation of that right should be. The amendment is silent on this point. So is the historical record. In fact, not until 1914 did the United States Supreme Court determine what the consequences would be for a violation of the prohibition against unreasonable searches and seizures.[4]

In *Weeks v. United States*,[5] the Supreme Court held that evidence obtained in violation of the fourth amendment would be barred from use in federal prosecutions.[6] The Court's rationale was simple:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.[7]

So, after 123 years of uncertainty, the question of how the fourth amendment was to be enforced was answered. The exclusionary rule was born. And 47 years later, the Court, in *Mapp v. Ohio*,[8]

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2. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19 (1966).
3. *Id.* at 34.
4. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (illegally seized evidence not admissible in federal criminal trial).
5. 232 U.S. 383 (1914).
6. *Id.* at 398.
7. *Id.* at 393.
8. 367 U.S. 643 (1961).

extended it to searches by state and local officials.[9]

From the beginning, the exclusionary rule generated controversy, as it does today. Legal scholars have debated it endlessly.[10] Researchers argue about whether the rule deters police misconduct and whether it contributes to crime.[11] Some pronounce it an abysmal failure and want it abolished;[12] others defend it as essential to preserving the full intent of the fourth amendment.[13] Moreover, some of our greatest Justices have been on opposite sides of the issue. Justice Holmes[14] and Justice Brandeis[15] wrote in support of the rule; Justice Cardozo questioned the integrity of a judicial system in which, as he put it, "[t]he criminal is to go free because the constable has blundered."[16]

Stephen Sachs, Attorney General of Maryland and a former United States Attorney, is an outspoken opponent of efforts to narrow or eliminate the exclusionary rule. But he also understands why the exclusionary rule arouses such controversy. Last fall, testifying at hearings on the exclusionary rule before the Senate Judiciary Subcommittee on Criminal Law, Mr. Sachs explained:

> The rule . . . is very fragile, especially in today's atmosphere of understandable public outrage at crime and at our perceived inability to do very much about it. It is vulnerable to attack because its values are abstract, while its price is tangible. It frequently excludes

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9. *Id.* at 655.

10. *See, e.g.*, Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?* 62 JUDICATURE 66 (1978); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 214 (1978); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'an Empty Blessing,'* 62 JUDICATURE 337 (1979); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979).

11. *See, e.g.* Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?* 62 JUDICATURE 398 (1979); Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?* 62 JUDICATURE 404 (1979); Canon, *A Postscript on Empirical Studies and the Exclusionary Rule*, 62 JUDICATURE 455 (1979); Schlesinger, *A Reply to Professor Canon*, 62 JUDICATURE 457 (1979).

12. *See, e.g.*, *The Exclusionary Rule Bills: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S. 101 and S. 751*, 97th Cong., 1st Sess. (1981) (statement of Steven R. Schlesinger) [hereinafter cited as *Exclusionary Rule Hearings*]. At the time of publication the transcripts of the Subcommittee's proceedings have not yet been printed; as a result page citations are unavailable.

13. *See, e.g.*, *Exclusionary Rule Hearings*, *supra* note 12 (statement of Stephen Sachs).

14. Olmstead v. United States, 277 U.S. 438, 470-71 (1928) (Holmes, J., dissenting).

15. *Id.* at 483-85 (Brandeis, J., dissenting).

16. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

hard evidence, the truth, from trial. It appears to reward the undeserving criminal whom it sometimes frees because the constable blundered. It seems to many to give aid and comfort only to the enemy in the war on crime, and it makes almost no sense to citizens fed up with crime and impatient with legal technicalities who want to believe that crime would disappear if only courts would stop coddling criminals. That is why the rule, although it has plenty of responsible critics, has also become a whipping boy of anti-crime rhetoricians.[17]

With that kind of public image, it is not surprising that the exclusionary rule has always been the focus of vehement criticism. Today, criticism of the rule has reached a fever pitch, and the prospects for a judicial or legislative narrowing or abolition of the rule loom larger than ever before. In fact, the Fifth Circuit Court of Appeals has already adopted a "good faith" exception to the rule in *United States v. Williams.*[18]

At the Supreme Court level, it is significant that only two members of the present Court are committed to retaining the rule as is,[19] while at least four members have called for a loosening of the constraints imposed by the rule.[20] No member of the present Court has been a more consistent critic of the rule than Chief Justice Warren Burger. As long ago as 1971,[21] he called for legislative reform of the rule which he considers a "Draconian, discredited device,"[22] that is "conceptually sterile."[23] So the chances of the

17. *Exclusionary Rule Hearings, supra* note 12.

18. 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981) (exclusionary rule no longer applicable when police seize evidence in reasonable, good-faith belief that seizure is constitutional). There were two separate majority opinions in the *Williams* case. Sixteen members of the court held that the search involved in *Williams* comported with the requirements of the Constitution. *Id.* at 833-39. Thirteen members of the court held that even if the search did violate the Constitution, the officer conducting the search reasonably believed in good-faith that his actions were lawful and therefore that the exclusionary rule would not be applied. *Id.* at 840-47. At that time there were twenty-five members of the Fifth Circuit Court of Appeals.

19. Justice Brennan and Justice Marshall have both committed themselves to retention of the rule in its present form. *See* United States v. Calandra, 414 U.S. 338, 355-67 (1974) (Brennan, J., with Douglas and Marshall, J.J., dissenting).

20. Both Justice Powell and Justice White would adopt some form of a reasonable, good-faith exception to the rule. *See* Stone v. Powell, 423 U.S. 465, 538 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., with Rehnquist, J., concurring in part). Chief Justice Burger and Justice Rehnquist have advocated complete abolition of the rule. *See, e.g.*, California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay).

21. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

22. Stone v. Powell, 428 U.S. 465, 50[illegible] (1976) (Burger, C.J., concurring).

Court rendering an anti-exclusionary rule decision are obviously very real.

But, what seems just as likely is that Congress will aim a blow at the rule. The improved prospect for legislative action is the result, to some extent, of the Reagan Administration's own interest in reform of the exclusionary rule. Both President Reagan[24] and Vice President Bush[25] have spoken out against the rule, and Senior White House Aide Edwin Meese, a former prosecutor, has called it "[t]he single most important factor behind the increase in crime in this country."[26] In addition, the Attorney General's Task Force on Violent Crime has spoken in favor of a "good faith" exception to the rule.[27] And the Department of Justice has recommended that such legislation be introduced.[28]

Of course, legislative efforts to alter or eliminate the exclusionary rule are not new. In the past, anti-exclusionary rule bills have been introduced, only to die in Committee without even a hearing.[29] But with strong encouragement from the Administration, momentum has been building on Capitol Hill. Already, more than half a dozen bills on the subject have been offered in the Ninety-Seventh Congress.[30] And the Senate Judiciary Subcommittee on Criminal Law has held the first congressional hearings ever devoted solely to an examination of the rule itself.[31]

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23. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). More recently, the Chief Justice has suggested that it should be the judiciary, rather than the legislature, which takes the first step toward modification of the exclusionary rule. *See* Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring) (legislatures unlikely to create statutory alternatives to exclusionary rule as long as rule is retained in its present form).

24. Remarks of President Reagan to the International Association of Chiefs of Police, New Orleans, Louisiana (September 28, 1981).

25. Remarks of Vice President Bush to the Annual Convention of the American Bar Association, New Orleans, Louisiana (August 1981).

26. Washington Star, July 21, 1981, at A5.

27. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, Recommendation 40 (August 17, 1981).

28. *See Exclusionary Rule Hearings*, *supra* note 12 (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice).

29. *See, e.g.*, S. 2657, 92d Cong., 1st Sess. (1971).

30. Senate bills introduced in the 97th Congress, 1st Session, dealing with the exclusionary rule include S. 101, S. 751, and S. 1995. House bills include H.R. 4422, H.R. 4606, H.R. 4259 and H.R. 4898. The Administration's own proposal was recently introduced in the Senate as S. 2231, 2d Sess., 128 CONG. REC. S2416 (daily ed. March 18, 1982). A similar proposal has been introduced as S. 2304.

31. The Subcommittee held hearings on October 5 and November 12, 1981, and on March 16 and 26, 1982.

The Subcommittee held four days of hearings on the exclusionary rule. Among the eighteen witnesses who testified were representatives of the Department of Justice, the American Bar Association, the American Civil Liberties Union, the International Association of Chiefs of Police, and Americans for Effective Law Enforcement; state prosecutors; criminal defense lawyers; law professors; and a political scientist. The hearings were balanced, with witnesses divided between those who favor abolishing or narrowing the rule and those who want to retain it in its original form.

United States Circuit Judge Malcolm Wilkey, an outspoken critic of the exclusionary rule, has written:

> Over the years the arguments pro and con have been well rehearsed and positions have crystallized to the extent that it sometimes appears as though almost any debate over the merits of the rule will likely degenerate into a polarized contest between proponents of the rule who see their adversaries as lamentably insensitive to violations of basic constitutional freedoms and opponents of the rule who, in turn, accuse the rule's supporters of softness on crime and criminals.[32]

Fortunately, I think the Subcommittee has managed to avoid that pitfall. The hearings were both informative and stimulating; the basic arguments on both sides were set out. Subcommittee members had an opportunity to become intimately familiar with the intricacies of the Department of Justice's "good faith" proposal, and with the three other bills pending before the Subcommittee which seek to abolish the rule or alter substantially its application in federal criminal cases. Those bills are:

—S. 101, Senator DeConcini's proposal to permit the admission of evidence obtained in violation of the fourth amendment unless the violation was either intentional or substantial;[33]

—S. 751, introduced by Senators Thurmond and Hatch to abolish the rule and replace it with a civil damage remedy;[34] and,

—S. 1995, Senator Dole's omnibus anti-crime bill which contains a proposal to limit the rule to intentional, bad faith vio-

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32. United States v. Ross, 655 F.2d 1159, 1203 (D.C. Cir.) (en banc) (Wilkey, J., dissenting), *rev'd*, 50 U.S.L.W. 4580 (U.S. June 1, 1982).

33. 97th Cong., 1st Sess., 127 Cong. Rec. S154 (daily ed. January 15, 1981).

34. *Id.* at S2401-02 (daily ed. March 19, 1981).

lations and to provide a tort remedy for such transgressions.[35]

These hearings have been helpful. They have shown that the issues involved are far more complex than they appear at first blush. A number of important questions of constitutional law and public policy have been raised during these hearings, the most interesting of which is whether the exclusionary rule is constitutionally mandated, or whether it is a judicially created doctrine, without constitutional underpinnings, and thus subject to congressional alteration by statute.

The most fundamental question facing the Subcommittee is this: Does Congress have the constitutional authority to alter or abolish the exclusionary rule?

Opponents of the rule argue that it is amenable to legislative alteration.[36] To them it is simply a judge-made rule of evidence that can be unmade:

> This rule of evidence did not come from on high. It's man-made, not God-given. Until there was a recent trend of examination into this rule . . . I fully expected somewhere along the line that someone would contend that Moses brought down a third tablet from Mount Sinai and that the Supreme Court only discovered it in 1914. . . . It's not even in the Constitution.[37]

Opponents of the exclusionary rule maintain that it was adopted in an effort to ensure proper enforcement of the fourth amendment and that it has failed to do that.[38] Therefore, they argue, the time has come to abandon the rule and replace it with a more effective alternative.[39] They see no impediment to Congress' taking such action.[40]

Admittedly, the exclusionary rule is not set forth in the Constitution. There are, however, a number of constitutional requirements that one will not find in the Constitution. For example, the

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35. *Id.* at S15,706-08 (daily ed. December 16, 1981).

36. *See, e.g.*, United States v. Ross, 655 F.2d at 1208-09 (abolition of exclusionary rule and creation of alternative tort remedy both within power of judiciary).

37. *Hearings before the Attorney General's Task Force on Violent Crime*, June 3, 1981, at 34-35 (testimony of Judge Wilkey).

38. *See, e.g.*, *Exclusionary Rule Hearings*, *supra* note 12 (statement of Steven R. Schlesinger) (exclusionary rule currently grounded on policy of deterrence and empirical evidence shows that rule does not deter).

39. United States v. Ross, 655 F.2d at 1208-09.

40. *See, e.g.*, *Exclusionary Rule Hearings*, *supra* note 12 (statement of Steven R. Schlesinger).

right of an indigent to appointment of counsel in criminal cases[41] is not explicit in the Constitution. It is the result of "judicial implication." The question is: Does that make it less important or more subject to legislative alteration?

Professor Yale Kamisar addressed this point in testimony before the Attorney General's Task Force on Violent Crime:

> Consider the [pre-*Miranda*] doctrine that a state cannot base a conviction on coerced confession, or involuntary confession, however much the confession is corroborated by extrinsic evidence. . . . That doctrine, too, is a matter of judicial implication. Read the Constitution. It never once mentions confessions, coerced, involuntary or otherwise. Does that mean Congress could have negated the old voluntariness doctrine by legislation? As a matter of fact, the Constitution doesn't mention very much. It doesn't mention line-ups or wiretapping or electronic eavesdropping or stomach-pumping or the presumption of innocence or an indigent's right to a trial transcript at state expense.[42]

The contention that the exclusionary rule is not a constitutional requirement is perplexing. That argument might indeed have had some merit prior to *Mapp v. Ohio*[43] for until then, the exclusionary rule could have been construed as an exercise of the Supreme Court's supervisory power over federal courts.[44] But *Mapp* eliminated the grounds of that argument.[45] The Supreme Court's supervisory power does not extend to state courts,[46] so the imposition of the rule by *Mapp* clearly was of constitutional dimension. Indeed, in *Mapp* the rule was characterized as "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without . . . which the Fourth Amendment would have been reduced to 'a form of words.' "[47]

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41. Gideon v. Wainwright, 372 U.S. 335 (1963).

42. *Hearings before the Attorney General's Task Force on Violent Crime*, June 3, 1981, at 64-65 (testimony of Yale Kamisar).

43. 367 U.S. 643 (1961).

44. Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 657-58.

45. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 23-24.

46. Geller, *supra* note 44.

47. 367 U.S. at 648 (1961) (citation omitted). The contrary view—that the exclusionary rule is not commanded by the Constitution, but is simply one method of enforcing the constitutional protection—has been forcefully presented by Judge Wilkey in his written responses to questions posed by the Criminal Law Subcommittee. *Exclusionary Rule Hearings*, *supra* note 12.

Although the Court has looked askance at *Mapp* from time to time,[48] the fact remains that the decision has never been overruled. This itself raises doubts about the prudence of congressional abolishment of the rule. The Department of Justice has argued, however, that Congress can at least limit the exclusionary rule to those situations in which its application would advance one of the rule's underlying goals.[49] And the only goal currently underlying the rule, in the Department's view, is deterrence of illicit police misconduct.[50] Arguing that the exclusionary rule cannot deter illegal searches conducted in good faith, the Department concluded that a statutory good faith exception to the rule, similar to that established in the *Williams* case,[51] would be constitutional.[52] The Department would not express an opinion on whether Congress could abolish the exclusionary rule entirely.[53] Under the Department's reasoning however, Congress could presumably eliminate the rule if it were replaced with an equally effective deterrent of violations of the fourth amendment.

Whether deterrence of police misconduct is the only remaining justification for the rule[54] and, if it is, whether this affects congressional power to alter the rule,[55] are both open to question.

Constitutional questions notwithstanding, Congress may well

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48. Although the court has not been willing to limit the rule's applicability to criminal trials, *see* Stone v. Powell, 428 U.S. 465, 492-93 (1976), it has refused to extend the rule to grand jury proceedings, United States v. Calandra, 414 U.S. 338, 349-52 (1974), and civil proceedings to collect federal wagering taxes when the illegal search was conducted by state officials. United States v. Janis, 428 U.S. 433, 454 (1976). Moreover, the Court has allowed the admission of illegally seized evidence against defendants who were the targets, though not the victims, of an illegal search, *see* United States v. Payner, 447 U.S. 727, 731 (1980) (defendant may invoke exclusionary rule only when illegal conduct invaded *his* legitimate expectation of privacy, not that of third party), and against all defendants for the purposes of impeachment. United States v. Havens, 446 U.S. 620, 627-28 (1980).

49. *Exclusionary Rule Hearings*, *supra* note 12 (statement of D. Lowell Jensen, Assistant Attorney General, Department of Justice, Criminal Division).

50. *Id.*

51. *See supra* note 18.

52. *Exclusionary Rule Hearings*, *supra* note 12 (statement of D. Lowell Jensen, Assistant Attorney General, Department of Justice, Criminal Division).

53. *See id.*

54. *See generally* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?* 62 JUDICATURE 66 (1978) (emphasizing that exclusionary rule is necessary to protect integrity of judicial process). *Cf.* United States v. Janis, 428 U.S. 433, 458-59 n.35 (1976).

55. *See Exclusionary Rule Hearings*, *supra* note 12 (statement of William W. Greenhalgh, on behalf of the American Bar Association) (arguing that Congress cannot alter rule even if deterrence is rule's sole justification).

decide to try to eliminate or modify the rule. If it does, it would not be the first congressional attempt to modify or even overturn a criminal procedure decision by the High Court.[56] For example, in 1968 Congress enacted a provision[57] that was designed to reverse the Supreme Court's decision in *Miranda v. Arizona*.[58] Although existing for almost fourteen years, this provision, part of title 2, of the Omnibus Crime Control and Safe Streets Act,[59] has been used sparingly; moreover, the Supreme Court has yet to rule on the law's constitutionality.[60] If the congressional sponsors of anti-exclusionary rule legislation have their way, the Court may have a chance to consider the validity of such a bill in the not-too-distant future.

Congressional efforts to offset Supreme Court decisions are very much in vogue in the Ninety-Seventh Congress. For example, there are more than thirty bills pending in Congress designed to circumvent Supreme Court rulings by divesting the federal courts of jurisdiction over a variety of constitutional issues.[61] There are,

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56. *See, e.g.*, The Privacy Protection Act of 1980, 42 U.S.C.A. § 2000aa (1981) (provides statutory protection against search and seizure of documentary evidence possessed by innocent third parties over and above protections required by the fourth amendment under Zurcher v. Stanford Daily, 436 U.S. 547 (1978)). The Privacy Protection Act, of course, placed *greater* restraints on government action than those imposed by the Constitution. Congress' power to limit the effect of a Supreme Court decision is certainly less extensive when it attempts to lessen any of the restraints imposed on government by the Constitution. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (congressional power under section 5 of the fourteenth amendment limited to adopting measures to enforce that amendment; Congress has no power to restrict, abrogate or dilute constitutional guarantees).

57. Omnibus Crime Control and Safe Streets Act of 1968, § 701(a), 13 U.S.C. §3501 (1976).

58. 384 U.S. 436 (1966). *Miranda* requires that prior to custodial interrogation law enforcement officials advise an individual that he has the right to remain silent, that his statements may be used against him, that he has the right to consult with an attorney, and that if he is indigent an attorney will be appointed to represent him. *Id.* at 444, 467-73. Statements taken in violation of *Miranda* are inadmissible in the prosecution's case-in-chief. *Id.* at 479. Under section 701(a) of the Omnibus Crime Control and Safe Streets Act, a voluntary confession would be admissible in the prosecution's case-in-chief despite the fact that *Miranda* warnings were not given. Section 701(a) was justified on the grounds that it merely overturned the factual determination that was the basis of the Court's decision in *Miranda*. *See* S. Rep. No. 1097, 90th Cong., 2d Sess. 63 (1968) (proponents of this provision argued that because *Miranda* was based on factual determination that custodial interrogation is inherently coercive, Congress can constitutionally change the *Miranda* rule by making factual findings to the contrary).

59. 18 U.S.C. § 3501 (1976).

60. *But cf.* United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975) (suggesting that Michigan v. Tucker, 417 U.S. 433 (1974), *sub silentio* upheld constitutionality of 18 U.S.C. § 3501).

61. *See, e.g.*, H.R. 867, 97th Cong., 1st Sess. (1981) (abortion); H.R. 869, 97th Cong.,

of course, important differences between efforts to strip the federal courts of jurisdiction and the proposals to reform the exclusionary rule,[62] but they have one thing in common—they are all attempts to achieve constitutional change without resort to the amendment process as set forth in article V.[63] As a Senator, I am opposed to the court jurisdiction bills because they seek to bypass the Constitution and I am uncomfortable with the anti-exclusionary proposals for the same reason.

I have dwelt on the constitutional aspect of this question because I believe that it is incumbent on members of Congress to make a reasoned judgment about the constitutionality of any bill that comes before us. All too often in the past the Congress has said in effect: "We aren't sure this bill is constitutional, but let's pass it and see what the courts decide." That is just an evasion of our responsibility.

Congress has a clear obligation—independent of that of the judiciary—to consider a bill's constitutionality. We cannot ignore this duty. We can be wrong; we can be in error just as the Court is on occasion; but we have sworn an oath to discharge our duties as members of Congress in accordance with the Constitution. I do not believe that we can perform those duties responsibly without coming to a conclusion about whether our contemplated actions are constitutional. As Chief Justice Burger has reminded us, "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[64] I concur wholeheartedly.

1st Sess. (1981) (busing); S. 481, 97th Cong., 1st Sess. (1981) (school prayer).

62. The putative constitutional authority for such legislation lies in Congress' power to make exceptions to the appellate jurisdiction of the Supreme Court under U.S. CONST. art. III, § 2, cl. 2 and in Congress' power to ordain and establish inferior federal courts under *id.* art. III, § 1, cl. 1.

63. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislature of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

64. United States v. Nixon, 418 U.S. 683, 703 (1974).

To that end, I am determined that the Criminal Law Subcommittee develop a comprehensive hearing record that will enable my colleagues and me to make an informed judgment on the constitutionality of proposals to reform the exclusionary rule. Although not the only issue raised by these bills, it is the most fundamental one. The constitutionality controversy must be resolved once and for all, because the freedom from unreasonable searches and seizures is a freedom no despotism can accommodate. It is a right that no free society can surrender.

*[367 US 643]
*DOLLREE MAPP, etc., Appellant,

v

OHIO

367 US 643, 6 L ed 2d 1081, 81 S Ct 1684

[No. 236]

Argued March 29, 1961. Decided June 19, 1961.

SUMMARY

The defendant was convicted in the Ohio Common Pleas Court of possession of obscene literature; the judgment of conviction was affirmed by the Ohio Court of Appeals, and the judgment of the latter court was in turn affirmed by the Supreme Court of Ohio (170 Ohio St 427, 11 Ohio Ops 2d 169, 166 NE2d 387). Noting that the obscene materials for possession of which defendant was convicted were discovered in the course of a search of defendant's residence, the Ohio Supreme Court found that the record left it in doubt whether there ever was any warrant for the search of her home, but held that under Ohio law evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution, and that under the decision of the Supreme Court of the United States in Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, a state was not prevented by the Federal Constitution from adopting the rule as it prevailed in Ohio. A majority of less than six members of the court were of the opinion that the statute under which defendant was convicted, making a criminal offense the knowing possession of lewd books and pictures, was unconstitutional, but under Ohio law this majority was not sufficient to permit the reversal of the judgment of the Court of Appeals.

On appeal, the Supreme Court of the United States reversed the judgment of the Supreme Court of Ohio and remanded the cause to that court. In an opinion by CLARK, J., expressing the views of five members of the Court, the earlier decision in Wolf v Colorado, supra, was overruled, and it was held that, as a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state court as it is in a federal court.

BLACK, J., concurred in a separate opinion, expressing the view that the constitutional basis of the rule announced by the Court in the present case was the Fourth Amendment's ban against unreasonable searches and seizures considered together with the Fifth Amendment's ban against compelled self-incrimination.

DOUGLAS, J., also concurred in a separate opinion, elaborating the grounds of decision

HARLAN, J., with the concurrence of FRANKFURTER and WHITTAKER, JJ., dissented on the grounds that (1) the present case, in which the primary issue was the constitutionality of the statute under which defendant was convicted, was not an appropriate occasion for re-examining Wolf v Colorado, and (2) this case was sound and should not be overruled,

STEWART, J., expressed the view that this was not an appropriate case to re-examine Wolf v Colorado, and that the judgment below should be reversed because the Ohio statute under which defendant was convicted violated the constitutional guaranties of free thought and expression.

SUBJECT OF ANNOTATION

Beginning on page 1544, infra

Admissibility of evidence obtained by illegal search and seizure

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Search and Seizure § 5 — reasonableness — test.

1. What is a reasonable search not prohibited by the Fourth Amendment is not to be determined by any fixed formula.

Appeal and Error § 1478 — search and seizure — reasonableness — determination by trial court.

2. What is a reasonable search not prohibited by the Fourth Amendment is in the first instance for the trial court to determine.

Evidence § 681 — illegal search and seizure.

3. All evidence obtained by searches and seizures in violation of the Fourth Amendment of the Federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court.

[*See annotation references* 1, 2, *and annotation p.* 1544, *infra*]

Search and Seizure § 4 — restrictions on states.

4. The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment.

[*See annotation reference* 2]

Constitutional Law § 840.5; Evidence § 681 — illegally obtained evidence.

5. As to the federal government, the Fourth and Fifth Amendments and, as to the states, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions enjoy an intimate relation in their perpetuation of principles of humanity and civil liberty, and express supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy; the philosophy of each amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.

[*See annotation reference* 2]

Constitutional Law § 840; Evidence § 681 — unconstitutional evidence.

6. The rule which excludes unconstitutional evidence from being admitted in a state criminal trial is an essential part of both the Fourth and Fourteenth Amendments.

[*See annotation p.* 1544, *infra*]

ANNOTATION REFERENCES

1. Admissibility of evidence obtained by illegal search, 24 ALR 1408; 32 ALR 408; 41 ALR 1145; 52 ALR 477; 88 ALR 348; 134 ALR 819; 150 ALR 566. As to modern (prior to the Mapp Case) status of rule, see 50 ALR2d 531. See also 93 L ed 1797; 96 L ed 145; 98 L ed 581; 100 L ed 239; 6 L ed 2d 1544 (dealing with United States Supreme Court cases in point).

2. Right of privacy, 138 ALR 22; 168 ALR 446; 14 ALR2d 750.

3. Constitutionality of federal and state regulation of obscene literature, 1 L ed 2d 2211; 4 L ed 2d 1821.

4. The Supreme Court and the right of free speech and press, 93 L ed 1151; 2 L ed 2d 1706.

Courts § 681 — conflicts.

7. The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.

Criminal Law § 46 — rights of accused — fair procedure.

8. However much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

Evidence § 681 — illegally obtained evidence — procedure.

9. In determining whether a state conviction of crime is constitutionally impermissible because of the admission at the trial of evidence unconstitutionally obtained, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.

[*See annotation p.* 1544, *infra*]

Point from Separate Opinion

Constitutional Law § 930 — freedom of speech — obscenity.

10. A state statute making criminal the mere knowing possession or control of obscene material is invalid because inconsistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. [From separate opinion by Stewart, J.]

[*See annotation references* 3, 4]

APPEARANCES OF COUNSEL

A. L. Kearns argued the cause for appellant.

Gertrude Bauer Mahon argued the cause for appellee.

Bernard A. Berkman for American Civil Liberties Union and the Ohio Civil Liberties Union, as amici curiae.

Briefs of Counsel, p 1542, infra.

OPINION OF THE COURT

Mr. Justice Clark delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio St 427, 428, 11 Ohio Ops 2d 169, 166 NE2d 387, 388.

*[367 US 644]

*On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their head-

1. The statute provides in pertinent part that

"No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture. . . .

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

quarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened[2] and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant be-

*[367 US 615]

cause she had been "belligerent" *in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." 170 Ohio St, at 430, 166 NE2d, at 389. The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to 'offend "a sense of justice,"' " but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." 170 Ohio St, at 431, 166 NE2d, at 389, 390.

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Four-

*[367 US 616]

teenth Amendment *does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. On this appeal, of which we have noted probable jurisdiction, 364 US 868, 5 L ed 2d 90, 81

2. A police officer testified that "we did pry the screen door to gain entrance"; the attorney on the scene testified that a policeman "tried . . . to kick in the door" and then "broke the glass in the door and somebody reached in and opened the door and let them in"; the appellant testified that "The back door was broken."

S Ct 111, it is urged once again that we review that holding.[3]

I.

Seventy-five years ago, in Boyd v United States, 116 US 616, 630, 29 L ed 746, 751, 6 S Ct 524 (1886), considering the Fourth[4] and Fifth Amendments as running "almost into each other"[5] on the facts before it, this Court held that the doctrines of those Amendments "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his

*[367 US 647]

drawers, *that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of these Amendments]."

The Court noted that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." At p. 635.

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Cong 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." At p. 638.

Less than 30 years after Boyd, this Court, in Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177 (1914), stated that "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal sys-

3. Other issues have been raised on this appeal but, in the view we have taken of the case, they need not be decided. Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that Wolf be overruled, the amicus curiae, who was also permitted to participate in the oral argument, did urge the Court to overrule Wolf.

4. "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."

5. The close connection between the concepts later embodied in these two Amendments had been noted at least as early as 1765 by Lord Camden, on whose opinion in Entick v Carrington, 19 Howell's State Trials, 1029, the Boyd court drew heavily. Lord Camden had noted, at 1073:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

tem with the enforcement of the laws." At pp. 391, 392.

*[367 US 618]

*Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At p. 393.

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." At p. 398. Thus, in the year 1914, in the Weeks Case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." Wolf v Colorado, supra (338 US at 28). This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." Holmes, J., Silverthorne Lumber Co. v United States, 251 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426 (1920). It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ," Weeks v United States, supra (232 US at 392), and that such evidence "shall not be used at all." Silverthorne Lumber Co. v United States, supra (251 US, at 392).

*[367 US 619]

*There are in the cases of this Court some passing references to the Weeks rule as being one of evidence. But the plain and unequivocal language of Weeks—and its later paraphrase in Wolf—to the effect that the Weeks rule is of constitutional origin, remains entirely undisturbed. In Byars v United States, 273 US 28, 71 L ed 520, 47 S Ct 248 (1927), a unanimous Court declared that "the doctrine [cannot] . . . be tolerated *under our constitutional system*, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed." At pp. 29, 30 (emphasis added). The Court, in Olmstead v United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376 (1928), in unmistakable language restated the Weeks rule:

"The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." At p. 462.

In McNabb v United States, 318 US 332, 87 L ed 819, 63 S Ct 608 (1943), we note this statement:

"[A] conviction in the federal courts, the foundation of which is

evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. Boyd v United States . . . Weeks v United States . . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers

*[367 US 650]

was greatly magnified' *. . . or 'who have been unlawfully held incommunicado without advice of friends or counsel' . . . ." At pp. 339, 340.

Significantly, in McNabb, the Court did then pass on to formulate a rule of evidence, saying, "[i]n the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue [for] . . . [t]he principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." At pp. 340, 341.

II.

In 1949, 35 years after Weeks was announced, this Court, in Wolf v Colorado (US) supra, again for the first time,[6] discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

"[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." At p. 28.

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause," cf. Palko v Connecticut, 302 US 319, 82 L ed 288, 58 S Ct 149 (1937), and announcing that it "stoutly adhere[d]" to the Weeks decision, the Court decided that the Weeks exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." 338 US, at 27–29. The Court's reasons for not

*[367 US 651]

considering essential to the *right to privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which Wolf was based.

The Court in Wolf first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of Weeks was "particularly impressive" (at p. 29); and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." At pp. 31, 32. While in 1949, prior to the Wolf Case, almost two-thirds of the States

6. See, however, National Safe Deposit Co. v Stead, 232 US 58, 58 L ed 504, 34 S Ct 209 (1914), and Adams v New York, 192 US 585, 48 L ed 575, 24 S Ct 372 (1904).

were opposed to the use of the exclusionary rule, now, despite the Wolf Case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule. See Elkins v United States, 364 US 206, Appx, pp. 224–232, 4 L ed 2d 1669, 1681–1687, 80 S Ct 1437 (1960). Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." People v Cahan, 44 Cal 2d 434, 445, 282 P2d 905, 911, 50 ALR2d 513 (1955). In connection with this California case, we note that the second basis elaborated in Wolf in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have

*[367 US 652]

been afforded "the *right to privacy."[7] 338 US, at 30. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been

*[367 US 653]

*recognized by this Court since Wolf. See Irvine v California, 347 US 128, 137, 98 L ed 561, 571, 74 S Ct 381 (1954).

Likewise, time has set its face against what Wolf called the "weighty testimony" of People v Defore, 242 NY 13, 150 NE 585 (1926). There Justice (then Judge) Cardozo, rejecting adoption of the Weeks exclusionary rule in New York, had said that "[t]he Federal rule as it stands is either too strict or too lax." 242 NY, at 22, 150 NE, at 588. However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Con-

7. Less than half of the States have any criminal provisions relating directly to unreasonable searches and seizures. The punitive sanctions of the 23 States attempting to control such invasions of the right of privacy may be classified as follows:

Criminal Liability of Affiant for Malicious Procurement of Search Warrant.—Ala Code, 1958, Tit 15, § 99; Alaska Comp Laws Ann, 1949, § 66-7-15; Ariz Rev Stat Ann, 1956, § 13-1451; Cal Pen Code § 170; Fla Stat, 1959, § 933.16; Ga Code Ann, 1953, § 27-301; Idaho Code Ann, 1948, § 18-709; Iowa Code Ann, 1950, § 751.38; Min Stat Ann, 1947, § 613.54; Mont Rev Codes Ann, 1947, § 94-35-122; Nev Rev Stat §§ 199.130, 199.140; NJ Stat Ann, 1940, § 33:1-64; NY Pen Law § 1786, NY Code Crim Proc § 811; NC Gen Stat, 1953, § 15-27 (applies to "officers" only); ND Century Code Ann, 1960, §§ 12-17-08, 29-29-18; Okla Stat, 1951, Tit 21, § 585, Tit 22, § 1239; Ore Rev Stat, § 141.990; SD Code, 1939 (Supp 1960), § 34.9904; Utah Code Ann, 1953, § 77-54-21.

Criminal Liability of Magistrate Issuing Warrant Without Supporting Affidavit.—NC Gen Stat, 1953, § 15-27; Va Code Ann, 1960 Replacement Volume, § 19.1-89.

Criminal Liability of Officer Willfully Exceeding Authority of Search Warrant.—Fla Stat Ann, 1944, § 933.17; Iowa Code Ann, 1950, § 751.39; Minn Stat Ann, 1950, § 613.54; Nev Rev Stat § 199.450; NY Pen Law § 1847, NY Code Crim Proc § 812; ND Century Code Ann, 1960, §§ 12-17-07, 29-29-19; Okla Stat, 1951, Tit 21, § 536, Tit 22, § 1240; SD Code, 1939 (Supp 1960), § 34.9905; Tenn Code Ann, 1955, § 40-510; Utah Code Ann, 1953, § 77-54-22.

Criminal Liability of Officer for Search with Invalid Warrant or no Warrant.—Idaho Code Ann, 1948, § 18-703; Minn Stat Ann, 1947, §§ 613.53, 621.17; Mo Ann Stat, 1953, § 558.190; Mont Rev Codes Ann, 1947, § 94-3506; NJ Stat Ann, 1940, § 33:1-65; NY Pen Law § 1846; ND Century Code Ann, 1960, § 12-17-06; Okla Stat Ann, 1958, Tit 21, § 535; Utah Code Ann, 1953, § 76-28-52; Va Code Ann, 1960 Replacement Volume, § 19.1-88; Wash Rev Code §§ 10.79.010, 10.79.045.

stitution by state agents, Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437, supra; the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched, Jones v United States, 362 US 257, 266, 267, 4 L ed 2d 697, 705, 706, 80 S Ct 725, 78 ALR2d 233 (1960); and, finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, Rea v United States, 350 US 214, 100 L ed 233, 76 S Ct 292 (1956). Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution, and, at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine." United States v Rabinowitz, 339 US 56, 63, 94 L ed 653, 658, 70 S Ct 430 (1950).

Headnote 1
Headnote 2

It, therefore, plainly appears that the factual considerations supporting the failure of the Wolf Court to include the Weeks exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

III.

*[367 US 654]

*Some five years after Wolf, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the Weeks exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [Weeks] rule." Irvine v California, supra (347 US, at 134). There again it was said:

"Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment." Ibid.

And only last Term, after again carefully re-examining the Wolf doctrine in Elkins v United States (US) supra, the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement in Wolf "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the Weeks Case. At p. 213. At the same time, the Court pointed out, "the underlying constitutional doctrine which Wolf established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested . . . ." Ibid. The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close

Headnote 3

*[367 US 655]

the only *courtroom door remaining

open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in Wolf that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even Wolf "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the Boyd, Weeks and Silverthorne Cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was

*[367 US 656]

*logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf Case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v United States, supra (364 US at 217).

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." Wolf v Colorado, supra (338 US, at 27). This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, in-

cluding, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. Rogers v Richmond, 365 US 534, 5 L ed 2d 760, 81 S Ct 735 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods papers, effects, documents, etc.? We

*[367 US 657]

find that, *as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation"[8] in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," Bram v United States, 168 US 532, 543, 544, 42 L ed 568, 573, 574, 18 S Ct 183 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." Feldman v United States, 322 US 487, 489, 490, 88 L ed 1408, 1412, 1413, 64 S Ct 1082, 154 ALR 982 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. Rochin v California, 342 US 165, 173, 96 L ed 183, 190, 72 S Ct 205, 25 ALR2d 1396 (1952).

Headnote 5

V.

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in Elkins, "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between

Headnote 6

Headnote 7

*[367 US 658]

*state and federal courts." 364 US, at 221. Such a conflict, hereafter needless, arose this very Term, in Wilson v Schnettler, 365 US 381, 5 L ed 2d 620, 81 S Ct 632 (1961), in which, and in spite of the promise made by Rea, we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In nonexclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across

8. But compare Waley v Johnston, 316 US 101, 104, 86 L ed 1302, 1304, 62 S Ct 964, and Chambers v Florida, 309 US 227, 236, 84 L ed 716, 721, 60 S Ct 472, with Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, and Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359.

the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as Rea and Schnettler, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.

Headnote 8

"However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." Miller v United States, 357 US 301, 313, 2 L ed 2d 1332, 1340, 78 S Ct 1190 (1958). Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. Byars v United States, 273 US 28, 71 L ed 520, 47 S Ct 248 (1927); Lustig v United States, 338 US 74, 93 L ed 1819, 69 S Ct 1372 (1949).

*[367 US 659]

*There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." People v Defore, 242 NY, at 21, 150 NE, at 587. In some cases this will undoubtedly be the result.[9] But, as was said in Elkins, "there is another consideration—the imperative of judicial integrity." 364 US, at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v United States, 277 US 438, 485, 72 L ed 944, 959, 48 S Ct 564, 66 ALR 376 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. Elkins v United States, supra (364 US at 218). The Court noted that

"The federal courts themselves have operated under the exclusionary rule of Weeks for almost half

9. As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with Burns v Ohio, 360 US 252, 3 L ed 2d 1209, 79 S Ct 1164, Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR 2d 1055, and Pennsylvania ex rel. Herman v Claudy, 350 US 116, 100 L ed 126, 76 S Ct 223. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

Headnote 9

*[367 US 660]
a century; *yet it has not been suggested either that the Federal Bureau of Investigation[10] has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting but seemingly inexorable." Id. 364 US at 218, 219.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.[11] Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SEPARATE OPINIONS

*[367 US 661]
*Mr. Justice Black, concurring.

For nearly forty years, since the decision of this Court in Weeks v United States,[1] federal courts have refused to permit the introduction into evidence against an accused of his papers and effects obtained by "unreasonable searches and seizures" in violation of the Fourth Amendment. In Wolf v Colorado, decided in 1949, however, this Court held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[2] I concurred in that holding on these grounds:

"For reasons stated in my dissenting opinion in Adamson v. California, 332 U.S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures,' but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to

10. See the remarks of Mr. Hoover, Director of the Federal Bureau of Investigation, FBI Law Enforcement Bulletin, September, 1952, pp. 1-2, quoted in Elkins v United States, 364 US 206, 218, 219, note 8, 4 L ed 2d 1669, 1678, 1679, 80 S Ct 1437.

11. Cf. Marcus v Search Warrant of Property, 6 L ed 2d post, p. 1127.

1. 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, decided in 1914.

2. 338 US 25, 33, 93 L ed 1782, 1788, 69 S Ct 1359.

be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[3]

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evi-

*[367 US 662]

dence, and I am *extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem,[4] has long been recognized and, indeed, was expressly made the ground for this Court's holding in Boyd v United States.[5] There the Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[6] It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the Wolf Case.[7] And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the Boyd doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, sound-

*[367 US 663]

ly based in reason, *and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the Boyd Case:

"[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[8]

3. Id. 338 US at 39, 40.

4. The interrelationship between the Fourth and the Fifth Amendments in this area does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately. See Feldman v United States, 322 US 487, 502, 503, 88 L ed 1408, 1419, 1420, 64 S Ct 1082, 154 ALR 982 (dissenting opinion); Frank v Maryland, 359 US 360, 374-384, 3 L ed 2d 877, 886-892, 79 S Ct 804 (dissenting opinion).

5. 116 US 616, 29 L ed 746, 6 S Ct 524.

6. Id. 116 US at 633.

7. 338 US at 47, 48.

8. 116 US at 635. As the Court points out, Mr. Justice Bradley's approach to interpretation of the Bill of Rights stemmed directly from the spirit in which that great charter of liberty was offered for adoption on the floor of the House of Representatives by its framer, James Madison: "If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice

The case of Rochin v California,[9] which we decided three years after the Wolf Case, authenticated, I think, the soundness of Mr. Justice Bradley's and Mr. Justice Rutledge's reliance upon the interrelationship between the Fourth and Fifth Amendments as requiring the exclusion of unconstitutionally seized evidence. In the Rochin Case, three police officers, acting with neither a judicial warrant nor probable cause, entered Rochin's home for the purpose of conducting a search and broke down the door to a bedroom occupied by Rochin and his wife. Upon their entry into the room, the officers saw Rochin pick up and swallow two small capsules. They immediately seized him and took him in handcuffs to a hospital where

*[367 US 664]

the capsules *were recovered by use of a stomach pump. Investigation showed that the capsules contained morphine and evidence of that fact was made the basis of his conviction of a crime in a state court.

When the question of the validity of that conviction was brought here, we were presented with an almost perfect example of the interrelationship between the Fourth and Fifth Amendments. Indeed, every member of this Court who participated in the decision of that case recognized this interrelationship and relied on it, to some extent at least, as justifying reversal of Rochin's conviction. The majority, though careful not to mention the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," showed at least that it was not unaware that such a provision exists, stating: "Coerced confessions offend the community's sense of fair play and decency. . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[10] The methods used by the police thus were, according to the majority, "too close to the rack and the screw to permit of constitutional differentiation,"[11] and the case was reversed on the ground that these methods had violated the Due Process Clause of the Fourteenth Amendment in that the treatment accorded Rochin was of a kind that "shocks the conscience," "offend[s] 'a sense of justice'" and fails to "respect certain decencies of civilized conduct."[12]

I concurred in the reversal of the Rochin Case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision

*[367 US 665]

against self-incrimination *applicable to the States and that, given a broad rather than a narrow construction, that provision barred the introduction of this "capsule" evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak.[13] In reaching this conclusion I cited and relied on the Boyd Case, the constitutional doctrine of which was, of course, necessary to my disposition of the case. At that time, however, these views were very definitely in

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will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Congress 439 (1789).

9. 342 US 165, 96 L ed 183, 72 S Ct 205, 25 ALR2d 1396.

10. Id. 342 US at 173.

11. Id. 342 US at 172.

12. Id. 342 US at 172, 173.

13. Id. 342 US at 174-177.

the minority for only Mr. Justice Douglas and I rejected the flexible and uncertain standards of the "shock-the-conscience test" used in the majority opinion.[14]

Two years after Rochin, in Irvine v California,[15] we were again called upon to consider the validity of a conviction based on evidence which had been obtained in a manner clearly unconstitutional and arguably shocking to the conscience. The five opinions written by this Court in that case demonstrate the utter confusion and uncertainty that had been brought about by the Wolf and Rochin decisions. In concurring, Mr. Justice Clark emphasized the unsatisfactory nature of the Court's "shock-the-conscience test," saying that this "test" "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free."[16]

*[367 US 666]

*Only one thing emerged with complete clarity from the Irvine Case—that is that seven Justices rejected the "shock-the-conscience" constitutional standard enunciated in the Wolf and Rochin Cases. But even this did not lessen the confusion in this area of the law because the continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a majority opinion in the Irvine Case left the situation at least as uncertain as it had been before.[17] Finally, today, we clear up that uncertainty. As I understand the Court's opinion in this case, we again reject the confusing "shock-the-conscience" standard of the Wolf and Rochin Cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the Boyd Case. I fully agree with Mr. Justice Bradley's opinion that the two Amendments upon which the Boyd doctrine rests are of vital importance in our constitutional scheme of liberty and that both are entitled to a liberal rather than a niggardly interpretation. The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the Boyd doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

Mr. Justice Douglas, concurring.

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure.

*[367 US 667]

The police entered a home *forcefully, and seized documents that were later used to convict the occupant of a crime.

She lived alone with her fifteen-year-old daughter in the second-floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and

14. For the concurring opinion of Mr. Justice Douglas see id. 342 US at 177–179.

15. 347 US 128, 98 L ed 561, 74 S Ct 381.

16. Id. 347 US at 138.

17. See also United States v Rabinowitz, 339 US 56, 66–68, 94 L ed 653, 660, 661, 70 S Ct 430 (dissenting opinion).

the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home, who was wanted for questioning in connection with a recent bombing."[1] To the appellant's question, however, they replied only that they wanted to question her and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene; and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant; but the officer refused to let her see it although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper

*[367 US 668]

*from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and of the basement of the house.

The testimony concerning the search is largely nonconflicting. The approach of the officers; their long wait outside the home, watching all its doors; the arrival of reinforcements armed with a paper;[2] breaking into the house; putting their hands on appellant and handcuffing her; numerous officers ransacking through every room and piece of furniture, while the appellant sat, a prisoner in her own bedroom. There is direct conflict in the testimony, however, as to where the evidence which is the basis of this case was found. To understand the meaning of that conflict, one must understand that this case is based on the knowing possession[3] of four little pamphlets, a couple of photographs and a little pencil doodle—all

1. This "confidential source" told the police, in the same breath, that "there was a large amount of policy paraphernalia being hidden in the home."

2. The purported warrant has disappeared from the case. The State made no attempt to prove its existence, issuance or contents, either at the trial or on the hearing of a preliminary motion to suppress. The Supreme Court of Ohio said: "There is, in the record, considerable doubt as to whether there ever was *any* warrant for the search of defendant's home. . . . Admittedly . . . there was no warrant authorizing a search . . . for any 'lewd, or lascivious book . . . print, [or] picture.'" 170 Ohio St 427, 430, 11 Ohio Ops 2d 169, 166 NE2d 387, 389. (Emphasis added.)

3. Ohio Rev Code, § 2905.34: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture . . . or drawing . . . of an indecent or immoral nature . . . . Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

of which are alleged to be pornographic.

According to the police officers who participated in the search, these articles were found, some in appel-
*[367 US 669]
lant's *dressers and some in a suitcase found by her bed. According to appellant, most of the articles were found in a cardboard box in the basement; one in the suitcase beside her bed. All of this material, appellant—and a friend of hers—said were odds and ends belonging to a recent boarder, a man who had left suddenly for New York and had been detained there. As the Supreme Court of Ohio read the statute under which appellant is charged, she is guilty of the crime whichever story is true.

The Ohio Supreme Court sustained the conviction even though it was based on the documents obtained in the lawless search. For in Ohio evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." State v Mapp, 170 Ohio St 427, syllabus 2, 11 Ohio Ops 2d 169, 166 NE2d 387; State v Lindway, 131 Ohio St 166, 5 Ohio Ops 538, 2 NE2d 490. This evidence would have been inadmissible in a federal prosecution. Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177; Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437. For, as stated in the former decision, "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints . . . ." Id. 232 US 391, 392. It was therefore held that evidence obtained (which in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution.

We held in Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the Weeks Case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle.

*[367 US 670]
*As stated in the Weeks Case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 US, at 393.

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home (to use an expression of Mr. Justice Murphy, Wolf v Colorado, at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action with the hierarchy of the police system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in Wolf v Colorado, at 42, "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if ex-

clusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. 338 US 42–44. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, Wolf v Colorado in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter," as Mr. Justice Rutledge said in his dissent. See 338 US, at 47.

Wolf v Colorado (US) supra, was decided in 1949. The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which Wolf
*[367 US 671]
imported into the law. See *Stefanelli v Minard, 342 US 117, 96 L ed 138, 72 S Ct 118; Rea v United States, 350 US 214, 100 L ed 233, 76 S Ct 292; Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437, supra; Monroe v Pape, 365 US 167, 5 L ed 2d 492, 81 S Ct 473. It is an appropriate case because the facts it presents show—as would few other cases—the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person.

It is also an appropriate case in the narrower and more technical sense. The issues of the illegality of the search and the admissibility of the evidence have been presented to the state court and were duly raised here in accordance with the applicable Rule of Practice.[4] The question was raised in the notice of appeal, the jurisdictional statement and in appellant's brief on the merits.[5] It is true that argument was mostly directed to another issue in the case, but that is often the fact. See Rogers v Richmond, 365 US 534, 535–540, 5 L ed 2d 760, 763–766, 81 S Ct 760. Of course, an earnest advocate of a position always believes that, had he only an additional opportunity for argument, his side would win. But, subject to the sound discretion of a court, all argument must at last come to a halt. This is especially so as to an issue about which this Court said last year that "The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here." Elkins v United States, supra (364 US 216).

Moreover, continuance of Wolf v Colorado in its full vigor breeds the unseemly shopping around of the kind revealed in Wilson v Schnettler, 365 US 381, 5 L ed 2d 620, 81 S Ct 632. Once evidence, inadmissible in a federal court, is admissible in
*[367 US 672]
*a state court a "double standard" exists which, as the Court points out, leads to "working arrangements" that undercut federal policy and reduce some aspects of law enforcement to shabby business. The rule that supports that practice does

4. "The notice of appeal . . . shall set forth the questions presented by the appeal . . . . Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." Rule 10(2)(c), Rules of the Supreme Court of the United States.

5. "Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the Prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1 of the United States Constitution . . . ?"

not have the force of reason behind it.

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Whittaker join, dissenting.

In overruling the Wolf Case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for stare decisis, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the Wolf rule represents sounder Constitutional doctrine than the new rule which now replaces it.

I.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining Wolf. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate

*[367 US 673]

points, the new and *pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code making criminal the *mere* knowing possession or control of obscene material,[1] and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.[2] That was the principal issue which was decided by the Ohio Supreme Court,[3] which was tendered by appellant's Jurisdictional Statement,[4] and which was

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1. The material parts of that law are quoted in note 1 of the Court's opinion. Ante, p 1083.

2. In its note 3, ante, p 1085, the Court, it seems to me, has turned upside down the relative importance of appellant's reliance on the various points made by him on this appeal.

3. See 170 Ohio St 427, 11 Ohio Ops 2d 169, 166 NE2d 387. Because of the unusual provision of the Ohio Constitution requiring "the concurrence of at least all but one of the judges" of the Ohio Supreme Court before a state law is held unconstitutional (except in the case of affirmance of a holding of unconstitutionality by the Ohio Court of Appeals), Ohio Const, Art 4, § 2, the State Supreme Court was compelled to uphold the constitutionality of § 2905.34, despite the fact that four of its seven judges thought the statute offensive to the Fourteenth Amendment.

4. Respecting the "substantiality" of the federal questions tendered by this appeal, appellant's Jurisdictional Statement contained the following:

"The Federal questions raised by this appeal are substantial for the following reasons:

"The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual 'to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional rights of the individual' (Justice Herbert's dissenting Opinion, Appendix 'A'). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code [the latter two Sections providing exceptions to the coverage of § 2905.34 and related provisions of Ohio's obscenity statutes] are read together, . . . they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the de-

briefed[5] and argued[6] in this Court.

*[367 US 674]

*In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule Wolf. With all respect for the views of the majority, and recognizing that stare decisis

*[367 US 675]

carries different weight *in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining Wolf.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For in overruling Wolf the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable)[7] and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene,[8] surely presents

fendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions."

5. The appellant's brief did not urge the overruling of Wolf. Indeed it did not even cite the case. The brief of the appellee merely relied on Wolf in support of the State's contention that appellant's conviction was not vitiated by the admission in evidence of the fruits of the alleged unlawful search and seizure by the police. The brief of the American and Ohio Civil Liberties Unions, as amici, did in one short concluding paragraph of its argument "request" the Court to re-examine and overrule Wolf, but without argumentation. I quote in full this part of their brief:

"This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings."

6. Counsel for appellant on oral argument, as in his brief, did not urge that Wolf be overruled. Indeed, when pressed by questioning from the bench whether he was not in fact urging us to overrule Wolf, counsel expressly disavowed any such purpose.

7. "2905.37 Legitimate Publications Not Obscene.

"Sections 2905.33 to 2905.36, inclusive of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

§ 3767.01(C)

"This section and sections 2905.34, . . . 2905.37 . . . of the Revised Code shall not affect . . . any newspaper, magazine, or other publication entered as second class matter by the post-office department."

8. The Ohio Supreme Court, in its construction of § 2905.34, controlling upon us here, refused to import into it any other exceptions than those expressly provided by the statute. See note 7, supra. Instead it held that "If anyone looks at a book and

*[367 US 676]

a Constitutional *question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of Wolf, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the Wolf Case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "nonexclusionary" aspect, Wolf did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the Federal Constitution, the Fourth and Fifth Amendments, not applicable to the States." People v Defore, 242 NY 13, 20, 150 NE 585. Though, of course, not reflecting the full measure of this continuing reliance, I find that during the last three Terms, for instance, the issue of the inadmissibility of illegally state-obtained evidence appears on an average of about fifteen times per Term just in the in forma pauperis cases summarily disposed of by us. This would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on Wolf, and that were we determined to re-examine that doctrine we would not lack future opportunity.

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling Wolf without full-dress argu-

*[367 US 677]

ment *is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one to be sure with explicit misgivings.[9] I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering Wolf, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set

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finds it lew he is forthwith, under this legislation, guilty . . . ."

9. See Wolf v Colorado, 338 US at 39, 40, Irvine v California, 347 US 128, 133, 134, and at 138, 139, 98 L ed 561, 569, 572, 74 S Ct 381. In the latter case, decided in 1954, Mr. Justice Jackson, writing for the majority, said (at p 134): "We think that the Wolf decision should not be overruled, for the reasons so persuasively stated therein." Compare Schwartz v Texas, 344 US 199, 97 L ed 231, 73 S Ct 232, and Stefanelli v Minard, 342 US 117, 96 L ed 138, 72 S Ct 118, in which the Wolf Case was discussed and in no way disapproved. And see Pugach v Dollinger, 365 US 458, 5 L ed 2d 678, 81 S Ct 650, which relied on Schwartz.

down for reargument, in view of the inadequate briefing and argument we have received on the Wolf point. To all intents and purposes the Court's present action amounts to a summary reversal of Wolf, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

II.

*[367 US 678]

*Essential to the majority's argument against Wolf is the proposition that the rule of Weeks v United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, cf. Wolf v Colorado, 338 US at 39, 40 (concurring opinion), I shall assume, for present purposes, that the Weeks rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is "part and parcel" of the Fourth Amendment (2) Wolf held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the Weeks exclusionary rule should also be enforced against the States.[10]

This reasoning ultimately rests on the unsound premise that because Wolf carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment (338 US, at 27), it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty,"
*[367 US 679]
*and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in Wolf was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as Wolf itself pointed out (338 US, at 26), has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." (Id. 338 US, at 27.) It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in Wolf of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a pre-existing legal context on which both

10. Actually, only four members of the majority support this reasoning. See, p 1107, infra.

interpret[illegible] decisions and enabling statutes [illegible] at least build.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable" —say in a tort action against state officers—we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But in this instance more than that is involved, for here we are reviewing not a determination that what the state police did was Constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could Constitutionally punish. Since there is not the slightest suggestion that Ohio's policy is "affirmatively to sanction . . . police incursion into privacy" (338 US, at 28), compare Marcus v Search Warrants of Property, 367 US 717, 6 L ed 2d 1127, 81 S Ct 1708, what the Court is now do-
*[367 US 680]
ing is to impose *upon the States not only federal substantive standards of "search and seizure" but also the basic federal remedy for violation of those standards. For I think it entirely clear that the Weeks exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on Wolf seem to me notably unconvincing.

First, it is said that "the factual grounds upon which Wolf was based" have since changed, in that more States now follow the Weeks exclusionary rule than was so at the time Wolf was decided. While that is true, a recent survey indicates that at present one-half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies. Berman and Oberst, Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure, 55 NW L Rev 525, 532-533. But in any case surely all this is beside the point, as the majority itself indeed seems to recognize. Our concern here, as it was in Wolf, is not with the desirability of that rule but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one. Moreover, the very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary
*[367 US 681]
*widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the Weeks rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a

time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the Weeks rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject for New York in People v Defore, 242 NY 13, 150 NE 585, the Weeks exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the Weeks rule on the States makes "very good sense," in that it will promote recognition by state and federal officials of their "mutual obligation to respect the same fundamental criteria" in their approach to law enforcement, and will avoid "'needless conflict between state and federal courts.'" Indeed the majority now finds an in-

*[367 US 682]

congruity *in Wolf's discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is for me the strength of that decision.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts. Our role in promulgating the Weeks rule and its extensions in such cases as Rea, Elkins, and Rios[11] was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done, as, for instance, the California Supreme Court did in People v Cahan, 44 Cal 2d 434, 282 P2d 905, 50 ALR2d 513, with reference to procedures in the California courts or as this Court did in Weeks for the lower federal courts.

11. Rea v United States, 350 US 214, 100 L ed 233, 76 S Ct 292; Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437; Terrones Rios v United States, 364 US 253, 4 L ed 2d 1688, 80 S Ct 1431.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court,

*[367 US 683]

tested in some final appellate *court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds we deal ther with a finished product in the creation of which we are allowed no hand, and our task, far from being one of overall supervision, is, speaking generally, restricted to a determination of whether the prosecution was Constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the Weeks rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the Weeks rule to be as a means of securing Constitutional rights.

Finally, it is said that the overruling of Wolf is supported by the established doctrine that the admission in evidence of an involuntary confession renders a state conviction Constitutionally invalid. Since such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial, the argument continues, this doctrine is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is Constitutionally significant to the fairness of a trial. I believe this analogy is not a true one. The "coerced confession" rule is certainly not a rule that any illegally obtained statements may not be used in evidence. I would suppose that a state-

*[367 US 684]

ment which is procured during *a period of illegal detention, McNabb v United States, 318 US 332, 87 L ed 819, 63 S Ct 608, is, as much as unlawfully seized evidence, illegally obtained, but this Court has consistently refused to reverse state convictions resting on the use of such statements. Indeed it would seem the Court laid at rest the very argument now made by the majority when in Lisenba v California, 314 US 219, 86 L ed 166, 62 S Ct 280, a state-coerced confession case, it said (at 235):

"It may be assumed [that the] treatment of the petitioner [by the police] . . . deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.

"But illegal acts, as such, committed in the course of obtaining a confession . . . do not furnish an answer to the constitutional question we must decide. . . . The gravamen of his complaint is the unfairness of the *use* of his confessions, and what occurred in their procurement is relevant only as it bears on that issue." (Emphasis supplied.)

The point, then, must be that in requiring exclusion of an involun-

tary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure. The operative assumption of our procedural system is that "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby the accused was interrogated in secret for hours on end." Watts v Indiana, 338 US 49, 54, 93 L ed 1801, 1806, 69 S Ct 1347, 1357. See Rogers v Richmond, 365 US 534, 541, 5 L ed 2d 760, 766, 81 S Ct 735. The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not,

*[367 US 685]

apart *from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed, 1824), c 46, § 34. That this is a *procedural right,* and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.

This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling Wolf, and not for the basic rationale by which four members of the majority have reached that result. For my Brother Black is unwilling to subscribe to their view that the Weeks exclusionary rule derives from the Fourth Amendment itself (see ante, p. 1093), but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth (see ante, pp. 1094, 1096).[12] On that score I need only say that whatever the validity of the "Fourth-Fifth Amendment" correlation which the Boyd Case (116 US 616, 29 L ed 746, 6 S Ct 524) found, see 8 Wigmore Evidence (3d ed 1940), § 2184, we have only very recently again reiterated the long-established doctrine of this Court that

*[367 US 686]

*the Fifth Amendment privilege against self-incrimination is not applicable to the States. See Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution

12. My Brother Stewart concurs in the Court's judgment on grounds which have nothing to do with Wolf.

places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

Memorandum of Mr. Justice Stewart.

Headnote 10

Agreeing fully with Part I of Mr. Justice Harlan's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

NOTE

An annotation on "Admissibility of evidence obtained by illegal search and seizure" appears p. 1544, infra.

PART VIII. SPECIAL PROCEEDINGS

Rule 37. Search and Seizure.

(a) Search Warrant – Issuance and Contents.

(1) A search warrant authorized by law shall issue only on

(i)(aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(bb) sworn testimony taken on the record, and

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified, and

(iv) shall direct that it be served between 7:00 a.m. and 10:00 p.m., but if an affiant is positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return With Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a

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copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) In Camera Hearing. A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in camera hearing, the court shall

grant or deny the motion to suppress on the record, and shall make written findings concerning the validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Amended by Chapter 17 SLA 1969 effective June 25, 1969, by Supreme Court Order 157 effective February 15, 1973 and by Supreme Court Order 505 effective April 16, 1982)

(a) CROSS REFERENCES: AS 12.35.010; AS 12.35.020; AS 12.35.030; Crim. Forms 46, 47

(b) CROSS REFERENCES: AS 12.35.050; AS 12.35.080; AS 12.35.090; AS 12.35.100; AS 12.35.110; Crim. Form 48

(c) CROSS REFERENCE: Crim. Form 49

EDITOR'S NOTE: Section 43, Chapter 143, Session Laws of Alaska 1982, provides that "AS 12.35.015, added by sec. 18 of this Act [Chapter 143, Session Laws of Alaska 1982], has the effect of changing Rule 37, Rules of Criminal Procedure, by allowing search warrants to be issued upon sworn oral testimony communicated by telephone or other appropriate means."

its consideration of relevant factors at sentencing, the superior court committed reversible error. Kelly v. State, Op. No. 2268, 622 P2d 432 (Alaska 1981).

It was not error to impose sentence without a psychological or psychiatric evaluation where defendant did not request such evaluation prior to sentencing and where there was no showing of how it would have benefited him. Spencer v. State, Op. No. 80, 642 P2d 1371. (Alaska 1982).

Criminal Rule 36

Collateral References

Same as Fed R. Crim. P. 36

2 Wright, Federal Practice and Procedure §§ 611–612 (1969)

Cases

The issue whether a superior court has power to forfeit an aircraft as condition of probation for unlawful possession and transportation of contraband by an airplane is not timely raised by appeal taken after a February 1973 order which amends an August 1972 judgment of conviction by identifying the airplane ordered forfeited. Such issue will not be considered, absent a showing of surprise or injustice or a showing of reason for an accused's failure to appeal the forfeiture within the required ten days. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

Postconviction proceedings, such as a motion for new trial or for an arrest of judgment, extend the period for taking an appeal. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

A motion to correct a clerical error in a criminal judgment can be made at any time to conform the judgement to the court's original intent insofar as that intent is clearly ascertainable from the record. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

An order entered to correct a clerical error in a criminal judgment may be appealed, but some prejudice such as surprise, must be shown. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

The identification of an airplane ordered forfeited, as a condition of probation, of an accused, who was convicted of unlawfully possessing and transporting contraband by airplane, is a proper modification of a clerical mistake. Graybill v. State, Op. No. 1045, 522 P2d 539 (Alaska 1974).

Where the effect of a judgment amendment is to increase the severity of a sentence, Criminal Rule 36 must be interpreted to be applicable only to sentencing errors which obviously conflict with the intention of the court. Shagloak v. State, Op. No. 1688, 582 P2d 1034 (Alaska 1978).

Under Criminal Rule 36, only an objectively ascertainable mistake—a mistake which can be determined by contemporaneous record evidence—will justify increasing a sentence. Shagloak v. State, Op. No. 1688, 582 P2d 1034 (Alaska 1978).

Criminal Rule 37

Collateral References

Generally

3 Wright, Federal Practice and Procedure § 678 (1969)

(a) Similar to Fed. R. Crim. P. 41(c)

3 Wright, Federal Practice and Procedure §670 (1979 Supp.)

(b) Similar to Fed. R. Crim. P. 41(d)

3 Wright, Federal Practice and Procedure §§ 671–672 (1969)

(c) Similar to Fed. R. Crim. P. 41(e), (f)

3 Wright, Federal Practice and Procedure § 673 (1979 Supp.)

Cases

Where defendant failed to move for return of property under Criminal Rule 37(c), the admission of such property taken from defendant was not error. Goss v. State, Op. No. 76, 368 P2d 884 (Alaska 1962).

Right to attack search of suitcase and seizure of gun as illegal was waived by pleading guilty to a charge of illegal possession of firearm. Rivett v. State, Op. No. 249, 395 P2d 264 (Alaska 1964).

Denial of motion to suppress evidence sustained where probable cause existed for arresting appellant without warrant and evidence was taken from him as an incident to such arrest. Maze v. State, Op. No. 400, 425 P2d 235 (Alaska 1967); Merrill v. State, Op. No. 392, 423 P2d 686 (Alaska 1967).

Where in the investigation of a rape case the accused, his father and an accused accomplice were voluntarily present in the police station, and the police officer learned through a statement of the accomplice that a note written by victim was in the accused's possession, constitutional provisions proscribing unreasonable searches and seizures did not prohibit seizure of the note to prevent its destruction or removal and motion to suppress the note as illegally obtained evidence was properly defined. Woltz, et al. v. State, Op. No. 433, 431 P2d 502 (Alaska 1967).

Since order of trial court suppressing evidence obtained by search would likely result in terminating the prosecution and involved a controlling question of law, review was appropriate. State v. Stump, Op. No. 1250, 547 P2d 305 (Alaska 1976).

Search warrant need not set out contents of the affidavit on which it is issued. Kirstich v. State, Op. No. 1264, 550 P2d 796 (Alaska 1976).

Valid service of a search warrant between the hours of 10:00 p.m. and 7:00 a.m. requires a determination by issuing judge that the warrant may be served at any time. State v. Shelton, Op. No. 1311, 554 P2d 404 (Alaska 1976).

That warrant was presented to judge in the middle of the night, with affidavit containing requisite showing for nighttime service under this rule and requesting an immediate search, clearly indicates that nighttime service was contemplated and authorized. State v. Shelton, Op. No. 1311, 554 P2d 404 (Alaska 1976).

A showing of probable credibility of a confidential informant is adequate where the affidavit alleges "that the informant has given accurate information in the past." Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

Fact that judge met police at a parking lot and then issued a search warrant within just a few minutes after an affidavit was presented to him did not mean that he failed to act in a neutral and detached manner. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

A description of the property to be searched is sufficient if there is no reasonable probability that the wrong premises will be searched. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

A warrant for a nighttime search may be issued pursuant to an affidavit showing probable cause that at some future time certain evidence will be at the location set forth in the warrant. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

An explicit statement by the affiant that he is positive that the property sought is at the place to be searched is not required to validate a nighttime search warrant. Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

The word "positive" as used in this rule means "reasonably certain". Johnson v. State, Op. No. 2169, 617 P2d 1117 (Alaska 1980).

Written log notes suffice as a record of the search warrant hearing in the absence of an electronic record due to equipment failure. Nelson v. State, Op. No. 2350, 628 P2d 884 (Alaska 1981).

An in camera hearing is mandatory if the court determines that the identity of an informant upon whose information a search warrant was issued need not be disclosed. Schmid v. State, Op. No. 2126, 615 P2d 565 (Alaska 1980).

This rule requires service of an inventory upon an individual who has been the subject of a warrant for participant electronic monitoring of conversations, but service may be postponed for a reasonable period of time, such period to be governed by the exigencies established in each case by the affidavit accompanying the state's application for the warrant. Jones v. State, Op. No. 93, 646 P2d 243 (Alaska 1982).

Where, through the course of indictment and pretrial discovery, defendant, who had been the subject of a warrant for participant electronic monitoring of conversations, was given information equivalent to that which he would have been entitled to under this rule, trial court's error in failing to make provision for eventual service of inventory as required by this rule was harmless. Jones v. State, Op. No. 93, 646 P2d 243 (Alaska 1982).

Criminal Rule 38

Collateral References

Similar to Fed. R. Crim. P. 43

3 Wright, Federal Practice and Procedure §§ 721–724 (1969)

Cases

I. In General
II. Communication Between Judge and Jury

CASE NOTE

SEARCH AND SEIZURE: *Alaska Expands Abandonment Exception to Fourth Amendment Warrant Requirement—State v. Salit*, 613 P.2d 245 (1980)—In *State v. Salit*,[1] the Alaska Supreme Court undertook a complex fourth amendment analysis of the search of defendant Salit's "carry-on" luggage. In order to assess the defendant's motion to suppress, the court considered the "administrative search," "consent," and "abandonment" exceptions to the fourth amendment warrant requirement. While the court settled on the last exception, the supporting arguments were inadequate. Consequently, the opinion's summary treatment results in an expansion of the abandonment doctrine.

Salit presented a handbag and a garment bag for x-ray examination before boarding a plane departing from Anchorage International Airport. The garment bag passed through without incident; however, the handbag was too dense to be x-rayed. Defendant granted permission for a hand search of the handbag. The security employee who conducted the hand search thought there were narcotics-related items in the handbag,[2] so he notified airport security. The airport security officer asked Salit to come with him and began to escort Salit to the first aid room,[3] when the officer noticed a garment bag lying over a chair. All the other passengers had left the area. When questioned, Salit denied that the bag belonged to him. The officer opened the side compartment of the garment bag and discovered a plastic bag containing a white substance. The search was discontinued. Salit was escorted to the first aid room where he was advised of his *Miranda*[4] rights.

At this point, a further handbag search revealed a large amount of cash and drug paraphernalia. The defendant was arrested after tests revealed that the plastic bag contained cocaine. Subsequently, Salit consented to a search of the garment bag and signed a written waiver form. At the jail, Salit threw away a paper bag which identified his hotel. This led police to the hotel. After an initial view of Salit's hotel room by an officer and the hotel

1. State v. Salit, 613 P.2d 245 (Alaska 1980).

2. The handbag contained several small ampules, a hand-rolled cigarette, a small pipe, a lighter, a butane torch, one razor and other seemingly drug-related paraphernalia. *Id.* at 247 n.2

3. The defendant had been frisked prior to this time. *Id.* at 248 n.3.

4. Miranda v. Arizona, 384 U.S. 436 (1966).

manager, a search warrant was obtained. The subsequent room search yielded more contraband.

The defendant moved to suppress (1) the contents of the handbag; (2) the fruits of the garment bag search (the cocaine); (3) admissions made to police officers; and (4) the fruits of the hotel room search.[5]

The Superior Court, Third District, ruled in favor of defendant's motion because the garment bag search did not fit within any of the exceptions[6] to the fourth amendment warrant requirement.[7] In addition, the court suppressed the results of the hotel room search under the "fruits of the poisonous tree" doctrine since this search stemmed from Salit's illegal arrest.[8]

While the Alaska Supreme Court was presented with four issues, the fourth issue was decisive.[9] The court considered (1) whether searching the garment bag was justified under general administrative search rationale; (2) if searching the garment bag was justified by defendant's submitting the bag to be x-rayed and whether this implied defendant's consent to having the bag opened and searched; (3) whether asking defendant if he owned the garment bag constituted "custodial interrogation" so as to require that he be given *Miranda* warnings; and (4) whether opening the garment bag was justified by a belief that the bag was abandoned, and thus did not violate Salit's "reasonable expectation of privacy."[10]

At the outset, the Alaska Supreme Court determined that the contents of the handbag could not establish the requisite probable cause for arrest. The incriminating evidence which could justify the arrest resulted from the garment bag search. Thus, the overriding issue was whether the search of the garment bag came within an exception to the search warrant requirement of the

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5. 613 P.2d at 245, 248-49.

6. *Id.* at 249. The lower court held that there were no "exigent circumstances" because the bag was in the possession of the police. In addition, "abandonment" was inapplicable due to the lack of defendant's "free and voluntary selection to forego ownership."

7. 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.

U.S. CONST. amend. IV.

8. In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) the court enunciated the "fruits of the poisonous tree" doctrine. Evidence illegally obtained shall not be used even for the purpose of gaining other evidence. Once the original evidence, the "tree," is shown to have been unlawfully obtained, all evidence stemming from it, the "fruit," is equally unusable.

9. The fourth issue was decisive because the court based its holding on this exception. 613 P.2d at 255-59.

10. Katz v. United States, 389 U.S. 347 (1967).

fourth amendment.[11]

The Alaska Supreme Court held that the search of the garment bag was not justified under the administrative search rationale[12] of the Air Transportation Security Act of 1974,[13] and that Salit did not consent to the search. In addition, the questioning of the defendant as to whether he owned the garment bag was considered not to be "custodial interrogation."[14] Finally, the court concluded that the officer was justified in believing that the garment bag was abandoned and that the search was not, therefore, unconstitutional.[15] A brief analysis of the other holdings will demonstrate the importance of the abandonment theory.

Airport screening searches under the Air Transportation Security Act fall within the administrative search exception of the warrant requirement.[16] The only legitimate purpose of this screening program is to prevent weapons, including explosives, from being brought into boarding areas and onto planes for hijacking purposes. As stated in *Terry v. Ohio*,[17] screening under a search warrant exception cannot be for purposes of uncovering crime; rather, "the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible."[18]

The *Salit* court held that a search of the contents of the garment bag "in an effort to discover drugs was certainly not authorized under [the airport search] exception to the warrant requirement."[19] Nor was the search justified by an "exigency"[20] since the search by the x-ray machine had not revealed weapons or explosives.

Another exception to the warrant requirement is consent to the search.[21] The prosecution argued that the defendant consented to the search by handing the garment bag to the security employee, because posted notices informed airline passengers that

11. Erickson v. State, 507 P.2d 508, 514-15 (Alaska 1973).
12. 613 P.2d at 253.
13. 49 U.S.C. §§ 1356, 1357 and 1516.
14. 613 P.2d at 257.
15. *Id.* at 258.
16. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); Woods & Rohde, Inc. v. State Dep't of Labor, 565 P.2d 138 (Alaska 1977); and ALASKA CONST. art. I, § 14 for support of the administrative search exception to the warrant requirement.
17. 392 U.S. 1 (1[illegible]).
18. *Id.* at 19.
19. 613 P.2d at 252.
20. There may be exigent circumstances which justify dispensing with the fourth amendment warrant requirement. These circumstances may include preventing the imminent destruction of evidence or preventing harm to persons. Cupp v. Murphy, 412 U.S. 291 (1973); United States v. Costa, 356 F. Supp. 606 (D.C.D.C. 1973), *aff'd*, 479 F.2d 921.
21. Erickson v. State, 507 P.2d at 515.

their bags might be opened. The court reasoned, however, that "hijacking searches" were not tantamount to consent searches. The court cited approvingly the principle in *Erickson v. State* that "consent to a search, in order to be voluntary, must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred."[22] The defendant did not expressly consent to the search of the garment bag within the confines of the aforementioned standard. The Alaska Supreme Court reasoned that "the mere fact that persons are on notice that they may be searched cannot . . . be the basis for implying consent . . . ."[23] Although defendant impliedly consented to having his bag x-rayed based on the posted notices, he did not consent to having the bag opened and searched.

As noted earlier, when Salit was asked if he owned the garment bag he had not been given a *Miranda* warning. If the question constituted "custodial interrogation," the defendant was entitled to the warnings.[24] Any statement obtained in violation of the *Miranda* rules would be inadmissible as prosecution evidence.[25]

Whether or not there was "custodial interrogation" is a close question. At the time of questioning the defendant was in a public area, and had not been arrested and was not told that he could not leave. In addition, the posted signs indicated that inspection could be refused. According to the court, the officer had "merely requested Salit to accompany him to the first aid room."[26] However, at the time of the questioning, defendant was surrounded by many officers.

Assessing the situation, the court adopted an objective "reasonable person" test—would a reasonable person think he was in custody—and rejected a subjective test based on the thoughts of the officer or the defendant.[27] Unfortunately, the court failed to apply this test.[28] Instead the court legitimized the questioning

22. *Id.* (quoting Rosenthal v. Henderson, 389 F.2d 514 (6th Cir. 1958)).

23. 613 P.2d at 254.

24. Although *Miranda*, *supra* note 4, is normally thought of as protecting the fifth amendment right against self-incrimination, it also plays an important role in fourth amendment analysis. Specifically, it has been held that Miranda warnings will not baptize a fourth amendment violation. The Miranda warnings cannot "purge the taint" of a fourth amendment violation. Dunaway v. New York, 442 U.S. 200 (1979); and Brown v. Illinois, 422 U.S. 590 (1975).

25. 384 U.S. at 477.

26. 613 P.2d at 257.

27. Hunter v. State, 590 P.2d 888 (Alaska 1979); Oregon v. Mathiason, 429 U.S. 492 (1977).

28. Perhaps applying this "reasonable person" test is itself unreasonable. A reasonable person, not in possession of contraband, would not have any reason to believe (or fear) he is in custody under similar circumstances.

based on an exception to *Miranda* "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding."[29] Admittedly, it was logical for the officer to make the inquiry so that defendant could take the bag with him to the first aid room. However, the court overlooked the coercive atmosphere created by the officers' presence and his demand that defendant accompany him to the first aid room.[30] Under the totality of these circumstances, whether a reasonable person would feel free to leave and break off police questioning was an issue inadequately addressed.[31]

Since the administrative search and implied consent rationales failed to justify the search, the court premised the legality of the garment bag search on the "abandonment" exception to the fourth amendment. As one commentator has noted,[32] the significance of "abandonment" in the law of search and seizure is that the protection of the fourth amendment does not extend to abandoned property. Thus, when one abandons property, he is said to terminate his right of privacy in it, and may not later complain about its subsequent seizure and use as evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause.

The Alaska Supreme Court correctly stated that the real test is whether the defendant relinquished possession of the garment bag under circumstances indicating that he retained no justified expectation of privacy in the object.[33] While it is clearly established that abandoned property may normally be obtained and used for evidentiary purposes, this is not so if the abandonment was coerced by unlawful police action.[34]

Here, the Alaska Supreme Court reasoned that Salit's denying ownership of the garment bag, at a time when the other passengers had left, justified the officer in treating the bag as abandoned. Furthermore, the court stated that Salit was not co-

29. Miranda v. Arizona, 384 U.S. 436 (1966).

30. 613 P.2d at 257. The officer had an intent not to allow defendant to leave. *Id.* at n.36.

31. *Id.* at 258. The court states that defendant was not led to believe that if he admitted ownership the bag would automatically be searched. Yet, the court by focusing on what defendant was "led to believe" contradicts its own legal philosophy which rejected the subjective test in favor of an objective "reasonable person" test. The inconsistency illustrates the court's inadequate resolution of this issue.

32. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399, 400-01 (1971).

33. W. LAFAVE, SEARCH AND SEIZURE § 2.6(b) at 368-69 (1978).

34. *Id.* at 372.

erced when asked about his ownership of the garment bag. Thus, the court held that the opening of the garment bag did not violate Salit's reasonable expectation of privacy. The court concluded there were ample grounds for the arrest resulting from the search of the abandoned garment bag and, therefore, the evidence obtained from the airport search should not have been suppressed.

In order to determine the applicability of the abandonment exception, the following circumstances surrounding the act of abandonment must be assessed:[35] the nature of the locale where the abandonment takes place; the behavior pattern of the individual; and most importantly for the instant case, the propriety of the retrieving or seizing officer's conduct both prior to and at the moment of abandonment.

If a defendant, in response to the lawful presence of law enforcement officers, abandons property in an area lying outside the protection of the fourth amendment, no issue of unreasonable search or seizure is presented.[36] Further, if the individual abandons the property out of any consciousness of guilt, or because of fear of potential arrest, it will be reasonable for a police officer to retrieve the property.[37] However, if there is improper police conduct the abandonment theory is inapplicable.[38]

Salit abandoned the property in public at an airport, and clearly relinquished any continued expectation of privacy in it. He did not release possession with any intent to retain owernship of the bag. As noted above, if the defendant divested himself of the bag due to fear of arrest it was reasonable for the officer to retrieve the property. Thus, the pivotal "circumstance" was the conduct of the officers.

While the officer's presence was certainly legitimate,[39] his activity was subject to scrutiny. Certainly there is coercion inherent when an officer encourages an individual into abandoning his property. Yet, there is no constitutionally significant distinction between an unreasonable search and seizure and official harassment, which prompts a suspect to reveal evidence which would otherwise be unobtainable. In short, the police may not do indirectly what is denied to them directly. In either event, they would be engaging in conduct equally unreasonable under the fourth

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35. Mascolo, *supra* note 32, at 404. Since the court did not elaborate on its "abandonment" holding, perhaps an analysis of the "circumstances" will reveal a rationale for the decision.

36. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968).

37. United States v. Martin, 386 F.2d 213, 215 (3rd Cir. 1967).

38. Mascolo, *supra* note 32, at 419.

39. *See* Air Transportation Security Act of 1974, *supra* note 13.

amendment.[40]

Before the *Salit* court could properly find abandonment it had to consider the issue of waiver of a basic constitutional protection. The waiver required the voluntary relinquishment of a known right.[41] As Justice Goldberg cautioned in his dissent in *United States v. Colbert*,[42] "A coerced lie cannot effect an abandonment . . . . To say that defendants knew they were waiving a constitutional right when they uttered these meaningless lies under the threat of imminent discovery is a fiction, pure and simple. This was not a case of physical abandonment . . . ." This reasoning seems particularly applicable to the present case.

Assuming that a "reasonable person" standard is viable, as the opinion suggests, the court should have considered the objective circumstances surrounding the arrest. From the facts, as reported by the court, the atmosphere at the moment defendant relinquished the bag was seemingly coercive.[43] Numerous security personnel were present. The defendant was detained extensively. He had not been given his *Miranda* rights. The defendant was asked to go to a more enclosed locale. A "reasonable person" would have been confused and intimidated. Thus, the question remains unanswered as to whether defendant's state of mind permitted the requisite voluntariness.

CONCLUSION

In the final analysis, the Alaska Supreme Court has carved out a wider interpretation of the abandonment exception to the fourth amendment warrant requirement. It is apparent that police misconduct must be substantial before the Alaska Supreme Court will find an infringement of the fourth amendment. For the defense attorney in Alaska, the burden of proof with respect to the abandonment doctrine has been increased.

Jeffrey H. Silberman

40. Mascolo, *supra* note 32, at 419.
41. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
42. 474 F.2d 174, 183 (5th Cir. 1973).
43. 613 P.2d at 247-48.

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights. (Added by Supreme Court Order 364 effective August 1, 1979)

Op. No. 2356, 628 P2d 570 (Alaska 1981).

The admission of evidence proscribed by this rule is harmless error if the evidence does not have a substantial influence on the jury's verdict. Fields v. State, Op. No. 2360, 629 P2d 46 (Alaska 1981).

When a defendant through testimony places his intent in issue, evidence of similar assaults previously committed against other women by defendant is admissible upon the issue of intent. Davis v. State, Op. No. 23, 635 P2d 481 (Alaska 1981).

In negligence action against water-bed manufacturer, it was error to allow testimony concerning post-accident conduct of manufacturer in not recalling the product or issuing a warning. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Trial court did not err in refusing to sever assault charge, arising from an incident which took place on September 19, 1977, from murder charge based on an incident which occurred six days later, since defendant's actions could be viewed as a continuing course of conduct and since the assault charge would have been admissible in the murder trial to prove criminal intent or motive or to show a common scheme or plan even if the charges had been severed. Davidson v. State, Op. No. 78, 642 P2d 1383. (Alaska 1982).

Evidence Rule 405

When hearsay evidence has been presented to a grand jury, character evidence concerning the hearsay declarant's credibility is permissible to the same extent to which it would be permissible at trial had the declarant's character been challenged. Putnam v. State, Op. No. 2251, 629 P2d 35 (Alaska 1981).

In negligence action against water-bed manufacturer, it was error to allow testimony concerning post-accident conduct of manufacturer in not recalling the product or issuing a warning. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Evidence Rule 407

The evidentiary rule precluding admission of post-injury accidents or design changes toward proof of negligence is inapplicable in products liability cases based on strict liability. Caterpillar Tractor Co. v. Beck, Op. No. 2304, 624 P2d 790 (Alaska 1981).

Evidence Rule 412

Where arrest is lawful, fact that arresting officer uses excessive force does not make the evidence obtained as a result of the arrest the product of illegality. Martin v. State, Op. No. 2298, 623 P2d 1225 (Alaska 1981).

Illegally seized evidence may be considered in fashioning a sentence when the illegally seized evidence is reliable, when the police conduct involved in obtaining the evidence does not shock the conscience of the court, and when it is clear that the evidence was not obtained for purposes of influencing the sentencing judge. Elson v. State, Op. No. 40, 633 P2d 292 (Alaska 1981).

The traditional requirement of standing has not been abrogated in search and seizure cases by adoption of this rule. G.R. v. State, Op. No. 61, 638 P2d 191 (Alaska 1981).

Defendant did not have standing to argue that his confession should be suppressed on the ground that it was the product of an illegal arrest and detention

of his companion. G.R. v. State, Op. No. 61, 638 P2d 191 (Alaska 1981)

Defendant had no standing to object to police officers' contact with his building manager and no right to seek suppression of the evidence derived from her even if the contact was the result of a trespassory entrance into the apartment building. Hubert v. State, Op. No. 62, 638 P2d 677 (Alaska 1981).

Defendant had standing to contest the illegal arrest of codefendant which led to defendant's confession. Unger v. State, Op. No. 65, 640 P2d 151 (Alaska 1982).

This rule, which permits evidence illegally obtained to be used under certain circumstances in perjury prosecutions, applies to such evidence regardless of the basis for determining that it was illegally obtained. Wortham v. State, Op. No. 69, 641 P2d 223 (Alaska 1982).

Suppression of illegally obtained evidence in defendant's cocaine prosecution was not res judicata nor did it collaterally estop the state from using the evidence in defendant's subsequent perjury prosecution where there was no suggestion that this rule was considered at the first suppression hearing. Wortham v. State, Op. No. 69 641 P2d 223 (Alaska 1982).

Evidence Rule 503

Defendant was a "client" within the meaning of the attorney-client privilege when she communicated with an employee of a law firm in order to obtain legal advice, notwithstanding that the law firm had not yet accepted her case and that only raw facts, not legal points, were discussed. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Evidence Rule 505

Where defendant forcibly entered his wife's residence without permission and shot her boyfriend in her presence, wife's testimony against defendant was permissible under the "necessity" or "crimes-against-the-other" exception to the privilege against adverse spousal testimony. Loesch v. State, Op. No. 2202, 620 P2d 646 (Alaska 1980).

When there is conclusive evidence that a marriage is in fact destroyed, the trial court may properly rule that the state's interest in a spouse's testimony outweighs the defendant spouse's interest in suppressing it. Loesch v. State, Op. No. 2202, 620 P2d 646 (Alaska 1980).

Trial court correctly dispensed with the spousal testimonial immunity privilege where defendant married on the eve of trial and had a strong motivation to prevent the testimony of the women he married. Osborne v. State, Op. No. 2291, 623 P2d 784 (Alaska 1981).

Evidence Rule 512

Trial courts are not obliged, sua sponte, to give an instruction pertaining to the accused's failure to testify. Tugatuk v. State, Op. No. 2322, 626 P2d 95 (Alaska 1981).

Evidence Rule 601

Once a child's competency to testify has been determined, any inconsistency should go to the weight of his testimony, and not its admissibility. Sevier v. State, Op. No. 2134, 614 P2d 791 (Alaska 1980).

Before permitting a young child to testify, the trial judge must ascertain that the child is capable of receiving just

COMMENTARY TO RULES OF EVIDENCE

Rule 412. Evidence Illegally Obtained.

Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas. While these rules of evidence generally do not incorporate constitutional doctrine, Rule 412 will go beyond what federal constitutional decisions require in protecting the rights of those accused of crime. Thus, for example, in *Harris v. New York*, 401 U.S. 222, 28 L.Ed.2d 1 (1971), the United States Supreme Court approved the use of statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), for impeachment purposes but not as part of the prosecutor's case-in-chief. *Walder v. United States*, 347 U.S. 62, 98 L.Ed. 503 (1954), sanctioned the introduction of testimony on illegally seized heroin to rebut the defendant's denial of prior drug possession. Rule 412 would forbid such uses as long as proper objection is made by the defendant. This last proviso is a change from Criminal Rule 26(g).

This ban on the use of both testimonial and physical evidence for impeachment purposes should not amount to a significant incentive for defendants to commit perjury. The prosecution will still be able to cross-examine the defendant on his claims, if it believes in good faith that the defendant's testimony is false. And, as discussed below, some otherwise inadmissible evidence will still be permitted in perjury prosecutions.

Rule 412 also does not bar the use as impeachment evidence of statements made by a defendant who testifies on a preliminary question of fact as permitted by Rule 104(d). If the preliminary question of fact involves a constitutional question, the argument could be made that a ruling favorable to the defendant renders any statements made during the preliminary hearing "fruit of the poisonous tree" and therefore inadmissible. *Cf. Harrison v. United States*, 392 U.S. 219 (1968) (use of evidence in case-in-chief). *But see People v. Sturgis*, 317 N.E.2d 545 (Ill. 1974), *cert. denied*, 420 U.S. 936, 43 L.Ed.2d 412 (1975). *See also United States v. Kahan*, 415 U.S. 239, 39 L.Ed.2d 297 (1974); *United States v. Mandujano*, 425 U.S.

564, 584, 48 L.Ed.2d 212, 277 (1976) (Brennan, J., concurring in the judgment). Where the defendant is successful in suppressing evidence the underlying constitutional right is protected. It seems an extravagant extension of constitutional protection to permit one version of facts from the defendant's mouth to keep evidence from a tribunal and to permit the defendant to offer another version at trial. If the motion to suppress is unsuccessful, there is even less reason to refrain from using the defendant's statements in support of the motion as impeachment evidence. The decision to take the oath and testify is attenuation enough to remove the taint of the initial illegality. The record of the statements, the advice of counsel, and the oath together remove many of the problems associated with *Harris v. New York, supra.*

In perjury prosecutions, the government's interest in convicting guilty defendants and the extreme difficulty of obtaining reliable evidence warrant controlled use of illegally obtained evidence. Hence Rule 412 contains two narrow exceptions to the blanket prohibition on the use of illegally obtained evidence properly objected to.

The first exception governs statements obtained in violation of the right to warnings under *Miranda,* if the statement whose admission is sought is relevant to the issue of guilt or innocence and shown to be otherwise voluntary and not coerced. The latter limitation, meant to guarantee the statement's reliability, is derived from *Harris v. New York, supra,* where the U.S. Supreme Court observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 101 U.S. at 224, 28 L.Ed.2d at 4.

The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for all purposes if the police misconduct involved in obtained it was flagrant. The concept of a "substantial violation of rights" is necessarily flexible, and

whether or not such a violation occurred will depend on the facts of each case. The simple reference to "rights" is intended to emphasize that this section has no bearing on the law of standing in search and seizure cases.

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[414 US 338]
UNITED STATES, Petitioner,

v

JOHN P. CALANDRA

414 US 338, 38 L Ed 2d 561, 94 S Ct 613

[No. 72-734]

Argued October 11, 1973. Decided January 8, 1974.

SUMMARY

A federal grand jury, investigating illegal loansharking activities, subpoenaed a witness to ask him questions based on evidence that had been seized by government agents during a search of the witness' place of business under a warrant issued in connection with an investigation of suspected illegal gambling operations. After the witness refused to testify on Fifth Amendment grounds, the government requested the United States District Court for the Northern District of Ohio, Eastern Division, to grant the witness immunity, but the witness sought suppression and return of the seized evidence as having been obtained through an illegal search and seizure. The District Court found for the witness (332 F Supp 737), and the United States Court of Appeals for the Sixth Circuit affirmed, holding that the Fourth Amendment exclusionary rule, under which illegally obtained evidence, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of an illegal search and seizure, was properly invoked by the witness to bar questioning based on evidence obtained in the unlawful search and seizure (465 F2d 1218).

On certiorari, the United States Supreme Court reversed. In an opinion by POWELL, J., expressing the view of six members of the court, it was held that a grand jury witness could not refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure, since (1) the Fourth Amendment exclusionary rule, which was a judicially-created remedy to safeguard Fourth Amendment rights by deterring unlawful police misconduct, rather than a personal constitutional right of the party aggrieved, was not applicable to grand jury proceedings, (2) to extend the exclusionary rule to grand jury proceedings would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and would achieve only a speculative and minimal advance of the rule's purpose of deterring police misconduct, and (3) grand jury questions based on evidence obtained from an illegal

Briefs of Counsel, p 828, infra.

search and seizure did not themselves constitute fresh and independent violations of the witness' Fourth Amendment rights.

BRENNAN, J., joined by DOUGLAS and MARSHALL, JJ., dissented, expressing the view that (1) application of the Fourth Amendment exclusionary rule should not depend solely on whether its invocation in a particular type of proceeding would significantly further the goal of deterrence of police misconduct, since the vital functions of the rule were to provide an enforcement tool giving content and meaning to the Fourth Amendment's guarantees, and to insure that the judiciary avoided even the slightest appearance of sanctioning illegal government conduct, and (2) thus, the rule should be considered applicable to grand jury proceedings.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Grand Jury § 6 — examination of witness — unlawful search and seizure

1. A witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure.

Grand Jury § 1 — responsibilities

2. The grand jury's responsibilities include both the determination whether there is probable cause to believe a

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29 AM JUR 2d, Evidence §§ 408–427; 38 AM JUR 2d, Grand Jury §§ 37, 38

11 AM JUR PL & PR FORMS (Rev ed), Federal Criminal Procedure, Forms 112, 114; 22 AM JUR PL & PR FORMS (Rev ed), Searches and Seizures, Forms 71–75

5 AM JUR TRIALS 331, Excluding Illegally Obtained Evidence

US L ED DIGEST, Evidence § 681; Grand Jury §§ 4–6

ALR DIGESTS, EVIDENCE §§ 983, 984; Grand Jury § 4

L ED INDEX TO ANNOS, Grand Jury; Search and Seizure

ALR QUICK INDEX, Grand Jury; Search and Seizure

FEDERAL QUICK INDEX, Grand Jury; Search and Seizure

ANNOTATION REFERENCES

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L Ed 2d 869.

Admissibility of evidence obtained by illegal search and seizure. 6 L Ed 2d 1544; 84 ALR2d 959.

Competency or sufficiency of evidence before grand jury as affecting validity of indictment or conviction in federal court. 100 L Ed 404.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 ALR3d 385.

Privilege against self-incrimination as to testimony before grand jury. 38 ALR2d 225.

crime has been committed and the protection of citizens against unfounded criminal prosecutions.

Grand Jury §§ 4, 5 — scope of inquiry

3. The grand jury may determine alone the course of its inquiry, and may compel the production of evidence or the testimony of witnesses as it considers appropriate; its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.

Grand Jury § 4 — scope of inquiry

4. A grand jury is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited by doubts whether any particular individual will be found properly subject to an accusation of crime.

Grand Jury § 4 — nature of proceedings

5. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated; rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.

Grand Jury § 4 — investigative power

6. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

Indictment, Information and Complaint § 98 — validity — evidence before grand jury

7. The validity of an indictment is not affected by the character of the evidence considered by the grand jury; an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

Grand Jury § 5 — witnesses — federal court's power

8. A federal court has power to compel persons to appear and testify before a grand jury.

Witnesses § 1 — duty to testify

9. The duty to testify is a basic obligation that every citizen owes his government.

Grand Jury § 6 — witnesses — interference with inquiry — objections

10. A witness may not interfere with the course of the grand jury's inquiry; he is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for such is no concern of his; nor is he entitled to challenge the authority of the court or the grand jury, or to set limits to the investigation that the grand jury may conduct.

Grand Jury §§ 4, 5 — subpoena power — court enforcement

11. The grand jury's subpoena power is not unlimited; the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses, and the court may quash or modify a subpoena on motion if compliance would be "unreasonable or oppressive" under Rule 17(c) of the Federal Rules of Criminal Procedure.

Grand Jury § 4 — consideration of incompetent evidence

12. The grand jury may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.

Witnesses §§ 74, 79 — self-incrimination — grand jury proceedings — immunity

13. The grand jury may not force a witness to answer questions in violation of the Fifth Amendment guarantee against self-incrimination; rather, the grand jury may override a Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination.

Witnesses § 74 — self-incrimination — grand jury proceedings — production of books and papers

14. A grand jury may not compel a

person to produce books and papers that would incriminate him.

Grand Jury § 4 — subpoena power — Fourth Amendment

15. The grand jury is without power to invade a legitimate privacy interest protected by the Fourth Amendment; a grand jury's subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment; judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.

Evidence § 681 — obtained by illegal search and seizure — fruits of evidence

16. The prohibition of the exclusionary rule of the Fourth Amendment, under which evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure, applies also to the fruits of the illegally seized evidence.

Evidence § 681 — illegally obtained evidence — exclusionary rule

17. The prime purpose of the exclusionary rule of the Fourth Amendment —under which evidence obtained in violation of the Fourth Amendment, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure—is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures; the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim.

Evidence § 681 — illegally obtained evidence — exclusionary rule

18. The rule which excludes from admission in a criminal trial evidence, and its fruits, obtained in violation of the prohibition of the Fourth Amendment against unreasonable search and seizure is calculated to prevent, not repair; its purpose is to deter—to compel respect for the constitutional guarantee in the only effective available way—by removing the incentive to disregard it.

Evidence § 681 — illegally obtained evidence — exclusionary rule

19. The exclusionary rule of the Fourth Amendment—under which evidence obtained in violation of the Fourth Amendment, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure—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.

Evidence § 681; Search and Seizure § 33 — illegally obtained evidence — standing to assert exclusionary rule

20. Rule 41(e) of the Federal Rules of Criminal Procedure, which provides that a person aggrieved by an unlawful search and seizure may move for return of the property unlawfully seized and suppression of its use as evidence, does not constitute an expansion of the exclusionary rule of the Fourth Amendment, and is no broader than the constitutional rule concerning standing to invoke the exclusionary rule.

Grand Jury § 6 — illegally obtained evidence — witness' standing to assert exclusionary rule

21. The government's offer of immunity under 18 USCS § 2514 to a federal grand jury witness who invoked his Fifth Amendment privilege against self-incrimination when the grand jury sought to ask him questions based on evidence illegally seized by federal officers during a search of the defendant's place of business, is irrelevant to the witness' standing to invoke the rule prohibiting admission of evidence, and its fruits, seized in violation of the Fourth Amendment.

Grand Jury § 6 — witnesses — unlawful search and seizure — exclusion of evidence

22. The Fourth Amendment exclu-

sionary rule, under which illegally obtained evidence, and the fruits of such evidence, cannot be used in a criminal proceeding against the victim of the illegal search and seizure, does not extend to grand jury proceedings, since allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and would achieve only a speculative and minimal advance of the rule's purpose of deterring police misconduct, and since the incentive to the police to disregard Fourth Amendment requirements solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim.

Evidence § 681; Search and Seizure § 32 — illegal seizure — suppression of evidence — other remedies

23. Although suppression of the use of illegally seized evidence against the search victim in a criminal trial is an important method of effectuating the Fourth Amendment, nevertheless the Fourth Amendment does not require adoption of every proposal that might deter police misconduct.

Evidence § 681; Search and Seizure § 33 — exclusion of illegally obtained evidence — who may complain

24. The deterrent values of preventing the incrimination of those whose rights the police have violated by an unconstitutional search and seizure are sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed, but the additional benefits of extending the exclusionary rule to other defendants does not justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Search and Seizure § 15 — grand jury questions as violative of Fourth Amendment

25. Grand jury questions, based on evidence obtained from an illegal search and seizure, do not themselves constitute fresh and independent violations of the witness' Fourth Amendment rights, since such questions involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning.

Grand Jury § 6; Witnesses § 74 — right of privacy — self-incrimination

26. Ordinarily, a witness has no right of privacy before the grand jury, since absent some recognized privilege of confidentiality, every man owes his testimony; he may invoke his Fifth Amendment privilege against compulsory self-incrimination, but he may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs.

Search and Seizure § 5 — purpose and application of Fourth Amendment

27. The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects; the wrong condemned is the unjustified governmental invasion of such areas of an individual's life.

SYLLABUS BY REPORTER OF DECISIONS

When respondent's place of business was being searched by federal agents under a warrant issued in connection with a gambling investigation and specifying that the object of the search was to discover and seize bookmaking records and wagering paraphernalia, one agent, knowing of a pending federal investigation of loansharking activities, discovered and seized a suspected loansharking record. Subsequently, a grand jury investigating loansharking activities subpoenaed respondent to query him on the seized

evidence, but he refused to testify on Fifth Amendment grounds. After the Government then requested transactional immunity for respondent, the District Court granted respondent's suppression motion on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant, and further ordered that respondent need not answer any of the grand jury's questions based on the suppressed evidence. The Court of Appeals affirmed. *Held:* A witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure.

(a) The exclusionary rule, under which evidence obtained in violation of the Fourth Amendment or the fruits of such evidence cannot be used in a criminal proceeding against the victim of the illegal search and seizure, is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the party aggrieved.

(b) Despite its broad deterrent purpose, the rule does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served.

(c) Allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury's role.

(d) Grand jury questions based on evidence obtained from an unlawful search and seizure involve no independent governmental invasion of privacy, but rather the usual abridgment thereof common to all grand jury questioning. Such questions are only a derivative use of the product of a past unlawful search and seizure and work no new Fourth Amendment wrong.

465 F2d 1218, reversed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Blackmun, and Rehnquist, JJ., joined. Brennan, J., filed a dissenting opinion, in which Douglas and Marshall, JJ., joined, post, p 356, 38 L Ed 2d, p 576.

APPEARANCES OF COUNSEL

Louis F. Claiborne argued the cause for petitioner.
Robert J. Rotatori argued the cause for respondent.
Briefs of Counsel, p 828, infra.

OPINION OF THE COURT

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Mr. Justice Powell delivered the opinion of the Court.

[1] This case presents the question whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. The issue is of considerable importance to the administration of criminal justice.

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I

On December 11, 1970, federal agents obtained a warrant authorizing a search of respondent John Calandra's place of business, the Royal Machine & Tool Co. in Cleveland, Ohio. The warrant was issued in connection with an extensive investigation of suspected illegal gambling operations. It specified that the object of the search was the

discovery and seizure of bookmaking records and wagering paraphernalia. A master affidavit submitted in support of the application for the warrant contained information derived from statements by confidential informants to the Federal Bureau of Investigation (FBI), from physical surveillance conducted by FBI agents, and from court-authorized electronic surveillance.[1]

The Royal Machine & Tool Co. occupies a two-story building. The first floor consists of about 13,000 square feet, and houses industrial machinery and inventory. The second floor contains a general office area of about 1,500 square feet and a small office occupied by Calandra, president of the company, and his secretary. On December 15, 1970, federal agents executed the warrant directed at Calandra's place of business and conducted a thorough, four-hour search of the premises. The record reveals that the agents spent more than three hours searching Calandra's office and files.

Although the agents found no gambling paraphernalia, one discovered, among certain promissory notes, a card indicating that Dr. Walter Loveland had been making periodic payments to Calandra. The agent stated in an affidavit that he was aware that the United States Attorney's

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office for the Northern District of Ohio was investigating possible violations of 18 USC §§ 892, 893, and 894 [18 USCS §§ 892, 893, 894], dealing with extortionate credit transactions, and that Dr. Loveland had been the victim of a "loansharking" enterprise then under investigation. The agent concluded that the card bearing Dr. Loveland's name was a loansharking record and therefore had it seized along with various other items, including books and records of the company, stock certificates, and address books.

On March 1, 1971, a special grand jury was convened in the Northern District of Ohio to investigate possible loansharking activities in violation of federal laws. The grand jury subpoenaed Calandra in order to ask him questions based on the evidence seized during the search of his place of business on December 15, 1970. Calandra appeared before the grand jury on August 17, 1971, but refused to testify, invoking his Fifth Amendment privilege against self-incrimination. The Government then requested the District Court to grant Calandra transactional immunity pursuant to 18 USC § 2514 [18 USCS § 2514]. Calandra requested and received a postponement of the hearing on the Government's application for the immunity order so that he could prepare a motion to suppress the evidence seized in the search.

Calandra later moved pursuant to Fed Rule Crim Proc 41(e) for suppression and return of the seized evidence on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant. On August 27, the District Court held a hearing at which Calandra stipulated that he would refuse to answer questions based on the seized materials. On October 1, the District Court entered its judgment ordering the evidence suppressed and re-

1. On the basis of the same affidavit, federal agents also obtained warrants authorizing searches of Calandra's residence and automobile. The present case involves only the search of the Royal Machine & Tool Co.

turned to Calandra and further ordering that Calandra need not answer any of the grand jury's questions based on the

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suppressed evidence. 332 F Supp 737 (1971). The court held that "due process . . . allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure." Id., at 742. The court found that the search warrant had been issued without probable cause and that the search had exceeded the scope of the warrant.

The Court of Appeals for the Sixth Circuit affirmed, holding that the District Court had properly entertained the suppression motion and that the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawfull search and seizure.[2] 465 F2d 1218 (1972). The offer to grant Calandra immunity was deemed irrelevant. Id., at 1221.

We granted the Government's petition for certiorari, 410 US 925, 35 L Ed 2d 585, 93 S Ct 1357 (1973). We now reverse.

II

[2] The institution of the grand jury is deeply rooted in Anglo-American history.[3] In England, the grand jury

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served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury [illegible] essential to basic liberties that [illegible] provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v United States, 350 US 359, 361-362, 100 L Ed 397, 76 S Ct 406 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v Hayes, 408 US 665, 686-687, 33 L Ed 2d 626, 92 S Ct 2646 (1972).

[3, 4] Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is un-

2. The Court of Appeals affirmed the District Court's finding that the search of Calandra's business and seizure of his property were unlawful. 465 F2d 1218, 1226 n 5. Although the Government does not agree with the court's finding, it has not sought review of this issue. In addition, the Government has not challenged the District Court's order directing return of the illegally seized property to Calandra.

3. For a discussion of the history and role of the grand jury, see Costello v United States, 350 US 359, 361-362, 100 L Ed 397, 76 S Ct 406 (1956); Blair v United States, 250 US 273, 279-283, 63 L Ed 979, 39 S Ct 468 (1919); Hale v Henkel, 201 US 43, 59, 50 L Ed 652, 26 S Ct 370 (1906); 4 W. Blackstone, Commentaries* 301 et seq.; G. Edwards, The Grand Jury 1-44 (1906); 1 F. Pollock & F. Maitland History of English Law 151 (2d ed 1909); 1 W. Holdsworth, History of English Law 321-323 (7th rev ed 1956).

restrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Blair v United States, 250 US 273, 282, 63 L Ed 979, 39 S Ct 468 (1919).

[5, 6] The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine

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whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged. Branzburg v Hayes, supra, at 700, 33 L Ed 2d 626; Costello v United States, supra, at 364, 100 L Ed 397.

In Branzburg, the Court had occasion to reaffirm the importance of the grand jury's role.

> "[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . ." 408 US, at 700, 33 L Ed 2d 626.
>
> "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. . . . 'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.' Wood v Georgia, 370 US 375, 392, 8 L Ed 2d 569, 82 S Ct 1364 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' United States v Stone, 429 F2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. Costello v United States, 350 US, at 362, 100 L Ed 397. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . . ." Id., at 701–702, 33 L Ed 2d 626.

[7] The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected

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by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, Costello v United States, supra; Holt v United States, 218 US 245, 54 L Ed 1021, 31 S Ct 2 (1910); or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, Lawn v United States, 355 US 339, 2 L Ed 2d 321, 78 S Ct 311 (1958).

[8–10] The power of a federal court to compel persons to appear and testify before a grand jury is also firmly established. Kastigar v United States, 406 US 441, 32 L Ed 2d 212, 92 S Ct 1653 (1972).

The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. Blackmer v United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932); United States v Bryan, 339 US 323, 331, 94 L Ed 884, 70 S Ct 724 (1950). In Branzburg v Hayes, supra, at 682 and 688, 33 L Ed 2d 626, the Court noted that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . ." and that "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings." The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure. Blair v United States, 250 US, at 281, 63 L Ed 979. Furthermore, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." Id., at 282, 63 L Ed 979. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." Ibid.

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[11-15] Of course, the grand jury's subpoena power is not unlimited.[4] It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. Branzburg v Hayes, supra; United States v Bryan, supra; Blackmer v United States, supra; 8 J. Wigmore, Evidence §§ 2290–2391 (McNaughton rev ed 1961). Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid, Lawn v United States, supra, the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. Rather, the grand jury may override a Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. Kastigar v United States, supra. Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. Boyd v United States, 116 US 616, 633–635, 29 L Ed 746, 6 S Ct 538 (1886). Cf. Couch v United States, 409 US 322, 34 L Ed 2d 548, 93 S Ct 611 (1973). The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is "far too sweeping in its terms to be regarded as reasonable" under the Fourth Amendment. Hale v Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.

[11] 4. The grand jury is subject to the court's supervision in several respects. See Brown v United States, 359 US 41, 49, 3 L Ed 2d 609, 79 S Ct 539 (1959); Fed Rules Crim Proc 6 and 17; 1 L. Orfield, Criminal Procedure Under the Federal Rules § 6:108, pp 475–477 (1966). In particular, the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witness, and the court may quash or modify a subpoena on motion if compliance would be "unreasonable or oppressive." Fed Rule Crim Proc 17(c).

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III

[16] In the instant case, the Court of Appeals held that the exclusionary rule of the Fourth Amendment limits the grand jury's power to compel a witness to answer questions based on evidence obtained from a prior unlawful search and seizure. The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. Weeks v United States, 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914); Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933 (1961). This prohibition applies as well to the fruits of the illegally seized evidence. Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407 (1963); Silverthorne Lumber Co. v United States, 251 US 385, 64 L Ed 319, 40 S Ct 182, 24 ALR 1426 (1920).

[17-19] The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." Linkletter v Walker, 381 US 618, 637, 14 L Ed 2d 601, 85 S Ct 1731 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v United States, 364 US 206, 217, 4 L Ed 2d 1669, 80 S Ct 1437 (1960).

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Accord, Mapp v Ohio, supra, at 656, 6 L Ed 2d 1081, 84 ALR2d 933; Tehan v Shott, 382 US 406, 416, 15 L Ed 2d 453, 86 S Ct 459 (1966); Terry v Ohio, 392 US 1, 29, 20 L Ed 2d 889, 88 S Ct 1868 (1968). In sum, the 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.[5]

[20, 21] Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. 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. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to in-

5. There is some disagreement as to the practical efficacy of the exclusionary rule, and as the Court noted in Elkins v United States, 364 US 206, 218, 4 L Ed 2d 1669, 80 S Ct 1437 (1960), relevant "[e]mpirical statistics are not available." Cf. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U Chi L Rev 665 (1970). We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials.

criminate the victim of the unlawful search. Brown v United States, 411 US 223, 36 L Ed 2d 208, 93 S Ct 1565 (1973); Alderman v United States, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961 (1969); Wong Sun v United States, supra; Jones v United States, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[6]

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IV

[22] In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context. It is evident that this extension of the exclusionary rule would seriously impede the grand jury. Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial. Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective.[7] The probable

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result would be "protracted interruption of grand jury proceedings," Gelbard v United States, 408 US 41, 70, 33 L Ed 2d 179, 92 S Ct 2357 (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

> "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation

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[20] 6. In holding that the respondent had standing to invoke the exclusionary rule in a grand jury proceeding, the Court of Appeals relied on Fed Rule Crim Proc 41(e). 465 F2d, at 1222-1224. Rule 41(e) provides, in relevant part, that "[a] person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained . . . ." It further states that "[t]he motion shall be made before trial or hearing . . . ." We have recognized that Rule 41(e) is "no broader than the constitutional rule." Alderman v United States, 394 US 165, 173, n 6, 22 L Ed 2d 176, 89 S Ct 961 (1969). Jones v United States, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR 2d 233 (1960). Rule 41(e), therefore, does not constitute a statutory expansion of the exclusionary rule.

[21] The Court of Appeals also found that the government's offer of immunity under 18 USC § 2514 [18 USCS § 2514] was irrelevant to respondent's standing to invoke the exclusionary rule. 465 F2d, at 1221. We agree with that determination for the reasons stated in Parts III, IV, and V of this opinion.

7. The force of this argument is well illustrated by the facts of the present case. As of the date of this decision, almost two and one-half years will have elapsed since respondent was summoned to appear and testify before the grand jury. If respondent's testimony was vital to the grand jury's investigation in August 1971 of extortionate credit transactions, it is possible that this particular investigation has been completely frustrated.

and frustrate the public's interest in the fair and expeditious administration of the criminal laws." United States v Dionisio, 410 US 1, 17, 35 L Ed 2d 67, 93 S Ct 764 (1973).

Cf. United States v Ryan, 402 US 530, 29 L Ed 2d 85, 91 S Ct 1580 (1971); Cobbledick v United States, 309 US 323, 84 L Ed 783, 60 S Ct 540 (1940). In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties.

[23, 24] Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule. Suppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment. But it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct. In Alderman v United States, 394 US, at 174–175, 22 L Ed 2d 176, for example, this

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Court declined to extend the exclusionary rule to one who was not the victim of the unlawful search:

"The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

We think this observation equally applicable in the present context.

Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly

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minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[8]

8. Respondent relies primarily on Silverthorne Lumber Co. v United States, 251 US 385, 64 L Ed 319, 40 S Ct 182, 24 ALR 1426 (1920), which the dissent contends "plainly controls this case." Post, at 362, 38 L Ed 2d at 579. In that case, federal officers unlawfully seized certain documents belonging to the Silverthornes and their lumber company and presented them to a grand jury that had

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[25, 26] Respondent also argues that each and every question based on evidence obtained from an illegal search and seizure constitutes a fresh and independent violation of the witness' constitutional rights.[9] Ordinarily, of course, a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony. He may invoke his Fifth Amendment privilege against compulsory self-incrimination, but he may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs. Blair v United States, 250 US 273, 63 L Ed 979, 39 S Ct 468 (1919). Respondent's claim must be, therefore, not merely that the grand jury's questions invade his privacy but that, because those questions are based on illegally obtained evidence, they some-

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already indicted the Silverthornes and the company. A district court ordered the return of the documents but impounded photographs and copies of the originals. Later, the prosecutor caused the grand jury to issue subpoenas duces tecum to the Silverthornes and the company to produce the originals, and their refusal to comply led to a contempt citation. In reversing the judgment, the Court held that the subpoenas were invalid because they were based on knowledge obtained from the illegally seized evidence, citing Weeks v United States, 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914). Mr. Justice Holmes, writing for the Court, stated that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 US, at 392, 64 L Ed 319.

Silverthorne is distinguishable from the present case in several significant respects. There, plaintiffs in error had previously been indicted by the grand jury and thus could invoke the exclusionary rule on the basis of their status as criminal defendants. Moreover, the Government's interest in recapturing the original documents was founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury. It did not appear that the grand jury needed the documents to perform its investigative or accusatorial functions. Thus, the primary consequence of the Court's decision was to exclude the evidence from the subsequent criminal trial. Finally, prior to the issuance of the grand jury subpoenas, there had been a judicial determination that the search and seizure were illegal. The claim of plaintiffs in error was not raised for the first time in a pre-indictment motion to suppress requiring interruption of grand jury proceedings.

By contrast, in the instant case respondent had not been indicted by the grand jury and was not a criminal defendant. Under traditional principles, he had no standing to invoke the exclusionary rule. The effect of the District Court's order was to deprive the grand jury of testimony it needed to conduct its investigation. Furthermore, respondent's motion to suppress had not been previously made and required interruption of the grand jury proceedings. In these circumstances, Silverthorne is certainly not controlling. To the extent that the Court's broad dictum might be construed to suggest a different result in the present case, we note that it has been substantially undermined by later cases. See Parts III and IV of this opinion.

9. At oral argument, counsel for respondent stated the contention as follows:

"I submit to the Court that each question asked of the Respondent before the Grand Jury, which question was only asked because of a past violation of the Fourth Amendment, [amounts to] a new, immediate violation of the Fourth Amendment . . . . [A] question derived from a past violation, a question into the privacy of the witness amounts to another intrusion in violation of the Fourth Amendment." Tr of Oral Arg 17.

"[R]efusing to answer a question in which the question conceivably is derived from a past violation of the Fourth Amendment, gives rise to an additional or new Fourth Amendment right to resist answering that question because the question itself becomes an additional intrusion . . . ." Tr of Oral Arg 19–20.

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constitute distinct violations of his Fourth Amendment rights. We disagree.

[27] The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong. Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies.

In the usual context of a criminal trial, the defendant is entitled to the suppression of, not only the evidence obtained through an unlawful search and seizure, but also any derivative use of that evidence. The prohibition of the exclusionary rule must reach such derivative use if it is to fulfill its function of deterring police misconduct. In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect. Our conclusion necessarily controls both the evidence seized during the course of an unlawful search and seizure and any question or evidence derived therefrom (the fruits of the unlawful search).[10] The same considerations of logic and policy apply to both the fruits

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of an unlawful search and seizure and derivative use of that evidence, and we do not distinguish between them.[11]

The judgment of the Court of Appeals is

Reversed.

10. It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. Bivens v Six Unknown Fed Narcotics Agents, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971). He may also seek return of the illegally seized property, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial. Go-Bart Importing Co. v United States, 282 US 344, 75 L Ed 374, 51 S Ct 153 (1931). In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure.

11. The dissent's reliance on Gelbard v United States, 408 US 41, 33 L Ed 2d 179, 92 S Ct 2357 (1972), is misplaced. There, the Court construed 18 USC § 2515 [18 USCS § 2515], the evidentiary prohibition of Tit III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat 211, as amended, 18 USC §§ 2510-2520 [18 USCS §§ 2510-2520]. It held that § 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of Tit III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication, in either Gelbard or the legislative history, that Tit III was regarded as a restatement of existing law with respect

SEPARATE OPINION

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

The Court holds that the exclusionary rule in search-and-seizure cases does not apply to grand jury proceedings because the principal objective of the rule is "to deter future unlawful police conduct," ante, at 347, 38 L Ed 2d at 571, and "it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal."

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Ante, at 351, 38 L Ed 2d at 573. This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule.

The commands of the Fourth Amendment are, of course, directed solely to public officials. Necessarily, therefore, only official violations of those commands could have created the evil that threatened to make the Amendment a dead letter. But curtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees. They thus bore out James Madison's prediction in his address to the First Congress on June 8, 1789:

> "If they [the rights] are incorporated into the Constitution, independent tribunals of justice will
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> [414 US 357]
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> consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong 439 (1789).

Since, however, those judges were without power to direct or control the conduct of law enforcement officers, the enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior,

to grand jury proceedings. As Mr. Justice White noted in his concurring opinion in Gelbard, Tit III "unquestionably works a change in the law with respect to the rights of grand jury witnesses . . . ." 408 US, at 70, 33 L Ed 2d 179.

The diss[e]nt also voices concern that today's decision will betray "'the imperative of judicial integrity,'" sanction "illegal government conduct," and even "imperil the very foundation of our people's trust in their Government." Post, at 360, 38 L Ed 2d at 579. There is no basis for this alarum. "Illegal conduct" is hardly sanctioned, nor are the foundations of the Republic imperiled, by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced. Cf. Alderman v United States, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961 (1969); Linkletter v Walker; 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731 (1965); and cases cited supra, at 347-348, 38 L Ed 2d at 571.

thus minimizing the risk of seriously undermining popular trust in government.

That these considerations, not the rule's possible deterrent effect, were uppermost in the minds of the framers of the rule clearly emerges from the decision which fashioned it:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . *should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions*
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> [414 US 358]
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> *have a right to appeal for the maintenance of such fundamental rights.* . . .
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> . . . . .
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> "This protection is equally extended to the action of the Government and officers of the law acting under it. . . . *To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.*" Weeks v United States, 232 US 383, 391–392, 394, 58 L Ed 652, 34 S Ct 341 (1914) (emphasis added).

Mr. Justice Brandeis and Mr. Justice Holmes added their enormous influence to these precepts in their notable dissents in Olmstead v United States, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928). Mr. Justice Brandeis said:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Id., at 485, 72 L Ed 944.

And Mr. Justice Holmes said:

> "[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to
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> [414 US 359]
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> choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.
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> ". . . If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." Id., at 470, 72 L Ed 944.

The same principles were reiterated only five years ago. In Terry v Ohio, 392 US 1, 12–13, 20 L Ed 2d

889, 88 S Ct 1868 (1968), Mr. Chief Justice Warren said for the Court:

> "The rule also serves another vital function—'the imperative of judicial integrity.' Elkins v United States, 364 US 206, 222, 4 L Ed 2d 1669, 80 S Ct 1437 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

It is true that deterrence was a prominent consideration in the determination whether Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933 (1961), which applied the exclusionary rule to the States, should be given retrospective effect. Linkletter v Walker, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731 (1965). But that lends no support to today's holding that the application of the exclusionary rule depends solely upon whether its invocation in a particular type of proceeding will significantly further the goal of deterrence. The emphasis upon deterrence in Linkletter must be understood in the light of the crucial fact that the States had justifiably relied from 1949 to 1961 upon Wolf v Colorado, 338 US 25, 93 L Ed 1782, 69 S Ct 1359 (1949), and consequently, that application of Mapp would have required the wholesale release of innumerable convicted prisoners, few of whom could have been successfully retried. In that circumstance, Linkletter held not only that retrospective application of Mapp would not further the goal of deterrence but also [414 US 360] that it would not further "the administration of justice and the integrity of the judicial process." 381 US, at 637, 14 L Ed 2d 601. Cf. Kaufman v United States, 394 US 217, 229, 22 L Ed 2d 227, 89 S Ct 1068 (1969).

Thus, the Court seriously errs in describing the exclusionary rule as merely "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." Ante, at 348, 38 L Ed 2d at 571. Rather, the exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy," Mapp v Ohio, supra, at 651, 6 L Ed 2d 1081, and "an essential part of both the Fourth and Fourteenth Amendments," id., at 657, 6 L Ed 2d 1081, that "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." Id., at 660, 6 L Ed 2d 1081.

This Mapp summation crystallizes the series of decisions that developed the rule and with which today's holding is plainly at war. For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct. This rejection of "the imperative of judicial integrity," Elkins v United States, 364 US 206, 222, 4 L Ed 2d 1669, 80 S Ct 1437 (1960), openly invites "[t]he conviction that all government is staffed by . . . hypocrites[, a conviction] easy to instill and difficult to erase." Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. C. & P. S. 255, 258 (1961). When judges appear to become "accomplices in the willful disobedience of a Constitution they [38 L Ed 2d]

are sworn to uphold," Elkins v United States, supra, at 223, 4 L Ed 2d 1669, we imperil the very foundation of our people's trust in their Government on which our democracy rests. See On Lee v United

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States, 343 US 747, 758–759, 96 L Ed 1270, 72 S Ct 967 (1952) (Frankfurter, J., dissenting). The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera. Moreover,

> "[I]nsistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." Miller v United States, 357 US 301, 313, 2 L Ed 2d 1332, 78 S Ct 1190 (1958).

The judges who developed the exclusionary rule were well aware that it embodied a judgment that it is better for some guilty persons to go free than for the police to behave in forbidden fashion. A similar judgment led the Court to decide in Silverthorne Lumber Co. v United States, 251 US 385, 64 L Ed 319, 40 S Ct 182, 24 ALR 1426 (1920), that a grand jury must be denied access to plainly relevant but illegally seized papers. In that case, after federal agents unlawfully seized papers belonging to the Silverthornes and their corporation, and presented the documents to a grand jury which had previously indicted the Silverthornes, a district court ordered the documents returned and copies that had been prepared in the interim impounded. After returning the originals, the grand jury attempted to recoup them by issuance of a subpoena duces tecum. Compliance with the subpoena was refused, and contempt convictions followed. In reversing the judgment of convictions, the Court, speaking through Mr. Justice Holmes, held that the Government was barred from utilizing any fruits of its forbidden act,

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stating that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id., at 392, 64 L Ed 319.

Silverthorne plainly controls this case. Respondent, like plaintiffs in error in Silverthorne,[1] seeks to avoid furnishing the grand jury with evidence that he would not have been called upon to supply but for the unlawful search and seizure. The Court would distinguish Silverthorne on the ground that there the plaintiffs-in-error had been indicted and could invoke the exclusionary rule "on the basis of their status as criminal defendants," since the Government's effort to obtain the documents was "founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury." Ante, at 352, 38 L Ed 2d at 574, n 8. The effort was clearly not founded on any such belief. Overlooked is the fact that the

1. Neither the Silverthorne Lumber Co., because it was a corporation, see Hale v Henkel, 201 US 43, 50 L Ed 652, 26 S Ct 370 (1906), nor respondent, because he was granted transactional immunity, could invoke the privilege against self-incrimination. The situations are therefore completely comparable.

grand jury's interest in again obtaining the documents in Silverthorne may well have been to secure information leading to further criminal charges, especially since indictments of three other individuals, as well as additional indictments of the Silverthornes, had been the consequence of initial submission of the documents to the grand jury. See Brief on Behalf of Plaintiffs in Error, 4, 18–19.[2] Only if Silverthorne is

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overruled can its precedential force to compel affirmance here be denied.

Congressional concern with the Silverthorne holding was clearly evidenced in enactment of 18 USC § 2515 [18 USCS § 2515], providing that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication *and no evidence derived therefrom* may be received in evidence in any . . . proceeding in or before *any* . . . *grand jury* . . . if the disclosure of that information would be in violation of this chapter." (Emphasis added.) In Gelbard v United States, 408 US 41, 33 L Ed 2d 179, 92 S Ct 2357 (1972), we set aside the adjudication in criminal contempt of a grand jury witness who refused to comply with a court order to testify on the ground that interrogation was to be based upon information obtained from the witness' communications allegedly intercepted by federal agents by means of illegal wiretapping and electronic surveillance. Our reasons track the grounds advanced in Silverthorne.

"The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both

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to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents." 408 US, at 51, 33 L Ed 2d 179 (footnotes omitted).

Similarly to allow Calandra to be subjected to questions derived from the illegal search of his office and seizure of his files is "to thwart the [Fourth and Fourteenth Amendments' protection] of . . . individual privacy . . . and to entangle the courts in the illegal acts of Government agents." Ibid. "And for a court, on petition of the executive department, to sentence a witness, who is [himself] the victim of the illegal [search and seizure], to jail for refusal to participate in the exploitation of that [conduct in violation of the explicit command of the

2. The Court also argues that "[t]he [Silverthorne's claim] was not raised for the first time in a pre-indictment motion to suppress requiring interruption of grand jury proceedings," ante, at 352, 38 L Ed 2d, at 574, n 8, and therefore presumably its assertion occasioned no delay. However, the District Court in Silverthorne had granted an earlier application for return of the seized documents from the grand jury after determining that they had been obtained in violation of the Fourth Amendment. This Court made no intimation that the District Court acted improperly in considering the initial application.

Fourth Amendment] is to stand our whole system of criminal justice on its head." In re Evans, 146 US App DC 310, 323, 452 F2d 1239, 1252 (1971) (Wright, J., concurring).

It is no answer, to suggest as the Court does, that the grand jury witnesses' Fourth Amendment rights will be sufficiently protected "by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." Ante, at 351, 38 L Ed 2d, at 573. This, of course, is no alternative for Calandra, since he was granted transactional immunity and cannot be criminally prosecuted. But the fundamental flaw of the alternative is that to compel Calandra to testify in the first place under penalty of contempt necessarily "thwarts" his Fourth Amendment protection and "entangle[s] the courts in the illegal acts of Government agents"—consequences that Silverthorne condemned as intolerable.

To be sure, the exclusionary rule does not "provide that illegally seized evidence is inadmissible against anyone for any purpose." Alderman v United States, 394 US 165, 175, 22 L Ed 2d 176, 89 S Ct 961 (1969). But clearly there is a crucial

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distinction between withholding its cover from individuals whose Fourth Amendment rights have not been violated—as has been done in the "standing" cases, Alderman v United States, supra, Jones v United States, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960)—and withdrawing its cover from persons whose Fourth Amendment rights have in fact been abridged.

Respondent does not seek vicariously to assert another's Fourth Amendment rights. He himself has been the victim of an illegal search and desires "to mend no one's privacy [but his] own." Gelbard v United States, supra, at 63, 33 L Ed 2d 179 (Douglas, J., concurring). Respondent is told that he must look to damages to redress the concededly unconstitutional invasion of his privacy. In other words, officialdom may profit from its lawlessness if it is willing to pay a price.

In Mapp, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights. 367 US, at 654-655, 6 L Ed 2d 1081. The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of deterrence, but that its application in grand jury proceedings will not "significantly" do so. Unless we are to shut our eyes to the evidence that crosses our desks every day, we must concede that official lawlessness has not abated and that no empirical data distinguishes trials from grand jury proceedings. I thus fear that when next we confront a case of a conviction rested on illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case

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also that "it is unrealistic to assume" that application of the rule at trial would "significantly further" the goal of deterrence—though, if the police are presently undeterred, it is difficult to see how removal of the sanction of exclusion

will induce more lawful official conduct.

The exclusionary rule gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong 439 (1789). We betray the trust upon which that prediction rested by today's long step toward abandonment of the exclusionary rule. The observations of a recent commentator highlight the grievous error of the majority's retreat:

> "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violational of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, Studying the

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Exclusionary Rule in Search and Seizure, 37 U Chi L Rev 665, 756 (1970).

See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv L Rev 1532, 1562–1563 (1972).

I dissent and would affirm the judgment of the Court of Appeals.