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# Evidence -- Inadmissibility of State-Seized Evidence in Federal Criminal Prosecutions -- Silver Platter Doctrine

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In *Sguros* the husband's change in jobs was presented in the most favorable light. He was a professional man seeking advancement and entering a highly respected new career. The appellate record indicates that the issue of good faith was not strongly contested.[22] There was no evidence offered to dispute his motive. But in future cases the question might arise whether the change in jobs would have been made had domestic harmony continued. If it were shown that the husband would not have changed jobs but for the discord, then perhaps an award based upon earning capacity would be sustained.

It is submitted that *Conrad* and *Sguros* are consistent and reasonable. Both require that the intent of the husband be examined before an award of alimony pendente lite may be based upon the husband's earning capacity.[23] In both the basic issue is the same, *i.e.,* Is the husband by changing jobs and reducing his income primarily motivated by a desire to avoid his support obligations? If this issue is answered affirmatively, the wife may be awarded alimony pendente lite based upon the husband's earning capacity; otherwise the award must be based upon his present earnings. This appears to be a reasonable result, for the husband should not be absolutely prohibited from changing jobs. And, at the same time, the wife's right to support should not be infringed when the husband does change jobs primarily for the purpose of reducing his income and thereby the amount of support.[24]

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**Evidence—Inadmissibility of State-Seized Evidence in Federal Criminal Prosecutions—Silver Platter Doctrine.**

In *Elkins v. United States*[1] defendants were indicted in a United States district court in Oregon for violating and for conspiracy to violate the Federal Communications Act. Before trial the defendants moved to suppress as evidence several recordings and a recording machine which had been seized by state officers and turned over to federal officials. The state officers had seized the evidence during a search

[22] See Brief for Appellee, p. 21.

[23] "The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is *honestly engaged* in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Sguros v. Sguros, ante,* 408. To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to earn *because of a disregard* of his marital obligation to provide reasonable support for his wife...." Conrad v. Conrad, 252 N.C. 412, 418, 113 S.E.2d 912, 916 (1960). (Emphasis added.)

[24] The same reasoning applies where a reduction in the husband's income has occurred without a change in jobs.

[1] 364 U.S. 206 (1960).

which, two Oregon state courts had found, was unreasonable. The district judge assumed without deciding that the search and seizure were unlawful but relied on the "silver platter"[2] doctrine and denied the motion to suppress. At the trial the articles were admitted in evidence, and the defendants were convicted. The Court of Appeals for the Ninth Circuit affirmed the convictions.[3] Upon granting certiorari, the Supreme Court set aside the judgment of the court of appeals and remanded the case to the district court. The Court held that evidence was inadmissible in a federal criminal trial over the defendant's timely objection[4] if it had been obtained by state officers during a search which, if conducted by federal officers, would have been unreasonable under the fourth amendment.

In dealing with the question of admissibility of relevant evidence obtained by an unreasonable search and seizure the courts are confronted with the problem of balancing conflicting social policies.[5] If the courts make use of all relevant evidence without regard to the manner in which it is obtained, it is said that the criminal law can be more effectively enforced.[6] On the other hand, it is argued that exclusion of evidence obtained during an unreasonable search is the only practical method of deterring such police illegality.[7] The Court in the principal case indicated its awareness of this problem and stated that limitations on the process of discovering truth in federal trials should be imposed only when other considerations outweigh the general need for disclosure of all relevant evidence.[8]

In two prior decisions the Court had implied that protection against unreasonable searches and seizures was more important than suppressing crime by illegal methods.

[2] The "silver platter" label was coined in Lustig v. United States, 338 U.S. 74 (1949). There the Court said, "[A] search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." *Id.* at 78-79.

[3] Elkins v. United States, 266 F.2d 588 (9th Cir. 1959).

[4] "The motion [to surpress] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." FED. R. CRIM. P. 41(e).

[5] "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice." People v. Defore, 242 N.Y. 13, 24-25, 150 N.E. 585, 589 (1926).

[6] See Nardone v. United States, 302 U.S. 379, 387 (1937) (dissenting opinion); Waite, *Public Policy and the Arrest of Felons,* 31 MICH. L. REV. 749, 763-66 (1933).

[7] See Weeks v. United States, 232 U.S. 383, 393 (1914); Irvine v. California, 347 U.S. 128, 151 (1954) (dissenting opinion); Wolf v. Colorado, 338 U.S. 25, 40, 41 (1949) (dissenting opinions).

[8] 364 U.S. at 216.

A unanimous Court in *Weeks v. United States*[9] held that evidence obtained by federal officers during an unreasonable search and seizure in violation of the fourth amendment was inadmissible in a federal criminal prosecution. However, the Court refused to exclude evidence obtained by state officers using methods contrary to the fourth amendment because "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."[10] The *Weeks* rule was extended by subsequent decisions to exclude evidence in federal prosecutions where federal agents participated with state officers in an unreasonable search and seizure[11] or where the state officers acted solely on behalf of the United States.[12]

In *Wolf v. Colorado*[13] the Court held that in a state criminal prosecution the due process clause of the fourteenth amendment did not require the exclusion of evidence obtained by an unreasonable search and seizeure even though such evidence would be excluded in federal prosecutions. However, the Court said, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[14] Thus the Court recognized that the federal constitution embraces a right of privacy enforceable against the states and their agencies. But the Court, granting that exclusion may be an effecive remedy against arbitrary intrusion, said that the requirements of due process were fulfilled if a state consistently applied other remedies[15] to enforce this basic right.

Because of the continued adherence to the rule that evidence unconstitutionally obtained by state officers was admissible in federal prosecutions,[16] an anomalous situation was created by the Court's decision

[9] 232 U.S. 383 (1914).

[10] *Id.* at 398.

[11] Byars v. United States, 273 U.S. 28 (1927).

[12] Gambino v. United States, 275 U.S. 310 (1927). In this case liquor seized by state officers after an unlawful search of the defendants' automobile was admitted as evidence against the defendants in federal court where they were tried for violation of the National Prohibition Act. The Court held it was error to admit the evidence. At the time of the search and seizure there was no suggestion that the defendants were committing any state offense; therefore, the state officers had acted solely on behalf of the United States.

[13] 338 U.S. 25 (1949). For a discussion of this case, see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950).

[14] 338 U.S. at 27.

[15] For example, the victim of an illegal search may have a tort action for damages against the searching officer. The state may dismiss the offending officer or prosecute him in a criminal proceeding. In this respect, see Wolf v. Colorado, 338 U.S. 25, at 30-32 n.1 (1949).

[16] "My view that the Supreme Court has not overruled the Weeks decision... is further reinforced by the fact that seven United States Circuit Courts of Ap-

in *Benanti v. United States*.[17] In *Benanti* the Court held that evidence obtained by state officers in violation of section 605 of the Federal Communications Act[18] was inadmissible in federal courts even though it was obtained without assistance from federal officers.[19] Thus prior to the principal case the courts excluded evidence obtained solely by state officers in violation of a federal statute but admitted evidence which they seized in violation of the Constitution. It would seem that more effect was given to the statute than to the Constitution. The Court in *Elkins* recognized this anomaly and stated that it would be logically impossible to justify such a policy.[20]

In the principal case the Court gave several reasons for its decision. First, exclusion is the only effective way to compel respect for the constitutional guaranty of freedom from unreasonable searches and seizures. Second, the new rule will avoid needless conflict between state and federal courts because the federal courts will no longer admit evidence illegally seized by state officers and thereby frustrate the attempt of the states having the exclusionary rule to preserve constitutional guaranties. Third, the new rule will encourage free and open cooperation between state and federal law enforcement officers. The Court stated that the old rule "implicitly invites federal officers to withdraw from such association" since participation by a federal officer in an unreasonable search conducted by state officers renders evidence so obtained inadmissible in the federal courts. Fourth, the imperative of judicial integrity requires that the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Lastly, the Court concluded that the *Wolf* decision had removed the "foundation" or "doctrinal underpinning" of the *Weeks* admissibility rule. The Court stated that the basis of the rule admitting state-seized evidence was that "unreasonable state searches and seizures"[21] did not

peals and several United States District Courts in the other circuits...have continued to adhere to it since and notwithstanding the Wolf decision." United States v. Blackman, 183 F. Supp. 545, 547 (D.D.C. 1960) (Pine, J.).

[17] 355 U.S. 96 (1957), 37 N.C.L. REV. 88 (1958).

[18] "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person...." 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[19] The Court construed § 605 as requiring the exclusion of evidence obtained by wire tapping even though the section contains no reference to the admissibility of such evidence. The first case holding wiretap evidence to be inadmissible in federal court was Nardone v. United States, 302 U.S. 379 (1937). However, in that case the tap was made by federal officers.

[20] 364 U.S. at 215.

[21] It seems that the Court used the phrase "unreasonable search and seizure" to mean unreasonable when compared with the standards of the fourth amendment. *Weeks* founded the admissibility rule on the fact that conduct of state officers did not violate the fourth amendment even though the same conduct on the part of federal officers would amount to an unreasonable search and seizure.

violate the federal constitution. Then the determination in *Wolf* that the fourteenth amendment prohibits "arbitrary intrusion by the police" was interpreted by the Court as meaning the amendment prohibits "unreasonable searches and seizures by state officers."

Implicit in this conclusion—that *Wolf* removed the foundation of the admissibility rule—is the assumption that conduct of state officers violates the fourteenth amendment if the same conduct on the part of federal officers would violate the fourth amendment. This was clearly pointed out by Mr. Justice Frankfurter in his dissenting opinion, and he stated that the majority was guilty of a "complete misconception of the *Wolf* Case."[22]

It is important to note that the only question before the Court in *Elkins* was the admissibility of evidence. No constitutional question was necessarily involved. The majority stated, "What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts...."[23] In the exercise of this power the Court, in reviewing convictions in the federal courts, is not confined to the ascertainment of constitutional validity but may establish civilized standards of procedure and evidence.[24] Therefore, it would seem that the Court in the principal case could have reached the same result without reference to the constitutional question raised by the *Wolf* decision—whether every "unreasonable search" which violates the fourth amendment is also an "arbitrary intrusion" which violates the fourteenth amendment.

The Court in *Elkins* referred to the experience of the states in adopting the exclusionary rule and noted that their movement toward this rule has been hesitant but seemingly unrelenting. The Court also stated that its decision would not affect the freedom of the states to develop and apply their own sanctions.[25] At the present time about one-half of the states have adopted the exclusionary rule.[26] North Carolina ad-

[22] "The identity of the protection of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today. It assumes this without explication in reason or in reliance upon authority, and entirely without regard for the essential difference, which has always been recognized by this Court, between the particularities of the first eight Amendments and the fundamental nature of what constitutes due process." 364 U.S. at 239-40 (dissenting opinion). "The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it." *Id.* at 238. The significance of Mr. Justice Frankfurter's statement that the majority is guilty of a complete misconception of *Wolf* is more apparent when it is recalled that he wrote the majority opinion in *Wolf*.

[23] 364 U.S. at 216. This power of supervision is embodied in FED. R. CRIM. P. 26.

[24] McNabb v. United States, 318 U.S. 332, 340 (1943).

[25] This would seem to suppress any idea that the next step by the Court will be to overrule *Wolf* and apply the exclusionary rule to state prosecutions.

[26] See Elkins v. United States, 364 U.S. 206, 224-25 (1960) (app.).

mitted evidence obtained during an illegal search until 1953[27] when the exclusionary rule was adopted by statute.[28]

Although the Court's consideration of the question of constitutionality of state searches and seizures could have best been avoided by adhering to the policy of deciding a case on other than constitutional grounds if at all possible,[29] its pronouncement of a rule of evidence seems sound. The uniformity achieved in federal criminal prosecutions by applying the same rule regardless of whether the search is by state or federal officers is wholly desirable.

G. MARLIN EVANS

**Torts—Res Ipsa Loquitur—Unexplained Automobile Accidents.**

In *Lane v. Dorney*[1] the North Carolina Supreme Court held that the doctrine of *res ipsa loquitur* was not applicable to unexplained single-car automobile accidents. The plaintiff relied on *Etheridge v. Etheridge*[2] as holding that *res ipsa* was applicable to such accidents. The court stated, however, that the doctrine was not applied in *Etheridge.*

In *Etheridge* the defendant was driving along a dirt road at a moderate rate of speed. As the defendant crossed an intersection his car swerved to the right, ran into a ditch, and turned over. The defendant offered testimony that he was not able to turn the car back toward the center of the road for some unknown reason and that his brakes did not seem to take hold. The court held that the evidence was sufficient to withstand a nonsuit. Though the words *"res ipsa loquitur"* were not used, the court stated the applicable rule to be as follows:

> When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care.... The rule has found limited application in automobile cases. It applies when the accident is one which

[27] State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949); State v. Simmons, 183 N.C. 684, 110 S.E. 591 (1922); State v. Wallace, 162 N.C. 623, 78 S.E. 1 (1913).

[28] N.C. GEN. STAT. § 15-27 (1953); N.C. GEN. STAT. § 15-27.1 (Supp. 1959). For a discussion of the use of illegally obtained evidence in state courts, see Note, 33 N.C.L. REV. 100 (1954).

[29] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 347 (1936) (concurring opinion).

[1] 250 N.C. 15, 108 S.E.2d 55 (1959).
[2] 222 N.C. 616, 24 S.E.2d 477 (1943).