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Constitutional Law - Fourth Amendment - A Witness May Not Invoke the Exclusionary Rule to Suppress Evidence before the Grand Jury or as a Basis for Refusing to Answer Questions Based on Evidence Seized in Violation of His Fourth Amendment Rights

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — FOURTH AMENDMENT — A WITNESS MAY NOT INVOKE THE EXCLUSIONARY RULE TO SUPPRESS EVIDENCE BEFORE THE GRAND JURY OR AS A BASIS FOR REFUSING TO ANSWER QUESTIONS BASED ON EVIDENCE SEIZED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS.

United States v. Calandra (U.S. 1974)

In December, 1970, federal agents, as part of their investigation of illegal gambling, obtained a warrant authorizing a search of respondent's place of business in order to find and seize gambling records and paraphernalia. After executing the warrant, the agents conducted a thorough search that failed to uncover any gambling paraphernalia. However, an agent did discover, among some promissory notes, a card indicating that a known victim of loansharking was making payments to respondent. Concluding that it was a loansharking record and as such would be pertinent to the loansharking investigation then being conducted by the United State's Attorney's Office, the agent seized the card.[1]

A short time later, a special federal grand jury was convened to investigate loansharking activities and respondent was subpoenaed to answer the grand jury's questions based upon the evidence seized during the search. He appeared but invoked his privilege against self-incrimination.[2] The hearing in response to a government motion to grant transactional immunity[3] was postponed to allow respondent to prepare a motion pursuant to rule 41(e) of the Federal Rules of Criminal Procedure[4] for the suppression and return of the evidence seized in the search.[5]

At a hearing upon this motion, the respondent stipulated that he would refuse to answer any question based on the seized materials.[6] The district

1. United States v. Calandra, 414 U.S. 338, 340–41 (1974).

2. *Id.*

3. Transactional immunity shields an immunized witness from a future criminal prosecution related to the matter for which immunity was granted. Comment, *Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470 (1973). Transactional immunity is broader than use/derivative use immunity which only prohibits use and derivative use of testimony against an immunized witness. *Id.* at 473–77.

4. The rule provides in pertinent part:
A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized.
FED. R. CRIM. P. 41(e).

5. 414 U.S. at 341.

6. *In re* Calandra, 332 F. Supp. 737, 738 (W.D. Ohio 1971).

court ruled that the evidence should be suppressed, and that respondent need not answer any of the grand jury's questions based upon that evidence.[7]

The Court of Appeals for the Sixth Circuit affirmed, holding that the suppression motion was properly entertained and the exclusionary rule properly invoked.[8]

The Supreme Court reversed, *holding* that the speculative and minimal increase in the deterrence of police misconduct to be obtained by extending the protection of the exclusionary rule to grand jury witnesses was outweighed by the substantial impediment it would pose to the important role of the grand jury in the criminal justice system, and that the same rationale prevented exclusion of the fruits of the illegal search, the grand jury questions. *United States v. Calandra,* 414 U.S. 338 (1974).

That the grand jury is a significant part of the criminal justice system is demonstrated by the fact that the Constitution requires that a federal trial for certain crimes be based upon a grand jury indictment.[9] This is because of the grand jury's traditional functions of determining the existence of probable cause to believe a crime has been committed and protecting citizens against unfounded criminal prosecutions.[10] While broad investigatory and indicting powers are required by these functions,[11] such powers are not absolute. Hence, the courts continue to exercise control over the grand jury.[12]

The rule that evidence seized in violation of the fourth amendment is inadmissible against the person whose rights have been violated — the exclusionary rule — was articulated for the federal system in *Weeks v.*

7. *Id.* at 746. The government did not seek review of the lower court's holding that the search was unlawful or of the order to return the seized property. 414 U.S. at 342 n.2.

8. United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972). The district court's ruling that the warrant and the search were invalid was affirmed. *Id.* at 1226 n.5.

9. The requirement is contained in the fifth amendment to the United States Constitution, which provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

10. 414 U.S. at 343.

11. The investigating power of a grand jury is broad so that it can adequately discharge its responsibility. Branzburg v. Hayes, 408 U.S. 665, 668 (1972). Citizens have an obligation to appear before the grand jury and testify. United States v. Dionisio, 410 U.S. 1, 9-10 (1973). The government can compel testimony, even in the face of a claimed fifth amendment privilege if immunity from prosecution co-extensive with that privilege is granted. Kastigar v. United States, 406 U.S. 441, 443, 466 (1972). Lastly, a witness cannot raise the objections of incompetency or irrelevancy or try to set limits upon the grand jury's investigation. Blair v. United States, 250 U.S. 273, 282 (1919). *See also,* United States v. Bryan, 339 U.S. 323, 331 (1950); Blackmer v. United States, 284 U.S. 421, 438 (1932).

The breadth of the indicting power is demonstrated by the fact that a facially valid indictment is impervious to attack by a criminal defendant. Costello v. United States, 350 U.S. 359, 363 (1956). *See also* United States v. Lawn, 355 U.S. 339, 349 (1958); Holt v. United States, 218 U.S. 245, 247 (1910).

12. The Supreme Court has stated that:

> A grand jury is clothed with great independence in many areas but it remains an appendage of the court, powerless to perform its investigative function without the court's aid . . . .

Brown v. United States, 359 U.S. 41, 49 (1959). *See* FED. R. CRIM. P. 6 and 17(c). *See also* Branzburg v. Hayes, 408 U.S. 665, 668, 700 (1972); *id.* at 709 (Powell, J., concurring).

United States.[13] The rule also deprives the government of the use as evidence at trial of the "fruits" of the illegal search, evidence obtained derivatively from the government's initial unconstitutional action.[14] The primary justification for the rule is that it is the best method for effective protection of fourth amendment rights because it deters police misconduct by discouraging future violations of rights.[15] Additionally, the rule is grounded in the desire to preserve judicial integrity by removing the implied judicial approval of illegality which would exist if the evidence were admissible.[16] While this rule remains the primary method of enforcing fourth amendment rights, case law now provides a federal damages remedy for the victims of a violation of fourth amendment rights.[17]

However, in order to invoke the exclusionary rule in a criminal proceeding, one must be a proper party to do so. The doctrine of the standing to assert fourth amendment rights has developed as the basic procedural limitation on a person's ability to use the rule.[18] The Supreme Court's response to the vicarious assertion of constitutional rights has been to

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13. 232 U.S. 383, 393 (1914). The exclusionary rule was extended through the fourteenth amendment to bar the use of illegally seized evidence in state courts in Mapp v. Ohio, 367 U.S. 643, 660 (1961). The Supreme Court refused to make the prohibition retroactive in Linkletter v. Walker, 381 U.S. 618, 640 (1965).

14. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963). This prohibition is not an absolute bar. When evidence seized in an illegal search is no longer "fruit of the poisonous tree" because it has such an attenuated causal connection with the initial illegality as to be "purged of the primary taint," it becomes admissible despite the illegal search. *Id.* at 487-88.

15. Mapp v. Ohio, 367 U.S. 643, 656 (1961). *See* Elkins v. United States, 364 U.S. 206, 217 (1960). For a general discussion of the justifications for the exclusionary rule, *see* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 668 (1970).

16. Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Weeks v. United States, 232 U.S. 383, 392-93 (1914). This concept was first articulated in *Weeks,* wherein the Court stated that "[t]o 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." *Id.* at 394.

Commentators have downgraded the importance of this concept. *See* Oaks, *supra* note 15, at 669. However, it is submitted that the Court should attempt to preserve judicial integrity, at the very least in cases where federal courts are involved, because the Supreme Court controls the practices of the federal courts and sets the tone for their dispensing of justice. *See, e.g.,* McNabb v. United States, 318 U.S. 332, 340-41 (1943).

17. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Commentators have pointed out that tort remedies have been ineffective. *See, e.g.,* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. LEGAL STUDIES 243, 269-72 (1973); Oaks, *supra* note 15, at 674. Before *Bivens* was decided, courts viewed damages as an ineffective remedy. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643, 651-653 (1961); Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966).

While there has been no final verdict in *Bivens,* the Second Circuit held that an agent has established a valid defense to a damages claim if he proves that he acted in good faith with a reasonable belief in the validity of the arrest and search. The agent must also show a reasonable belief in the necessity for carrying out the arrest and search in that way. Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1341 (2nd Cir. 1972).

18. *See, e.g.,* Alderman v. United States, 394 U.S. 165, 171-72 (1969).

hold that only the victim of the invasion of privacy has standing to invoke the exclusionary rule.[19]

Supreme Court cases involving the application of fourth amendment rights to grand jury proceedings have been limited in number to two. In *Hale v. Henkel*,[20] the Court held that a subpoena *duces tecum* was an unreasonable search and seizure if its demands were too broad.[21] In the other case, *Silverthorne Lumber Co. v. United States*,[22] the Court reversed a contempt conviction based upon a refusal to produce illegally seized evidence requested by a grand jury after the evidence had been ordered returned to the victims of the search.[23]

In the instant case, Mr. Justice Powell, writing for the Court, first determined that a grand jury hearing is not an adversary determination of guilt or innocence, but only an investigation into the probable existence of criminal conduct and, as such, should be unhampered by the procedural restraints attendant a trial.[24] Because society's interests are best served by a thorough investigation, he wrote, a witness must surrender his interest in privacy and testify when called.[25] However, Justice Powell did not view the grand jury's power as unlimited, but rather as subject to court control, at least in those cases where judicial supervision could prevent a wrong.[26]

The Court then turned specifically to the exclusionary rule. It concluded that "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.*"[27] Furthermore, the Court stated that the rule was used only in instances where its remedial objectives were thought to be most efficaciously served, as evidenced by the existence of the requirement that only the victim of the wrong had standing to invoke the exclusionary rule.[28]

Next, the Court balanced the potential injury to the historic role of the grand jury against the potential benefits of the application of the exclusionary rule in the grand jury context. The potential impediment to the grand jury was found to be grave since invocation of the exclusionary rule would bring up issues formerly reserved for trial, interfering with grand jury efficiency.[29] Due to the asserted importance of the grand jury,

19. Simmons v. United States, 390 U.S. 377, 389 (1968); Jones v. United States, 362 U.S. 257, 261 (1960). *See* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 346-47 (1970).
20. 201 U.S. 43 (1906).
21. *Id.* at 76.
22. 251 U.S. 385 (1920).
23. *Id.* at 392.
24. 414 U.S. at 343-44.
25. *Id.* at 345, *citing* Blair v. United States, 250 U.S. 273, 281 (1919).
26. 414 U.S. at 346.
27. *Id.* at 348 (emphasis added).
28. *Id.*
29. *Id.* at 349. The Court accorded some weight to the two and one-half years involved in this appeal. *Id.* at n.7.
Delay, however, is not a unitary concept: and it is necessary to distinguish avoidable delay from the time necessary for a proper proceeding. The lower court

it was feared that such delay could be "fatal to the enforcement of the criminal law."[30] In contrast, the advantages derived from the exclusionary rule were thought to be uncertain since the only police actions which would be deterred would be illegal investigations consciously directed towards discovery of evidence solely for use in grand jury investigations.[31] This uncertainty was compounded by the fact that any incentive to disregard the fourth amendment solely to obtain an indictment was negated by the inadmissibility of the evidence at the trial of the search's victim, since a prosecutor would be loathe to seek an indictment where the admissible evidence would not support a conviction.[32] These same considerations were found to limit the deterrent effect of permitting the witness to refuse to answer grand jury questions on the ground that they were the fruits of the illegal search. Therefore, the known burden was found to outweigh the unproven gain and the witness was prohibited from either excluding the illegally seized evidence or refusing to answer the grand jury's questions.[33]

It is submitted that the Court's balancing of the detriments and advantages was inaccurate because it was based upon an erroneous view of the grand jury's present function and incorrectly estimated the degree of deterrence to police misconduct afforded by the exclusionary rule. Moreover, as Justice Brennan pointed out in his dissenting opinion,[34] the majority both downgraded the importance of the preservation of judicial integrity as a foundation of the exclusionary rule and dealt inadequately with precedent.

The Court premised its holding on the possibly unrealistic model of the grand jury as having broad powers both to investigate crime and to serve as a strong buffer between the state and its citizens.[35] However, a recent article dealing specifically with the federal grand jury surveyed the grand jury's relationship with both witnesses and defendants and concluded that present policies surrounding the grand jury no longer serve a useful purpose because of radically changed circumstances: "[I]t is no longer a group of peers sitting to protect citizens; instead, it is an arm

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made this distinction and found that the suppression hearing was necessary to preserve respondent's rights. 332 F. Supp. at 741. The Supreme Court did not make the same distinction. Apparently it viewed the grand jury proceeding as being of such value as to make *any* delay improper.

30. 414 U.S. at 350.

31. *Id.* It should be observed that the evidence respondent sought to suppress had been seized because of a federal investigation. *See* text accompanying note 1 *supra*. The district court felt that the real object of this search was loansharking evidence, a view that supports the proposition that this search had been conducted to gather evidence for a grand jury. *See* 332 F. Supp. at 746.

32. 414 U.S. at 351.

33. *Id.* at 353–55.

34. *Id.* at 355–67 (Brennan, J., dissenting).

35. *See* text accompanying notes 9-12 *supra*.

of the state more powerful than ever before, serving the ends of the prosecution."[36]

If the grand jury no longer performs both its investigative and protective functions, the Court's model of the grand jury was therefore erroneous and consequently, its conclusion that sanctioning the use of the exclusionary rule would damage this important part of the criminal justice system, is questionable. Assuming *arguendo* that grand juries do investigate, the assumption that individuals are protected by the grand jury is one apparently without empirical basis, which induced the Court to deny a remedy that would have given effect to the grand jury witness' constitutional rights. It is submitted that the Court viewed the grand jury in an unrealistically favorable light.

Even if the Court perceived itself as somehow bound by the historical, theoretical model of the grand jury, it nevertheless ignored the deterrent created by the application of the exclusionary rule to grand jury investigations. In a criminal trial, the prosecutor's lack of control over *past* police actions means he can only attempt to mitigate the consequences of police misconduct. A grand jury investigation, on the other hand, is one situation in which the prosecutor controls the *present* conduct of police acting as investigators. Therefore, if the exclusionary rule could be invoked by grand jury witnesses, the prosecutor would be motivated to prevent misconduct by police because suppression of illegally seized evidence would endanger potential indictments.[37]

The Court found some deterrent to the use of illegally seized evidence before a grand jury in the inadmissibility of such evidence at the trial of the search victim.[38] However, the concept of standing to invoke the exclusionary rule makes this deterrent chimerical when, for example, the illegally seized evidence is used to obtain indictments against those who lack standing to protest fourth amendment violations at trial. In that

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36. Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 35 (1972). For a general summary of the arguments for and against the grand jury *see* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1049 (2d ed. 1969).

An early study of the grand jury concluded that, more often than not, the grand jury only rubber-stamped the actions of the prosecutor and allowed him to escape responsibility for the bringing of criminal charges. Morse, *A Survey of the Grand Jury System, Pt. II*, 10 ORE. L. REV. 295, 363 (1931). A more recent article by a former prosecutor describes the grand jury as a body dependent upon the prosecutor — since only he understands the technical and legal aspects of the proceeding — and as activist in orientation, with little interest in protecting the citizenry from unfounded criminal charges or safeguarding constitutional rights. The grand jury is portrayed as being no more than a reviewer of the prosecutor's predigested evidence and ratifier of his conclusions. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 155 (1965). A federal judge, while urging the abolition of the grand jury because its use is detrimental to the efficient administration of criminal justice, reached the same conclusion. *See* Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972).

One author has gone further, concluding that the grand jury has become an administrative agency unchecked by the safeguards applied to other such bodies. *See* Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 NEW MEXICO L. REV. 141, 166-67 (1972).

37. *Cf.* Oaks, *supra* note 15, at 726.

38. *See* text accompanying note 32 *supra*.

situation, prohibiting the use of the exclusionary rule by grand jury witnesses allows a prosecutor to obtain the benefits of illegal conduct without having to face the consequences of having evidence declared inadmissible at trial.[39]

Thus, concentrating on a deterrent that was questionable and ignoring the presence of the strong deterrent potential in the unique circumstance of close police-prosecutor cooperation in a grand jury investigation, the Court fallaciously found uncertain benefit from the exclusionary rule that could not overcome the alleged harm to the criminal justice system.

Finally, it is submitted that the Court afforded insufficient weight to the validity of the exclusionary rule by diminishing the importance of the preservation of judicial integrity.[40] The problem was summarily dismissed:

> "Illegal conduct" is hardly sanctioned . . . by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objective would not be effectively served . . . .[41]

However, this view ignores the long-recognized practice of not implying judicial approval of the illegal search. That ethic is hardly served when illegal evidence is placed before a grand jury subject to a court's supervision.[42] Exclusion of the evidence certainly would help to preserve judicial integrity.

In sum, the balance reached by the Court was faulty on two grounds: It failed to weigh realistically the grand jury's role in the modern criminal justice system and thereby added artificial legitimacy to this factor. At the same time, the Court's failure to consider a potential deterrent plus its ignoring of the concept of judicial integrity meant that potential benefits of the exclusionary rule, perhaps sufficient to tip the balance, went unrecognized.

Aside from employing its inaccurate balancing test, the Court also failed adequately to distinguish while refusing to overrule *Silverthorne Lumber Co. v. United States*,[43] which seemed to dictate a contrary result. In that case, while the Silverthornes were in custody, federal agents went to the Silverthorne Company's offices and seized all available documents and papers. An application for return of the documents was opposed by the government because the seizure had led to evidence that was before the grand jury. Before the district court ordered a return of the documents and impounded all copies, another indictment was framed and subpoenas to produce the original documents were served. The district court ordered compliance with the subpoenas even though it found that the papers had been seized in violation of the parties' constitutional rights.[44] The petitioners'

39. *See* White, *supra* note 19, at 351. *See also,* notes 18-19 and accompanying text *supra.*

40. *See* 414 U.S. at 360 (Brennan, J., dissenting). *See* note 16 and accompanying text *supra.*

41. 414 U.S. at 355 n.11.

42. *Id.* at 346 n.4.

43. 251 U.S. 385 (1920).

44. *Id.* at 390-91.

refusal to comply with the subpoenas led to the contempt conviction reversed by the Supreme Court.[45] The Court stated that its holding in the *Weeks* case precluded the direct submission of the papers to the grand jury[46] and, furthermore, that it would not sanction the two-step process employed against the Silverthornes. Said the Court in an oft-quoted passage:

> 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.*[47]

The majority in *Calandra* rejected the dissent's contention that *Silverthorne* was controlling[48] and distinguished the instant case on several grounds.[49] First, it was noted that the Silverthornes could have invoked the exclusionary rule on the basis of their status as criminal defendants, while Calandra was not a criminal defendant, thereby having no standing to invoke the rule.[50] Perhaps the Silverthornes could have relied upon their status as defendants, but there is nothing in that opinion to indicate such reliance.[51] In addition, the *Calandra* majority's limitation of standing in this sense to situations wherein the government seeks to incriminate[52] is unjustified because, as the dissent observed, standing was developed to avoid the danger of vicarious assertion of constitutional rights, a danger absent when the victim of the illegal search himself seeks to exclude evidence.[53] Lastly, it is unclear why the Silverthornes' status as defendants under a previous indictment[54] should afford them any special protection against a grand jury subpoena in a subsequent investigation.[55]

A second distinction made by the majority rested on its view that the subpoenas in *Silverthorne* were attempts to recapture illegally seized evidence for use in a previously authorized criminal prosecution. The "primary result" of *Silverthorne* was viewed as one excluding the evidence from the criminal prosecution only, rather than one also depriving a grand jury investigation of such information.[56] But *Silverthorne* did not make it clear that the documents were intended for a criminal prosecution; instead, it suggests that the documents were for the grand jury. Otherwise, the language in *Silverthorne* to the effect that illegally seized evidence could not be used before the court "at all" is inexplicable since the inadmissability of

45. *Id.* at 392.
46. *Id.* at 391-92.
47. *Id.* at 392 (emphasis added).
48. 414 U.S. at 361–64 (Brennan, J., dissenting).
49. *Id.* at 352 n.8.
50. *Id.*
51. The *Silverthorne* Court spoke of violations of the *parties'* rights: no mention was made of the Silverthornes' status as defendants. *See* 251 U.S. at 390-92.
52. 414 U.S. at 348.
53. *Id.* at 365 (Brennan, J., dissenting). *See* notes 18–19 and accompanying text *supra.*
54. 251 U.S. at 390.
55. *See* text accompanying note 25 *supra.*
56. 414 U.S. at 352 n.8.

the documents at trial could have been established simply by citing *Weeks*.[57] It therefore appears that both cases involved the presentation of illegally seized evidence to the grand jury and cannot be distinguished on the basis of different "primary results."[58]

A final distinction was based upon the Court's finding that prior to the issuance of the subpoena in *Silverthorne* there had been a judicial determination of the illegality of the search which had obviated any need for a pre-indictment suppression motion requiring the interruption of grand jury proceedings.[59] However, the prior judicial determination of illegality in *Silverthorne* required the return of evidence then before the grand jury,[60] and thus did involve an interruption of grand jury proceedings — a fact ignored by the *Calandra* Court.[61]

The inadequacy of the distinctions drawn by the Court in order to avoid following *Silverthorne* makes it appear, as the dissent argued, that the case was overruled sub silentio to the extent that it has prohibited the use of illegally seized evidence before the grand jury.[62]

While in most cases illegally seized evidence can now be considered by the grand jury, a consideration of illegal wiretaps leads to a contrary result. While a grand jury witness may not invoke the exclusionary rule to prevent grand jury questions propounded upon the basis of illegally seized evidence, he or she may nonetheless successfully invoke a federal statute that bars the use of information obtained by illegal wiretapping,[63] as a defense to a similar contempt judgment.[64] This contradiction exists despite the fact that Congress wrote the statute to reflect existing law.[65] While Congress' reading of the law is not necessarily correct, at least one commentator writing prior to the instant decision has agreed that allowing

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57. *See* note 13 and accompanying text *supra*. There are other indications that the documents were treated by the *Silverthorne* Court as having been intended for the grand jury. The opinion speaks of refusal to obey an order to produce documents before the grand jury. *Id.* at 391. The Court also says *Weeks* had established that laying papers directly before the grand jury was unwarranted. *Id.* at 391-92. Lastly, the Silverthornes later moved to quash the second indictment. They argued that the Supreme Court had barred the evidence from the grand jury since their motion was based, in part, on the grand jury's consideration of illegally seized evidence. The district court granted the motion for that reason. United States v. Silverthorne, 265 F. 859, 862-64 (W.D.N.Y. 1920).

58. However, even under *Silverthorne*, an independent source, perhaps the loan-shark victim, could provide the same knowledge as the seized material without the same problem of admissibility. 251 U.S. at 392. *See* text accompanying note 1 *supra*.

59. 414 U.S. at 352 n.8.

60. 251 U.S. at 391. *See* 414 U.S. at 342 n.2 (Brennan, J., dissenting).

61. *See* 414 U.S. at 342 n.2 (Brennan, J., dissenting).

62. *See* 414 U.S. at 362–63 (Brennan, J., dissenting).

63. The statute provides in partinent part that:

> Whenever 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.

18 U.S.C. §2515 (1970).

64. Gelbard v. United States, 408 U.S. 41, 47 (1972). The case was decided on statutory grounds. *Id.* at 45 n. 5.

65. S. REP. No. 1097, 90th Cong., 2d Sess. 96 (1968).

invocation of the illegal wiretap defense was consistent with existing law spawned by *Silverthorne*.[66]

In not allowing a grand jury witness to invoke the exclusionary rule, the Court has clearly determined that there is an area of the criminal justice system wherein the exclusionary rule will not operate even if the witness' fourth amendment rights have been violated. This fact is most significant when, as the court of appeals concluded in the instant case, the investigation involves organized crime.[67] The Court thus has created a potential in this type of investigation for permissible violations of the rights of the alleged lower echelon figures in order to obtain evidence and indictments against higher-ranking persons. Thus, the prosecutor benefits from illegal conduct and the victim of an illegal search is left with an uncertain damages remedy as his sole form of redress.[68]

In addition to giving only very limited relief to grand jury witnesses for violations of their fourth amendment rights, the Court's holding raises the question of the future of the exclusionary rule. Any attempt to predict future decisions is difficult, but it appeared to Mr. Justice Brennan that the majority was signalling a willingness to abandon the exclusionary rule in search and seizure cases.[69] This view is reinforced by Mr. Chief Justice Burger's well-known dislike of the exclusionary rule in search and seizure cases,[70] and, in the instant case, by the Court's downgrading of the importance of the exclusionary rule[71] and failure to deal adequately with the concept of judicial integrity.

Perhaps even more significant is the Court's noncommittal attitude toward the rule's application at trial. Noting that a dispute over the rule's efficacy existed, the Court nonetheless concluded, "We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials."[72] It is at least possible then that a rule which the Court tolerates only because of its theoretical deterrent effect[73] will be abandoned unless practical experience clearly demonstrates such deterrence. Additional support for this rationale could come from those commentators who have been unable to find a clear empirical foundation demonstrating the deterrent effect of the exclusionary rule.[74]

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66. *See* Boudin, *supra* note 36, at 11.
67. 465 F.2d at 1226.
68. *See* note 17 *supra*.
69. 414 U.S. at 365–66 (Brennan, J., dissenting).
70. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-425 (1971) (Burger, C.J., dissenting); Burger, *Who Will Watch the Watchman?*, 14 AMER. U.L. REV. 1 (1964).
71. Previous opinions dealt with the rule on the basis that "without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words'." Terry v. Ohio, 392 U.S. 1, 12 (1968). Now the rule is classified as a "remedy." *See* note 27 and accompanying text *supra*.
72. 414 U.S. at 340 n.1. While the Court does not decide questions not before it, one might have expected a panel with any degree of commitment to the rule to have at the least reaffirmed its use at trial.
73. *See* note 27 and accompanying text *supra*.
74. *See, e.g.*, Spiotto, *supra* note 17 at 276–77; Oaks, *supra* note 15 at 706–09.