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THOMPSON V. UNITED STATES: LIMITING THE SCOPE OF THE EXCLUSIONARY RULE

In 1982 the District of Columbia Court of Appeals, in *Thompson v. United States*,[1] ruled that illegally seized evidence is admissible in a probation revocation hearing absent egregious circumstances.[2]

The fourth amendment states that the "right of the people to be secure . . . in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[3] In 1914 the Supreme Court, in *Weeks v. United States*,[4] espoused the "exclusionary rule," which bars all tangible evidence obtained in an illegal search from introduction at trial.[5] The primary justification for the exclusionary rule is the efficacious deterrence of police misconduct.[6]

While the exclusionary rule precludes the use of illegally seized evidence to establish a defendant's guilt or innocence at trial, the Supreme Court has admitted such evidence for other purposes and at other proceedings. For example, under appropriate circumstances, illegally seized evidence is admissible at trial to impeach a defendant's testimony.[7]

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1. 444 A.2d 972 (D.C. Apr. 21, 1982).

2. *Id.* at 973.

3. U.S. CONST. amend. IV.

4. 232 U.S. 383 (1914).

5. *Id.* at 392. Although *Weeks* applied only in the federal courts, the exclusionary rule was extended to state courts through the operation of the fourteenth amendment and the Supreme Court decision in Mapp v. Ohio, 367 U.S. 643 (1961).

6. *Weeks*, 232 U.S. at 392. A significant number of judges and scholars, however, have questioned whether the exclusionary rule actually serves to deter police misconduct. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). *See generally* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973) (a study of motions to suppress in lower criminal courts in Chicago which concluded that the exclusionary rule did not deter law enforcement officers from conducting illegal searches and seizures); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (concluding that the exclusionary rule is of little deterrent value, if any).

7. United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954). Similarly, the Court has permitted prosecutors to use certain evidence to impeach a defendant's testimony by use of incriminating statements obtained in violation of the fifth amendment privilege against self-incrimination. *See* Oregon v. Hass, 420 U.S. 714 (1975) (illegally seized evidence admissible in grand jury proceeding); Harris v. New York, 401 U.S. 222 (1971), *reh'g denied*, 429 U.S. 874 (1976) (illegally seized evidence admissible so

In *Harris v. New York*,[8] a divided Supreme Court[9] ruled that evidence excluded under the standards set forth in *Weeks*[10] may be referred to during cross-examination and in a closing argument to impeach the credibility of the defendant so long as the "trustworthiness of the evidence satisfies legal standards."[11] Furthermore, the Court has held the exclusionary rule inapplicable in grand jury proceedings.[12] Under both circumstances the Court concluded that police misconduct would be sufficiently deterred by exclusion of the tainted evidence from the government's case-in-chief at trial.[13]

The Court further clarified its position in *Oregon v. Hass*[14] by observing that the evidence is a "valuable aid to the jury in assessing the [defendant's] credibility."[15] In *United States v. Calandra*,[16] the Court emphasized that the "exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons . . . . Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[17] The *Calandra* Court concluded that, because of the nature and purpose of a grand jury proceeding, applying the exclusionary rule would be of little deterrent value;[18] the law enforcement officers did not obtain the evidence primarily to secure an indictment. In addition, a grand jury proceeding is not a criminal proceeding and best serves its purpose if provided with the great-

long as evidence is trustworthy); *but see* Mincey v. Arizona, 437 U.S. 385 (1978) (statement obtained under circumstances rendering it unreliable may not be used for impeachment).

8. 401 U.S. 222 (1971).

9. Chief Justice Burger and Justices Blackmun, Harlan, Stewart, and White made up the majority; Justices Black, Brennan, Douglas, and Marshall dissented.

10. 232 U.S. 643 (1961).

11. *Harris*, 401 U.S. at 224. *Cf.* Mincey v. Arizona, 437 U.S. 385 (1978) (circumstances surrounding statement rendered it unreliable).

12. United States v. Calandra, 414 U.S. 338 (1974). Interestingly, a statutory exclusionary rule protects a grand jury witness from being asked questions based on illegal electronic surveillance. 18 U.S.C. § 2515 (1976). *See* Gelbard v. United States, 408 U.S. 41 (1972); *see generally* C. FISHMAN, WIRETAPPING AND EAVESDROPPING, §§ 223-236 (1978 & Supp. 1982).

13. The government's case-in-chief is the portion of the trial at which the prosecutor attempts to carry his initial burden of proof by presenting his evidence. *See Blacks Law Dictionary* 196 (rev. 5th ed. 1979). This is usually the point at which evidence of a search is introduced to prove the defendant's guilt. The same evidence is often useful for other purposes, such as impeachment or cross-examination. *See generally* Oregon v. Hass, 420 U.S. 714 (1975); United States v. Calandra, 414 U.S. 338 (1974); Harris v. New York, 401 U.S. 222 (1971).

14. 420 U.S. 714 (1975).

15. *Id.* at 721.

16. 414 U.S. 338 (1974).

17. *Id.* at 348.

18. *Id.* at 351.

est possible amount of information.[19]

The Supreme Court continued to broaden the exceptions to the exclusionary rule in *United States v. Janis*[20] by refusing to extend the rule to civil proceedings.[21] The Court maintained that in civil proceedings only incidental deterrence might be realized by precluding a different sovereign from using the evidence in a separate proceeding.[22]

A clear pattern has emerged indicating that the Supreme Court is increasingly reluctant to apply the exclusionary rule where the deterrent value is uncertain or minimal.[23] Although the Supreme Court has yet to rule on the application of the exclusionary rule in probation revocation hearings, the Court addressed the role of probation revocation hearings in the criminal justice system in *Mempa v. Rhay*.[24] The *Mempa* Court noted that when a probation revocation hearing is combined with an initial sentencing proceeding it is considered a "stage of a criminal proceeding."[25] The Court nonetheless determined that despite the potential loss of liberty at stake, the probation revocation hearing is not so critical that it requires a right to an attorney.[26]

The Supreme Court distinguished a probation revocation hearing from a criminal trial in *Gagnon v. Scarpeli*.[27] The *Gagnon* Court clarified its position on probation revocation hearings,[28] noting that "probation revocation . . . is not a stage of a criminal prosecution."[29] The Court observed that the difference between a criminal trial and a revocation proceeding is the informal nature of a probation revocation hearing, where formal pro-

19. *Id.* at 354.

20. 428 U.S. 433 (1976).

21. *Id.* at 459-60. Law enforcement officers turned over the fruits of an illegal search to the Internal Revenue Service, which in turn prosecuted Janis in a civil proceeding.

22. *Id.* at 457-58.

23. *See also* Stone v. Powell, 428 U.S. 465 (1976). Defendant sought habeus corpus relief claiming that his fourth amendment rights had been violated. The Court held that the defendant had been afforded a full and fair opportunity to litigate this claim in the state courts. *Id.* at 481-82.

24. 389 U.S. 128 (1967).

25. *Id.* at 137.

26. *Id.*

27. 411 U.S. 778 (1973).

28. *Mempa* held that a probation revocation hearing was a stage in a criminal proceeding because, on occasion, the hearing includes an initial sentencing hearing. Sentencing is an integral part of the criminal trial process, and initial sentencing coupled with any other proceeding would correctly be viewed as a stage in a criminal proceeding. *Mempa*, 389 U.S. at 134. *Mempa* did not, however, pass on the quality of probation revocation hearings.

29. *Gagnon*, 411 U.S. 782. Gagnon was denied a probation revocation hearing by the lower court. The Supreme Court, however, held that due process mandates a probationer's right to a hearing. *Id.* at 791.

cedures and rules of evidence are not employed.[30] In *Greenholtz v. Nebraska Penal Inmates*,[31] the Supreme Court emphasized the distinction between a parole release and a parole or probation revocation. The "revocationers," the Court explained, are "at liberty" and have a greater tangible interest at stake.[32]

In light of the Supreme Court decisions, many lower courts have determined that the exclusionary rule is inapplicable in probation revocation hearings.[33] A majority of the United States courts of appeals have endorsed the Ninth Circuit's analysis of this issue in its *United States v. Winsett* decision.[34] Winsett violated the terms of his probation by leaving the district without notifying his probation officer. He was subsequently arrested by the United States Border Patrol for possessing a large quantity of

30. *Id.* at 789.

31. 442 U.S. 1 (1979).

32. *Id.* at 9.

33. *See* United States v. Frederickson, 581 F.2d 711, 713 (8th Cir. 1978); United States v. Wiygul, 578 F.2d 577, 578 (5th Cir. 1978); United States v. Vandemark, 522 F.2d 1019, 1020-22 (9th Cir. 1975); United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160, 162-63 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); United States v. Hill, 447 F.2d 817, 818-19 (7th Cir. 1971); Grogan v. United States, 262 F.2d 78, 79 (5th Cir. 1958), *cert. denied*, 359 U.S. 944 (1959); *but cf.* United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978), *aff'd after remand*, 617 F.2d 48, 51 (1980); Grubbs v. State, 373 So. 2d 905 (Fla. 1979) (exclusionary rule held applicable to probation cases solely because FLA. CONST. art. I, § 12 provides that "Articles or information obtained in violation of this right, analogous to fourth amendment of federal constitution, shall not be admissible in evidence."). In State v. Dodd, 396 So. 2d 1205 (Fla. Dist. Ct. App. 1981), the court held that but-for the Florida Supreme Court's interpretaton of that clause in *Grubbs*, "we would hold the exclusionary rule inapplicable to probation cases." 396 So. 2d at 1208. *See also* Adams v. State, 153 Ga. App. 41, 264 S.E.2d 532, 533 (Ga. Ct. App. 1980). The court in *Adams* relied on Wong Sun v. United States, 371 U.S. 471, 485 (1963), which stated: "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows . . . that the Fourth Amendment may protect against the overhearing of verbal statements as well . . . ." *See* State v. McMilliam, 243 N.C. 775, 92 S.E.2d 205, 208 (1956) (court cited no authority or precedent in support of the exclusionary rule); Michaud v. State, 505 P.2d 1399 (Okla. Crim. App. 1973) (court interpreted *Wong Sun* to mean that no evidence obtained during an unconstitutional search was ever admissable. The court relied on a self-constructed syllogism that no revocation can occur without competent evidence; illegally seized evidence is incompetent; therefore illegally seized evidence can not be used to revoke probation); Rushing v. State, 500 S.W.2d 667 (Tex. Crim. App. 1973) (arresting officer had prior knowledge that defendant was on probation and used that knowledge to arrest him).

34. 518 F.2d 51 (9th Cir. 1975). *See, e.g.*, United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Wiygul, 578 F.2d 577 (5th Cir. 1978); United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *but see* United States v. Workman, 585 F.2d 1205 (1978), *aff'd after remand*, 617 F.2d 48 (4th Cir. 1980); *see also supra* note 33.

marijuana.[35] Prior to his trial on charges of possession with intent to sell marijuana, Winsett successfully moved to suppress the marijuana because the search had violated the fourth amendment. The unlawful possession-with-intent-to-sell marijuana charge was dismissed.[36] However, at the probation revocation hearing, the testimony of a border patrolman was introduced to establish that Winsett had violated his probation by leaving his judicial district.[37]

The *Winsett* court analyzed the purpose of probation and the value of information at revocation hearings, stating that the conditions of probation serve a dual purpose in that they enhance the chance for rehabilitation while simulaneously affording society a measure of protection. Because violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation by integration into society, it is extremely important that *all reliable* evidence shedding light on probationer's conduct be available during probation revocation proceedings.[38]

The court concluded that both interests were best served by allowing the border patrolman to testify at the probation revocation hearing. The *Winsett* court reasoned that effective deterrence could only be achieved if the border patrol had been aware that the appellant was on probation.[39] Favoring the interests of societal protection, the court stated that the exclusionary rule is inapplicable in probation hearings because the rule "tend[s] to frustrate the remedial purposes of the probation system."[40]

The Fourth Circuit stands alone in its disagreement with the *Winsett* analysis. In *United States v. Workman*,[41] a probation officer conducted a warrantless search on Workman's property.[42] The court premised its discussion by asserting that a probation revocation hearing is an adjudicative criminal proceeding.[43] In support of this proposition, the *Workman* court

35. *Winsett*, 518 F.2d at 52. The violation of probation was not the possession of illegal drugs, but leaving the area without reporting to a probation officer.

36. *Id.*

37. *Id.*

38. *Id.* at 54-55 (emphasis in original).

39. *Id.* at 55.

40. *Id.*

41. 585 F.2d 1205 (4th Cir. 1978).

42. This case is distinguishable on the facts. In *Workman*, the searching officer was aware of defendant's probationary status. *Id.* at 1206. Thus, effective deterrence might be achieved by applying the exclusionary rule. The *Workman* court nonetheless failed to dispose of the case on this distinction and instead, ignored the distinction in favor of disagreeing with the other circuit courts.

43. The *Workman* court, however, recognized the noncriminal nature of a probation revocation hearing by referring to probation officers' investigations as "administrative" searches. *Id.* at 1207.

noted that Congress included probation revocation hearings in the Criminal Code; therefore, the hearings were intended to be criminal in nature.[44] Second, the court noted that a probation revocation hearing may result in the imposition of criminal sanctions.[45]. The *Workman* court concluded that because the exclusionary rule must be applied in all criminal proceedings, it should apply in the probation revocation hearing as well.[46]

In *Thompson v. United States*,[47] the District of Columbia Court of Appeals extended earlier judicial analysis, ruling that "absent egregious circumstances," the exclusionary rule is not applicable to probation revocation hearings.[48] As a result of a plea bargaining agreement, Thompson was placed on probation for two years. Thompson was subsequently arrested, searched, and a weapon was found on his person.[49] Although the weapons charge was dismissed after the trial court held the arrest and search unlawful, a probation revocation hearing was ordered because of Thompson's illicit conduct. Thompson challenged the lower court's finding, contending that the exclusionary rule precluded the evidence from being introduced at a probation revocation hearing.[50]

Judge Mack, writing for a unanimous court, examined Thompson's contention in view of the nature and purpose of the exclusionary rule, of probation, and of probation revocation hearings. The court noted that the purpose of the exclusionary rule is not to remedy individual violations of fourth amendment rights, but to deter law enforcement officials from con-

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44. *Id.* at 1209 n.5. Although a grand jury is also provided for in the code, *see* 18 U.S.C. § 3321 (1976), the Supreme Court in *Calandra* exempted it from the operation of the exclusionary rule, thereby indicating that such a factor is not dispositive of the rule's application. *See supra* text accompanying notes 16-19.

45. 585 F.2d at 1209. This contradicts dicta in both *Gagnon* and *Greenholtz*, wherein the Supreme Court referred to the consequences of such a proceeding as the revocation of a privilege, rather than as the imposition of a penalty. In both *Gagnon* and *Greenholtz* the defendants were incarcerated, but later granted freedom based on certain conditions. *See generally* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). Gagnon v. Scarpeli, 411 U.S. 778 (1973).

46. 585 F.2d at 1211. The *Workman* court cited the Supreme Court in *Wong Sun* for the proposition that the exclusionary rule should apply in all criminal proccedings. It is not clear whether the *Wong Sun* Court made such an absolute statement, *see supra* note 33. *See also Calandra*, 414 U.S. 338, 348 (1974), and *supra* text accompanying notes 16-19.

47. 444 A.2d 972 (D.C. 1982).

48. *Id.* at 973. The District of Columbia Court of Appeals in Short v. United States, 366 A.2d 781 (D.C. 1976) held that a probation revocation hearing is administrative, not criminal, in nature. *Id.* at 785. In *Short*, the court held that immunity from prosecution did not extend to probation revocation hearings. *Id.*

49. D.C. CODE ANN. § 22-3201 (1981) provides that carrying a weapon without a license is illegal.

50. 444 A.2d at 973.

ducting unlawful searches and seizures.[51] Moreover, Judge Mack stressed that the exclusionary rule had been applied only in criminal proceedings,[52] and emphasized that a probation revocation hearing is an administrative, rather than criminal, proceeding.[53] Thus, the exclusionary rule's applicability must be determined by balancing the competing interests of community safety and rehabilitation, against the deterrent value of excluding the evidence.[54] The *Thompson* court found that there were no egregious circumstances attending the violation of fourth amendment rights[55] that would tip the balance in favor of the deterrence interest.[56] Hence, the *Thompson* court followed the trend of a majority of the jurisdictions that have considered the issue, by appreciating the need for full and accurate information in the probation revocation setting.[57] The United States Court of Appeals for the District of Columbia Circuit has not considered this issue, and as a result, *Thompson* constitutes the only ruling on the applicability of the exclusionary rule to probation revocation hearings in the District of Columbia.

The Supreme Court in *Harris, Calandra, Hass*, and *Janis* limited the exlusionary rule's applicability in criminal proceedings to the case-in-chief.[58] It is apparent that as long as the evidence was obtained for a different purpose, the societal interest in using the illegally obtained evidence far outweighs the deterrent value.

The facts of *Thompson* clearly fall within this standard. Thompson's weapons charge was dropped after the court granted a motion to suppress the illegally seized evidence.[59] The officers apparently did not know of Thompson's probationary status, nor was there any evidence of a willful attempt to revoke his probation.[60] Thus, no deterrent interest was served by excluding the seized evidence.

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51. *Id.*

52. *Id.* at 973-74. *See, e.g., Janis*, 428 U.S. 433 (1976); *Hass*, 420 U.S. 714 (1975); *Calandra*, 414 U.S. 338 (1974). *See supra* notes 12-22 and accompanying text.

53. 444 A.2d at 974. *See supra* note 48 and accompanying text.

54. *Id.* (citing United States v. Winsett, 518 F.2d 51 (9th Cir. 1975)).

55. 444 A.2d at 975. The District of Columbia Court of Appeals did not disturb the lower court's finding that no egregious circumstances were present.

56. *Id.* Judge Mack indicated that egregious circumstances would be "[w]here, for example, illegal acts of a government agent were directed specifically at a probationer or [where they] shock the conscience . . . ." In such a situation, she said, "the deterrent effect that exclusion of such evidence would have, outweighed the need of the sentencing court for full and reliable information." *Id.*

57. *Id.* at 974-75.

58. *See supra* notes 12-22 and accompanying text.

59. 444 A.2d at 973.

60. *Id.* at 975. The court did not disturb the lower court's findings. *Id.*

Although the court intimated that the exclusionary rule would apply in "egregious circumstances,"[61] it is unclear precisely what circumstances would be considered egregious. For example, a law enforcement officer may be aware of a probationer's status and nevertheless act in good faith while conducting an illegal search and seizure. It is not clear whether this knowledge will automatically activate the exclusionary rule for purposes of a probation revocation hearing.[62] On the other hand, the probationer requires protection from law enforcement officers who may proceed carelessly or with unusual malice due to their knowledge of the probationer's status. Even if the seized evidence is inadmissible in the case-in-chief, such ill-intentioned officers may well be satisfied with the revocation of probation. Perhaps the probationer's interests are best protected by the "egregious circumstances" standard enunciated by the *Thompson* court.

The failure of the court to set clear guidelines for determining what constitutes egregious circumstances underscores the necessity of determining the relevant facts on a case-by-case basis to protect the probationer's interests. The resulting individualized treatment may increase the rights of the probationer because the court, while serving to safeguard the interests of society, must attempt to assess the officer's knowledge of probationary status.[63]

While consistent with the Supreme Court's application of the exclusionary rule, *Thompson* further limits the rule's applicability. The unanimity of the court reflects the strong support for social interests and the uncertainty inherent in any application of the concept of deterrence. The absence of guidelines and a definition of egregious circumstances indicates that future evaluation of these cases will be on an individual basis, thus ensuring both the safeguards of the fourth amendment and the value of deterrence.

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61. *Id.* at 974-75.

62. While the court considered police knowledge of the probationer's status relevant in determining egregious circumstances, it also cited intentional seizure to cause revocation, and acts which shock the conscience. *Id.* at 975. *See supra* note 56.

63. *Id.* at 974.