EXCLUSION OF ILLEGAL EVIDENCE UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

THE FEDERAL DOCTRINE which renders evidence inadmissible if obtained through illegal search and seizure[1] is made available to an aggrieved party through Rule 41(e) of the Federal Rules of Criminal Procedure.[2] As to the procedural requisites for its employment, this rule provides that:

> The motion [to suppress evidence] 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.* [emphasis added]

The last clause of this subsection was highlighted in *Wrightson v. United States*,[3] a recent decision of the Court of Appeals for the District of Columbia. The defendant was convicted, in a federal district court, of armed robbery. During the trial, he moved[4] to suppress certain evidence seized by police officers at the time of his arrest.[5] The record of the trial was ambiguous as to which of two possible dispositions the trial judge had made of this motion, and the resolution of this ambiguity

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[1] The federal doctrine had its origin in *Weeks v. United States*, 232 U.S. 383 (1914). The majority of state courts follow a contrary rule, holding that illegal acquisition does not bar the introduction of evidence. 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

[2] Rule 41(e) provides, in 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 and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise submitted to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. . . ."

[3] 222 F.2d 556 (D.C. Cir. 1955).

[4] The defendant did not make a formal motion to suppress, but his objections to the introduction of evidence were regarded as the equivalent thereof. *Id.* at 557, 560, 563.

[5] Following his arrest, the defendant was identified by the victim of the robbery and made a full confession, which he later retracted. *Id.* at 562.

was the primary point in controversy on appeal. The majority of the appellate court[6] concluded that the trial judge,[7] in the exercise of his discretion, as provided for by the last clause of Rule 41(e), had entertained the motion to suppress and had denied it after a consideration on the merits. Having found that the trial judge did *entertain* the motion, the majority concluded that its denial *on the merits* was error.[8] The dissenting judge,[9] on the other hand, concluded that the trial judge had not, in fact, entertained the motion, but had, in his discretion, refused to do so on the ground that it had not been timely made.[10]

Rule 41(e) was intended to be a codification of the federal common law rule which excluded evidence obtained by illegal search and seizure.[11] This federal rule of evidence was, in turn, an outgrowth of *Weeks v. United States*.[12] There the Supreme Court ruled that illegally

[6] Circuit Judges Prettyman and Fahy voted to reverse the decision below.

[7] The trial judge was Alexander Holtzoff. The dissent accorded especial significance to this fact, siuce Holtzoff had been secretary of the Advisory Committe of the Supreme Court on Criminal Rules and co-author of an outstanding work on federal criminal and civil procedure, BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (1951). (Judge Holtzoff, however, did not participate in the preparation of Volume 4, which deals with the Federal Rules of Criminal Procedure).

[8] The majority ruled that there was not sufficient evidence of "probable cause" to justify the arrest, which had been made without a warrant. The arrest having been found illegal, the search and seizure incident thereto, were ruled illegal also. 222 F.2d at 559.

[9] Circuit Judge Miller voted for affirmance of the decision below.

[10] The dissenting judge succinctly expressed his conclusion as follows: "His [the trial judge's] position may be fairly summarized as being that he denied the motion because it came too late, but that he would not do so if he thought from what had been said in evidence, that it might have merit; for, if he thought that, he would exercise his discretion to consider the motion and receive evidence out of the jury's presence on any issue of fact necessary to decision thereon." 222 F.2d at 565.

[11] FED. R. CRIM. P. 41(e), Advis. Comm. Notes, p. 32. The Advisory Committee's notes indicated one change effected by Rule 41(e). Prior to the codification, motions to suppress were permitted to be made before a commissioner as well as before the court. This alternative was eliminated in order "to prevent multiplication of pleadiugs."

[12] 232 U.S. 383 (1914). An earlier decision, *Boyd v. United States*, 116 U.S. 616 (1886) had presaged the holding in the *Weeks* case. An intermediate holding of the Court, however, virtually repudiated the *Boyd* decision. Adams v. New York, 192 U.S. 585 (1904). In the *Weeks* case, the defendant was convicted of using the mails for the trausmission of lottery tickets. Subsequent to the defendant's arrest at his place of employment, a United States marshal searched the accused's dwelling and seized incriminating correspondence. Prior to the trial, the defendant petitioned for the return of this property and did so again just after the jury had been sworn in at the trial. Both these petitions were denied, and the defendant's objection during trial to the introduction of the seized property was similarly overruled. Upon conviction, the defendant appealed, assigning as error the court's denial of his petitions for the return of the property. In reversing, the United States Supreme Court held that the district court

obtained evidence should be excluded by the trial courts, but the decision was impliedly limited to those instances in which the motion to suppress was made before trial.[13] This implied limitation on the *Weeks* ruling was prompted by a recognition that the question of illegal acquisition is a "collateral issue," for the determination of which the court should not interrupt its proceedings.[14]

Subsequent decisions, however, extended the procedural effect of the *Weeks* decision beyond this limitation; and it came to be well accepted that the courts would entertain motions to suppress evidence at trial when it had been impracticable for the movant to raise the question earlier.[15] Consequently, in codifying the prior law, Rule 41(e) recognizes these judicial extensions by announcing two exceptions to the general rule requiring a pre-trial motion to suppress. The entertainment of a late motion to suppress is made obligatory upon the court either, first, if there was no opportunity for the accused to make a pre-trial motion; or, second, if the defendant was unaware of the grounds for such motion before trial.

In addition, the final clause of Rule 41(e) gives discretionary power to the trial judge to entertain a motion to suppress made at trial, even though the movant is unable to bring himself within one of the above two exceptions. The considerations prompting the inclusion of this clause are not made explicit by the codifiers of the rule, nor do the cases cited by the Advisory Committee clarify its basis.[16] At least two justifications for the clause, however, may be advanced. First, it appears settled that a trial judge may, on his own motion, exclude evidence which, for any reason, is clearly inadmissible.[17] Failure to grant a judge,

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erred in admitting evidence seized in violation of the fourth amendment guaranty against "unreasonable search and seizure." For a full discussion of both the "state" and "federal" doctrines with regard to the exclusion of illegally seized evidence, see 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

[13] 232 U.S. at 396.

[14] See 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940). This "collateral issue" theory is probably the primary rationale underlying the traditional rule that illegal acquisition is no ground for the objection to the introduction of evidence. See note 1 *supra*.

[15] Amos v. United States, 255 U.S. 313 (1921) (motion to suppress allowed at trial when seizure had been surreptitious, and accused was unaware of grounds for the motion); Agnello v. United States, 269 U.S. 20 (1925) (motion to suppress allowed at trial when it appeared movant was unaware of the search and the probable introduction of the seized evidence); Poulos v. United States, 8 F.2d 120 (1925) (motion to suppress allowed at trial when illegality of seizure was first shown in prosecution's evidence).

[16] *But see*, Gouled v. United States, 255 U.S. 298, 312 (1921) (dictum).

[17] United States v. Janitz, 6 F.R.D. 1, 3 (D.N.J. 1946) (dictum); 88 C.J.S., Trial § 156 (1955).

already vested with initiating power to suppress, an opportunity to respond to a party's motion to suppress, would, at best, be anomalous. Secondly, the final clause of Rule 41(e) may well have been included so that, in the event of unusual circumstances not anticipated by the two specific exceptions in Rule 41(e), the court will not be prevented from entertaining such a motion where it appears that justice may require it to do so.

It is in the context of this background that judicial treatment of the discretionary clause can be better appraised, on both the trial and the appellate levels. On the trial court level, cases raise no problems when the challenged evidence is so clearly inadmissible that it may be excluded without a hearing.[18] Instead, the difficulties arise only when a hearing on the merits would be necessary in order adequately to pass on the issue of illegal acquisition. Since a motion to suppress invokes the discretionary power of the court, the first problem in such cases is to determine what countervailing considerations should be balanced by the judge in exercising this discretion. The origins and development of Rule 41(e)[19] suggest that one consideration is the probable trial delay. In addition, it would seem unlikely that a judge would interrupt a trial to hold a hearing on the motion without reflecting on the probability that the merits of the motion warrant this special treatment. As a consequence, it seems inevitable that the ultimate decision on whether or not to entertain the motion depends on whether the probable merits of the motion outweigh the probable inconvenience of a hearing. The paradox is obvious: the judge must advert to the merits in order to determine whether to consider the merits. Not only does this paradox seem inevitable under the final clause of Rule 41(e), but it also seems necessary—a lesser evil than those which a change in this clause might precipitate. For example, if the trial court were under an absolute duty to entertain motions to suppress made at trial, the danger of harassing tactics by defendants is apparent.[20] At the other extreme, elimination of the discretionary provision would encroach[21] on the power of the trial court to entertain late motions, the untimeliness of which derived from circumstances not otherwise provided for in the rule.

Assuming, then, that elimination or amendment of the clause is not

[18] Gouled v. United States, 255 U.S. 298 (1921); United States v. Janitz, 6 F.R.D. 1, 3, *app. dismissed* 161 F.2d 19 (1946) (dictum).

[19] See text to note 15 *supra*.

[20] Note, 28 TEXAS L. REV. 273 (1950).

[21] Where illegal acquisition is clear, the trial judge, even without the discretionary clause, *could* suppress the evidence. See note 17 *supra*.

the solution, the responsibility rests with the trial court judges to recognize the paradox which proper application of the discretionary clause evokes, and, for the purposes of the record, to postpone any discussion of the merits of a motion to suppress until after having plainly indicated whether or not the motion will be entertained. Any earlier comment on the merits would too often result in ambiguities such as those which plagued the appellate court in the *Wrightson* case.

The problems raised by Rule 41(e) on the appellate level are no less complex. Again, clear cases need no consideration;[22] but if the disposition by the trial court of a motion to suppress is rendered uncertain by an ambiguous record, then the appellate court must appreciate the paradox inherent in the discretionary clause in order to resolve the ambiguity correctly. Comments by the trial judge on the merits, where a motion to suppress is made at trial, must not be taken as conclusive that the motion was entertained and decided on the merits. Rather, it must be recognized that even a proper application of the discretionary clause may result in comment on the merits, though the motion was, in fact, dismissed for untimeliness.

In some cases, trial record ambiguities might be resolved by reference to the provision in Rule 41(e) that "the judge shall receive evidence on any issue necessary to the decision of the motion."[23] Where it is obvious that additional evidence would be necessary to a decision on the issue of illegal acquisition, the fact that no hearing was conducted would tend to indicate that the motion was not entertained.[24]

In conclusion, it seems that the avoidance of these problems on the trial court level and their resolution by the appellate courts can only be achieved through an awareness of the history, purpose, and paradox of the discretionary clause of Rule 41(e).

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[22] If the motion to suppress is clearly denied because of its untimeliness, the ruling of the trial judge is not reviewable. United States v. Di Re, 159 F.2d 818, 820 (2d Cir. 1947), *aff'd* 332 U.S. 581 (1948) (dictum). On the other hand, where the motion was obviously entertained by the trial court and denied on the merits, this ruling is subject to review. *Stein v. United States*, 166 F.2d 851 (9th Cir. 1948), *cert. denied* 334 U.S. 884 (1948); United States v. Di Re, *supra*.

[23] See note 2 *supra*.

[24] The dissent in the *Wrightson* case noted the failure of the trial judge to conduct a hearing: "That he conducted no hearing on the motion is, to me, convincing proof that, as he said, he denied it 'because the rules provide that any such objection must be made before trial by a motion to suppress. No such motion was made.'" 222 F.2d at 565.