CRIMINAL PROCEDURE: CIRCUIT COURT REFUSES TO EXTEND "POISON FRUIT" DOCTRINE TO TESTIMONY OF WITNESS DISCOVERED AS A RESULT OF ILLEGAL DETENTION

SINCE the famous *Weeks*[1] case established the rule excluding evidence obtained from an illegal search and seizure from trials in the federal courts, the principles stated therein have developed apace to an ever widening application.[2] In *Smith v. United States*,[3] however, the Circuit Court of Appeals for the District of Columbia refused to extend the exclusionary doctrine to testimony of an eyewitness to a crime who was discovered as a result of clues obtained from defendants while they were illegally detained.

Testimony indicated that Miksa Merson was struck from behind and robbed by unknown assailants. The victim died shortly thereafter, and the police had few clues. About a week later, defendants Smith and Bowden were arrested in connection with another robbery in the area of the killing. Upon failure of the victim of the second robbery to identify either of the suspects, Bowden, a juvenile, was released, but Smith was detained to be included in a line-up the next morning. The homicide officer assigned to the Merson case was present at this line-up and suspected a connection between Smith and the Merson killing. Bowden was subsequently picked up for questioning. During the interrogation defendants confessed and cited clues ultimately leading the police to eyewitness Holman.[4] The trial court excluded the confessions but permitted Holman to testify.[5] Following conviction, appeal was taken on the ground that the testimony of Holman was improper since he was found as a result of information obtained while defendants were illegally detained in

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[1] Weeks v. United States, 232 U.S. 383 (1914).

[2] See generally, MCCORMICK, EVIDENCE §§ 118, 139-42 (1954); 8 WIGMORE, EVIDENCE §§ 2184a, b (McNaughton rev. 1961); 2 VARON, SEARCHES, SEIZURES AND IMMUNITIES chs. XIII, XVII (1961).

[3] 324 F.2d 879 (D.C. Cir. 1963).

[4] Apparently witness Holman had accompanied Smith and Bowden on their lawless venture. *Id.* at 880-81, 883 n.4.

[5] Smith's confession was excluded under the rule of Mallory v. United States, 354 U.S. 449 (1957), excluding confessions taken during illegal detention. Bowden, a juvenile, came under the rule of Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961), excluding a minor's admissions to police before juvenile court had waived its exclusive jurisdiction.

violation of rule 5 (a) of the Federal Rules of Criminal Procedure.[6] The Circuit Court of Appeals upheld the admissibility of Holman's testimony on the grounds of lack of precedent for exclusion under these circumstances and the attenuated connection between the confession and the testimony in the trial court.[7]

Under traditional common law rules evidence was not excluded from trial solely on the basis of the methods used by police in obtaining it.[8] Under the modern federal rules, however, there have been several controversial lines of cases excluding otherwise admissible evidence from trial on the ground of improper police investigative methods.

Weeks v. United States[9] is traditionally considered the leading case excluding evidence acquired during an illegal search and seizure. Subsequently, *Silverthorne Lumber Co. v. United States*[10] went beyond the mere exclusion of the immediate fruits of the illegal search to inaugurate the so-called "poison fruit doctrine" excluding evidence coming to the knowledge of the police as a result of having acquired the illegally obtained evidence. The recent case of *Wong Sun v. United States*[11] reaffirms the *Silverthorne* doctrine

[6] FED. R. CRIM. P. 5 (a) provides: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." The defendant also contended it was error to admit in evidence Smith's palm print obtained from him the day before trial, which corresponded with the palm print on the victim's car registration card. 324 F.2d at 881. The Court of Appeals, however, considered the taking of the palm print part of the routine identification process during lawful custody and not related to the illegal detention. *Id.* at 882; *cf.* United States v. Bynnm, 274 F.2d 767 (D.C. Cir. 1960) (per curiam).

[7] 324 F.2d at 881. The court settled the lack of precedent ground by stating that "no case as yet has held that a jury should be denied the testimony of an eyewitness to a crime because of the circumstances in which his existence and identity was learned." *Ibid.* This statement is not completely accurate. See note 12 *infra.* The "attenuated connection" results from interposing the human personality of the witness between the unlawful police action and the eventual testimony. 324 F.2d at 881 n.2.

[8] See MCCORMICK, *op. cit. supra* note 2, § 137; 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure,* 8 A.B.A.J. 479 (1922).

[9] 232 U.S. 383 (1914). For many years the *Weeks* doctrine did not apply to evidence presented for use in state courts. Today, however, the exclnsionary rules in relation to search and seizure have been extended to apply to the states. See Mapp v. Ohio, 367 U.S. 643 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319.

[10] 251 U.S. 385 (1920).

[11] 371 U.S. 471 (1963), 49 A.B.A.J. 285 (1963), 51 CALIF. L. REV. 637 (1963), 51

and makes it clear that there is no logical reason to distinguish between physical and verbal evidence. While there are no federal cases directly holding that testimony of an eyewitness to a crime should be excluded as "poison fruit" merely because the witness was found through the use of illegally obtained evidence, two states have done so, citing *Silverthorne* and other federal cases as authority.[12]

A second exclusionary development has been accomplished by the Supreme Court in relation to wire-tapping[13] under section 605 of the Federal Communications Act of 1934.[14] Reliance on the statute as the foundation for exclusion became necessary with the rejection of the argument that wire-taps fell under the constitutional prohibition against illegal search and seizure.[15] The prohibition against trial use of evidence secured indirectly or derivatively from wire-taps extended the *Silverthorne* rule into this new area.[16] It is in connection with wire-tapping activities that one would expect to find cases directly in point as to whether a witness *discovered* through the use of illegally obtained information would be permitted to testify. However, this is not the case. It seems that no one has speculated on whether this natural breeding ground for finding prosecution witnesses remains unlitigated because of difficulty in proving how witnesses are discovered or from an assumption that such evidence would be clearly excluded. The general *Nardone* rule that wire-tap information cannot be used derivatively to acquire evidence has been construed by one prominent writer to mean that testimony of a

GEO. L.J. 838 (1963), 31 GEO. WASH. L. REV. 851 (1963), 77 HARV. L. REV. 117 (1963), 42 N.C.L. REV. 219 (1963), 46 NEB. L. REV. 483 (1963), 2 WASHBURN L.J. 292 (1963).

[12] People v. Mickelson, 59 Cal.2d 448, 380 P.2d 658 (1963) (Traynor J.); People v. Schaumloffel, 53 Cal.2d 96, 346 P.2d 393 (1959); People v. Mills, 148 Cal. App. 2d 392, 306 P.2d 1005 (Dist. Ct. App.), *cert. denied*, 355 U.S. 841 (1957); People v. Albea, 2 Ill. 2d 317, 118 N.E.2d 277 (1954), 30 N.Y.U.L. REV. 1121 (1955); People v. Schinoll, 383 Ill. 280, 48 N.E.2d 933 (1943); People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942). The *Schaumloffel* case is particularly interesting since it involved a definite chain of causation. The police made an illegal search of a doctor's office and took some cards with names on them. One card led to witness Edgar. Edgar in turn informed the police about witnesses Watts and Justen. The California Supreme Court affirmed the holding that testimony of all three witnesses must be excluded as "poisonous fruit."

[13] Nardone v. United States, 302 U.S. 379 (1937); see Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514 (1947); 33 CORNELL L.Q. 73 (1947); Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952); 8 WIGMORE, *op. cit. supra* note 2, § 2184b.

[14] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[15] Olmstead v. United States, 277 U.S. 438 (1928).

[16] Nardone v. United States, 308 U.S. 338 (1939); see Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99 (1942).

witness discovered by wire-tap information would be excluded.[17] He came to the same conclusion about testimony of a witness induced to testify by confronting him with wire-tap information, provided the defendant had standing to object.[18] This conclusion as to using wire-tap information to accomplish police coercion of witnesses was drawn by implication from *United States v. Goldstein.*[19]

A third major area of exclusion was developed in the cases of *McNabb v. United States*[20] and *Upshaw v. United States.*[21] These cases, taken together, establish that illegal detention in violation of rule 5 (a) of the Federal Rules of Criminal Procedure is sufficient *by itself* to exclude confessions made by the defendant during that illegal detention. This infirmity may carry over to a later confession made while in lawful custody.[22] It also appears well settled that physical evidence acquired during illegal detention must be excluded.[23]

A common strand runs through each of these three areas: Otherwise relevant evidence is excluded on the sole ground that it was acquired by the police either as a result of or during some unlawful action in relation to the defendant.[24] There seems to be no sub-

[17] Bernstein, *supra* note 16, at 102-03.

[18] *Ibid.*

[19] 316 U.S. 114 (1942), *affirming* 120 F.2d 485 (2d Cir. 1941). *Goldstein* held that the defendants did not have standing to object because they were not parties to the conversations used to induce the witnesses to testify. The oral testimony of the witnesses at trial was free from any taint of wire-taps. They testified from memory and no wire-tap information or evidence derived therefrom was used to refresh their recollection. Still, the Supreme Court indicated that objection by a party to the wire-taps would have made the testimony inadmissible. See Weiss v. United States, 308 U.S. 321 (1939), in which the prosecution unsuccessfully attempted to get wire-tap transcripts in evidence through witnesses induced to testify by confronting them with wire-tap information. In this case, the defendants had standing to object because the evidence was the subject matter of conversations to which they were parties.

[20] 318 U.S. 332 (1943). See generally MCCORMICK, *op. cit. supra* note 2, § 118.

[21] 335 U.S. 410 (1948). See Mallory v. United States, 354 U.S. 449 (1957); Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1 (1958); Inbau, *The Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442 (1948); Wicker, *Some Developments in the Law Concerning Confessions,* 5 VAND. L. REV. 507 (1952).

Most states take the position that the fact that a confession was given during a period of illegal detention is one factor to be considered in determining whether or not it was voluntary; but it does not make the confession inadmissible per se. See, *e.g.*, State v. Archer, 244 Iowa 1045, 58 N.W.2d 44 (1953); People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916); Commonwealth v. Johnson, 372 Pa. 266, 93 A.2d 691 (1953), *cert. denied,* 345 U.S. 959 (1953); Annot., 19 A.L.R.2d 1331-47 (1951).

[22] Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962).

[23] See United States v. Di Re, 332 U.S. 581 (1948); Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958).

[24] It is an established characteristic of the federal exclusionary rules that the un-

stantial argument denying that the exclusionary rule applies in all three instances to both the immediate fruits and the indirect or derived fruits of the unlawful action.[25] With regard to derived fruits, the critical question is to determine what connection must exist between the unlawful action and the evidence acquired so as to make it "poisonous."

The general rule is clearly stated in *Silverthorne:* "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.*"[26] The most recent statement of a suggested test for determining when the fruit becomes poisonous was given in *Wong Sun.*[27] In that case one Toy gave information during an illegal arrest which led to one Yee who stated that containers of heroin in his possession were given to him by Toy and Wong Sun. After arraignment, both Toy and Wong Sun made prejudicial unsigned statements.[28] On trial, Yee repudiated his story and invoked the fifth amendment. The heroin surrendered by Yee was also introduced into evidence. In determining the admissibility of the evidence, the Court postulated two situations in which the taint of unlawful police action would not preclude its use: (1) evidence derived from an unlawful police action would nevertheless be admissible if the same evidence was also derived from an inde-

lawful police action must violate some right of the defendant before he can complain about the use of evidence acquired thereby. See, *e.g.,* Wong Sun v. United States, 371 U.S. 471 (1963) (illegal search and seizure); Jones v. United States, 362 U.S. 257 (1960) (standing to object accorded to anyone legitimately on premises where search occurs); Goldstein v. United States, 316 U.S. 114 (1942) (wire-tapping); Edwards, *Standing to Suppress Unreasonably Seized Evidence,* 47 NW. U.L. REV. 471 (1952). This aspect of the federal rule is discussed and criticized by Justice Traynor as an illogical introduction of property and tort concepts into the exclusionary area. Traynor, *supra* note 9, at 334-37.

[25] *But see* Wicker, *supra* note 21. The author states without supporting authority that in relation to the *McNabb* and *Upshaw* cases "the fact that confessions which are inadmissible often furnish excellent leads whereby the police can secure evidence that is admissible, militates somewhat against the effectiveness of the defendant's remedy under the new rules and relieves some of the pressure which that rule places upon federal officers to comply with prompt arraignment statutes." *Id.* at 514. This premise was clearly rejected in Walder v. United States, 347 U.S. 62 (1954).

[26] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). (Emphasis added.)

[27] Wong Sun v. United States, 371 U.S. 471 (1963).

[28] Wong Sun and Toy were released from custody on their own recognizance after the arraignment. Both made unsigned statements before release. Wong Sun later voluntarily returned to the police station and made another unsigned statement. *Id.* at 491.

pendent source[29] and (2) evidence acquired as a result of unlawful police action would be admissible if the connection between the unlawful conduct and the acquisition of the evidence had "become so attenuated as to dissipate the taint."[30] In directing its remarks to admission of the heroin, the Court noted that the police would not have known about it except for the illegal police action; therefore, the independent source test clearly was not met.[31] However, the contention was rejected that all evidence is "fruit of the poisonous tree" merely because the police would not have known about it except for the unlawful police action.[32] Rather, the Court stated that the further "attenuated connection" test to be applied was whether, assuming the primary illegality, the evidence had been obtained by exploitation of that illegality or by some other means sufficiently distinguishable to be purged of the primary taint.[33] The Court held that the following of Toy's illegally obtained instructions leading to discovery of the heroin was exploitation of the illegality.[34] On the other hand, the defendant's voluntary return to the police station to make a statement after he had been released from the unlawful arraignment was a "means sufficiently distinguishable" to purge the primary taint.[35] Clearly the Court thought the unlawful arraigument did not *cause* the subsequent voluntary statement. While these tests are not as definite as might be desired they are certainly sufficient to distinguish most, if not all, of the cases admitting evidence in spite of its connection with unlawful police action.[36]

[29] *Id.* at 487; see Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[30] Wong Sun v. United States, 371 U.S. 471, 487 (1963). The implication seems to be that the "attenuated connection" is one of causation, perhaps analogous to the doctrine of proximate cause. *Compare id.* at 491, *with* Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). See Bernstein, *supra* note 16, at 104-08.

[31] Wong Sun v. United States, *supra* note 30, at 487.

[32] *Id.* at 487-88.

[33] *Ibid.* See MAGUIRE, EVIDENCE OF GUILT 221 (1959).

[34] Wong Sun v. United States, 371 U.S. 471, 488 (1963).

[35] *Id.* at 491.

[36] There are a number of cases permitting admission of evidence having a substantial connection with the unlawful police action but which was held to have been acquired either from an independent source or by means sufficiently unrelated to the unlawful action to be purged of the primary taint. In Payne v. United States 294 F.2d 723 (D.C. Cir.), *cert. denied*, 368 U.S. 883 (1961), a witness independently located by police identified the defendant during an illegal detention but was still permitted to identify him in open court. In Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960), the court refused to admit a fingerprint obtained during illegal detention but did permit admission of a fingerprint later obtained from FBI files. The instant *Smith* case admitted a palm print of the defendant obtained during a later lawful detention on the ground that this was a routine part of identification. 324 F.2d at

Applying these general rules to the fact situation in *Smith v. United States,* it would seem that the testimony of an eyewitness discovered directly from the use of information acquired during illegal detention clearly should have been excluded. As eminent a jurist as Justice Traynor has so held in the illegal search and seizure area, relying on the *Silverthorne, Nardone* and *Wong Sun* cases as precedent.[37] In *Smith,* however, the court, while admitting the direct exploitation of the illegally obtained confessions in *discovery* of the witness, used the "individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give"[38] to erect a wall of "attenuated connection" between the unlawful action and eventual testimony.[39] If a wall is to be erected on the basis of the human personality, at what point will it be called into play? *Wong Sun* indicates that the personality of the defendant himself will not attenuate the connection. Certainly the attenuated connection does not arise when the witness is a police officer who took part in the illegal action.[40] It does not seem likely that testimony of a witness discovered during the actual perpetration of the unlawful police conduct would be admissible.[41] It is doubtful that testimony of witnesses induced to testify by confrontation with illegally obtained evidence would be admissible in the face of an objection by a defendant with standing to object.[42]

882. Watson v. United States, 234 F.2d 42 (D.C. Cir. 1956), held a confession was not invalid unless the illegal detention produced the disclosure.

The evidence may be allowed because it is determined that it had *no* connection with the unlawful action. See United States v. Mitchell, 322 U.S. 65 (1944) (confession obtained before unnecessary delay); Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959) (confession obtained before unnecessary delay); Haines v. United States, 188 F.2d 546 (9th Cir. 1951) (defendant has burden of showing unnecessary delay). Illegally obtained evidence may be admissible for a collateral purpose, *e.g.,* impeaching defendant's credibility. See Walder v. United States, 347 U.S. 62 (1954); compare Agnello v. United States, 269 U.S. 20 (1925). Reversal for admitting illegally obtained evidence may be refused where there would be no practical change in sentence, *e.g.,* where sentence for counts not depending on illegal evidence ran concurrent with sentence for counts supported by illegal evidence. See Heinecke v. United States, 294 F.2d 727 (D.C. Cir. 1961).

[37] People v. Mickelson, 59 Cal.2d 448, 380 P.2d 658 (1963).

[38] 324 F.2d at 881.

[39] *Ibid.*

[40] See Rea v. United States, 350 U.S. 214 (1956); McCinnis v. United States, 227 F.2d 598 (1955).

[41] See People v. Mickelson, 59 Cal.2d 448, 380 P.2d 658 (1963); People v. Albea, 2 Ill.2d 317, 118 N.E.2d 277 (1954); Annot., 41 A.L.R.2d 895 (1955); *cf.* Jones v. United States, 362 U.S. 257 (1960), which extends standing to object to admission of illegally obtained evidence to "anyone legitimately on premises where a search occurs." *Id.* at 267.

[42] See Goldstein v. United States, 316 U.S. 114 (1942); Weiss v. United States, 308 U.S. 321 (1939); Bernstein, *supra* note 16, at 102-03.

Had witness Yee in *Wong Sun* not decided to repudiate his story and plead the fifth amendment his appearance as a witness would have permitted the Court to rule directly on the status of his testimony. Even without a direct ruling on the point, it seems that the Court would not have viewed the connection attenuated where the same exploitation of the illegally obtained evidence that demanded exclusion of the heroin also led to witness Yee.[43] As a practical matter, admission of the testimony of Yee would have made the exclusion of the heroin meaningless. This anomalous situation would always exist where the witness also had relevant physical evidence in his possession.

Assuming agreement with the policy supported by the exclusionary rules, there appears no sound basis for the *Smith* case distinction between living persons and inanimate objects. The exploitation of the illegally obtained confessions up to the point of discovery of the witness is clear and direct. Further exploitation can only be suspected from remarks of the circuit court[44] and a general knowledge of police interrogation practices when they are armed with complete knowledge of the crime and the persons involved.

[43] It is not clear from *Wong Sun* whether a direct line of causation can ever be attenuated once the illegally obtained evidence is exploited to find secondary evidence. See Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), where a voluntary human act intervening between unlawful conduct and acquiring physical evidence did not attenuate the connection. At least this would indicate that the "human personality" does not break the chain of causation. See 324 F.2d at 884 n.6 (dissenting opinion). The sequence of events in *Wong Sun* were: (1) illegal arrest, (2) statement by Toy during illegal arrest which led directly to Yee, (3) agents followed the leads given by Toy and found Yee, (4) Yee went to his bureau and took out a container of heroin which he gave to the agents, (5) Yee explained his possession of the narcotics by implicating Toy and Wong Sun as sellers of narcotics. The Court excluded the heroin because it was found by exploiting the illegally obtained statement from Toy. Witness Yee was found the same way. Perhaps the connection could be attenuated by changing the direct chain of causation. For example, if the agents had acquired nothing from Yee and Yee had voluntarily gone to the agents several days later with the narcotics and his story, the connection might well be attenuated. For state court cases dealing with exploitation of illegally obtained evidence involving witnesses see note 12 *supra*.

[44] In *Smith* the position of witness Holman in relation to the crime should be kept in mind. He evidently accompanied the defendants as a partner in their unlawful venture. It is highly unlikely that he had forgotten the details of a murder he had watched. Yet the court cites Holman's reaction to police interrogation as an illustration of the "unique human process" which should attenuate the connection between the confessions and eventual testimony: "This is illustrated here by the circumstance that when initially located Holman gave no information adverse to appellants; only after reflection and the interaction of these faculties of human personality did Holman eventually relate to the jury the events of the night of the killing. These factors in part account for the rule allowing a party to cross-examine his own witness on a claim of surprise and ultimately to impeach his own witness." 324 F.2d at 881 n.2. This would seem to indicate that not only did the police use the illegal confessions

Any conclusions drawn concerning the result in the *Smith* case ultimately confront the wisdom of the policies underlying the exclusionary rules. It is virtually unanimously agreed today that the exclusionary rules are designed neither to punish police officers[45] nor to let the guilty go free. Except insofar as required by constitutional and statutory safeguards, they are not intended to discourage effective police investigation.[46] The goal is to discourage police from using unlawful means to acquire evidence.[47] The courts apparently feel that the exclusionary rules are the best devices available to them to accomplish this goal.[48] Use of the exclusionary rules assumes that the police are primarily interested in convictions,[49] and modern investigative methods largely make the use of unlawful action unnecessary to accomplish this purpose.[50]

In the final analysis disagreement with the exclusionary rules is founded on a basic disagreement with constitutional and statutory policy.[51] The policy manifested in the exclusionary rules certainly interferes with police investigations. It can easily be argued that the

to discover Holman, but also, perhaps the knowledge imparted to the police by the confessions was used to "refresh his memory" and to induce him to testify.

[45] See Upshaw v. United States, 335 U.S. 410, 414-37 (1948) (dissenting opinion); People v. Cahan, 44 Cal.2d 434, 443, 282 P.2d 905, 910 (1955); Traynor, *supra* note 9.

[46] Effective police investigation has been the subject of much research and argument. See generally Foote, *Tort Remedies for Police Violation of Individual Rights*, 39 MINN. L. REV. 493 (1955); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65 (1957); Plum, *Illegal Enforcement of the Law*, 24 CORNELL L.Q 337 (1939).

[47] See Wong Sun v. United States, 371 U.S. 471, 486 (1963); Rea v. United States, 350 U.S. 214 (1956); Walder v. United States, 347 U.S. 62, 64-65 (1954); MCCORMICK, *op. cit. supra* note 2, § 138; Traynor, *supra* note 9, at 334-35.

[48] See Mapp v. Ohio, 367 U.S. 643 (1961); Killough v. United States, 315 F.2d 241, 245-46 (D.C. Cir. 1962); United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945) (L. Hand, J.); Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940); People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955) (Traynor, J.); Traynor, *supra* note 9, at 334-38. For summary of other remedies against police and their use see MCCORMICK, *op. cit. supra* note 2, at § 138 nn. 5-7.

[49] See People v. Cahan, 44 Cal.2d 434, 448, 282 P.2d 905, 913 (1955); see generally authorities cited note 46 *supra*. One writer using limited empirical data suggests that the exclusionary rule is most effective in discouraging illegal searches in cases involving serious offenses where conviction is important. Conversely, where the police believe that a policy of harrassment is an effective means of law enforcement, the exclusionary rule will not keep them from using unlawful methods. See Comment, 47 NW. U.L. REV. 493, 496-99 (1952).

[50] See, *e.g.*, Elkins v. United States, 364 U.S. 206, 218 n.8 (1960); Traynor, *supra* note 9, at 323.

[51] See Mallory v. United States, 354 U.S. 449, 453 (1957); McNabb v. United States, 318 U.S. 332, 343-44 (1943); Killough v. United States, 315 F.2d 241, 446-48 (D.C. Cir. 1962); People v. Cahan, 44 Cal.2d 434, 438-39, 282 P.2d 905, 907 (1955); Traynor, *supra* note 9, at 322. The policy reason supporting the requirement for taking an arrested

present rules go too far in hampering efficient police investigation.[52] It can also be expected that many judges will view the freeing of an obviously guilty defendant with alarm when evidence remote from the unlawful action must be excluded. On the other hand, it is arguable that once the constitutional and statutory rights are formulated by proper authority the consequences in court should not be different than they would have been had police used lawful methods.[53] The problem is one of balancing individual rights with public safety.[54] The courts have definitely leaned toward protection of individual rights on the theory that adequate means still remain for maintenance of high standards of public safety. The "poison fruit" doctrine is a substantial part of the structure designed to safeguard the individual against arbitrary police action. A few exceptions have been necessary,[55] but it is submitted that the direct causal connection between the unlawful detention and the discovery of the eyewitness in *Smith* should foreclose an exception in this case.

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person before a committing magistrate without unnecessary delay is to advise him of his rights under the circumstances. FED. R. CRIM. P. 5 (b) provides: "The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

[52] See Upshaw v. United States, 335 U.S. 410, 414-37 (1948) (dissenting opinion); McNabb v. United States, *supra* note 51, at 347-49 (dissenting opinion); 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940); Comment, 42 MICH. L. REV. 679 (1944). See generally Inbau, *supra* note 21; Wicker, *supra* note 21; Wigmore, *supra* note 8.

[53] Wigmore's hostility to the *Weeks* exclusionary rule was satirically demonstrated in his now famous "Titus-Flavius" verse ridiculing solving the illegal search and seizure problem by leaving unpunished criminal Titus and Marshal Flavius. 8 WIGMORE, EVIDENCE § 2184a n.1 (McNaughton rev. 1961). A not so well known but equally pointed rejoinder soon followed: "Titus, your house has been searched illegally and in violation of the rights guaranteed you by the Constitution. Your papers and documents have been carried away by one who has thus put himself in the position of a criminal. But we will not return to you your papers. We, as duly authorized and constituted tribunal of the State, will accept and use against you the fruits of violations and illegality. However, we will threaten Flavius, the Marshal who thus violated your rights, with jail and other punishment, and we hope that this will be some comfort to you, though we, in fact, know that the officer will not be punished; for, if we did seriously punish him, he would cease to seize papers and documents unlawfully and we would be hampered in the prosecution of such criminals as yourself." Letter From Hall to the American Bar Association Journal, Aug. 12, 1922, 8 A.B.A.J. 646, 647 (1922).

[54] See Upshaw v. United States, 335 U.S. 410, 434-37 (1948); Nardone v. United States, 308 U.S. 338, 339-40 (1939); Killough v. United States, 315 F.2d 241, 246-47 (1962); MCCORMICK, *op. cit. supra* note 2, § 138.

[55] See note 36 *supra*.