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Evidence--Internal Revenue Code--Admissibility of Illegally-Obtained Evidence

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To guard against "coerced confessions," the magistrate should also be present at all times when the suspect is being interrogated. This system would elevate magistrates to the status of more useful public officials, would relieve attorneys of the overwhelming burden which may otherwise be cast upon them, would reduce or eliminate appeals on the basis of "right to counsel" and "coerced confession," and would insure the rights of the suspect prior to arraignment.²¹

Paul W. Blair

EVIDENCE—INTERNAL REVENUE CODE—ADMISSIBILITY OF ILLEGALLY-OBTAINED EVIDENCE.—An information under section 7203 of title 26 *United States Code*¹ was filed against defendants charging each with failure to file income tax returns for two taxable years. Subsequently an indictment under section 7201 of title 26 *United States Code*² was returned against defendants charging each with willful tax evasion. Before the trial defendants moved to suppress for use as evidence against them certain files, records and information seized by means of a compulsory process directed at one Birrell. The court reserved decision on all issues raised by the motion and the case proceeded to trial. The jury failed to reach a verdict and the judge declined to decide the reserved motion.

In another court, Birrell moved to have the seized documents suppressed as evidence against him and returned to him, and to have various indictments against him dismissed. Neither the indictment nor the information that charged defendants, charged Birrell, and therefore, neither was made the subject of Birrell's motion. A decision on Birrell's motion was reserved by the court.

Upon assignment of the information and indictment against defendants to the United States district court for the southern district of New York, defendants renewed their motion to suppress, and, in

²¹ See, *supra* note 2.

¹ Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

² Any person who willfully attempts in any manner to evade or defeat any tax imposed by law, or the payment thereof, shall, in addition to other penalties by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution.

addition, requested that the trial be postponed pending the decision on the Birrell motions. The court denied the renewed motion and the request, determining that under the test of *Jones v. United States*,³ defendants lacked standing to challenge the lawfulness of the seizure. Defendants vainly renewed their motions throughout the trial and post trial motions. Verdicts of guilty were returned against defendants on the information charge of failure to file tax returns. The jury failed to agree with respect to the indictment count of willful tax evasion.

After defendants' trial, Birrell was granted his motion to suppress. On the strength of that determination, defendants promptly renewed their motions to suppress, attacking both their indictment and conviction. *Held*: Motions denied. The fact that evidence had been illegally obtained from Birrell, who was not a defendant, did not preclude admission of the evidence against the other defendants. *United States v. Granello*, 243 F. Supp. 325 (S.D. N.Y. 1965).

In reaching this result the court interpreted the Supreme Court case of *Wong Sun v. United States*⁴ as an expression of the rule that the fact that evidence has been obtained from A in violation of A's constitutional rights⁵ does not prevent its admission in a prosecution of B. In *Wong Sun* the government had obtained possession of narcotics from one Yee as a result of information obtained from defendant Toy in violation of Toy's rights. The narcotics were admitted into evidence against both Toy and defendant, Wong Sun. The Supreme Court reversed Toy's conviction because of the admission of evidence seized in violation of Toy's rights. As to defendant Wong Sun, the Court held that, though his conviction had to be reversed on other grounds, the narcotics were properly admitted against him.

The rule brought forth from *Wong Sun* by the court which decided *Granello* conveys the basic idea that in order to be heard to claim a constitutional protection, the claimant must belong to the class for whose sake the protection is given.⁶ Fundamentally the fourth amendment exclusion rule is a means for making effective protection of

³ 362 U.S. 257 (1960). In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. 362 U.S. at 261.

⁴ 371 U.S. 471 (1963).

⁵ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. U.S. Const. amend. IV.

⁶ *Hatch v. Reardon*, 204 U.S. 152 (1907).

privacy and the security of property, *i.e.*, a personal protection. Therefore, to avail of that protection, one must establish the evasion of his own right to property⁷ or privacy.⁸ He must be the one against whom the search was directed or a victim of the seizure, and not merely a person claiming prejudice through the use of evidence gathered as a consequence of a search and seizure directed at another.⁹ As the Court stated in *Wong Sun*:

The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of the heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.¹⁰

The rule brought forth in *Granello* is well grounded in the *Wong Sun* decision and lends support to the conclusion that the fourth amendment exclusion rule is to be narrowly construed by the federal courts, *i.e.*, evidence seized from A in violation of A's rights will always be admissible against B.

In adopting this strict limitation upon the fourth amendment protection the court in *Granello* considered two basic alternatives as suggested in the opinions of the courts:

- (1) The government cannot use against anyone evidence that has been illegally seized;
- (2) Evidence seized in violation of A's rights can be used against B if it is physically available, or if it is contraband, or where for some other reason A is not entitled to its return.

To examine these alternatives we will analyze the cases cited by the court in illustration of each proposition.

*The Government Cannot use Against Anyone Evidence that has
Been Illegally Seized.*

In *McDonald v. United States*¹¹ defendants McDonald and Washington were tried jointly for operating an illegal lottery. Unlawfully seized evidence was admitted against both defendants. The illegal seizure had taken place in McDonald's room where Washington was merely a guest. The Supreme Court held that the seizure violated McDonald's rights under the fourth amendment and reversed his con-

⁷ *United States v. Lee Wan Nam*, 274 F.2d 863 (1960).

⁸ *Jones v. United States*, 362 U.S. 257 (1960).

⁹ *Ibid.*

¹⁰ 371 U.S. at 492.

¹¹ 335 U.S. 451 (1948).

viction. In reversing the conviction of defendant Washington, the Court said:

Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error prejudicial to Washington as well.¹²

The Court declined to specifically decide whether or not Washington's personal rights were violated by the search of McDonald's room. However, Mr. Justice Rutledge, in his concurring opinion, indicated that such a determination would be of no consequence. He concurred with the Court's opinion as to the inadmissibility of the evidence with respect to McDonald, but as to Washington he concurred on the ground "that the evidence, having been illegally obtained, was inadmissible,"¹³ the idea ostensibly being that evidence illegally obtained is inadmissible as against any defendant.

As noted by the court in *Granello*, the view of Mr. Justice Rutledge was expressed by no other Justice. Rejection of this proposition, however, was based on more than mere lack of authority to support it. The court concluded that the only acceptable basis for such a rule would be to determine that the policy against illegal searches and seizures by the government is so strong that the law ought to deter such practice by preventing it from being of any benefit whatever. A corollary to this policy would be the idea that one of the primary reasons for raising the fourth amendment exclusionary rule is to deter official illegality.¹⁴ But the court concluded that such a strict inhibition on governmental authorities only serves to distribute incidental benefits to wrongdoers far more than it safeguards the highly cherished right of privacy.

Consideration of this proposition thus involves the weighing against each other of two important public policies: that of proper constitutional safeguards under the fourth amendment and the policy of public protection. It is submitted that the court in *Granello* correctly determined that to adopt such a strict adherence to the fourth amendment exclusionary rule as to render a result that official illegality always works inadmissibility would deter adequate law enforcement more than it would safeguard the rights of privacy or property. To insist upon the policy that "the criminal is to go free because the constable

¹² *Id.* at 456.

¹³ *Id.* at 457.

¹⁴ Compare *Wolf v. Colorado*, 338 U.S. 25 (1949), with *Mapp v. Ohio*, 367 U.S. 643 (1961).

has blundered"¹⁵ is not only to impose an unwise and inefficient sanction on law enforcement but also to greatly extend the intent of the protection afforded through the fourth amendment.

Evidence Seized in Violation of A's Rights can be Used Against B if it is Physically Available, or if it is Contraband, or Where for Some Other Reason A is not Entitled to its Return.

The proposition that evidence seized in violation of A's rights can be used against B if it is physically available is attributable to the view of the four other concurring Justices in *McDonald*,¹⁶ including Mr. Justice Douglas, writer of the main opinion. The proposition suggests that admissibility as to B depends upon the availability of the evidence to a court after a determination of the illegality of the seizure. The basic premise is that if the search and seizure as to A is found to be illegal, such illegally obtained evidence must be returned to A and is therefore not available against B. It would then follow that if the evidence was obtained without violation of A's rights, it would not have to be returned and would be available and admissible against both A and B. In *McDonald*, if the illegally seized evidence had been returned to defendant McDonald, it would not have been available for use against defendant Washington, therefore denial of McDonald's motion was prejudicial to Washington as well,

Rejecting this proposition, the court in *Granello* noted its impracticality. In *McDonald*, even if the seized evidence had been returned to McDonald, it would have been available to the government by means of compulsory legal process. Practically speaking, no property is unavailable to the government except property that has been destroyed, and destruction can be prevented by the service of compulsory process on the aggrieved party at the same time that the illegally seized property is returned to him.

A corollary to the availability proposition is the answer suggested in *United States v. Lee Wan Nam*.¹⁷ There, defendant Lee Wan Nam had been convicted of having violated the Narcotic Drugs Import and Export Act. On appeal, defendant contended that evidence once suppressed and held inadmissible during a trial cannot be subsequently introduced in the same trial even though the victim of the illegal search and seizure had been dismissed as a defendant. Denying this contention and affirming the conviction, the court held that here the property illegally seized was heroin, and as such it was contra-

¹⁵ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

¹⁶ 335 U.S. 451 (1948).

¹⁷ 274 F.2d 863 (1960).

band. It could not be returned to the aggrieved party despite the illegal seizure. On this basis, the court made a distinction as to *McDonald* where the decision as to the defendant's conviction turned upon the fact that there was error in not returning the evidence to the aggrieved party. The court considered its decision to be in complete agreement with the *McDonald* decision.¹⁸

To adopt the proposition that evidence seized in violation of A's rights is admissible against B where contraband is involved would be to create an inconsistency in the law and a clear discrimination favoring certain defendants over others. Where the unlawfully seized evidence consisted of property other than contraband, such as lottery tickets as in *McDonald*, B would be protected as an incidental beneficiary to A's rights under the fourth amendment. B would not be so protected where, as in *Lee Wan Nam*, the seized property consisted of narcotics or other such contraband.

The analysis of these alternative propositions leads to the conclusion that to broaden the exclusionary rule, as defendants sought in *Granello*, and to include as incidental beneficiaries of the deterrence policy persons whose rights were unaffected by the official legality would be to render the rule a far more inefficient sanction. As the court points out, whether or not the rule is to be so broadened is a matter ultimately for the Supreme Court, and in light of present policies and authorities it is difficult to anticipate it doing so.

David W. Crumbo

CRIMINAL LAW—SEARCH AND SEIZURE—RETROACTIVITY OF *Mapp*.—Petitioner was convicted of robbery by a Louisiana court on May 20, 1959. At his trial he contested the use of certain evidence on the ground that it had been illegally seized, but the trial court held the seizure valid. The Louisiana Supreme Court affirmed. In June 1961, immediately after the *Mapp* decision¹ making the federal exclusionary rule mandatory upon state courts, petitioner filed an application for habeas corpus in the state court. The writ was denied and on appeal the denial was affirmed. Petitioner then filed habeas corpus proceedings in the federal district court; again the writ was denied and petitioner appealed to the circuit court of appeals. There, the court ruled the search and seizure invalid, but refused to apply the *Mapp* rule to petitioner's case. The Supreme Court granted certiorari. *Held*: Af-

¹⁸ *Id.* at 866.

¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).