Volume 71
Issue 2 *Dickinson Law Review - Volume 71, 1966-1967*

1-1-1967

Recent Cases

RECENT CASES

CRIMINAL LAW—INFORMER'S PRIVILEGE

Commonwealth v. Carter, 208 Pa. Super. 245, 222 A.2d 475 (1966).

Until the recent case of *Commonwealth v. Carter*,[1] the Commonwealth of Pennsylvania had elicted no rule or policy as to disclosure of the identity of an informer in a criminal prosecution. In *Carter* the superior court announced that the Commonwealth has the right to withhold the identity of an informer, and based their decision primarily on the public policy requirement of aiding law enforcement agencies in detecting crime. This Note will analyze the *Carter* ruling in light of recent state and federal decisions in this area of so-called "informer's privilege."

In October of 1965, the defendant, Melvin Carter, was met on a street corner in Philadelphia by an undercover agent for the Philadelphia Police and an informer, under the surveillance of a federal narcotics agent who observed from a distance. After refusing to make a direct sale of narcotics to the undercover agent, Carter sold three envelopes of narcotics to the informer, who, in defendant's presence, immediately gave the material to the agent. Carter was subsequently indicted for felonious possession and sale of narcotic drugs.

At no time was the informer's name disclosed; nor did his name appear as a witness on the indictment; nor was he called as a witness at trial. Because of this non-disclosure, Carter's counsel[2] demurred at the close of the Commonwealth's case, claiming that the prosecution failed to produce or disclose the identity of an eyewitness. The court below, in overruling the demurrer, held that the Commonwealth need not identify the informer, and further found that appellant knew the informer, so that he could have been called, had defendant wished to do so.

Carter's defense at trial was not entrapment, but a complete denial, to wit, mistaken identity; that he was not at the scene; and that he never dealt in narcotics. The accused was positively identified at the trial by the two law enforcement officers.

On appeal, the superior court affirmed the lower court's refusal to require the prosecution to produce or disclose the identity of the informer. As a result of this determination, defendant's

1. 208 Pa. Super. 245, 222 A.2d 475 (1966).
2. Carter appeared in forma pauperis. Counsel was provided by Defender Association of Philadelphia.

sentence of five to ten years for felonious possession and sale of drugs was affirmed, but not without vigorous dissent.

The court realized that the application of the government's privilege of non-disclosure depends on the particular circumstances of the individual case, citing the leading case on informer's privilege, *Roviaro v. United States*.[3] Thus, upon balancing of public interest in protecting the flow of information against the individual's right to prepare his defense,[4] the court held that the appellant's right, under these circumstances, must give way.

The superior court, in setting a precedent for Pennsylvania, appears to rub against the grain of *Roviaro*[5] and other recent decisions[6] in this area, which have held that, under the facts of their cases, failure of the lower court to require disclosure of the identity of an informer is reversible error. In those cases, the informer was considered a material witness on the issue of guilt or innocence of the accused, and for the purpose of fair trial, the informer's identity had to be revealed.

In *Roviaro*, the accused was convicted in federal district court on two counts of violation of federal narcotics laws. At trial, two federal narcotics agents and two Chicago police officers testified for the prosecution, which revealed that in August of 1954, an informer (referred to only as "John Doe"), after being searched for narcotics,[7] met Albert Roviaro, the accused, in a parked car on a street corner in Chicago; that the alleged sale took place between Roviaro and the informer in Doe's car; that one police officer hid in the trunk of said car, overhearing the conversation between Doe and Roviaro; that the other law enforcement officers observed the transaction from a distance. Roviaro's defense was a complete denial.

Roviaro's counsel, before and during trial, attempted without success, to obtain the identity of the informer. The court of

3. 353 U.S. 53 (1957).

4. *Id.* at 62: ". . . taking into consideration the crime charged, the possible defenses, the possible significance of informer's testimony, and other relevant factors."

5. *Supra* note 3.

6. Gilmore v. United States, 256 F.2d 565 (5th Cir. 1955); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); United States v. Conforti, 200 F.2d 365 (7th Cir. 1953); Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); People v. Durazo, 52 Cal.2d 354, 340 P.2d 594 (1959); People v. Williams, 51 Cal.2d 355, 333 P.2d 19 (1959); People v. McShann, 50 Cal.2d 802, 330 P.2d 33 (1958); People v. Diaz, 174 Cal. App. 2d 799, 345 P.2d 370 (1959); People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957); State v. Oliver, 92 N.J. Super. 228, 222 A.2d 761 (1966).

7. The usual pattern in narcotics cases of this nature is as follows: An informer, employed by the government, is searched by narcotics agents to determine that the informer himself is carrying no narcotics. He is then given money (usually marked) and told to make a purchase of drugs. The agents then follow the informer and observe the transaction between the defendant and informer. The informer then turns the incriminating packets over to the agents for analysis.

appeals sustained the conviction,[8] and certiorari was granted by the United States Supreme Court[9] to pass on the propriety of non-disclosure and to consider a conflict with other federal cases in this area.[10]

The Supreme Court reversed Roviaro's conviction on the basis that fundamental fairness to the defendant limits the government's privilege of non-disclosure.[11] The Court stated:

> Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.[12]

Thus, the *Roviaro* Court felt that "the only person, other than petitioner himself, who could, controvert, explain or amplify"[13] the prosecution's testimony was the informer, John Doe.

The Pennsylvania Superior Court distinguishes between the *Roviaro* and *Carter* facts on the basis that in *Roviaro*, the informer was a sole participant (ergo, his testimony would be relevant) and in *Carter*, there were others present (ergo, his testimony would not be relevant). The *Carter* dissent takes issue with this interpretation of *Roviaro*, and points out that *Roviaro* is concerned primarily with the *materiality* of a witness on the issue of a defendant's guilt,[14] as later cases have shown,[15] and not primarily whether the informer was a participant, non-participant, sole participant or otherwise.

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8. United States v. Roviaro, 229 F.2d 812 (7th Cir. 1956).

9. Roviaro v. United States, 351 U.S. 936 (1956).

10. Portomene v. United States, 221 F.2d 582 (5th Cir. 1955). (Accused denied sales of narcotics to informer, thought informer had grudge. Court held nondisclosure was prejudicial to defense of accused); United States v. Conforti, 200 F.2d 365 (7th Cir. 1953) (Accused convicted of possession of counterfeit notes through alleged sale to informer. Court affirmed conviction, but intimated that accused would have been entitled to disclosure of identity of informer if proper demand was made at trial); Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947) (disclosure would have been ordered, had not the informer's identity been disclosed during trial by testimony of another government witness).

11. There are certain basic limitations to the government's privilege of nondisclosure: (1) If disclosure of contents of informer's communication would not reveal the identity of the informer, the contents are not privileged; (2) If identity of the informer has already been disclosed, or is admitted, or known, then the privilege of secrecy is superfluous; (3) If disclosure appears necessary to avoid risk of false testimony, or in order to secure useful testimony and fair determination of the issues, the identity will be compelled. The cases under discussion fall into this third category. See 353 U.S. at 60-61; 8 WIGMORE, EVIDENCE § 2374 (McNaughten Rev. 1961) at 765-769; MODEL CODE OF EVIDENCE, rule 230 (1942).

12. 353 U.S. at 60-61.

13. *Id.* at 64.

14. 208 Pa. Super. at 252, 222 A.2d at 479.

15. See state cases cited note 6 *supra*. See also Annot., 76 A.L.R.2d 257 (1959).

State decisions were quick to embrace *Roviaro* and to emphasize the need for disclosure based on materiality, not participation. For example, in a leading California case, *People v. McShann*,[16] the defendant's conviction for possession and sale of narcotics was reversed when it appeared that an informer, whose identity was not revealed in the lower court, set up the alleged transactions by telephone, and then participated in an alleged purchase. For the court, Justice Traynor stated:

> Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be 'relevant and helpful . . . or essential . . .' even though the informer was not a participant. For example, the testimony of an eyewitness-non-participant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously be relevant and helpful.
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> * * * Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the people must either disclose his identity or incur a dismissal.[17]

Again, in *People v. Durazo*,[18] the California Supreme Court required disclosure of the identity of an informer although the informer had only participated in the first of three alleged sales for which the defendant was being prosecuted.[19] The court reasoned that if the informer had contradicted the police officer's identification of the defendant with respect to the first sale in which the informer was a direct participant, his testimony "would have been highly significant to discredit the identification"[20] with respect to alleged direct sales between defendant and police officers during the days that followed.

In *People v. Castiel*,[21] disclosure of an informer was necessary when it was found that the informer had made telephone arrangements for two sales of narcotics, at different times during the same day, and participated as purchaser in both. The testimony of the officers who observed the transactions was denied by the defense. The court stated:

> It is the deprival of the defendants[22] of the opportunity of producing evidence which *might* result in their ex-

16. 50 Cal.2d 802, 330 P.2d 33 (1958).
17. *Id.* at 808, 330 P.2d at 36.
18. 52 Cal.2d 354, 340 P.2d 594 (1959).
19. Informer participated alone in the alleged first sale, for which defendant was acquitted without informer's identity revealed.
20. 52 Cal.2d at 356, 340 P.2d at 596.
21. 153 Cal. App. 2d 653, 315 P.2d 79 (1957).
22. Testimony revealed that the informer spoke by telephone to defendant Castiel to arrange for first sale, and then later that day contacted by telephone another person, joined as defendant, to arrange for a second sale between defendant Castiel and informer. It appears that both telephone calls were made to the home of the joined defendant.

> oneration which constitutes error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors.[23]

In a recent New Jersey case, *State v. Oliver*,[24] disclosure of the informer's identity was again deemed essential, as he was an eyewitness, though not a participant, at three of the four alleged incidents of defendant's bookmaking activity. The court in explaining its position, there stated:

> [T]he rationale . . . is not that disclosure is based on the fact of participation, etc., per se, but rather on the circumstance that the informer's relationship to the alleged criminatory events has rendered him a material witness on the issue of defendant's guilt.[25]

In *Carter*, however, the Pennsylvania Superior Court held that the facts did not require disclosure of the informer, that the decision as to disclosure rests with the discretion of the court, and that the court had not abused its discretion.[26] In so deciding, the court seems to have side-stepped the all-important issue of materiality of the informer's identity to the fair trial of the accused. Since Carter's defense was a complete denial, the credibility of the police officers' testimony was brought into question. The informer, being an eyewitness-participant to the alleged sale, would necessarily have been in a position to "controvert, explain, or amplify"[27] the testimony of the law enforcement officers; and the mere availability of these two eyewitnesses should not have affected the materiality of the informer's possible testimony in any way.

Thus, the *Carter* decision, in effect, says, that the Commonwealth, in its prosecution of an alleged illegal sale of narcotics, need not produce nor identify an informer who, in the presence of law enforcement officers, made the incriminating purchase, *even though the informer's testimony might be relevant and helpful to a fair trial for the accused.*

Also, the *Carter* court, in citing reasons for its decision, stated that the accused knew the informer, and since he could have been called, but defendant failed to do so, his identity was not necessary to preparation of the defense.[28] However, this forecloses the very fact in issue, in light of defendant's complete denial, for it infers that defendant was at the scene, and that therefore he would know with whom he had made the alleged illegal sale.[29] The

23. 153 Cal. App. 2d at 659, 315 P.2d at 82.
24. 92 N.J. Super. 228, 222 A.2d 761 (1966).
25. Id. at 238, 222 A.2d at 766.
26. 208 Pa. Super. at 251, 222 A.2d at 478.
27. Roviaro v. United States, 353 U.S. 53, 64 (1957).
28. 208 Pa. Super. at 251, 222 A.2d at 478.
29. *Id.* at 254, 222 A.2d at 480. *Cf.*, DeLosa v. Superior Court, 166 Cal. App. 2d 1, 332 P.2d 390 (1958), where the court rejected prosecution's contention that defendant support his denial of knowledge of the identity

logic of court's supposition here is questionable.

At common law,[30] communications to the government by informers have been deemed to be protected by a privilege based on public interest in detection of crime through a free flow of information.[31] Behind the lofty ideal that it is in the public interest for each person to report information regarding crime, is a practical incentive in the form of a privilege of non-disclosure by which the government can protect the individual, and without which, an informer would not come forth freely with his information, for fear of retribution.[32]. The privilege is created to protect the informer, and thereby ultimately designed to protect the public.[33]

However, upon this privilege have been engrafted certain limitations,[34] the most important of which is an elemental fairness to the accused. A prime example of this limitation has been in the area where a person, as in *Carter*, becomes in reality more than a mere informer, that is, where not only does he transmit information upon which police officers can begin to gather evidence, but plays some active role in the transaction or event for which the defendant is accused. When this occurs, the materiality of such person must be considered, and the "fundamental fairness" limitation to the privilege of non-disclosure becomes of paramount importance.[35]

Recent cases in this area illustrate situations in which an informer must be revealed. Thus, if identity or production of an

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of the confidential agent. The court felt that evidence must *clearly show* that the defendant does know the informer's identity; then, error in refusing disclosure might not be prejudicial. Also, in People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958), evidence introduced by the prosecution that defendant had received two telephone calls from the informer and that he made a sale of narcotics to the informer was not enough to establish that defendant knew informer since he denied receiving such calls, and denied making such a sale.

30. See, for example *In re* Quarles and Butler, 158 U.S. 532, 535-36 (1895).

31. See generally, 8 WIGMORE, EVIDENCE § 2374 (McNaughten Rev. 1961).

32. See, *e.g.*, Draper v. United States, 358 U.S. 307 (1959), (informer "died" four days after arrest of defendant); Brown v. United States, 222 F.2d 293 (9th Cir. 1955) (informer met violent death); Shuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958) (informer murdered after bank robber apprehended).

33. See generally, Annot., 1 L.ed. 2d 1998.

34. See *supra* note 11.

35. For an interesting analysis of who comprises the class of persons courts refer to as informers, see Comment, 63 YALE LAW Journal 206 (1954). From a questionnaire distributed in 1953 by the Yale Law Journal to 31 Police Departments in cities of 25,000 or more, it was found that the most prolific source of informers are ordinary citizens. Next are persons who have participated in crime and have turned against their partners. Occasionally, they are "plants" employed by law enforcement agencies to participate in crime, or are those who seek evidence of a crime with approval or upon urging of governmental authorities.

informer is relevant and helpful;[36] can amplify, explain or contradict;[37] can vindicate the accused;[38] lessen the risk of false testimony;[39] sow the seeds of innocence, or of substantial doubt, or of overwhelming corroboration;[40] might produce evidence which will result in exoneration of the accused;[41] or is highly significant to discredit identification,[42] then the prosecution cannot in all fairness to the accused refuse to reveal the informer's identity.[43] This is the concept behind the disclosure of an informer's identity and the trend today. The perspective taken by the courts has been, as it should be, an analysis of facts through the eyes of one standing trial, as to his ability to prepare an adequate defense. Therefore, if there is a *possibility* that the accused does not have such requisite ability, the government's privilege of non-disclosure of the identity of an informer must fall.[44] Yet the *Carter* court has, in effect, ruled otherwise.

It is conceivable that the police may be hampered, especially in enforcement of narcotics laws, by losing a future source of information when disclosure of an informer's identity is deemed necessary.[45] It is also well known that informers when identified may be exposed to extreme danger.[46] It is laudable to look prospectively toward the protection of the general public by aiding in the detection and prosecution of crime.

However, it should be the aim of every court to strike a balance between protection of a free flow of information and the right of an accused to a proper defense; therefore, it is submitted that a realistic balance upon the facts of *Carter* should not have merited such a result on the defendant, so as to deprive him of

36. Roviaro v. United States, 353 U.S. 53, 60-61 (1957).
37. *Id.* at 64.
38. People v. McShann, 50 Cal.2d 802, 808, 330 P.2d 33, 36 (1958).
39. *Id.*
40. Gilmore v. United States, 256 F.2d 565, 567 (5th Cir. 1955).
41. People v. Castiel, 153 Cal. App. 2d 653, 659, 315 P.2d 79, 82 (1957).
42. People v. Durazo, 52 Cal.2d 354, 356, 340 P.2d 594, 596 (1959).
43. State v. Oliver, 92 N.J. Super. 228, 236, 222 A.2d 761, 765 (1966).
44. *Id.* at 42, 222 A.2d at 768.
45. See People v. Durazo, 52 Cal.2d 354, 358, 340 P.2d 594, 597 (1958) (dissent):

> We are advised by the attorney general that prior to the recent restrictive decision of this court in favor of the defendants relating to the disclosure of informer's names, the great majority of narcotics arrests resulted from the use of informers for the purpose of initiating, developing or substantiating the investigation. But since those decisions the use of informers has been almost eliminated and law enforcement in this area has become comparatively ineffective.

46. See *supra*, note 32. Query whether a person may inform through personal inward motivation for example, of revenge, hate, or prospect of lessened sentence, without knowledge of the informer's privilege, and regardless of the possible revelation of his identity or possible dangerous consequences therefrom, therefore putting aside the "fear of retribution" theory which is a pillar of the privilege of nondisclosure.

an informer-eyewitness-participant in the alleged illegal act for which he must stand trial.

The basic tenet of our system of criminal justice should still prevail, that the accused is innocent until proven guilty by a jury of his peers beyond a reasonable doubt, and that one so accused, of necessity, must be given an adequate opportunity to prepare his defense. That need must not be cast aside.

ERIC D. GERST

EVIDENCE—EXCLUSIONARY RULE—DOES MAPP v. OHIO APPLY TO EVIDENCE OBTAINED BY PRIVATE PERSONS IN A DIVORCE CASE

Del Presto v. Del Presto, 92 N.J. Super. 305, 223 A.2d 217 (1966).

The New Jersey Superior Court, Chancery Division, in *Del Presto v. Del Presto*[1] has held evidence secured by illegal forcible entry into the correspondent's home by the plaintiff and private investigators to be inadmissible in a divorce action. The decision was rendered upon a motion to suppress evidence.[2] In so ruling, the New Jersey court has reached a result opposite to a similar New York case.[3] Both cases were decided upon constitutional grounds and required determination of the effect to be given *Mapp v. Ohio*[4] and *Burdeau v. McDowell*.[5]

Plaintiff Rose Del Presto upon searching the home at which both she and her husband resided discovered love letters and Christmas cards from her husband's alleged paramour as well as a pamphlet on birth control pills and a receipt for jewelry purchased by the husband for the alleged paramour.[6] Plaintiff further staged a raid upon the apartment occupied by the alleged paramour accompanied by an entourage composed of her son, private investigators and the police.[7] Both the defendant and the correspondent were in the apartment at the time and the plaintiff took numerous photographs and made visual observations.[8] Upon rendition of his opinion, Judge Consodine suppressed the evidence obtained by breaking and entering the apartment as well as the love letters, etc., obtained by plaintiff's search of the marital residence.[9]

The court gave literal effect to the holding of *Mapp v. Ohio*: "that *all* evidence obtained by searches and seizures in viola-

1. 92 N.J. Super. 305, 223 A.2d 217 (Chancery Div. 1966).
2. *Ibid.*
3. Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481 (1964). *Contra*, Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. Ohio 1966).
4. 367 U.S. 643 (1961).
5. 256 U.S. 465 (1921).
6. Brief for plaintiff, second unnumbered page.
7. Brief for defendant, page 2; Brief for plaintiff, second unnumbered page.
8. *Ibid.*
9. Letter from Harold M. Savage to Michael R. Connor, Dec. 8, 1966, quoting a letter from Judge Consodine. Judge Consodine said:

> As to the motion of the defendant, I will suppress all evidence secured by breaking and entering the apartment of the woman alleged to be the friend of the defendant. I will also suppress all evidence secured by the plaintiff without legal right from the defendant. I refer particularly to alleged love letters, Christmas cards, a pamphlet on pregnancy, and a receipt for jewelry. The law applicable is applicable to both the personal property and the raid.

tion of the Constitution is, by that same authority, inadmissible in a state court."[10] Plaintiff argued that *Mapp* only applied to governmental seizures, citing *Burdeau v. McDowell*[11] as authority for the proposition that the fourth amendment is not involved in nongovernmental intrusions. The New Jersey Court was influenced by *Williams v. United States*[12] which said that *Burdeau* was in effect overruled by *Elkins v. United States.*[13]

The New York case of *Sackler v. Sackler*[14] was disregarded because of the subsequent Supreme Court decision in *One 1958 Plymouth Sedan v. Pennsylvania.*[15] There the exclusionary rules were held applicable to a quasi-civil forfeiture action. Justice Goldberg, speaking for the Court, was unable to justify use of illegally seized evidence in a forfeiture proceeding which requires the showing that the criminal law was violated, while prohibiting its use in a criminal proceeding.

Historically, all competent and relevant evidence has been freely admissible regardless of the manner in which it was obtained.[16]

> The judicial rules of evidence were never meant to be used as an indirect method of punishment. To punish the incidental violation by rendering evidence obtained thereby inadmissible in the primary litigation is to enlarge improperly the fixed penalty of the law . . . by adding to it the forfeiture of some civil right through the loss of the means of providing it.
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> The incidental illegality is by no means condoned. It is merely ignored in *this* litigation.[17]

Boyd v. United States[18] introduced the concept of a constitutional exclusionary rule. There in rather limited circumstances it was held that the fifth amendment's protection against self-incrimination rendered the admission of certain evidence erroneous and unconstitutional. Subsequently *Weeks v. United States,*[19] held that evidence illegally seized by federal authorities would be inadmissible in a federal court. *Burdeau v. McDowell*[20] rejected an attempt to extend this exclusionary rule to privately seized evidence despite the intent of federal officials to use the evidence thus obtained in criminal prosecutions. The court said that the fourth amendment was only intended to be a restraint on the activities of sovereign authority and not on private persons.[21]

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10. 376 U.S. at 655 (Emphasis added.)
11. 256 U.S. 465 (1921).
12. 282 F.2d 940 (6th Cir. 1960).
13. 364 U.S. 206 (1960).
14. 15 N.Y.2d 40, 203 N.E.2d 481 (1964).
15. 380 U.S. 693 (1965).
16. See 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).
17. *Ibid.* (original emphasis).
18. 116 U.S. 616 (1886).
19. 232 U.S. 383 (1914).
20. 256 U.S. 405 (1921).
21. *Id.* at 475.

Mapp v. Ohio[22] and the cases leading up to it[23] greatly expanded the exclusionary rule in criminal cases. *One 1958 Plymouth Sedan v. Pennsylvania*[24] extended this rule to a forfeiture case. It is a large step, however, from a forfeiture case, having strong criminal overtones, to a purely civil matter such as a divorce. Mr. Justice Goldberg continually emphasized[25] the quasi-criminal nature of a forfeiture action as a justification for use of the exclusionary rule. "[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[26]

Aside from the difficulties encountered in extending the exclusionary rule from a forfeiture case to a purely civil action, *Del Presto* faces yet another constitutional snag. The evidence excluded in *Del Presto* was obtained by private citizens in no way acting in a governmental capacity. It is not clear that *Elkins v. United States*[27] did overrule the holding of *Burdeau v. McDowell*[28] that the fourth amendment is inapplicable to seizure by private persons; *Elkins* involved a seizure by state agents.[29] The New York Court of Appeals concluded in *Sackler v. Sackler* that despite *Elkins, Burdeau* was still the law.[30]

Judge Van Vorhis in his dissent to *Sackler* was of the opinion that *Mapp* was controlling:

> In Mapp v. Ohio . . . the Supreme Court . . . said: 'We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.' In that broad pronouncement, no distinction is made between the admissibility of such evidence in civil and criminal cases, nor between whether the illegal search and seizure has been made by a public office holder. In fact, there is no such thing as an illegal search by a public officeholder as such, inasmuch as our fundamental law regards him under such circumstances as having stepped out of his role as a public official become a trespasser.[31]

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22. 367 U.S. 643 (1961).

23. Rea v. United States, 350 U.S. 214 (1956) (evidence illegally seized by federal officers could not be turned over to state officers for state prosecution); Elkins v. United States, 364 U.S. 206 (1960) (evidence of federal crime illegally seized by state officers inadmissible in federal courts).

24. 380 U.S. 693 (1965).

25. See, *e.g.*, the following pages of his opinion at 380 U.S. 697, 700, 701, 702.

26. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. at 700.

27. 364 U.S. 206 (1960).

28. 256 U.S. 465 (1921).

29. The Sixth Circuit in *Williams v. United States*, 282 F.2d 940 (6th Cir. 1960), however, assumed without discussion that *Elkins* overruled *Burdeau*.

30. Sackler v. Sackler, 15 N.Y.2d at 43, 44, 203 N.E.2d at 483 (1964).

31. *Id.* at 45, 203 N.E.2d at 484. See also Tracy v. Swarthout, 35 U.S.

Despite this broad language, we are left with *Burdeau*, yet to be expressly overruled, which holds the fourth amendment inapplicable to private seizures. Also, any Supreme Court application of the exclusionary rule has occurred only in a criminal or quasi-criminal context.

A commentator upon *Sackler v. Sackler* has suggested that any civil exclusionary rule would be better based upon grounds of policy rather than the constitution.[32] It was there suggested that the exclusionary rule be based upon something akin to the equitable doctrine of clean hands or the common law refusal to let one profit from his own wrong.[33] Such a rule would go far to prevent the illegal seizure of evidence and would curtail the trade of those who make the illegal gathering of evidence their business. While there might be certain policy reasons which would favor the exclusion in civil suits of evidence illegally seized by private persons, it remains unclear that such a result is constitutionally commanded.

MICHAEL R. CONNOR

(10 Pet.) 80 (1836) (unlawful act by a public official partakes the character of a private transaction).

32. Note, 43 N.C.L. REV. 608 at 613 (1965).

33. *Ibid.*