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Criminal Procedure, Constitutional Law - Applying the Fruit of the Poisonous Tree Doctrine to Evidence Obtained through Statements Made without Proper Miranda Warnings - Stamper v. State

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CRIMINAL PROCEDURE, CONSTITUTIONAL LAW—Applying the "Fruit of the Poisonous Tree" Doctrine to Evidence Obtained through Statements Made Without Proper *Miranda* Warnings. *Stamper v. State*, 662 P.2d 82 (Wyo. 1983).

In July 1981, Pete Stamper was arrested on a charge of second degree murder in connection with the death of John Smith. Smith died following a fight with Stamper outside of a Wyoming saloon.[1]

Stamper was arrested by members of the Fremont County Sheriff's office at his residence. Without advising Stamper of his *Miranda* rights, but after placing him under arrest, an officer asked Stamper for the boots Stamper had worn on the night of the fight. In response, Stamper went into his house, got his boots and gave them to the officer.[2]

At Stamper's trial the judge ruled that the boots were admissible. Any statement elicited from Stamper concerning the boots, however, was not admissible because of the failure to provide *Miranda* warnings.[3] Although no statements about Stamper's ownership of the boots were allowed, the boots were admitted in evidence, over objection, simply by the prosecution stating that it would like to admit this pair of boots in evidence. No testimony concerning the ownership of the boots was given.[4] Stamper was convicted of aggravated assault with a deadly weapon under section 6-4-506(b) of the Wyoming Statutes.[5]

Stamper appealed, arguing that the evidence (boots) was obtained in violation of his rights under the fourth[6] and fifth[7] amendments to the

1. Stamper v. State, 662 P.2d 82, 84 (Wyo. 1983).
2. *Id.* at 85.
3. *Id.*
4. Brief for Appellant at 12-13, Stamper v. State, 662 P.2d 82 (Wyo. 1983). Stamper's counsel objected to admitting the boots due to the lack of sufficient foundation in light of the trial judge's previous ruling excluding testimony about their acquisition. The trial judge overruled the objection stating that the jury knew that Stamper probably was not barefoot on the night of the fight and that everyone could assume that the jury would assume these were the boots Stamper had worn. The Wyoming Supreme Court held that the boots were improperly admitted because sufficient foundation had not been laid for their admission. This error was prejudicial and required reversal of Stamper's conviction. 662 P.2d at 85.
5. WYO. STAT. § 6-4-506(b) (1977) provides:
   > With a dangerous weapon. Whoever, while armed with a dangerous or deadly weapon, including an unloaded firearm, maliciously perpetrates an assault or an assault and battery upon any human being, shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned in the penitentiary not more than fourteen (14) years, or both.

   (Current version at WYO. STAT. § 6-2-502 (1977)).
6. U.S. CONST. amend. IV, provides:
   > 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 persons or things to be seized.
7. U.S. CONST. amend. V, provides:
   > No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, and article I section 4[8] and article I section 11[9] of the Wyoming Constitution. The Wyoming Supreme Court reversed the conviction and remanded the case.[10] The court held that the state failed to establish that the evidence warranted giving the lesser-included-offense instruction upon which Stamper was convicted.[11]

This Note will deal with the question raised by Justice Rose in a footnote to his majority opinion.[12] The question raised was whether the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*[13] applies when the police recover physical evidence as a result of a statement obtained without giving proper *Miranda* warnings. Justice Rose conceded that the question was a difficult one, but felt that *Miranda*[14] only applies in the context of testimony or communication requiring the accused to incriminate himself.[15] Justice Rose thus expressed doubt that the doctrine is applicable to *Miranda* violations which produce physical evidence.[16]

This Note will consider whether the "fruit of the poisonous tree" doctrine should apply to evidence obtained by the police as a result of statements made without the benefit of proper *Miranda* warnings. This Note will first view the Supreme Court decision in *Wong Sun* and the exclusionary rule in general.[17] Then *Miranda v. Arizona*[18] and related Supreme Court cases will be discussed, with concentration centered on the Supreme Court's view of what *Miranda's* function should be. Because the Supreme Court has not directly answered Justice Rose's question,[19] a few lower court decisions answering it will be examined. Finally, after considering the reasons given by the Supreme Court for the "fruit of the poisonous tree" doctrine and for *Miranda,* a conclusion will be reached as to whether it is logical to apply the "fruit of the poisonous tree" doctrine to *Miranda* violations.

8. WYO. CONST. art. 1, § 4 provides:
> 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 warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

9. WYO. CONST. art. 1, § 11 provides:
> No person shall be compelled to testify against himself in a criminal case, nor shall any person be twice put in jeopardy for the same offense. If a jury disagree, or if the judgment be arrested after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

10. 662 P.2d at 93.
11. *Id.* The lesser included offense instruction was not warranted because the only evidence with respect to a deadly weapon was the boots and the boots were never properly connected with the defendant. This meant that the prosecution never produced a deadly weapon and so there was no proper way to convict Stamper of a crime which necessitated a deadly weapon. *See supra* note 5.
12. 662 P.2d at 91 n.8.
13. 371 U.S. 471 (1963).
14. Miranda v. Arizona, 384 U.S. 436 (1966).
15. 662 P.2d at 91 n.8.
16. *Id.*
17. Although a brief history of the exclusionary rule is presented it is at most a cursory view. For a thorough accounting see 1 LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT (1978).
18. 384 U.S. 436 (1966).
19. *See supra* text accompanying notes 12-16.

THE EXCLUSIONARY RULE

Generally, the exclusionary rule commands that evidence obtained in violation of the privileges guaranteed by the Constitution must be excluded at trial.[20] The rule is intended to serve the following purposes: (1) to prevent courts from becoming accomplices in disobedience of the Constitution;[21] (2) to assure people that the government will not profit from its unlawful behavior;[22] and (3) to deter future illegal conduct by the police.[23] This final purpose, deterrence, has become the major purpose for the rule.[24] It is important to keep these purposes in mind because the Court's view of the purposes for the rule will determine the scope and fate of the rule.[25]

The branch of the exclusionary rule this note is primarily concerned with is the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*.[26] In *Wong Sun*, federal agents arrested one Hom Way for possession of heroin.[27] Hom Way, who had not before been an informant, told the officers that he had purchased the heroin from a person known to him only as "Blackie Toy," who operated a laundry on Leavenworth Street.[28] The agents, with this information only, went to "Oye's Laundry" on Leavenworth Street. The proprietor (Toy) came to the door and when the agent identified himself, Toy fled down the hallway. All of the agents broke open the door, captured Toy and placed him under arrest.[29] In response to the agents' accusations, Toy stated that he had not been selling narcotics but he did know someone who had.[30] The agents left and by using Toy's statements, found one Johnny Yee and several tubes containing heroin in Yee's bedroom.[31]

The Supreme Court agreed with the Court of Appeals that there were no reasonable grounds for Toy's arrest.[32] Because this was an illegal arrest, Toy's statements were considered fruits of unlawful action and thus fell within the protection of the exclusionary rule.[33] More importantly, the Supreme Court also held that the drugs obtained from Yee also fell within the exclusionary rule because they were "fruit of the poisonous tree."[34] Thus in *Wong Sun*, the Court decided that evidence obtained through statements made by a defendant, whose fourth amendment rights had been violated, should not be admissible against the defendant.

20. BLACK'S LAW DICTIONARY 506 (5th ed. 1979).
21. 1 LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 1.1 (1978).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. 371 U.S. 471 (1963).
27. *Id.* at 473.
28. *Id.*
29. *Id.* at 474.
30. *Id.*
31. *Id.* at 475.
32. *Id.* at 479.
33. *Id.* at 487.
34. *Id.* at 488.

The holding in *Wong Sun* does not mean that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police.[35] The Court expressly rejected this "but for" test and stated that the determining question is whether the evidence was discovered by the exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.[36] This is an attempt to mark the point at which the illegal activity of the police is so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost.[37] The cost is depriving the prosecution of reliable and probative evidence[38] thus denying the trier of fact knowledge of this relevant evidence.

In addition to this attenuation exception to the exclusionary rule, there are two other major exceptions. One is the independent source test, which generally means that if not even the "but for" test can be met, then the evidence is not a fruit of the prior fourth amendment violation.[39] This exception thus allows evidence to be admitted when an independent source for discovering the evidence exists.[40] Another exception to the exclusionary rule is the "inevitable discovery" rule. This rule has not been expressly sanctioned by the Supreme Court but it has been used by many lower courts.[41] This exception differs from the independent source rule. Here the question is not whether the police in fact acquired evidence by reliance on an untainted source. Instead, evidence falls within the inevitable discovery exception if the evidence would inevitably have been discovered lawfully.[42] The trial judge must be convinced that without any illegal conduct by the police the evidence would have been discovered. Admitting evidence through the inevitable discovery exception has been attacked as being completely at odds with the purpose for the exclusionary rule because it allows the police to gain an advantage while standing to lose only something that they would not have otherwise had.[43] This criticism of the inevitable discovery exception is well founded. The exclusionary rule loses much of its deterrent effect when police officers are allowed to take this "no risk" action. The inevitable discovery exception has also been attacked because it encourages police short-cutting.[44]

The scope of the exclusionary rule has been narrowed by three major exceptions.[45] In addition, the exclusionary rule has been limited by the Supreme Court's perception of what the rule is and what its function should

35. *Id.*
36. *Id.*
37. Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part).
38. *Id.* at 612.
39. 3 LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 11.4 (1978).
40. *Id.* There is a stronger argument for admission of evidence when the independent source is discovered before the illegal activity than when it is discovered after the illegal activity. *Id.*
41. *Id.* at § 11.4 n.42.
42. *Id.* at § 11.4.
43. Comment, *Fruit of the Poisonous Tree—A Plea For Relevant Criteria,* 115 U. PA. L. REV. 1136, 1143 (1967).
44. *Id.* Police short-cutting is encouraged by the inevitable discovery exception because the police can often illegally obtain evidence with less effort and this evidence can be admitted through the exception.
45. *See supra* text accompanying notes 36-42.

be. In *Illinois v. Gates et. ux.*,[46] the Supreme Court restated its view that the exclusionary rule is a judicially created remedy designed to safeguard fourth amendment rights, and is not a personal Constitutional right of the party aggrieved.[47] The function of the exclusionary rule is to prevent, not repair, and thus is used to deter future illegal activity by the police by excluding evidence obtained through such activity.[48] Although not every member of the Court adheres to this view,[49] *Gates* reflects the current view of the majority of the Court and this view of the rule leads to further limitations on its application.

One way this view of the exclusionary rule has limited its application appears in *United States v. Ceccolini.*[50] In *Ceccolini,* the Supreme Court held that the exclusionary rule should be invoked with greater reluctance when the illegally obtained evidence is a live witness as opposed to an inanimate object.[51] Although writers have attacked this distinction as one without a logical basis,[52] it is logical if one considers the Supreme Court's view of the exclusionary rule.

If the exclusionary rule's function is deterrence, there is less reason to exclude a willing witness than there is reason to exclude an inanimate object. This is because a willing witness is more likely to be discovered by legal means and thus there is less incentive to conduct an illegal search.[53] Since there is less incentive to conduct an illegal search for such a witness, there is less of a deterrent function served by excluding such evidence.[54]

Another reason to distinguish between types of derivative evidence springs from the concept that a balancing test should be used whenever the exclusionary rule is used.[55] The three purposes of the exclusionary rule,[56] with deterrence weighing most heavily, must be balanced against the cost of denying to the trier of fact relevant information. The truthseeking function is often impaired to a greater extent when live-witness testimony is excluded than when tangible evidence is excluded.[57] Since excluding live witnesses is often more costly than excluding tangible evidence, courts should consider what type of evidence they are dealing with when applying the exclusionary rule.

Finally, the exclusionary rule has been limited by the Supreme Court's view that the good faith of the police should be considered when dealing with the exclusionary rule. The Supreme Court has limited its recognition of a good faith exception to cases involving police actions based on an

46. 51 U.S.L.W. 4709 (June 8, 1983) (No. 81-430).
47. *Id.* at 4712.
48. United States v. Calandra, 414 U.S. 338, 347-48 (1974).
49. *Id.* at 356 (Brennan, J., dissenting).
50. 435 U.S. 268 (1978).
51. *Id.* at 280.
52. Note, *The Evisceration of the Exclusionary Rule: The Supreme Court Invents the Oral Evidence Exception,* 15 LAND & WATER L. REV. 323 (1980).
53. United States v. Ceccolini, 435 U.S. 268, 276 (1978).
54. It must be remembered that the function of the exclusionary rule is to deter future illegal activity.
55. United States v. Ceccolini, 435 U.S. 268, 278 (1978).
56. *See supra* text accompanying notes 21-24.
57. United States v. Ceccolini, 435 U.S. 268, 278 (1978).

ordinance which is later declared unconstitutional[58] or on existing case law which is later held to be bad law.[59] When officers act in good faith and violate only technical standards, the argument for excluding evidence obtained is weaker because the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful or negligent conduct in depriving the defendant of some right.[60] Thus when police act in good faith on a warrant which is later invalidated or pursuant to a statute which is later declared unconstitutional, this good faith should be considered in determining whether to exclude the evidence.[61] At the opposite end of the good faith spectrum is willful and negligent disregard of the defendant's rights. In these cases the deterrent value of exclusion would most likely be effective.[62] Although the Supreme Court has only recognized the good faith exception in these limited circumstances, if it recognizes that deterrence is the main function for the exclusionry rule then it should logically adopt the good faith exception in other circumstances. Police officers who, in good faith, believe they are acting lawfully will not be deterred by excluding evidence obtained through these actions.

All of these exceptions and limitations to the exclusionary rule have been characterized as leading to its total demise by a whittling away at both ends.[63] However, a better understanding of what has happened to the rule is provided by Justice White in his concurring opinion in *Illinois v. Gates et. ux.*[64] The trend and direction of the exclusionary rule decisions indicate a fuller appreciation of the costs incurred when reliable evidence is withheld from the trier of fact.[65] The costs include interference with the truthseeking function of the trial court and deterring legitimate as well as unlawful police activity.[66] This "fuller appreciation" of the costs involved leads to a more limited application of the exclusionary rule but certainly not to its total demise.

MIRANDA AND SELF-INCRIMINATION

In *Miranda v. Arizona,*[67] the Supreme Court considered whether there were times when an individual's statements, given while under police custody, should be inadmissible as evidence against the defendant in order to protect the fifth amendment privilege against self-incrimination.[68] The Court examined various police manuals which documented successful procedures for obtaining confessions[69] and the entire interrogation atmosphere in which the defendant is placed.[70] The Court realized the possible evils of such an atmosphere, and devised procedural safeguards to pro-

58. Michigan v. DeFillippo, 443 U.S. 31 (1979).
59. United States v. Peltier, 422 U.S. 531 (1975).
60. Brown v. Illinois, 422 U.S. 590, 611-12 (Powell, J., concurring in part).
61. *Id.*
62. *Id.*
63. Note, *supra* note 52, at 335.
64. 51 U.S.L.W. 4709, 4718 (June 8, 1983) (No. 81-430) (White, J., concurring).
65. *Id.* at 4721.
66. *Id.*
67. 384 U.S. 436 (1966).
68. *Id.* at 439.
69. *Id.* at 448.
70. *Id.* at 456.

tect fifth amendment rights. These safeguards must be observed unless other procedures, at least as effective in apprising the individual of his right of silence and assuring him of a continuous opportunity to exercise it, are devised.[71]

The Court devised the following warnings to insure that the person in custody is aware of his rights. First the person must be informed in clear and unequivocal terms that he has the right to remain silent. This warning must be accompanied by the explanation that anything he says can and will be used against him in court. The person must be told of his right to consult with a lawyer and to have counsel present during questioning. Finally, the person must be informed that if he is indigent a lawyer will be appointed to represent him.[72] These warnings are the result of the Court seeking a protective device to dispel the compelling atmoshpere of interrogation.[73]

There is one other point to consider in the *Miranda* decision. The holding was briefly stated near the beginning of the decision: the prosecution may not use any statements, stemming from a custodial interrogation of the individual unless it demonstrates that the procedural safeguards were used.[74] However, the court also stated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."[75]

A. A Clarification of Miranda

In *Michigan v. Tucker,*[76] the Supreme Court had the opportunity to answer the question of whether the "fruit of the poisonous tree" doctrine should apply to *Miranda* violations. In *Tucker,* the defendant was arrested and advised of his right to remain silent and of his right to counsel.[77] He was also told that any statement he made could be used against him in court.[78] The police did not, however, advise the defendant that counsel would be furnished free of charge if he could not afford the services himself.[79] Tucker then stated to the police that he had been with Henderson at the time the rape, for which he was being questioned, occurred.[80] Henderson discredited the defendant's story and in fact testified at trial in the prosecution's case-in-chief.[81]

Tucker's conviction was affirmed by both the Michigan Court of Appeals[82] and the Michigan Supreme Court.[83] Tucker then sought and was granted habeas corpus relief by the Federal District Court.[84] The district court held that Tucker had not been given his full *Miranda* warnings and so

71. *Id.* at 467.
72. *Id.* at 467-68.
73. *Id.* at 465.
74. *Id.* at 444.
75. *Id.* at 479.
76. 417 U.S. 433 (1974).
77. *Id.* at 436.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 436-37.
82. People v. Tucker, 19 Mich. App. 320, 172 N.W. 2d 712 (Mich. 1969).
83. People v. Tucker, 385 Mich. 594, 189 N.W. 2d 290 (Mich. 1971).
84. Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972).

the testimony of Henderson, whose identity was learned through Tucker's statements, should have been excluded in order to protect Tucker's fifth amendment rights.[85] After the Court of Appeals for the sixth circuit affirmed,[86] the Supreme Court granted certiorari.[87]

Justice Rehnquist, writing for the majority, determined that the facts of the case strongly indicated that the police conduct did not deprive Tucker of his privilege against compulsory self-incrimination, but only failed to make available the full measure of *Miranda's* procedural safeguards.[88] The Court acknowledged that *Miranda* required that statements taken in violation of the *Miranda* principles cannot be used to prove the prosecution's case at trial[89] and that fruits of police conduct infringing on a defendant's fourth amendment rights must also be suppressed.[90] However, the Court noted that it had already concluded that the police conduct did not violate Tucker's privilege against self-incrimination but only violated the prophylactic standards of *Miranda.*[91] This indicated that the warnings[92] required by *Miranda* are not Constitutional rights but are only a protective shield developed to protect Constitutional rights. The Supreme Court then determined that there was no controlling precedent and the question of whether Henderson's testimony should be excluded had to be decided as a question of principle.[93]

The Court turned to the rationale of the exclusionary rule and noted that in a search and seizure context the prime purpose of the rule is to deter future unlawful police conduct.[94] The rule is calculated to prevent, not to repair, and is to compel respect for constitutional guaranty by removing the incentive to disregard it.[95] This rationale, the Court suggested, would seem to be applicable to the fifth amendment context in a proper case.[96] While continuing its search for the principles underlying the exclusionary rule, the Court discussed the need to protect the courts from untrustworthy evidence and the notion that the government is required to shoulder the entire load.[97]

The Court then stated that there should be a balancing of the interests.[98] The reasons for exclusion should be balanced against the "strong" interest of any system of justice in making available to the trier of fact all relevant and trustworthy evidence.[99] If deterrence is the primary function of the exclusionary rule,[100] the amount of deterrence that

85. *Id.* at 268.
86. Tucker v. Johnson, 480 F.2d 926 (6th Cir. 1973).
87. 414 U.S. 1062 (1973).
88. Michigan v. Tucker, 417 U.S. 433, 444 (1974).
89. *Id.* at 445.
90. *Id.* (citing Wong Sun v. United States, 371 U.S. 471 (1963)). *See supra* text accompanying notes 26-34.
91. 417 U.S. at 445-46.
92. *See supra* text accompanying note 72.
93. 417 U.S. at 446.
94. *Id.* (citing United States v. Calandra, 414 U.S. 338 (1974)).
95. *Id.* (quoting Elkins v. United States, 364 U.S. 206 (1960)).
96. *Id.* at 447.
97. *Id.* at 448, 449.
98. *Id.* at 450.
99. *Id.*
100. *See supra* text accompanying notes 46-48.

excluding the evidence can be expected to produce will obviously be the determining factor in this balancing test. This is because the other purposes for exclusion (keeping the courts from becoming accomplices and assuring people that the government will not profit from its illegal behavior) are not variables. The interest in making available relevant evidence to the trier of fact is not a variable either. This leaves deterrence as the determining factor in this balancing test. When the police action was in good faith, the deterrence rationale loses much of its force.[101] Since deterrence determines the balancing test and because good faith can have such an effect on deterrence, good faith of the police will necessarily go a long way in determining whether evidence should be excluded. In *Tucker* the Court determined that the balance fell in favor of admitting the evidence.[102] The Court considered it significant that the failure to advise Tucker of his rights occurred prior to the *Miranda* decision.[103] Since *Miranda* was held to apply to Tucker's case[104] this last statement indicates that the good faith of the police must have been the significant factor.

So, in *Tucker,* the Supreme Court ruled that testimony from a witness, whose identity was learned through a defendant's statements made without the proper *Miranda* warnings, could be used as part of the prosecution's case-in-chief. This might seem to answer our question, except that the Court in *Tucker* expressly stated that it was not answering the broad question of whether evidence obtained from statements taken in violation of the *Miranda* rules must be excluded, regardless, of when the interrogation took place.[105] The concurring opinion of Justice Brennan should erase any doubts as to whether the Court had any intention of deciding this question in *Tucker*. Justice Brennan stated that if *Miranda* is applicable at all to the fruits of statements made without proper warnings, it should be limited to those cases in which the fruits were obtained as a result of post-*Miranda* interrogations.[106] Thus *Tucker* makes *Miranda* warnings mere prophylactic standards which can be violated without violating fifth amendment rights.[107]

The Supreme Court has not expressly stated whether the "fruit of the poisonous tree" doctrine should apply to evidence obtained through statements elicited without proper *Miranda* warnings. However, if the function of the exclusionary rule is to prevent future violations of fourth amendment rights through deterrence, it is logical to extend the exclusionary rule to evidence obtained in violation of *Miranda* in order to protect fifth amendment rights. In *Tucker* the Supreme Court stated that in a proper case the deterrence rationale would be applicable in the fifth amendment context.[108] If the rationale behind the rule is applicable to the fifth amendment, it seems logical that the rule itself should be applicable to the

101. 417 U.S. at 447.
102. *Id.* at 450.
103. *Id.* at 447.
104. *Id.* at 435.
105. *Id.* at 447.
106. *Id.* at 458 (Brennan, J., concurring).
107. Only Justice Douglas felt that any violation of Miranda warnings without a showing of other fully effective means to notify the person of his rights, is always a violation of the fifth amendment. 417 U.S. at 463 (Douglas, J., dissenting).
108. 417 U.S. at 447.

fifth amendment context. Lower courts have held that the "fruit of the poisonous tree" doctrine is applicable to *Miranda* violations.

CASES THAT HAVE APPLIED THE "FRUIT OF THE POISONOUS TREE" DOCTRINE TO MIRANDA VIOLATIONS

In *United States v. Cassell,*[109] the defendant Jackson[110] was involved in a scheme of stealing checks from the mail and forging the payee's name. While under custodial interrogation Jackson was given his full *Miranda* warnings, except he was told that a lawyer would be appointed for him if and when he went before a United States Commissioner.[111] In response to questions asked by the officials, Jackson admitted that one of the forged signatures appeared to be in his writing.[112] In addition, Jackson gave the officials a handwriting exemplar which was compared with forged signatures.[113]

The court concluded that the statement was inadmissible because of the *Miranda* violation.[114] The *Cassell* court also held that the handwriting exemplar was also inadmissible as a "fruit of the poisonous tree," even though the court recognized that other federal courts had held that compelling the modeling of clothing and submissions to blood tests and fingerprinting were not violations of the privilege against self-incrimination.[115] Although the *Cassell* court recognized that the Supreme Court in *Gilbert v. California*[116] had held that the taking of handwriting exemplars did not violate fifth amendment rights, the court still declared that any evidence is inadmissible if obtained in violation of the Constitution.[117]

The *Cassell* court's referral to evidence obtained in violation of the Constitution would seem to mean that the court felt that an improper or incomplete *Miranda* warning is a violation of the fifth amendment. Since the Supreme Court later held, in *Michigan v. Tucker,*[118] that an improper *Miranda* warning was not necessarily a fifth amendment violation,[119] the court's reasoning in *Cassell* should no longer stand. The purpose of including *Cassell,* a pre-*Tucker* case, is to show the effect that *Tucker* and its description of the prophylactic standards of *Miranda,* have had on this application of the "fruit of the poisonous tree" doctrine. Nevertheless, *Cassell* has been referred to as authority for applying the "fruit of the poisonous tree" doctrine to evidence obtained from statements made without proper *Miranda* warnings.[120]

109. 452 F.2d 533 (7th Cir. 1971).
110. There were three defendants in *Cassell.* However, only defendant Jackson's case is considered in this analysis.
111. 452 F.2d at 541.
112. *Id.* at 540.
113. *Id.*
114. *Id.* at 541.
115. *Id.*
116. 388 U.S. 263 (1967).
117. 452 F.2d at 541.
118. 417 U.S. 433 (1974).
119. *See supra* text accomapnying notes 91-92.
120. *See* LAFAVE, *supra* note 39, at § 11.4.

In *Commonwealth v. White*,[121] the defendant successfully appealed his conviction when Massachusetts' highest court held that evidence used by the prosecution should not have been admitted.[122] In *White*, the defendant had been arrested for driving under the influence of intoxicating liquor.[123] The defendant tried to reach an attorney but kept dropping coins and acted like "he didn't know what he was doing."[124] After a breathalyzer test indicated that he was intoxicated, the defendant was searched and placed in a holding cell.[125] The search revealed a marihuana cigarette and prompted the officer to ask the defendant if he had any other marihuana on his person or in his car.[126] When the defendant responded that he had more in his car, the officer applied for and received a search warrant based on the defendant's statement.[127] A search of the car's trunk produced various controlled substances and other evidence that was used against the defendant at trial.[128]

The trial judge ruled that the statements were not admissible because the Commonwealth did not meet its burden of showing that the defendant had knowingly waived his privilege against self-incrimination.[129] The trial judge ruled, however, that the evidence seized from the car did not have to be excluded as "fruit of the poisonous tree."[130] Massachusetts' highest court disagreed with the trial judge on this last point and held that the evidence should have been excluded.[131]

This holding, overruling the trial judge, exemplifies a correct application of the "fruit of the poisonous tree" doctrine to a *Miranda* violation. In *White* the officer's conduct can be considered a violation of the "prophylactic standards" of *Miranda*.[132] However, even though the conduct only violated "prophylactic standards" of *Miranda*, it did lead to statements which were used to support the issuance of a search warrant. If a court admits evidence obtained through such a search warrant then the court would not be deterring illegal police action. The police would actually be encouraged to elicit statements (legally or illegally) from a defendant because such statements could then be used to secure a search warrant. The police could rest assured that evidence gathered through this warrant would be admissible even though they would not have been able to secure the warrant, and thus the evidence, without the illegally elicited statements.

The final case to consider is *United States Ex. Rel. Hudson v. Cannon*.[133] In this case the defendant (Hudson) was arrested, taken to the police station and questioned.[134] Hudson claimed that he was not told of his

121. 374 Mass. 132 (1977), 371 N.E. 2d 777, *cert. granted sub nom.* Massachusetts v. White, 436 U.S. 925 (1978), *reh'g denied* 439 U.S. 1136 (1979).
122. *Id.* at 781.
123. *Id.* at 778.
124. *Id.* at 779.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 781.
132. *See supra* text accompanying notes 91-92.
133. 529 F.2d 890 (7th Cir. 1976).

right to remain silent, and was denied his requests to phone his attorney.[135] Hudson implicated an accomplice during this interrogation and this accomplice (and another accomplice who was implicated by the first) testified against Hudson at his trial.[136] The district court judge held that the Supreme Court's balancing test in *Michigan v. Tucker*[137] implied that the interest in securing trustworthy evidence was sufficient to justify the admission of fruits (testimony of accomplices) of an involuntary statement.[138] The court of appeals correctly overruled this holding and noted that nothing in *Tucker* suggests that there need not be exclusion of third party testimony when the defendant can show that such testimony is the product of coerced statements.[139]

The Hudson court was split on the question of whether third party testimonial evidence should ever be excluded based only on the omission of *Miranda* warnings.[140] The majority felt that the deterrent effect was not sufficient, in such a case, to warrant exclusion.[141] The author of the opinion, Chief Judge Fairchild, felt that the majority's view failed to heed *Tucker's* emphasis on good faith.[142] *Tucker* and its emphasis on good faith[143] supports Chief Judge Fairchild's position that *Tucker* should not be read as holding that there is never enough deterrent effect, when there is only a *Miranda* violation, to justify excluding third party testimonial fruits.

STAMPER

When a court is confronted with the question of whether evidence obtained through a statement made without proper *Miranda* warnings should be admissible it should follow a logical process. This process can be illustrated by applying it to the case of *Stamper v. Wyoming.*

First a court must determine whether the evidence falls within the exclusionary rule in general. When a court takes this first step it must keep in mind the function of exclusion, primarily deterrence. In *Stamper,* the police failed to give any *Miranda* warnings.[144] This conduct must be and would be discouraged by excluding the boots.

Next a court must determine whether any of the major exceptions to the exclusionary rule apply. The valid exceptions are the independent source rule and the attenuation exception. Criticisms of the inevitable discovery exception are valid and this exception should be rejected. A court should not permit speculation as to whether the evidence would have been discovered without the illegal conduct. Police short-cutting will be deterred

134. *Id.* at 891.
135. *Id.*
136. *Id.*
137. *See supra* text accompanying notes 98-102.
138. 529 F.2d at 892.
139. *Id.*
140. *Id.* at 894-95.
141. *Id.* at 895.
142. *Id.*
143. *See supra* text accompanying notes 100-102.
144. 662 P.2d at 85, n.5.

by rejecting the inevitable discovery exception.[145] If a court accepts the inevitable discovery exception it must be convinced that the evidence would inevitably have been discovered. In *Stamper*, the boots do not meet the attenuation exception since they were recovered directly and immediately through the *Miranda* violation. There is no indication that the police would have discovered the boots through an independent source. Finally, it is not possible to determine whether the trial judge would have concluded that the boots fit within the inevitable discovery exception because there was no need, and thus no attempt, to convince the trial judge that the boots would inevitably have been discovered.

Assuming the evidence is within the exclusionary rule's protection, a court must apply the Supreme Court's balancing test.[146] Items which must be weighed on the side for exclusion include: (1) the need to prevent the courts from becoming accomplices in disobedience of the Constitution; (2) assuring people that the government will not profit from its own illegal acts; (3) deterring these illegal acts and thus protecting Constitutional rights in the future. On the opposite side of the balance are items which must be weighed in favor of admitting the evidence. These items include: (1) the "strong" interest in making available to the trier of fact all relevant information; and (2) the costs imposed on legitimate police activities by excluding evidence.

In all cases, there is a need to make available to the trier of fact all relevant evidence. Excluding relevant evidence will always have a negative impact on the truthseeking function, and the need for a "correct" result will never vary. Although excluding evidence can have an adverse impact by discouraging some legitimate police activities, excluding the evidence in *Stamper* would only serve to encourage the police to give *Miranda* warnings and this would hardly impose a burden on legitimate police activities.

On the exclusion side of the balance, deterrence is the only variable. The need to prevent courts from becoming accomplices and to assure people that the government will not profit from wrongdoing will not vary from case to case. The deterrent effect that excluding evidence will produce does vary in each case. In *Stamper*, the deterrent effect produced by excluding the boots would be the primary consideration.

Both the type of evidence and the good faith of the police must be considered since both affect the amount of deterrence.[147] The boots were tangible evidence and unlike witnesses could not be discovered through their own volition. Thus there was more incentive to conduct illegal activity to discover the boots (as opposed to a willing witness). The deterrent effect of excluding the evidence in *Stamper* would be greater than the deterrent effect of excluding a voluntary witness, illegally discovered, and the court must consider this effect.

145. *See supra* note 44.
146. *See supra* text accompanying notes 55-56.
147. Distinguishing between types of evidence in these cases has been attacked as illogical and arbitrary. *See* Note, *Miranda Without Warning: Derivative Evidence as Forbidden Fruit*, 41 BROOKLYN L. REV. 325, 347 (1974).

In addition to the type of evidence, the good faith of the police must be considered. Here the equation is: the greater the good faith the less the deterrent effect and thus the weaker the argument to exclude evidence. In *Stamper*, the police failed to give any *Miranda* warnings and this was standard procedure. Excluding evidence in such cases should certainly deter the police from continuing such a policy. Although the atmosphere and the way the request was made should be considered, the fact remains that Stamper was already under arrest and in a custodial setting. A technical violation of *Miranda's* prophylactic standards is easily dismissed because excluding evidence in such cases will not have a great deterrent effect. The *Miranda* violation in *Stamper*, however, was not a mere technical violation.

CONCLUSION

There is no logical reason not to apply the "fruit of the poisonous tree" doctrine to evidence obtained through statements made without proper *Miranda* warnings. The exclusion of evidence can protect both fourth and fifth amendment rights through its deterrent effect. Before determining whether of not evidence must be excluded the judge should follow a logical process. Finally the judge must remember that the primary function of exclusion is to protect Constitutional rights by deterring illegal police activity in the future.

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