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United States v. Payner--Constriction of the Federal Courts' Supervisory Power

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CASE COMMENTS

UNITED STATES v. PAYNER—CONSTRICTION OF THE FEDERAL COURTS' SUPERVISORY POWER

I. THE CASE

United States v. Payner,[1] recently decided by the United States Supreme Court, re-examines and affirms the Court's earlier holding that a criminal defendant cannot invoke the exclusionary rule by vicariously asserting that a third party's fourth amendment rights were violated.[2] More importantly, the Court holds that federal trial courts may not use their supervisory powers to suppress evidence in cases wherein the Supreme Court has previously indicated that the defendant would not have fourth amendment standing to challenge the admission of the evidence.[3]

The case against Payner arose out of an indictment for falsification of his federal income tax return. The Government's case relied heavily upon a loan guarantee agreement in which Payner pledged his funds in a Bahamas bank as security for a large loan.[4] This guarantee agreement was obtained by the Government in a "flagrantly illegal search"[5] conducted during the course of an Internal Revenue Service investigation of the financial activities of American citizens in the Bahamas. Part of this investigation entailed a federal agent's engaging two private investigators to cultivate a friendship with Wolstencroft, the president of the Bahamian Castle Bank. While Wolstencroft was visiting in Miami and on an arranged "date" with one of the private investigators, the other investigator entered Wolstencroft's apartment and removed his briefcase. During the brief

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[1] 100 S.Ct. 2439 (1980). Mr. Justice Powell delivered the opinion of the Court.

[2] Rakas v. Illinois, 439 U.S. 128, 143 (1978).

[3] United States v. Payner, 100 S.Ct. 2439, 2445, 2447 (1980).

[4] *Id.* at 2442.

[5] *Id.* at 2443.

period that followed, the private investigator delivered the briefcase to the federal agent who supervised the copying of approximately 400 documents from the briefcase. The investigator then replaced the briefcase in the apartment. Some of the documents photographed led federal agents to a Florida bank. Subpoenas served on the Florida bank ultimately uncovered the loan guarantee which became the Government's chief evidence in *United States v. Payner*.[6]

After finding Payner guilty of the alleged tax fraud, the district court ruled on the reserved motion to suppress evidence.[7] The court decided the evidence against Payner "was the fruit of the outrageously illegal seizure of Wolstencroft's briefcase."[8] The court reasoned that although Payner had no standing under the fourth amendment to protest the admissibility of the evidence, the nature of the Government's activities required that the evidence be excluded under the inherent supervisory power of the federal courts.[9] Without the benefit of Payner's loan guarantee, the Government's case lacked sufficient evidence, and the district court set aside Payner's conviction.[10] The Sixth Circuit Court of Appeals affirmed the district court's use of its supervisory power to suppress the aforesaid evidence.[11] The Supreme Court granted the Government's petition for certiorari.[12]

II. STANDING AND THE FOURTH AMENDMENT EXCLUSIONARY RULE

Both the lower court and the higher courts' decisions in *Payner* focused on the federal court's supervisory power rather than Payner's rights under the fourth amendment. Any right of Payner to complain of a fourth amendment violation was foreclosed by *Rakas v. Illinois*,[13] where the Supreme Court ruled

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[6] *Id.*

[7] *Id.* at 2442-43, *citing* United States v. Payner, 434 F. Supp. 113, 136 (N.D. Ohio 1977).

[8] 434 F. Supp. at 133.

[9] 100 S.Ct. at 2443-44, *citing* United States v. Payner, 434 F. Supp. at 129, 133-35.

[10] 100 S.Ct. at 2443.

[11] United States v. Payner, 590 F.2d 206 (6th Cir. 1979).

[12] 100 S.Ct. at 2442.

[13] 439 U.S. 128 (1978).

that the fourth amendment does not operate to exclude evidence unless the person claiming the rule's protection has a legitimate expectation of privacy in the premises searched or in the property seized.[14] Clearly, Payner did not have an interest in Wolstencroft's papers, briefcase, or hotel room sufficient to create a legitimate expectation of privacy therein.

The Supreme Court first adopted the exclusionary rule in 1914,[15] and immediately thereafter the federal courts began limiting the use of the rule to those defendants with standing.[16] The early standing requirement focused on fourth amendment rights personal to the defendant, thereby necessitating a showing that his own possessory or ownership interests had been invaded.[17] In 1960, in *Jones v. United States*,[18] the Supreme Court expanded the standing concept by holding that a defendant, or "person aggrieved," has standing to object to an unreasonable search and seizure if he is "legitimately on the premises where a search occurs."[19] In 1967, in *Katz v. United States*,[20] the Supreme Court further expanded the standing concept. Prior to *Katz*, there could be no fourth amendment violation in the absence of a physical intrusion into an area wherein the defendant was legitimately on the premises. *Katz* recognized that the fourth amendment protects "people, not places,"[21] and therefore the fourth amendment is applicable to seizures of evidence in which a defendant has a "legitimate expectation of privacy."[22] In finding that the evidence seized by tapping the telephone booth occupied by Katz was illegal, the Court stated that a search is illegal if the person aggrieved had an actual subjective expectation of privacy and if that expectation was objectively reason-

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[14] *Id.*

[15] Weeks v. United Sates, 232 U.S. 383 (1914).

[16] *See, e.g.*, Graham v. United States, 15 F.2d 740 (8th Cir. 1926); Remus v. United States, 291 F. 501 (6th Cir. 1923); Chicco v. United States, 284 F. 434 (4th Cir. 1922); Tsuie Shee v. Backus, 243 F. 551 (9th cir. 1917); Moy Wing Sun v. Prentis, 234 F. 24 (7th Cir. 1916).

[17] *See* Comment, *Rakas v. Illinois: The End of Fourth Amendment Standing But Not to Fourth Amendment Confusion*, 46 BROOKLYN L. REV. 123, 125 n.22 (1979).

[18] 362 U.S. 257 (1960).

[19] *Id.* at 267.

[20] 389 U.S. 347 (1967).

[21] *Id.* at 351.

[22] *Id.* at 353.

able.[23] The "legitimate expectation of privacy" analysis implies that the court will focus on the person aggrieved and not on the area searched.[24] For eleven years, the two cases stood side by side, with both the standard of "legitimately on the premises" and the standard of "legitimate expectation of privacy" being applied.[25]

Finally, in *Rakas v. Illinois*,[26] the Supreme Court settled the issue of standing with regard to persons in positions similar to Payner. The "legitimately on the premises" test in *Jones* was rejected[27] and Rakas' request to exclude evidence was denied because Rakas' own fourth amendment rights had not been violated. The *Rakas* Court reiterated the principle that "Fourth Amendment rights are personal rights which may not be vicariously asserted."[28] Further, its decisions adopted the *Katz* "legitimate expectation of privacy" analysis. In so doing, the Court reinterpreted *Jones* and construed its language narrowly.[29] Because a person legitimately on the premises—as a guest or licensee in a house or apartment—will probably have a legitimate expectation of privacy, the "legitimacy on the premises" test used in *Jones* was swallowed up by the *Katz* "legitimate expectation of privacy" standard. As the phrase im-

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[23] Comment, *Standing to Invoke The Exclusionary Rule Narrowed by New Use of Privacy Expectation Standard*, 64 CORNELL L. REV. 752, 758 (1979).

[24] 389 U.S. at 353. In *Katz*, the nature of the telephone booth was not important; rather, the Court focused on the expectation of privacy one has when he shuts behind him the door of that booth.

[25] *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973) (the *Jones* standards were relied upon); Combs v. United States, 408 U.S. 224 (1972) (the Court followed the *Mancusi-Katz* "reasonable expectation of freedom from governmental intrusion" analysis); Spinelli v. United States, 393 U.S. 410 (1969) (the *Jones* "legitimately on the premises" standard was applied); and Mancusi v. De Forte, 392 U.S. 364 (1968) (the Court considered factors from both *Jones* and *Katz*).

[26] 439 U.S. 128 (1978).

[27] *Id.* at 133-35.

[28] *Id.* at 133. The Court cited Alderman v. United States, 394 U.S. 165, 174 (1969) for the above proposition. In *Alderman*, the Court refused to suppress evidence obtained by Government electronic surveillance, where Alderman neither participated in the conversation overheard nor had any interest in the places surveyed. *Id.* at 168. The Court stated, "No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so." *Id.* at 174.

[29] 439 U.S. at 135-39.

plied, "legitimate expectation of privacy" is an objective standard, not dependent on common-law interests in real or personal property. However, the possessory or property interests of a defendant are still relevant factors.[30]

As a result, when *Payner* came before the Supreme Court one term after *Rakas*, there was no question but that the present-day interpretation of the fourth amendment required denial of Payner's request to exclude evidence seized illegally from Wolstencroft's apartment and briefcase. If Rakas had no expectation of privacy in the automobile he occupied but did not own, Payner could not expect the Court to find he had an expectation of privacy in a hotel room or briefcase he has never even seen. Despite the original and repeatedly affirmed goals of the exclusionary rule,[31] the competing interest of limiting the exclusionary rule so that fewer criminals go free solely because evidence is tainted[32] has prevailed—at least on the issue of vicarious assertion of fourth amendment rights. For a short time, it had appeared that the standing concept could be expanded to protect persons such as Payner[33] in order to accomplish the goals of the exclusionary rule. *Rakas* eliminates the possibility of expanding the exclusionary rule to *Payner*-type situations

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[30] Although footnote 12 in *Rakas* downplays the need for a "common-law interest in real or personal property," *id.* at 144 n.12, the Court analyzes Rakas' property and possessory interest in the automobile searched. *Id.* at 148. The dissent notes that the Court "effectively ties the application of the Fourth Amendment and the exlusionary rule . . . to property law concepts." *Id.* at 156-57 (White, J., dissenting). One commentator observed, "*Rakas* does not return to pre-*Jones* distinctions based on property law labels, but it does exalt the possession, control, and ownership of property." Comment, *supra* note 23, at 758.

[31] One purpose and goal of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). *See also* Mapp v. Ohio, 367 U.S. 643 (1961). The other purpose is to maintain judicial integrity. McNabb v. United States, 318 U.S. 332, 345 (1943).

[32] *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971); Irvine v. California, 347 U.S. 128, 136 (1954). In Stone v. Powell, 428 U.S. 465, 490 (1976), the Court stated, "Application of the rule thus deflects the truthfinding process and often frees the guilty."

[33] Although such a broadening of "standing" might have been possible, the *Alderman* holding, discussed in note 28 *supra*, would have been a formidable obstacle. The prohibition against vicarious assertion of fourth amendment rights has been frequently stated. *See, e.g.*, Brown v. United Sates, 411 U.S. 223, 230 (1973); Simmons v. United States, 390 U.S. 377, 389 (1968).

where evidence against a defendant was seized through "purposefully illegal conduct" in an "intentional, bad faith act of hostility."[34] The strict requirements of the "legitimate expectation of privacy" standard frustrate the purpose of the exclusionary rule and will fail to deter Government officials' acts such as those in *Payner*.

III. THE SUPERVISORY POWERS ARE CONSTRICTED

The attempted and thwarted use of the federal courts' supervisory powers in *Payner* to suppress evidence seized by the use of an unreasonable search and seizure must be discussed in light of the historic use of the supervisory powers.

The supervisory powers are the federal appellate courts' ability to decide the proceedings before them and to review the decisions of the lower courts in their own system.[35] For example, one aspect[36] of the authority is the courts' ability to issue law or to create principles judicially, as opposed to that law created by statute or the principles explicit in the Federal Constitution. Specifically, the Supreme Court has used its supervisory power to create rules of evidence, the most notable of which is the exclusionary rule.[37]

As the exlusionary rule has developed, whether in the area of search and seizure or involuntary confessions, the Court has repeatedly discussed the purposes of and restraints on the supervisory powers interchangeably with the same purposes of and restraints on the exclusionary rule.[38] Dicta in *McNabb v.*

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[34] 434 F. Supp. at 135.

[35] Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as A Constitutional Requirement*, 59 MINN. L. REV. 251, 271 n.65 (1974).

[36] Other aspects are noted in Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193 (1969).

[37] The principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has . . . formulated rules of evidence to be applied in federal criminal prosecutions.

McNabb v. United States, 318 U.S. 332, 341 (1943), *citing* Nardone v. United States, 308 U.S. 338 (1939).

[38] The purposes of the exclusionary rule and the uses of the supervisory

United States,[39] stated that, "[j]udicial supervison . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence."[40] In addition, *McNabb* stated that the courts should invoke their supervisory powers to suppress evidence because "a conviction resting on evidence [illegally seized would make] the courts themselves accomplices in willful disobedience of the law."[41] Furthermore, the fears created by the exclusionary rule[42] have been soothed to some extent by dicta calling for a limited application of the supervisory power,[43] which also demonstrates the interchangeability of the two concepts.

Until 1961, the supervisory power was the only means of implementing the fourth amendment exclusionary rule because, although the rule was *based* on the fourth amendment, it was not considered to be a *requirement* of the fourth amendment.[44] Upon the "somewhat inexplicit language"[45] of *Weeks v. United States*,[46] the Court proceeded for thirty-five years to implement the exclusionary rule without clarifying the rule's origin.[47] Final-

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powers are to deter illegal police conduct, *see* note 31 *supra*; to maintain judicial integrity, *see* accompanying text at notes 39-41 *infra*.

[39] 318 U.S. 332 (1943).

[40] *Id.* at 340.

[41] *Id.* at 345. This dicta has been frequently cited. *See* Elkins v. United States, 364 U.S. 206 (1960); Mallory v. United States, 354 U.S. 449 (1957); Mesarosh v. United States, 352 U.S. 1 (1956); Upshaw v. United States, 335 U.S. 410 (1948).

[42] *See* text accompanying note 32 *supra*.

[43] "[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." United States v. Calandra, 414 U.S. 338, 348 (1974). *See also* Hampton v. United States, 425 U.S. 484, 495 (1976); Rea v. United States, 350 U.S. 214, 216-17 (1956); Elkins v. United States, 364 U.S. 206, 223 (1960).

[44] Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 GEO. WASH. L. REV. 193 (1964).

[45] *Id.* at 195. That language read:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914).

[46] 232 U.S. 383 (1914).

[47] The Court avoided the issue in 1943, in *McNabb*, saying it was unnecessary to decide if the exclusion was constitutionally required, and excluded evidence through its supervisory powers. 318 U.S. at 340.

ly, in *Wolf v. Colorado*,[48] the Court held that the exclusionary rule was not a constitutional requirement, but only a federal judicial decision or policy.[49]

Thus, for the next twelve years, the federal courts continued to suppress evidence seized in the course of unreasonable searches and seizures by virtue of the courts' supervisory powers.[50] The exclusionary rule, thus imposed, offered federal criminal defendants greater rights and protections than those deemed by the Supreme Court to be guaranteed by the United States Constitution.[51] The supervisory powers were a means for the courts to provide more rights than the Constitution was presumed to provide and, further, led the way for the Court's eventual change.

In 1961, *Wolf* was overruled by *Mapp v. Ohio*.[52] In holding that the exclusionary rule must be applied in state criminal actions, the Court ruled that the exclusionary rule was a requirement of the Constitution.[53] *Mapp* meant that the Federal Constitution finally offered as much protection as the supervisory

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[48] 338 U.S. 25 (1949).

[49] *Id.* at 27-28. "Later cases, particularly *Wolf*, indicated that the exclusionary rule was a judicially made rule of evidence not required by the Constitution." Wolf, *supra* note 44, at 195, and *see generally*, 195-99. *See also* Comment, 84 A.L.R.2d 959. It was necessary for the Court in *Wolf* to find that the rule was judicially created and not a constitutional requirement, because if the rule was part of the Constitution, the fourteenth amendment would apply the rule to the states along with the fourth amendment. "[T]he Court's hesitancy in requiring that the states adopt the exclusionary rule could be said to show a traditional sense of judicial conservatism and a respect for the role of the states in our federal system." Wolf, *supra* note 44, at 201.

[50] *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Elkins v. United States, 364 U.S. 206 (1960); Mallory v. United States, 354 U.S. 449 (1957); Rea v. United States, 350 U.S. 214 (1956); Mesarosh v. United States, 352 U.S. 1 (1956); Stefaneli v. Minard, 342 U.S. 117 (1951).

[51] "The unique contribution of the supervisory power doctrine . . . is that it enables the Court to raise the standards of fairness in the administration of federal justice in advance of the relatively slow pace acceptable in the constitutional area." Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666-67 (1963).

[52] 367 U.S. 643 (1961).

[53] *Id.* at 660. In *Mapp*, the Court stated:

> Having once recognized that the rights to privacy embodied in the Fourth Amendment is enforceable against the States and that the right to be secure against rude invasions of privacy by state officers is,

powers and that the federal courts could thereafter abandon their supervisory powers and simply apply the exclusionary rule as a requirement of the Constitution.[54]

During the years between *Mapp* and the beginning of the Burger Court, the Warren Court continued to expand the constitutional rights and protections of criminal defendants. After 1969 the Burger Court began a pattern of constricting these rights.[55] In the face of that constriction, defendant Payner found himself before the Court with no constitutional grounds on which to suppress evidence seized in bad faith hostility to the Constitution. The *Rakas* rule that fourth amendment rights cannot be vicariously asserted foreclosed Payner's fourth amendment challenge. Innovatively, perhaps, the district court employed its federal supervisory power to accomplish its traditional goals,[56] and attempted once again to expand the rights and protections afforded to criminal defendants further than provided

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> therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. *Id.*

Note, however, that this interpretation has been contradicted, albeit inconsistently, by the Supreme Court. In *Mapp*, at 648, the Court stated that the "exlusionary rule has been a requirement of the Constitution since 1914," but later held in 1974, that the exclusionary rule was "judicially created . . . rather than a personal constitutional right . . . ." United States v. Calandra, 414 U.S. 338, 348 (1974). The inconsistency is discussed in great detail in Schrock & Welsh, *supra* note 35. The authors state that:

> For Justice Day [in *Weeks*] . . . the rule was not 'an enforcement tool,' but was *itself* a 'Fourth Amendment guarantee.' Or, to put it another way, the rule does not '*give* content and meaning to the Fourth Amendment guarantees as Brennan [in *Calandra*] says; it is *part* of that meaning. . . . In short, Day's is a constitutional right holding, whereas Brandeis and Holmes made a supervisory power argument.' *Id.* at 288.

See also Monaghan, *The Supreme Court, 1974 Term, Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10, 40 (1975).

[54] Ker v. California, 374 U.S. 23, 33 (1963).

[55] Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980). The constriction has been so thorough that the foremost proponents of the theory that the exlusionary rule is a constitutional requirement have found that the constitutional requirement-judicial rule argument is resolved. They recognize that "[w]hat was early understood as a rule expressing an exclusionary right is now understood not as a personal constitutional right but rather as a judicially created remedy." Schrock & Welsh, *Reconsidering The Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978).

[56] *See* note 38 *supra*.

under the Supreme Court's interpretation of the Constitution. The difference, of course, was that the district court expanded a defendant's rights after the Supreme Court had restricted them, where always before the supervisory powers had expanded rights not yet addressed. The Supreme Court based its reasoning upon this difference. The Court rejected the district court's use of the supervisory powers, saying the use is improper where the Court has already spoken.[57] The decision demonstrates that the Supreme Court is not only presently in an era of constricting constitutional rights,[58] but it is also entering an era of constricting the scope of the federal courts' supervisory powers, at least within areas where the Supreme Court has previously dictated controlling law. Constriction of the fourth amendment has been ensured by *Payner's* limitation of the federal courts' supervisory powers.

IV. ANALYSIS AND IMPACT OF THE PAYNER DECISION

Understandably, the Supreme Court has sought to achieve a steadfast, positive statement on the rights and protections provided to criminal defendants in federal court. In light of the many fears expressed during the periods of expanded criminal protections, many conservatives will view the Supreme Court's restriction of the exclusionary rule as a positive step toward achieving more criminal convictions and better protection of society. Others, however, who have a more sympathetic view towards persons such as Payner and Wolstencroft, or who have ideals concerning the meaning of the Federal Constitution that take priority over the drawbacks of the exclusionary rule, or who have cynicism toward the zealousness of law enforcement officers, will view the decision with renewed discouragement. The ironies in the decision abound, for the *Payner* decision states several times in the majority opinion alone that society has an interest in deterring the bad faith conduct inherent in many illegal searches and seizures.[59] Yet, the Court concludes that the need to deter searches such as that conducted of Wolstencroft's briefcase does not outweigh the need to acquire sufficient evidence to convict one individual of income tax fraud. The

[57] 100 S.Ct. at 2446-47.

[58] *See* note 55 *supra.*

[59] 100 S.Ct. at 2446 n.8, 2447.

Court seems concerned that the "controlling decisions of this Court"[60] be paramount and not evaded in any manner, rather than in any discretionary means of avoiding the undesirable repercussions of its *Rakas* decision.

Furthermore, upon noting that principles of the Court denounce lawless activities and exclude evidence obtained in such activities, the Court states that "they must be weighed against the considerable harm that would flow from indiscriminate application of an exlcusionary rule."[61] Ironically, it is discrimination that is contemplated by the use of the supervisory powers[62] and is emphatically rejected by the *Payner* decision. When the Court holds that permitting the lower courts to use the supervisory powers where the Supreme Court has already rule would "enable the federal courts to exercise a standardless discretion in their application of the exclusionary rule,"[63] the Court closes the door to any discretion—standardless or not—and any consideration of relevant or even overwhelming social phenomena or policy. In his dissent to the *Rakas* decision, Mr. Justice White commented that the majority's opinion declared ' "open season' on automobiles;"[64] after *Payner*, the Court has gone further and declared a permanent "open season" on bank officials and anyone else who might possess information federal officers could covet.

One must examine the impact that the Supreme Court's decision in *Payner* will have on state courts and state criminal defendants. To be sure, some states will follow the Supreme Court's interpretation of the fourth amendment with in-kind interpretations of their own state constitutions' search and seizure provisions. However, the present trend throughout the country is for state courts to apply their own interpretations of

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[60] *Id.* at 2447.

[61] *Id.* at 2445.

[62] "The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion .... Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." Nardone v. United States, 308 U.S. 338, 342 (1939).

[63] 100 S.Ct. at 2445.

[64] 439 U.S. at 157 (White, J., dissenting).

their own constitutions, thereby affording criminal defendants more rights and protections under some state constitutions than under the United States Constitution.[65] This trend, dubbed the "New Federalism," has been employed largely by state courts *evading* federal issues whenever possible and deciding state issues under their own broader interpretations of their own state constitutions.[66] The Supreme Court of Hawaii, in *State v. Kaluna*,[67] stated that:

> [W]e are of the opinion that *as a search and seizure*, the conduct of the police in this case was unreasonable. While this results in a divergence of meaning between words which are the same in both the federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is *greater* protection of individual rights under state law than under federal law . . . . In this respect, the opinion of the United States Supreme Court on the meaning of the phrase 'unreasonable searches and seizures' is merely another source of authority admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by article I, section 5 of the Hawaii Constitution.

Furthermore, the Pennsylvania court has actually excluded evidence obtained in an unlawful search and seizure of a defendant's bank records under the Pennsylvania state constitution,[68] flatly refusing to follow *United States v. Miller*,[69] wherein such evidence was deemed *not* excludable under the Federal Constitution.[70]

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[65] Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975).

[66] *Id. See also* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

[67] 520 P.2d 51, 58 n.6 (Hawaii 1974).

[68] Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979).

[69] United States v. Miller, 425 U.S. 435 (1976). The Supreme Court held that the fourth amendment to the United States Constitution did not protect a defendant from the admission of evidence secured in the seizure of bank deposit slips and checks, because there is no legitimate expectation of privacy concerning such information.

[70] The Pennsylvania court held, "As we believe that *Miller* establishes a dangerous precedent, with great potential for abuse, we decline to follow that case when construing the state constitutional protection against unreasonable searches and seizures." 403 A.2d at 1289.

Unlike the Pennsylvania court, the West Virginia Supreme Court of Appeals has not yet chosen to interpret its own constitution rather than the Federal Constitution in a case involving a "legitimate expectation of privacy." However, there is every reason to believe that such interpretation is imminent, for the West Virginia court has twice expressed that it is "free to adopt stronger protections under our state constitution than those afforded by its federal counterpart."[71] Justice Miller believes that the West Virginia court should tie constitutional guarantees to the West Virginia Constitution whenever possible.[72] Recognizing that the United States Supreme court has "pendulate[d] on its interpretation of the Bill of Rights,"[73] Justice Miller hopes that the constitutional "rights based on the West Virginia Constitution will become more permanent."[74] The West Virginia court has utilized its freedom to interpret and to apply the state constitution independently in *State ex rel. Whitman v. Fox*,[75] which involved a conspiracy statute and the due process clause. The West Virginia court, upon opportunity, will probably make a search and seizure decision independently of the Federal Constitution's current constrictions.

Thus, some state courts will probably continue to exclude evidence such as that seized from Wolstencroft's briefcase, on the grounds that such searches are unreasonable under their respective state constitutions, and on the assumption that such exclusion would constitute a valid policy in discouraging similar illegal conduct by other law enforcement officers. The Supreme Court has stated, however, that the federal courts are stripped of any power to make similar discretionary judgments.

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[71] State v. Canby, 252 S.E.2d 164, 167 n.2 (W. Va. 1979). *Canby* involves the test of exigent circumstances for the making of an arrest for a felony without a warrant. *See also* State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 172 (W. Va. 1979), which involved the issue of double jeopardy.

[72] Gooden v. Board of Appeals of W. Va. Dept. of Public Safety, 234 S.E.2d 893, 898 (W. Va. 1979) (Miller, J., concurring).

[73] *Id.* at 898-99.

[74] *Id.*

[75] 236 S.E.2d 565 (W. Va. 1979). The court found that a West Virginia conspiracy statute was modeled on a similar federal conspiracy statute, and recognized that that federal conspiracy statute had withstood constitutional scrutiny. Nevertheless, the court insisted on evaluating the West Virginia statute's constitutionality under the state's due process clause. The court stressed West Virginia's "long constitutional tradition of protecting individual rights." *Id.* at 569.

V. CONCLUSION

The effects of *Payner* seem very clear. First, the Supreme Court has affirmed its constriction of the fourth amendment protections so as to preclude any vicarious assertion of a third party's rights to be free of unreasonable search and seizure. In so holding, the Court has defined and restricted the fourth amendment with such precision that no federal court is permitted to exclude evidence after an independent evaluation under its supervisory powers. By holding that the supervisory powers may not be utilized to expand fourth amendment rights where the Court has previously spoken, the Court has furthered its policy of restricting fourth amendment protections. The supervisory powers, long a tool for deterring bad faith searches and seizures and of preserving judicial integrity, may no longer be used upon a federal court's discretionary determination that those ends need to be served. The result is that the supervisory powers are constricted, the fourth amendment's protection is limited, and there are no means left by which the federal courts can deter conduct such as the Government officials displayed in *Payner*. The bite into judicial integrity may be irreparable, but on the other hand the public may feel more confident that fewer criminals "will go free because the constable has blundered."[76]

Second, the Supreme Court has implied that the supervisory powers may be implemented by lower federal courts in areas where the Supreme Court has not ruled, but may not be implemented to circumvent the previous decisions of the Court.

Third, the Supreme Court has, whether intentionally or not, placed responsbility for protecting individual rights on the states. Although it remains to be seen how many states will extend the coverage of their own constitutions beyond the coverage of the Federal Constitution, the evolution of the "New Federalism"[77] in some states reassures that some state defendants' rights will not be eroded. However, the Supreme Court's restriction of the fourth amendment and of the supervisory powers clearly leaves those persons accused of federal crimes unprotected.

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[76] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[77] *See* notes 65-66 and accompanying text *supra*.

Finally, the only possible relief for a future federal criminal defendant in Payner's shoes is a Congressional statute nullifying the effect of *Payner*. In the face of the unlikelihood of such an enactment, and in the face of the finality of *Payner* and *Rakas*, defendants can only rely on the potential protections of state courts interpreting their own state constitutions.

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