**Montana Law Review**

Volume 20
Issue 2 *Spring 1959*

Article 5

January 1959

# Procedures for Suppressing Illegally Seized Evidence: The Exclusionary Rule

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Montana's requirements in the entire area of admissions by reciprocity, excepting the number of years practice required, are more stringent and exacting than the standards in a number of other states. The present rules probably will require no alteration in the existing requirements of the N.C.B.E. character investigation, the detailed affidavit reporting any prior professional delinquencies, and the certificate of good standing from the presiding judge of the supreme court of the applicant's former jurisdiction.

These comments made by Mr. Justice Metcalf in 1952 are still applicable to the status of our bar admission standards:[151]

> The place to begin to tighten up admission requirements would appear to be in establishing stricter standards for permission to take the bar examination. . . . I am afraid that our loose interpretation of the rule allowing applicants to offer equivalent study or experience for academic pre-legal training holds out false hopes for most of the applicants who do not have adequate preparation. . . .
>
> [I]t would appear that what is needed is not a piece-meal amendment but a re-evaluation of the whole process. . . .
>
> [T]he initiative for needed changes in the court rules and examination procedures should come in this state from the Montana Bar Association.

CHARLES W. WILLEY

## PROCEDURES FOR SUPPRESSING ILLEGALLY SEIZED EVIDENCE THE EXCLUSIONARY RULE

At common law, evidence which had been seized illegally was nevertheless admissible if otherwise competent. This rule was generally accepted by American courts until the United States Supreme Court, in *Weeks v. United States*,[1] held that the introduction at a trial of evidence obtained through an unreasonable search and seizure nullifies the rights guaranteed by the fourth amendment to the Constitution, and that timely application for return of the property should be granted, thus preventing its use in evidence. The Court has subsequently suggested that this rule, known as the "exclusionary rule," is not a mandate of the fourth amendment, but is a judicially created rule of evidence implied from the fourth amendment.[2]

Even if the exclusionary rule were considered a mandate of the fourth amendment, that amendment binds only the federal government. Nevertheless, following the *Weeks* case many states have voluntarily adopted a

[151]Note 100 *supra*, at 10-12.

[1]232 U.S. 383 (1914).

[2]Wolf v. Colorado, 338 U.S. 25 (1949).

similar exclusionary rule, either as an implied mandate of the state constitution or as a judicially created rule of evidence.[3]

Before discussing the procedural means for enforcing the exclusionary rule, it may be helpful to describe the circumstances in which it is applicable.

## *APPLICABILITY OF THE EXCLUSIONARY RULE*

### *Evidence within the Scope of the Rule*

#### *Fruit of the Poisonous Tree*

Real evidence, oral testimony as to what was learned by the search and seizure, and evidence derived from information gained in an unlawful search are all within the scope of the exclusionary rule. In *McGinnis v. United States,*[4] it was held that there is no basis for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning the objects illegally observed. To allow such distinction, the court said, "would grant the victims of unreasonable search and seizure the rather unsubstantial right to be convicted on the basis of evidence which was illegally observed rather than evidence which was illegally taken." Other cases are to the same effect.[5] Photostats of unlawfully seized documents are likewise not admissible.[6] The same is true of evidence discovered through information obtained in an illegal search.[7] In *Silverthorne Lumber Co. v. United States*[8] the Supreme Court said, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." This evidence obtained indirectly from an illegal act is what the *Nardone* case characterized as "fruit of the poisonous tree."[9]

#### *Standing to Object*

In the federal courts it is undisputed that the protection afforded by the fourth amendment is personal to him whose rights are violated. Therefore, in order to complain, one must have an interest in the place searched or property seized.[10] Generally, only the possessor or owner of premises or

[3]The exclusionary rule has been adopted in 22 states, the District of Columbia and Hawaii. In at least two states, Alabama and Maryland, it has been enacted by statute for certain situations, while the common law rule of admissibility prevails in all other situations not covered by statute. The common law rule of admissibility still prevails without qualification in 25 states, England and Canada. The exclusionary rule is firmly established in United States federal courts.

[4]227 F.2d 598 (1st Cir. 1955).

[5]State v. Hunt, 280 S.W.2d 37 (Mo. App. 1955); Quan v. State, 185 Miss. 513, 188 So. 568 (1939).

[6]People v. Berger, 44 Cal. 2d 459, 282 P.2d 509 (1955).

[7]People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942).

[8]251 U.S. 385 (1920).

[9]In Nardone v. United States, 308 U.S. 338 (1939), where the Court was confronted with the admissibility of information derived indirectly from an illegal wiretap, it held that a defendant must be given an opportunity to prove that evidence to which he objects is the "fruit of the poisonous tree; "that is, was indirectly derived from the illegal wiretap.

[10]Hall v. United States, 150 F.2d 281 (5th Cir. 1945).

property seized has standing to raise the objection on the ground of an unconstitutional search and seizure.[11]

The only case decided by the United States Supreme Court in which this question was squarely presented was *United States v. Jeffers*.[12] In that case, the Court decided that even though Congress declared that no property rights should exist in narcotics (the goods seized), it intended to prevent narcotics traffic rather than to abolish the exclusionary rule.

In the *Jeffers* case, even though the accused had no proprietary interest in the premises searched and no title to the goods nor even any physical possession of them, he was held to have a sufficient interest in the goods seized to have standing to object. A question arises, however, as to the standing of a person who has no interest in goods which are unlawfully seized, other than possession, but who owns and occupies the premises from which the articles are unlawfully taken. This point was not discussed in the *Jeffers* case. It has been held, however, that a person in such a situation has sufficient standing to object.[13]

A lessee,[14] sublessee,[15] and tenant by suffrance[16] have been held to have a sufficient proprietary interest in the premises to raise the objection, but a trespasser has no standing to raise the issue.[17] Where the owner has not consented to a search of his premises, a person who occupies them with the owner's permission has standing to object,[18] but whether a guest may complain about an illegal search of a room in which he is staying is still open.[19] The lower federal courts tend to deny his standing.[20]

Many state courts recognize the rule that an accused cannot object to the admission of evidence on the ground that it was obtained by an unlawful search and seizure where the search and seizure concerns property of third persons or property in which the accused has no right, title, or interest.[21] On the other hand, the exclusionary rule applies in some jurisdictions even though the search and seizure did not violate any constitutional right of the accused and even though he had no interest in the property seized or disclaimed any interest therein.[22] The nature of the interest required in the property searched or seized, as a requisite to a standing to object, varies among the states.[23] In Maryland,[24] the owner of property

[11]MacDaniel v. United States, 297 Fed. 769 (6th Cir. 1924).

[12]342 U.S. 48 (1951).

[13]In Matthews v. Carrea, 135 F.2d 534, 537 (2d Cir. 1943), where title to articles seized unlawfully from the dwelling of the accused was vested in his trustee in bankruptcy, it was held that he had a sufficient interest to object to the unconstitutional search, and to have the articles seized excluded from evidence.

[14]Coon v. United States, 36 F.2d 164 (10th Cir. 1929) (dictum).

[15]Brown v. United States, 83 F.2d 383 (3d Cir. 1936).

[16]Klee v. United States, 53 F.2d 58 (9th Cir. 1931).

[17]Chicco v. United States, 284 Fed. 434 (4th Cir. 1922).

[18]United States v. Jeffers, 342 U.S. 48 (1951).

[19]McDonald v. United States, 335 U.S. 451 (1948).

[20]*In re* Nassetta, 125 F.2d 924 (2d Cir. 1942); Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945).

[21]Fla., Idaho, Ill., Ind., Ky., Md., Mich., Miss., Mont., Okla., Ore., Tenn., Tex., Wash., W. Va.

[22]People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

[23]See Annot., 50 A.L.R.2d 580 (1955).

[24]Frantom v. State, 195 Md. 163, 72 A.2d 744 (1950).

has sufficient interest even though the property, at the time of the search, was leased to someone else. Right of possession is sufficient in Indiana,[25] Michigan,[26] and Oklahoma.[27] In *State ex rel. Teague v. District Court*,[28] where the accused disclaimed all ownership and right to possession to the premises searched and the property seized, the Montana court held he was in no position to complain.

Thus a situation may arise where an accused faces a dilemma. To show his standing to object to the introduction of evidence seized from him unlawfully, he must prove an interest in the premises searched or the property seized. Yet, if he does so, he may admit an element of the crime charged if the offense involves unlawful possession. Nevertheless it seems that most courts apply the general rule that unless an accused can show a sufficient interest in the articles seized or premises searched, he has no standing to object[29]

*Collateral Use of Evidence*

In the federal courts, even though evidence obtained through an unreasonable search and seizure may not be admissible to prove a crime, it may be used to discredit defendant's testimony given on direct examination. In *Walder v. United States*,[30] where the defendant on direct and cross-examination denied ever selling or possessing narcotics, the government was allowed to impeach him by introducing a heroin capsule which had been secured from his possession by an unreasonable search. The case of *Agnello v. United States*,[31] where the opposite result was reached in a similar situation, was distinguished. There the government had failed to get the tainted evidence admitted in their case in chief and tried to smuggle it in by eliciting a denial of possession from the defendant on cross-examination and then offering the evidence for impeachment purposes.

*"Search" within the Meaning of the Constitution*

*Wiretapping*

In *Olmstead v. United States*[32] the Supreme Court expressly held that the protection of the fourth amendment does not extend to telephone wires or to messages flowing over them. The only reason for excluding such evidence, if otherwise competent, is under specific statute. Section 605 of the Federal Communications Act prohibits the interception or divulgence of a telephonic communication without the authorization of the sender. Exclusion of such evidence is properly obtained by objection at trial. This special statutory problem will not be dealt with further here.[33]

[25]Dalton v. State, 230 Ind. 626, 105 N.E.2d 509, 31 A.L.R.2d 1071 (1952).
[26]People v. Galnt, 235 Mich. 646, 209 N.W. 915 (1926).
[27]Ellesworth v. State, 295 P.2d 296 (Okla. Crim. 1956).
[28]73 Mont. 438, 236 Pac. 257 (1925).
[29]See Annot., 96 L.Ed. 72 (1952) ; Annot., 50 A.L.R.2d 529 (1955) ; Recent Decision, 27 NOTRE DAME LAW. 273, 276 (1952).
[30]347 U.S. 62 (1954).
[31]269 U.S. 20 (1925).
[32]277 U.S. 438, 466 (1927).
[33]See note 18 MONT. L. REV. 198, 211 (1957), for a discussion of the admissibility of wiretap evidence with a special emphasis on the question in Montana.

*Open Fields*

Though to invade one's dwelling without a warrant is ordinarily a violation of his rights,[34] and though the protection of the constitution has been extended to one's place of business[35] and even to his automobile, the constitutional guarantee does not extend to open fields or woods.[36] To invade one's fields may well be a trespass, but it is not a "search" within the meaning of the constitution.

*Search by Officers of Another Sovereign or by Private Persons*

The constitutional prohibition against unreasonable searches and seizures which appears in both federal and state constitutions is in each case aimed only at the sovereign whose constitution it is.[37] It is not concerned with the acts of private persons nor even with the acts of official persons who do not represent the sovereign. As a consequence the courts have generally held that evidence seized illegally by private persons,[38] federal officers[39] or officers of sister states[40] is not excluded from state courts; and evidence illegally obtained by private persons or by state officers is not excluded from the federal courts.[41] It should be noted, however, that there are some contrary decisions relating to law officers.[42] The United States Supreme Court has recently stated that the question whether federal courts may receive evidence from state officers is still undecided by that court.[43]

The simple rules are complicated by problems of cooperation. If private persons or officers of another sovereign make the seizure at the direction of or in cooperation with officers of the first sovereign, the evidence must be excluded.[44] It may be sufficient to establish this cooperation to show that there is a general understanding and common practice

[34]Agnello v. United States, 269 U.S. 20 (1925).

[35]Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[36]Hester v. United States, 265 U.S. 57 (1924).

[37]Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (dictum); People v. Tarantino, 45 Cal. 2d 590, 290 P.2d 505 (1955); Gilliam v. Commonwealth, 263 Ky. 342, 92 S.W.2d 346 (1936); Colburn v. State, 175 Miss. 704, 166 So. 920 (1936); State v. Hepperman, 349 Mo. 681, 162 S.W.2d 878 (1942).

[38]*Ibid.*

[39]State v. Gardner, 77 Mont. 8, 249 Pac. 574 (1926); State *ex rel.* Kuhr v. District Court, 82 Mont. 515, 268 Pac. 501 (1928); Johnson v. State, 155 Tenn. 628, 299 S.W. 800 (1927). *But see* Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956) (concurring opinion), where one judge interpreted Rea v. United States, 350 U.S. 214 (1956), as forbidding the admission of evidence seized by a federal officer in a state prosecution.

[40]People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935); Kaufman v. State, 189 Tenn. 315, 225 S.W.2d 75 (1949).

[41]Lotto v. United States, 157 F.2d 623 (8th Cir. 1946), *cert. denied*, 330 U.S. 811 (1947); United States v. Diuguid, 146 F.2d 848 (2d Cir. 1945), *cert. denied*, 325 U.S. 857 (1945).

[42]State v. Arregui, 44 Idaho 43, 254 Pac. 788, 52 A.L.R. 463 (1927); Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839 (1923); Little v. State, 171 Miss. 818, 159 So. 103 (1935); State v. Rabasti, 306 Mo. 336, 267 S.W. 858 (1924); State v. Hiteshew, 42 Wyo. 147, 292 Pac. 2 (1930).

[43]Benanti v. United States, 355 U.S. 96, 102 n.10 (1957).

[44]Byars v. United States, 273 U.S. 28 (1927); Lustig v. United States, 338 U.S. 74 (1949).

of exchanging evidence between federal and state officers.[45] Further, even in the absence of any federal participation, evidence is not admissible in a federal prosecution if it has been obtained by state officers for the sole purpose of aiding in the enforcement of federal law.[46]

*What is "Unreasonable" under the Constitution*

To search a man's person or premises and seize his property is such a serious infringement on his personal liberty as to be justifiable only under compelling circumstances.

*Search Under a Warrant*

The term "unreasonable" as used in the fourth amendment has been construed in the light of what was deemed unreasonable when the constitution was adopted.[47] The practices before the Revolution which were especially obnoxious involved the issuance of general search warrants permitting the holder to enter any man's home to search for unnamed goods—a real instrument of tyrrany.[48] Under the federal constitution and those of most states search under a properly restricted warrant is permitted. Search under a valid warrant is therefore reasonable, and conversely search under an invalid warrant is unreasonable. Under both federal and state law a search warrant can properly issue only upon probable cause and with particular description of the place to be searched and thing sought.[49] Loose, vague or doubtful information,[50] or mere suspicion[51] cannot constitute probable cause; description which does not permit the officer with reasonable effort to identify with certainty the premises and things sought is inadequate.[52]

Even without a warrant there may be special circumstances which make a search and seizure reasonable.

*Search Incident to Arrest*

The right to search, even without a warrant, incident to an arrest, is based upon the necessity of the situation and is granted to protect the arresting officer from violence, to prevent the escape of the prisoner, and to forestall destruction of evidence of the crime.[53] These purposes would be fully served by searching the person arrested and his immediate surroundings; but the law has actually been expanded to permit search of the whole room[54] or the whole apartment where the offender was arrested,[55]

[45]Gilbert v. United States, 163 F.2d 325 (10th Cir. 1947).
[46]Gambino v. United States, 275 U.S. 310 (1927).
[47]Carroll v. United States, 267 U.S. 132, 149 (1925).
[48]47 AM. JUR. *Searches and Seizures* § 52 (1943).
[49]Jones v. United States, 357 U.S. 493 (1958); State *ex rel.* King v. District Court, 70 Mont. 191, 224 Pac. 862 (1924). See Note, 18 MONT. L. REV. 198, 204 (1957).
[50]Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
[51]Byars v. United States, 273 U.S. 28 (1927); State *ex rel.* Thibodeau v. District Court, 70 Mont. 202, 224 Pac. 866 (1924).
[52]Steele v. United States, 267 U.S. 498 (1925).
[53]Agnello v. United States, 269 U.S. 20 (1925).
[54]United States v. Rabinowitz, 339 U.S. 56 (1950).
[55]Harris v. United States, 331 U.S. 145 (1947).

and even to permit entry of the house though the prisoner had left the house before arrest.[56]

*Search of Vehicles*

Another category of searches, held reasonable even without warrant, involves vehicles. Because of the high mobility of modern vehicles and the impracticability of securing a warrant to search them in many cases, the Supreme Court has created the rule that to search such vehicles when there is probable cause to believe they are being usd to transport contraband is permissible.[57]

*Search to Save Evidence*

It may sometimes happen that a law enforcement officer has probable cause to believe that evidence is about to be destroyed, and in this case he probably is permitted to enter and seize the evidence even though he might not be in a position to enter lawfully for the purpose of making an arrest.[58]

*Search with Consent*

The law is clear that the constitutional right against unreasonable searches and seizures may be waived by voluntary consent.[59] The cases are, however, by no means agreed as to what constitutes a consent.[60]

## *PROCEDURES FOR ENFORCING EXCLUSIONARY RULE*

### *Motion to Suppress*

In *Weeks v. United States*[61] the defendant filed before trial a "Petition to Return . . . Property." The Supreme Court held that denial of the petition was error, since it was timely made and to deny it was to nullify the safeguard of the fourth amendment. *Adams v. New York*[62] was distinguished as holding that the question of using illegally seized evidence could not first he raised as a collateral issue during the trial of the case.

Because in other cases the objects illegally seized were contraband, which defendant could not lawfully possess, a petition to return was there inappropriate, but a motion to have the objects suppressed and excluded from evidence was always proper.

To be timely, objection to the use of illegally seized property in evidence must ordinarily be taken prior to trial,[63] but to this there are at least two exceptions. The objection is timely during the trial, first, if the defendant only then initially learns of the evidence,[64] and second, if the unlawfulness of the seizure appears from the undisputed evidence.[65]

[56]People v. Cisneros, 332 P.2d 376 (Cal. App. 1958).
[57]Carroll v. United States, 267 U.S. 132 (1925).
[58]Johnson v. United States, 333 U.S. 10, 15 (1948) (by implication).
[59]CORNELIUS, SEARCH AND SEIZURE §§ 20-28 (2d ed. 1930); State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906); State v. Uotila and Certain Intoxicating Liquors, 71 Mont. 351, 229 Pac. 724 (1924).
[60]Annot., 74 A.L.R. 1437 (1931).
[61]232 U.S. 383 (1914).
[62]192 U.S. 585 (1904).
[63]Segurola v. United States, 275 U.S. 106, 111 (1927).
[64]Gouled v. United States, 255 U.S. 298 (1920).
[65]Agnello v. United States, 269 U.S. 20 (1925).

The *Federal Rules of Criminal Procedure* specifically provide for a motion to suppress. Rule 41(e) states in part:

> The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

This provision has been held to be but a statutory enactment of existing law and practice,[66] but in terms it differs. It does not include as a matter of right exclusion at trial where there is undisputed proof of the illegality. On the other hand it grants discretion in any case to entertain the motion to suppress at trial. At least two cases have allowed a motion to suppress to be heard for the first time at the trial notwithstanding the fact that the defendant could have objected earlier.[67] In *United States v. Asendio*[68] the defendant was permitted to raise the issue of illegal search for the first time in a motion for new trial. It is true, however, that the case involved trial to the court, a jury having been waived. The court said, "[W]e should find it difficult to support the position that a basic constitutional right of defendant can be denied because his counsel failed to object before or at the introduction of the colorable evidence." Still, the court refused to take the position that it would consider the issue if it were raised for the first time on appeal.

Most state courts which have adopted the exclusionary rule require that a motion to suppress be made before trial, or the right to object to the evidence is lost.[69] For example, in *State ex rel. Samlin v. District Court,*[70] the Montana Supreme Court stated:

> It is well settled that articles wrongfully taken from one accused of crime may be used as evidence against him upon the trial, though objection is made that the prosecution obtained possession of them unlawfully. . . . Where however, the question is raised before the trial, by a direct proceeding instituted to test the legality of the means by which possession of the articles has been secured, it then becomes the duty of the court to direct return of them to the accused if it determines that unlawful means have been employed to secure possession.

Even more explicity, the Montana court said in *State v. Gardner*:[71]

> In practically every jurisdiction where the procedure by motion to suppress is recognized, it is held that the application to suppress must be made timely, and the decided cases do not leave room for doubt as to what is meant by timely application. In the *Samlin* case, above, we intimated that if the application is made before the trial it is sufficient and this is the rule followed generally. [Citing cases.] The principle which underlies the rule is that a court will

[66]United States v. Di Re, 159 F.2d 818 (2d Cir. 1947), *aff'd*, 332 U.S. 581 (1948); Notes of Advisory Committee on Rules, FED. R. CRIM. P. 41, 18 U.S.C. (1952).

[67]Ganci v. United States, 287 Fed. 60 (2d Cir. 1923), *cert. denied*, 262 U.S. 755 (1923); United States v. Asendio, 171 F.2d 122 (3d Cir. 1948).

[68]171 F.2d 122, 125 (3d Cir. 1948).

[69]Fla., Idaho, Ill., Mich., Mo., Mont., Ore., S.D., Wash., Wis.

[70]59 Mont. 600, 198 Pac. 362 (1921).

[71]74 Mont. 377, 384, 240 Pac. 984, 986 (1925).

not stop the trial of a criminal case to frame a collateral issue and determine by what means the evidence was obtained. [Citing cases.] Since in this instance the motion to suppress was made before the cause was actually called for trial, it was "timely" within the meaning of that term as employed in the authorities.

A number of other jurisdictions do not require a pre-trial motion to suppress, but hold that the accused may first object when the evidence is offered at trial.[72]

*Appeal from Order Denying Motion to Suppress*

Should a pre-trial motion to suppress evidence be denied, it may be possible to appeal directly from the order denying the motion. The general rule is that, in the absence of statute, only a final judgment, and not an interlocutory order, is appealable.[73] The purpose behind this rule is to avoid bringing a case to the appellate court in fragments.

Section 1291, 28 U.S.C., provides that the federal courts of appeal shall have jurisdiction of appeals from all *final decisions.* Similarly section 93-8003, *Revised Codes of Montana,* 1947, provides that an appeal may be taken to the state supreme court from a *final judgment* in the district court. Appealability, then, of an order denying a motion to suppress depends on whether the order is final or only interlocutory.

In *Cogen v. United States*[74] the question of the appealability of an order denying a motion to suppress was before the United States Supreme Court. There, after an indictment for conspiracy to violate the prohibition laws had been returned, but before trial, defendant's motion to suppress had been denied and he appealed from the order denying the motion. The defendant claimed the order was concerned with a matter collateral to the general subject of the criminal proceeding and that it was final and hence appealable. In holding the order not appealable, the Court recognized a distinction between proceedings independent of, and proceedings ancillary to, a criminal proceeding. The Court observed that the order did not deal with a matter distinct from the prosecution, but that its main purpose was the suppression of evidence at the forthcoming trial.[75] It went on to say that the disposition of the motion would necessarily determine the conduct of the trial and could vitally affect the result. The motion to suppress was likened to an application to suppress a deposition, to compel production of books and documents, for leave to make a physical examination of a plaintiff, or for a subpoena duces tecum. These all have relation to the principal lawsuit. These interlocutory orders were differentiated from orders given in independent proceedings brought for similar purposes which would be final. A motion for the return of papers in the possession of an officer of the court was given as an example. The Court said that in such a situation the motion's "essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case."[76]

[72]Cal., Ind., Ky., Md., Okla., Tex., W. Va.
[73]2 AM. JUR. *Appeal and Error* § 21 (1936).
[74]278 U.S. 221 (1929).
[75]*Id.* at 223.
[76]*Id.* at 225.

An important factor to be considered in determining whether the order is in an independent or merely ancillary proceeding is the pendency at the time the motion is made (and not, at the time the motion is acted upon) of a criminal action in which the evidence is to be used.[77] Whenever there is no indictment or information pending against the movant, the independent character of the motion to suppress (or the petition to return, as it would then more likely be titled) seems clear and an order denying the motion should be appealable.[78] Similarly, if the motion for return is made by a stranger to the criminal action, the proceeding is independent as to him and the order appealable.[79] On the other hand, if a party to a pending criminal action asks for a return of the seized property it seems likely that his principal purpose is to suppress the evidence, in which case the resulting order would be interlocutory and not appealable.[80] Still, orders denying motions to suppress have been held appealable where made in a different district from that in which the trial will occur,[81] or perhaps where the emphasis is on the return of property rather than on its suppression as evidence.[82]

Different problems are raised in considering the right of the government to appeal from the granting of a motion to suppress, since no appeal will lie from an acquittal. In some lower federal courts a liberal view was taken of the "finality" concept and appeal permitted from the granting of a motion to suppress,[83] but they have been effectually nullified as authority by the decision of the Supreme Court in *Carroll v. United States*[84] clearly holding such an order not appealable.

In a number of state courts orders denying motions to suppress have been held interlocutory and hence not appealable where, at the time the application was filed a criminal action was pending against the movant.[85]

*Objection to the Evidence at Trial*

Once a pre-trial motion to suppress has been denied, the question arises whether objection must also be made at trial to the introduction of the tainted evidence in order to preserve the objection for review. Cases in

[77]United States v. Poller, 43 F.2d 911, 74 A.L.R. 1382 (2d Cir. 1930). *But see* United States v. Williams, 227 F.2d 149, 151 (4th Cir. 1955), where the court stated that it did not think that the time of the finding of the indictment is the sole criterion for deciding whether the proceeding initiated by the motion to suppress is plenary or ancillary.

[78]Cogen v. United States, 278 U.S. 221 (1929); Burdeau v. McDowell, 256 U.S. 465 (1921); Cheng Wai v. United States, 125 F.2d 915 (2d Cir. 1942); United States v. Rosenwasser, 145 F.2d 1015, 156 A.L.R. 1200 (9th Cir. 1942).

[79]Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[80]Cogen v. United States, 278 U.S. 221 (1929).

[81]Dier v. Benton, 262 U.S. 147 (1923).

[82]Steele v. United States, 267 U.S. 498 (1925); United States v. Williams, 227 F.2d 149 (4th Cir. 1955). See also Carroll v. United States, 354 U.S. 394, 403 (1957) (dictum).

[83]United States v. Cefaratti, 202 F.2d 13 (D.C. Cir. 1952); United States v. Stephenson, 223 F.2d 336 (D.C. Cir. 1955); United States v. Ponder, 238 F.2d 825 (4th Cir. 1956). See als Note, 35 N.C.L. REV. 501 (1957).

[84]354 U.S. 394 (1957).

[85]People v. Rau, 220 Mich. 502, 190 N.W. 243 (1922); Settle v. State, 31 Okla. Crim. 257, 238 Pac. 499 (1925); State v. Zachte, 69 S.D. 519, 12 N.W.2d 372 (1943); State v. Bass, 153 Tenn. 162, 281 S.W. 936 (1926); State v. Johnson, 150 Wash. 456, 273 Pac. 532 (1929).

Texas,[86] Florida[87] and California[88] have clearly held that the pre-trial objection must be renewed at trial to be preserved. There is a Missouri case which may represent the same point of view, but is of doubtful authority.[89]

This precise question was before the Court of Appeals for the District of Columbia in *Waldron v. United States.*[90] Citing cases from the Second[91] and Third Circuits,[92] the court expressly held that where a motion to suppress has been denied, the movant need not renew the motion or object in any other way to the evidence at the trial to preserve the objection for review. The court said:[93]

> The movant has a right to renew his point; it would be safer and more skillful to interpose an objection when the evidence is offered, but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly.

*Injunction*

A federal injunction may sometimes be secured to prevent the availability in a state prosecution of evidence secured illegally by a federal officer. This stands as a practical limitation on the general rule that where evidence has been seized by a federal officer, with no participation by state officers, it is admissible in a state prosecution.

In *Rea v. United States*[94] a federal officer had seized narcotics under an invalid search warrant. A motion to suppress was granted and the indictment was dismissed. Because the narcotics were contraband no motion for their return was made. A federal narcotics agent then swore to a complaint before a New Mexico judge and the defendant was charged with a violation of the state narcotics law. The case in the state court was to be based on the testimony of the federal agent concerning the illegal search and on the evidence seized. The defendant moved the federal district court to enjoin the agent from testifying in the state prosecution, and, if the evidence seized was out of the custody of the United States, to direct the agent to reacquire the evidence and destroy it or transfer it to another agent. The district court denied the motion and the court of appeals affirmed. On certiorari in the United States Supreme Court, the denial of the motion was reversed. The Court said:

> That policy [to protect the privacy of the citizen] is defeated if the federal agent can flout them [federal rules governing searches and seizures] and use the fruits of his unlawful act either in a federal or state proceeding.

[86]Bailey v. State, 157 Tex. Crim. 315, 248 S.W.2d 144 (1952); Spencer v. State, 157 Tex| Crim. 496, 250 S.W.2d 199 (1952).
[87]Robertson v. State, 94 Fla. 770, 114 So. 534 (1927).
[88]People v. Shannon, 147 Cal. App. 2d 300, 305 P.2d 101 (1956).
[89]State v. Lord, 286 S.W.2d 737 (Mo. 1956).
[90]219 F.2d 37 (D.C. Cir. 1955).
[91]Keen v. Overseas Tanking Corp., 194 F.2d 515 (2d Cir. 1952), *cert. denied*, 343 U.S. 966 (1952).
[92]Green v. Reading Co., 183 F.2d 716 (3d Cir. 1950).
[93]Waldron v. United States, *supra* note 90, at 41.
[94]350 U.S. 214 (1956).

It would seem from the decision in the *Rea* case that not only could the agent be enjoined from testifying in a state prosecution, but also the physical evidence illegally seized by him could, if within control of the federal officials, be withheld from the state court.

*Writ of Prohibition*

In Montana, during the prohibition era, a practice developed of utilizing the writ of prohibition to prevent the introduction of evidence obtained through an unreasonable search and seizure. In *State ex rel. Samlin v. District Court*[95] a search warrant for the seizure of liquor was issued on insufficient grounds. Under the prohibition law there was a special proceeding upon return of the search warrant in which the owner of seized liquor could defend and in which the liquor could be adjudged forfeit. In this proceeding the owner of the seized whiskey moved to quash the search warrant and to return the liquor. His motion was denied and the hearing was continued. He made application for a writ of prohibition to the Montana Supreme Court and it was issued to stay further action in the search warrant proceeding.

Section 93-9201, R.C.M., 1947 provides:

> The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, *when such proceedings are without or in excess of the jurisdiction* of such tribunal, corporation, board, or person. (Emphasis supplied.)

It has often been declared that the writ will issue only to prevent excesses of jurisdiction and only where no plain, speedy, and adequate remedy exists in the ordinary course of law.[96] The crux of the *Samlin* case was that the judge had no information upon which a valid search warrant could issue and hence had no jurisdiction to issue the warrant. Since the search warrant proceeding and forfeiture of the liquor would therefore be in excess of jurisdiction, it is arguable that the writ of prohibition issued for its designed purpose. However, it has been decided that once the search warrant hearing has been held, the writ is no longer proper, since a judgment of forfeiture of the liquor would be appealable.[97]

In later cases, however, the writ of prohibition was issued by the Montana Supreme Court, directed to district courts, to prevent the use *as evidence at the trial* of liquor seized under invalid search warrants. In *State ex rel. King v. District Court*,[98] a petition to suppress evidence had been denied. While the opinion states that the application for prohibition was made for the purpose of staying a search warrant proceeding, the court nevertheless said:[99]

[95]59 Mont. 600, 198 Pac. 362 (1921).

[96]State *ex rel.* Boston and Montana Consolidated Copper and Silver Mining Co. v. District Court, 22 Mont. 220, 56 Pac. 219 (1899); State *ex rel.* Hauswirth v. Beadle, 90 Mont. 24, 300 Pac. 197 (1931); State *ex rel.* Saxtorph v. District Court, 128 Mont. 353, 275 P.2d 209 (1954).

[97]State *ex rel.* Barnes v. District Court, 59 Mont. 491, 197 Pac. 565 (1921).

[98]70 Mont. 191, 224 Pac. 862 (1924).

[99]*Id.* at 202, 224 Pac. at 866.

> In the instant case, the ultimate question before the court is whether the relator is entitled to have suppressed the evidence obtained upon the occasion of the unlawful search and seizure. This question being answered in the affirmative, a *writ will issue prohibiting the use as evidence* of the liquor and other articles seized upon the occasion of the unlawful search *upon the trial* of the relator, as well as the use as evidence of the possession thereof so acquired. . . . (Emphasis supplied.)

It appears then, that the writ was not directed toward staying a search warrant proceeding at all, but was directed instead toward suppressing the evidence in the trial of the accused. Even though the admission of such evidence at the trial may have been reversible error, it is submitted that such a use of the writ of prohibition was improper, because the court still had jurisdiction. This is distinguishable from cases where the writ was directed toward staying a search warrant proceeding based on an invalid warrant, where the writ may be appropriate.

In *State ex rel. Thibodeau v. District Court*[100] the propriety of the writ of prohibition in a similar case was directly before the court. There a petition to suppress evidence obtained under an invalid search warrant was denied. The defendant then applied to the Supreme Court for a writ of prohibition to prevent the use of the property seized as evidence at the trial. The court rejected as without foundation the respondent's contention that, since relator could have appealed from the order denying the petition to suppress, he had an adequate remedy by appeal and the writ of prohibition would be improper. The court dismissed almost as summarily respondent's second contention that relator could appeal from any judgment of conviction. The court stated merely that the remedy of appeal was not an adequate remedy immediately available. The propriety of the writ was based on this argument. The lower court, it was argued, could not render a valid judgment based on the testimony obtained under the invalid search warrant. The admission of that testimony would be reversible error. The court then cited *State ex rel. Lane v. District Court*[101] for the proposition that whenever it is made to appear that under no conceivable circumstances can the district court render a valid judgment, the writ should issue. The court in the *Thibodeau* case went on to say, "Why should the citizen, presumed to be innocent, be subjected to the humiliation and expense of a trial where no valid judgment can be rendered against him?" The effect of this ruling is that even though a district court may have jurisdiction over a criminal matter, because the admission of certain evidence would constitute reversible error if objected to, the writ of prohibition will issue to prevent needless litigation and save expense. This may be a praiseworthy objective, but it is not the purpose for which the writ of prohibition was designed. To recognize that the writ was improperly issued in the *Thibodeau* case, it is only necessary to regard the actual holding in the *Lane* case. There the court said:[102]

> Whenever it is made to appear, as in this instance, that under no conceivable circumstance can the district court render a valid judg-

[100]70 Mont. 202, 224 Pac. 866 (1924).
[101]51 Mont. 503, 154 Pac. 200 (1915).
[102]*Id.* at 508, 154 Pac. at 202.

> ment *because of a lack of jurisdiction*, the discretion should be exercised in issuing the writ, to the end that litigants may be saved the needless trouble and expense of prosecuting their litigation to a fruitless judgment. (Emphasis supplied.)

It is apparent that the lack of jurisdiction is the error to which the writ of prohibition was designed to be directed. This was recognized in the *Lane* case, but was overlooked or disregarded in the *Thibodeau* case. The words of the statute[103] and the cases interpreting it[104] emphasize that the writ is directed against excesses of jurisdiction. The false notion that the writ lies to save expense and prevent needless litigation alone, even where a court has jurisdiction, has nevertheless been followed.[105]

No similar use of this extraordinary writ has been discovered in any other jurisdiction. In California the statutes[106] specifically provide that the writ of prohibition may issue to prevent a prosecution where a defendant's committment is based entirely on illegally obtained evidence. In *Badillo v. Superior Court*,[107] the California court said:

> [A] defendant has been held to answer without reasonable cause if his committment is based entirely on incompetent evidence and acordingly in such a case the trial court should grant a motion to set aside the information . . . , and if it does not do so, a peremptory writ of prohibition will issue to prohibit further proceedings.

In Montana there is no express statutory provision granting authority to issue a writ of prohibition in such a case. Section 94-6601, R.C.M. 1947, sets out the grounds on which an indictment or information may be set aside. Conceivably a writ of prohibition might lie to prevent a prosecution in Montana if a motion to set aside an indictment or information, based on a fatal defect in the accusation, were denied. That question is not within the scope of this Note. However, the fact that a writ of prohibition may be proper in such a case, because of lack of jurisdiction to proceed under a faulty indictment or information, is no authority for allowing the writ to prevent the use of evidence at a trial where the court does have jurisdiction and the information or indictment is valid.

There is still another reason for concern with the writ of prohibition than that it may serve as a means of appeal from an otherwise non-appealable denial of a motion to suppress. The special statutory hearing under the prohibition law has its counterpart under the general search warrant provisions.[108] It is there specified that upon the return of the warrant the owner of the seized goods has opportunity to controvert the grounds for issuing the warrant and to demand the return of his property. It seems arguable that this is a sufficiently independent proceeding that one who makes his objection at this time in vain may have a remedy by appeal or perhaps by writ of prohibition.

[103] REVISED CODES OF MONTANA, 1947, § 93-9201.
[104] Note 96, *supra*.
[105] State *ex rel.* Putnam v. District Court, 109 Mont. 223, 95 P.2d 441 (1939).
[106] CAL. PEN. CODE § 999a.
[107] 46 Cal. 2d 269, 294 P.2d 23 (1956).
[108] REVISED CODES OF MONTANA, 1947, §§ 94-301-1 to 301-21.

## *CONCLUSION*

The exclusionary rule is available to protect a fundamental right of the criminal defendant. Counsel is obligated in conscience to use for his client this safeguard which the law allows. He may fulfill this duty by making objection in any search warrant proceeding, by moving before trial to suppress the evidence and return it to defendant, by objecting to the admission of the objects in evidence, and by taking timely appeal or application for a writ of prohibition where that is appropriate.

Many procedural questions involving the exclusionary rule which have been decided in the federal courts have never been raised in state courts. However, the fact that state courts feel free to disregard the federal rulings is illustrated by the following statement of the California court in *People v. Cahan*:[109]

> In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them.

In applying the *Weeks* doctrine it is important that the law of each jurisdiction be carefully noted, for diversity in procedure and substance in this field is the rule and not the exception.

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[109] 44 Cal. 2d 434, 282 P.2d 905, 50 A.L.R.2d 513 (1955).