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Fourth Amendment-in-Court Identifications

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FOURTH AMENDMENT—IN-COURT IDENTIFICATIONS

United States v. Crews, 100 S. Ct. 1244 (1980).

I. INTRODUCTION

In *United States v. Crews*,¹ the Supreme Court further demarcated the limits of the exclusionary rule as applied to fourth amendment² violations. The Court unanimously held that in-court identification testimony could not be excluded as the product of an illegal arrest. In reaching this decision, the Court failed to employ a complete exclusionary rule analysis, neglecting to consider fully whether the identification testimony in itself constituted suppressible evidence or whether the prosecution had obtained the testimony as a result of purposeful, illegal police conduct. Even though the victim remembered the defendant's face from the crime, the Court could have considered the victim's testimony as tainted evidence and excluded it.

Finding no need to employ an exclusionary rule analysis, five members of the Court summarily agreed that in-court identification testimony crucial to a successful prosecution could not be suppressed because an illegal arrest cannot bar a defendant's prosecution. However, these Justices failed to distinguish the commencement of a prosecution from the purposes of the exclusionary rule.

The *Crews* Court refused to deny prosecutors the invaluable incriminating evidence of an in-court identification. In so doing, the Court manifested its increasing willingness to weigh successful prosecution more heavily than fourth amendment protections in deciding whether to apply the exclusionary rule. While criminal convictions constitute an important societal interest, the *Crews* opinion also reduces the incentive of police to observe fourth amendment protections.

II. FACTS AND CASE HISTORY

Early in January 1974, a young man robbed a woman in the restroom at the Washington National Monument.³ During the robbery, the victim

¹ 100 S. Ct. 1244 (1980).

² The fourth amendment provides in part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

³ 100 S. Ct. at 1246.

had a good opportunity to view her assailant.⁴ Soon after the robber left, the woman reported the incident.⁵ In the next few days, two similar robberies occurred in the same restrooms with the victims giving substantially similar descriptions of the assailant.⁶

Three days after the first incident, a United States Park Police officer saw Keith Crews in the area of the restrooms and noticed his resemblance to police descriptions of the robber. The officer stopped Crews and allowed him to leave after brief questioning.⁷ When the officer's conversation with a tour guide aroused further suspicion in Crews, the park police once again detained him at the Monument.⁸ Trying unsuccessfully to photograph Crews at the site,⁹ the police took him into custody, ostensibly for truancy. At police headquarters, police photographed Crews, called his school, and released him, never charging him with an offense.¹⁰

The next day, police showed the first victim a photographic array. She immediately identified Crews as the man who had robbed her. A few days later, one of the other women made a similar identification. Police then took Crews into custody, and the two women identified him at a court-

⁴ Through the space which separated the partition and the door of the stall the woman occupied, the assailant looked at the victim and demanded money. After the woman complied, the robber gained entry to the stall. The woman tried to resist his sexual advances, which he discontinued after a few minutes and left. *Id.* at 1247.

⁵ The assailant warned the woman not to leave for twenty minutes after his departure. When the time had expired, the victim immediately went to the police. *Id.*

⁶ *Id.*

⁷ The officer approached Crews, requested his name and age, asked why he was not in school and informed Crews of his similarity with the suspect's description. The officers then allowed Crews to leave, and he entered a restroom. *Id.*

⁸ While Crews was inside the restroom, the officers spoke to a tour guide who had seen a young man loitering around the area on the day of the first robbery. When Crews left the restroom, the guide identified him as the man he had previously seen. *Id.*

⁹ A detective working on the case could not obtain a clear picture of Crews due to inclement weather. *Id.*

¹⁰ 100 S. Ct. at 1247.

ordered lineup.¹¹ A grand jury later indicted Crews on counts of armed robbery and assault.¹²

Before trial, Crews moved to suppress all identification testimony on the ground that his initial detention had been a pretext to gain evidence.¹³ After hearing testimony, the trial judge concluded that Crews' initial detention constituted an arrest without probable cause in violation of the fourth amendment and thus, he excluded the photographic and lineup identifications. However, the judge determined that the victims' ability to identify Crews in court derived from an independent recollection, unaffected by the previous identifications. A jury convicted Crews of robbing the first woman.¹⁴

On appeal, the District of Columbia Court of Appeals reversed the conviction.¹⁵ The appellate court agreed that police had detained Crews without probable cause, but the court treated the in-court identification problem within the framework of the "poisonous fruits" doctrine.¹⁶ Viewing the issue as whether the identification had been obtained by an exploitation of illegal police conduct, the appellate court reasoned that but for the first unlawful arrest, police would not have obtained the photographs which led to Crews' subsequent arrest and in-court identification during prosecution of the case.¹⁷ Finding that none of the exceptions to the exclusionary rule¹⁸ applied to the facts in Crews' case, the appellate court held that the in-court identification should have been suppressed.

¹¹ *Id.* at 1248.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Crews v. United States*, 389 A.2d 277 (D.C. 1978).

¹⁶ The fruit of the poisonous tree doctrine derives from *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and from the Court's discourse on the exclusionary rule in *Wong Sun v. United States*, 371 U.S. 471 (1963).

¹⁷ 100 S. Ct. at 1249.

¹⁸ Courts have recognized three exceptions to the exclusionary rule. First, evidence obtained from an independent source unrelated to illegal police conduct is admissible. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. Second, evidence will not be excluded if the government would have inevitably discovered it in the normal, legal course of their investigation. *See United States ex rel. Owens v. Twomey*, 508 F.2d 858, 865 (7th Cir. 1974). Finally, if the illegality surrounding the initial seizure of the evidence has become so attenuated as to dissipate the taint of illegality, the evidence will be admissible. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

The Supreme Court unanimously reversed,¹⁹ although members of the Court differed as to the reasons for their reversal. The entire Court agreed that the appellate court had erroneously determined that the in-court identification constituted an evidentiary product tainted by the illegal arrest. Writing for the Court, Justice Brennan initially divided the in-court identification into three elements. First, the victim is present at trial to testify to the robbery events. Second, the victim possesses "knowledge of and the ability to reconstruct the prior criminal occurrence" and to identify the defendant on the basis of this knowledge.²⁰ Third, the defendant is present in the courtroom for comparison by the victim with her memory of the assailant.²¹ The Court found that the victim herself did not appear in court as the result of any illegality.²² Since the victim had retrieved a "mnemonic representation"²³ of the robber etched in her mind during the robbery, the Court reasoned that the victim's capacity to identify the assailant neither "resulted from nor was biased by the unlawful police conduct."²⁴ Thus, the Court relied on the trial court's finding that the victim had an independent recollection of the defendant's face. Finally, in reference to the defendant's courtroom presence, the Court noted that an illegal arrest by itself never barred a subsequent prosecution.²⁵ The Court stated that the defendant was "not himself a suppressible 'fruit'" and that his illegal arrest could not deprive the government from using untainted evidence.²⁶

In a portion of the opinion concurred in by Justices Stewart and Stevens, Justice Brennan further discussed whether a defendant's physiognomy²⁷ has evidentiary value and status such that it could constitute suppressible evidence. Justice

¹⁹ Justice Marshall took no part in the case.

²⁰ 100 S. Ct. at 1250.

²¹ *Id.*

²² The Court distinguished the instant situation from one in which police had discovered the victim's identity through an illegal search or confession. *Id.*

²³ In defining "mnemonic representation" the Court noted the analogy used by the government. This analogy "compared the witness' mental image to an undeveloped photograph of the robber that is given to the police immediately after the crime, but which becomes developed only at trial." *Id.* at 1250 n.16.

²⁴ *Id.* at 1251.

²⁵ *Id.* In support of this proposition, the Court cited *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

²⁶ 100 S. Ct. at 1251.

²⁷ "Physiognomy" refers to a person's physical characteristics such as facial features, height, weight, etc.

Brennan concluded that this issue need not be decided in *Crews* because the police had obtained specific descriptions of Crews, amounting to the victims' mnemonic representations at the time, when they detained him. Thus, the illegal arrest added nothing to the police investigation.²⁸ Brennan distinguished *Davis v. Mississippi*,²⁹ where police obtained the defendant's fingerprints during a dragnet search of suspects, noting that the police investigation in *Crews* had focused upon a specific defendant. Justice Brennan also relied on *Bynum v. United States*,³⁰ where the court first reversed the defendant's conviction when police obtained his fingerprints during an illegal arrest, but upheld a later indictment³¹ when the government had used fingerprints on file, unconnected with the initial arrest. On the basis of *Bynum*, Justice Brennan concluded that the in-court identification in *Crews* was admissible because the "police's knowledge of respondent's identity and the victim's independent recollection of him both antedated the unlawful arrest and were thus untainted by the constitutional violation."³² However, Justice Brennan implied that when police did not have "independent reasonable grounds to suspect . . . [an individual's] culpability," an in-court identification deriving from an illegal arrest might be suppressible.³³

Justice Powell, with whom Justice Blackmun joined, did not concur in Brennan's discussion of *Davis* and *Bynum*. Powell found that a defendant's face could never be a suppressible fruit since under the *Ker-Frisbie* doctrine³⁴ a defendant could always be tried even if illegally arrested.³⁵

Justice White, joined by Chief Justice Burger and Justice Rehnquist, also filed a concurring opinion. Justice White found the *Ker-Frisbie* doctrine dispositive. Disdaining Justice Brennan's apparent attempt to keep open the circumstances in which in-court identification might be suppressible, Justice White argued that the "fact that [Crews] was present at trial and therefore capable of being identified by the victim is merely the inevitable result of the trial being held, which is permissible under *Frisbie* despite [Crews'] unlawful arrest."³⁶ In

conclusion, Justice White noted that a majority of the Court agreed that *Frisbie* foreclosed an argument that the defendant's face could be a suppressible fruit.³⁷

III. PRINCIPLES OF THE EXCLUSIONARY RULE

The factual situation of *Crews* presented the Court with the issue of whether any and all evidence obtained from an illegal arrest, including the victim's in-court identification of the assailant, should be inadmissible under the exclusionary rule. The Court declined to suppress the victim's in-court identification on two grounds: first, such an identification did not constitute a product of the illegal arrest, and second, once a defendant is brought into court, an illegal arrest does not prevent prosecution. A brief review of the exclusionary rule's principles and applications will help analyze the two bases for the Court's holding.

The purpose of the exclusionary rule is to further fourth amendment protections by depriving the prosecution of the use of evidence obtained by illegal means. In announcing the rule, the Court stated:

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.³⁸

The rule is premised upon two policies. First, it aims to deter unconstitutional police conduct, a goal which the Court has found can be achieved by excluding illegally obtained evidence, thereby removing the incentive to disregard constitutional guarantees.³⁹ Second, the rule seeks to maintain judicial integrity. Since the admission of illegally obtained evidence implies the judiciary's approval of conduct securing the evidence, the Court has invoked the exclusionary rule to close the "doors of the federal courts to any use of evidence unconstitutionally obtained."⁴⁰ Thus, exclusion of illegally

³⁷ *Id.*

³⁸ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

³⁹ *Elkins v. United States*, 364 U.S. 206, 217 (1960). See also *United States v. Calandra*, 414 U.S. 338, 347 (1974). For an excellent discussion of the policies underlying the exclusionary rule, see Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. Crim. L. & C. 343 (1980).

⁴⁰ *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). The Court has also closed the doors of state courts to such evidence. *Mapp v. Ohio*, 367 U.S. 643 (1960). See Sunderland, *supra* note 39, at 348.

²⁸ 100 S. Ct. at 1252.

²⁹ 394 U.S. 721 (1969).

³⁰ 262 F.2d 465 (D.C. Cir. 1958).

³¹ *Bynum v. United States*, 274 F.2d 767 (D.C. Cir. 1960).

³² 100 S. Ct. at 1253.

³³ *Id.* at 1252.

³⁴ See note 25 & accompanying text *supra*.

³⁵ 100 S. Ct. at 1253.

³⁶ *Id.* at 1254.

obtained evidence prevents contamination of the judicial process.⁴¹

The Court has sought to effect these policies by excluding all products obtained directly and indirectly by illegal means.⁴² However, the Court has declined to exclude evidence simply because it would not have been discovered but for illegal police actions. Instead, the Court has determined that the relevant inquiry is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality instead of by means sufficiently distinguishable to be purged of the primary taint."⁴³

The application of the exclusionary rule frequently means the suppression of relevant evidence. Therefore, when applying the rule, the Court often balances the policies of deterrence and judicial integrity against the competing interest of society in the successful prosecution of crime. The rule does not "proscribe the use of illegally seized evidence in all proceedings or against all persons."⁴⁴ Rather, it operates where "its remedial objectives are thought most efficaciously served."⁴⁵ The Court avoids applying the rule when the defendant would receive a windfall disproportionate to the deterrence value of applying the rule in a particular case.⁴⁶

In the context of eyewitness identification, the Court has held that testimony regarding identification of a defendant at a pretrial lineup where the defendant was not represented by counsel must be excluded in order to guarantee a defendant his right to counsel at critical stages in a criminal proceeding.⁴⁷ In *Gilbert v. California*,⁴⁸ the Court went one step further, holding that the testimony of witnesses discovered as a result of the victim's original defective pretrial identification must be suppressed.⁴⁹ The Court stated that only a per se exclusion of testimony "can be an effective sanction

to assure that law enforcement authorities will respect the accused's right to the presence of his counsel at the critical lineup."⁵⁰

In considering the admissibility of lineup testimony, the Court held in *United States v. Wade*⁵¹ that in-court identification following a defective lineup should not be excluded if such identification was sufficiently independent of the illegal lineup.⁵² The Court found that the determination of independence constituted a factual issue and thus remanded the case, reserving for a later day the determination of whether in-court identification could be excluded at all.⁵³

In *Crews*, the Court faced and resolved that reserved issue. The *Crews* decision raises two questions for analysis: first, whether a defendant's person or a victim's in-court identification testimony constitute suppressible evidence and second, whether the *Ker-Frisbie* doctrine is dispositive of the in-court identification issue. Both questions must also be considered in terms of whether the exclusionary rule's principles of deterrence and judicial integrity should compel suppression of in-court identification.

IV. THE EXCLUSIONARY RULE AND IN-COURT IDENTIFICATION

The *Crews* Court recognized that the in-court identification presented a "fruit of the poisonous tree" issue. Several factors must all be found to exist in a particular case in order for the Court to exclude evidence under this analysis. First, the factual situation must include some evidence which might be subject to suppression. Second, the government must have obtained this evidence through an exploitation⁵⁴ of its illegal conduct.⁵⁵ Third, the evidence must not derive from a source independent of and untainted by the illegal police conduct.⁵⁶ Finally, the principles of the exclusionary

⁵⁰ *Id.*

⁵¹ 388 U.S. 218.

⁵² *Id.* at 241. In *Wade*, the Court enumerated several factors which would determine the admissibility of in-court identification testimony. These factors include:

prior opportunity to observe the alleged criminal activity, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to the lineup of another person, failure to identify the defendant upon a prior occasion, and lapse of time between the alleged act and a lineup identification. *Id.* at 241.

⁵³ *Id.* at 242.

⁵⁴ For a discussion of the meaning of "exploitation," see note 69 & accompanying text *infra*.

⁵⁵ See *Wong Sun v. United States*, 371 U.S. 471.

⁵⁶ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385.

⁴¹ *Stone v. Powell*, 428 U.S. 465, 484 (1976).

⁴² See *Silverthorne Lumber Co. v. United States*, 251 U.S. at 392, where Justice Holmes stated that 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."

⁴³ *Wong Sun v. United States*, 371 U.S. at 488 (quoting J. McGUIRE, EVIDENCE OF GUILT 221 (1959)).

⁴⁴ *United States v. Calandra*, 414 U.S. at 348.

⁴⁵ *Id.*

⁴⁶ *Stone v. Powell*, 428 U.S. at 490.

⁴⁷ *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

⁴⁸ 388 U.S. 263.

⁴⁹ *Id.* at 273.

rule must warrant suppression.⁵⁷ This section will consider each of these factors in relation to the Court's decision in *Crews*.

In considering whether the in-court identification should be excluded, members of the Court differed as to whether *Crews* involved evidence which could be subject to suppression. Five Justices⁵⁸ summarily concluded that a defendant's face could never be considered suppressible as the fruit of an illegal arrest.⁵⁹ Three others⁶⁰ pointed out that when a victim identifies a defendant, "his physiognomy becomes something of evidentiary value, much like a photograph showing respondent at the scene of the crime."⁶¹

The evidentiary question is indeed technical. An in-court identification may be considered as evidence in several ways. For example, the defendant himself may constitute the evidence, but no court has held that a defendant's face itself constitutes material or demonstrative evidence.⁶² Although witnesses may point out the defendant as the culprit who committed the crime, the defendant's face is never actually entered into evidence. Thus, such identification testimony differs from the foundation testimony which precedes the admission into evidence of an inanimate object, such as drugs, clothing, or guns.⁶³ Since the defendant's face is never formally admitted into evidence, it cannot itself be evidence. In this sense, the *Crews* majority correctly concluded that the case did not present a "fruits" question.

Yet on the basis of different considerations, an in-court identification may constitute evidence. As

⁵⁷ Compare *Stone v. Powell*, 428 U.S. 465 with *Elkins v. United States*, 364 U.S. 206.

⁵⁸ Justices Powell, Blackmun, White, Rehnquist, and Chief Justice Burger.

⁵⁹ 100 S. Ct. at 1253 (Powell, J., concurring); *id.* (White, J., concurring).

⁶⁰ Justices Stevens, Stewart, and Brennan.

⁶¹ 100 S. Ct. at 1252.

⁶² In *Stevenson v. Matthews*, 529 F.2d 61 (7th Cir. 1976), the defendant argued that he was suppressible evidence. In that case, police searched and arrested the defendant pursuant to an invalid warrant. Defendant was indicted on charges of narcotics possession. Later defendant was charged by an information with narcotics sales. He challenged the sale charge on the basis that if the police had not come to his home to execute the defective search warrant, they could not have identified him in connection with the sale charge. Thus, the defendant contended that he constituted tainted evidence. Without explaining its reasoning, the court rejected this argument and found that the in-court identification was admissible. *Id.* at 63.

⁶³ The foundation for the admissibility of tangible evidence is basically that the object itself is authentic.

Justice Brennan implied, a defendant's physiognomy has some probative value. This value accrues only when the victim identifies the defendant as the individual who committed the crime. Without this link, neither the defendant's face nor the victim's testimony would arguably constitute relevant evidence. In this sense, a defendant's face is much like a fingerprint found at the scene of the crime. The fingerprint has no evidentiary value until linked with a particular person, usually accomplished through the testimony of a crime lab expert. This view of an in-court identification thus consists of two types of evidence: the tangible object of the defendant and the linking testimony of the victim.

Since the defendant's presence in court is assured by his arrest, the crucial factor in the identification becomes the victim's testimony, which itself obviously constitutes evidence. Indeed, testimony is a kind of evidence which may be excluded. Even though the exclusionary rule most often prevents the use of tangible evidence, the Court in *Wong Sun v. United States*,⁶⁴ stated that "verbal evidence which derives so immediately from an unlawful entry and unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."⁶⁵ The Court noted that the underlying policies of the exclusionary rule did not "invite any logical distinction between physical and verbal evidence."⁶⁶ The Court has treated identification testimony in cases involving identifications made during a pretrial lineup as falling within the *Wong Sun* rule.⁶⁷ Thus, if the victim's testimony itself constitutes evidence, the *Crews* majority concluded too hastily that the case presented no evidence that might be subject to suppression.

Assuming that the suppressible evidence can consist not of the defendant's face but of testimony given by the victim or witnesses, the next factor in applying the exclusionary rule is whether police obtained such testimony as a result of illegal conduct. The Court avoided this question by framing the issue differently. In a portion of the opinion joined by the entire Court, Justice Brennan stated that the in-court testimony was not a product of the illegal arrest for three reasons: the victim's presence in court was not due to any illegality; the

⁶⁴ 371 U.S. 471.

⁶⁵ *Id.* at 485.

⁶⁶ *Id.* at 486.

⁶⁷ See *Stovall v. Denno*, 388 U.S. 293; *Gilbert v. California*, 388 U.S. 263; *United States v. Wade*, 388 U.S. 218.

illegal arrest had not tainted the victim's memory; and any illegality surrounding the defendant's presence in court was irrelevant to the suppression issue.⁶⁸ The Court thus disagreed with the finding of the District of Columbia Court of Appeals that the in-court identification was causally related to or an exploitation of the illegal arrest.⁶⁹

While the second factor⁷⁰ of the Court's reasoning correctly indicates that the victim's identification emanated from her memory of the crime, the Court's analysis neglects to consider how the government utilized that memory to implicate the defendant. The victim's mnemonic representation itself has little probative value until matched with the defendant's physiognomy. In *Crews*, this matching did not occur until after the police procured photographs of Crews during the illegal detention. The logical chain of causation is straight and narrow: the illegal arrest produced photographs, which in turn resulted in the victim's identification of Crews and his subsequent arrest and prosecution.

Upon finding such a causal connection between an illegal arrest and an ultimate identification, several courts have excluded the in-court identification testimony.⁷¹ These courts employ a strict logical relation test, reasoning that but for the arrest the victim would not have had the opportunity to identify the defendant. Indeed, the District of Columbia Court of Appeals employed this analysis in deciding *Crews*.⁷²

The Supreme Court rightly rejected this but-for analysis.⁷³ From a practical standpoint, it is likely that legal police identification procedures would eventually lead to the defendant's arrest. Thus, it is unreasonable that "but for the illegal arrest the [defendant] would have remained at large indefinitely."⁷⁴ In addition, when determining whether to exclude evidence, the Court has rejected a purely but-for connection as a reason for exclusion.⁷⁵ In-

stead, the Court has developed a more sophisticated test of the causal relation between the illegal police conduct and the evidence sought to be used.⁷⁶

The essence of the Court's causation test is whether police exploited the illegality by purposefully engaging in illegal conduct to obtain the evidence.⁷⁷ In *Davis v. Mississippi*,⁷⁸ police took the defendant into custody, without probable cause, as part of a dragnet investigation of a rape. Police later matched the fingerprints obtained during the illegal detention with those found at the scene of the crime. In holding that the fingerprints must be excluded, the Court disdained the use of illegal detentions to gather evidence. The Court stated that all evidence obtained in violation of the Constitution, no matter how relevant and trustworthy, was inadmissible.⁷⁹

One federal court has utilized the *Davis* exploitation rationale to exclude an in-court identification. In *United States v. Edmons*,⁸⁰ police arrested the defendants on the pretext of not having selective service cards in their possession in order to obtain identification evidence for a separate incident. As a result of the arrest, Federal Bureau of Investigation agents were able to identify the defendants as participants in the earlier crime. The court found that the "arrests were a necessary cause of the in-court identification testimony," since the agents had not been able to identify the defendants on subsequent trips to the scene of the crime.⁸¹ The court held that:

When the police, not knowing the perpetrator's identity, make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial, the fulfillment of this objective is as

Dunaway v. New York, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975).

⁶⁸ In *Brown v. Illinois*, the Court developed a causal connection test to determine the admissibility of statements obtained after an illegal arrest. The test consists of three factors: the temporal proximity of the arrest and confession, the presence of intervening factors, and the flagrancy of the official misconduct. 422 U.S. at 602-04. See also *Dunaway v. New York*, 442 U.S. 200.

⁶⁹ For a discussion of the Court's treatment of police conduct in considering whether to exclude evidence, see Note, *Admissibility of Statements Obtained During an Illegal Detention*, 70 J. CRIM. L. & C. 446, 455-56 (1979).

⁷⁰ 394 U.S. 721 (1969).

⁷¹ *Id.* at 724.

⁷² 432 F.2d 577 (2d Cir. 1970).

⁷³ *Id.* at 583.

⁶⁸ 100 S. Ct. at 1250.

⁶⁹ 389 A.2d at 289.

⁷⁰ The first factor involving the victim's presence in court does not lend itself to further analysis. The Court's treatment of the third factor is discussed below. See note 108 & accompanying text *infra*.

⁷¹ *United States v. Barragan-Martinez*, 504 F.2d 1155 (9th Cir. 1974). See also *People v. Glover*, 64 Ill. App. 3d 662, 381 N.E.2d 439 (1978).

⁷² *Crews v. United States*, 389 A.2d 277, 289 (1978).

⁷³ 100 S. Ct. at 1250.

⁷⁴ *Commonwealth v. Garvin*, 448 Pa. 258, 266, 293 A.2d 33, 38 (1972). See also *Wyatt v. State*, 566 S.W.2d 597, 601 (Tex. Crim. App. 1978).

⁷⁵ *Wong Sun v. United States*, 371 U.S. at 488. See also

much an exploitation of 'the primary illegality' as where a defendant is arrested without probable cause in the expectation that a search or the taking of fingerprints... will yield evidence that will convict him of a crime....⁸²

Many state courts have also employed the *Wong Sun-Davis* exploitation analysis. These courts have generally admitted in-court identification testimony when the police acted in good faith, even though a trial court later determined that the arrest lacked probable cause.⁸³ They have also admitted such testimony when the identification was made incident to an arrest whose sole purpose was not exploitation.⁸⁴ However, when police engage in a ruse to obtain photographs for use in identification⁸⁵ or when police use illegally seized evidence to obtain identifications,⁸⁶ courts have excluded in-court identification testimony as the product of the illegal police conduct. Thus, these state exclusion cases and *Edmons* show that an in-court identification is no different from any other type of evidence obtained by means of purposefully illegal conduct.

In *Crews*, the police obtained the victim's identification of Crews from photographs procured during an unlawful arrest. The Court's statement of the facts indicates that park police knew that they lacked probable cause to arrest Crews but detained him solely to take a photograph. In spite of these facts, the majority in *Crews* employed no detailed exploitation analysis.

Only Justices Brennan, Stevens, and Stewart recognized that an in-court identification could be inadmissible given exploitive police conduct. However, these Justices distinguished *Davis* by conceiv-

ing a new standard of exploitation. Brennan implied that when police have reasonable suspicion that an individual committed a crime, identification evidence may be admitted. While this view is tailored to the facts of *Crews*, these Justices at least attempted to employ an exploitation analysis consistent with the Court's exclusionary rule precedent.

Perhaps one reason why the *Crews* Court did not thoroughly analyze the exploitation question is that the trial court found that the victim identified Crews from her independent recollection of the criminal incident.⁸⁷ The Court likened this independent memory with two distinct but related concepts: (1) evidence deriving from an independent source; and (2) the independent origin test applied to determine whether a particular identification procedure has been unfairly suggestive.⁸⁸

The Court has long exempted from the exclusionary rule evidence deriving from an independent source. In *Silverthorne Lumber Co. v. United States*,⁸⁹ Justice Holmes stated that even though evidence may be illegally obtained, "this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."⁹⁰ The *Crews* Court, as well as many other courts which have considered the in-court identification issue,⁹¹ equated an individual's memory with an independent source.

This view may not be entirely accurate. The pertinent evidence or facts with relation to in-court identification is the victim's testimony. While this testimony derives from memory, the memory itself is of little probative value until correlated with a photographic or in-person identification of the defendant. Only after this correlation does the identification become complete evidence. In the terms of *Silverthorne*, the government gains knowledge of this complete evidence through its own wrongful conduct since the photograph obtained by means of an illegal arrest leads to the ultimate in-court identification. Therefore, an independent recollection

⁸² *Id.* at 584.

⁸³ *People v. Price*, 76 Ill. App. 3d 613, 394 N.E.2d 1256 (1979) (police photographed defendant as part of regular booking procedures); *People v. Washington*, 60 Ill. App. 3d 662, 377 N.E.2d 397 (1978) (arresting officer did not request photographing of defendant).

⁸⁴ See *Cunningham v. United States*, 391 A.2d 1360 (D.C. 1978) (police made identification of defendant when he voluntarily surrendered even though police had learned his identity from a previous illegal search); *Herbert v. Commonwealth*, 566 S.W.2d 798 (Ky. App. 1978), cert. denied, 439 U.S. 968 (1979) (victim unexpectedly met and spontaneously identified defendant at police station).

⁸⁵ See *People v. Howard*, 90 Misc. 2d 662, 395 N.Y.S.2d 385 (Sup. Ct. 1977), where police induced defendant to appear on her front porch for a photograph by giving her a false excuse to leave the house.

⁸⁶ See *People v. Pleasant*, 101 Misc. 2d 154, 420 N.Y.S.2d 859 (Sup. Ct. 1979). There, during an illegal stop and search, police obtained a stolen revolver. They then showed photographs of the defendant to the owner of the gun.

⁸⁷ 100 S. Ct. at 1251.

⁸⁸ *Id.* at 1251 n.18.

⁸⁹ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385.

⁹⁰ *Id.* at 392.

⁹¹ See *Terry v. Peyton*, 433 F.2d 1016 (4th Cir. 1970); *State v. Timley*, 541 S.W.2d 6 (Mo. App. 1976); *Commonwealth v. Diggs*, 260 Pa. Super. Ct. 349, 394 A.2d 586 (1978).

tion cannot be equated with an independent source for exclusionary rule purposes.

The *Crews* Court also discussed the trial court's findings of independent recollection in terms of the independent origins test. The Court normally applies the independent origins test in the context of pretrial identifications. The Court seeks to determine whether a particular pretrial identification resulted from unduly suggestive procedures⁹² or whether the witness identified the defendant from her memory of the incident, independent of the suggestiveness.⁹³ Without this independence, the Court presumes that suggestive pretrial identifications are mistaken and violate a defendant's due process rights under the fifth and fourteenth amendments.⁹⁴ Thus, reliability is the crux of the constitutional right involved in pretrial procedures. In contrast, the reliability and trustworthiness of evidence is not a concern of the fourth amendment exclusionary rule. Since an application of the rule is not a remedy for a given constitutional injury, but is an attempt to deter illegal police conduct, the rule regularly excludes trustworthy information.⁹⁵ Therefore, whereas reliability is essential under a true independent origins test, the reasons for that test do not apply in the fourth amendment context. Indeed, the *Crews* Court recognized that the independent origins test did not meet the underlying concerns of the fourth amendment.⁹⁶ For purposes of this amendment then, an independent recollection cannot be likened to a memory of independent origin.

Indeed, an independent recollection is irrelevant to fourth amendment analysis because that analysis focuses on the essential right of protection against unreasonable seizures. The probable cause requirement is a fundamental aspect of fourth amendment protection.⁹⁷ In *Davis* the Court stated, "[n]othing

is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"⁹⁸ Indeed, the privacy protection deriving from the fourth amendment is "implicit in 'the concept of ordered liberty.'"⁹⁹

The Court formerly sought to protect these ideals by invoking the exclusionary rule so as to remove the incentive of police to violate constitutional guarantees. In *Mapp v. Ohio*,¹⁰⁰ the Court observed that even though the exclusionary rule operates to set a criminal free, "it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."¹⁰¹ In recent years, the Court has become concerned that frequent use of the exclusionary rule may breed disrespect when people see criminals go free.¹⁰² Therefore, the Court has emphasized the deterrence of illegal police conduct less than the dangers of setting criminals free.

However, this recent emphasis confuses the constitutional goal. Indeed, increasing numbers of exclusionary rule cases may give the appearance that many criminals go unpunished. Yet the instances in which police invade the constitutional rights of innocent persons never come before the courts in an exclusionary rule posture.¹⁰³ The only way to protect such innocent persons is to exclude "evidence obtained against those who are frequently guilty."¹⁰⁴ While the present Court laments the absence of empirical data demonstrating that the exclusionary rule actually shapes police conduct,¹⁰⁵ the Court previously recognized that "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled."¹⁰⁶ Since empirical data cannot be conclusive, the Court should balance in favor of possible deterrence and exclude illegally obtained evidence to prevent police from violating the fourth amendment with impunity.

If the Court in *Crews* had wished to deter lawless police conduct it would have done so by excluding

⁹⁸ *Davis v. Mississippi*, 394 U.S. at 726-27.

⁹⁹ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

¹⁰⁰ 367 U.S. 643 (1960).

¹⁰¹ *Id.* at 659.

¹⁰² *Stone v. Powell*, 428 U.S. at 491.

¹⁰³ *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Stone v. Powell*, 428 U.S. at 492 n.32.

¹⁰⁶ *Elkins v. United States*, 364 U.S. at 218.

⁹² Procedures which may be suggestive include showing one photograph to a victim or putting the defendant in a lineup in which his physical characteristics are unique.

⁹³ Thus, a memory is of an independent origin when the identification is unaffected by illegal suggestive identification procedures.

⁹⁴ See *Stovall v. Denno*, 388 U.S. 293; *United States v. Wade*, 388 U.S. 218. Cf. *Manson v. Brathwaite*, 432 U.S. 98 (1977) (circumstances in which pretrial procedures do not violate due process.)

⁹⁵ See *Davis v. Mississippi*, 394 U.S. at 724.

⁹⁶ 100 S. Ct. at 1251 n.19. However, since the Court believed that *Crews* did not contain either tainted evidence or evidence obtained by exploitive police conduct, the Court did not further distinguish the independent origins test as it would apply to the fourth amendment.

⁹⁷ *Henry v. United States*, 361 U.S. 98, 100-01 (1959).

the in-court identification. By excluding this evidence, the Court would have sent a message to police that fourth amendment protections must be respected at all times during a criminal investigation. However, acting consistently with other recent decisions limiting the scope of the exclusionary rule,¹⁰⁷ the Court chose not to do so.

V. APPLICATION OF THE *KER-FRISBIE* DOCTRINE TO *CREWS*

Perhaps one reason why the Court did not fully analyze the issue of whether the in-court identification constituted suppressible evidence lies in the apparently dispositive nature of a doctrine first established in *Ker v. Illinois*¹⁰⁸ and later applied in *Frisbie v. Collins*.¹⁰⁹ Both cases involved situations in which government agents forcibly brought a defendant by unlawful means into the jurisdiction of the court which tried him. In each case, the Court found that such unlawful means did not prevent the trial court from asserting jurisdiction. Thus, an unlawful arrest does not bar prosecution. The *Frisbie* Court held that: "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."¹¹⁰ In recent cases preceding *Crews*, the Court has reaffirmed that the means by which the defendant appears in court will not bar prosecution.¹¹¹

A majority of the *Crews* Court found that *Ker-Frisbie* foreclosed any objection by the defendant to in-court identification.¹¹² Since the doctrine applies to the manner in which a defendant appears in court, these Justices placed more emphasis on the arrest itself than on the separate issue of whether the defendant himself constituted evidence. Justices White, Burger, and Rehnquist recognized that if the defendant himself was an evidentiary product of an illegal arrest, then such an arrest would always prevent successful prosecution where an in-court identification is essential.¹¹³ To

prevent this result, the majority summarily concluded that a defendant himself did not constitute evidence.¹¹⁴ Having overcome the tainted evidence problem, the majority found that the illegal arrest did not prevent the prosecution from proceeding, since the in-court identification was "merely the inevitable result of the trial being held . . ."¹¹⁵

The majority's use of *Ker-Frisbie* is problematic. In order to ensure a successful prosecution, the concurring *Crews* Justices applied *Ker-Frisbie* without considering that the policies of that doctrine differ from those of the exclusionary rule. *Frisbie* recognized that a defendant must receive a fair trial, even though he was brought illegally before the court. The right to invoke the exclusionary rule may be a due process concern, deriving from the fourth amendment, which affects the fairness of a trial. The scope of *Ker-Frisbie* is limited to whether a court has properly asserted jurisdiction. Thus, once the prosecution begins, the doctrine becomes irrelevant to later evidentiary or procedural matters. Indeed, the *Frisbie* Court recognized that due process is satisfied only after a "fair trial in accordance with constitutional safeguards."¹¹⁶ A fair trial usually means the observance of safeguards specifically stated in the Constitution, such as the right to counsel or the right to confront adverse witnesses.¹¹⁷ However, due process and trial fairness also involve other general safeguards. For example, prosecutors must disclose material inculpatory evidence upon the defendant's request.¹¹⁸ Such general safeguards usually derive from and help to effectuate a specific constitutional right. In the criminal discovery context, prosecutorial disclosure serves to guarantee the observance of the right to trial and the right to cross-examine witnesses.

The exclusionary rule similarly constitutes a gen-

evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential.

100 S. Ct. at 1253 (White, J., concurring).

¹¹⁴ 100 S. Ct. at 1253 (Powell, J., concurring); *id.* (White, J. concurring).

¹¹⁵ 100 S. Ct. at 1254 (White, J., concurring).

¹¹⁶ 342 U.S. at 522.

¹¹⁷ The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."¹¹⁸ U.S. CONST. amend VI.

¹¹⁸ See *United States v. Agurs*, 427 U.S. 97 (1976).

¹⁰⁷ See *Rawlings v. Kentucky*, 100 S. Ct. 2565 (1980); *United States v. Salvucci*, 100 S. Ct. 2547 (1980); *United States v. Ceccolini*, 435 U.S. 271 (1978); *Stone v. Powell*, 428 U.S. 465.

¹⁰⁸ 119 U.S. 436 (1886).

¹⁰⁹ 342 U.S. 519 (1952).

¹¹⁰ *Id.* at 522.

¹¹¹ See *Stone v. Powell*, 428 U.S. 465; *Gerstein v. Pugh*, 420 U.S. at 119.

¹¹² 100 S. Ct. at 1253 (Powell, J., concurring); *id.* (White, J., concurring).

¹¹³ Justice White stated that:

a holding that a defendant's face can be considered

eral safeguard, the application of which serves to enforce fourth amendment guarantees against unreasonable search and seizure. While the fourth amendment itself does not concern trial procedure, the exclusionary rule applies to evidentiary matters and is affected with due process concerns. Significantly, the Court in *Mapp v. Ohio*,¹¹⁹ used due process reasoning to extend the exclusionary rule to the states.¹²⁰ Thus, observance of the fourth amendment through use of the exclusionary rule constitutes a due process concern relating to the fairness of a trial.

Although most courts have steadfastly applied *Ker-Frisbie*,¹²¹ the Second Circuit has twice questioned the doctrine on due process grounds. In *United States v. Edmons*,¹²² the court found *Ker-Frisbie* unpersuasive because the cases were decided prior to the fourth amendment's application to the states and thus rested only upon general considerations of due process.¹²³ In *United States v. Toscanino*,¹²⁴ where American agents kidnapped the defendant in Uruguay and returned him to the United States for prosecution on narcotic smuggling charges, the court again declined to apply *Frisbie*. The *Toscanino* court noted that the concept of due process had expanded since *Frisbie* and was no longer confined to the "guarantee of 'fair' procedure at trial."¹²⁵ The court then stated that "[i]n an effort to deter police misconduct, the term [due process] has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial."¹²⁶ Thus, the court concluded that due process "now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation" of any lawlessness.¹²⁷

Edmons and *Toscanino* point out that due process may dictate the exclusion of evidence under the fourth amendment even after the court has asserted jurisdiction under *Ker-Frisbie*. Under this fairness analysis, the Court should conduct an extensive

inquiry into whether the defendant himself constitutes evidence rather than merely concluding that he does not by relying on the *Ker-Frisbie* concept that a defendant in court may be prosecuted. The failure of the *Crews* majority to conduct a due process fairness inquiry is not entirely without reason. After *Edmons* and *Toscanino*, the Court held in *Stone v. Powell*¹²⁸ that the exclusionary rule was not a personal constitutional right.¹²⁹ Nevertheless, even without being an enumerated right, the exclusionary rule is so inextricably bound¹³⁰ with the implementation of the fourth amendment that its use in judicial proceedings should involve the due process considerations outlined in *Edmons* and *Toscanino*.¹³¹

Regardless of whether the exclusionary rule involves due process fairness, the reasoning of *Toscanino* reveals a second problem with the *Crews* majority's use of *Ker-Frisbie*. The concurring Justices failed to distinguish the commencement of a prosecution from the evidentiary concerns which arise at trial. Jurisdiction and the admissibility of evidence constitute two separate issues. When the District of Columbia Court of Appeals decided *Crews*, it was cognizant of this distinction.¹³² That court held that while the prosecution against *Crews* could continue despite his illegal arrest, the *Ker-Frisbie* doctrine did not prevent exclusion of tainted evidence. The court noted that even if the exclusion of such evidence eviscerated the prosecution's case, *Ker-Frisbie* would not be violated because the exclusion of evidence is a constituent part of the trial proceedings.¹³³ Indeed, the court pointed out that in many instances the exclusion of tangible evidence effectively ends the prosecution of a defendant.¹³⁴ Yet this exclusion does not affect the court's assertion of jurisdiction in the first instance.

Justices Brennan, Stewart, and Stevens did rec-

¹²⁸ *Stone v. Powell*, 428 U.S. 465.

¹²⁹ *Id.* at 486.

¹³⁰ In *Mapp*, the Court stated that the exclusionary rule is an essential part of the fourth and fourteenth amendments. 367 U.S. at 657.

¹³¹ If nothing else, such decisions as *Stone* indicate the Court's present tendency to limit the scope of the exclusionary rule. In *Mapp*, the Court considered the exclusion of illegally seized evidence to be a constitutional right. 367 U.S. at 655-57. However, since *Mapp* the Court has emphasized that the rule is only a judicially created device. *United States v. Calandra*, 414 U.S. at 348. Given this change, the *Toscanino* court properly reasoned on the basis of *Mapp*.

¹³² 389 A.2d at 284-85.

¹³³ *Id.* at 286.

¹³⁴ *Id.* at 288 n.6.

¹¹⁹ 367 U.S. 643 (1960).

¹²⁰ *Id.* at 654-55.

¹²¹ *See, e.g., United States v. Millican*, 600 F.2d 273 (5th Cir. 1979); *Myers v. Rhay*, 577 F.2d 504 (9th Cir. 1978); *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975).

¹²² 432 F.2d 577 (2d Cir. 1970).

¹²³ *Id.* at 583.

¹²⁴ 500 F.2d 267 (2d Cir. 1974).

¹²⁵ *Id.* at 272.

¹²⁶ *Id.* (citing *United States v. Russell*, 411 U.S. 423, 430-31 (1973)).

¹²⁷ *Id.* at 275.

ognize implicitly that *Ker-Frisbie* and the exclusionary rule serve different functions. Justice Brennan implied that in some circumstances an in-court identification would be suppressible following an illegal arrest. He indicated, for example, that exclusion might be necessary where police illegally obtained identification information before their investigation had focused on a particular individual.¹³⁵ This position implies that evidence obtained through a constitutional violation would be excluded despite the apparent mandate of *Ker-Frisbie* to prosecute in any event.

In contrast to the majority's opinion, Justice Brennan's analysis thus places more importance on protections of fourth amendment rights than on successful prosecutions. His opinion recognizes that the defendant's presence in court, when linked with the victim's identification testimony, constitutes a form of suppressible evidence. The suppression of such evidence furthers the exclusionary rule's goal of deterring fourth amendment violations. The fact that such exclusion may frustrate the prosecution is simply a cost of the rule.

Since the in-court identification might have constituted suppressible evidence,¹³⁶ it appears as though the *Crews* majority relied upon *Ker-Frisbie* to insure not only that the prosecution would begin, but that it would also result in conviction. In recent cases, the Court has sought to narrow the exclusionary rule by emphasizing successful prosecution.¹³⁷ While this is a meritorious goal, the *Crews* majority did not strive to achieve it in a principled manner. The suppression of an in-court identification belongs under the rubric of evidentiary proceedings, and is not merely a result of the trial being held under the *Ker-Frisbie* doctrine.

VI. CONCLUSION

In *Crews*, the Court refused to extend the exclusionary rule to in-court identifications where the police had arrested the defendant illegally. The Court found that such in-court testimony did not constitute evidence tainted by illegality. However, while the defendant himself may not be evidence, identification testimony may constitute suppressible evidence. Identification testimony is tainted when the government obtains it through purposeful, illegal conduct. Since the police detained *Crews* for the purpose of taking his photograph and since the government would not have been able to identify, arrest, and prosecute *Crews* without the illegal photographs, the Court could have applied its own exclusionary rule principles to suppress the in-court identification. The Court's reliance on the victim's independent memory of the defendant does not answer the fourth amendment issue because the government did not match the victim's memory with the defendant by means of an untainted process and because a memory of independent origin is not relevant to fourth amendment analysis. The Court's refusal to employ a complete exclusionary rule analysis indicates that *Crews* represents another case in which the Court has placed a greater emphasis on successful prosecutions than on fourth amendment rights.

This balance in favor of prosecution is also indicated by the opinion of five Justices that the *Ker-Frisbie* doctrine controlled in *Crews*. These Justices did not distinguish the fact that the *Ker-Frisbie* doctrine and the exclusionary rule serve different purposes. An assertion of jurisdiction under *Ker-Frisbie* is not tantamount to insuring that the defendant receive a fair trial. Thus, even though the exclusion of evidence may fatally weaken the prosecution's case, such exclusion does not affect the *Ker-Frisbie* doctrine.

¹³⁵ 100 S. Ct. at 1252.

¹³⁶ See note 107 & accompanying text *supra*.

¹³⁷ See notes 62-67 & accompanying text *supra*.