Journal of Criminal Law and Criminology

Volume 62 | Issue 4 Article 3

1972

Search and Seizure: Coolidge v. New Hampshire, 403 U.S. 443 (1971), Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

 Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

Search and Seizure: Coolidge v. New Hampshire, 403 U.S. 443 (1971), Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), 62 J. Crim. L. Criminology & Police Sci. 480 (1971)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

further exceptions to the *Miranda* exclusionary rule.[79] Though the Court did not use *Harris* as an opportunity to reverse *Miranda*[80] and in many states and federal circuits the collateral impeachment rule remains narrower than what *Harris* permits,[81] a new majority attitude towards the rights of the accused is evident.

[79] *Cf.* United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), *aff'd* 435 F.2d 26 (2d Cir. 1970) (Illegally obtained evidence can be used by trial court during sentencing deliberations, regardless of admissibility at trial of guilt); Nettles v. State, ___Fla. Supp.___, 248 So. 2d 259 (1971) (*Miranda* warnings not required in confession to probation officer).

[80] *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (concurring opinion of Harlan, J.) (Law of search and seizure needs an overhaul, starting with overruling of Mapp v. Ohio, 367 U.S. 643 (1961) and Ker v. California, 374 U.S. 23 (1963)); Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (dissenting opinion of Burger, C.J.) (Whole Exclusionary Rule needs legislative overhaul, but *Mapp* and *Weeks* need not be overruled).

[81] *See* cases collected in notes 44–45, 47 *supra*.

SEARCH AND SEIZURE

Coolidge v. New Hampshire, 403 U.S. 443 (1971)
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)

In *Coolidge v. New Hampshire*[1] the Supreme Court restricted the scope of warrantless search and seizure by limiting the use of the automobile[2] and plain view[3] exceptions to the warrant requirement of the fourth amendment.[4]

The body of a fourteen-year-old New Hampshire girl was found several miles from her home near a major highway. Police investigation revealed that Edward Coolidge's automobile had been observed stopped alongside the highway where the girl's body was discovered. Upon this information, the police secured an automobile search warrant and then seized the vehicle a few hours after they arrested Coolidge inside his home. The vehicle was searched three times—two days, eleven months, and fourteen months later—and vacuumed for possible evidence. The vacuum sweepings were introduced at trial. Also introduced against Coolidge were guns and clothing he owned which his wife had voluntarily given the police. The Court quickly dismissed the contention that the latter evidence had been obtained illegally, holding that good faith efforts of a wife could not be construed as a search and seizure under the fourth amendment.[5]

The Supreme Court has long made it clear that a search warrant, to be constitutionally valid, must be issued by a "neutral and detached magistrate." [6] In *Coolidge*, the warrant was issued by a New Hampshire magistrate who was also the state Attorney General and later chief prosecutor at Coolidge's trial. Although this satisfied state law,[7] the Court held the magistrate's triple-function to be a *per se* violation of the "neutral and detached" standard,[8] irrespective of any showing of probable cause to issue the warrant.[9] Mr. Justice Black, dissenting, contended that the only fourth amendment requirement for issuing a warrant is probable cause and, therefore, the triple-function was harmless

[1] 91 S. Ct. 2022 (1971).

[2] *See* Carroll v. United States, 267 U.S. 132 (1925). The Court construed the fourth amendment

> [A]s recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction. . . .

Id. at 153. *See also* Chambers v. Maroney, 399 U.S. 42 (1971); Cooper v. California, 386 U.S. 58 (1967); Brinegar v. United States, 338 U.S. 160 (1949).

[3] Seizure of evidence found by the police in plain view has consistently been treated as an exception to the warrant requirement. *See, e.g.*, Frazier v. Cupp, 394 U.S. 371 (1969); Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23 (1963); Marron v. United States, 275 U.S. 192 (1927).

[4] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[5] 91 S. Ct. at 2050.

[6] *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966); Aguilar v. Texas, 378 U.S. 108 (1964); Johnson v. United States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 452 (1932).

[7] N.H. REV. STAT. ANN. § 595:1 (repealed 1969).

[8] 91 S. Ct. at 2029.

[9] *Id.* at 2023. *See also* Agnello v. United States, 269 U.S. 20, 33 (1925).

error, if error at all.[10] Although he did not directly attack the "neutral and detached" standard, Black implied that he would reach the same conclusion even if the magistrate did, in fact, lack neutrality, as long as probable cause was shown and the state law complied with.[11]

Finding the search warrant invalid, the Court turned to the question of whether the automobile search fell within any of "a few specifically established and well-delineated exceptions" to the warrant requirement.[12] The exceptions at issue in *Coolidge* were search incident to arrest,[13] evidence found in plain view,[14] and automobile searches.[15]

Unable to apply the holding in *Chimel v. California*,[16] the most recent case on search incident to arrest, because of its own decision not to apply it retrospectively,[17] the Court turned to the pre-*Chimel* law embodied in *United States v. Rabinowitz*.[18] In *Rabinowitz*, the Court held that the reasonableness of a search incident to arrest is to be determined by the facts and circumstances of each case, limited to those areas in the possession and under the control of the arrestee. In *Coolidge*, the vehicle was seized in the defendant's driveway two and one-half hours after the defendant was arrested in his home. The Court viewed this seizure as unreasonable, observing that "even under *Rabinowitz* 'a search may be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.' " [19] In his dissent, Justice Black drew the issue as one of reasonableness under the fourth amendment, and stated that "the test of reasonableness cannot be governed by such arbitrary rules." [20] Because the automobile, in plain view of the police arresting Coolidge, fit the description of the one they were seeking, Justice Black felt it could reasonably be seized.[21]

For the Court, any warrantless search is invalid if it does not fall within one of the defined exceptions.[22] This is best illustrated by the Court's rejection of the automobile search exception as applicable to the search in *Coolidge*. In a landmark decision, *Carroll v. United States*,[23] the Court held that

[10] 91 S. Ct. at 2055.

[11] The New Hampshire Supreme Court held in effect that the state attorney general's participation in the investigation of the case at the time he issued the search warrant was harmless error if it was error at all. I agree. It is difficult to imagine a clearer showing of probable cause. There was no possibility of prejudice because there was no room for discretion. Indeed, it could be said that a refusal to issue a warrant on the showing of probable cause made in this case would have been an abuse of discretion.

Id. at 2055–56 (Black, J., dissenting).

[12] The inapplicability of any of the exceptions to the warrant requirement makes a search without a warrant *per se* unreasonable as violative of the fourth amendment. *Id.* at 2032. *See also* Chimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967).

[13] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

[14] *See* note 3 *supra*.

[15] *See* note 2 *supra*.

[16] 395 U.S. 752 (1969) (A search incident to arrest must be limited to the arrestee's "immediate control" for the sole purpose of removing possible weapons and finding evidence before it can be destroyed).

[17] Williams v. United States, 401 U.S. 646 (1971). Justice Harlan implies in his concurring opinion in *Coolidge* that he concurred because he felt *Chimel* should be applied retroactively. 91 S. Ct. at 2051.

[18] 339 U.S. 56 (1950).

[19] 91 S. Ct. at 2033, quoting from Vale v. Louisiana, 399 U.S. 30, 33 (1970).

Because this Court has held that police arresting a defendant on the street in front of his house cannot go into that house and make a general search it follows, says the majority, that the police having entered a house to make an arrest cannot step outside the house to seize clearly visible evidence.

91 S. Ct. at 2056 (Black, J., dissenting). *See also* Shipley v. California, 395 U.S. 818 (1969); Stoner v. California, 376 U.S. 483 (1964).

The Court attempted to strengthen its argument by citing Preston v. United States, 376 U.S. 364 (1964), for the proposition that even if they could search the automobile in the driveway when the police arrested Coolidge they could not seize it, remove it, and later search it. 91 S. Ct. at 2033. Preston had been arrested for vagrancy and there was apparently no probable cause to search his automobile. Thus the justification for the search was not under the automobile doctrine but rather as a search incident to arrest, and the Court held this was not permissible at the station house. But when the original justification is probable cause to search an automobile under Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. 42 (1970), applies instead. In *Chambers*, the Court held that if the police can search an automobile under *Carroll* they can also search it later at the station house.

In light of Chimel v. California and its restrictive definition of search incident to arrest, it is unlikely that a *Preston* case will actually ever again arise.

[20] 91 S. Ct. at 2056.

[21] Justice Black's approach to search and seizure is premised on a strictly literal reading of the fourth amendment, which appears, when compared to the approach of the Court, to confuse the plain view and search incident to arrest doctrines. He seems to feel that the search incident to arrest doctrine is not limited by time or distance from the arrest insofar as plain view evidence is concerned. Since the fourth amendment prohibits only "unreasonable" search and seizure, Black feels that reasonableness should be determined from the facts and circumstances of each case unhindered by the "arbitrary rules" the Court imposes. *See id.* at 2056.

[22] *Id.* at 2032. *See also* Katz v. United States, 389 U.S. 347 (1967).

[23] 267 U.S. 132 (1925).

the police may make a warrantless search of an automobile whenever they have probable cause to do so. Modifying *Carroll*, the *Coolidge* Court held that even if there is probable cause to search, a warrant is necessary if the vehicle lacks mobility.[24] Thus the automobile's mobility, not the vehicle itself, creates the exception.[25]

Justice Black argued for the applicability of both *Carroll* and *Chambers v. Maroney*,[26] in which the Court reaffirmed the *Carroll* principle, holding that once probable cause to search an automobile obtains, it is not lost if the police first transport the vehicle to the station house. Black cited *Chambers* for the proposition that an automobile seized with probable cause did not lose its mobility when later searched at the police station.[27] For Justice Black, an automobile could hardly be less "mobile" than when it rests guarded in a police garage, yet the search in *Chambers* was lawful and the one in *Coolidge* was not.[28]

Justice White, dissenting, also disagreed with the Court's rationale which failed to apply *Carroll* and *Chambers*. Citing a series of automobile cases, White observed:

> Each of them approved the search of a vehicle that was no longer moving and, with the occupants in custody, no more likely to move than the unattended but movable vehicle parked on the street or in the driveway of a person's house.[29]

Nevertheless, Justice White declined to rely on *Chambers* due to the fact that the last two searches were so remote in time from the vehicle's seizure. He looked instead to the plain view exception to validate the search.

The Court approached the "plain view" exception to the warrant requirement in a manner similar to that of the automobile exception. The Court explained that any item will be in "plain view" prior to its seizure and that, therefore, it is the presence of other circumstances, not merely plain view, which validates the search.[30] Where the police had knowledge of the object and its location beforehand and intended to seize it, the Court deemed it constitutionally unreasonable, absent exigent circumstances, to proceed without a warrant. However, where the object in plain view was come upon "inadvertently," seizure was permissible.[31] The Court concluded that the police had not come upon Coolidge's automobile inadvertently and held the plain view exception inapplicable.

Justices Black and White, dissenting in separate opinions, disagreed with this result. Justice Black argued that no searches would ever be made if police did not expect to discover evidence. In fact, he concluded, no evidence seized incident to arrest is truly unexpected.[32] Justice White asserted that the police did not know that the automobile would be parked at Coolidge's house, and, therefore, the discovery of it in the driveway was truly inadvertent.[33]

The thrust of *Coolidge* thus restricts the scope of the automobile and plain view exceptions. In light

[24] The Court viewed the language in *Carroll*, "where it is not practicable to obtain a warrant," 267 U.S. at 153, as meaning some automobiles are mobile while others are not and, when they are not mobile, it is practicable to obtain a warrant. But the sentence in which that phrase is located can also be read to mean that an automobile must be treated as mobile or imminently mobile and, therefore, rarely subject to the warrant prerequisite. Such an interpretation would make the word "where" interchangeable with the word "because," and the automobile cases prior to *Coolidge* appear to have applied such reasoning, assuming that *all* vehicles are mobile.

[25] The Court said, "There was probable cause, but no exigent circumstances justified the police in proceeding without a warrant." 91 S. Ct. at 2037.

[26] 399 U.S. 42 (1970).

[27] "The probable cause factor still obtained at the station house and so did the mobility of the car." 91 S. Ct. at 2057, quoting from 399 U.S. at 52.

[28] Probable cause existed in both *Chambers* and *Coolidge*, and mobility is not a factor in determining probable cause. Since *Chambers* and *Coolidge* both involved an automobile search upon probable cause after delivery to the station house there is one possible explanation for the disparity in the holdings—the determination of mobility is made at the *time of seizure*, not the time of the later search. Therefore, if an automobile is mobile when seized it retains its mobility at the station house; if it is not mobile when seized it will not later be mobile. The logic is appalling, yet apparently supported by *Chambers*. *See* note 27 *supra*, particularly use of the word "still."

[29] 91 S. Ct. at 2067 (White, J., dissenting). Justice White thus underscores the problem of determining when a car is, in fact, mobile. In *Coolidge*, the vehicle was considered immobile because Coolidge was in custody, the house was being watched, and his wife was taken from the home to stay elsewhere—in short, the possibilities of the car being moved were very slight. Justice White's statement definitely suggests that almost all automobile searches validated in the past are little different, if at all different, from the one in *Coolidge*.

[30] *Id.* at 2037.

[31] *Id.* at 2040.

[32] *Id.* at 2059. The disagreement between Justice Black and the Court appears to be in the interpretation of the words "anticipation" and "expectation." Black argued that officers always expect to find evidence—that that is the purpose of searching. The majority based its decision on the anticipation of discovering a *specific* piece of evidence, in this case an automobile.

[33] *Id.* at 2065.

of *Coolidge*, it may be appropriate to rename them the "mobility" and "inadvertency" doctrines, respectively. In each case the practicability of obtaining a warrant is a major factor and exigent circumstances such as mobility and inadvertency will, according to the Court, only validate the seizure of some automobiles and some evidence found in plain view.[34]

Ultimately the *Coolidge* decision raises the question whether good faith in obtaining a warrant, which is found invalid on grounds other than lack of probable cause, should assure the legality of any search made pursuant to it. In *Coolidge*, the invalid automobile search warrant was conclusive evidence of the practicability of obtaining a warrant, and consequently precluded the legality of the warrantless search in light of the Court's formulation of the warrant exceptions.[35]

Coolidge v. New Hampshire[36] is another decision in a long line of cases since *Weeks v. United States*[37] which recognizes and applies the exclusionary rule as a remedy for fourth amendment violations.[38] In *Bivens v. Six Unknown Named Agents*[39] the Supreme Court established yet another remedy—a federal action for damages against the individual federal officers involved.

Bivens was arrested in his apartment for alleged narcotics violations. The arresting officers handcuffed him in front of his wife and children, threatened to arrest them, and thoroughly searched the apartment. Bivens was then taken to the federal courthouse where he was further searched, interrogated and booked. He was released and the charges were later dropped.

Bivens brought suit in federal district court, alleging that his fourth amendment rights had been violated, and asked for $15,000 damages from each of the arresting officers. The complaint alleged that the officers secured neither an arrest nor search warrant and that they lacked probable cause for both. The court of appeals affirmed the district court's dismissal on the ground that the complaint failed to state a cause of action.[40]

While the fourth amendment is concerned with the prohibition of unreasonable search and seizure, the injuries received from the violation of the fourth amendment by federal law enforcement officers are those of state common law tort actions such as trespass of property and invasion of privacy. The Supreme Court determined that the rights involved under the fourth amendment are different from these state tort actions[41] and thus decided that a federal cause of action claiming only the violation of fourth amendment rights is necessary to the full vindication of those rights.[42] In addition, in order to support its claim that it had the power to establish this cause of action, the Court cited cases in which remedies have been provided to promote policies embodied in federal statutes where the Congress had failed to make enforcement provisions clear.[43] Justice Harlan, in a concurring opinion, probably best expressed the Court's sentiments, observing:

> It is apparent that damages in some form is the only possible remedy for someone in Biven's alleged position. It will be a rare case indeed in which an individual in Biven's position will be able to obviate the law by securing injunctive relief from any Court. However desirable a direct

[34] While the practicability of obtaining a warrant is a very important factor, it is not the only consideration. For example, even when officers come upon evidence "inadvertently" it is very possible that it would not be removed, altered, or destroyed and that they could return for a warrant. But, the "inadvertency" doctrine articulated by the Court does not require such. At the same time, though, it does appear that the mobility doctrine and the practicability of obtaining a warrant when an automobile is involved go hand in hand.

[35] If the police had not obtained a warrant, they could have virtually assured legality of the seizure by claiming inadvertence under the plain view doctrine.

[36] 91 S. Ct. 2022 (1971).

[37] 232 U.S. 383 (1914), where the Court established the exclusionary rule for use in federal cases. Mapp. v. Ohio, 367 U.S. 643 (1961), applied the rule to the states.

[38] We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant. . . . In holding them and permitting their use upon the trial, we think prejudicial error was committed.

232 U.S. at 398.

[39] 403 U.S. 388 (1971).

[40] Bivens v. Six Unknown Named Agents, 409 F.2d 718 (2d Cir. 1969). The court reversed, though, the lower court's decision that it lacked jurisdiction.

[41] [T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.

403 U.S. at 392.

[42] Whether necessary or not, the decision conflicts directly with earlier dicta in Weeks v. United States, 232 U.S. at 398:

> What remedies the defendant may have against [the policemen] we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies.

[43] *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Jacobs v. United States, 290 U.S. 13 (1933).

> remedy against the Government might be as a substitute for individual official liability, the Sovereign still remains immune to suit. Finally, assuming Biven's innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Biven's shoes, it is damages or nothing.[44]

In a dissenting opinion, Chief Justice Burger expressed reservation about the Court's decision, considering it a direct infringement on the legislative function.[45] The Chief Justice took the occasion, however, to express his disenchantment with the exclusionary rule. He observed that deterrence of unlawful police action is the rationale most frequently advanced to support the suppression doctrine,[46] but that it is not empirically supported.[47] Furthermore, he maintained the exclusion of evidence fails to punish the wrongdoing official and instead often releases the defendant.[48] In addition, it fails to protect innocent persons who are the victims of illegal but fruitless searches.[49] Consequently, the Chief Justice suggested that the Court abandon the exclusionary rule and exhort Congress to establish an administrative or quasi-judicial remedy against the government itself.[50]

There is much support for the argument that present tort remedies provide little relief for injured parties.[51] Equally ineffective have been the federal statutes making police officers criminally liable for violating fourth amendment proscriptions.[52] 42 U.S.C. § 1983 (1964)[53] attempts to eliminate some of these problems by providing for damage suits against state officers similar to the action now established by the Court in *Bivens* against federal officers. Nevertheless, in *Pierson v. Ray*,[54] the Supreme Court limited the effectiveness of § 1983 by granting the officers the defenses of good faith and probable cause. Also, § 1983 actions are subject to the same problems inherent in other civil actions and, therefore, there is little reason to suspect that this new cause of action will be any different.

The Chief Justice's proposal would ostensibly eliminate some of these drawbacks,[55] but even as-

[44] 403 U.S. at 409–10.

[45] We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power.

Id. at 411–12.

[46] *Id.* at 415.

[47] The Chief Justice cites as support Oaks, *Studying the Exclusionary Rule in Search and Siezure*, 37 U. CHI. L. REV. 665 (1970). Professor Oaks' detailed study concluded that there was no evidence that the exclusionary rule deterred unlawful police action, but it also concluded that there is no evidence that it does not.

[48] 403 U.S. at 413, citing Irvine v. California, 347 U.S. 128, 136 (1954).

[49] 403 U.S. at 413.

[50] *Id.* at 422–23. The Chief Justice's suggestion consists of five parts:

1) Waiver of sovereign immunity as to the illegal acts of law enforcement officials.
2) Creation of a cause of action for damages upon violation of the fourth amendment by government agents.
3) Creation of a quasi-judicial tribunal patterned after the Court of Claims.
4) Elimination of the exclusionary rule.
5) Provision that the remedy is in lieu of the exclusionary rule.

[51] *See, e.g.*, Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Schad, *Police Liability for the Invasion of Privacy*, 16 CLEV.-MAR. L. REV. 428 (1967); Comment, *Federal Jurisdiction—Suits Against Federal Officers for Violation of the Fourth Amendment*, 48 N.C. L. REV. 705 (1970). Cited as reasons are the fact that juries tend to prefer the cause of the policeman to that of the suspected criminal, policemen are better able to defend themselves than plaintiffs are able to sue, actual damages are usually slight and hard to prove and punitive damages are difficult to obtain absent willful or malicious action on the part of the perpetrator.

[52] 18 U.S.C. § 2234 (1970) reads in pertinent part:

> Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year.

18 U.S.C. § 2236 (1970) reads in pertinent part:

> Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than $1,000; and, for a subsequent offense, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

For obvious reasons, it is unlikely that law enforcement officials will bring suit against their fellow officers under either of these statutes.

[53] 42 U.S.C. § 1983 (1964) reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[54] 386 U.S. 547 (1967).

[55] *See* 403 U.S. at 423. The Chief Justice believes that lawyers sitting on the tribunal would be less prejudicial to the suspected criminal than are the lay jurors in the civil trials presently and that his proposal would be a good way of keeping files on individual officers to determine whether they might need further training or, possibly, be dismissed for continued violations of individuals' fourth amendment rights.

suming that elimination of governmental immunity and the establishment of a quasi-judicial body are legally desirable, the further question remains whether or not the exclusionary rule should be contemporaneously abandoned. Dissenting in *Wolf v. Colorado*,[56] Mr. Justice Murphy presented one viewpoint: "For there is but one alternative to the rule of exclusion. That is no sanction at all." [57] It is possible that Justice Murphy meant there is no alternative in the criminal setting,[58] for it is clear that for the truly innocent person whose fourth amendment rights have been violated, "the 'exclusionary rule' is simply irrelevant." [59] Therefore, while *Bivens* may prove to be a rather ineffective cause of action, it is a small step in the right direction.

[56] 338 U.S. 25 (1949).
[57] *Id.* at 41. (Murphy, J., dissenting).
[58] One might wonder what the damages would be if a person were jailed on a conviction substantially based on illegally seized evidence.
[59] *See* note 44 *supra*.

United States v. Harris, 403 U.S. 573 (1971)

The Supreme Court in *United States v. Harris*[1] examined the constitutional requisites[2] for issuing a warrant upon a police informant's report. The crux of the controversy was whether the tax investigator's affidavit supplied sufficient facts for a magistrate to conclude that the informant was probably telling the truth. The Court's decision changed direction from its prior holdings and left uncertain the outer limits of permissible search and seizure.

Roosevelt Hudson Harris was convicted in federal district court of possessing non-tax paid liquor. The evidence introduced at trial was obtained with a search warrant issued by a federal magistrate.[3] The warrant was issued solely on the basis of a tax investigator's affidavit, which alleged that Harris had been known to the investigator for more than four years as a trafficker in non-tax paid liquor; that over this period the investigator had received "numerous information [sic] from all types of persons as to his activities;" that a local constable had found a sizeable cache of illicit whiskey in an abandoned house under Harris' control during this period; and that the investigator had received information from a "prudent" person—who feared for his life if his name were revealed—that he had personally purchased illicit whiskey from the described residence for more than two years (most recently within the past two weeks) and had personal knowledge that illicit whiskey was consumed by purchasers in an outbuilding, from which he had seen Harris obtain whiskey for people on numerous occasions.

Relying on *Aguilar v. Texas*,[4] the court of appeals[5] found the affidavit insufficient because no background information was presented which would have enabled the magistrate to evaluate the informant's credibility.[6] The court felt the statement that the informant was "prudent" revealed nothing about the trustworthiness of his information.[7] The court then considered other allegations in the affidavit to determine whether there was independent corroboration of the informant's assertions. Relying on *Spinelli v. United States*,[8] the court held that the constable's prior discovery of illicit whiskey at some time within the past four years was too remote[9] and that the assertion that the defendant had a general reputation as a trafficker in illegal liquor was of no legal consequence.[10]

[1] 91 S. Ct. 2075 (1971).
[2] U.S. CONST. amend. IV:
The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
[3] Federal magistrates were formerly called United States Commissioners. *See* 28 U.S.C. § 631 (Supp. V, 1969).
[4] 378 U.S. 108 (1964), holding that an affidavit based on hearsay must be accompanied by facts and underlying circumstances from which a magistrate could draw his own conclusions about the reliability of the information, and the credibility of the informant.
[5] 412 F.2d 796 (6th Cir. 1969).
[6] *Id.* at 797.
[7] According to the court, it signified only that he was "circumspect in the conduct of his affairs." *Id.* at 798.
[8] 393 U.S. 410 (1969).
[9] The court declared that reliance on this assertion would violate the principle that "probable cause must be determined as of the time the warrant is issued." 412 F.2d at 798. *See also* Schoeneman v. United States, 317 F.2d 173, 177 (1963).
[10] 412 F.2d at 798. The court stated:

Reversing, the Supreme Court, in a splintered 5-4 decision,[11] ruled that the informant's report together with the investigator's personal knowledge of Harris' activities supported issuance of the search warrant. Speaking for the Court, Chief Justice Burger emphasized that the fourth amendment requires "practical" and "commonsensical" interpretation, and should not be restricted by highly technical requirements.[12] The Court characterized the court of appeals' objection to the affidavit's use of the word "prudent" as a "hypertechnicality," explaining that "a policeman's affidavit 'should not be judged as an entry in an essay contest,' but rather must be judged by the facts it contains." [13]

The Court likened the warrant in *Harris* with a warrant upheld in *Jones v. United States*.[14] In *Jones*, as in *Harris*, the warrant was supported primarily by the affiant's recitation of an informant's personal observations,[15] or simple hearsay. However, there was an averment in *Jones* that the informant had previously reported accurately.[16] Although there was no such averment in *Harris*,[17] the Court dismissed this difference by saying "this Court in *Jones* never suggested that an averment of previous reliability was necessary." [18]

The Court used the *Jones* analogy to distinguish *Harris* from *Spinelli* by pointing out that in *Spinelli* there was no averment of personal observation by the informant nor were there facts supporting the assertion that Spinelli had a reputation with the officers for illegal activities.[19] More difficult to square with *Spinelli* was the *Harris* Court's willingness to consider the investigator's averments concerning Harris' reputation. In *Spinelli* the Court dismissed as "bald and unilluminating" the assertion that the suspect was known as a gambler.[20] This apparent inconsistency was disposed of in *Harris* by the Court's explanation that *Spinelli* relied on earlier decisions[21] in which evidence of reputation was held insufficient when standing alone, but aquired relevance when supported by other information.[22] If this explanation proved unsatisfactory, the Court was willing to deal more harshly with *Spinelli*:

> To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.[23]

The Court also observed that statements made by the informant against his penal interest[24] added to his credibility. Conceding that admissions of crime do not always make accusations reliable, the Court felt that the informant's admission of illegal

---

[T]he Supreme Court has held that this type of statement may not be used 'to give additional weight to allegations that would otherwise be insufficient.'

Spinelli v. United States, 393 U.S. at 418.

[11] Only two of the four justices who concurred in the judgment joined in the opinion of the Court, written by Chief Justice Burger.

[12] *Cf.* United States v. Ventruska, 380 U.S. 102, 108 (1965).

[13] 91 S. Ct. at 2080, quoting from *Spinelli*, 393 U.S. at 438.

[14] 362 U.S. 257 (1960).

[15] The *Jones* Court stated:

> The question here is whether an affidavit which sets out personal observations . . . is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.

362 U.S. at 269.

[16] As additional bases for crediting the hearsay, the *Jones* Court also noted that the informer's present report was independently corroborated and the defendant was known to the police as a narcotics user. *Id.* at 271.

[17] "It will not do to say that warrants may not issue on uncorroborated hearsay." 91 S. Ct. at 2082. *Harris* concluded that it did not matter that the magistrate did not see the informant or know his name, for the police themselves "almost certainly" knew his name. According to the Court, *id.*, the case of McCray v. Illinois, 386 U.S. 300, 305 (1967), "disposed of the claim that the informant must be produced whenever the defendant so demands."

[18] 91 S. Ct. at 2081. *See* note 15 *supra.*

[19] 393 U.S. at 420–22.

[20] *Id.* at 414.

[21] *Id. See* Nathanson v. United States, 290 U.S. 41, 46–47 (1933).

[22] The Court claimed its interpretation was approved in Brinegar v. United States, 338 U.S. 160 (1949), in which the Court held that assertions by the searching officer that he had previously arrested the defendant for a similar offense and that the defendant had a reputation for hauling liquor were proper in determining probable cause, though such evidence would rarely be admissible at trial. *But see* 91 S. Ct. at 2088–89, where Justice Harlan, dissenting, distinguished *Brinegar* as carefully limited to situations where the arrestees were driving motor vehicles, 338 U.S. at 174, adding that the Court in *Brinegar* held the arrest valid "wholly apart from [the agent's] knowledge that [the suspect] bore the general reputation of being engaged in liquor running." *Id.* at 170.

[23] 91 S. Ct. at 2082.

[24] Informant's admissions, if true, constituted an offense under INT. REV. CODE of 1954 § 5205(a)(2), which proscribes sale, purchase, or possession of unstamped liquor.

purchases "itself and without more" furnished probable cause to search.[25]

Justice Harlan, joined by three justices in his dissent,[26] concluded that the affidavit failed to provide a magistrate with information adequate for an independent determination of the informant's reliability.[27] Since the determination of probable cause is made by a magistrate, not the affiant, the affiant's determination that the informer was "prudent" was insufficient to allow the magistrate to draw his own conclusion. Harlan observed that, though there might be some significance to the informant's unusually detailed description, that alone was insufficient to support credibility, since such statements would easily occur to a person prone to fabrication. The opinion concluded that this aspect of the affidavit could not by itself "enable a man of reasonable caution" [28] to uphold a warrant without opening the door to little more than "florid" affidavits as justification for search warrants.[29]

The dissent also rejected the two factors which the majority felt established creditable background on the defendant. Regarding the past discovery of illicit whiskey in an abandoned house "under Harris' control," [30] Harlan observed that even a past conviction could not provide probable cause for searching a suspect's home some years later.[31] The second factor, a claim by the affiant that he had received other information[32] about the suspect's criminal activities, was dismissed by the dissent as a mere suspicion, insufficient on the basis of prior Supreme Court holdings to establish probable cause for issuance of a warrant.[33]

Justice Harlan also took the majority to task for giving so much weight to the self-incriminating nature of the informant's statements, in light of the government's failure to even raise the issue. Furthermore, there was no reason to think the informer would necessarily assume his statements might be harmful to him.[34] Justice Harlan felt that the employment of uncorroborated hearsay to support a finding of probable cause would require an extensive relaxation of the rules of evidence.[35]

Justice Harlan did not share the government's belief that an affirmance of the court of appeals' opinion would hinder federal law enforcement. He suggested that informers could be brought before magistrates to allow the magistrates to determine the informer's credibility for themselves or that federal agents could give the magistrates enough background information on the informants, including general reputation, previous reliability and sources of information, to allow them to make independent determinations of reliability.[36] He

[25] 91 S. Ct. at 2082. Conceding that the informant's statements may not be admissible at trial, the Court stressed that the issue in warrant proceedings is not guilt beyond a reasonable doubt that probable cause for believing a crime has occurred. *See* Bruton v. United States, 391 U.S. 123 (1968); Donnelly v. United States, 228 U.S. 243 (1913); 5 J. WIGMORE, EVIDENCE § 1477 (3d ed. 1940). *See also* Brinegar v. United States, 338 U.S. at 173.

[26] 91 S. Ct. at 2083.

[27] Harlan maintained that a magistrate could properly issue a warrant only if he concluded:

> (a) [T]he knowledge attributed to the informant if true, would be sufficient to establish probable cause; (b) the affiant is likely relating truthfully what the informer said; and (c) it is reasonably likely that the informer's description of criminal behavior accurately reflects reality.

91 S. Ct. at 2083–84. The dispute in this case centered around the last point. According to Justice Harlan, no one disputed that the first two points were not supported.

[28] Berger v. New York, 388 U.S. 41, 55 (1967). The Court stated:

> Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been committed.

[29] 91 S. Ct. at 2087.

[30] *See id.* at 2078.

[31] Harlan expressed disbelief: "I can only conclude that this argument is a make-weight, intended to avoid the necessity of calling for an outright overruling of *Spinelli*." *Id.* at 2088.

[32] *See* note 30 *supra*.

[33] *See* Spinelli v. United States, 393 U.S. at 414; Nathanson v. United States, 290 U.S. at 47. Regarding the majority's argument that *Nathanson* was limited to holding reputation standing alone was insufficient, the dissent concluded that this was the exact problem here —only the suspect's reputation was seriously invoked to establish the informant's credibility.

[34] Harlan observed:

> [W]here the declarant is also a police informant it seems at least as plausible to assume . . . that the declarant-confidant at least believed he would receive absolution in return for his statement. . . .

91 S. Ct. at 2087.

[35] And these rules cannot be completely relaxed, of course, since the basic thrust of *Spinelli*, *Aguilar*, *Nathanson*, Whiteley v. Warden, 401 U.S. 560 (1971), and Giordenello v. United States, 357 U.S. 480 (1958), is to prohibit the issuance of warrants upon mere uncorroborated hearsay. The simple statement by an affiant that he and another had committed a crime, where offered to prove the complicity of the third party, is little, if any more than that.

91 S. Ct. at 2083 (Harlan, J., dissenting). *Girondenello* and *Whiteley* involved arrest rather than search warrants, but similar methods were used for determining probable cause for issuance. *See also* note 25 *supra*.

[36] Expanding on this, Harlan stated:

concluded that the warrant in *Harris* could not be sustained "without cutting deeply into the core requirement of the Fourth Amendment" that such warrants issue only upon independent conclusions of magistrates.[37]

In approving the issuance of the warrant in this case, the Court delegated a substantial portion of the magistrate's judicial duty to a law enforcement officer. Although the Court did not specifically overrule *Aguilar* or *Spinelli*,[38] *Harris* is not easily reconcilable with their common thesis that a judicial officer make a wholly independent determination of probable cause before issuing a warrant. In accepting uncorroborated hearsay as a proper basis for issuance of a warrant the Court has raised the possibility of acceptance of almost any kind of allegation to establish probable cause. *Harris* set no outer bounds showing the minimum information required for the issuance of a warrant.

The *Harris* decision gives heightened importance to another warrant case the Supreme Court decided three months earlier. In *Whitely v. Warden*[39] the Court held that an arrest warrant issued solely on the basis of a sheriff's conclusion that two men had committed a crime, with no facts, corroboration, or mention of an informant, was invalid.[40] The sheriff was, in fact, acting on an informant's tip, but he did not advise the magistrate of this and the Court, citing numerous prior decisions including *Spinelli*, *Aguilar* and *Jones* held that there were not enough facts in the complaint to support an independent judicial conclusion as to probable cause for issuance of a warrant.

Before *Harris*, the result of this case would appear reasonably obvious based on the Court's prior decisions. After *Harris* there is some doubt. Three justices dissented from the holding in *Whiteley*.[41] Justice Black based his strongly worded dissent[42] on the fact that the sheriff requesting the warrant had received a tip, evidence was found when the suspects were arrested, and the suspects were arrested by officers responding to a bulletin who did not know the basis on which the warrant had been issued. Black dismissed the fact that there was no information from which a magistrate could have drawn his own conclusions as to probable cause for issuance of the warrant.[43]

In light of the *Harris* decision, *Whiteley* may give some indication of the minimum information which the Court, at this time, would require before a magistrate could issue a warrant.

I do not understand why a federal agent, who has determined a confidant to be 'reliable,' 'credible,' or 'prudent' cannot lay before the magistrate the grounds upon which he based that judgment. I would not hold that a magistrate's determination that an informant is 'prudent' is insufficient to support the issuance of a warrant. To the contrary, I would only insist that this judgment be that of the magistrate, not the law enforcement officer who seeks the warrant.

91 S. Ct. at 2090.

[37] While the fourth amendment does not specifically call for independent conclusions of magistrates, the Supreme Court has held this factor imperative to safeguard fourth amendment rights. *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Byars v. United States, 273 U.S. 28 (1927); Ripper v. United States, 178 F. 24, 26 (8th Cir. 1910).

The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

333 U.S. at 13–14. *See generally* FED. R. CRIM. P. 3–4.

[38] Justices Black and Blackmun, concurring separately, indicated that they would directly overrule *Spinelli*. Justice Black added that he would also overrule *Aguilar*.

[39] 401 U.S. 560 (1971).

[40] The sheriff's complaint which provided the basis for the arrest warrant read:

I, C. W. Ogburn, so solemnly swear that on or about the 23 day of November, A.D. 1964, in the County of Carbon and State of Wyoming, the said Harrold Whiteley and Jack Daley, defendants, did then and there break and enter a locked and sealed building [describing the location and ownership of the building].

Id. at 563.

[41] Justices Black and Blackmun and Chief Justice Burger dissented.

[42] Justice Black opened his dissent by stating:

I am constrained to say that I believe the decision here is a gross and wholly indefensible miscarriage of justice. For this reason it may well be classified as one of those calculated to make many good people believe our Court actually enjoys frustrating justice by unnecessarily turning professional criminals loose to prey upon society with impunity.

Id. at 570.

[43] Citing Justice Clark's dissent in *Aguilar*, 378 U.S. at 116, and his own dissent in *Spinelli*, 393 U.S. at 429, Justice Black declared:

My disagreement with the majority concerning the wisdom and constitutional necessity of a 'little trial' before a magistrate or justice of the peace prior to the issuance of a search or arrest warrant is a matter of record.

Id. at 573.

United States v. White, 401 U.S. 745 (1971)

James White was convicted in district court of violating federal narcotics laws.[1] Federal Bureau of Narcotics agents testified over objection to incriminating statements made by White and transmitted by an electronic eavesdropping device worn by a government informer.[2] The informer was not available at the trial to testify as to his conversation with White.

The Seventh Circuit reversed the conviction and remanded for a new trial.[3] The circuit court, sitting en banc, was of the opinion that the surreptitious electronic monitoring of White's conversations by federal agents violated his fourth amendment rights, since it had not been authorized by a warrant. In invalidating the agents' testimony as evidence against White, the circuit court majority relied on the principles of *Katz v. United States*.[4] The electronic surveillance of White's conversations was held to be protected by the warrant requirements of the fourth amendment because "[a] realistic appraisal of the defendant's conduct permits no other conclusion than he justifiably expected his conversation to be private." [5]

The Supreme Court reversed the Seventh Circuit's ruling in *United States v. White*.[6] Mr. Justice White, in an opinion joined by the Chief Justice and Justices Stewart and Blackmun, spoke for the Court, and separate opinions concurring in the result were filed by Justices Brennan and Black. In his plurality opinion, Justice White held that the testimony was admissible because the principles of *Katz*, upon which the court of appeals had based its decision, could not be applied retroactively.[7] Justice White then went beyond the narrow issue of retroactivity to address the more difficult questions posed by the application of fourth amendment protections to instances of third-party eavesdropping. He argued that the testimony of federal agents as to incriminating statements overheard by warrantless electronic eavesdropping, where one of the parties to the conversation acquiesced in the monitoring, was admissible and did not violate fourth amendment protections.[8] Justice Brennan concurred solely on the separate ground that *Katz* should not be applied retroactively,[9] while Justice Black concurred in the result on the grounds that the fourth amendment could not be expanded to protect against electronic surveillance.[10]

In dissent, Justices Douglas, Harlan, and Marshall argued that *Katz* should be applied retroactively, and then went on to challenge the plurality's discussion of the scope of the fourth amendment's protection in electronic surveillance cases.[11] Justice Harlan found that the decisional basis for Justice White's opinion had been significantly altered by more recent cases,[12] while Justice Douglas emphasized the need for judicial supervision of electronic surveillance to prevent the chilling of free speech.[13] Justice Brennan agreed

[1] White was convicted of violations of 21 U.S.C. § 174 (1964) and INT. REV. CODE of 1954, § 4705 (a).

[2] Conversations between White and the informer were monitored by federal agents on eight separate occasions.

[3] 405 F.2d 838 (7th Cir. 1969).

[4] 389 U.S. 347 (1967).

[5] *Id.* at 846. The Court of Appeals held:

> On the basis of the Constitutional principles set forth in *Katz* and our understanding of the protection which the fourth amendment was drawn to provide, we are of the opinion that the surreptitious monitoring of the defendant's conversation was a naked violation of his rights and that the resultant seizure of his statements was not made in conformity with the provisions of that amendment.

Id. at 848.

[6] 401 U.S. 745 (1971)

[7] Desist v. United States. 394 U.S. 244 (1969). The Court held that *Katz* applied only to electronic surveillance subsequent to the date of the *Katz* decision. *Id.* at 246. Further discussion of the Court's application of its decision in Desist v. United States may be found in United States v. Williams, 401 U.S. 646 (1971).

[8] 401 U.S. at 753.

[9] *Id.* at 755.

[10] Mr. Justice Black concurred in the result on the basis of his dissent in Katz v. United States, 389 U.S. 347, 364 (1967). There he concluded "the Fourth Amendment simply does not apply to eavesdropping." *Id.* at 366. In Mr. Justice Black's analysis:

> The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of persons, houses, papers, and effects. No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

Id. at 374.

[11] 401 U.S. at 766, 793 (Douglas and Harlan, J.J., dissenting). *See* Desist v. United States, 394 U.S. 244, 255 (Douglas, J., dissenting), 256 (Harlan, J., dissenting), 269 (Fortas, J., dissenting) (1969).

[12] 401 U.S. at 777–80. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966).

[13] 401 U.S. at 760, 762–63. Douglas argued that *Katz* and *Berger* were of a different "vintage" than Lopez v. United States, 373 U.S. 427 (1963), and On Lee v. United States, 343 U.S. 747 (1952), on which the majority relied. *See* 401 U.S. at 751.

with the dissenters in their discussion of the fourth amendment issues.[14]

The retroactivity issue aside,[15] the importance of *White* rests with the fact that it offers insight into several justices' thoughts on the question of fourth amendment rights in the area of overheard conversations. The basis for the differences between the plurality and the dissents lies in the history of two developments in the law of search and seizure: the right of the individual to be free from warrantless electronic surveillance and the right of the government to use undercover agents to gain incriminating evidence from unwitting suspects.

Electronic eavesdropping is a modern phenomenon. The development of the law with respect to judicial limitation of the government's use of electronic devices to obtain information without a warrant has therefore been slow. Until recently, it was necessary that a physical penetration of defendant's property occur for a warrantless government search and seizure to violate the fourth amendment. In *Olmstead v. United States*,[16] the defendant's telephone was tapped by government agents who subsequently testified to incriminating statements he made on it. In rejecting the defendant's contention that the wiretap was an invasion of the defendant's right to privacy, Chief Justice Taft, speaking for the Court, stated that "the [Fourth] Amendment itself shows that the search is to be of material things." [17] Since the defendant's conversation was defined not to be material, the government's wiretapping activities were held to be constitutional.

Cases subsequent to *Olmstead* interpreted that holding to require either the seizure of "physical" property or "physical" penetration or "trespass" on defendant's property for a violation of the fourth amendment search and seizure clause by the government.[18] The first of these requirements was modified in *Silverman v. United States*,[19] where the Court held for the first time that a conversation could be the object of an unlawful search and seizure even though it was not "physical" property.[20]

The second of these requirements, that an actual physical penetration occur, was overruled in *Katz v. United States*,[21] where agents had attached a recording device to the outside of a telephone booth from which petitioner was making a call. Justice Stewart abandoned the view that any non-trespassing surveillance was constitutionally permissible.[22] Instead of the trespass inquiry, he followed a "justifiable reliance" analysis to determine whether an individual's fourth amendment right to privacy had been invaded by electronic devices.[23] The Court reversed petitioner's conviction using this analysis, holding that his justifiable expectation of privacy had been violated when his conversation was "seized" without a search warrant.[24]

A second line of Supreme Court cases, which dealt with fourth amendment limitations on the government's use of informers, is equally applicable

[14] 401 U.S. at 755.

[15] In Desist v. United States, 394 U.S. 244 (1969), the Court's decision in Katz v. United States was given prospective effect only. In Linkletter v. Walker, 381 U.S. 618, 629 (1965), the Court first established the rule that the "Constitution neither prohibits nor requires retrospective effect." Shortly thereafter, in Stovall v. Denno, 388 U.S. 293 (1967), the Court fashioned three requirements to judge whether a case should be given prospective or retroactive effect. The factors were:

> (a) [T]he purpose to be served by the new standards (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Id. at 297.

The Court in *Desist* held that all three of these factors militated against a retroactive application of *Katz*. 394 U.S. at 250. In separate dissenting opinions, Justices Douglas and Harlan objected to the fact that the defendants in those cases which were pending review at the time *Katz* was decided were not afforded the same relief as petitioner Katz. *Id.* at 255, 258. Since United States v. White was pending review after *Katz* was decided, that case, under the rule announced in *Desist*, could not be applied to *White*. *See generally* Hadad, *"Retroactivity Should be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L.C. & P.S. 417 (1969).

[16] 277 U.S. 438 (1927).

[17] *Id.* at 464.

[18] *See, e.g.*, On Lee v. United States, 343 U.S. 747, 751 (1952); Goldman v. United States, 316 U.S. 129, 135-36 (1942).

[19] 365 U.S. 505 (1961). In *Silverman*, District of Columbia police inserted a spike with a microphone attached to it under a baseboard in a room which they expected the defendant to occupy shortly. *Id.* at 506. On the basis of this "physical intrusion", the Court ruled that the police activities deprived the defendant of his fourth amendment right to privacy. *Id.* at 509.

[20] *Id.* at 509. *See* Berger v. New York, 388 U.S. 41, 51 (1967); Wong Sun v. United States, 371 U.S. 471, 485 (1963).

[21] 389 U.S. 347 (1967).

[22] *Id.* at 355.

[23] *Id.* at 353.

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the fourth amendment.

[24] *Id.*

to *White*. The first of these decisions, *On Lee v. United States*,[25] involved a factual situation almost identical to *United States v. White*. In *On Lee*, as in *White*, an informer equipped with a transmitting device engaged a suspect in conversations which were transmitted to a nearby federal narcotics agent.[26] The petitioner argued that the penetration of his premises by a government informer carrying an electronic device constituted a "trespass" under the pre-*Katz* view of the fourth amendment and that even without a physical trespass, the Court should overrule its previous cases holding warrantless wiretapping to be permissible under the fourth amendment. The Court rejected petitioner's first contention on the ground that the "trespass" of the electronic device was vitiated by the fact that the government informer entered the petitioner's premises with his consent.[27] However, the physical penetration doctrine was subsequently overruled in *Katz*.[28] With respect to the petitioner's argument that the Court's prior decisions excepting the wiretapping of conversations from fourth amendment proscriptions should be overruled, the Court strongly disagreed that an analogy should be made between wiretapping and operating a radio set.[29] The Court went on to suggest that in any event there was no difference between a government agent listening in on a conversation through a two-way radio or through an open window.[30]

In *Lopez v. United States*,[31] the Supreme Court again concluded, in a factual context similar to that in *On Lee*, that the activities of the government informer were proper and required no warrant. The only factual distinction between *On Lee* and *Lopez* was that in *On Lee* the defendant's conversation was being simultaneously transmitted on a two-way radio,[32] while in *Lopez* his statements were being taped on a recording device carried by the informer.[33] Speaking for the Court, Mr. Justice Harlan virtually ignored the *On Lee* decision in holding that the risk that the defendant assumed that what he was saying would be relayed to the government was the same whether the informer reported the conversation to the authorities from memory or reproduced it by a tape recording.[34]

Finally, in *Hoffa v. United States*,[35] the Court measured the "risk" which the defendant assumed in terms of "expectations of privacy" and rejected the notion that the fourth amendment protects such expectations. In *Hoffa*, a government informer was successful in his efforts to befriend the defendant in order to gain access to incriminating conversations. The Court, over the strong dissent of Chief Justice Warren,[36] rejected the argument that Hoffa's friendship with the informer raised the level of his expectations of privacy and held that the fourth amendment was never intended to protect mere expectations.[37]

In *United States v. White*, the Court was faced with a factual situation which fell squarely between the government informer line of cases, consisting of *On Lee*, *Lopez*, and *Hoffa*, and the electronic surveillance cases of *Silverman* and *Katz*. The defendant's statements were made in the presence of a government informer, but his statements were electronically seized by the government without a warrant. Because the factual situation in the first of the government informer cases, *On Lee*, was essentially the same as that in *White*, the issue was whether *On Lee*, either by itself or read together with *Hoffa* and *Lopez*, was overruled by *Katz v. United States*. If *On Lee* were not overruled, there was no fourth amendment violation in *White*.

In addressing this issue for the plurality, Justice White acknowledged the fact that insofar as the Court in *On Lee* relied on the physical penetration doctrine to uphold the government's electronic eavesdropping, that decision was overruled by *Katz*.[38] Justice White found, however, that not all of the *On Lee* decision was attenuated by *Katz*.[39] The defendant in *On Lee* had asked the Court to rule that his fourth amendment right to privacy had been violated irrespective of whether there was a physical trespass by the government.[40] This was the same argument facing the Court in *White*. The Court in *On Lee* responded to this argument by

[25] 343 U.S. 747 (1952).
[26] *Id.* at 749.
[27] *Id.* at 752.
[28] 389 U.S. at 353.
[29] 343 U.S. at 753–54.
[30] *Id.* at 754.
[31] 373 U.S. 427 (1963).
[32] 343 U.S. at 749.
[33] 373 U.S. at 430.
[34] *Id.* at 438–39.
[35] 385 U.S. 293 (1966).
[36] *Id* at 313. According to the Chief Justice:
An invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invasion accomplished by force.
Id. at 314.
[37] *Id.* at 302.
[38] 401 U.S. at 750.
[39] *Id.*
[40] 343 U.S. at 753.

stating that the simultaneous monitoring of defendant Lee's conversation had "the same effect on his privacy" as if he had been overheard by someone outside his window,[41] which is constitutionally permissible under the fourth amendment.

Relying on this statement in *On Lee*, Justice White reasoned that the use of devices aiding observation or auditing of defendants engaged in private conversation was not a forbidden search and seizure because the effect on privacy was the same as it would have been without the use of those devices.[42] Disclosure by an agent who used a listening device therefore had the same effect on the privacy of the individual as disclosure by an informer who was a party to the conversation. This was an implicit holding in *Lopez v. United States*.[43] Furthermore, since *Hoffa v. United States* held the activities of government informers to be outside the ban of the fourth amendment,[44] it followed that if the effect on privacy was the same whether or not the informer carried an eavesdropping device, the *Hoffa* protection extended to informers with eavesdropping devices.

The plurality rejected the court of appeals' application of *Katz* to the factual situation in *White* on the ground that *Katz* "involved no revelation to the government by a party to conversations with the defendant." [45] The plurality noted that *Katz* did not hold that a person has a "justifiable and constitutionally protected expectation" that a party with whom he converses on the telephone will not reveal the contents of that conversation to the police.[46]

In dissent, Justices Harlan, Douglas and Marshall, joined by Justice Brennan in his concurring opinion, pointed out that the plurality had misapprehended the theoretical underpinnings of *Katz v. United States*. In *Katz*, the Court had ruled that the government's activities in electronically listening in on the conversation of the defendant "violated the privacy upon which he justifiably relied" in violation of his fourth amendment rights.[47] Justices Brennan, Douglas, and Harlan reasoned that the theory behind *Katz* was derived largely from Justice Brennan's dissent in *Lopez v. United States* in which he had asserted that the fourth amendment must be evaluated in terms of the risk to which the expectation of privacy is subjected.[48] Under this analysis, the protection which the fourth amendment affords to an expectation of privacy should be measured in terms of the reasonableness of that expectation and the extent to which it is threatened by government activity. The dissenting justices and Justice Brennan regarded the threat from electronic eavesdropping to the individual's expectation of privacy to be so substantial as to require a warrant,[49] irrespective of whether this activity is accompanied by the presence of a government informer.

The dissenters further criticised the plurality for its reliance on *On Lee v. United States*. Justice Harlan referred to the statement of the *On Lee* Court alluded to by the plurality as a mere "unelaborated assertion"[50] which had no bearing on the disposition of that case. He emphasized the fact that *Katz* did not attempt to validate such a ground for decision.[51]

Neither the plurality nor the dissent was able to reconcile its position with former Supreme Court rulings. Basing its position on prior government informer cases, the plurality dismissed *Katz* as factually inapposite to the case at hand.[52] As the dissent correctly noted, however, *Katz* cannot be distinguished away so easily. It is difficult to delineate intellectually a difference in the "expectation of privacy" expressed in *Katz* merely by adding a government informer. If the fact of the electronic surveillance itself raises the level of that expectation of privacy, the presence of a government informer cannot be seen as affecting the suspect's

[41] *Id.* at 754.

[42] 401 U.S. at 751.

[43] *See* 373 U.S. at 438. The Court was concerned primarily with whether it was constitutionally proper for the informer's evidence to be introduced at all. The device was found to be used merely to insure the reliability of the evidence. *Id.* at 439.

[44] 385 U.S. at 302.

[45] 401 U.S. at 749.

[46] *Id. See* 389 U.S. at 351. Justice Stewart held that the fourth amendment protects people, not places, so that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.*

[47] *Id.* at 353.

[48] 401 U.S. at 755 (Brennan, J., concurring), 759 (Douglas, J., dissenting). *See* 373 U.S. at 450.

[49] 401 U.S. at 756 (Brennan, J., concurring), 760 (Douglas, J., dissenting), 789–90 (Harlan, J., dissenting). In *Lopez*, Justice Brennan found it unreasonable that

> [T]he risk that third parties, whether mechanical auditors . . . or human transcribers of mechanical transmissions . . .—third parties who cannot be shut out of a conversation as convential eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place—may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one's mouth shut on all occasions.

373 U.S. at 450 (Brennan, J., dissenting).

[50] 401 U.S. at 774.

[51] *Id.* at 775.

[52] *Id.* at 749.