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State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule?

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STATE V. BRECHT: EVOLUTION OR OFFSHOOT OF THE FOURTH AMENDMENT EXCLUSIONARY RULE?

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POINT OF DEPARTURE

The Exculusionary Rule

State v. Brecht,[1] a recent Montana decision applying the federal fourth amendment exclusionary rule, signals a fundamental change in the application of that rule in Montana. *Brecht* represents not only a break with previous Montana applications of the rule, but with the very basis of the rule itself. The purpose of this note will be to explore the changes wrought by this decision, and their possible ramifications.

The exclusionary rule, requiring the exclusion in criminal prosecutions of all evidence obtained in violation of the defendant's fourth amendment right to be free from illegal searches and seizures,[2] is a constitutionally derived, judicially implied rule of evidence. Originally imposed only on criminal prosecutions in the federal courts,[3] it has since been held to apply to state court proceedings as well through the fourteenth amendment.[4]

Synopsis of the Decision

The defendant was tried for the murder of his wife, and was found guilty of second degree murder. At the trial, the sister of the deceased testified to certain threats she overheard the defendant make. She overheard these threats while listening surreptitiously on an extension telephone in her home. It was the admission of this testimony that the court found to be reversible error. The relevant portions of the decision are as follows:

> We hold that the admission of Sandra Blumfield's testimony concerning the telephone conversation . . . which she overhead while listening on the extension phone, constitutes prejudicial and reversible error. Admission of this testimony violated the defendant's fourth amendment rights under the federal constitution as applied to state court criminal proceedings under the "due process" clause of the fourteenth amendment. It equally violated the defendant's rights under Article III, Sec. 7 of the Montana Constitution.[5]

The state at this point contended that the constitutional proscriptions against invasions of a person's right of privacy as guaranteed under the fourth amendment applied solely to government action, and not to private action such as occurred here. The court answered:

[1]State v. Brecht, ... Mont. ....., 485 P.2d 47 (1971).

[2]C. McCormick, Handbook of the Law of Evidence, 364 (2d ed. 1972) [hereinafter cited as McCormick].

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

[4]Mapp v. Ohio, 367 U.S. 647, 655 (1961).

[5]State v. Brecht, *supra* note 1 at 50.

> We think not. The violation of the constitutional right to privacy and against compulsory self-incrimination is as detrimental to the person to whom the protection is guaranteed in the one case as in the other. To distinguish between classes of citizens is tantamount to destruction of the right itself.[6]
>
> . . . .
>
> This Court in the present case would be remiss were it not to recognize that evidence obtained by the unlawful or unreasonable invasion of several of the constitutionally protected rights guaranteed to its citizens by both the federal and Montana constitutions properly comes within the contemplation of this Court's exclusionary rule. To do otherwise would lend Court approval to a fictional distinction between classes of citizens: those who are bound to respect the Constitution and those who are not. Were the exclusionary rule to recognize such distinctions it would by indirection circumvent the rule established by this Court to enforce these rights and would in fact render the rule and the constitutional guarantees it protects meaningless.[7]

This decision is interesting for a number of reasons. It is clearly contrary to existing state and federal law on the subject. It treats the fourth amendment guarantees of freedom from illegal searches and seizures and invasions of privacy as extending to include private action as well as state action. And finally, it applies the rule in a manner that is inconsistent with the rule's basic tenets.

THE EXCLUSIONARY RULE—DEVELOPMENT AND PURPOSE

THE DILEMMA

The exclusionary rule is not a completely satisfactory rule. Rather, it represents the attempts of many courts to solve a problem that defies simple solution. The very core of the problem devolves from conflicting policy considerations. Balanced against the interest society has in prosecuting and eliminating criminal activities is the interest in prohibiting law enforcement personnel from violating the fourth amendment proscription against illegal searches and seizures, a proscription which has been extended to invasions of privacy as well.[8] The exclusionary rule was promulgated specifically to enforce that proscription,[9] by removing the incentive for officers to violate it.

As might be expected of a rule that directly benefits only the criminal and provides no direct sanction against the person breaking it, the rule has not received warm judicial[10] or academic[11] approval. Use of the rule has been likened to the "fox hunting" approach to law enforcement, where the emphasis is more on the rules of the chase than the object of it.[12] And, as is pointed out by McCormick, the danger inhering in such an approach is that a single police officer may, by

[6]*Id.* at 51.
[7]*Id.*
[8]Katz v. United States, 389 U.S. 347, 351 (1967).
[9]Mapp v. Ohio, *supra* note 4 at 658.
[10]People v. DeFore, 242 N.Y. 13, 150 N.E. 585, 587 (1926).
[11]8 J. WIGMORE, THE LAW OF EVIDENCE § 2184 (McNaughton Rev. 1961) [hereinafter cited as WIGMORE].
[12]Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255, 256 (1961).

his misconduct, effectively confer immunity upon a defendant.[13] The decision to apply the exclusionary rule, in both state and federal courts, represents the culmination of seventy-five years of judicial threshing of the problem of securing official respect for the fourth amendment guarantees of freedom from unreasonable searches and seizures and invasions of privacy.[14] Courts found themselves compelled to apply the rule because all the other remedies, such as criminal or tort remedies, had "completely failed to secure compliance with the constitutional provisions on the part of police officers."[15] It was for that reason that the United States Supreme Court made the rule binding on the state as well as the federal courts.[16]

DEVELOPMENT OF THE RULE

There is no basis for the exclusionary rule in either the common law or the early period of American constitutional law. The admissibility of evidence was never questioned on the grounds that it might have been improperly obtained.[17] Not only was there an understandable reluctance to disregard valuable evidence, but it was thought that the source of the evidence was a separate question, and not properly an issue in the trial of the defendant.[18]

The constitutional basis for the rule has its roots in *Boyd v. United States*.[19] Noting that the fourth and fifth amendments were very closely tied, in that the "unreasonable searches and seizures condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment,"[20] the Court stated that "[I]n this regard the fourth and fifth amendments run almost into each other."[21] The Court ruled that the principles of these amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."[22] Though the case eventually turned on the fifth amendment, the admission of evidence obtained in violation of these amendments was specifically termed "unconstitutional."[23]

Stating flatly that "conviction by means of unlawful seizures . . . should find no sanction in the judgments of the court,"[24] *Weeks v. United States* was the first case to bar evidence obtained through illegal search and seizure. The Court said that the fourth amendment "put the courts

[13]MCCORMICK, *supra* note 2 at 367.
[14]From Boyd v. United States, 116 U.S. 616 (1886) to Mapp v. Ohio, *supra* note 4.
[15]People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 911-912 (1955).
[16]Mapp v. Ohio, *supra* note 4 at 655.
[17]MCCORMICK, *supra* note 2 at 365; 8 WIGMORE, *supra* note 11 at § 2185.
[18]8 WIGMORE, *supra* note 11 at § 2185.
[19]Boyd v. United States, *supra* note 14.
[20]*Id.* at 633.
[21]*Id.* at 630.
[22]*Id.*
[23]*Id.* at 638.
[24]Weeks v. United States, 232 U.S. 383, 392 (1914).

of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints." Furthermore, the "duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."[25] The Court reasoned that the evidence should not be admissible, for if "letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment declaring his right to be secure against such searches and seizures is of no value."[26] The *Weeks* decision was actually quite limited in scope. The Court said that the fourth amendment "is not directed to individual misconduct of state officers. Its limitations reach the Federal Government and its agencies."[27] Still it marked a tremendous change by declaring in effect that the "Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction if obtained by government officers through a violation of the amendment."[28]

The *Weeks* ruling was broadened thirteen years later in *Byars v. United States*.[29] Though not directly ruling on the effect of the fourth amendment on the states, the Court held that evidence illegally seized in a joint operation between state and federal officers must be excluded, as the "effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own."[30]

It was not until *Wolf v. Colorado*[31] that the Supreme Court dealt with the fourth amendment and its effect on the individual states. The Court held that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is . . . implicit in the 'concept of ordered liberty', . . . and as such enforceable against the States through the Due Process Clause."[32] Having reached that decision, however, the Court did not take what would appear to be a logical next step, and declare that evidence seized illegally by state officers had to be excluded from state proceedings as well.

Though the Court said that it would "have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment,"[33] it did not require the state courts to exclude evidence obtained by such incursions. Two reasons were given for not imposing the exclusionary rule on the states at that point. The reasons were of a basically practical, not constitutional, nature. One reason was that "other

[25] *Id.*
[26] *Id.* at 392.
[27] *Id.* at 398.
[28] Olmstead v. United States, 277 U.S. 438, 462 (1928).
[29] Byars v. United States, 273 U.S. 28, 33 (1927).
[30] *Id.*
[31] Wolf v. Colorado, *supra* note 3 at 27-28.
[32] *Id.*
[33] *Id.*

means of protection" were available to the state courts to enforce the right to privacy;[34] and the other reason was that the Court did not care to overturn the states' established rules of evidence.[35] These reasons would not prove to be lasting.

A California decision, *People v. Cahan*,[36] was both prophetic and persuasive in its adoption of the exclusionary rule in 1955. That court found itself

> . . . compelled to apply the rule because other remedies have completely failed to secure the compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect, condone, the lawless activities of law enforcement officers.[37]

Cahan found the exclusionary rule to be the only satisfactory method of curbing police conduct, as "a system that permits the prosecution to trust habitually to the use of illegally obtained evidence cannot help but encourage violations of the constitution at the expense of lawful means of enforcing the law."[38]

That the function of the rule was to sanction police misconduct and to prevent further occurrences of illegal searches and seizures became very apparent in *Elkins v. United States*.[39] *Weeks*, it will be remembered, did not require the exclusion of any evidence except that seized illegally by federal officers.[40] A predictable outgrowth of that ruling was that prosecutors simply used evidence obtained illegally by state officers in a federal criminal trial. This was permissible under what became known as the "silver platter" doctrine, a doctrine which allowed the use of such evidence simply because no federal agent had participated in the illegal search and seizure.[41] Amazingly, this rather uncommendable cooperation continued for some thirty-five years without question.[42] *Elkins* ended the practice by ruling inadmissible in federal criminal trials any "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment."[43]

After the *Elkins* decision,[44] there existed only one "courtroom door remaining open to evidence secured by means of illegal searches and

[34] *Id.* at 30.
[35] *Id.* at 31-32.
[36] People v. Cahan, *supra* note 15.
[37] *Id.* at 911.
[38] *Id.* at 914.
[39] Elkins v. Unted States, 364 U.S. 206 (1960).
[40] Weeks v. United States, *supra* note 24 at 398.
[41] McCormick, *supra* note 2 at 372.
[42] Byars v. United States, *supra* note 29 at 33.
[43] Elkins v. United States, *supra* note 39 at 223.
[44] *Id.*

seizures."[45] In *Mapp v. Ohio*[46] it was decided to close that door as well. The Court decided that the reasons it had not extended the exclusionary rule to the states in *Wolf*[47] were no longer valid. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth," by virtue of the *Wolf* decision, the Court held that "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[48]

Summary of the Rule and its Development

With the *Mapp* decision ruling that the exclusionary rule was within the rights guaranteed by the fourth amendment, some conclusions about the fundamental purposes of the rule may now be made. The "basic postulate" of the rule was stated somewhat earlier in *Elkins v. United States*. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[49] The rule is prospective in operation, and was imposed as being the only effective means of deterring illegal police activity.[50] In emphasizing this aspect, the Supreme Court in *Linkletter v. Walker* refused to apply the decision in *Mapp* retrospectively. Noting that the rule's function was deterrent in nature, the Court did not see how "this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved."[51]

LIMITATIONS ON THE USE OF THE EXCLUSIONARY RULE

The Exculsionary Rule and the Wrongful Acts of Private Citizens

In deciding that Sandra Blumfield's testimony was inadmissible because obtained in violation of Brecht's fourth amendment rights,[52] the court in *Brecht* relied on the standard set in *Katz v. United States*.[53] The *Brecht* decision stated that *Katz* "established the principle that the 'search and seizure provisions' of the Fourth Amendment . . . protects [sic] persons and their right to privacy and is not confined to trespass against property rights."[54] In *Katz*, the United States Supreme Court faced the question of whether evidence the police secured by attaching a listening device to the outside of a telephone booth would be

[45]*Id.* at 224.
[46]Mapp v. Ohio, *supra* note 4 at 655.
[47]Wolf v. Colorado, *supra* note 3.
[48]Mapp v. Ohio, *supra* note 4 at 655.
[49]Elkins v. United States, *supra* note 39 at 220.
[50]Mapp v. Ohio, *supra* note 4 at 655.
[51]Linkletter v. Walker, 381 U.S. 618 (1965).
[52]State v. Brecht, *supra* note 1 at 50.
[53]Katz v. United States, *supra* note 8.
[54]State v. Brecht, *supra* note 1 at 50.

admissible. The Court held it was not. It held that physical trespass was not necessary for a violation, because the fourth amendment "protects people, not places."[55] In his concurring opinion, Justice Harlan stated that the fourth amendment extends to protect an individual from governmental intrusion wherever he has a reasonable "expectation of privacy."[56]

Though the state contended in *Brecht* that the proscriptions mentioned in *Katz* applied only to intrusions of government officers, and not to the acts of private persons, the court thought not. It stated that the "violation of the constitutional right to privacy is as detrimental to the person to whom the protection is guaranteed in the one case as in the other."[57] *Katz* itself, though, suggests that conduct of a private individual does not come within the proscriptions of the fourth amendment.

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion. . . . Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a persons general right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, left largely to the law of the individual states.[58]

And in fact, until *Brecht*, the courts generally had not applied the exclusionary rule in criminal cases to evidence uncovered by the wrongful acts of a private citizen.[59] The rule was developed with two very specific goals in mind. One goal was to retain a certain "judicial integrity."[60] The other goal was to deter lawless official conduct.[61] As might be suspected of a rule that was developed with specific goals in mind, the exclusionary rule has not proven susceptible to a procrustean application to every invasion of privacy. Even the United States Su-

[55]Katz v. United States, *supra* note 8 at 351.
[56]*Id.* at 361.
[57]State v. Brecht, *supra* note 1 at 50-51.
[58]Katz v. United States, *supra* note 8 at 350-351. However, in the opinion of *Griswold v. Connecticut*, 381 U.S. 479, 484, 485 (1965), Justice Douglas suggests that the "specific guarantees of the Bill of Rights have penubras" covering the various facets of the right of privacy. In light of the number of opinions in that case, though, the Court can hardly be said to be in agreement on this point.
[59]Burdeau v. McDowell, 256 U.S. 465 (1921); Duran v. United States, 413 F.2d 596 (9th Cir. 1969), *cert. den.* 396 U.S. 917; Watson v. United States, 391 F.2d 927 (5th Cir. 1968), *cert. den.* 393 U.S. 985; United States v. McGuire, 381 F.2d 306 (2d Cir. 1967), *cert. den.* 389 U.S. 1053; Barnes v. United States, 373 F.2d 517 (5th Cir. 1967); United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964), *cert. den.* 377 U.S. 953; Geniviva v. Bingler, 206 F.Supp. 81 (D. Penn. 1961); Miromontes v. Superior Court for County of San Mateo, 25 Cal.App.3rd 877, 102 Cal. Rptr. 182 (1972); Stapleton v. Superior Court of Los Angeles County, 70 Cal.2d 97, 73 Cal.Rptr. 575, 447 P.2d 967 (1969); People v. Katzman, 258 Cal.App.2d 777, 66 Cal.Rptr. 318 (1968); People v. Botts, 250 Cal.App.2d 478, 58 Cal.Rptr. 412 (1967); People v. Wright, 245 Cal.App.2d 265, 53 Cal.Rptr. 844 (1966); People v. Potter, 240 Cal.App.2d 621, 49 Cal. Rptr. 892, *cert. den.* 388 U.S. 924, *reh. den.* 389 U.S. 890 (1966); People v. Johnson, 153 Cal.App.2d 870, 315 P.2d 468 (1957); People v. Torres, 49 Misc.2d 39, 266 N.Y.S.2d 695 (1966).
Contra: State v. Brecht, *supra* note 1.
[60]Terry v. Ohio, 392 U.S. 1, 12-13 (1968).
[61]*Id.*

preme Court has recognized the limitations of the rule that it imposed. In *Terry v. Ohio,* the Court said that "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."[62]

As a general rule, then, both "federal and state courts have almost uniformly held that evidence obtained by private individuals pursuant to activities which, if performed by governmental agents, would constitute a violation of Fourth Amendment rights, is nevertheless admissible."[63] The reasons courts have advanced for not applying the rule to other than governmental violations rest fundamentally on two bases. One is that the courts find themselves reluctant to extend fourth amendment protection beyond its long established limits. Viewing the fourth amendment only as a limitation of government authority, the courts have found that an invasion of an individual's rights by one other than a government official is not within the protection of the amendment.[64] The other reason is based on the objectives sought to be reached by the rule. As the rule's function primarily has been to deter official lawlessness,[65] that purpose could not be served by excluding evidence obtained solely by an individual acting for himself.[66]

THE CONSTITUTIONAL BASIS

The leading case on the admissibility of evidence obtained illegally by a private citizen[67] is *Burdeau v. McDowell.*[68] In reversing the trial court's suppression of evidence seized illegally by a private individual, the Court held that the protection of the fourth amendment applies only to governmental action. The Court said that the origin and history of the fourth amendment "clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended as a limitation upon other than governmental agencies."[69] Since the evidence in question had come into the government's possession without violation of fourth amendment rights by anyone connected with the government, it was held to be admissible.[70]

Even though the exclusionary rule has been greatly expanded since 1921 when *Burdeau* was decided, it "has not been expanded to the extent that evidence obtained by persons not acting in concert with either state or federal officials must be excluded."[71] This still remains true. Even

[62] *Id.* at 15.
[63] McCormick, *supra* note 2 at 372.
[64] Burdeau v. McDowell, *supra* note 59 at 475.
[65] Mapp v. Ohio, *supra* note 4 at 655; People v. Cahan, *supra* note 15 at 912.
[66] People v. Johnson, *supra* note 59 at 472-473.
[67] McCormick, *supra* note 2 at 371.
[68] Burdeau v. McDowell, *supra* note 59.
[69] *Id.* at 475.
[70] *Id.* at 476.
[71] Geniviva v. Bingler, *supra* note 59 at 83.

very current state[72] and federal[73] authorities retain the rule that the fourth amendment applies only to official action, and refuse to exclude evidence wrongfully obtained by a private individual.

The two earliest Montana cases, *State ex rel. Samlin v. District Court*[74] and *State ex rel. King v. District Court*,[75] wherein evidence was suppressed for having been illegally obtained were cited in the *Brecht* decision. The language of these cases gives no indication of departing from the normal boundaries of the exclusionary rule. In *Samlin* it was held that the Montana counterpart to the fourth amendment, article III, § 7, was "expressive of the same fundamental principles," and that furthermore, it "was intended to be equally as effective to prevent an invasion of the rights of the citizen under the guise of law by the state government or any of its officers."[76] Accordingly, the court followed the *Weeks* example and ordered the evidence be suppressed.[77] *King* holds similarly, stating that article III, § 7, is substantially a "reiteration of the Fourth Amendment," and that its purpose is also to "protect the people from unreasonable searches and seizures . . . by authority of the government."[78] A later case, and one which was not cited in *Brecht,* stated that the constitutional safeguards against unreasonable searches and seizures "can only be invoked . . . to protect a citizen against the activities of the government."[79] The court then continued to say that it "is only when persons are acting under color of authority from the government that evidence developed in violation of the law can be at all rejected."[80]

THE FUNCTIONAL BASIS

The exclusionary rule was finally imposed because experience had taught the courts that it was the only effective method of curbing official misconduct.[81] As it directly benefits only the criminal on trial, though, there would be very little to recommend the rule once it ceases to perform this function. Logic indicates that certain requirements must

[72]*Supra* note 59.
[73]*Id.*
[74]State *ex rel.* Samlin v. District Court, 59 Mont. 600, 198 P. 362 (1921).
[75]State *ex rel.* King v. District Court, 70 Mont. 191, 224 P. 862 (1924).
[76]State *ex rel.* Samlin v. District Court, *supra* note 74 at 365.
[77]*Id.* at 367. It is interesting to note that the court not only ordered the evidence suppressed, but ordered the illegal liquor be returned to Samlin. If the logic of this decision defies explanation, so does the legality. *Samlin* was decided on May 6, 1921. On March 22, 1921, § 23, Ch. 9 of Ex. L. 1921 was passed by the Montana legislature. It states: "It shall be unlawful to have or possess any liquor . . . and no property right shall exist in any such liquor. . . ." (Codified as Revised Codes of Montana 1921, § 11070). It should also be noted that John Samlin was not the only fortunate defendant. Similar decisions were handed down in *State ex rel. Hogue v. O'Brien,* 60 Mont. 178, 198 P. 1117 (1921) (decided May 23, 1921); and in *State ex rel. Goodwin v. Dishman,* 61 Mont. 117, 201 P. 286 (1921) (decided on October 7, 1921). This practice of returning the liquor to the defendant was finally stopped some three years later in *State. ex rel. King v. District Court,* 70 Mont. 191, 224 P. 862, 866 (1924).
[78]State *ex rel.* King v. District Court, *supra* note 75 at 864.
[79]State *ex rel.* Sadler v. District Court, 70 Mont. 378, 225 P. 1000, 1003, (1924).
[80]*Id.*
[81]Terry v. Ohio, *supra* note 60 at 12-13; Mapp v. Ohio, *supra* note 4 at 655.

be met if the rule is in fact going to fulfill its deterrent function. For one thing, the person committing the search and seizure must have an interest in obtaining a conviction with the information he secures. Obviously the rule is of no value where, for example, the police have "no interest in prosecuting, or are willing to forego successful prosecution in the interest of serving another goal."[82] This would be especially true in situations such as *Brecht,* in which the person obtaining the evidence did so without any intent of securing evidence to be used in a prosecution.[83]

The other requirement, which on the surface seems elemental, is that the person involved in the search and seizure must at least be aware of the rule.[84] While it is not unusual to expect the police to be familiar with certain salient rules of evidence, it does seem unlikely that a layman with no interest or intent of securing the conviction of criminals would have much knowledge in this area. Certainly, Sandra Blumfield did not have, nor could she reasonably be expected to have, this knowledge.

California faced squarely this question of whether to apply the exclusionary rule to evidence obtained illegally by a private citizen in *People v. Johnson.*[85] Two years previous to this case, in *People v. Cahan,* the California supreme court had imposed the exclusionary rule in California as being the only method of securing police compliance with constitutional provisions.[86] In *Johnson,* the court decided that the exclusionary rule did not apply to evidence obtained by a private person who was not associated with any sort of governmental unit or agency.[87] It so decided by saying that the situation before it was not even "remotely close to the situation sought to be cured by the rule of evidence established [in *People v. Cahan*] to stop police from rampant, violent, illegal and unreasonable searches and seizures."[88]

The Silver Platter Doctrine and the Admissibility of Evidence Obtained Illegally by Private Individuals

The admissibility of evidence unlawfully secured by private individuals might be regarded as merely an extension of the "silver platter" doctrine struck down in *Elkins.*[89] However, the courts have not so regarded it.[90] In *United States v. McGuire,*[91] though the Court did not have to reach the issue, it did make special mention of the effect of *Elkins,* on the admissibility of evidence from private individuals covered

[82]Terry v. Ohio, *supra* note 60 at 14.
[83]State v. Brecht, *supra* note 1 at 50.
[84]People v. Botts, 250 Cal.App.2d 478, 58 Cal.Rptr. 412, 415-416 (1967).
[85]People v. Johnson, *supra* note 59 at 468.
[86]People v. Cahan, *supra* note 15 at 911.
[87]People v. Johnson, *supra* note 59 at 469.
[88]*Id.* at 472-473.
[89]Elkins v. United States, *supra* note 39.
[90]United States v. McGuire, *supra* note 59 at 313.
[91]*Id.*

in *Burdeau*. In finding that the weight of the authority had left "*Burdeau* unimpaired by *Elkins*," the Court stated that the "thrust of the Fourth Amendment is to assure protection from official, not private intrusion."[92]

This creates less of a problem than might be imagined, and does not foster the sort of cooperation between police and private citizens that one might expect. The cooperation is not fostered because it is not rewarded. As soon as a private individual acts in association or cooperation with the police, the courts have held that his act is deemed to be the act of the state.[93] Not only will evidence be excluded if a private individual works at the direction or supervision of the police,[94] but it will also be excluded when the police are guilty of no more than just "idly standing by."[95] Montana foreclosed the possibility of this type of cooperation as far back as 1924. In *State ex rel. Sadler v. District Court*[96] the court ruled inadmissible evidence that was illegally seized by two private investigators hired by the Cascade County Attorney.

CONCLUSION

This overview of the development and purpose of the exclusionary rule indicates that it is not an appropriate remedy for the unlawful acts of private citizens. In so ruling, it appears that the Montana court has engaged in a bit of judicial pioneering that has resulted in a unique application of the rule. As applied in *Brecht,* the rule is incapable of fulfilling its prime function of deterring unlawful official conduct. As a private citizen is likely neither to know of the rule nor to be greatly interested in obtaining criminal convictions, his situation appears to be beyond the scope of the rule. The result of applying the rule to cases such as *Brecht* can only be "to free a guilty man without any assurance that there would result any counterbalancing restraint of similar conduct in the future."[97]

[92] *Id.*
[93] Miramontes v. Superior Court for County of San Mateo, *supra* note 59 at 189; Stapleton v. Superior Court of Los Angeles County, *supra* note 59 at 969; People v. Tarrantino, 45 Cal.2d 590, 290 P.2d 505, 509 (1955).
[94] People v. Tarrantino, *supra* note 93 at 509.
[95] Stapleton v. Superior Court of Los Angeles County, *supra* note 59 at 970.
[96] State *ex rel.* Sadler v. District Court, *supra* note 79 at 1003.
[97] People v. Botts, *supra* note 59 at 416.