THE “SILVER PLATTER” IN THE CONTEXT OF STATE CONSTITUTIONAL ADJUDICATION

Martin McGuinness*

I. INTRODUCTION

A. Background—the “Silver Platter Doctrine”

Almost fifty years ago, a divided United States Supreme Court issued the landmark ruling in Elkins v. United States.1 In Elkins, the majority held that evidence obtained by state officers in violation of the Fourth Amendment could not be introduced against a defendant in a federal criminal trial, notwithstanding the fact that federal agents had not participated in the constitutional violation.2 In issuing its decision, the Court ended the long-term practice known as the “silver platter doctrine,” wherein state agents would procure evidence against a defendant that federal agents would otherwise be unable to obtain themselves because of the limitations enforced against them by the Fourth Amendment and the exclusionary rule.3

Interestingly, the “silver platter doctrine” (although not the phrase)4 arose in response to another landmark case, Weeks v. United States,5 decided by the Court almost fifty years before Elkins. In Weeks, the Court held that evidence obtained by federal officials in violation of the Fourth Amendment cannot be used against a defendant in a federal criminal proceeding.6 In deciding

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2 Id. at 208.
3 Id.
5 232 U.S. 383 (1914).
6 Id. at 398.
as such, the Court established what in legal terminology became known as the “exclusionary rule,” denoted as such because it requires the exclusion of illegally obtained evidence. Also at issue in *Weeks*, however, was evidence obtained by state officials in violation of the Fourth Amendment. With regard to that particular evidence, the Court took a different view and decided that because (at the time) the Fourth Amendment was not enforceable against the states, evidence seized by state agents in violation of it did not have to be excluded from a federal criminal proceeding.7

The written portion of the *Weeks* decision that deals with the evidence obtained by state officials is minor in comparison to the portion establishing the “exclusionary rule” for federal officials. In spite of such brevity, however, the Court’s analysis on that issue had a major impact on federal constitutional jurisprudence. By disallowing the admission of evidence obtained unconstitutionally by federal officials while providing for the admission of such evidence if it were obtained by state officials, the Court created incentive for federal officials to look to state officials to obtain evidence that would otherwise be inadmissible. Federal officials took due notice of this incentive, and their subsequent collusion with state officials over the next few decades led directly to the Court’s decision in *Elkins*.

B. State Constitutional Issues

While the “silver platter doctrine” in the Federal Constitutional context may have rusted in light of *Elkins* and the Court’s landmark decision one year later in *Mapp v. Ohio*,8 there are similar evidentiary situations that are very important in the context of state constitutional adjudication. In this paper, I will be examining cases which present what I feel to be the most important of these situations—those in which a federal prosecution is seeking to admit evidence seized by federal or state officials in violation of the

7 *Id.* (explaining that “the Fourth Amendment is not directed to individual misconduct of such [state] officials”).
8 367 U.S. 643, 654–55 (1961) (reaffirming that Fourth Amendment protections are enforceable against the states through the Fourteenth Amendment and further requiring the states to exclude illegally obtained evidence in a state trial), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949). I cite *Mapp* here because although *Elkins* previously eliminated the admissibility of evidence seized by state agents in violation of the Fourth Amendment in a federal trial, it was not until *Mapp* that the Fourth Amendment itself actually became enforceable against the states.
constitution of the state where it was obtained.\footnote{The phrase “in violation of the constitution of the state” means simply that if the prosecuting jurisdiction was the state where the evidence was seized, as opposed to a federal criminal court, the evidence would be inadmissible because the seizure was illegal under the particular state’s law or constitution.}

The reason I find this evidentiary scenario to be the most prominent in terms of state constitutional adjudication is essentially two-fold. First, states cannot violate the Federal Constitution and provide fewer constitutional protections than granted federally.\footnote{\textit{See, e.g.}, \textit{Mapp}, 367 U.S. at 655 (explaining that “the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth . . . by the same sanction of exclusion as is used against the Federal Government“) (emphasis added).} States may, however, choose to provide those inside their geographical confines with more protection than provided federally, as long as this too does not violate the Federal Constitution in some manner. Second, many state constitutions actually do provide more protection than the Federal Constitution in a variety of areas.\footnote{\textit{See, e.g.}, \textit{Iowa v. Cline}, 617 N.W.2d 277, 290 (Iowa 2000) (rejecting the Supreme Court’s “good faith” exception to the exclusionary rule because it “only encourage[s] lax practices by government officials in all three branches of government”); \textit{Commonwealth v. Blood}, 507 N.E.2d 1029, 1036 n.13 (Mass. 1987) (criticizing the Supreme Court’s interpretation of Fourth Amendment rights in \textit{United States v. White}, 401 U.S. 745 (1971) as “a topsy-turvy one in which the paranoid’s delusory watchfulness is the stance held ‘reasonable’”); \textit{People v. Scott}, 593 N.E.2d 1328, 1335 (N.Y. 1992) (rejecting the Supreme Court’s “open fields” analysis used in \textit{Oliver v. United States}, 466 U.S. 170, 173 (1984) and finding that New York citizens are “entitled to more protection”).}

The ability to provide more protection results in situations where federal or state officers may be operating within a state in a manner that is consistent with the Federal Constitution or federal law, but wholly in violation of the particular state’s law or constitution. Indeed, this is a common situation which has resulted in a significant amount of litigation in the federal courts.

With each case discussed, I will be analyzing how the court decided the admissibility issue, as well as its reasoning for deciding as such. It is irrelevant to the analysis whether the particular court chose to exclude or admit the evidence, and cases with both outcomes will be examined. The purpose of this is to provide an overview of the arguments courts use to either justify the admission of the evidence, or require the exclusion of the evidence. After arguments and cases on both sides have been discussed, I will attempt to apply their reasoning to a contemporary example that is currently unfolding in New York and predict how and why a federal court in New York will decide the issue.
II. THE CASES

A. Holding—The Evidence is Admissible

The first type of case to be examined is where the federal court held that evidence seized in violation of a particular state’s constitution is admissible in a federal criminal trial. One such case is United States v. Hall,\(^\text{12}\) a Ninth Circuit case where the court was confronted with a situation in which federal officers had obtained information via a wiretap that was in complete compliance with federal law, but that was in fact prohibited under an existing California law making such wiretaps illegal.\(^\text{13}\) The federal agents provided the information to state agents who, pursuant to which, illegally obtained evidence from the defendant.\(^\text{14}\) The state agents then gave the evidence to the federal agents who subsequently introduced it at trial.\(^\text{15}\) The reason the state agents turned the evidence over to federal officials was because they realized it was obtained in violation of state law, making it inadmissible in a California trial.\(^\text{16}\)

On appeal, the defendant argued that the evidence obtained by the state agents pursuant to the federally obtained information was inadmissible because under California law the federal wiretap was prohibited.\(^\text{17}\) The court held that although the wiretap and any subsequent seizure of evidence pursuant to it was illegal under California law, such evidence was properly admitted in federal court.\(^\text{18}\) In deciding as such the court found that the exclusionary rule in a federal case does not apply to violations of state law. Rather, it held that the exclusionary rule in federal cases is applicable only to those situations where a federal constitutional right or law has been violated. Therefore, because only the defendant’s state rights had been violated, it was not error to admit

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\(^\text{12}\) 543 F.2d 1229 (9th Cir. 1976).
\(^\text{13}\) Id. at 1231.
\(^\text{14}\) Id. at 1235 (noting that the subsequent arrest and search of the defendant by state agents were also violations of California state law because they stemmed from the illegal wiretap).
\(^\text{15}\) Id. at 1231.
\(^\text{16}\) Id. at 1238 (Koelsch, J., dissenting) (noting that because the “heroin would have been inadmissible in a state prosecution, they turned it over to the federal agents who ultimately used it to obtain Hall’s indictment and conviction”) (citations omitted).
\(^\text{17}\) Id. at 1231.
\(^\text{18}\) Id. at 1235.
the evidence against him.

Nor, as our previous discussion has indicated, have we found exclusion of the wiretap evidence to be required by federal law. In the absence of any federal violation, therefore, we are not required to exclude the challenged material; the bounds of admissibility of evidence for federal courts are not ordinarily subject to determination by the states.¹⁹

The above case illustrates an interesting scenario. A defendant’s state rights were violated in the state by both federal and state agents, resulting in the obtainment of inculpatory evidence. In spite of these violations, however, the court chose to admit the evidence. The reasoning used by the court to support inclusion is essentially that where a prosecution is federal, only a defendant’s federal rights cannot be violated. If a defendant’s federal rights are not violated, the exclusionary rule does not apply because it is only aimed at protecting federal rights. In other words, a state’s attempt to provide those within its boundaries with greater protections than granted federally is entirely irrelevant if the case is federal.

The potential this reasoning creates for abuse by state agents is profound. If state agents cannot legally obtain evidence under the state constitution, but can under the Federal Constitution, they have incentive to violate the state constitution and seize the evidence anyway. The incentive arises from the fact that the evidence can still legally be used against the defendant, except at a federal trial instead of a state one. The situation in Hall denotes this nicely. It is probable that the state agents knew the search was illegal when they conducted it.²⁰ It made no difference, however, because they were able to turn over the seized evidence to federal officials for proper use in a federal trial. By admitting the evidence, the court is inviting state agents to violate their own constitutions. A few Circuit Courts that have addressed similar cases have conjured counterarguments to this point that are at best questionable.²¹

Furthermore, the reasoning encourages federal agents to

¹⁹ Id.
²⁰ Id. at 1237–38 (Koelsch, J., dissenting).
²¹ See, e.g., United States v. Pfozzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (explaining that federal prosecutors should be presumed to be operating in good faith); United States v. Clyburn, 24 F.3d 613, 616 (4th Cir. 1994) ("[A]ny contention that state officials may use a federal prosecution to evade [state] requirements . . . neglects the fact that the conduct of state officials remains subject to the safeguards of the Fourth Amendment. . . .") (emphasis added).
disregard state law. In this case, the California wiretap law was on the books at the time the federal agents engaged in the wiretapping.22 The federal wiretap, therefore, was in direct violation of California state law. By allowing for the admission of evidence resulting from the wiretap, the court sanctioned the federal agent’s illegal state conduct. In fact, one may wish to question when the federal agents actually became aware that their wiretap was against California law. If they possessed that knowledge at the time the tap was placed, the court’s holding encourages federal agents to consciously ignore state laws. If they didn’t possess the knowledge, the court’s holding encourages federal agents to remain ignorant of state laws. Neither is a desirable alternative. Interestingly, the Ninth Circuit may have limited its holding in Hall in a case decided six years later, United States v. Henderson.23

B. Holding—The Evidence is Inadmissible

A case with facts similar to Hall, but with the opposite outcome, is United States v. Garcia,24 a Fifth Circuit case decided roughly five years after Hall. In Garcia, the court was confronted with a scenario where three defendants were arrested for a federal crime by state agents in a manner that was illegal under state law.25 The court found that because the arrests were illegal under state law, the evidence obtained pursuant to the arrests should have been excluded at trial.26 In reasoning as such, the court held that even in federal cases, the legality of the arrest should be judged according to the standards of the relevant state, as long as those standards do not violate the Federal Constitution.27 As the court found that the arrests violated state law, it did not address whether the arrest met federal standards.28

Unlike Hall, upon finding a violation of state law, the court here

22 See Hall, 543 F.2d at 1231.
23 721 F.2d 662, 665 (9th Cir. 1983) (per curiam) (dictum) (“We think there is much to be said for the argument that federal courts should, in the interest of comity, defer to a state’s more stringent exclusionary rule with respect to evidence [illegally] secured without federal involvement. . . . [W]e conclude that this is a question we need not reach.”).
24 676 F.2d 1086 (5th Cir. 1982), vacated, 462 U.S. 1127 (1982).
25 Id. at 1094 (explaining that “[b]ecause the stop and arrests by the game warden were not based on actual or suspected gaming law violations” they were illegal under Texas law).
26 Id.
27 Id. at 1089.
28 Id. at 1095 n.27.
excluded the evidence from a federal prosecution. We cannot say with certainty what the Court would have done were the evidence obtained in violation of state law by federal officials, as there were no federal officials involved in the case. One can make an educated guess, however, that if the court thinks the governing standard for arrests in a federal prosecution is that of the state, then it should make little difference if the arresting officer was federal. What is clear from Garcia is that when state agents are involved in an arrest that is illegal under the state’s law or constitution, the Fifth Circuit is not willing overlook the violation merely because the prosecution is federal. To expound on this fact, one need only look at the cases the court cites to support its position, every single one of which is another Fifth Circuit case.29 Upon examination of those cases, however, it is apparent that the support originates from a 1963 Supreme Court decision, Ker v. California.30

Interestingly, the court’s judgment in Garcia was vacated by the Supreme Court,31 and remanded with instructions to reconsider in light of another 1982 Supreme Court decision, United States v. Ross.32 The Supreme Court’s opinion in Ross, however, mentions nothing about unlawful arrests or evidence seized by agents in violation of state law for use in a federal prosecution.33 This is something that the Fifth Circuit noted with much confusion on remand, as the state law violation was the primary issue of the original case.

We can make nothing of the Court’s remand of this cause for reconsideration in Ross’s light unless it be an indication that our former disposition took it up by the wrong end; that our focus should be upon the constitutional question rather than upon the arresting state officers’ powers.34 Furthermore, the majority opinion issued on remand limited the

29 Id. at 1089.
30 374 U.S. 23, 34 (1963) (finding that states are not prohibited from establishing their own rules governing arrests as long as they “do not violate the constitutional proscription of unreasonable searches and seizures”).
32 456 U.S. 798, 825 (1982) (holding that the “automobile exception” of the Fourth Amendment’s requirement for search warrants extends to “every part of the vehicle and its contents that may conceal the object of the search”).
33 Perhaps the reason for this is because the search and seizure issue in the case derived from the conduct of District of Columbia police officers, whose governing constitution is only the Federal Constitution. See id. at 800.
district court to reexamining only the constitutionality of the search and not the legality of the arrest. This motivated one judge on the court to issue an impassioned dissent.\textsuperscript{35}

All emotions aside, it is unclear whether the Supreme Court invalidated the Fifth Circuit’s original holding that evidence obtained pursuant to arrests by state agents in violation of state law is inadmissible in a federal trial. Other U.S. Courts of Appeals have also addressed the admissibility, in a federal criminal trial, of evidence obtained in violation of a state law or constitution. All of the courts have held, just as the Ninth Circuit in \textit{Hall}, that the evidence is admissible.\textsuperscript{36} Now that we have covered the basic arguments governing the admissibility of evidence in such situations, it is time to turn our attention to a current situation which seems ripe for litigation in this regard.

### III. A CONTEMPORARY EXAMPLE IN NEW YORK

#### A. Background Facts—Operation Community Shield

Recently, on Long Island, there was a federal immigrations sweep that was part of a nationwide immigration enforcement endeavor,
Operation Community Shield, the purpose of which is to “singl[e] out violent [Hispanic] gang members for deportation.” In both Nassau and Suffolk counties, the sweep resulted in the arrests of 186 Hispanic men. In the Suffolk County town of Greenport alone there were eleven arrests. On the surface, the operation is aimed at the noble cause of ridding communities of illegal immigrants who are gang members, and the numbers of arrests seem to indicate its success in that regard. Beneath the surface, however, there are many problematic areas that make the sweep a ripe source of litigation in the context of state constitutional adjudication.

While the number of arrests may be high, most of the arrests were of men who had absolutely no gang affiliations. In Greenport, for example, only one out of the eleven men arrested was actually suspected of gang-related activities. The ten other men who were arrested had no criminal records, and were known in the community “as good workers and family men.” Some men were arrested by federal agents while they were in bed sleeping with their wives, fiancées, and children. In fact, throughout the sweep, there were even armed raids conducted on the wrong homes, such as that of James Berry, a U.S. citizen and Greenport firefighter.

It is not these disturbing facts, however, that are of concern here. What is of concern is that the arrests were conducted without warrants. Furthermore, a recurring theme throughout the operation was that if a Hispanic person, or a person appearing to be Hispanic, opened the door when the federal agents knocked, the agents would gain entry into the home and arrest any Hispanic men inside who could not produce proper immigration documents. This was true regardless of whether the person who opened the door was suspected of being the person whom the agents were actually looking for, or whether the targeted person actually even still lived at the address. With these facts in mind, it is necessary to evaluate the constitutionality of the arrests under New York law.

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38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
and its state constitutional standards.

B. The New York Standard—People v. De Bour

The standard governing police initiated inquiries in New York is set forth in the Court of Appeals decision of People v. De Bour.47 In De Bour, the Court held that police must possess an “articulable reason,” not necessarily related to criminality, to justify approaching a person for the purpose of requesting information.48 If the police have an articulable reason for requesting information from a person, they may approach that person for the purpose of doing so.49 It naturally follows that if the police do not possess such a reason, they may not approach the person and request information from them. The purpose of requiring police to possess an articulable reason is to prevent police from approaching people capriciously.50

It is helpful to view the right of an officer to approach and request information as the first part of a three or four tiered framework governing the conduct of police in New York.51 The relevant subsequent tiers are, respectively, where the police reasonably suspect that a person has engaged in criminal conduct they may stop and detain the person for the purpose of conducting a weapons frisk, and finally, where the police have probable cause to believe a person has committed a crime they may arrest that person.52 Furthermore, another important and relevant principle of De Bour is that where there is no articulable reason justifying the initial police encounter, the police may not subsequently establish reasonable suspicion or probable cause through that encounter.53

C. De Bour Applied to Operation Community Shield

Applying the De Bour requirements governing police activity it becomes clear that as a matter of New York law, the federal agents’ conduct throughout the immigration sweep on Long Island was

48 Id.
49 Id.
51 Id. (finding that De Bour established a “four-tiered analytical framework” governing the right of police to initiate encounters).
52 Id.
53 See id. at 333 (holding that an initially invalid “police encounter cannot be validated by a later-acquired suspicion”) (citation omitted).
illegal. There are several factors which lead to this conclusion. It appears from the facts that the federal agents acted in concert with local police on Long Island in obtaining the names and addresses of suspected gang members or associates.\textsuperscript{54} Essentially, the federal and local agents would compare their respective lists of suspected gang members in a particular area.\textsuperscript{55} Whichever names were common to both lists were then entered into a general database which provided addresses associated with the name.\textsuperscript{56} These addresses were the ones that were eventually visited by the federal agents.\textsuperscript{57}

Once the agents visited the addresses, \textit{De Bour} was triggered because it was a police initiated encounter, the purpose of which was to gather information. The first question one must ask is whether the agents, at the outset, had an articulable reason for visiting these addresses. The answer to this question depends on whether the presence of the names on local and federal databases of suspected gang members amounts to an articulable reason. In my opinion, the answer is most likely that it does not.

First of all, there is no legal definition of a criminal street gang.\textsuperscript{58} It is probable, therefore, that there is no specific and consistent criteria for which one is placed on the local and federal lists of suspected gang associates. For instance, the local police detective in Greenport who provided names of suspected gang associates to the federal agents indicated only that “he knows the signs of gang participation.”\textsuperscript{59} Some of the signs of gang participation include the clothes that the person wears, any tattoos that they have, or whether they keep the company of other suspected gang members.\textsuperscript{60}

It is clear, therefore, that the police exercise an enormous amount of discretion in deciding who is placed on the list. In fact, it is not even necessary that the person be suspected of committing an actual crime.\textsuperscript{61} Indeed, many of the addresses visited by the federal agents were associated with men who were not suspected of any crimes, and had no criminal records.\textsuperscript{62} While the articulable reason

\textsuperscript{54} Bernstein, \textit{supra} note 37, at 41.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} See \textit{id.}
\textsuperscript{62} \textit{Id.}
standard under *De Bour* is a standard lower than that of reasonable suspicion or probable cause, it still is a standard. In my mind, it is doubtful that this standard can be met by something as tenuous as a tattoo or the clothing a person wears. This is especially true where the association between the address and the person often proves to be inaccurate or nonexistent.

Let us assume, for argument’s sake, that the presence of a person’s name on local and federal lists did provide the agents with an articulable reason for visiting the addresses associated with that person. The initial visit would, therefore, be legal under New York law. Once the agents visited the address, however, and learned that the person was never or no longer associated with the address, the articulable reason would cease to exist because it was the address’s association with the person that provided it. With no more articulable reason to provide the basis for requesting information, the agents would naturally be required to end the encounter. That, however, is not what happened during the immigration sweeps on Long Island.

Again, what actually happened is that once the agents ascertained that the person whom they were targeting did not live at the address, they continued to request information from the person at the door and eventually gained entry into the home, arresting any Hispanic person who could not produce proper immigration documents.63 This conduct is exactly the type of capricious police behavior that *De Bour* was meant to curtail. The arrests, therefore, were clearly violations of New York law. This is true even if the agents subsequently gained probable cause to enter the premises and arrest because, again, an initially invalid police encounter cannot be validated by any later acquired probable cause emanating from the encounter.64 The same can be said even if the person who answered the door consented to the agents’ entry into the premises.65

63 Id.

64 This argument is somewhat superfluous because it appears that once the police learned that the targeted person did not live at the address, the sole purpose they continued speaking to the person at the door and gained entry into the premises was that the person appeared to be, or was Hispanic. It is obvious that a person’s ethnicity cannot provide probable cause to believe that the person is an illegal immigrant, and relevant immigration law itself says so. See id.

65 See People v. McIntosh, 755 N.E.2d 329, 334 (N.Y. 2001) (Smith, J., concurring) (citation omitted).
IV. CONCLUSION—THE FEDERAL COURTS’ DILEMMA

We have already established that the arrests of the men during the federal immigration sweep on Long Island were most likely illegal under governing New York law. Assuming the arrests were legal under federal law, a federal court will be confronted with the same situation that the courts in *Hall* and *Garcia* were confronted with. The arrests of the men were conducted in a manner that was constitutional under the federal constitution, but unconstitutional in the state where the arrests were actually made. If the court decides that because it is a federal proceeding only federal law is applicable, then the evidence of the person’s illegal status in the country will be admitted and he will be deported. If the court decides that state law is the relevant law governing arrests, then the person’s illegal status will not be admissible and he will not be deported.

Recall that in *Garcia* the illegal arrests were made by agents of the state itself, and not by federal officials. It was previously discussed what the court would have done were the arresting agents, who engaged in the illegal arrests, federal agents as opposed to state agents. It was my conclusion that because the Court’s reasoning rested on the fact that state law was the relevant law governing arrests, then it would be irrelevant to the analysis whether or not the illegal arrest was by federal agents. If the federal court in New York adopts this reasoning then the evidence of the men’s illegal status in the country will be inadmissible evidence.

It is also possible, however, that the court will take the view of most of the Circuit Courts and that of *Hall*. Again, under the *Hall* line of reasoning, the federal exclusionary rule serves as a remedy only for violations of a person’s federal rights. It is not a remedy aimed at violations of a person’s state rights, and while a state’s attempt to provide greater rights is permissible under our federalist system, it is irrelevant to any federal case. Therefore, because the arrests here were federally constitutional, it would not matter to the court if they violated New York law because the case is federal. In the end, I am not sure how the federal court in New York will resolve the issue. I would like to believe that it will resolve it as the

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66 See supra Part II.B.
67 See supra Part II.A.
court in *Garcia*, especially in light of the fact that federal agents used a person’s Hispanic ethnicity as justification for invading their home.