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Constitutional Law--Fourth Amendment Protection against Unreasonable Searches and Seizures Extended to Aliens on Foreign Soil

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judges are no more capable of appraising human motivations than is the legislature, and because the statute applies equally to all guests, it does not discriminate invidiously and the court should not invade the province of the legislature.

The Supreme Court of Iowa in *Keasling v. Thompson* summarily dismissed the equal protection arguments against the Iowa guest statute in finding that "If *Silver v. Silver* . . . is to be reversed we must acknowledge the Supreme Court's exclusive right to do so."[26] Under the ruling of *Keasling* the proper remedy for the injured guest is with the legislature.

Due to the adoption of the significant relationship rule in *Brickner v. Gooden*, Oklahoma residents who are injured guests have a greater chance of recovery in the Oklahoma courts, but their opportunity to sue is by no means absolute. A foreign guest statute may yet defeat recovery if an Oklahoma court finds that with respect to the particular issue the foreign state had the most significant relationship to the occurrence and the parties. The only solution which will produce uniformity in this area is for the states which have guest statutes to repeal them or to follow the direction of the *Thompson* court and declare them unconstitutional.

It appears likely that state courts will continue to split in accepting or rejecting the *Thompson* rationale. Oklahoma courts can prevent the unequal consequences of these foreign statutes only by ruling that the forum state has the most significant relationship to the parties and applying the law of Oklahoma in all guest litigation.

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CONSTITUTIONAL LAW—FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES EXTENDED TO ALIENS ON FOREIGN SOIL. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

A tale of international intrigue involving kidnapping and torture has resulted in a significant decision by the United States Court of Appeals for the Second Circuit against illegal searches and seizures by

26. — Iowa —, —, 217 N.W.2d 687, 692 (1974).

agents of the United States in foreign countries.[1] Francisco Toscanino alleged that he had been kidnapped in Uruguay, tortured for over two weeks in Brazil and ultimately brought to the United States where he was convicted in the Eastern District of New York for conspiracy to smuggle heroin into the United States.

Without questioning the sufficiency of the evidence or making any claim of error with respect to the trial itself, Toscanino offered to prove that he had been abducted and brought under the jurisdiction of the United States in violation of the laws of Uruguay, Brazil and the United States. Toscanino, an Italian citizen residing in Uruguay, contended that he had been lured from his home in Montevideo by a telephone call from a Uruguayan policeman who had been bribed by American agents. He was then knocked unconscious with a gun and thrown into the car of the policeman and driven by a circuitous route to the Brazilian border where he was turned over to Brazilian-American agents. Once in Brazil, Toscanino claimed to have been tortured and interrogated for seventeen days. The methods employed by his captors were said to have included deprivation of food and sleep, electrical shocks to sensitive areas of the body, beatings, and injections of harsh chemicals into the nasal and anal passages.

Finally, Toscanino was taken to Rio de Janeiro where he was drugged and placed on a flight to the United States accompanied by American agents. He alleged that during the entire period of his ordeal that the United States Attorney for the Eastern District of New York (and the prosecutor of his case) received regular reports of the progress of the interrogation. Toscanino also contended that he had been the victim of illegal wiretaps prior to his abduction from Uruguay and that this activity was evidenced by the subsequent arrest in Uruguay of the telephone company employee who had been bribed by American agents.

The United States Attorney for the Eastern District of New York neither affirmed nor denied the allegations and the district court denied Toscanino's motion for an order vacating the verdict and ordering his return to Uruguay. The lower court relied principally on the United States Supreme Court decisions of *Frisbee v. Collins*[2] and *Ker v. Illinois*,[3] both holding that the illegal abductions which brought the de-

1. 500 F.2d 267 (1974).
2. 342 U.S. 519 (1952).
3. 119 U.S. 436 (1886).

fendants within the respective jurisdictions of Michigan and Illinois were immaterial to the disposition of the cases.

The court of appeals reversed the district court's decision and remanded for a hearing in which the government will be required to respond to Toscanino's allegations. Judge Mansfield, writing the majority opinion, acknowledged the *Ker-Frisbee* rule, but held that subsequent decisions by the Supreme Court have undermined it and expanded the interpretation of "due process."

> No longer is [due process] limited to the guarantee of fair procedure at trial. In an effort to deter police misconduct, the term has been expanded to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial.[4]

As support for this broadened interpretation of due process, Judge Mansfield cited *Rochin v. California*,[5] a case decided during the same term as *Frisbee*. In *Rochin* the Court reversed a conviction for narcotics possession obtained after agents, by the forceful induction of an emetic solution, had caused the defendant to vomit up the morphine capsules which he had swallowed. Justice Frankfurter, speaking for the majority, stated that:

> Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'[6]

The landmark decision of *Mapp v. Ohio*,[7] wherein the exclusionary rule was held applicable to state prosecutions, provided, in Judge Mansfield's opinion, further weakening of the *Ker-Frisbee* doctrine. That rule, he said, represented a device created by the courts to ". . . deter disregard for constitutional prohibitions and give substance to constitutional rights."[8] The Court of Appeals for the Third Circuit has also expressed similar reservations about the continued validity of *Ker-*

4. 500 F.2d at 272. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). *See also* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 600 (1968).

5. 342 U.S. 165 (1952).

6. *Id.* at 169.

7. 367 U.S. 643 (1961).

8. 500 F.2d at 273.

Frisbee in *Government of Virgin Islands v. Ortiz*[9] because it "condones illegal police conduct".[10]

Judge Mansfield was unable to reconcile these subsequent cases and their expansion of due process which has denied to the government the fruits of deliberate pretrial illegality with the *Ker-Frisbee* rule. If Toscanino's allegations were proven to be true, then only by returning him to his *status quo ante* (i.e., returning him to Uruguay) could the requirements of the fourth amendment and fundamental fairness be met. In other words, the majority felt that courts must simply divest themselves of jurisdiction over defendants whose presence has been secured by illegal conduct.

The existence of an extradition treaty[11] between the United States and Uruguay under which Toscanino's surrender may have been legally effected made the narcotics agents' conduct even more reprehensible to the court. Judge Mansfield relied upon this treaty to distinguish this case and *United States v. Cotten*,[12] wherein the Court of Appeals for the Ninth Circuit adhered to *Ker* and *Frisbee* in affirming convictions of defendants who had been forcibly taken from Viet Nam to stand trial in the United States. The United States did not have an extradition treaty with the Republic of Viet Nam and Judge Mansfield disposed of *Cotten* by concluding: "Thus the transportation of the appellants to the United States did not violate international law or an international treaty."

The most remarkable portion of the majority's opinion, however, is revealed in the discussion of the allegation of illegal wiretapping of Toscanino's home in Montevideo. Although agreeing with the government that the statute governing wiretapping[13] had no application in a foreign country, the court held that an alien on foreign soil was entitled to the protection of the United States Constitution when he is the victim of unlawful conduct by United States government agents. Though necessarily implied from the early portion of the opinion, the court here expressly held that:

> No sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit

9. 427 F.2d 1043 (3d Cir. 1970).
10. *Id.* at 1045 n.2.
11. 35 Stat. 2028 (1908).
12. 471 F.2d 744 (9th Cir. 1973).
13. 18 U.S.C. § 2510 et seq.

> the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States.[14]

It has long been held that an alien within the jurisdiction of the United States is entitled to constitutional guarantees,[15] as are Americans on foreign soil when dealing with the United States government.[16] Here, however, as was said by Judge Mulligan, who dissented from the court's refusal to reconsider the case, the original decision ". . . holds, for the first time and without any discernible authority, that the Fourth Amendment protects a foreign national while residing on alien soil against 'unlawful searches and seizures.' "[17]

The court of appeals' holding is conceptually interesting. One would think that the term "unconstitutional" appears by definition to be describing a force of some sort (a statute or police action, for example) working to deprive a person protected by the Constitution of some right guaranteed by it. Here, however, the Second Circuit holds in effect that one can be acting unconstitutionally toward another who heretofore had not been entitled to the protection of the Constitution.

Clearly, conduct such as that alleged should be deterred by our courts by refusing to the government the opportunity to exploit its fruits. Perhaps, however, the Second Circuit should not have gone so far as to extend constitutional protection to aliens in foreign countries. Although similar rights for the citizens of the world are to be desired, the practical effect of such a holding is to make international fugitives immune from prosecution for federal crimes in United States courts unless United States Constitutional criminal procedure is followed by federal agents in the country where they are apprehended.[18] Most would agree that the procedural safeguards which the American agent could personally extend to the subject of the investigation should be extended (e.g., *Miranda* warning). However, when the legal system of a foreign country does not afford a method by which American agents can com-

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14. 500 F.2d at 280.

15. Au Yi Lau v. United States Immigration and Naturalization Service, 445 F.2d 217, *cert. denied*, 404 U.S. 864 (1971).

16. Reid v. Covert, 354 U.S. 1 (1957).

17. Wall Street Journal, Oct. 16, 1974 at 2, col. 1.

18. As Judge Mansfield implied, the "silver platter" doctrine is still in effect with regard to evidence obtained by foreign officials:

> The Constitution, of course, applies only to the conduct abroad of agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country. [Citations omitted]. Whether or not United States officials are substantially involved, or foreigners are acting as their agents or employees, is a question of fact to be resolved in each case.

500 F.2d at 280 n.9.

ply with the more technical procedural requirements of the United States, then perhaps our courts should be more reluctant to exclude evidence obtained in the foreign country.

Judge Mansfield apparently relied upon the First Circuit decision of *Best v. United States*[19] as support for his statement that, "It is no answer to argue that the foreign country which is the situs of the search does not afford a procedure for issuance of a warrant."[20] The *Best* decision, however, indicated only that constitutional rights cannot be suspended in a foreign country *when the United States is governing that country* (in this case, occupied Austria). Thus, even though United States citizens may not necessarily be assured of *all* procedural protections when in a country where no equivalent legal machinery exists, Judge Mansfield's interpretation of *Best* and his generosity with Constitutional rights would insure such protection for aliens.[21]

Judge Anderson, concurring in the result, would not have based the decision upon such broad grounds:

> [T]his court need not hold that the Bill of Rights has extraterritorial application for foreign nationals. Defendant could show that he was carried into this jurisdiction in violation of the Fourth Amendment, but the Government need not comply with the Fourth Amendment or the United States wiretap laws in foreign jurisdictions. To hold otherwise would be novel and would make unreasonable demands on our foreign agents, who by following the laws of the country in which they are staying could at the same time find themselves in defiance of United States constitutional safeguards.[22]

The court could have easily achieved the same result without an express holding that aliens are protected by the Constitution simply by refusing to take jurisdiction when (1) the actions of the American agents violate the laws of the country where the accused is apprehended, or (2) by declaring the Federal court system will not be demeaned by exercising jurisdiction when sufficiently improper conduct by American agents is involved. The majority, however, appeared to derive moral support for its reasoning from the dissenting opinion of

19. 184 F.2d 131, 138 (1st Cir.), *cert. denied*, 340 U.S. 939 (1950).

20. 500 F.2d at 280.

21. The opinion is silent as to the possible ramifications of such a holding. For example, do the constitutional guarantees only attach when the alien is the object of an investigation by federal agents and do they disappear when the investigation is dropped? Would an alien later have a cause of action against federal agents for violating his constitutional rights?

22. *Id.* at 281.