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SEASONABLE PROTESTS AGAINST UNREASONABLE SEARCHES AND SEIZURES

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The desirability of excluding unreasonable seized evidence, from the trial of one whose Fourth Amendment rights have been violated, has created and maintained a sharp divergence of opinion among courts and commentators. Substantively, the federal courts have long professed to accept the views of the “exclusionists” such as Justice Holmes and Brandeis, thus nominally rejecting the protests of Dean Wigmore and Justice Cardozo on this point. Procedurally, however, the federal courts have imposed two distinct limitations upon the rule against the admission of evidence procured by an unreasonable search and seizure.

The first such procedural limitation exists in the unusually restrictive application of the familiar doctrine of standing to raise a constitutional issue. This limitation has been described elsewhere.¹

The second procedural limitation arises from the unusually restrictive application of the equally familiar doctrine that constitutional issues must be asserted seasonably or they will not be considered upon review by the Supreme Court. It is the purpose of this article to analyze and describe this second procedural limitation upon the only effective remedy for unreasonable searches and seizures.

The General Requirement of Seasonable Assertion of Constitutional Issues. Resting largely upon the theory that it should not examine and rule upon a constitutional issue where the lower court has had an inadequate opportunity to determine that issue, the Supreme Court has repeatedly held that an appellant who seeks review of such an issue must be able to show that it was raised at the earliest practicable moment.²

In its application to Supreme Court review of state court decisions, this doctrine has been invoked with rigidity and even unrealistic harshness.³ The constitutional issue must be presented in the state courts,⁴ and it cannot be raised for the first time in the

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³New York v. Kleinert, 268 U. S. 646 (1925); House v. Road Improvement Dist., 266 U. S. 175 (1924).

⁴See, for example, Herndon v. Georgia, 295 U. S. 441 (1935).

⁵Murdock v. Memphis, 20 Wall. 590 (1875); Church v. Kelsey, 121 U. S. 282 (1887).
Supreme Court. If the question is first presented in the petition for review by the Supreme Court, it is too late. The precise moment separating seasonable from tardy invocations of the constitutional issue is a matter controlled by state practice, and thus where that practice limits state supreme court review to questions raised in the trial court, the constitutional issue must be presented in such trial court or it is unavailable throughout the subsequent appellate process.

Where the Supreme Court reviews the decisions of inferior federal courts, however, the requirement of seasonable assertion of constitutional rights has been substantially relaxed except in the Fourth Amendment area. The Court's power of review over state courts "is limited ... to the particular claims duly made below, and denied ...", as distinguished from "the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. ..." For purposes of Supreme Court review of inferior federal courts, the constitutional question is seasonably raised if it is presented in "[m]otions to quash, to instruct the jury to find for the defendant, for new trial, ... in arrest of judgment, ... by ... exception to rulings on the admission or exclusion of evidence, ... [or] instructions given or the refusal of instructions asked. ..." Assertion of the constitutional issue is too late if it first appears in the assignment of errors.

**Application of the Rule in the Fourth Amendment Area.** Thus the general rule is that, for purposes of Supreme Court review of inferior federal courts, a constitutional issue is seasonably raised if it is presented at any time during the trial, but in the Fourth Amendment area this rule is abandoned and seasonable assertion of such rights is interpreted to mean *pre-trial* challenge to the search

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10. Ibid.
and seizure.\textsuperscript{13} Most courts hold that the victim of an unreasonable search and seizure loses his rights under the Fourth Amendment, or its counterpart in state constitutions, if he does not assert them prior to the introduction of the seized evidence in his trial. If he fails to do so and waits until the evidence has been offered, and then for the first time raises the question of the legality of the seizure, he has asserted his rights too late.\textsuperscript{14} In \textit{United States v. Wernecke},\textsuperscript{15} Justice (then Circuit Judge) Minton declared that if seized property was otherwise admissible, "the court will not inquire at the trial for the first time into the legality of the possession by the Government. The validity of the seizure could have been tested in a motion made before the trial for the return of the papers. No such motion was made..." Most federal courts have adopted this view.\textsuperscript{16} The courts seem particularly emphatic about this requirement where the objection is not only made for the first time when the seized evidence is offered at the trial, but it is made "not by formal petition or motion to suppress the evidence or to require the return of the documents, but merely by an objection to the admissibility of the evidence..."\textsuperscript{17} Where two bills of information were issued in the same criminal proceeding, and the defendant seasonably asserted his Fourth Amendment rights by moving to quash the search warrant and exclude the evidence under the first information, he has been held to have lost his rights to exclusion of the evidence by waiting to renew such motion under the second information until the evidence was offered in the trial. Under such circumstances the Court of Appeals for the Ninth Circuit ruled that "No objection..."

\textsuperscript{13} The term "unreasonable search and seizure" is used throughout this article as including both the prohibitions of the Fourth Amendment of the Federal Constitution and the similar provision which is found in each of the forty-eight state constitutions. For an example of the problem in the latter area, see People v. Winn, 324 Ill. 428, 440-441, 155 N. E. 337, 341 (1927), where the court said: "Where it is claimed that evidence against one accused of crime has been obtained by means of an unlawful search... and seizure... the question of such unlawful search and seizure must in general be presented to the court before the trial, if possible."

\textsuperscript{14} Segurola v. United States, 275 U. S. 106 (1927).

\textsuperscript{15} 138 F. 2d 561 (7th Cir. 1943), \textit{cert. denied}, 321 U. S. 771 (1944).

\textsuperscript{16} Id. at 564.

\textsuperscript{17} Patterson v. United States, 31 F. 2d 737 (9th Cir. 1929); Brink v. United States, 60 F. 2d 231 (6th Cir.), \textit{cert. denied}, 287 U. S. 667 (1932); Harkline v. United States, 4 F. 2d 526 (8th Cir. 1925); Souza v. United States, 5 F. 2d 9 (9th Cir. 1925); Rossi v. United States, 6 F. 2d 350 (8th Cir. 1925); Rocchia v. United States, 78 F. 2d 966 (9th Cir. 1935); Durkin v. United States, 62 F. 2d 305 (1st Cir. 1932); Peters v. United States, 97 F. 2d 500 (9th Cir. 1938); Younghblood v. United States, 266 Fed. 795 (8th Cir. 1920); Lyman v. United States, 241 Fed. 945 (9th Cir. 1917); Lum Yan v. United States, 193 Fed. 970 (9th Cir. 1912).

\textsuperscript{18} MacDaniel v. United States, 294 Fed. 769 (6th Cir.), \textit{cert. denied}, 264 U. S. 593 (1924); Cardenti v. United States, 24 F. 2d 782 (9th Cir. 1928).
was made in the proceeding under the new information, nor was the search challenged in the proceeding under the new information, until the still was offered in evidence. This was not timely. . . . \[^{22}\]

Only in the Third Circuit have the federal courts substantially departed from these principles. In United States v. Asendio,\[^{20}\] the defendant did not challenge the constitutionality of the seizure of narcotics evidence until he had moved for a new trial, after a verdict of guilty has been rendered. The trial judge overruled the motion for a new trial, but the Court of Appeals for the Third Circuit held that such ruling was an error despite the fact that the defendant had failed to move for suppression of the evidence before trial, or indeed even when such evidence was offered during the trial. This, of course, permits the defendant to “allow introduction of questionable evidence without objection in the hope that he may succeed on the merits, but with the assurance that if he loses, he may attack such evidence and thereby secure a new trial.”\[^{21}\]

The state courts have been distinctly less uniform in their definitions of the seasonable requirement. Some have adopted the rule of the federal courts by holding that a challenge to the method of procuring the evidence “is ineffectual when raised for the first time when such testimony is offered during the progress of the trial,”\[^{22}\] but most state courts have departed from the federal version of this requirement. Thus it has been held that if the search and seizure challenge is first made when the evidence is offered, it is the duty of the court to hear argument upon the point and pass upon the competency of the evidence before admitting it to jury consideration.\[^{23}\] In Kentucky an objection to the use of evidence procured by an unreasonable search and seizure is seasonable even through it is not made for the first time until all the evidence of both the prosecution and the defense has been presented.\[^{24}\] Indeed, in that jurisdiction, a trial judge commits reversible error if he grants a pre-trial motion to prohibit the introduction of evidence secured by an unreasonable search and seizure.\[^{25}\]

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19. Armstrong v. United States, 16 F. 2d 62, 64 (9th Cir. 1926).
20. 171 F. 2d 122 (3d Cir. 1938).
25. “The action of the trial court in suppressing this evidence, whether it would or would not be competent on the trial, is unauthorized under the practice in this state. The competency of evidence unlawfully acquired . . . cannot be drawn and questioned before it is offered on the trial.” Commonwealth v. Meiner, 196 Ky. 840, 842, 245 S. W. 890, 891 (1922).
As has been indicated, most courts require a pre-trial effort on the part of the victim of an unreasonable search and seizure to assert his rights to suppression and/or return of the evidence so procured. But, for this purpose definitions of what constitutes “pre-trial” action have been unusually restrictive. For example, where the defendant first moves for the suppression of the evidence immediately after the jury is impaneled and sworn or even while the clerk of the court was still impaneling the jury, the motion has been held to be too late on the ground that “the machinery of the court [was] set in motion” and the trial “had in effect begun...” Where an indictment has been returned, and a non-resident defendant was required to give bond to insure his appearance before the trial court, he may challenge the legality of the seizure of evidence to be used against him, and seek its suppression at that time, without violating the seasonable requirement.

Finally, it should be noted that the federal courts will more readily hold that the defendant failed to satisfy the requirement of seasonable assertion of Fourth Amendment rights if he not only waits until the property procured by the unreasonable search and seizure is offered in evidence to interpose his objection, but permits oral testimony concerning the search to precede without objection such offer of the seized property.

**Implied Waiver as a Basis of the Rule**

"Even the constitutional right to move for a return of property illegally seized, and to object to evidence obtained and offered in violation of the Fourth and Fifth Amendments, may be impaired, if not lost, when not seasonably asserted ...", and most federal courts have regarded the defendant's delay in raising the search and seizure point as constituting a waiver of his right to suppression of the evidence.

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26. Cardenti v. United States, 24 F. 2d 782 (9th Cir. 1928).
28. Id. at 660, 194 N. W. at 584.
29. "Promptly upon complying with the condition of his bond, the point was raised, and was not thereafter waived. His appearance was analogous to arrest as of its date, or appearance upon an indictment but newly returned, and it was then not too late to raise the question." Holt v. United States, 42 F. 2d 103, 104-105 (6th Cir. 1930).
30. "Oral evidence obtained from what we assume was an unreasonable search was first admitted without objection. Under such circumstances, the objection taken at the trial came too late." Peters v. United States, 97 F. 2d 500, 502 (9th Cir. 1938); Durkin v. United States, 62 F. 2d 305, 306 (1st Cir. 1932). In the latter case the court said: "Officer Murphy having been permitted to testify to all that took place [at the time of the search and seizure] without objection, and before any question was raised that there had been an unlawful search, it was too late to raise it after the evidence had been admitted."
32. Cardenti v. United States, 24 F. 2d 782 (9th Cir. 1928); Rossini
Defendants Knowledge of Search and Seizure as a Prerequisite of the Rule. As has been noted, most courts require the defendant to seek suppression of the unreasonable seized evidence prior to trial, or he will have lost the power to invoke the exclusionary rule. This factor, plus the choice of the implied waiver concept as the basis for requiring such seasonable assertion of Fourth Amendment rights, makes it apparent that the defendant's knowledge before trial of the existence of the search and seizure is an important factor. In Gouled v. United States, the Supreme Court recognized the injustice of assigning an implied waiver of Fourth Amendment rights to a defendant who had not made a pre-trial effort of the evidence so procured because he did not know of the existence of the search until the time of the trial when the seized papers were offered in evidence. "The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the Government was in possession of the paper, the rule of practice relied upon, that such objection will not be entertained unless made before trial, was obviously inapplicable." Four years later the Court reiterated their view in a unanimous opinion by Justice Butler. Thus under Supreme Court sponsorship the doctrine has developed in federal courts that "where the defendant has no knowledge of the unlawful search and seizure prior to the trial," and therefore has had "no opportunity to present the matter in advance of trial," he will be held to have satisfied the requirement of seasonable petition for suppression of the evidence if he seeks such relief when he first learns that the search has been conducted—i.e. when the government offers property so secured in evidence.

The Collateral Issue Fiction as a Basis of the Rule. The extent to which the judicial requirement of seasonable assertion of the right to suppress unreasonably seized evidence is a manifestation of Wigmorean influence may be demonstrated by the frequency with which the courts rely upon the collateral issue argument to support such a rule. The Supreme Court, in a unanimous opinion by Chief Justice Taft, adopted the view that "the court will not in trying a

v. United States, 6 F. 2d 350 (8th Cir. 1925); Peters v. United States, 97 F. 2d 500 (9th Cir. 1938); MacDaniel v. United States, 294 Fed. 769 (6th Cir.), cert. denied, 264 U. S. 593 (1924).
33. 255 U. S. 298 (1921).
34. Id. at 305.
36. Harkline v. United States, 4 F. 2d 526, 527 (8th Cir. 1925).
38. Durkin v. United States, 62 F. 2d 305 (1st Cir. 1932); Landwirth v. United States, 299 Fed. 281 (3d Cir. 1924).
criminal cause permit a collateral issue to be raised as to the source of competent evidence . . . ," and therefore a defendant having knowledge of the search and seizure before trial must make a pre-trial assertion of his rights to suppression of evidence procured thereby. To allow such defendant to wait until the seized property was offered in evidence, and then assert his objection, would be to "halt the orderly progress of a cause, and consider incidentally a question wholly independent thereof . . . ." Justice Minton, in an opinion written while he was still a member of the Court of Appeals for the Seventh Circuit, endorsed this view. While some state courts have relied upon this collateral issue basis of the rule, the principal criticism of the doctrine has come from a state supreme court. In Youman v. Commonwealth, a state supreme court decision which has had much influence outside the rendering jurisdiction, the collateral issue basis of the requirement of seasonable assertion of Fourth Amendment rights was subjected to effective criticism. "It is a matter of common experience," the court argued, "that in almost every jury trial the court must occasionally stop for a time to pass on the competency of evidence to which objection is made, for the purpose of considering the question raised, and in some cases, as, for example, where a dying declaration is offered in a homicide case and objection is made to its competency, it is the general practice for the court to hear away from the jury the evidence relating to the declaration, for the purpose of determining whether it should be admitted." The force of such contentions will be recognized by anyone familiar with the American law of evidence. For example, in the judicial administration of the hearsay rule, the court necessarily must interrupt the trial to determine whether an offer of hearsay evidence comes within such exceptions as dying declarations, regular

40. Winkle v. United States, 291 Fed. 493, 496 (8th Cir. 1923); Salata v. United States, 286 Fed. 125, 126 (6th Cir. 1923).
41. " . . . the court will not at the trial form and pursue a collateral issue as to the legality of the possession of the defendant's papers by the Government." United States v. Wernecke, 138 F. 2d 561, 564 (7th Cir. 1943), cert. denied, 321 U. S. 771 (1944).
42. People v. Winn, 324 Ill. 428, 155 N. E. 337 (1927); People v. Vulje, 223 Mich. 656, 194 N. W. 582 (1923).
44. Id. at 169-170, 224 S. W. at 867-868.
45. Thurston v. Fritz, 91 Kans. 468, 138 Pac. 625 (1914); Pendleton v. Commonwealth, 131 Va. 676, 109 S. E. 201 (1921).
entries in the course of business,\textsuperscript{47} or any of the other various exceptions to the hearsay rule. Similarly, in the judicial administration of the opinion rule, or the best evidence rule, or any of the rules of privilege, the court may have to interrupt the trial of the principal issue to hear argument, and sometimes receive evidence, in order to determine the applicability of the particular rule of evidence on which rests the objection to its admissibility.

Finally, it should be noted that despite the Supreme Court's endorsement of the collateral issue objection to delayed assertion of the right to suppression of unreasonably seized evidence,\textsuperscript{48} it has ruled that the trial court must consider and decide whether the seizure was unconstitutional even though a motion to return such evidence was denied before trial.\textsuperscript{49}

\textit{Disputed Violation of Search and Seizure Rights as a Prerequisite of the Rule.} Just as the adoption of the implied waiver concept as the basis of requirement of seasonable assertion of Fourth Amendment rights required recognition of an exception where the defendant had no knowledge of the search and seizure prior to the actual trial, so also the collateral issue fiction as a basis for the rule requires recognition of the fact that there may be no dispute over the Fourth Amendment violation which procured the evidence sought to be introduced. The Supreme Court, in a unanimous opinion by Justice Butler, had declared that "where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized..."\textsuperscript{50} Thus where there is nothing in the record to dispute the fact that the evidence was procured by a Fourth Amendment violation, a trial court erred by denying defendant's petition for the return of this property even though such petition was not presented until after the jury was impaneled.\textsuperscript{51}

\textsuperscript{47} Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F. 2d 934 (2d Cir. 1927); Lebrun v. Boston & Me. Ry., 83 N. H. 293, 142 Atl. 128 (1928).

\textsuperscript{48} Segurola v. United States, 275 U. S. 106 (1927).

\textsuperscript{49} "...where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial." Gouled v. United States, 255 U. S. 298, 312-313 (1921).

\textsuperscript{50} Agnello v. United States, 269 U. S. 20, 34 (1925).

\textsuperscript{51} Amos v. United States, 255 U. S. 313 (1921).
fact that the collateral issue objection is inapplicable where the un-
constitutionality of the search and seizure is not disputed has been
recognized by some lower federal courts\(^5\) and by some state courts.\(^3\)

Government "Surprise" as a Basis of the Rule. Of all the rea-
sons assigned for the insistence upon seasonable assertion of the
right to suppress unreasonably seized evidence, the most indef-
defensible is that to hold otherwise might unfairly surprise the pro-
secution at the trial. Thus one encounters the argument that "had the
government been advised of this objection by a seasonal and timely
application, followed by an order from which it did not desire to
appeal, it might and would otherwise have prepared for trial, and
have procured and had present other evidence fully adequate to
meet the changed situation resulting from a suppression of this
evidence. . . ."\(^4\) One may search in vain for a rational cause of
federal courts' concern with the "embarrassments to the prosecu-
tion and the resulting advantage to defendants"\(^6\) if the defendant is
allowed to make his initial effort to suppress unreasonably seized
evidence at the trial. By the adoption of such a view, the exclusion
rule is materially undercut if not destroyed. That it to say, federal
law enforcement officials may procure evidence in violation of the
Fourth Amendment, await the opening of the trial to see if the
victim of the search will move to suppress the evidence, and if no
such motion is made, the government is relieved of the responsibili-
ty of securing evidence by constitutional means. On the other hand,
if such a pre-trial objection to the use of the evidence is interposed,
the seasonable assertion requirement means that the government
will always be guaranteed additional time in which to procure evi-
dence by legitimate means. The federal courts have taken the
absurd position that to permit the defendant to wait until the gov-
ernment offers the unreasonably seized evidence at the trial to
interpose his objection would be to afford the victim of such search
and seizure "an opportunity to lay a trap which would prevent the
government from producing other testimony of the offense or suffi-
cient testimony concerning the character and sufficiency of the
search and seizure. . . ."\(^7\) It is submitted that if the federal exclu-
sionary rule is to have any efficacy the government must be put in
the position of assuming that evidence which it procures by an un-

\(^5\) Salata v. United States, 286 Fed. 125 (6th Cir. 1923).
\(^3\) Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920).
\(^4\) MacDaniel v. United States, 294 Fed. 769 (6th Cir.), cert. denid,
264 U. S. 593 (1924).
\(^5\) Cardenti v. United States, 24 F. 2d 782, 783 (9th Cir. 1928).
\(^6\) Rossini v. United States, 6 F. 2d 350, 353 (8th Cir. 1925).
reasonable search and seizure is worthless and of no avail to its prosecution efforts. To hold that the government which has committed a wrong of constitutional proportions must be protected from the victim of such a wrong on the ground that the latter might “surprise and entrap the government”\(^7\) is to demonstrate the extent to which the federal courts have permitted a procedural device to dilute the substantive protection offered by the federal exclusionary rule.

Other Bases of the Rule. A related objection has been expressed in terms of allowing the defendant to gamble on the outcome of the case by delaying his objection to the admissibility of the unreasonably seized evidence. It has been argued that a defendant should not be “permitted to speculate on the outcome of the state’s case, and, after ascertaining that the state’s evidence is of an incriminating nature, then, for the first time, interpose an objection that it was illegally obtained.”\(^8\) Such a contention is unrealistic because both the government which seized the evidence, and the defendant from whom the evidence was taken, know the incriminating nature of such property in advance of the trial. And to argue that the federal exclusionary rule should not permit the defendant “to allow introduction of questionable evidence without objection in the hope that he may succeed on the merits, but with the assurance that if he loses, he may attack such evidence and thereby secure a new trial,”\(^9\) is equally unrealistic. Such argument assumes that the requirement of seasonable assertion of Fourth Amendment rights may be satisfied at any time prior to the verdict, but as has been shown above, such is not the case. Conceding that a defendant should never be allowed to gamble on a verdict, and then interpose an objection not presented to the trial judge, it does not follow that a violation of that principle occurs where he interposes the objection at the time the prosecution offers the unreasonably seized property in evidence.

Finally, it has sometimes been argued that the expense and delay involved in hearing an objection to admissibility of evidence after the trial has begun is adequate to deny that right to the defendant victim of the unreasonable search. The refusal of the courts to

\(^7\) MacDaniel v. United States, 294 Fed. 769 (6th Cir.), cert. denied, 264 U. S. 593 (1924).


"pause or delay the trial to determine how the evidence was procured" has also been subjected to justified criticism.

Conclusions. From the foregoing analysis of the seasonable assertion rule, six conclusions emerge.

First, the Supreme Court strictly adheres to the rule that, in its review of state courts, constitutional issues must be presented in the trial court or be unavailable on review, but, aside from the Fourth Amendment area, the Court has relaxed the application of the rule in review of inferior federal court decisions.

Second, in its review of inferior federal courts in the Fourth Amendment area, however, the Court has applied the rule in an even more restrictive sense than it is applied to state courts in most areas—i.e., seasonable challenge of an unreasonable search and seizure in federal courts means pre-trial challenge.

Third, most state courts, in the interpretation of the state constitutions' provisions on unreasonable searches and seizures, have rejected the federal courts equation of seasonable assertion with pre-trial assertion of such rights.

Fourth, the adoption of an implied waiver theory, as a basis for the requirement of a pre-trial challenge to the search and seizure, has caused the creation of an exception to the rule where the victim of the search had no knowledge thereof prior to the trial.

Fifth, the adoption of the Wigmorean collateral issue theory as a basis for the pre-trial requirement has caused the creation of a further exception to the rule where there is no dispute as to the unconstitutionality of the seizure.

Sixth, the least defensible theory invoked as a basis for the pre-trial requirement is that of "surprising" the very government whose agents committed the violation of the Fourth Amendment.