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# The Pre-Indictment Suppression of Illegally Obtained Confessions

# NOTES

## THE PRE-INDICTMENT SUPPRESSION OF ILLEGALLY OBTAINED CONFESSIONS

A right to seek the pre-indictment suppression of tangible evidence gained from an illegal search and seizure has been generally recognized.[1] Suppression is accomplished by a civil suit to enjoin use of the evidence, or by a "motion" to suppress relying on a broad judicial interpretation of federal Rule 41(e). A later statute established a similar procedure for suppressing wiretap and related evidence[2]—an expansion necessitated by removal of the "tangible" limitation long applied to fourth amendment violations. In 1947, in the case of *In re Fried*, similar expansion was effected by the Second Circuit Court of Appeals for the results of fifth amendment violations, specifically unconstitutionally obtained confessions.[3]

Apparently, few attorneys have followed the lead of Fried's counsel in filing a pre-indictment motion to suppress unconstitutionally obtained confessions. Indeed, the remedy usually is either ignored or receives cursory attention in treatments of the rules of federal criminal procedure, the criminal justice system or criminal defense tactics.[4] In view of the potential benefits of employing the procedure, it deserves more considered attention. This note will examine *In re Fried* and subsequent case law which defines the *Fried* procedure or clarifies the scope of the remedy. Despite the absence of explicit discussion of the procedure in the new proposed federal rules of criminal procedure,[5] the relationship between them and the *Fried* developments will also be discussed. Lastly, the use of the *Fried* remedy as a criminal defense tactic will be considered.

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1. C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 673 (1969) [hereinafter cited as WRIGHT]. This, in turn, codified an existing practice dating at least from Weeks v. United States, 232 U.S. 383 (1914). The rule modified existing case law only in requiring that the motion be made before the court rather than, as permitted under prior practice, the Commissioner. *See also* Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965).

2. 18 U.S.C. § 2518(10)(a) (1970).

3. 161 F.2d 453 (2d Cir.), *cert. denied*, 331 U.S. 858, *cert. dismissed*, 332 U.S. 807 (1947).

4. *E.g.*, WRIGHT § 673 n. 23 and accompanying text. The availability is also sometimes expressly negated, *e.g.*, I A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 224(B) (1967).

5. *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 547, 582-87 *passim*, 628-633 *passim* (1970).

## I. IN RE FRIED

Phillip Fried and others were suspected of possession of a large quantity of stolen crude rubber. A warrant for "knowing possession of goods stolen in foreign commerce" was issued.[6]

The warrant was executed in several places. First, one Neary was arrested on the premises of the "Special Formula Chemical Company" where Fried conducted a rubber cement business. Incident to Neary's arrest, a search was conducted. Neary signed a written waiver of the right to be served with a search warrant as a condition to searching the premises. An investigation of the premises yielded two bales of rubber matching the description of the stolen property. Business records were also examined; some were seized but subsequently returned as innocent goods. Later the same day, FBI agents arrested Fried and another suspect, Birnbaum, at their homes. The evidence indicated that neither was informed of the reasons for his arrest.[7]

At FBI headquarters, the subjects were denied permission to contact their lawyers, none received dinner, and each was separately and intensively interrogated by FBI agents working in shifts.[8] The interrogations continued well into the night, until each began to give "satisfactory answers". All three ultimately signed confessions.[9] Fried's subsequent petition alleged that the agents who arrested him threatened and abused him and that he was reduced to a state of hysteria by the interrogation.[10] The following morning, all three subjects were arraigned before a U.S. Commissioner, where each specifically denied the facts attested in the signed confessions.

Prior to indictment, each petitioned the district court for return of the seized documents and suppression of the confessions, alleging that the confessions were obtained by violating petitioner's rights to prompt arraignment and by other unlawful means.[11] At the hearing, Judge Rifkind dismissed the petitions for the suppression of the confessions as premature.[12] He grounded his conclusion in two factors: first, the lack of precedent for such an application; and second, the practical disadvantage of burdening the court with additional pretrial motions.[13]

6. Application of Fried, 68 F. Supp. 961, 965 (S.D. N.Y. 1946).
7. *In re* Fried, 161 F.2d 453 (2d Cir. 1947).
8. *Id.*
9. *Id.*
10. *Id.* at 457.
11. 68 F. Supp. at 961-62.
12. *Id.* at 961.
13. *Id.* at 962-63.

The prayer for suppression of the tangible evidence was rejected on the merits.[14] On appeal, the second circuit affirmed Rifkind's denial of the motion to suppress the tangible evidence.[15] A majority reversed the trial court's decision as to the confession, holding that confessions shown to be a result of constitutional violations may be suppressed prior to indictment.[16]

*A. Jurisdiction*

Of significance in evaluating *Fried's* continued utility to a criminal defendant is the jurisdictional basis for pre-indictment suppression of unconstitutionally obtained confessions. Although never explicitly identifying the jurisdictional basis on which it decides the issue, the court appears to rely on its general supervisory powers over officers of the court—including United States Attorneys. Judge Frank, who wrote the majority opinion, noted that "the court 'may reach forward' to control the presentation, in a case before it, of evidence acquired through the unlawful conduct of federal officers."[17] This statement recognizes a line of cases reaching back to 1844 in which the court's supervisory jurisdiction has been employed.[18] That the majority in *Fried* reasons by analogy to Rule 41(e) further supports this thesis. Rule 41(e) itself codifies case law-imposed limitations on the use of seized evidence which were grounded in the exercise of the supervisory power.[19]

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14. *Id.* at 965-66.

15. 161 F.2d at 457.

16. *Id.* at 460.

17. *Id.* at 458.

18. The existence of supervisory jurisdiction was first declared by the Supreme Court in Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844): "There is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power, courts would be wholly impotent and useless." Supervisory power has consistently been recognized by federal courts since *Griffin. E.g.*, Rea v. United States, 350 U.S. 214 (1956); Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968); United States v. Paiva, 294 F. Supp. 742 (D. D.C. 1969); *see also* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

19. *See* Foley v. United States, 64 F.2d 1 (5th Cir. 1933); Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 YALE L.J. 590, 595 (1963). In arguing by analogy to Rule 41(e), Judge Frank did not intend that the decision in *Fried* be interpreted as an extension of Rule 41(e) to include confessions. The government had argued that 41(e) rested on a "property right", an element not present with confessions. Noting that 41(e) permitted the suppression of contraband, to which no property right could be said to exist, Frank sought to focus, rather than on the rule itself, on its equitable base.

Learned Hand's "consistency" argument (*see* notes 25-26 *infra* and accompanying text) was not designed to imply that confessions were to be suppressed by the established motion, but that a

Because it is based on the supervisory power, a pre-indictment motion to suppress confessions becomes subject to both legislative intervention in the scope of its exercise[20] and alteration by the Supreme Court.[21]

### *B. Theoretical Bases for Pre-indictment Suppression of Unconstitutionally Obtained Confessions*

The court in *Fried* presents three arguments for exercising its supervisory power to extend prior uses of the pre-indictment motion to suppress. The first two appear in the body of Judge Frank's opinion; the third in that of Judge Learned Hand.

1. *Deterrence*—The first argument is the now familiar one that, if the fruits of official transgression are immediately suppressible, the government will be less inclined to commit such transgressions. As there is a social interest in deterring the illegal practices of federal law enforcement officials in securing coerced confessions, it seems logical that the means used should be as effective as practical in effectuating that value, and that denying to erring officials the use of illegal evidence to obtain an indictment is such a means.[22]

2. *Avoiding wrongful indictment*—An individual clearly has an interest in not being wrongfully indicted. As Judge Frank notes, an individual may be greatly harmed by an indictment alone, even if it never results in a trial.[23]

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motion to suppress an unconstitutionally obtained confession was to be given treatment, in an independent and separate motion, equal to 41(e).

Evidence that the parties to the original action so understood the judges' intention is contained in their briefs on appeal. *See* Petitioner's Brief for Certiorari, United States v. Fried, 331 U.S. 803 (1947); Respondent's Brief in Opposition to Certiorari, United States v. Fried, 331 U.S. 803 (1947).

20. *Compare cf.* Mallory v. United States, 354 U.S. 449 (1957), *with* 18 U.S.C. § 3501 (c) (1969).

21. *See* discussion *infra* of the proposed amendments to the Federal Rules of Criminal Procedure.

22. Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputation. That discretion is almost completely unfettered. It should surely not extend so far as to preclude judicial interference with a prosecutor's whim to induce an indictment by offering to a grand jury evidence which is the product of illegal acts of federal officers.

* * *

Until such miserable behavior is stamped out, it will remain an empty boast that we have, and that we respect, a Constitution which guarantees civil liberties, and blocks representatives of government from lawless incursions on the rights of the individual.

161 F.2d at 459.

23. In our democratic society, only a hardened cynic will assert that to convict an innocent man, through mistaken fact-finding induced by his coerced confession, should be a matter of

3. *Consistency*—Judge Learned Hand relied more explicitly on the analogy to pre-indictment suppression of tangible evidence seized in violation of the fourth amendment. Noting that he could not "see any rational basis for distinguishing between the [fourth and fifth] amendments when the situation is so nearly the same," he argued that he felt "too much the force of consistency not to take this added step."[24]

Judge Augustus Hand wrote a dissenting opinion which rejected the remedy of pre-indictment suppression of unconstitutionally obtained confessions. His dissent rested on two practical arguments: first, he was not convinced that such a motion was necessary to prevent substantial injustice because the harm to an accused would be no greater than he would suffer from the grand jury's consideration of other incompetent evidence;[25] second, he feared that such motions would overburden the courts.[26]

### C. *Evidence to be Suppressed*

The *Fried* extension is narrowly limited to confessions which are obtained by infractions of constitutional rights.[27] Judge Frank, however, goes farther and registers a partial dissent. He argues that a confession obtained in violation of a federal statute should also be suppressed prior to indictment. To illustrate his point, he adverted to the basis for the invalidity of the confession in *McNabb v. United States,*[28] although noting that McNabb, unlike Fried, filed his application after he had been indicted.[29] Frank argues that "McNabb" confessions should also

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no great concern, since the conviction will help to create or preserve public respect for the "substantive" criminal rule which the court applied—although erroneously—fully as much as if the man were guilty, provided only that the mistake is never publicly disclosed. And only such a cynic will say that the public welfare is similarly served by indictment of the innocent, induced by grand-jury misfinding of the fact, when an indictment is followed by an acquittal of which the public never learns. As a wrongful indictment inflicts a substantial harm on the indicted person, infringing his "substantive right" to be exempt from such harm, the courts should actively repudiate the cynic's view. Since preventive justice is usually the best sort of justice, the courts, I think, should try, by all feasible means to forestall such harms.

*Id.* at 464-65.

24. *Id.* at 465.

25. *Id.* at 465, 466; *see* discussion of *United States v. Costello,* note 64 *infra* and accompanying text.

26. "I am confident that it will multiply dilatory motions and impede prosecuting officers without, except in rare instances, affording defendants any relief not available at the trial." 161 F.2d at 465, 466.

27. *Id.* at 460.

28. 318 U.S. 332 (1943).

29. 161 F.2d at 460.

be suppressible prior to indictment: ". . . the reason for suppressing a confession procured by a violation of a constitutional privilege is solely the illegality of the means used in procuring it; and the means are just as illegal if they consist of official transgression of a federal statute."[30] He further contended that statutory violations, when recognized as such by an accused, tend themselves to be coercive by increasing the accused's feeling of helplessness and so diminishing the trustworthiness of what he says.[31]

Because other categories of sanctioned evidence—*e.g.*, incompetent, irrelevant—are not discussed in the *Fried* opinion they are not expressly rejected in it. One may, however, infer that the motion made available by *Fried* would not extend to such evidence. First, the majority limited the remedy to unconstitutionally obtained confessions. Secondly, Augustus Hand's discussion of the lack of real distinction in terms of harm between the use against an accused of incompetent evidence and the use of an unconstitutionally obtained confession, supports the inference that *Fried* may not support the pre-indictment suppression of merely incompetent evidence. Lastly, this conclusion is supported by two facts: first, Judge Frank confined his discussion to illegally obtained evidence in his "partial dissent"; and second, he asserted that the extension effected by *Fried* would not lead to a pre-trial "trial of the evidence".

## II. Post-Fried Case Law Development and Denial of the Pre-Indictment Suppression of Unconstitutionally Obtained Confessions

### *A. Pre-Indictment Suppression of Confessions*

Most federal courts called upon to rule on the *Fried* procedure have approved the *Fried* holding.[32] It should be noted, however, that much of

30. *Id.*

31. *Id.* at 461. *See also* J. Frank, If Men Were Angels (1942).

32. *See, e.g.*, Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965); Austin v. United States, 297 F.2d 356 (4th Cir. 1961) [The continuing force of this is questionable, however, as the order issued was subsequently withdrawn without opinion owing to an intervening Supreme Court decision indicating that the order appealed from was interlocutory (*see* Wright § 673 n. 23)]; Lapides v. United States, 215 F.2d 253 (2d Cir. 1954); Plato v. Katzenbach, 253 F. Supp. 1021 (N.D. N.Y. 1966); United States v. Quinn, 17 F.R.D. 342 (S.D. N.Y. 1955).

In the first circuit, *Centracchio v. Garrity* is generally seen as having rejected the *Fried* holding. 198 F.2d 382 (1st Cir.), *cert. denied*, 344 U.S. 866 (1952). *Centracchio* concerned a taxpayer's confessions and turning over of books, supposedly under a promise of non-prosecution; the Treasury Department was operating at that time on a voluntary disclosure policy. The court found that the evidence was voluntarily given and that no fourth or fifth amendment rights were infringed.

the approval does not go beyond *dicta* found in cases reflecting often urged efforts to extend the *Fried* remedy beyond the suppression of unconstitutionally obtained confessions. In many respects, a proper construction of *Fried's* current status in the law depends on the differences present in these cases.

### *1. Confessions Unconstitutionally Obtained*

Citations to *Fried* generally note that the majority holding in *Fried* was confined to violations of fifth amendment rights. Most courts so citing *Fried* were presented with confessions obtained in this manner. Several, however, did not concern unconstitutionally obtained confessions, and an approval of *Fried* was juxtaposed with a refusal to extend the remedy to confessions obtained in violation of statutes.[33]

### *2. Confessions Obtained in Violation of Statute*

Two cases support an extension of *Fried* to all illegally obtained confessions, but they lack fact patterns which squarely raise the issue. *United States v. Carabasi*[34] cited Frank's argument with approval, but the confession in question was obtained in violation of Carabasi's constitutional rights. *United States v. Klapholz*[35] approved pre-indictment suppression of illegally, though not unconstitutionally, obtained tangible evidence. One may, however, equate the arguments in these cases with Frank's own argument to support such an extension.

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The case is, therefore, distinguishable from *Fried* on its facts, although it is fair to imply that the *Centracchio* court would not approve an extension to illegal evidence or confessions obtained in a manner violating a statute. Some strong disapproval of *Fried* is evident in the court's dicta—"It would not seem to be in the public interest to enlarge the recognized category of dilatory motions at the pre-indictment stage. . . ." (*Id.* at 388)—but the court was careful to point out that it expressed no "opinion as to the correctness" of *Fried*. *Id.* at 387. *See also* Biggs v. United States, 246 F.2d 40 (6th Cir. 1957) (finding that no violation of constitutional rights occurred, with citation to *Centracchio* and expressing a view that *Fried* extended preindictment suppression only to unconstitutionally obtained confessions, relief was denied); Benes v. Canary, 224 F.2d 470 (6th Cir. 1955).

33. United States v. Quinn, 17 F.R.D. 342 (S.D. N.Y. 1955); United States v. Tuzzo, 9 F.R.D. 466 (D. N.J. 1949). Other cases, presenting tangible evidence seized in violation of statutory rules, argue for an opposite conclusion. For example, *United States v. Klapholz* presented a 41(e) motion to suppress evidence seized in violation of Rule 5(a). The petitioner utilized Frank's "partial dissent" to support his argument that rule violations were, like fourth amendment violations, subject to sanction under 41(e). The court—citing Rea v. United States, 350 U.S. 214 (1956), as blurring the distinction between fourth amendment and rule violations—ruled that 41(e) would be available for the suppression of illegally obtained evidence. 230 F.2d 494 (2d Cir. 1956).

34. 218 F. Supp. 147 (E.D. Pa. 1963). *Carabasi* concerned confessions obtained by fraudulent representations that no prosecution would occur.

35. 230 F.2d 494 (2d Cir. 1956); *see also* note 36 *supra*.

Indeed, a developing pattern of judicial blurring of the historical distinction between illegally obtained tangible evidence and that obtained in violation of the fourth amendment provides a compelling argument for the position posited by Frank in *Fried.* It should be noted, however, that Congress is increasingly unfavorable to exclusion based solely on rule violations. The example of the Omnibus Crime Bill limitation on the *Mallory* rule[36]—significantly, the rule violation typically appearing in these cases[37]—is the clearest. Therefore, although Frank's argument finds support in the post-*Fried* development, prospects for realization seem slight.

To this point, however, no cases provide firm precedent for the pre-indictment suppression of confessions obtained in violation of statute. No cases have been found presenting the issue of pre-indictment suppression of incompetent evidence and *Fried,* in any event, offers no support for such a great extension of the 41(e) rationale.[38]

### *B. Bases for Pre-Indictment Suppression of Unconstitutional Confessions*

Few courts construing *Fried* rely exclusively on one theoretical basis for the pre-indictment suppression of unconstitutional confessions. In *Austin v. United States,*[39] for example, consistency between protection of fifth and fourth amendment rights is argued together with an argument reflecting the deterrence rationale. Yet other cases, instead of extending blanket approval of suits to enjoin prosecutors from any use of such a confession, emphasize the inherent harmfulness of basing *the indictment* on the unconstitutionally obtained confession. Thus, *Plato v. Katzenbach*[40] holds that the right to suppress attaches when the

36. *Compare* Mallory v. United States, 354 U.S. 449 (1957), *with* 18 U.S.C. §§ 3501(c), (d) (1969).

37. *E.g., In re* Fried, 161 F.2d 453 (2d Cir. 1947).

38. *But see* Benes v. Canary, 224 F.2d 470 (6th Cir. 1955) [". . . the competency or incompetency of the evidence obtained through appellant's claimed reliance upon the Treasury's 'voluntary disclosure' policy should not be determined in a pre-indictment proceeding of this kind. . . ." (*dicta*)]; Centracchio v. Garrity, 198 F.2d 382, 387-88 (1st Cir. 1952) (". . . even the majority opinion in the Fried case recognized that it was 'not feasible to enjoin the presentation to grand juries of all untrue, irrelevant or incompetent evidence'. . . . It would not seem to be in the public interest to enlarge the recognized category of dilatory motions at the pre-indictment stage, which would have the effect of impeding prosecuting officers, without, except in rare instances, affording defendants any relief not available after indictment or during trial." The petition had alleged constitutional violations but was rejected because the evidence sought to be suppressed seemed to be possibly inadmissible but not unconstitutionally obtained.).

39. 297 F.2d 356 (4th Cir. 1961).

40. 253 F. Supp. 1021 (N.D. N.Y. 1966).

prosecutors move to the grand jury seems probable. Relief was denied in *Plato* as the prosecutor had done nothing to indicate that a grand jury investigation was imminent. Although *Plato* did not involve a confession, it supported this statement by citation to *Fried* as the expression of policy in the area. The same rationale is implicit in *United States v. Tuzzo*,[41] which did involve a confession. Relief was denied in *Tuzzo* because an indictment had already been returned and the harm was done—defendant now had to wait until trial. *Tuzzo* characterized *Fried* as designed mainly to avoid wrongful indictment.

## III. The Fried Remedy under the Proposed Amendments to the Federal Rules of Criminal Procedure

An examination of the arguments in *Fried* and its progeny reveals that their theoretically independent underpinnings are neither usually separated nor easily separable. Any analysis, however, must recognize that the arguments ultimately center on whether it is necessary—or even desirable—to equate the techniques for protecting the citizenry against fifth amendment violations with those available to protect against fourth amendment violations. What must be remembered is that the rights themselves came before particular remedies. The difference is between rule and sanction, although the sanction may be, or may become, so critical as to be inseparable from the rule itself. Thus, when the rule reflects a constitutional imperative, the sanction may or may not be part of that constitutional imperative. The classic illustration, of course, is found in the history of the fourth amendment's search and seizure clause and its application to the states through the fourteenth amendment's due process clause. *Wolf v. Colorado*[42] established a constitutional *rule* that the prohibition against unreasonable searches and seizures bound the states, but it did not find a constitutional requirement that enforcement occur through application of the exclusionary *sanction*. In 1963, *Mapp* did find such a requirement in the Constitution, and so the sanction as well as the rule became part of the constitutional mandate.[43]

But there is no reason in logic for concluding that the additional sanction of precluding the use of unconstitutionally seized evidence in obtaining indictments either (1) should or should not be adopted, or (2) that, if adopted, it should automatically become part of the

41. 9 F.R.D. 466 (D. N.J. 1949).
42. 338 U.S. 25 (1949).
43. Mapp v. Ohio, 367 U.S. 643 (1961).

constitutional mandate against violations of the fourth amendment. And so it is with the extension of the pre-indictment exclusion sanction to unconstitutionally obtained confessions. Indeed, there would seem to be no constitutional requirement that the admissibility of confessions claimed to have been obtained by unconstitutional means be determined before trial at all, although a requirement that the trial judge preclude unconstitutionally obtained confessions as a matter of law has been made part of the constitutional imperative itself by *Jackson v. Denno.*[44] And, indeed, it is quite clear that whatever else may be the status of *Fried,* it is not of constitutional dimension. Against that background, an examination of the proposed amendments to the Federal Rules of Criminal Procedure and their relationship to the *Fried* doctrine is indicated.

The proposal for amendments to the Federal Rules of Criminal Procedure eliminates the 41(e) motion,[45] except for a motion limited to seeking return of property. Instead, the motion to suppress must now be brought in a pre-trial setting held sometime *after arraignment.*[46] The appropriate time to move for exclusion of confessions—with an exception for the *Fried* procedure, conventionally considered to be at trial—is moved back to this hearing as well. The clear intent of the proposal is to hear all motions for exclusion together and at one time;

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44. 378 U.S. 368 (1964).

45. *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts,* 48 F.R.D. 547 (1970). Rule 41(e) as it reads in the proposed amendment is titled "Motion for Return of Property". *Id.* 627. A new subsection is proposed 41(f), titled "Motion to Suppress". It provides:

> (f) MOTION TO SUPPRESS. A motion to suppress evidence may be made in the court of the district of trial as provided in rule 12.

*Id.* 628. Rule 12 has been altered to read in pertinent portions (changes are indicated with italics for new wording and strikeouts for deletions):

> (b) PRETRIAL MOTIONS. Any defense, or objection, *or request* which is capable of determination without the trial of the general issue may be raised before trial by motion.
> (2) Defenses and Objections must be raised. *The following must be raised prior to trial:*
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> * * *
>
> (3) *Motions to suppress evidence on the ground that it was illegally obtained; or*
>
> * * *
>
> (c) MOTION DATE. *Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions and, if required, a later date for hearing.*

*Id.* 579-80.

46. *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts* 12, 12(b)(3) and 12(c), 48 F.R.D. 547, 579-80 (1970). The specific language is quoted in note 45 *supra.*

and as the time for the hearing is set at arraignment, this will necessarily be post-indictment. The rules as proposed to be amended do permit a court to vary this schedule;[47] but as they reflect, first, a policy choice to hear all motions together, and second, to hear them after arraignment, adoption of the rules would provide little incentive to so vary.

Unless a choice is made to tie 41(e) and the *Fried* procedure more firmly to a notion that the timing they embody is a due process requirement—an unlikely notion—adoption of the proposed amendments would abolish the remedy. The appropriateness of this great change requires some scrutiny of both the policies underlying the initial choice for the remedies and some reflection of the value of reviving the *Fried* procedure itself.

The policies, discussed primarily in relation to the *Fried* remedy but similarly applicable to 41(e), may be summarized as: (1) deterring disapproved conduct of police and prosecutor; and (2) avoiding wrongful indictment. Both reflect values articulated in the fourth or fifth amendment and show concern with adherence to the mandates of those amendments.

A revival of the *Fried* remedy may be considered to have potential impact in the following areas: (1) on plea bargaining; and (2) on derivative evidence.

(1) Plea bargaining—To opposing parties in a criminal case, *Fried's* importance lies in its effect on the ultimate disposition of the case. As guilty pleas account for up to 90% of convictions,[48] and as many if not most of these pleas are at least substantially attributable to bargaining between prosecutor and defendant, the effect of an available additional pre-indictment suppression motion on the bargain process must be considered.

It is often expressed that a demand for trial would place the judicial system in danger of collapse.[49] This assumption, coupled with the resource limitations of the prosecutor's office itself,[50] make bargaining

47. *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts* 12, 12(c), 48 F.R.D. 547, 580 (1970).

48. *See, e.g.*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 4 (1967). *See also* AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS 97-112, 132-35 (D. McIntyre, Jr. ed. 1967); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

49. *See* Goldman & Holt, *How Justice Works: The People vs. Donald Payne*, NEWSWEEK, March 8, 1971, at 20, 32.

50. *See generally* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969).

attractive to the prosecutor. A conviction is never a sure thing and the spectre of *Miranda* diminishes that certainty in many cases involving confessions.[51]

If a defendant has his confession suppressed prior to indictment by a *Fried* motion, he immediately knows that the confession may not be used as evidence against him, either at trial or in procuring an indictment. This will either markedly improve his bargaining stance, if the suppressed confession is only a part of the evidence against the defendant; or, if the confession is the substance of the prosecution case, will free the defendant from prosecution. If, however, he should make his motion and have it *denied,* his bargaining position is not only weakened but is practically lost, for now the prosecutor knows he has an admissible confession and with such evidence there is little else needed to convict.[52] Thus, it would seem that—unless suppression is a certainty—the defendant's most beneficial use of the motion is to wield it as a threat, much in the manner of other available procedures with dilatory aspects, not to actually invoke it. Essentially then, the *Fried* procedure, apart from the notion of avoiding wrongful indictment and attendent publicity, adds to the arsenal of defense delay tactics as to a different class of evidence—confessions—and operationally may insure the defendant a more favorable bargaining outcome. Reasons exist for denying this outcome, but they are really arguments with the bargaining institution itself. Certainly in a system which sanctions bargaining, whatever the philosophical difficulties, the improvement of a *defendant's* bargaining position can not be condemned out of hand.

Additionally, a wider recognition of the availability of the *Fried* procedure would cause defense attorneys, in every case involving a confession, to consider a suit to enjoin its use by the prosecutor. Assuming that the admissibility of the confession is in doubt, both defense and prosecution may wish to avoid the suit, with the result that negotiation of the plea may be accelerated and occur before indictment, removing some costly stages of the prosecution. A defendant in this situation would waive his indictment and his right to motions, and proceed to arraignment prepared to plead to an agreed upon charge.[53]

51. For two surveys evaluating the effect of the *Miranda* decision on police interrogations and the use of confessions to obtain a conviction, *see* Seeburger & Wettick, *Miranda in Pittsburgh—a Statistical Study,* 29 U. PITT. L. REV. 1 (1967); Note, *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967).

52. *Cf.* Miranda v. Arizona, 384 U.S. 436, 466 (1966).

53. A prosecutor may charge a suspect when the only evidence is a confession if he believes that the confession may induce a guilty plea. This problem was discussed by the Supreme Court in

(2) Derivative evidence—Exclusion of tangible evidence discovered as a result of the defendant's illegal confession has been generally unsuccessful.[54] Although derivative evidence was not a part of the law of confessions prior to *Miranda, Miranda* may include such a rule.[55] One commentator points out that the *Miranda* opinion refers three times expressly to "evidence and its fruits" as being inadmissible, indicating that an extension of the derivative evidence rule was contemplated.[56] Other support for this position lies in the Court's general posture in past cases of including derivative evidence within the protection against self-incrimination,[57] and its use of the rule in other context.[58] Whether or not dictated by *Miranda,* the evolvement of a derivative evidence rule applying to confessions seems imminent.[59] Under such an extension, the *Fried* remedy becomes increasingly attractive. If a potential defendant could suppress both the confession and the derivative evidence, his bargaining position would be strengthened considerably. The second circuit has approved the extension of *Fried* to such evidence in *Lapides v. United States.*[60]

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McMann v. Richardson, 397 U.S. 759 (1970). Inducement follows because the defendant's decision to plead guilty or not guilty turns on whether he feels the law will allow the confession to be used against him. *McMann* did not find that this dilemma made the choice involuntary as a matter of law. For a discussion of the judicially determined parameters of voluntariness and a collection of cases, *see* Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas,* 1970 WASH. U.L.Q. 289.

54. *See, e.g.,* Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963) (refusal to suppress eyewitness); *but see* Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964) (excluding evidence obtained through illegal—though not unconstitutional—confession).

55. *See* George, *The Fruits of Miranda: Scope of the Exclusionary Rule,* 39 U. COLO. L. REV. 478, 485-90 (1967).

56. *Id.*

57. *E.g.,* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Counselman v. United States, 142 U.S. 547 (1892).

58. The derivative evidence rule was first enunciated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). It held that not only did the exclusionary rule of the fourth amendment apply to the direct evidence received in an unlawful search, but also to the indirect evidence, or that which would not have been available but for the unlawful search. Derivative evidence may be admissible, however, if knowledge of it is gained from an independent source. *Id.* at 392. Justice Frankfurter first coined the term "Fruit of the poisonous tree" to describe derivative evidence in Nardone v. United States, 308 U.S. 338 (1939), which held that the connection between the lawless conduct of the police and the discovery of the evidence, for it to be admissible, must "become so attenuated as to dissipate the taint." *Id.* at 341. Wong Sun v. United States, 371 U.S. 471 (1963), held that verbal evidence was equally subject to taint and might fall within the rule excluding derivative evidence.

59. In forming such a rule, the probable increase in *Jackson v. Denno* hearings [*see* Jackson v. Denno, 378 U.S. 368 (1964)] would have to be weighed against the interest of the individual to suppress derivative evidence, unless suppression would be defined as a constitutional requirement. The close link with *Miranda* makes the latter probable.

60. 215 F.2d 255 (2d Cir. 1954).

An evaluation of the change made by the proposed amendments requires a consideration of the merits of all of the above factors: deterring improper official conduct; avoiding wrongful indictment; and, improved tactical advantage in plea bargaining for a potential defendant. Furthermore, the deterrence or wrongful basis must contemplate not only confessions but probably derivative evidence as well.

## IV. CONCLUSION

This note has demonstrated that a right to pre-indictment suppression of unconstitutionally obtained confessions pertains, at least in the federal system.[61] It has been further indicated that proposed amendments to the Federal Rules of Criminal Procedure will eliminate the remedy, as well as its fourth amendment analogue the 41(e) pre-indictment motion to suppress tangible evidence, at least when no property right exists.[62] Instead, the proposals move all such motions into a post-arraignment/pre-trial setting.[63]

This movement may not be characterized as an attempt to align fourth and fifth amendment protection—although in fact, by including illegal evidence, protection is increased in one sense—for the availability of the *Fried* remedy performed this function, and the authors of the proposed amendments must have certainly been aware of *Fried.* Evaluation of the amendments must instead focus on the policy choice to place all motions in the same forum at the same time, specifically post-arraignment/pre-trial. This choice must be analyzed in terms of the deterrence and wrongful indictment arguments[64] underlying *Fried* and

61. *See* note 35 *supra.*

62. *See* notes 45-47 *supra.*

63. *See* note 46 *supra.*

64. Developments in the law relative to evidence before the grand jury seem to reinforce this concern, or alternatively argue for an explicit rejection of the "harm" seen to accrue from wrongful indictment. Costello v. United States, 350 U.S. 359 (1956), held that an indictment could issue even though the grand jury heard no competent evidence. United States v. Blue, 382 U.S. 251 (1966), added that a petitioner could not have his indictment *dismissed* on the ground that it was based upon *unconstitutional* evidence. The ability of a grand jury to hear *any* category of evidence, posited in *Costello* and *Blue,* does not preclude preindictment motions such as the 41(e) or *Fried* motions. Those cases do, however, indicate that if the petitions are not made, the evidence will be heard by the grand jury and may support an indictment. These cases do however climax a series of cases which progressively diminished post-indictment review of the grand jury proceedings. Other procedural changes, such as the apparent ability of U.S. Attorneys to skip over the preliminary hearing and move directly into the grand jury setting under § 303 of the Federal Magistrates Act of 1968 [18 U.S.C. § 3060 (1969)]—*see* Weinberg & Weinberg, *The Congressional Invitation to Avoid the*

41(e) and in terms of more basic system dynamics—especially plea bargaining. With the demonstrated ability of courts to themselves effect consistency, and with the example of *Fried,* that argument will not support the rule changes proposed. Rather, a squaring of the contemplated changes with the policy and actuality of pre-indictment suppression as a deterrent technique, as well as consideration of the harm of indictment based on improper evidence and the social undesirability of ignoring such harm, pose the real issues.

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*Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968,* 67 MICH. L. REV. 1361 (1969)—aggravate these problems.

Avoiding the preliminary hearing lessens the possibility that an accused will "discover" what evidence will be presented to the grand jury, which in substantial measure decreases his ability to take advantage of the available *Fried* motion or the 41(e) motion; review over the grand jury use of unconstitutional or illegal evidence has been similarly contracted. The removal of the pre-indictment motions under the proposed amendments to the Federal Rules of Criminal Procedure merely completes the circle. The propriety of the noted contraction may not only be argued in terms of general social policy, but may be questioned in a constitutional light. *Miranda, Escobedo, et al.* establish a logical basis for the theory that the introduction of coerced confessions as testimony in *any* criminal proceeding is a separate and independent violation of the self-incrimination privilege. As the privilege extends to custodial interrogation, a confession obtained in violation of that privilege must be excluded at trial to prevent a violation of due process. It is perhaps fair to infer that a grand jury hearing is a "criminal proceeding" sufficient to allow characterization of its use of the unconstitutionally obtained confession as violative of due process, much like such use at trial.