SUPREME COURT OF THE UNITED STATES

No. 97–581

PENNSYLVANIA BOARD OF PROBATION AND PAROLE, PETITIONER *v.* KEITH M. SCOTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

[June 22, 1998]

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Court's holding that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), has no application to parole revocation proceedings rests upon mistaken conceptions of the actual function of revocation, of the objectives of those who gather evidence in support of petitions to revoke, and, consequently, of the need to deter violations of the Fourth Amendment that would tend to occur in administering the parole laws. In reality a revocation proceeding often serves the same function as a criminal trial, and the revocation hearing may very well present the only forum in which the State will seek to use evidence of a parole violation, even when that evidence would support an independent criminal charge. The deterrent function of the exclusionary rule is therefore implicated as much by a revocation proceeding as by a conventional trial, and the exclusionary rule should be applied accordingly. From the Court's conclusion to the contrary, I respectfully dissent.

This Court has said that the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). Be-

cause the exclusionary rule thus "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," *United States* v. *Leon*, 468 U. S. 897, 906 (1984) (internal quotation marks omitted), "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Ibid.* (quoting *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983)). The exclusionary rule does not, therefore, mandate the exclusion of illegally acquired evidence from all proceedings or against all persons, *United States* v. *Calandra*, *supra*, at 348, and we have made clear that the rule applies only in "those instances where its remedial objectives are thought most efficaciously served," *Arizona* v. *Evans*, 514 U. S. 1, 11 (1995). Only then can the deterrent value of applying the rule to a given class of proceedings be seen to outweigh its price, including "the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1041 (1984); see also *United States* v. *Janis*, 428 U. S. 433, 454 (1976); *United States* v. *Calandra*, *supra*, at 349–350.

Because we have found the requisite efficacy when the rule is applied in criminal trials, see *Elkins* v. *United States*, 364 U. S. 206 (1960); *Mapp* v. *Ohio*, *supra*; *Weeks* v. *United States*, 232 U. S. 383 (1914), the deterrent effect of the evidentiary limitation upon prosecution is a baseline for evaluating the degree (or incremental degree) of deterrence that could be expected from extending the exclusionary rule to other sorts of cases, see *INS* v. *Lopez-Mendoza*, *supra*. Thus, we have thought that any additional deterrent value obtainable from applying the rule in civil tax proceedings, see *United States* v. *Janis*, *supra*, habeas proceedings, see *Stone* v. *Powell*, 428 U. S.

465 (1976), and grand jury proceedings, see *United States* v. *Calandra*, *supra*, would be so marginal as to be outweighed by the incremental costs.

In *Janis*, for example, we performed incremental benefit analysis by focusing on the two classes of law enforcement officers affected. We reasoned that when the offending official was a state police officer, his "zone of primary interest" would be state criminal prosecution, not federal civil proceedings; accordingly, we said, "common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." 428 U. S., at 457–458. *Stone* v. *Powell* was another variant on the same theme, where we looked to the collateral nature of the habeas proceedings in which the rule might be applied: "The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal." 428 U. S., at 493. And in *United States* v. *Calandra* we observed that excluding such evidence from grand jury proceedings "would deter only police investigation[s] consciously directed toward the discovery of evidence solely for use in a grand jury investigation," 414 U. S., at 351; an investigation so unambitious would be a rare one, we said, since prosecutors are unlikely to seek indictments in the face of dim prospects of conviction after trial, *ibid*.

In a formal sense, such is the reasoning of the Court's majority in deciding today that application of the exclusionary rule in parole revocation proceedings would have only an insignificant marginal deterrent value, "because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional

searches." *Ante*, at 6. In substance, however, the Court's conclusion will not jibe with the examples just cited, for it rests on erroneous views of the roles of regular police and parole officers in relation to revocation proceedings, and of the practical significance of the proceedings themselves.

As to the police, the majority say that regular officers investigating crimes almost always act with the prospect of a criminal prosecution before them. Their fear of evidentiary suppression in the criminal trial will have as much deterrent effect as can be expected, therefore, while any risk of suppression in parole administration is too unlikely to be on their minds to influence their conduct.

The majority's assumption will only sometimes be true, however, and in many, or even most cases, it will quite likely be false. To be sure, if a police officer acts on the spur of the moment to seize evidence or thwart crime, he may have no idea of a perpetrator's parole status. But the contrary will almost certainly be the case when he has first identified the person he has his eye on: the local police know the local felons, criminal history information is instantly available nationally, and police and parole officers routinely cooperate. See, *e.g.*, *United States ex rel. Santos* v. *New York State Bd. of Parole*, 441 F. 2d 1216, 1217 (CA2 1971) (police officer, who had obtained "reasonable grounds" to believe that the parolee was dealing in stolen goods, informed the parole officer; the parolee officer and police officer together searched parolee's apartment), cert. denied, 404 U. S. 1025 (1972); *Grimsley* v. *Dodson*, 696 F. 2d 303, 304 (CA4 1982) (upon receipt of information about probationer, probation officer contacted a sheriff, sheriff obtained search warrant, and together they searched probationer's house), cert. denied, 462 U. S. 1134 (1983); *State ex rel. Wright* v. *Ohio Adult Parole Auth.*, 75 Ohio St. 3d 82, 83–84, 661 N. E. 2d 728, 730 (1996) (police officers suspected parolee had committed burglary and asked his parole officer to search his resi-

dence; parolee was then reincarcerated for violating his parole conditions); *People* v. *Stewart*, 242 Ill. App. 3d. 599, 611–612, 610 N. E. 2d 197, 206 (1993) (police conducting illegal traffic stop and subsequent search and seizure knew or had reason to know that defendant was on probation); *People* v. *Montenegro*, 173 Cal. App. 3d 983, 986, 219 Cal. Rptr. 331, 332 (4th Dist. 1985) (police contacted parole agent so that they could conduct search of parolee's apartment); see also Pennsylvania Board of Probation and Parole, Police Procedures in the Handling of Parolees 16 (1974) (parole agent has a responsibility to inform police in the area where parolee will be living and to provide "full cooperation to the police").

As these cases show, the police very likely do know a parolee's status when they go after him, and (contrary to the majority's assumption) this fact is significant for three reasons. First, and most obviously, the police have reason for concern with the outcome of a parole revocation proceeding, which is just as foreseeable as the criminal trial and at least as likely to be held. Police officers, especially those employed by the same sovereign that runs the parole system, therefore have every incentive not to jeopardize a recommitment by rendering evidence inadmissible. See *INS* v. *Lopez-Mendoza*, 468 U. S., at 1043 (deterrence especially effective when law enforcement and prosecution are under one government). Second, as I will explain below, the actual likelihood of trial is often far less than the probability of a petition for parole revocation, with the consequence that the revocation hearing will be the only forum in which the evidence will ever be offered. Often, therefore, there will be nothing incremental about the significance of evidence offered in the administrative tribunal, and nothing "marginal" about the deterrence provided by an exclusionary rule operating there, *ante*, at 10. Finally, the cooperation between parole and police officers, as in the instances shown in the cases cited above, casts

serious doubt upon the aptness of treating police officers differently from parole officers, doubt that is confirmed by the following attention to the Court's characterization of the position of the parole officer.

The Court recalls our description of the police as "engaged in the often competitive enterprise of ferreting out crime," which raises the temptation to cut constitutional corners (which in turn requires the countervailing influence of the exclusionary rule). *United States* v. *Leon*, 468 U. S., at 914. As against this picture of the police, the Court paints the parole officer as a figure more nearly immune to such competitive zeal. As the Court describes him, the parole officer is interested less in catching a parole violator than in making sure that the parolee continues to go straight, since "'realistically the failure of the parolee is in a sense a failure for his supervising officer.'" *Ante*, at 10–11 (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 485–486 (1972)). This view of the parole officer suffers, however, from its selectiveness. Parole officers wear several hats; while they are indeed the parolees' counselors and social workers, they also "often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees." N. Cohen & J. Gobert, Law of Probation and Parole §11.04, p. 533 (1983); see also *Minnesota* v. *Murphy*, 465 U. S. 420, 432 (1984) (probation officer "is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers") (internal quotation marks omitted)); T. Wile, Pennsylvania Law of Probation and Parole §5.12, p. 88 (1993) (parole officers "act in various capacities, supervisor, social worker, advocate, police officer, investigator and advisor, to the offenders under their supervision"). Indeed, a parole officer's obligation to petition for revocation when a parolee goes bad, see Cohen & Gobert, *supra*, §11.04, at 533, is presumably the basis for the legal rule in Pennsylvania that "state parole agents are considered police officers with

respect to the offenders under their jurisdiction," Wile, *supra*, §5.12, at 89.

Once, in fact, the officer has turned from counselor to adversary, there is every reason to expect at least as much competitive zeal from him as from a regular police officer. See *Gagnon* v. *Scarpelli*, 411 U. S. 778, 785 (1973) ("[A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation"). If he fails to respond to his parolee's further criminality he will be neglecting the public safety, and if he brings a revocation petition without enough evidence to sustain it he can hardly look forward to professional advancement. R. Prus & J. Stratton, Parole Revocation Decisionmaking: Private Typings and Official Designations, 40 Federal Probation 51 (Mar. 1976). And as for competitiveness, one need only ask whether a parole officer would rather leave the credit to state or local police when a parolee has to be brought to book.

The Court, of course, does not mean to deny that parole officers are subject to some temptation to skirt the limits on search and seizure, but it believes that deterrents other than the evidentiary exclusion will suffice. The Court contends that parole agents will be kept within bounds by "departmental training and discipline and the threat of damages actions." *Ante*, at 11. The same, of course, might be said of the police, and yet as to them such arguments are not heard, perhaps for the same reason that the Court's suggestion sounds hollow as to parole officers. The Court points to no specific departmental training regulation; it cites no instance of discipline imposed on a Pennsylvania parole officer for conducting an illegal search of a parolee's residence; and, least surprisingly of all, the majority mentions not a single lawsuit brought by a parolee against a parole officer seeking damages for an illegal

search. In sum, if the police need the deterrence of an exclusionary rule to offset the temptations to forget the Fourth Amendment, parole officers need it quite as much.[1]

Just as the Court has underestimated the competitive influences tending to induce police and parole officers to stint on Fourth Amendment obligations, so I think it has misunderstood the significance of admitting illegally seized evidence at the revocation hearing. On the one hand, the majority magnifies the cost of an exclusionary rule for parole cases by overemphasizing the differences between a revocation hearing and a trial, and on the other hand it has minimized the benefits by failing to recognize the significant likelihood that the revocation hearing will be the principal, not the secondary, forum, in which evidence of a parolee's criminal conduct will be offered.

The Court is, of course, correct that the revocation hearing has not only an adversarial side in factfinding, but a predictive and discretionary aspect in addressing the proper disposition when a violation has been found. See *ante*, at 8 (citing *Gagnon* v. *Scarpelli*, *supra*, at 787 (quoting *Morrissey* v. *Brewer*, supra, at 480)). And I agree that open-mindedness at the discretionary, dispositional stage is promoted by the relative informality of the proceeding even at its factfinding stage. *Gagnon* v. *Scarpelli*, *supra*,

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[1]While it is true that the Court found in *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984), that the deterrence value of applying the exclusionary rule in deportation proceedings was diminished because the INS "has its own comprehensive scheme for deterring Fourth Amendment violations by its officers," *id.*, at 1044, and "alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights" were available, *id.*, at 1045, these two factors reflected what was at least on the agency's books and, in any event, did not stand alone. The Court in that case found that as a practical matter "it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding." *Id.*, at 1044. As the instant case may suggest, there is no reason to expect parolees to be so reticent.

at 786. That informality is fostered by limiting issues so that lawyers are not always necessary, 411 U.S, at 787–788, and by appointing lay members to parole boards, *Morrissey* v. *Brewer*, 408 U. S., at 489. There is no question, either, that application of an exclusionary rule, if there is no waiver of Fourth Amendment rights, will tend to underscore the adversary character of the factfinding process. This cannot, however, be a dispositive objection to an exclusionary rule. Any revocation hearing is adversary to a degree: counsel must now be provided whenever the complexity of fact issues so warrant, *Gagnon* v. *Scarpelli*, *supra*, at 787, and lay board members are just as capable of passing upon Fourth Amendment issues as the police, who are necessarily charged with responsibility for the legality of warrantless arrests, investigatory stops, and searches.[2]

As to the benefit of an exclusionary rule in revocation proceedings, the majority does not see that in the investigation of criminal conduct by someone known to be on parole, Fourth Amendment standards will have very little deterrent sanction unless evidence offered for parole revocation is subject to suppression for unconstitutional con-

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[2]On the subject of cost, the majority also argues that the cost of applying the exclusionary rule to revocation proceedings would be high because States have an "overwhelming interest'" in ensuring that its parolees comply with the conditions of their parole, given the fact that parolees are more likely to commit future crimes than average citizens. *Ante*, at 6–7. I certainly do not contest the fact, but merely point out that it does not differentiate suppression at parole hearings from suppression at trials, where suppression of illegally obtained evidence in the prosecution's case-in-chief certainly takes some toll on the State's interest in convicting criminals in the first place. The majority's argument suggests not that the exclusionary rule is necessarily out of place in parole revocation proceedings, but that States should be permitted to condition parole on an agreement to submit to warrantless, suspicionless searches, on the possibility of which this case has no bearing. See *infra*, at 11–12.

duct. It is not merely that parole revocation is the government's consolation prize when, for whatever reason, it cannot obtain a further criminal conviction, though that will sometimes be true. See, *e.g.*, *State ex rel. Wright* v. *Ohio Adult Parole Auth.*, 75 Ohio St. 3d, at 83–89, 661 N. E. 2d, at 730 (State sought revocation of parole when criminal prosecution was dismissed for insufficient evidence after defendant's motion to suppress was successful); *Anderson* v. *Virginia*, 20 Va App. 361, 363–364, 457 S. E. 2d 396, 397 (1995) (same); *Chase* v. *Maryland*, 309 Md. 224, 228, 522 A. 2d 1348, 1350 (1987) (same); *Gronski* v. *Wyoming*, 700 P. 2d 777, 778 (Wyo. 1985) (same). What is at least equally telling is that parole revocation will frequently be pursued instead of prosecution as the course of choice, a fact recognized a quarter of a century ago when we observed in *Morrissey* v. *Brewer* that a parole revocation proceeding "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State." 408 U. S., at 479; see also Cohen & Gobert, §8.06, at 386 ("Favoring the [exclusionary] rule's applicability is the fact that the revocation proceeding, often based on the items discovered in the search, is used in lieu of a criminal trial").

The reasons for this tendency to skip any new prosecution are obvious. If the conduct in question is a crime in its own right, the odds of revocation are very high. Since time on the street before revocation is not subtracted from the balance of the sentence to be served on revocation, *Morrissey* v. *Brewer*, *supra*, at 480, the balance may well be long enough to render recommitment the practical equivalent of a new sentence for a separate crime. And all of this may be accomplished without shouldering the burden of proof beyond a reasonable doubt; hence the obvious popularity of revocation in place of new prosecution.

The upshot is that without a suppression remedy in

revocation proceedings, there will often be no influence capable of deterring Fourth Amendment violations when parole revocation is a possible response to new crime. Suppression in the revocation proceeding cannot be looked upon, then, as furnishing merely incremental or marginal deterrence over and above the effect of exclusion in criminal prosecution. Instead, it will commonly provide the only deterrence to unconstitutional conduct when the incarceration of parolees is sought, and the reasons that support the suppression remedy in prosecution therefore support it in parole revocation.

Because I would apply the exclusionary rule to evidence offered in revocation hearings, I would affirm the judgment in this case. Scott gave written consent to warrantless searches; the form he signed provided that he consented "to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole." App. 7a. The Supreme Court of Pennsylvania held the consent insufficient to waive any requirement that searches be supported by reasonable suspicion,[3] and in the absence of any such waiver, the State was bound to justify its search by what the Court has described as information indicating the likelihood of facts justifying the search. *Griffin* v. *Wiscon-*

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[3] See *Scott* v. *Pennsylvania Bd. of Probation and Parole*, 548 Pa. 418, 426, 698 A. 2d 32, 35–36 (1997) ("'the parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct reasonable searches of his residence listed on the parole agreement without a warrant'") (quoting *Commonwealth* v. *Williams*, 547 Pa. 577, 588, 692 A. 2d 1031, 1036 (1997)). Since Pennsylvania has not sought review of this conclusion, I do not look behind it, or offer any opinion on whether the terms and sufficiency of such a waiver are to be scrutinized under state or federal law.

sin, 483 U. S. 868 (1987) (dealing with the analogous context of probation revocation). The State makes no claim here to have satisfied this standard. It describes the parole agent's knowledge as rising no further than "the possibility of the presence of weapons in Scott's home," Brief for Petitioner 7, and rests on the argument that not even reasonable suspicion was required.

Because the search violated the Fourth Amendment, and because I conclude that the exclusionary rule ought to apply to parole revocation proceedings, I would affirm the decision of the Supreme Court of Pennsylvania.