

No. 19-5050

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U.S. SUPREME COURT

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUN 04 2019
OFFICE OF THE CLERK

Southern District of New York

John Asmodeo — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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—
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Questions Presented

Circuit Split

Despite virtually identical circumstances between this Second Circuit case and that of Cordero-Rosario, a First Circuit case, the result is two opposing outcomes. It is in the interest of fairness that this Court should rule on this matter in order to give the circuits guidance to avoid diametrically opposed rulings in cases involving virtually identical circumstances.

Attenuation Factors

Temporal Proximity: The Appeals Court cited "The long delay between the search and the discovery of the CD" as a "Significant gap". However the proper measure of time should be between Agent Mullen's and Det. Nagle's discussion of seized evidence with Condon -- despite being aware that said evidence was the subject of an upcoming Suppression Hearing - and her mention of (and later production of) the CD.

Intervening Circumstances: The Appeals Court cited "Condon's unanticipated production of the CD" as the intervening circumstance. This is directly conflicting with Agent Mullen's credited testimony that he sought Condon -- in part - because she might provide "other potential victims, potential witnesses" which is exactly what she did by providing the CD. This is further contested by credited testimony that Condon provided the CD at "the end" of a 1 hour and 45 minute long interview and only after Agent Mullen brought up and discussed seized evidence.

Flagrant Misconduct of the Official(s): With regards to the original search the Appeals Court said it "cannot say that the officer's misconduct was insignificant" but this overlooks Agent Mullen's continued misconduct when he chose to discuss evidence

that he knew was the subject of an upcoming suppression hearing with a person that he believed could provide information on "other potential victims, potential witnesses" in order to induce the cooperation of that person.

Finucan Factors

In Finucan two factors are articulated to provide guidance on this very issue; (1) Absent the illegal search, would investigators have known the identity of all third parties or what to ask, and (2) Whether those third parties would have come forward on their own.

First Factor: Agent Mullen testified "well, he has a child", a fact revealed during the interrogation, "we should speak to that child's mother", because "she'd be able to shed some light on... other potential victims". Agent Mullen asked Condon "Who is Tiffany Carrol?", the answer he already knew based on the interrogation and his previous investigation of her and her daughter.

Second Factor: Condon possessed the CD for 13 years, $2\frac{1}{2}$ of which Asmodeo was being prosecuted for charges similar to those of his later conviction, $1\frac{1}{2}$ of which Asmodeo had been incarcerated on federal charges, she still did not seek out law enforcement, and she only mentioned/provided the CD after agents first sought her out and then chose to discuss evidence that was illegally seized with her.

Purpose of Condon's Interview

The Appeals Court "credited Nagle's and Mullen's testimony that they interviewed Condon not to find evidence of Asmodeo's illegal activity" but ignored other credited testimony by Mullen when he was asked (in substance) "absent the suppression hearing would you have interviewed Condon anyway?", to which he replied "absolutely"..."We knew she had a child in common with Mr. Asmodeo, but like part of any other case, when

we -- I'm investigating a person I look at the people closest to them". Agent Mullen knew Asmodeo had a son from the interrogation, saw the mother of that son as someone who could potentially provide him with "other potential victims", "like part of any other case" he would have sought her out, the police report may have been how he found her, but that was something he would have simply found by other means anyway, as it is unlikely he would simply have thrown his hands up in defeat because there was no easily available means to locate her.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 5th, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provisions Involved

Amendment IV(1791)

The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Constitutional Provision for which this petition is being extended is specifically the Attenuation Exception to the Exclusionary Rule, as is applies to the suppression of evidence obtained in violation of the Fourth Amendment.

As the purpose of the Exclusionary Rule is to deter Flagrant Police Misconduct, any exception to that rule that places more emphasis on Temporal Proximity and/or Intervening Circumstances that Flagrant Official Misconduct must be applied incorrectly.

The analysis herein is with respect to the application of the Fruit of the Poisonous Tree Doctrine to evidence provided by third-parties who's identities are known only as a result of Police Misconduct during an illegal search.

Further questions arise as to whether use of illegally seized evidence during the questioning of third-parties constitutes a new instance of Official Misconduct that would be deterred by suppression of the evidence gained directly as a result of that action by the official.

Statement of the Case

A Circuit Split exists between the First and Second Court of Appeals on the application of the Attenuation exception to the Exclusionary Rule when applied to physical evidence obtained from a third party. Specifically, "Ceccolini 'stressed our adversary system's preference for live testimony' a factor not presented by a case seeking 'not rejection of live testimony but rather suppression of documents obtained from third parties'" (United States V. Cordero-Rosario, 786 F.3d 64 (2015)).

The Court in Cordero explained, the factors in Brown V. Illinois, 422 U.S. 590, 609, 95S. Ct. 2254, 45 L.E.D. 201 416 (1975), and United States V. Finucan, 708 F.2d 838 (1st Cir. 1983) are both important to this type of analysis "Balancing these factors will illuminate the extent of Attenuation in this case, and along with it, the deterrence value of excluding evidence derived from D.M.C.'s consent" (Cordero at 78). In this instant case both the District Court and the Appeals Court focused solely on the Brown Factors to the complete exclusion of the factors present in Finucan. If this instant case were brought before the 1st Circuit and the Finucan Factors applied, the outcome here would be far different. It is for that reason that this Court should rule on this matter in order to give guidance to the lower Courts on the proper method to decide Attenuation when applied to physical evidence rather than live witness testimony provided by third parties.

The factors outlined in Finucan (Hereafter "Finucan Factors") are as follows: (1) "Whether the Government relied on information from the illegally seized documents in conducting it's investigation", (2) "whether 'absent the illegal search, the investigators would have known the identity of all the third parties or what to ask them'", and (3) "whether the third parties would have come forward on their own had investigators not sought them out" (United States V. Cordero-Rosario, 252 F.Supp.3d 79 (2016) at 105 Citing Finucan at 843). As these factors are an integral part of any analysis in this type of case, their exclusion is detrimental to any application of Attenuation with regards to similar circumstances, and constitutes a Circuit Split in need of clarification.

When applying the Finucan Factors to this instant case it is best to work backwards as the Second and Third factors aid in the analysis of the First factor.

The Third Factor; "Would Condon have come forward on her own had investigators not sought her out?", can only be answered with "No".

The credited facts of the case show that "in April 2005, after she [Condon] terminated her relationship with Asmodeo, he gave her a CD containing a video of him having sex with other girls" (Appendix "C" page 3), and though she claims "she did not look at this DVD" she gives her reason as "because she had already seen his cheating on videos she found" (Appendix "D" page 2). The videos she had found she described to investigators as "him [Asmodeo] having sex with a girl, Eve Condon stated this girl may have been 14 or 15 years old and her

name was either Jessica or Ashley" (Appendix "C" page 3). The videos of "Jessica or Ashley" were the only videos that existed and are the very videos charged in this instant case.

Thus, Condon knew about the conduct, knew a video had been made, knew she possessed a CD that likely contained that video, and still she never sought out law enforcement in the over 11 years between April 2005 and June 2016. Investigators testified that it wasn't until the end of the nearly 1 hour and 45 minute long interview "At almost the conclusion of the interview" (Appendix "E" page 3, 11-17) that Condon "added that while going through some DVD's belonging to Asmodeo, she found a video" (Appendix "C" page 3). This was after investigators asked "Who is Tiffany Carroll?" (Appendix "C" page 3) and "The subject of child pornography on Mr. Asmodeo's computer did come up" as confirmed twice by Det. Nagle (Appendix "E" page 9, 21-25).

At the time of the interview Agent Mullen and Det. Nagle already knew that "Tiffany Carroll" was the mother of the girl from the original indictment thus asking Condon that question was obviously intended to redirect the conversation from the layout of the residence, and "the subject of child pornography on Mr. Asmodeo's computer" was used to demonize Asmodeo and induce Condon's cooperation along the line of discussing "Potential other victims, other witnesses". Both knowledge of "Tiffany Carroll" and "child pornography on Mr. Asmodeo's computer" are fruits of the illegal search and/or interrogation.

The Second Factor; "Absent the illegal search", (A) "the investigators would have known the identity of all the third parties", or (B) "What to ask them". The answer to both questions is "No".

The third party identification of Condon, from a prior police report, by Det. Nagle, was done so at the request of Agent Mullen. Agent Mullen testified "It's a collateral interview, we do them in all sorts of cases like these. If we want to find out more about the subject, we speak to people that know him or have had a past relationship with him", Agent Mullen went on to testify when asked "at whose direction was the interview set up?", "I [Mullen] requested him [Nagle] to do that" (Appendix "E" page 2, 12-22), and that request was made because up till that point Agent Mullen knew only "he [Asmodeo] has a child, we should speak to that child's mother... she may be able to provide us some information" (Appendix "E" page 5, 8-11). Agent Mullen knew Asmodeo had a son from the interrogation video he watched, he testified when asked "were there any aspects of it [the interrogation video] to which you paid special attention?", he answered "his admission of a young girl in a bathroom" (Appendix "E" page 1, 10-13), this is the very same point in the interrogation video where "Mr. Asmodeo says that the child-victim in the bathroom was friends with his son" (Appendix "E" page 6, 8-13). Thus the eventual identification of Condon through a police report was merely the means to locate a person of interest stemming from information obtained during the original search/interrogation.

Knowing what to ask Condon, specifically "Who is Tiffany Carroll?", the mother of the girl from the bathroom, was only possible as a direct result of the search/interrogation where the video was

discovered/discussed. This was the first victim, the one that lead Agent Mullen to believe there might be "potential other victims" (Appendix "E" page 4, 24", and to seek out Condon because she might be able to provide him with information about said "other victims". The use of "Tiffany Carrol" to transition the Condon interview from the living arrangements to "other victims" and "child pornography on Mr. Asmdeo's computer" was only possible because of the illegal search/interrogation.

The First Factor; "whether the Government relied on information from the illegally seized documents in conducting it's investigation", is a resounding "Yes".

The Government first became aware of Asmdeo's criminal conduct during the illegal search, learned of a first victim during the interrogation, learned that the victim was friends with and that Asmdeo had a son from that same interrogation, and based all of it's future investigation solely around that information. By June 2016 Agent Mullen was well aware the original evidence was likely illegally obtained, he could/should have created a "taint team", supplied it with only facts and evidence obtained legally, and allowed it to move forward with an independent investigation not tainted by the original official misconduct. However, Agent Mullen also knew, placing a taint team in the position it would have occupied prior to the official misconduct would have left that taint team with very little. The taint team would have known only that based on a database query that "Kelly Whalen's I.P. was seen downloading child pornography. As Kelly Whalen was never questioned nor her home searched the team's investigation

would have stalled. Even assuming they had somehow interviewed Condon after locating the 2012 police report, it is unlikely that interview would have gone any differently than the one in May 2014 that already took place where Condon never mentioned the conduct, video, or CD.

It is around this First Finucan Factor that the similarity with Cordero and this instant case becomes very clear, "Rather than initiating the independent investigation on a tabula rasa, Agudelo reached out to Martorell with the intention of getting consent to search the computer" therefore "as in Finucan, the agents banked on the illegally obtained evidence in guiding their investigation, at least in the beginning. Relying on Wong Sun rationale, I find police obtained Martorell's consent by exploitation of the illegality" (Cordero-Rosario, 252 at 106-107).

Aside from the exclusion of the Finican Factors analysis, the District Court and the Appeals Court both erred in the application of the Brown Factors to the facts in this instant case.

The Courts determined the following; (1) "the long delay between the search and the discovery of the CD also suggest a weak causal connection between the events", (2) "Condon's unanticipated production of the CD", and (3) "we cannot say that the official's misconduct was insignificant or that suppression would not deter similar conduct" (Appendix "A" pages 6 & 7).

The First Brown Factor; The courts considered the "delay" incorrectly, Agent Mullen used the evidence seized -- in the form of knowledge of

"Tiffany Carrol" and "child pornography found" - when he interviewed Condon, Despite being well aware of an upcoming suppression hearing he used that illegally obtained knowledge to change the topic of the interview and induce the cooperation of someone he hoped could provide him with "potential other victims, other witnesses". Agent Mullen knew or had reason to know his actions were unconstitutional, he used evidence he knew was obtained illegally, and as such his actions constitute a new instance of Official Misconduct. The first test of Purposeful and Flagrant conduct is when "the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was unconstitutional but engaged in it nevertheless (United States V. Simpson, 439 F.3d 490 at 496).

The Second Brown Factor; Agent Mullen sought out Condon because she might be able to provide "potential other victims", which is exactly what she did, though the form -- a CD - was unanticipated, the questions is "what was the purpose of the interview?", and though it was partially about the layout of the residence, it was the investigators who first changed the topic to victims and child pornography. The second test of Purposeful and Flagrant Misconduct is if "the misconduct was investigatory in design and purpose and executed in the hope that something might turn up" (Simpson at 496). Surely seeking Condon in the hopes another victim might turn up and steering the conversation to that end qualifies.

The Third Brown Factor; The Appeals court deemed the original search/interrogation and the Official's Misconduct as "significant"

but then went on to say "However, any deterrent value of suppression is significantly diminished because an Intervening Circumstance disrupted the Casual Chain" (Appendix "A" page 6). How does one factor diminish the existence of another? Here, Intervening Circumstance is weighed against Flagrant Official Misconduct and despite prevailing case law more weight is being given to the Intervening Circumstances factor, "this factor [Flagrant Official Misconduct] 'is considered the most important factor because it is directly tied to the purpose of the exclusionary rule-deterring police misconduct" (Simpson at 496).

Thus even if you ignore Agent Mullen's conduct in using the illegally seized evidence and also ignore the fact that Condon's production of the CD was neither unanticipated nor unsolicited, those are but two lesser factors being weighed against the greater factor. The fact that both Temporal Proximity and Intervening Circumstances are both questionable when considering Agent Mullen's actions should give even greater weight to the deterrent value of exclusion based on Flagrant Official Misconduct.

In summation, the conviction was based on the fruits of an illegal search, arrest, and interrogation, without which the Government would not have known who to question or what to ask them. Here the Attenuation Doctrine is being used as a go around to legitimize the illegal actions of the Government's agents. Here agents clearly profited from the illegal search and used those profits to further profit.

Reasons for Granting the Petition

This instant case presents the need for review by this Court in order to resolve a conflict between the First and Second Circuit. The use of Attenuation when related to third-party testimony is well settled throughout the circuits but the same cannot be said for evidence provided by third parties.

The primary difference being that a third-party who testifies in open court must; (1) make a conscious decision to testify, (2) maintain the resolve to testify in the time leading up to a trial, (3) be prepared and willing to face the defendant in open court, and (4) be willing to be subjected to the scrutiny of questioning while under oath.

In contrast, a third-party who provides physical evidence must only decide momentarily to cooperate, and no further investment of time or effort is required of them.

The First Circuit reasoned that it needed to weigh not only the Brown Factors when deciding Attenuation but should also balance those factors with the factors presented by Finucan. The Second Circuit however decided Attenuation based solely on the Brown Factors.

The result is opposing outcomes for virtually identical circumstances. The need for Judicial Review by this Court pertains directly to the application of the same law(s) to similar circumstances with diametrically opposed outcomes.

If left as is, a person facing a case involving a third-party who was not only identified by illegally seized evidence but also induced to cooperate using that

evidence would essentially be entering into a jurisdictional lottery. Those lucky enough to go before the First Circuit would be granted suppression where as those who go before the Second Circuit would be denied.

Without the aid of this Court, in exercising it's supervisory power to give guidance to the lower courts, there is no guidelines to which courts in other circuits could turn when/if faced with cases that are similarly situated

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Asmodeo

Date: June 03, 2019