

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

COREY RAMONE FRAZIER,

Defendant-Appellee.

FOR PUBLICATION

March 7, 2006

9:00 a.m.

No. 256986

Genesee Circuit Court

LC No. 95-052613-FC

Official Reported Version

Before: Cooper, P.J., and Talbot and Fort Hood, JJ.

TALBOT, J. (*concurring in part and dissenting in part*).

This case involves two issues: whether the prosecution can use defendant's suppressed statement as impeachment evidence in the event of a new trial and whether the prosecution can present the testimony of Wilbert Mack and Anthony Wright, witnesses who were referenced by defendant in his statement to the police. I concur that defendant's statements can be used as impeachment evidence at a new trial, but dissent from the majority's conclusion that the derivative evidence must be suppressed.

In 1995, defendant made several statements to the police. He told the police that he was present at the murder scene, but fled and got a ride home with "Will," one of two "street cleaners" whom he met at the Speedy-Q gas station. Defendant also admitted to the police that he knew that Idell Cleveland, his accomplice, "was going to rob them when he told me to get his gun," and that after the shooting, Cleveland gave him two \$50 bills.

The background of this case is somewhat unusual. It reaches us following a federal district court determination that a writ of habeas corpus be granted under the Antiterrorism and Effective Death Penalty Act, 28 USC 2254(d)(1), because counsel was ineffective under the Sixth Amendment, and that the prosecution was prohibited from using defendant's statements in its case-in-chief. The federal district court found that the state court unreasonably analyzed the issues in this case under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), rather than *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984).¹ The federal district court concluded that the "absence of counsel during the

¹ In fact, contrary to the reasoning of the federal district court, *Cronic*—decided the same day as *Strickland*—does not represent a separate standard; rather, it provides an explanation of specific
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interrogation tainted the whole trial process, as evidenced by the use of [defendant's] statements at trial." Under *Cronic*, the federal district court concluded, prejudice was presumed. The prosecutor apparently did not appeal that decision. Given this uncertain foundation, and the jumble of underlying issues, I question the value of a published decision in the case before us. Although this matter touches on questions of first impression, the sui generis nature of the facts limits the application of any ruling here, and I would caution that this opinion not be construed more broadly than the issues require.

The primary purpose of the exclusionary rule is to deter police misconduct, *Michigan v Tucker*, 417 US 433, 446; 94 S Ct 2357; 41 L Ed 2d 182 (1974). The exclusionary rule, a judicially created doctrine, "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*, 417 US 446 (quoting *Elkins v United States*, 364 US 206, 217; 80 S Ct 1437; 4 L Ed 2d 1669 [1960]). "Despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons" *Stone v Powell*, 428 US 465, 486; 96 S Ct 3037; 49 L Ed 2d 1067 (1976). "In sum, the rule is a judicially created remedy designed to safeguard the Fourth Amendment generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v Calandra*, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974). "[A]pplication of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.*

As the majority acknowledges, police misconduct is not alleged in this case. There was no violation of defendant's *Miranda* rights,² *Dickerson v United States*, 530 US 428; 120 S Ct 2326; 147 L Ed 2d 405 (2000), no "knowledge gained by the Government's own wrong" that must be suppressed, *Wong Sun v United States*, 371 US 471, 485; 83 S Ct 407; 9 L Ed 2d 441 (1963), and no deterrent purpose to be served by excluding the testimony of Mr. Mack and Mr. Wright.

In cases involving a violation of the Sixth Amendment right to counsel, exclusion of physical evidence is sometimes warranted to preserve "the adversary process in which the reliability of proffered evidence may be tested in cross-examination." *Nix v Williams*, 467 US 431, 446; 104 S Ct 2501; 81 L Ed 2d 377 (1984). The adversary system is undermined, however, if the suppression of evidence puts the state in a worse position that it would have occupied without any misconduct. *Id.*, 467 US 447.

In the case before us, the majority volunteers that it agrees with the federal district court that defendant was "abandoned" by his attorney and denied his Sixth Amendment right to the

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circumstances that are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 US 658. The presumed prejudice in *Cronic* is based on the premise that the attorney's failure to "subject the prosecution's case to meaningful adversarial testing" was complete. *Bell v Cone*, 535 US 685, 696-697; 122 S Ct 1843; 152 L Ed 2d 914 (2002). I see no evidence of that occurring here.

² *Miranda v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

effective assistance of counsel. That issue is not before us but, in light of the majority's pronouncement, I note that I am not at all sure that the federal district court decision, which was based on arguments never raised by defendant in the state courts, is correct. The Antiterrorism and Effective Death Penalty Act was intended to "ensure that state-court convictions are given effect to the extent possible under law" and to provide habeas corpus relief when a state court decision is objectively unreasonable, but not where its application of federal law is merely erroneous or incorrect. *Bell v Cone*, 535 US 685, 693-694; 122 S Ct 1843; 152 L Ed 2d 914 (2002). Although I see no evidence that the state court action in this case rose to the level of being "objectively unreasonable," I concede that we are bound by the unchallenged federal district court determination. For that reason, I concur with the majority's conclusion on the first issue, that defendant's voluntary statements to the police, even when obtained in violation of the Sixth Amendment right to counsel, may be used for impeachment purposes. See *Michigan v Harvey*, 494 US 344; 110 S Ct 1176; 108 L Ed 2d 293 (1990).

As for the second issue, however, the federal district court did not find, and I am not willing to concede, that the presumed prejudice in *Cronic* applies to the testimony of Mr. Mack and Mr. Wright. I see no reason to compound the problems in this case by further extending the judicially created exclusionary rule in a situation in which there was no government misconduct and no damage to the adversary process. Although the result of the majority decision would likely be negligible here, where the challenged evidence is of little moment, it creates an extension that could be devastating in future cases. Further, even if the exclusionary rule were relevant here, remand would not be warranted. It is all but certain that defendant would have made reference to the "street cleaners" even if he had been represented by counsel, and that, even without defendant's statement, the witnesses would have been discovered in the course of a competent police investigation. And so I dissent from the remainder of the majority opinion.

As this Court recognized in a previous review of this matter, "If defendant's statements to the police had comported with his statements to counsel, he would not have inculpated himself in the crime. Rather he would have admitted that he was merely present while [another person] robbed and murdered the victims." *People v Frazier (After Remand)*, unpublished opinion per curiam of the Court of Appeals (Docket No. 193891, issued April 21, 2000), slip op, p 5. There is every reason to believe that defendant would have made his initial statement to the police even if counsel had accompanied him to the interview.

Even after trial, at the *Ginther*³ hearing, defendant never denied being at the murder scene, he only argued that he was merely present. Before defendant spoke to the police, they were already aware that Kenneth Haywood had driven defendant and Idell Cleveland to the murder scene and that Haywood abandoned defendant there so that he had to find another way home.⁴ According to defendant's trial counsel, defendant insisted that he wanted to give a

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ Haywood testified at trial that Cleveland promised to give him \$20 in exchange for a ride. Haywood testified that he drove Cleveland and defendant to a house and saw them go inside, that he heard Cleveland say, "Get on the floor," that he heard gunshots, and that he became frightened and drove away without waiting for Cleveland or defendant to return to the car.

truthful statement to the police in an effort to secure a plea bargain. Counsel said that he told defendant not to talk to the police, but that defendant maintained his innocence and wanted to "get his story out." Counsel testified that he advised defendant of the risks of talking to the police and said that "what he was telling me had to be the truth if he was going to be talking, in order to pursue a plea bargain." Defendant told counsel that he was not involved in the murders and that "he had no knowledge of the armed robbery, or of the robbery that was going to be occurring." Counsel explained defendant's "options" to him and advised him that "as long as he was honest and truthful," he could pursue a plea bargain with the police. Defendant was advised by the police of his rights, he chose to make statements, and those statements have been determined, on numerous occasions, to have been voluntary.

Because part of defendant's "story," even after he was convicted of the crimes, was that he was present at the murder scene and had to find a ride home, I believe that the challenge to the essentially neutral testimony of Mr. Mack and Mr. Wright is much ado about nothing.⁵ The record contains every assurance that, even if counsel had gone with defendant to the interview, defendant would have told the police that he was merely present and that he found a ride home with street cleaners after he fled the scene.

There appears to be no law precisely on point with this case and it is clear that the labyrinth of federal law can be read to support virtually any conclusion. The majority suggests that the cure for the alleged Sixth Amendment violation here is to apply the inevitable discovery exception to the exclusionary rule under *Nix*, 467 US 446. I believe this is an unwarranted extension of the doctrine, and I see no good reason to create a prophylactic rule to protect defendants who lie to their attorneys and then get into trouble by telling the police more of the truth than they intended. Nor do I agree that *Nix* governs the result in this case. As the majority explains, *Nix* involved a defendant who, in the absence of counsel, told the police—who had promised not to question him—where to find the body of the murdered child. The evidence of the child's body was deemed admissible because its discovery was inevitable. *Nix*, 467 US 449-450. In my view, the doctrine of inevitable discovery simply does not apply on the facts of this case, where physical evidence is not at issue. "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment," *id.*, 467 US 444 n 5, while this case is rife with speculation.

Although the majority correctly notes that neither case is precisely on point, I believe that this case is far more like *Tucker* than it is like *Nix*, and that the exclusionary rule does not apply. The *Tucker* case involved a pre-*Miranda* interrogation and, while the defendant was asked if he

⁵ Mr. Mack and Mr. Wright did not know defendant. Because defendant did not dispute that he was present at the scene and had to find a ride home, the only damaging part of Mr. Mack's and Mr. Wright's testimony was that defendant asked them if they had "change for a 50." Neither witness ever saw any money in defendant's possession, but there was other evidence regarding a stack of money, with a \$50 bill on top, at the scene before the shootings. As noted previously, defendant also told the police that accomplice Cleveland gave him two \$50 bills after the shootings, but that statement would not be presented as substantive evidence at a new trial and is not relevant to this discussion.

wanted counsel, he was not advised that an attorney would be appointed if he could not afford one. *Tucker*, 417 US 435. Although the defendant in *Tucker* was interrogated before the decision in *Miranda*, his trial took place afterward, so the rule in *Miranda* applied. The defendant's statements themselves were excluded at trial, and the question on appeal was whether testimonial evidence derived from the interrogation needed to be excluded. *Tucker*, 417 US 437-439. The testimony at issue was that of a third party named by defendant as an alibi witness and, because the defendant's statements were voluntary and because the police conduct was a departure from later-enacted "prophylactic standards" rather than actual misconduct, the testimony was deemed admissible. The Court emphasized that no particular pressure was placed on the defendant to make the statement and that "the evidence which the prosecution successfully sought to introduce was not a confession of guilt by respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures." *Id.*, 417 US 449. Noting that "[h]ere we deal, not with the offer of respondent's own statements in evidence, but only with the testimony of a witness whom the police discovered as a result of respondent's statements," the Supreme Court reasoned that "the reliability of [the] testimony was subject to the normal testing process of an adversary system." *Id.* While *Tucker* was argued under Fifth Amendment principles, the Court concluded that "recourse to respondent's voluntary statements does no violence to such elements of the adversary system as may be embodied in the Fifth, Sixth, and Fourteenth Amendments." *Id.*, 417 US 450.

I do not believe that there can be a "bright line" rule of exclusion when it comes to living witnesses, and I am certain that this is neither the proper case nor the proper place to fashion such a rule. As the majority acknowledges, living witnesses are "not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized." *United States v Ceccolini*, 435 US 268, 277; 98 S Ct 1054; 55 L Ed 2d 268 (1978), quoting *Smith v United States*, 117 US App DC 1, 3-4; 324 F2d 879 (1963). "The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, *per se*, since the living witness is an individual human personality whose attributes of will, perception memory and volition interact to determine what testimony he will give." *Ceccolini*, 435 US 277. "The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify." *Id.*

The "Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process," *Nix*, 467 US 453 (Stevens, J., concurring). There was no *Miranda* violation in this case, no police misconduct, no claim of witness-bias, no challenge to the "reliability of [the] proffered evidence," *id.*, 467 US 446, and nothing in the record to suggest that the adversarial process would be tainted by the testimony of Mr. Mack and Mr. Wright. This case does not involve physical evidence that could only have been discovered as a result of defendant's uncounseled statements. As in *Tucker*, the challenged evidence here is "only" the "testimony of a witness whom the police discovered as a result" of defendant's statements. *Tucker*, 417 US 450. If the name of a potential witness is "of no evidentiary significance, *per se*," *Ceccolini*, 435 US 277, then defendant here, who did not know the names of the witnesses, gave the police even less.

Moreover, even if defendant had not given any statement, there is every reason to believe that the identities of Mr. Mack and Mr. Wright would have been discovered in the course of a competent police investigation. It is clear that, before defendant was interviewed, the police had a great deal of information about the crime and about defendant's involvement in it. If defendant had not made any statement to the police, we can be sure that the investigation of these execution-style killings would have continued. At this point, it is impossible to say with certainty what would have happened next or whether the police would have sought information at the Speedy-Q gas station, and that is precisely why the United States Supreme Court has declined to apply the exclusionary rule to living witnesses. But, in keeping with human nature, it is more likely than not that Mr. Mack and Mr. Wright would have become aware of and taken an interest in news of the double murder that took place during their work hours and in the area where they worked. The record shows that both Mr. Mack and Mr. Wright recognized and identified defendant at trial. According to their testimony, they were at the Speedy-Q gas station every night in the course of their work. They testified willingly. There is no suggestion that they were subjected to any police pressure, and it is certain that they were subject to the "normal testing process of an adversary system" through cross-examination. *Tucker*, 417 US 449. Suppression of their testimony would do nothing to preserve the adversary process, *Nix*, 467 US 446, and would place the police in a worse position than if defendant's Sixth Amendment right to counsel had not been violated.

The disqualification of "knowledgeable witnesses from testifying at trial" would be a serious obstruction "to the ascertainment of truth." *Ceccolini*, 435 US 277. As recognized by the majority, neither the exclusionary rule nor the inevitable discovery doctrine have been previously applied to the testimony of witnesses who were named in a defendant's statement, even when that statement was procured in the absence of counsel. *Tucker*, 417 US 444. Here, where the alleged constitutional violation played no "meaningful part in the witness[es]' willingness to testify," *Ceccolini*, 435 US 278, and the testimony was the product of free will, I believe that the testimony of Mr. Mack and Mr. Wright is admissible.

In my opinion, remanding this matter to the trial court is a waste of time and an exercise in pretense. Because there is no way to know what would have happened under different circumstances, the trial court will be forced by the majority, on remand, to either exclude the tenuous "fruit" of defendant's voluntary statement on what amounts to a whim, or to speculate that the witnesses would have been discovered as a result of a competent police investigation. I would prefer to admit that the connection between defendant's statements and the witnesses' willing testimony is too attenuated to presume prejudice, and that the exclusionary rule simply does not apply in this case. The "cure" for the alleged Sixth Amendment violation here is the suppression of defendant's statements as substantive evidence against him. Defendant has been afforded that protection and is not entitled to anything more.

/s/ Michael J. Talbot