[J-18-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 15 WAP 2009
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered September 3, 2008 at No.
	:	903 WDA 2007 affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Allegheny County entered November
	:	20, 2006 at No. CP-02-CR-0011250-2005.
CALVIN HENDERSON,	:	
	:	
Appellant	:	ARGUED: April 13, 2010
	:	

CONCURRING OPINION

MADAME JUSTICE TODD **DECIDED: APRIL 25, 2012**

I concur in the result reached by the majority, as I agree that the results of testing performed on the second sample of blood taken from Appellant's body were, as the suppression court found, admissible. However, I cannot endorse the majority's rationale in arriving at this result. The majority acknowledges that, in order for evidence to be admissible at a criminal trial under Article I, Section 8 of the Pennsylvania Constitution, the rule articulated by our Court in Commonwealth v. Mason, 535 Pa. 560, 637 A.2d 251 (1993), and Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226 (1996) (hereinafter, the Mason/Melendez rule), was intended to require an independent investigative team in **all** instances where police conduct an unlawful search and seizure prior to seizing the

evidence through lawful means.[1] Nevertheless, despite that recognition, the majority now chooses to radically constrict the applicable scope of that rule to only those limited instances in which police engage in the specific egregious police misconduct which was exhibited in those cases — namely, battering down the door of an apartment with a battering ram without probable cause (Mason), or unlawfully seizing the owner of a house and using her key to gain entry to her house (Melendez). I believe such a limitation to be wholly ill-advised and unwarranted.[2]

The overarching concern for protecting the fundamental individual rights secured by Article I, Section 8,[3] which was the impetus for our Court's "independent source" requirement, see Melendez, 544 Pa. at 334, 676 A.2d at 231, is not diminished in the factual context of the instant case; nor would application of this requirement operate in the present case to "forever" bar the Commonwealth "from obtaining non-evanescent evidence

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[1] See Majority Opinion at 10-11 ("We begin with the acknowledgment that, from an original-intent frame of reference relative to Melendez, the independent-investigative-team requirement appears to have been intended to extend to the broader category of unlawful searches and seizures, and the requirement of true independence was to have meant just that.").

[2] While I respectfully differ with the majority's decision to abrogate our Court's prior Melendez decision, I note that it is written with the usual erudition and thoughtfulness that is the hallmark of its author. As I explain herein, my difference with the majority's present decision to veer from the clear jurisprudential course illuminated by our Court in our prior Melendez decision is founded on a principled disagreement with the majority as to how the values embodied in Article One, Section 8 of our Constitution may best be served by courts in circumstances such as those presented by the case at bar.

[3] This Pennsylvania constitutional provision guarantees:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

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connecting Appellant with his crimes" as the majority suggests. Majority Opinion at 14. Nonetheless, the majority has truncated the Mason/Melendez rule in a sweeping and prospective fashion so that it will henceforth apply only to those narrow subset of cases in which police conduct amounts to "willful misconduct" or "malfeasance." In so doing, our Court has needlessly, and in my view, unwisely, diminished the protections of the citizenry of this Commonwealth which Article I, Section 8 affords. Thus, I write separately to distance myself from the majority's curtailment of this rule, particularly as the facts of this case present no compelling reason for doing so.

In adopting a standard for the application of the independent source doctrine under Article 1, Section 8 for all cases in which police "malfeasance is not present," Majority Opinion at 14, the majority supplants the Mason/Melendez rule with that set forth by the United States Supreme Court in Murray v. United States, 487 U.S. 533 (1988). However, such an all-encompassing embrace disregards our Court's clear recognition in Mason and Melendez that the federal Murray standard is insufficiently protective of the rights of the people of this Commonwealth which are secured by Article 1, Section 8.

The proscription against unlawful searches and seizures, contained in Article 1, Section 8, is one of the foundational protections of individual human rights provided by the framers of our state Constitution, and is "meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries." Commonwealth v. Edmunds, 526 Pa. 374, 394, 586 A.2d 887, 897 (1991). This prohibition against governmental trammeling of the right of individual privacy through unlawful intrusion was

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Pa. Const. art. I, § 8.

the driving force behind the inclusion of the prohibition against unlawful searches and seizures in our original Constitution in 1776, a full 15 years before the Fourth Amendment was ratified, and it remains enshrined, virtually unchanged, in our present charter of governance. See Commonwealth v. Sell, 504 Pa. 46, 65, 470 A.2d 457, 467 (1983) ("[T]he survival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth."). The historical motivation of the drafters of our original Constitution, led by Benjamin Franklin in 1776, was to protect the right of individual privacy from unlawful governmental intrusion through the insistence that no search or seizure of a person via warrant take place unless that warrant was supported by probable cause:

> The primary purpose of the warrant requirement was to abolish 'general warrants,' which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.

Edmunds, 526 Pa. at 394, 586 A.2d at 897 (citation omitted). Thus, to bolster this aim of Article 1, Section 8 — the safeguarding of individual privacy and ensuring that warrants will be issued only on probable cause — it is a bedrock principle of our law that any evidence obtained through a search with a warrant which was issued without probable cause will be excluded from use by a court of this Commonwealth in a criminal trial.

By contrast, the United States Supreme Court has embraced a different rationale for excluding evidence seized in violation of the individual privacy rights secured by the Fourth Amendment to the United States Constitution, which does not require the exclusion of such

evidence in order "to redress the injury to the privacy of the search victim." U.S. v. Calandra, 414 U.S. 338, 347 (1974). Rather, the high Court considers the primary purpose for excluding such evidence to be deterrence of future police violations of the Fourth Amendment. Arizona v. Evans, 514 U.S. 1, 10 (1995). Thus, in Murray, the high Court's elucidation of the parameters required by the Fourth Amendment for the application of the independent source doctrine[4] was in furtherance of this objective of prospective deterrence of police misconduct. The high Court utilized a "cost-benefit" approach, which the majority seemingly has adopted today, in explaining that the doctrine's application should be governed by the balancing of the interest in deterring unlawful police conduct against the interest in receiving probative evidence at a criminal trial:

> The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police

[4] The concurring opinion by Chief Justice Castille posits that this characterization of the independent source doctrine as an "exception" to the exclusionary rule is somehow erroneous. Concurring Opinion (Castille, C.J.) at 3 n.2. I respectfully disagree. In a situation where evidence tainted by an illegal search is otherwise obtained by the police through a genuinely independent source, without violation of individual constitutional rights, the exclusionary rule will not operate to bar introduction of the evidence at a subsequent criminal trial; thus, in this sense, it is an exception to the application of the exclusionary rule. This characterization of the independent source doctrine as an exception to the exclusionary rule is hardly an aberration as it has been frequently utilized by other courts and recognized by scholarly commentators. See, e.g., U.S. v. Runyan 290 F.3d 223, 235 (5th Cir. 2002); U.S. v. Heckenkamp, 482 F.2d 114, 1149 (9th Cir. 2007); State v. Rabon 930 A.2d 268, 275 (Me. 2007); State v. Gaines, 116 P.3d 993, 996 (Wa. 2005); William E. Ringel, Searches and Seizures and Arrests and Confessions, § 3:8 (2009); John E. Theuman, State Constitutional Requirements as to Exclusion of Evidence Unlawfully Seized — post-Leon Cases, 19 A.L.R. 5th 470 (2011). Whatever the concurrence posits as the proper characterization, it remains the case that the independent source doctrine simply has no application absent the specter that challenged evidence might otherwise be inadmissible under the exclusionary rule.

> in the same, not a worse, position tha[n] they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray, 487 U.S. at 537 (emphasis omitted) (quoting Nix v. Williams, 467 U.S. 431, 443, (1984)). The Court ultimately considered the objective of deterrence to be adequately served by allowing evidence which had previously been illegally seized by police to be admitted into evidence, so long as the subsequent acquisition of such evidence was "genuinely independent" of a preceding tainted seizure. Murray, 487 U.S. at 542. In this regard, Murray delineated two factors which would defeat a finding of independence: (1) the decision of the police to request the second search warrant was prompted by what was seen during the initial unlawful search, or (2) evidence or information obtained in the original search was presented to the magistrate in the application for the second warrant and thereby affected his decision to issue the second warrant. Id.

We utilized the Murray test in Commonwealth v. Brundidge, 533 Pa. 167, 620 A.2d 1115 (1993); however, such utilization was proper in that case, as our Court was considering only the question of the applicability of the independent source doctrine under the Fourth Amendment to the United States Constitution. Later that same year, though, in Commonwealth v. Mason, 535 Pa. 560, 637 A.2d 251 (1993), our Court considered whether the Murray test governed the application of the independent source doctrine under Article I, Section 8 of the Pennsylvania Constitution. Specifically, we considered whether the doctrine permitted the use of evidence seized from the defendant's apartment after members of a police undercover drug investigative unit, who were awaiting the arrival of a search warrant which one of their team members had gone to a magistrate to obtain,

decided to break down the apartment door with a battering ram and search it. Our Court concluded such a warrantless intrusion and seizure of evidence, absent probable cause and exigent circumstances, violated Article I, Section 8, and the evidence discovered in the unlawful search could not be admitted pursuant to the independent source doctrine simply because a warrant was, in fact, later issued authorizing a search of the apartment.

In arriving at this conclusion, our Court recognized that if it were to decide the case based on Fourth Amendment law as articulated by Murray, suppression of the evidence would not be required. However, mindful that the protections of Article 1, Section 8 are applied not merely for the purpose of deterring police misconduct, but "also to safeguard privacy and the requirement that warrants shall be issued only upon probable cause," Mason, 535 Pa. at 571, 637 A.2d at 256, we declined to follow the Murray test.

Former Chief Justice, then Justice, Cappy authored a joining concurrence in which he lauded the majority's approach as "reining in" what he viewed, in the wake of Brundidge, as a potential "unfettered stampede" to use the independent source doctrine to contravene the clear purposes of Article I, Section 8 and our exclusionary rule. Id. at 572, 637 A.2d at 257. From Justice Cappy's perspective, the source of the information for the issuance of the warrant in Brundidge was not truly independent. Id. at 572 n.1, 637 A.2d at 257 n.1.

Justice Cappy expressed his belief that the independent source doctrine should be applied only in very narrow and limited circumstances, "where the 'independent source' is **truly independent from both the tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered**." Id. at 573, 637 A.2d at 257-58 (emphasis original). He voiced his overarching concern that

"the 'independent source doctrine,' as an exception to the exclusionary rule, should not be allowed to swallow the rule itself." Id. In his view,

> [T]he application of the "independent source doctrine" in a situation where the 'independent source' is not truly independent of both the tainted evidence itself and the officers involved in the initial illegal search will completely eviscerate the exclusionary rule, failing either to deter police misconduct or to protect individual privacy rights as required by Article I, Section 8 of the Pennsylvania Constitution.

Id. at 574, 637 A.2d at 258.

It was this same concern for protecting the privacy interests of individuals in their persons and their homes that led this Court in Melendez to adopt Justice Cappy's suggested restriction on the use of the independent source doctrine under Article I, Section 8 to only those situations where the source "is truly independent." Melendez, 544 Pa. at 334, 676 A.2d at 231 (quoting Mason, 535 Pa. at 573, 637 A.2d at 258).[5] As the majority

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[5] Although in his concurrence the Chief Justice highlights the fact that the Mason and Melendez Courts did not conduct a formal four-part "Edmunds analysis," Concurring Opinion, (Castille, C.J.) at 4, the absence of this analysis does not, in my view, undermine the precedential strength of those cases or diminish the strength of the state constitutional analysis contained therein. In Edmunds itself we imposed no requirement on courts to follow that particular analytical framework in addressing questions regarding the scope and application of Article I, Section 8; rather we found it important (though not mandatory) that **litigants** brief these factors in cases implicating the Pennsylvania Constitution. See Edmunds, 526 Pa. at 390, 586 A.2d at 895 ("[W]e find it important to set forth certain factors to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania constitution.") Indeed, a mere five months prior to the Melendez decision our Court stated: "Edmunds expresses the idea that it may be helpful to address the concerns listed therein, not that these concerns must be addressed in order for a claim asserted under the Pennsylvania Constitution to be cognizable." Commonwealth v. White, 543 Pa. 45, 50, 669 A.2d 896, 899 (1995); see also Commonwealth v. Shaw, 564 Pa. 617, 622 n.2, 770 A.2d 295, 298 n.2 (2001) ("Edmunds imposes no . . . requirement [to conduct "an Edmunds analysis"] on **this Court**, but instead, sets forth the briefing requirements for **litigants** seeking this Court's review of claims based exclusively on the Pennsylvania Constitution." (emphasis original)). Further, in Mason and Melendez, we expressly (continued…)

herein recognizes, this restriction was intended to apply in all instances where the evidence in question previously was obtained via an illegal search and seizure. This was wholly consonant with our Court's emphasis that it is irrelevant for purposes of Article I, Section 8 whether an illegal seizure of evidence is the result of blatant police misconduct or was merely the product of inadvertent reliance on a warrant lacking probable cause, since Article I, Section 8's emphasis on protecting individual privacy prohibits the introduction of evidence at trial which is obtained through either type of conduct with equal force.[6]

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considered the unique history and fundamental purposes of Article I, Section 8 in choosing not to follow the United States Supreme Court in its interpretation of the Fourth Amendment to the United States Constitution.

[6] I do not suggest that the police committed any misconduct in executing the first search warrant in this case after the magistrate issued it; however, it is not disputed that this warrant lacked the constitutionally-mandated probable cause required for its issuance, and it was, therefore, invalid. Thus, the forcible taking of blood from the body of Appellant pursuant to this invalid warrant was illegal. See, e.g., Commonwealth v. Dobbins, 594 Pa. 71, 934 A.2d 1170 (2007) (holding that since sheriffs had no statutory authorization to seek search warrant, resulting search was illegal); Edmunds (recognizing that searches conducted pursuant to a warrant issued without probable cause or which is otherwise fundamentally defective are illegal); Commonwealth v. White, 459 Pa. 84, 88, 327 A.2d 40, 42 (1974) ("Since the search warrant was defective and there was no voluntary consent to the search, the trial court did not err in its conclusion that this was an illegal search and seizure."). It was this illegal seizure of evidence in violation of the basic rights secured by Article I, Section 8 which irrevocably tainted the evidence acquired under the first warrant and necessitated that it be excluded from use in a judicial proceeding in this Commonwealth. See Edmunds, 526 Pa. at 395-397, 586 A.2d at 897-899 (emphasizing the consistent objective of the exclusionary rule in Pennsylvania to exclude evidence obtained in violation of Article I, Section 8 is to "bolster the twin aims of Article I, Section 8[:] . . . the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause.").

Moreover, and respectfully, the situation present in the case at bar is not, as suggested by the Chief Justice in his concurrence, see Concurring Opinion (Castille, C.J.) at 6, analogous to one in which a police officer applies for a warrant and the warrant application is denied by a magistrate for lack of probable cause, but the officer gathers additional information to augment the warrant application, reapplies for a search warrant, (continued…)

Edmunds, supra. The purpose of the Mason/Melendez rule of strict independence of investigative teams, was, therefore, to ensure that, if such evidence is to be used by a court of this Commonwealth in a criminal trial, it has been thoroughly purged of the taint of the original violation of the rights secured by Article I, Section 8. See Commonwealth v. Melilli, 521 Pa. 405, 421, 555 A.2d 1254, 1262 (1989) ("If the prosecution can demonstrate that the allegedly tainted evidence was procured from an independent origin — a means other than the tainted sources — the evidence will be admissible.")

The majority's present restriction of this requirement to only the rare situations where the police have engaged in the most blatant type of misconduct significantly weakens this safeguard, since, as Justice Marshall has aptly observed:

> When . . . the same team of investigators is involved in both the first and second search, there is a significant danger that the "independence" of the source will in fact be illusory, and that the initial search will have affected the decision to obtain a warrant notwithstanding the officers' subsequent assertions to the contrary. It is therefore crucial that the factual premise of the exception — complete independence — be clearly established before the exception can justify admission of the evidence.

Murray, 487 U.S. at 548-549 (Marshall, J., dissenting).[7]

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and a warrant supported by probable cause is then issued by the magistrate. In that circumstance, the police officer conducted no illegal search and obtained no evidence unlawfully but rather conducted the search only after probable cause existed for the issuance of a valid search warrant; hence the seizure of the evidence pursuant to that warrant is untainted by any prior constitutional violation and unquestionably lawful.

[7] In his concurrence, the Chief Justice postulates that the logic embodied in Justice Marshall's dissent in Murray must be understood as founded on an exclusionary rule, the application of which is focused solely on deterring police misconduct — and, thus, should be read only in that context. See Concurring Opinion (Castille, C.J.) at 6 n.3. I do not so narrowly cabin the quoted wisdom of that eminently learned jurist. Inasmuch as the fundamental truth of Justice Marshall's observation is rooted in a common sense (continued…)

Consequently, in my view, whenever evidence is seized pursuant to an initial illegal search undertaken as the result of a search warrant issued without probable cause, and the Commonwealth later seizes that same evidence pursuant to a subsequent valid search warrant, the Mason/Melendez rule should be applied to guarantee that the admission of such evidence is wholly free of the taint of the original Article I, Section 8 violation. Thus, evidence obtained pursuant to a subsequent search warrant, based on constitutionally sufficient probable cause, should be deemed to have originated from an independent source only if: (1) the tainted evidence obtained from execution of the prior illegal warrant is not relied upon in the pursuit of the subsequent warrant, and (2) the affiant or affiants seeking the subsequent warrant are truly independent of the police officers or the investigative team[8] which participated in the previous illegal search and seizure.

Although the majority posits it is presently necessary to abandon the Mason/Melendez rule because, in its estimation, enforcement in this case would potentially result in "the Commonwealth being forever barred from obtaining non-evanescent evidence connecting Appellant with his crimes," Majority Opinion at 14, the record does not support

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understanding of the influence of human observations on behavior, as the late Chief Justice Cappy recognized in Mason and Melendez, the requirement of strict independence of investigative teams from officers who conducted a prior illegal search and seizure is vitally necessary to vindicate the protections of Article I, Section 8, as it is the only sure means of ensuring that the decision to seek any subsequent warrant is truly independent from, and, thus, not infected by, the evidence obtained as the result of the violation of that constitutional provision.

[8] This latter requirement was never intended, as Appellant suggests, to necessitate barring an **entire** police department from conducting a subsequent independent investigation after a previous illegal search or seizure by some officers in that department; rather, it was intended to bar only those specific officers who participated in that search or seizure. See Mason, 535 Pa. at 574, 637 A.2d at 258, (Cappy, J., concurring) (specifying that independent source doctrine applies only when the source of the evidence is "independent of both the tainted evidence itself and **the officers** involved in the initial illegal search" (emphasis added)).

this conclusion. As the majority recites, the trial court, applying the Mason/Melendez rule, found the evidence obtained pursuant to the second warrant to be admissible under the independent source doctrine as it was "independent from the tainted evidence and the investigative team" who obtained the first warrant. Trial Court Opinion, 6/20/06, at 5 (citing Melendez). I believe the evidence adduced at the suppression hearing, when viewed in a light most favorable to the Commonwealth as the prevailing party, supports the trial court's finding in this regard.[9]

Regarding the first prong of the application of the Mason/Melendez rule, which requires that the tainted evidence play no role in the investigative process which leads to the obtaining of the second search warrant, I discern nothing from the record to indicate that Appellant's DNA test results obtained by the execution of the first warrant, in which Detective Evans did not participate, contaminated the investigative process which led to the issuance of the second warrant. As acknowledged by the majority, the record does not establish that Detective Evans had any awareness of those test results, and neither the results themselves, nor any derivative evidence therefrom, was utilized by Detective Evans in his investigation, nor in his affidavit of probable cause presented to the magistrate for the issuance of the second warrant. Thus, the tainted evidence procured by the first warrant did not infect the magistrate's decision to issue the second warrant.

With respect to the second prong of the Mason/Melendez rule, that the independent source be truly independent from the police officers or investigative team who engaged in

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[9] When we review a suppression ruling adverse to the defendant, we consider only the evidence presented by the Commonwealth, and the evidence of the defense which is uncontradicted when fairly read within the context of the entire record. Commonwealth v. Pruitt, 597 Pa. 307, 325, 951 A.2d 307, 317 (2008). Our task in reviewing the factual findings of the suppression court is to determine if they are supported by the record, and, if we establish that they are, we are bound by them. Commonwealth v. Jones, 605 Pa. 188, 198, 988 A.2d 649, 654 (2010).

the illegal search, the record evidence, when viewed most favorably to the Commonwealth, supports the trial court's conclusion that Detective Evans was not a member of the group of officers who initially investigated the victim's assault, or that he played any other part in the investigation which led to the obtaining of the first search warrant. Indeed, at the time the first investigation was taking place, Detective Evans was doing "pre-employment polygraphs" for the Pittsburgh Police Department. N.T. Suppression Hearing, 5/22/06, at 53.

Additionally, and critically, there was no evidence of record suggesting that, as Detective Evans conducted his own investigation, Detective Johnson, or any other member of the original investigative team, supervised, coordinated, or collaborated with Detective Evans on the conduct of his investigation in any way. According to the testimony adduced under oath at the suppression hearing, Detective Evans' sole contact with Detective Johnson regarding the investigation occurred when Detective Evans met with Assistant District Attorney Janet Necessary and Detective Johnson, and was told at that time to research and develop probable cause for a search warrant for Appellant's blood. Detective Evans attested, under oath, that he did not review the first search warrant with Detective Johnson, nor was he informed of any problems with that warrant. Id. at 55-56, 58-59.

Although Detective Evans' investigation quite naturally covered some of the same ground as Detective Johnson's, the record supports the conclusion that he did not simply robotically reenact Detective Johnson's efforts.[10] Detective Evans testified that he did not rely solely on the information in the case file in the conduct of his investigation, but, rather, conducted his own independent investigation, which included: reviewing a number of

[10] The Mason/Melendez rule requires only that information which was obtained in a prior illegal search and seizure be kept independent of a subsequent effort to secure a warrant; thus, Detective Evans was not barred from utilizing information which Detective Johnson previously acquired in his investigation, and which was untainted by the illegal seizure of Appellant's blood.

reports in the file in addition to Detective Johnson's report; reading the victim's medical records, which provided the additional information the victim had initially reported to the emergency room doctor that she was assaulted by two men; interviewing the controller at the nonprofit organization where Appellant previously worked and confirming both, that Appellant had a key to the van identified as used in the assault, and, also, that the key was not returned after he left the employ of the organization; corroborating that Robert Hawkins, who was previously identified by an eyewitness as the person who abducted the victim, was Appellant's stepson and was with him on the day of the crime; and, finally, reviewing the crime lab report which excluded Robert Hawkins as the rapist. In view of these facts, the suppression court's finding that Detective Evans, in conducting his investigation, acted truly independently from Detective Johnson and the original investigative team who obtained the first invalid search warrant was supported by the record.

Under these circumstances, the second blood test results obtained through the execution of that warrant were admissible under the Mason/Melendez rule, just as the lower court concluded. This case, therefore, presents no justification to re-assess this rule as the majority has done. Moreover, the majority does not merely "limit" the rule, as it suggests, but, rather, in my view, eviscerates it, which may lead to the very destruction of the exclusionary rule itself — an exceedingly perilous regression in the protection of individual rights which Justice Cappy expressly warned against in Mason. I am therefore compelled to concur only in the result reached by the majority in this matter.

Mr. Justice Baer joins this concurring opinion.