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It's Reasonable to Expect Privacy When Watching Adult Videos

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IT'S REASONABLE TO EXPECT PRIVACY WHEN WATCHING ADULT VIDEOS

SUPREME COURT OF NEW YORK
NEW YORK COUNTY

People v. Hemmings[1]
(decided January 12, 2012)

I. FACTUAL BACKGROUND

The New York City Police Department organized and conducted a buy-and-bust operation in New York City, resulting in a positive identification of the defendant, subsequent arrest, and simultaneous seizure of certain illegal contraband found on his person.[2] The ghost officer in the operation, who shadowed the primary undercover officer, surveyed both the primary undercover officer and the suspect for approximately thirty minutes before each entered an adult DVD store.[3] Soon after entering, the undercover officer exited the store and signaled to the ghost officer that he had purchased narcotics from the suspect (later identified as the defendant), which prompted the ghost officer alongside his undercover team to enter the premises.[4] After searching the first and third floors and finding no signs of the suspect, the ghost officer and his team proceeded to the second floor where they found approximately eight to ten viewing booths designed for watching pornographic material.[5]

Each booth had a door six to seven feet in height that "[a]lmost reached the floor and which could be locked."[6] Of those eight to ten booths, only two were closed, which prevented the ghost

[1] 937 N.Y.S.2d 549 (Sup. Ct. 2012).

[2] *Id.* at 551. This was conducted in the Times Square area early in the morning on February 16, 2011. *Id.*

[3] *Id.* While the suspect did fit a certain profile, stocky with a leather jacket, the ghost officer did not see the face of the suspect. *Id.*

[4] *Hemmings*, 937 N.Y.S.2d at 551.

[5] *Id.*

[6] *Id.*

officer from seeing who was inside.[7] According to the ghost officer, he approached the first booth with a closed door, discovered it was unlocked, and without knocking entered the booth and told the person inside to come out.[8] Upon doing so, the officer acknowledged that he was unsure if the person inside the booth was the suspect he had been following, but further observed that there was a leather jacket and knapsack on the floor of the booth.[9] The ghost officer then proceeded to the second booth with a closed door and ordered that occupant to come out.[10] The officer noted that the suspect in the second booth clearly did not match the description of the suspect he had been following earlier and therefore let the second man go.[11] At that point the ghost officer led the individual from the first booth outside where he was then identified by the primary undercover officer as the man who sold him the narcotics, the defendant in this case.[12] Upon identification, the defendant was searched and forty-six dollars was recovered from his person. In addition to the money, the officers also seized the black leather jacket and knapsack belonging to the defendant which were discovered in his booth.[13]

At trial, the defendant sought to suppress both the evidence recovered by law enforcement as well as the identification by the primary undercover officer, alleging that "the police did not act lawfully because he had a reasonable expectation of privacy in the booth."[14] Further, urging the court's application of the exclusionary rule, the defendant sought to suppress both the identification and evidence retrieved from his person, as the ill-gotten fruit of a poisonous tree.[15]

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[7] *Id.* at 551-52.

[8] *Id.* at 552.

[9] *Hemmings*, 937 N.Y.S.2d at 552.

[10] *Id.*

[11] *Id.*

[12] *Id.* This was done from a car-length away and while the defendant was in police custody. *Id.*

[13] *Hemmings*, 937 N.Y.S.2d at 552. The black leather jacket and the knapsack had been on the floor of the booth. *Id.*

[14] *Id.* at 551-52 (noting that this would certainly cover the physical evidence if successful).

[15] *Id.* at 556 ("Where the police lack probable cause, the exclusionary rule requires suppression of the confirmatory identification."); *see also* People v. Gethers, 654 N.E.2d 102, 103 (N.Y. 1995) (noting that evidence recovered without probable cause is inadmissible); United States v. Crews, 445 U.S. 463, 467-69 (1980) (noting that the Court of Appeals agreed that the trial court was correct in ruling that the evidence was obtained without probable cause).

The court granted the defendant's application to suppress the identification and the physical evidence, finding each was obtained unlawfully.[16] In making its determination, the court looked to the explicit language of the Fourth Amendment, which specifically states:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[17]

Based upon the protections afforded therein, the court arrived at two conclusions of law.[18] First, over the People's objections, the court found that the defendant had a reasonable expectation of privacy while occupying a closed viewing booth inside of the adult video store.[19] Second, that the mere fact that "a person may have a reasonable expectation of privacy does not shield him from investigation by the police, but it [nevertheless] requires that before they may negate the privacy interest, they must have a sufficient basis to do so and must act reasonably."[20]

With respect to the court's first conclusion, in an attempt to save both the identification and physical evidence from suppression, the People argued, that while the defendant inarguably maintained a subjective expectation of privacy inside the booth, his expectation was not one that "society recognizes as reasonable."[21] In support of this position, the People relied on precedent which provides in pertinent part that "[p]ublic areas of commercial premises are not afforded Fourth Amendment protection."[22] Despite acknowledging that privacy may be afforded to an individual who, even though occupying a public space, takes reasonable steps to safeguard his or her privacy, the People insisted that "the defendant lacked a reasonable expectation of privacy in the booth in this instance . . . because he did not

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[16] *Hemmings*, 937 N.Y.S.2d at 556.

[17] U.S. CONST. amend. IV.

[18] *Hemmings*, 937 N.Y.S.2d at 553-54.

[19] *Id.* at 552-53.

[20] *Id.* at 554 (citing People v. Mercado, 501 N.E.2d 27 (1986)).

[21] *Id.* (citing Katz v. United States, 389 U.S. 347 (1967)).

[22] *Id.* at 553.

lock the door to the booth."[23]

The court rejected both of the People's arguments, explaining at the outset that the presence, absence, or ultimate use "of a lock is not a determinative factor in deciding whether a person has a reasonable expectation of privacy."[24] Rather, the court recognized that courts tend to construe an expectation of privacy as reasonable based upon "the nature of the activity involved, not the precise physical characteristics of the enclosure."[25] Thus, the court in *Hemmings* determined that the defendant's expectation of privacy was "objectively justifiable,"[26] explaining it as analogous to the degree of privacy reasonably afforded to an individual occupying a toilet stall, bedroom, or room wherein an individual intends to change his or her articles of clothing.[27]

With respect to the second conclusion, the court held that although an individual may have a reasonable expectation of privacy, he or she is automatically shielded "from investigation by the police, but rather that before the police "negate a privacy interest, they must have a sufficient basis to do so and must act reasonably."[28] In turn, the court observed, as the New York Court of Appeals found in *People v. Mercado*,[29] where the circumstances presented are sufficient to give the police "probable cause to believe that criminal activity [is] taking place in the [place to be searched]", a search may be deemed reasonable notwithstanding an intrusion upon an individual's reasonable expectation of privacy.[30] Likewise, the court recognized the exigencies surrounding the situation might also justify the intrusion upon an individual's reasonable expectation of privacy.[31]

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[23] *Hemmings*, 937 N.Y.S.2d at 553.

[24] *Id.* (citing *Mercado*, 501 N.E.2d at 29).

[25] *Id.*

[26] *Id.* at 552 (citing *Katz*, 389 U.S. 347).

[27] *Id.* at 552-53 (citing *Mercado*, 501 N.E.2d at 29).

[28] *Hemmings*, 937 N.Y.S.2d at 554 (citing *Mercado*, 501 N.E.2d at 29).

[29] 501 N.E.2d 27 (N.Y. 1986).

[30] *Hemmings*, 937 N.Y.S.2d at 554 (citing *Mercado*, 501 N.E.2d at 29). The court clarified:

> [I]n passing on whether there was probable cause for an arrest, we consistently have made it plain that the basis for such a belief must not only be reasonable, but it must appear to be at least more likely than not that a crime has taken place and that the one arrested is its perpetrator.

Id. at 555 (quoting People v. Carrasquillo, 429 N.E.2d 775, 778 (N.Y. 1981)).

[31] *Id.* (citing Kroehler v. Scott, 391 F. Supp. 1114, 1119 (E.D. Pa. 1975) ("The Fourth Amendment requires, at a minimum, the determination by a detached official that there is

In this regard, the court noted that the police had reason to believe that the suspect was in the adult video store and had facts pertaining to the suspect's physical description, i.e., the police "knew that the [suspect] had a stocky build and was wearing a dark leather jacket."[32] Yet, the information and knowledge upon which the police relied was not enough to provide probable cause.[33] Furthermore, the court noted that the police "had no basis to believe that [the defendant] knew that [the police] had observed the drug sale or was aware of their presence", and thus, they lacked justifiable concern that the defendant would attempt to escape."[34] Therefore, emphasizing (i) the overwhelming police presence throughout the store; (ii) the lack of danger to the police or risk of evidence being destroyed, or (iii) reason to believe that the defendant "was engaged in criminal activity while he was in the booth," the court found no exigent circumstances to justify the search.[35] Rather, the court explained that "[t]he police could have simply waited a short while and apprehended [the defendant] [] as he walked away from the booth."[36]

In turn, having found that "the defendant had an expectation of privacy in the booth" and that "the police did not act reasonably under the circumstances", the court ruled to suppress both the defendant's identification and physical evidence retrieved by the police at trial.[37] The court arrived at this conclusion in spite of the People's argument that because "the identification took place outside the video store, the taint stemming from [the] improper seizure was attenuated", and thus, did not require suppression under the exclusionary rule.[38] In rejecting this contention, the court distinguished the precedent that the People relied upon, noting that the police lacked probable cause to arrest the defendant in the instant case.[39] However, the

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probable cause warranting a search prior to its commencement, or at least the presence of those rare exigent circumstances which justify a warrantless search.").

[32] *Id.*

[33] *Id.*

[34] *Hemmings*, 937 N.Y.S.2d at 555-56 (observing that defendant "was certainly not attempting to escape from them, as he had closeted himself in a confined area with only one means of egress").

[35] *Id.*

[36] *Id.* at 556.

[37] *Id.*

[38] *Id.* (citing People v. Ramos, 613 N.Y.S.2d 870, 873 (App. Div. 1st Dep't 1994) ("The fact that the identification took place after the parties left the apartment sufficiently dissipated the taint of the warrantless entry.").

[39] *Compare Hemmings*, 937 N.Y.S.2d at 556 (noting that the police did not have probable

court further acknowledged that the primary undercover officer might still be able to identify the defendant at trial, and ordered an independent source hearing be held to rule on said matter.[40]

There is little precedent directly on point regarding the expectation of privacy that one is entitled to while occupying a closed video booth within an adult video store, as was at issue in *Hemmings*. However, the court considered the appropriate, related precedent pertaining to the Fourth Amendment protections that are guaranteed to individuals in places similarly occupied for the purpose of engaging in activities that are intimate in nature, and thus, society recognizes as warranting an objectively reasonable expectation of privacy. This case note explores the present standard used to determine when the Fourth Amendment protects an individual's expectation of privacy and the exclusionary rule's impact upon search and seizure jurisprudence. Moreover, this case note considers how probable cause, exigent circumstances, and the lapse of time impact a court's decision in whether (i) governmental action was reasonable under the circumstances, and (ii) suppression is the appropriate remedy as a result of unlawful government action.

II. THE FEDERAL APPROACH

A. Redefining the Protections Afforded by the Fourth Amendment

Although there exists good precedent that a person cannot maintain a reasonable expectation of privacy in activities or information exposed to the public at large,[41] the United States Supreme

cause to make the arrest), *with Ramos*, 613 N.Y.S.2d at 873 (noting that "the only illegality attaching to defendant's arrest [was] that it was made after the police, without a warrant, improperly entered premises in which defendant had an expectation of privacy, notwithstanding that the record amply support[ed] that the police had probable cause to make such arrest at that time").

[40] *Hemmings*, 937 N.Y.S.2d at 556 (citing *Crews*, 445 U.S. at 477). In *Crews*, although the court determined that the police could not introduce "[t]he pretrial identification obtained through use of [a] photograph take during respondent's illegal detention", the Court nevertheless held that "the in-court identification [was] admissible . . . because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation." *Crews*, 445 U.S. at 477.

[41] *See, e.g.*, Lewis v. United States, 385 U.S. 206, 211 (1966) (recognizing that "when . . . the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were

Court clarified in *United States v. Katz*,[42] that what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[43] The Court noted that although its earlier interpretation of the Fourth Amendment was more restrictive, construing it to protect "only searches and seizures of tangible property . . . 'the premise that property interests control the right of the Government to search and seize has been discredited.' "[44] Thus, contrary to what the government argued, "the absence of such [physical] penetration . . . [did not] foreclose further Fourth Amendment inquiry."[45]

In *Katz*, the government monitored a person's phone calls inside a public telephone booth.[46] Notwithstanding the fact that the electronic listening device used by the government made no physical intrusion into the booth, as it was attached to the exterior of the booth occupied by the defendant, the Court recognized that the government's surveillance was an intrusion into the defendant's privacy.[47] Moreover, the Court observed, while the defendant was visible to onlookers because the booth was made of glass, the defendant did not intend to prevent others from seeing him, but rather, sought to prevent them from hearing him.[48] In turn, the Court reasoned that the defendant, while occupying the public telephone booth, had a reasonable expectation of privacy protected by the Fourth Amendment.[49] The Court explained that a person in a telephone booth who "[s]huts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[50]

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carried on in a store, a garage, a car, or on the street").

[42] 389 U.S. 347 (1967).

[43] *Id.* at 352.

[44] *Id.* at 353 (quoting Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304 (1967)).

[45] *Id.* (citing Olmstead v. United States, 277 U.S. 438, 457 (1928), *overruled in part by Katz*, 389 U.S. 347).

[46] *Id.* at 348 (noting that the evidence obtained via surveillance showed that the defendant conveyed wagering information from Los Angeles to Miami and Boston in violation of federal statute).

[47] *Katz*, 389 U.S. at 348-49, 352 (noting that "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication").

[48] *Id.* at 352 (observing that the court agreed with the government that the booth allowed the defendant to be seen).

[49] *Id.*

[50] *Id.*

Although the Court in *Katz* reiterated the principle that "the Fourth Amendment protects people-and not simply 'areas'-against unreasonable searches and seizures", the Court's holding demonstrates that the place which a person occupies is nevertheless a pertinent factor in deciding whether a person maintains a reasonable expectation of privacy.[51] This notion is also illustrated in *Kroehler v. Scott*,[52] in which the district court reviewed the constitutionality of "covert police observation of activities undertaken in toilet stalls in public restrooms."[53]

In *Kroehler*, "in response to complaints of homosexual and drug-related activity occurring in the public men's room at the Penn Central Railroad Station and at Long Park, [the government] initiated a program of surveillance designed to . . . apprehend persons involved in these criminal activities."[54] Under the program, "holes were drilled in the ceilings directly above the toilet stalls", enabling the government actors who implemented the program "to peer covertly into the stall[s] below and observe, unnoticed, whatever transpired."[55] Those persons apprehended as a result of these observations filed suit, arguing that the surveillance program violated their right to privacy.[56] Specifically, those apprehended alleged the program was unconstitutional because it was implemented "without [the government actors] first obtaining a search warrant based upon a showing of probable cause that criminal activity was taking place therein or demonstrating at least the exigent circumstances which suspend the requirement of a warrant.[57] In response, the government relied heavily on "the circumstances which gave rise to the surveillance—namely, numerous complaints of criminal activities", and urged the court find "the surveillance in question[] constitutionally proper, prompted by the threat thus posed to the innocent public."[58]

Ultimately, the court concluded that a person maintains a reasonable expectation of privacy while occupying a toilet stall.[59] Observing that the purpose of using a bathroom involves activities that

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[51] *Id.*
[52] 391 F. Supp. 1114 (E.D. Pa. 1975).
[53] *Id.* at 1117.
[54] *Id.* at 1115.
[55] *Id.* at 1116.
[56] *Id.*
[57] *Kroehler*, 391 F. Supp. at 1116.
[58] *Id.*
[59] *Id.* at 1117.

are personal, intimate, and private by their nature, and having determined that the occupation of a bathroom stall warrants a reasonable expectation of privacy, the court further explained that this privacy expectation is not lost as a result of a person's failure to utilize a door to prevent disclosure of his or her activities.[60] Pertinent to the court's rationale was the fact that the surveillance at issue enabled the government to view "not only those involved in criminal activity, but also countless innocent and unknowing persons who reasonably expected and were properly entitled to a modicum of privacy."[61] Therefore, explaining that "[t]he Fourth Amendment requires, at a minimum, the determination by a detached official that there is probable cause warranting a search prior to its commencement, or at least the presence of those rare exigent circumstances which justify a warrantless search," the court found "[t]he warrantless and non-selective search of all individuals who happen[ed] to be in the area [was not] justified under the circumstances."[62]

B. Application of the Exclusionary Rule Evaded by the Attenuation Principle

The exclusionary rule is a judicially-crafted mandate which was "adopted to effectuate [and safeguard] the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' "[63] When the exclusionary rule is invoked, "evidence obtained in violation of the Fourth Amendment" should be suppressed, as the United States Supreme Court has long recognized that evidence unlawfully obtained "cannot be used in a criminal proceeding against the victim of the illegal search and seizure."[64] In *Wong Sun v. United States*,[65] the Supreme Court added further clarity to the exclusionary rule's application. The Court observed that the exclusionary rule applies both to

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[60] *Id.*

[61] *Id.* at 1119; *see also* Bielicki v. Superior Court of L.A. Cnty., 371 P.2d 288, 290 (Cal. 1962) (noting that the court suppressed the evidence retrieved as a result of surveillance over toilet stalls on the ground that there was not probable cause to justify the intrusion into the individuals' privacy and the surveillance allowed for the observation of the "innocent and guilty alike").

[62] *Kroehler*, 391 F. Supp. at 1119.

[63] United States v. Calandra, 414 U.S. 338, 347 (1974) (quoting U.S. CONST. amend. IV)).

[64] *Id.* (citing Weeks v. United States, 34 S. Ct. 341, 346 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961)).

[65] 371 U.S. 471 (1963).

the evidence "traditionally barred . . . physical, tangible materials obtained either during or as a direct result of an unlawful invasion" and "testimony as to matters observed during an unlawful invasion."[66] In turn, the Court established precedent that has carried through search and seizure jurisprudence with great impact, articulating that "[t]he exclusionary prohibition extends [to both] the indirect [and] the direct products of such invasions."[67]

In *Wong Sun*, federal narcotics agents observed a suspect over the course of six weeks and he was subsequently arrested for heroin possession.[68] Thereafter, following the suspect's arrest, he gave up the person who he bought the heroin from, which information led the narcotics agents to the residence and business of the person the suspect identified.[69] Thereafter, without a search warrant, the officers entered the identified seller's dwelling, at which time the alleged seller advised the narcotics officers that another individual, Johnny Yee, was allegedly the supplier of the drugs.[70] Relying on this information, the officers then went to Yee's residence, recovered several tubes of heroin, and were then directed to the residence of yet another individual, Wong Sun, who was allegedly the original supplier of the heroin.[71] Wong Sun was arrested and convicted along with Yee.[72]

At trial, Wong Sun argued the evidence obtained and presented against him, specifically, his unsigned confession which was obtained at the time of his arrest "without probable cause or reasonable grounds"[73] was inadmissible as it was the fruit "of unlawful arrests or of attendant searches."[74] However, the Court rejected this contention, observing that although the arrest was in fact unlawfully made, Wong

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[66] *Id.* (citing McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955) (explaining that there was "no basis in the cases or logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed"). In *Wong Sun*, the Court considered the claims of more than one petitioner, each who alleged that the evidence obtained and presented against them at trial was unlawfully obtained. *Id.* at 490-92. However, for the purposes of this case note, only petitioner Wong Sun's claim is explored.

[67] *Id.* at 484.

[68] *Id.* at 473.

[69] *Id.* at 473-74.

[70] *Wong Sun*, 371 U.S. at 474.

[71] *Id.* at 475.

[72] *Id.*

[73] *Id.* at 491.

[74] *Id.* at 477.

Sun was nevertheless "released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement."[75] Thus, relying on the precedent previously set forth in *Nardone v. United States*,[76] the Court held that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.' "[77] The holding in *Wong Sun* illustrates how the United States Supreme Court has narrowly interpreted the exclusionary rule as applicable only in limited circumstances to exclude a limited category of evidence.

In *United States v. Crews*,[78] the Supreme Court again examined the exclusionary rule and attenuation principle from *Wong Sun* and *Nardone*, observing that in addition to direct physical evidence, "items observed or words overheard in the course of the unlawful activity, [and] confessions or statements of the accused obtained during an illegal arrest and detention" fall within the exclusionary rule's realm and are subject to suppression.[79] At issue in *Crews* was the constitutionality of "an in-court identification of the accused by the victim of a crime" where such identification stemmed from an unlawful arrest."[80] The constitutional challenge came as a result of an assault and robbery after which respondent was questioned by the police, "tentatively identified," questioned a second time, photographed without the police making a formal arrest or bringing charges, and subsequently identified which prompted an indictment.[81]

After adopting "the trial court's finding that respondent was detained without probable cause"[82] and assessing each element of "[a] victim's in-court identification of the accused",[83] the Court con-

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[75] *Wong Sun*, 371 U.S. at at 491.

[76] 308 U.S. 338 (1939).

[77] *Wong Sun*, 371 U.S. at 491.

[78] 445 U.S. 463 (1980).

[79] *Id.* at 470 (citing Dunway v. New York, 442 U.S. 200, 218 (1979) (observing that "[w]hen there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but also use of the evidence is more likely to compromise the integrity of the courts").

[80] *Id.* at 465.

[81] *Id.* at 465-69.

[82] *Id.* at 469.

[83] *Crews*, 445 U.S. at 471.

> A victim's in-court identification of the accused has three distinct elements. First, the victim is present at trial to testify as to what transpired between her and the offender, and to identify the defendant as the culprit. Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her ob-

cluded the challenged identification was "not the product of any police misconduct."[84] Rather, explaining that the "the illegal arrest [did not] infect the victim's ability to give accurate identification testimony" and recognizing the time lapse between the unconstitutional action and the evidence in question and the number of links in the chain between each act, the Court found that "the toxin in this case was injected only after the evidentiary bud had blossomed [and] the fruit served at trial was not poisoned."[85]

Thereafter, in *New York v. Harris*,[86] the Court further established that the attenuation principle might permit the government to introduce a confirmatory identification even where the identification was unlawfully procured.[87] In *Harris*, the Court accepted the lower court's finding that the defendant "did not consent to the police officers' entry into his home and the conclusion that the police had probable cause to arrest him."[88] However, in assessing and determining how to resolve the facts before it, the Court stated that it would not "adopt a 'per se' or 'but for' rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest."[89]

The Court observed that the defendant had not authorized the police to enter his home and the police did so without a warrant.[90] This effectively cast a shadow upon whether all evidence as the result of an illegal arrest would be deemed the forbidden fruit of such an unlawful arrest.[91] While, the Court recognized that "the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality,"[92] the Court ultimately determined that because the police maintained a right to question the defendant before arresting him, any information

> servations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender.

Id.

84 *Id.*

85 *Id.* at 472.

86 495 U.S. 14 (1990).

87 *Id.* at 17.

88 *Id.*

89 *Id.* at 18 (quoting United States v. Ceccolini, 435 U.S. 268, 276 (1978)).

90 *Id.* at 17.

91 *Harris*, 495 U.S. at 18 (citing *Crews*, 445 U.S. at 474).

92 *Id.* at 19.

they got upon questioning him, even after the illegal arrest, was subject to attenuation.[93]

III. THE NEW YORK STATE APPROACH

A. Defining an Individual's Expectation of Privacy by the Place of Occupancy

In *People v. Mercado*,[94] the court was asked to determine whether the police, in making an instantaneous investigation into the men's rest room at Kennedy Airport, acted unreasonably when standing on top of the commode within a bathroom stall in order to peer over and into an adjoining stall occupied by the defendant.[95] This action was prompted by an unidentified man's tip to the police that "there were two men in a toilet stall in the restroom."[96] An officer entered, confirmed that two men were in fact within one stall, as he could hear their voices, but was unable to conclusively determine the substance of their conversation.[97]

Thereafter, the officer tried "to peer through the space between the door and the frame," but his view was blocked; he could however, view the defendant, who was "sitting on top of the flushing unit with his feet resting on the toilet bowl."[98] The officer then "entered the adjoining stall, stood on the commode and looked down into the occupied stall."[99] As a result of gaining this view, the officer observed "an open glassine envelope containing white powder", which the defendant flushed upon realizing that the officer had discovered them.[100] The men exited the stall upon order and "19 'nickel bags' of heroin" were retrieved after the police conducted a pat-down search.[101] Over the defendant's objection at trial that the evidence used against him had been unlawfully obtained, and thus, required suppression, he was indicted and sentenced.[102]

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93 *Id.*
94 501 N.E.2d 27 (N.Y. 1986).
95 *Id.* at 28-29.
96 *Id.* at 29.
97 *Id.* at 28.
98 *Id.* at 28-29.
99 *Mercado*, 501 N.E.2d at 29.
100 *Id.*
101 *Id.*
102 *Id.*

The issue before the court in *Mercado* was "whether defendant's Fourth Amendment rights were violated when the officer looked into the stall."[103] Because "[t]he enclosure exists precisely to insure privacy and to shield its occupant from public view," the court explained that "an expectation of privacy in a public rest room stall is reasonable."[104] The court reasoned that "[o]nce the door is closed, an individual is entitled to assume that while inside he or she will not be viewed by others."[105] However, the court also recognized that "since the Fourth Amendment protects against only unreasonable intrusions, a search may be justified by the existence of probable cause to believe that a crime has occurred, is occurring or is about to take place."[106]

In order to determine whether the officer had probable cause the court considered the circumstances of the incident, specifically noting that the officer (i) was on the job "working in airport security"; (ii) entered the bathroom and peered into the stall to investigate a tip; and (iii) made observations from which reasonable inferences could be drawn to conclude that "the stall was not being used for its intended purpose."[107] Emphasizing that "[p]robable cause does not require proof beyond a reasonable doubt," the court in found that the officer had probable cause and his conduct was reasonable under the circumstances.[108] The court in *Mercado* explained that after the officer's "suspicions [were] heightened by what he saw and heard from afar, the officer was not compelled to turn heel and leave the rest room."[109] Rather, the officer was justified in taking reasonable steps "to learn what was going on inside" of the stall.[110]

In *People v. Milom*,[111] the court established that "not every instance of police surveillance in a public rest room constitutes a

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[103] *Id.*

[104] *Mercado*, 501 N.E.2d at 29.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 29-30.

[108] *Id.* at 30.

[109] *Mercado*, 501 N.E.2d at 30.

[110] *Id.*; *see also* People v. Green, 507 N.Y.S.2d 408, 409 (App. Div. 2d Dep't 1986) ("Despite the defendant's reasonable expectation of privacy in the restroom stall, the information received by the police from the victim, when coupled with their own observations, provided them with a reasonable basis to enter the stall and, upon observing the gun, they had probable cause to arrest the defendant.").

[111] 428 N.Y.S.2d 678 (App. Div. 1st Dep't 1980).

Fourth Amendment violation."[112] Rather, as is the case with all Fourth Amendment challenges, whether or not there is an expectation of privacy and whether or not it is reasonable varies based upon the underlying circumstances.[113] In *Milom*, an officer looked through the window of a bar bathroom and observed the defendant in possession of a white power and snorting that white powder along with several other individuals.[114] The officer then confronted the defendant, confirmed that the white powder was narcotics, which he retrieved from the defendant a along with a silver measuring spoon and substantial sum of cash.[115] At trial, the defendant argued that the officer's "surveillance of the rest room constituted a search within the meaning of the Fourth Amendment [and was] not justified by exigent circumstances and [was conducted] without benefit of a warrant."[116] Although cognizant of the fact that in many, if not most instances, individuals maintain a reasonable expectation of privacy while in a bathroom, the court focused on the open area in which the defendant chose to expose and use his drugs.[117] Specifically, the court in *Milom* noted that the defendant did not engage in conduct privately within a bathroom stall, but rather occupied the rest room's "public" area.[118] In turn, the court established, "[t]here is no justified expectation of privacy as to incriminating conduct which occurs in the public area of a rest room rather than inside one of the stalls."[119]

In order to find harmony between the holding in *Mercado*, the existing precedent related to bathroom stalls, as reiterated in *Milom*, and the court's conclusion in *People v. Saunders*,[120] it is necessary to carefully consider the particular facts involved before turning to the issue before the court. In *Saunders*, the search and seizure at issue occurred as a result of the defendant's visit to the Adolescent Reception Center on Rikers Island.[121] The officer on duty at the time of his visit directed all visitors to dispose of any and all contraband in an "amnesty box" and advised the visitors that such disposal could be

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[112] *Id.* at 681.
[113] *Id.* at 680.
[114] *Id.*
[115] *Id.*
[116] *Milom*, 428 N.Y.S.2d at 680.
[117] *Id.* at 680-81.
[118] *Id.* at 681.
[119] *Id.*
[120] 531 N.Y.S.2d 987 (Sup. Ct. 1988).
[121] *Id.* at 988.

made "with 'no questions asked.' "[122] The defendant was also told that all personal belongings were to be secured in lockers and were not permitted inside the prison during the visit with an inmate.[123] Thereafter the defendant entered the toilet facilities which were located in close proximity to the area which was being patrolled by the officer on duty.[124] The lock on the toilet stall that the defendant occupied "was apparently broken."[125] The officer then entered the toilet facilities, heard "a loud sniffing sound," and inquired about it.[126] Without any objection, the defendant turned around to face the officer, revealing "a quantity of white powder on the [his] face—more particularly, on his 'nose, lip and mouth.' "[127]

The facts in *Saunders* are important to understand the court's holding that the defendant, when occupying the bathroom stall at the correctional institution, did not have an objectively reasonable expectation of privacy that is protected by the Fourth Amendment.[128] In arriving at this conclusion, the court observed that "one's expectation of privacy while within the confines or even upon the perimeter of a correctional institution is less than such expectation would be outside the institution."[129] However, the court nevertheless noted that every Fourth Amendment challenge should be assessed by "an objective standard [that strives for a balance] between zealous government agents and private citizens."[130]

Thus, turning to the circumstances of this encounter, the court recognized that the search and seizure was made by "a prison security officer, [who] as part of his assigned duties, [took] note of something evident to his sense of hearing."[131] Reasoning that the officer's conduct was reasonable under the circumstances, the court explained that "[t]he notion that a prison setting affords the same guarantee of protection from warrantless police intrusion as the sanctity of the home and/or the privacies of life, on its face, is at odds with both common

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122 *Id.*
123 *Id.*
124 *Id.*
125 *Saunders*, 531 N.Y.S.2d at 988.
126 *Id.*
127 *Id.*
128 *Id.* at 987.
129 *Id.* at 992.
130 *Saunders*, 531 N.Y.S.2d at 992.
131 *Id.* at 992-93.

sense and reality."[132]

In *People v. Diaz*,[133] the court clarified that there is not "much distinction between the privacy which people have a right to expect in public restrooms from that which they hope to find in fitting rooms."[134] In *Diaz*, a "special patrolman" in a department store, assigned to prevent theft and to apprehend those who commit such a crime, witnessed the defendants place a scarf into a knapsack.[135] After viewing the defendants enter a fitting room with items, the special patrolman gained a vantage point above the fitting room and viewed the defendants remove price tags from the clothing that they proceeded to place in a knapsack.[136] As a result of discovering the theft that occurred, the defendants were detained and arrested.[137]

When the circumstances preceding the arrest were later challenged at trial, the court first observed, "there can be no reasonable expectation of privacy as to those things which are fully disclosed and generally noticeable by the public at large."[138] Thus, the court explained, crucial in determining whether a reasonable expectation of privacy exists involves looking to "the nature of the activity involved and whether an individual engaged in that activity may reasonably believe that he may perform it in private."[139] The court recognized, "[t]he function of a fitting room is, after all, to provide a place where a customer can try on items of clothing in private, undisturbed from the observation of others."[140] The court also considered that clothing stores in particular have had great difficulty "in dealing with the problem of theft." However, observing that "there are far less intrusive security measures which [stores] can utilize [rather] than resorting to surreptitious spying on shoppers as they undress," the court found the fitting room surveillance was unreasonable and violated the defendants' expectation of privacy deserving of Fourth Amendment protection.[141]

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[132] *Id.*
[133] 376 N.Y.S.2d 849 (Crim. Ct. 1975).
[134] *Id.* at 854.
[135] *Id.* at 850-51.
[136] *Id.* at 851.
[137] *Id.*
[138] *Diaz*, 376 N.Y.S.2d at 853 (citing Harris v. United States, 390 U.S. 234 (1968)).
[139] *Id.* at 855.
[140] *Id.*
[141] *Id.*

B. Application of the Attenuation Principle

In *People v. Gethers*,[142] the court applied the exclusionary rule and suppressed an "on-the-scene identification . . . as a product of [an] illegal arrest."[143] The case came before the court on a motion to suppress both tangible evidence and an identification that resulted from a "buy and bust" drug operation in Manhattan.[144] The undercover detective bought illegal narcotics and subsequently relayed to another officer the descriptions of both the defendant and another man, who were arrested by that officer and led to a street corner in order for the undercover officer to confirm the suspects' identification.[145] The undercover officer then identified the two suspects as the dealers.[146]

At a pre-trial suppression hearing, the court determined that the police did not have probable cause to arrest the two individuals.[147] The court further observed that "[t]he casual link between the arrest and identification is obvious and unattenuated."[148] In its conclusion, the court noted that the illegal seizure and detention of the defendants not only made the identification possible, but was done for the purpose of displaying them to the undercover officer and thereby securing a pretrial identification to be used at the trial to bolster her in-court identification."[149] Thus, the court suppressed the confirmatory identification and ordered that an independent source hearing be held to determine whether the officer would be permitted to make an "in-court identification . . . sufficiently distinguishable to be purged of the primary taint."[150]

However, as demonstrated by the court's ruling in *People v. Ramos*,[151] circumstances arise in which the exclusionary rule will not mandate suppression of evidence despite the fact that it was unlawfully come upon. In *Ramos*, the court concluded that the defendant's arrest was unlawful because the police did not have a warrant when

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142 654 N.E.2d 102 (N.Y. 1995).
143 *Id.* at 103.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Gethers*, 654 N.E.2d at 104.
148 *Id.*
149 *Id.*
150 *Id.* at 105 (citing *Wong Sun*, 371 U.S. at 488).
151 613 N.Y.S.2d 870 (App. Div. 1st Dep't 1994).

they entered premises "in which [the defendant] had a legitimate expectation of privacy."[152] Therefore, since the arrest was improper, the court established that the physical evidence seized from the premises at that time was "fruit" of the unlawful arrest, and thus, required suppression.[153]

However, noting that "a confirmatory identification would normally be suppressed if defendant had been unlawfully detained by the police,"[154] the court nevertheless concluded that under the facts presented there was "no need to suppress the identification under the Fourth Amendment."[155] Rather, emphasizing that "the identification took place after the parties left the apartment sufficiently dissipated the taint of the warrantless entry."[156]

V. CONCLUSION

As demonstrated by the case law and various doctrines explored herein, both federal and New York State courts have endeavored to strike a balance between the need for the police to have some leeway to conduct warrantless searches and the need to safeguard the rights intended by our framers to be afforded to every citizen of the United States, whether suspected, found guilty, or otherwise innocent to the criminal activity at issue. The court in *Hemmings* arrived at its decision after a careful analysis of the specific circumstances preceding and surrounding the defendant's encounter with the police. Absent exigent circumstances or at least probable cause to justify the nature of the intrusion at issue, the court rendered its decision in an effort to protect the defendant's reasonable expectation of privacy. The court's ruling is not only consistent with, but flows directly from the seminal decision of the United States Supreme Court in *Katz*—what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"[157]—especially when that individual shuts the door behind him.

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[152] *Id.* at 872.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Ramos*, 613 N.Y.S.2d at 872-73.
[157] *Katz*, 389 U.S. at 352.

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