CONSTITUTIONAL LAW: RETROACTIVE EFFECT GIVEN TO *MAPP V. OHIO* IN COLLATERAL ATTACK OF PRE-*MAPP* CONVICTION

IN THE landmark decision of *Mapp v. Ohio*,[1] which barred for the first time the introduction in state courts of evidence obtained by unconstitutional searches and seizures,[2] the Supreme Court did not expressly provide whether the decision was to have retroactive effect. The problem raised by this omission has significance to the substantial number of persons convicted of crimes prior to the *Mapp* decision on the basis of illegally seized evidence.[3] The recent case of *Hall v. Warden*[4] presents the first instance in which a court in meeting this question, has given retroactive effect to *Mapp* in a collateral attack of a pre-*Mapp* conviction.[5]

[1] 367 U.S. 643 (1961). For general discussions of this decision see Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

[2] Weeks v. United States, 232 U.S. 383 (1914), established the exclusionary rule in federal courts by holding that in a federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure by federal officers. Whether this exclusionary rule applied to the states was not expressly decided until Wolf v. Colorado, 338 U.S. 25 (1949). This case held that although constitutional guarantees against unreasonable searches and seizures are applicable to the states through the due process clause of the fourteenth amendment, due process did not require exclusion by state courts of unconstitutionally seized evidence. *Mapp v. Ohio* overruled *Wolf* and made the exclusionary rule mandatory on the states as a matter of due process.

[3] Approximately two-thirds of the states admitted unconstitutionally seized evidence when *Wolf* was decided in 1949, and almost half of the states continued to do so until *Mapp* was decided in 1961, including many of the most populous, e.g., New York, Ohio, Pennsylvania, New Jersey, and, until 1955, California. See Appendix to Elkins v. United States, 364 U.S. 206, 224-32 (1960); Appendix to Wolf v. Colorado, 338 U.S. 25, 33-39 (1949).

Unconstitutionally seized, or illegally seized, evidence is that which is obtained through the "unreasonable searches and seizures" prohibited by the fourth amendment. Elkins v. United States, 364 U.S. 206, 223-24. For discussions of the application of the fourth amendment to state action through the fourteenth amendment, see generally authorities cited note 1 *supra*.

[4] 313 F.2d 483 (4th Cir. 1963), *cert. denied*, 374 U.S. 809 (1963).

[5] Collateral attacks of pre-*Mapp* convictions should be distinguished from those arising on direct appeal. Collateral attacks arise through habeas corpus or similar state proceedings, while direct appeals occur through normal appellate procedure. On direct appeal, most courts will apply *Mapp* on the ground that cases on appeal should be decided on the basis of current law. For a collection of cases see Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 680-83 (1962).

Petitioner Hall was tried for murder in a Maryland court prior to *Mapp*. At his trial, the state without objection introduced evidence obtained from a search of Hall's hotel room conducted without a search warrant. Hall was convicted, and, after exhausting his post-conviction remedies on grounds unrelated to the introduction of evidence, was sentenced to death.[6] Subsequent to the *Mapp* decision, Hall filed a petition in the United States District Court for the District of Maryland seeking a writ of habeas corpus on the ground that illegally obtained evidence was presented at his trial, and that this introduction violated his constitutional rights. The district court determined that the evidence was not the product of an illegal search, but that in any event *Mapp* should not be applied retroactively.[7] On appeal, the Fourth Circuit determined that the evidence had been illegally seized[8] and reversed and remanded the case to permit a new trial.

In determining whether to apply *Mapp* retroactively, the court of appeals first considered the state's argument that Hall had waived the opportunity to assert a violation of his constitutional rights by failing to object to the admission of the evidence at his trial. The court rejected this contention by noting that the Supreme Court had refused many times to impose on the states a rule excluding unconstitutionally seized evidence, and, therefore, Hall's counsel had no reason to suspect that evidence clearly admissible under Maryland law would later be found unconstitutional.[9]

Since the *Mapp* decision involved the affirmation of a basic constitutional protection and did not contain any clear prohibition against retroactive application, the court applied the principle of consistent constitutional law[10] and held that if the admission of

[6] Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); Hall v. Warden, 224 Md. 662, 168 A.2d 373, *cert. denied,* 368 U.S. 867 (1961).

[7] Hall v. Warden, 201 F. Supp. 639 (D. Md. 1962), *rev'd,* 313 F.2d 483 (4th Cir.), *cert. denied,* 374 U.S. 809 (1963).

[8] The state contended and the district court had found that by his actions Hall had consented to the search of his hotel room, and that the search was therefore not illegal. The two dissenting judges in the instant appeal adopted this finding on the ground that appellate courts should not review factual determinations resting upon substantial evidence. 313 F.2d at 497, 498 (Haynsworth and Bryan, JJ., dissenting).

[9] 313 F.2d at 496.

[10] The traditional view has been that a decision interpreting the Constitution must be retroactive, even if it is an overruling decision, under the theory that the reqnirements of the Constitution have always been the same. See, *e.g.,* Norton v. Shelby County, 118 U.S. 425 (1886). Sometimes, however, especially where commercial obligations were assumed in reliance on the overruled decision, or where actions previously thought innocent have become criminal under the new decision, courts apply the judgment prospectively only. See, *e.g.,* James v. United States, 366 U.S. 213 (1961).

certain evidence violates the constitutional right of due process today, it must also have violated the same right yesterday.[11] The court observed that a comparable problem was presented as a result of the decision in *Griffin v. Illinois*,[12] where the Supreme Court found for the first time that due process required states to provide indigent criminal defendants with free trial transcripts when a right of appeal exists. The only mention in *Griffin* of whether the decision would operate retroactively was in Mr. Justice Frankfurter's concurring opinion, in which he urged that the case be applied only prospectively.[13] Subsequently, however, in a collateral attack of a twenty-three year old state conviction,[14] the Court gave *Griffin* retroactive effect by directing the state to make a transcript available to the prisoner and to consider his appeal.[15]

The court next addressed itself to the argument that retroactive application would flood courts with petitions from convicted prisoners. Summary dismissal was given this contention when the court stated: "If such is the result of enlightened opinion, so be it. Such fears have not deterred courts before."[16]

In previous collateral attacks of pre-*Mapp* convictions, the most common reason given for denying relief has been that by not raising objections to the introduction of illegally obtained evidence at trial or on appeal, the prisoner has waived his opportunity to assert a violation of his constitutional rights.[17] As the court noted in the

In such cases, however, prospective application is usually expressly provided for in the overruling decision. See generally Snyder, *Retroactive Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940); Note, 43 VA. L. REV. 1279, 1280-82, 1290-94 (1957).

[11] 313 F.2d at 495.

[12] 351 U.S. 12 (1956).

[13] 351 U.S. at 25-26.

[14] Eskridge v. Washington State Bd. of Prison Terms, 357 U.S. 214 (1958).

[15] Reliance on *Griffin* and *Eskridge* as a basis for retroactive application of *Mapp* has been attacked on the ground that in *Eskridge*, retroactive application was necessary to minimize the risk of having convicted an innocent person. On the other hand, a violation of the *Mapp* requirement does not detract from the accuracy of the conviction. See Traynor, *supra* note 1, at 340-41.

[16] 313 F.2d at 495.

[17] See, *e.g.*, Mezzatesta v. Delaware, 199 F. Supp. 494, 496 (D. Del. 1961); Johnson v. Walker, 199 F. Supp. 86, 92 (E.D. La. 1961); Rayne v. Warden, 198 F. Supp. 552, 555 (D. Md. 1961); Petition of John T. Dirring, 183 N.E.2d 300 (Mass. 1962) State v. Long, 71 N.J. Super. 583, 584, 177 A.2d 609, 610 (Essex County Ct. 1962); People v. Eastman, 33 Misc. 2d 583, 228 N.Y.S.2d 156, 167 (Kings County Ct. 1962); Commonwealth *ex rel.* Stoner v. Myers, 199 Pa. Super. 341, 185 A.2d 806, 808 (1962). This was also one ground advanced for the lower court's decision in the instant case. Hall v. Warden, 201 F. Supp. 639, 643 (D. Md. 1962).

Waiver has been occasionally used by courts refusing to apply *Mapp* on direct appeal. See, *e.g.*, People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100, 101, 227 N.Y.S.2d

instant case, however, the waiver doctrine is often discarded in exceptional circumstances,[18] and frequently is not applied where constitutional rights are involved.[19] Furthermore, it is unrealistic to penalize a defendant for failing to anticipate *Mapp* by holding him responsible for not objecting to what was at the time settled law.[20]

423, 425 (1962); Commonwealth v. Mancini, 198 Pa. Super. 642, 184 A.2d 279 (1962), *cert. denied,* 372 U.S. 911 (1963).

In the recent case of *Fay v. Noia,* 372 U.S. 391 (1963), the Supreme Court dealt with the problem of waiver in federal habeas corpus reviews of state convictions. There the petitioner was convicted in a New York court on the basis of a confession now admitted by the state to have been obtained in violation of the fourteenth amendment. Petitioner objected to the admission of the confession at trial, but after an adverse finding, failed to appeal. Subsequently, petitioner was denied state *coram nobis* relief on the ground that in not appealing the conviction he had waived the opportunity to assert a violation of his constitutional rights.

Petitioner then instituted federal habeas corpus proceedings in the district court, reaching the Supreme Court on writ of certiorari. The Supreme Court determined that his failure to appeal did not bar federal habeas corpus jurisdiction for lack of exhaustion of state remedies, since the exhaustion requirement of § 2254 of the Judicial Code is limited to remedies still open at the time the federal application is filed. The Court rejected that petitioner's waiver in the state court deprived the federal system of jurisdiction over his petition. Federal jurisdiction, reasoned the Court, is conferred by the allegation of an unconstitutional restraint and is not defeated by state procedural rules. A forfeiture of state remedies does not legitimize the unconstitutional conviction. 372 U.S. at 426-28.

The decision thus indicates that the waiver doctrine will be very narrowly applied when state prisoners are challenging the constitutionality of their detention through federal habeas corpus proceedings.

[18] "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. . . . In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may . . . notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 159-60 (1936).

[19] This is especially true where the rights involved are of great magnitude. For instance, in Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956), petitioner, in habeas corpus proceedings, was allowed to assert that pleas of guilty during his trial eight years previously were coerced, despite the absence of any objection during the trial. "[M]en incarcerated in flagrant violation of their constitutional rights have a remedy." *Id.* at 123.

[20] Although many courts have found that in not raising objections to evidence at trial or on appeal, parties have waived that right in later proceedings, at least one court has gone so far as to penalize a defendant for litigating the matter in the original proceedings. In Gaitan v. United States, 295 F.2d 277 (10th Cir. 1961), *cert. denied,* 369 U.S. 857 (1962), petitioner had objected to the admission of evidence at trial and had litigated the matter on appeal without success. The Supreme Court decided Elkins v. United States, 364 U.S. 206 (1960), holding that evidence obtained by state agents in an unreasonable search and seizure is inadmissible in a federal court, and later *Mapp v. Ohio.* Thereafter, petitioner sought to vacate his sentence on the basis of these decisions. The court denied relief on the ground that the question of admissibility of evidence was now res judicata between the petitioner and the United States. Thus, one line of authority holds a party responsible for not objecting to the evidence, while another punishes him if he does.

It may be questioned whether the approach in *Gaitan* is consistent with the reasoning in *Fay v. Noia, supra* note 17.

In addition to the doctrine of waiver, an argument for denying retroactive application has been that the state prosecutors, at the time of the pre-*Mapp* convictions, were entitled to rely on the holding in *Wolf v. Colorado*[21] that the fourteenth amendment did not prohibit admission in state courts of evidence seized through unconstitutional searches and seizures.[22] The rationale of this view is that since state law enforcement officers acted in reliance on *Wolf* and neglected to obtain sufficient evidence by legal methods to support a conviction, they should not now, years later, be confronted with the task of securing admissible evidence. But this reliance seems to be irrelevant as a consideration. The prosecutors were aware that the searches themselves were in violation of the fourteenth amendment, although the fruits of the searches were admissible at trial. State officials having willfully performed their duties in an unconstitutional manner, the state should not now be given special consideration at the expense of the accused.[23] Moreover, since there could have been no such reliance prior to *Wolf*, accepting this argument would lead to the incongruous result of giving retroactive effect to *Mapp* in pre-*Wolf* convictions while denying such application to convictions between *Wolf* and *Mapp*, including direct appeals now before the courts.

Several courts,[24] on the basis of one footnote[25] and the use of

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[21] 338 U.S. 25 (1949).

[22] See State v. Valentin, 36 N.J. 41, 174 A.2d 737 (1961); Bender, *supra* note 5, at 654.

[23] An additional reason relied upon by appellate courts for not giving retroactive effect to *Mapp*, however, is that the *trial courts* were also entitled to rely on what appeared to be the law at the time. See, *e.g.*, Commonwealth v. Mancini, 198 Pa. Super. 642, 184 A.2d 279, 281 (1962), *cert. denied*, 372 U.S. 911 (1963); Commonwealth *ex. rel.* Stoner v. Myers, 199 Pa. Super. 341, 185 A.2d 806, 808 (1962). But again, such reliance should not be a consideration, since it caused no detriment to the court.

Furthermore, neither the reliance of trial courts nor the reliance of prosecutors would seem sufficient reason for denying federal habeas corpus remedy, under the decision of *Fay v. Noia*, *supra* note 17.

[24] See, *e.g.*, United States *ex rel.* Gregory v. New York, 195 F. Supp. 527, 528 (N.D.N.Y. 1961); People v. Eastman, 33 Misc. 2d 583, 228 N.Y.S.2d 156, 158-59 (Kings County Ct. 1962).

[25] "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with Burns v. Ohio, 360 U.S. 252 (1959), Griffin v. Illinois, 351 U.S. 12 (1956), and Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956). In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties." 367 U.S. at 659 n.9.

several verbs and adverbs[26] in the *Mapp* decision have concluded that the language of the opinion itself prohibits retroactive application.[27] Although these sources might be construed to suggest prospectivity,[28] the implication arising from the use of several words and a cryptic footnote does not appear to be a sound basis for resolving a major constitutional issue. The Justices undoubtedly were aware of the problem raised by their decision,[29] and apparently intended to leave it unresolved. Such an inference seems reasonable, since the suggestion that *Wolf* be overruled and an exclusionary rule applied to the states was made only in an amicus brief in the *Mapp* case,[30] and the court could justifiably have been hesitant to determine the consequences of its decision without hearing argument on the point.

The policy enunciated in *Mapp* presents the strongest argument for applying the decision only prospectively. Unconstitutionally seized evidence is excluded from trial in order to protect individual privacy from unlawful police intrusion.[31] Proponents of this argu-

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[26] "*Presently*, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may . . . ." 367 U.S. at 657 (Emphasis added.)

"If the fruits of an unconstitutional search *had been* inadmissible in both state and federal courts, this inducement to evasion [the ability to use the evidence in state prosecutions] would have been sooner eliminated." *Id.* at 658 (Emphasis added.)

"Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, . . . we can *no longer* permit that right to remain an empty promise." *Id.* at 660 (Emphasis added.)

[27] But see Allen, *supra* note 1, at 43-45, where the author argues that the language of the Court indicates a retroactive application should be given *Mapp*.

[28] Mr. Justice Harlan's dissent in *Mapp*, on the other hand, indicated an assumption that the majority decision would be applied retroactively:

"[T]he issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf*. . . ." 367 U.S. at 676.

[29] A similar problem had been raised by Griffin v. Illinois, 351 U.S. 12 (1956), and in Eskridge v. Washington State Bd. of Prison Terms, 357 U.S. 214 (1958), the Court determined that *Griffin* should be given retroactive application. See text accompanying notes 12-15 *supra*. Six of the Justices who took part in the *Mapp* decision also took part in the *Griffin* decision, while seven participated in *Eskridge*.

[30] See Brief for the American Civil Liberties Union as Amicus Curiae, p. 20, Mapp v. Ohio, 367 U.S. 643 (1961).

[31] That the purpose of *Mapp* is not primarily to insure a fair trial but to protect the individual's constitutional rights outside the court room is clear from the language of the decision: "[T]he second basis elaborated in Wolf in support of its failure to enforce the exclusionary doctrine against the States was that 'other means of protection' have been afforded 'the right to privacy.' . . . The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*." 367 U.S. at 651-53. "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional

ment[32] urge that this purpose would not be served by retroactive application, as the invasion of privacy has already been committed. Furthermore, society will suffer from such application because the convicted criminal, regardless of the source of the evidence used to convict him, clearly did the acts with which he was charged. The weakness of this argument, however, is that it fails to sufficiently recognize that *Mapp* does not merely establish a rule of evidence based on public policy,[33] but is a constitutional affirmation that people are deprived of their fourteenth amendment rights when convicted by means of illegally seized evidence. Furthermore, strict application of the policy argument would make *Mapp* inapplicable to any *seizures* occurring before the date of that decision. Thus, *Mapp* would not be applied to post-*Mapp* convictions where the seizures occurred before the *Mapp* decision, or even to the conviction of Mrs. Mapp herself.

It is submitted that *Hall* presents a satisfactory solution to the basic fear raised by the prospect of retroactive application of the *Mapp* decision—the wholesale release of convicted criminals. *Hall* does not open the doors of the prison, but merely reopens the doors to the courts. After a prisoner has proven that the evidence used against him was illegally obtained, and that he was thus deprived of his constitutional rights, the state is given an opportunity to retry him.[34] Although the passage of time makes it difficult for the prose-

guaranty in the only effectively available way—by removing the incentive to disregard it.'" 367 U.S. at 656. "Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold." 367 U.S. at 657.

"Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States . . . we can no longer permit that right to remain an empty promise." 367 U.S. at 660.

[32] See Bender, *supra* note 5, at 660-68; Traynor, *supra* note 1, at 340-42.

[33] Prior to *Mapp*, California adopted the exclusionary rule in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). Treating the new rule as a rule of evidence, the California courts gave it retroactive application on direct appeals, but not in collateral attacks. Traynor, *supra* note 1, at 339. The example set by state courts, however, does not govern the decision to be made by courts applying *Mapp*, since *Mapp* does not establish a procedural rule but rather a constitutional mandate.

[34] This remedy will not conflict with the constitutional prohibition of double jeopardy or with any statute of limitations. The universal rule in this country in regard to double jeopardy is that if a defendant obtains the reversal of a conviction by his own appeal, he may be tried again for the same offense. Most courts regard the new trial as a second jeopardy but justify this on the ground that the petitioner has "waived" his plea of former jeopardy by asking that the conviction be set aside. See, *e.g.*, Trono v. United States, 199 U.S. 521 (1905); Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950); Annot., 97 A.L.R. 160 (1935). Neither may it be asserted that the appropriate statute of limitations prevents a retrial, inasmuch as these statutes by

cution to prove its case, time also makes it difficult for the prisoner to prove the illegality of his conviction, especially since matters relating to the source of the evidence would normally not appear in the transcript.

Hall's answer to the retroactive problem of *Mapp* is consistent with the constitutional rights enunciated in the latter decision.[35] Hopefully, when the Supreme Court determines the application to be given *Mapp v. Ohio,* its decision will be along the lines first set forth in *Hall v. Warden.*

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their wording cease running upon indictment for an offense, and the same indictment may be used upon retrial.

[35] A logical extension of the exclusionary rule is to also exclude evidence derivatively obtained from illegally seized evidence. This principle, known as the "fruit of the poisonous tree" doctrine, is applied to verbal evidence as well as to the tangible fruits of an illegal search. Thus, in Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940), the court found that where defendant's home was entered without a warrant, and the mere presence of the police officers induced a voluntary confession, the confession was the fruit of illegal police tactics and therefore inadmissible. On the basis of *Nueslein,* the court in *Hall* found it possible that a confession given by Hall immediately upon learning that police had searched his hotel room was induced by the illegal search. Therefore the court instructed the trial court on retrial to determine whether the search, even before the results of it were made known to Hall, affected his power of resistance. "The psychological effect on Hall produced by this search . . . is a factor to be considered." 313 F.2d at 490.

The fruit of the poisonous tree doctrine was recently given new scope by the Supreme Court in Wong Sun v. United States, 371 U.S. 471 (1963). Here a confession was induced by the illegal presence of seven policemen in defendant's home. This confession led police to interrogate a third party who voluntarily surrendered heroin which was subsequently introduced into evidence against defendant. The Court excluded the confession, as well as the heroin, a fruit of the illegal entry. In discussing the application of the poisonous tree doctrine, the Court said, "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 487-88.