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

In the landmark decision of Mapp v. Ohio, which barred for the first time the introduction in state courts of evidence obtained by unconstitutional searches and seizures, 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. The recent case of Hall v. Warden 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.


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. 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. On appeal, the Fourth Circuit determined that the evidence had been illegally seized 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.

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 and held that if the admission of

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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 requirements 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. The court observed that a comparable problem was presented as a result of the decision in *Griffin v. Illinois*, 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. Subsequently, however, in a collateral attack of a twenty-three year old state conviction, the Court gave *Griffin* retroactive effect by directing the state to make a transcript available to the prisoner and to consider his appeal.

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."

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. 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).


21 813 F.2d at 495.
22 381 U.S. 12 (1956).
25 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.


Waiver has been occasionally used by courts refusing to apply *Mapp* on direct appeal. See, *e.g.*, People v. Fricola, 11 N.Y.2d 157, 182 N.E.2d 100, 101, 227 N.Y.S.2d 157 (1962).
instant case, however, the waiver doctrine is often discarded in exceptional circumstances, \footnote{423, 425 (1962); Commonwealth v. Mandini, 198 Pa. Super. 642, 184 A.2d 279 (1962), \textit{cert. denied}, 372 U.S. 911 (1963).}

Furthermore, it is unrealistic to penalize a defendant for failing to anticipate \textit{Mapp} by holding him responsible for not objecting to what was at the time settled law.\footnote{In the recent case of \textit{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 \textsection{2254} of the \textit{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.}

\textit{Mapp} v. \textit{Ohio}. \footnote{This is especially true where the rights involved are of great magnitude. For instance, in \textit{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. \textit{Men incarcerated in flagrant violation of their constitutional rights have a remedy.} Id. at 123.}

It may be questioned whether the approach in \textit{Gaitan} is consistent with the reasoning in \textit{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*\(^2\) that the fourteenth amendment did not prohibit admission in state courts of evidence seized through unconstitutional searches and seizures.\(^2\) 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.\(^2\) 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,\(^2\) on the basis of one footnote\(^2\) and the use of

\(^1\) See *State v. Valentini*, 36 N.J. 81, 174 A.2d 737 (1961); *Bender*, supra note 5, at 654.

\(^2\) 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, 186 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.


\(^5\) "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\textsuperscript{28} in the Mapp decision have concluded that the language of the opinion itself prohibits retroactive application.\textsuperscript{27} Although these sources might be construed to suggest prospectivity,\textsuperscript{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,\textsuperscript{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,\textsuperscript{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.\textsuperscript{31} Proponents of this argu-

\textsuperscript{28} "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.)

\textsuperscript{29} 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.

\textsuperscript{30} 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.

\textsuperscript{31} 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.

\textsuperscript{32} See Brief for the American Civil Liberties Union as Amicus Curiae, p. 20, Mapp v. Ohio, 367 U.S. 643 (1961).

\textsuperscript{33} 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
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, 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. Although the passage of time makes it difficult for the proseguaranty in the only effectively available way—by removing the incentive to disregard it."

"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
ution 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.\textsuperscript{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.

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

\textsuperscript{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.