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Editor: Duane R. Nedrud, Associate Professor of Law, University of Kansas City, Kansas City, Missouri

PETITION FOR REHEARING

MAPP v. OHIO

Whether one agrees or disagrees with the decision in Mapp v. Ohio, 81 S. Ct. 1684 (1961), no one will question that its effect is far reaching. This is true not only for some twenty-six states that had not adopted any form of the "exclusionary rule" but also for other states whose pre-existing exclusionary doctrines may not measure up to the standards which are or may be placed upon the states by the Supreme Court.

Taking into consideration that which was not brought out in any of the Supreme Court's opinions (much of which cannot be published), as well as that which was brought out in Justice Frankfurter's dissenting opinion, it is obvious that the Supreme Court majority was looking for a case in order to impress the "exclusionary rule" upon the states. *Mapp v. Ohio* will go down in history as the case chosen for that purpose.

Newspapers may report on such parts of the Petition for Rehearing in the *Mapp* Case as they believe to be newsworthy. To one interested in reading the newspapers and even the Supreme Court's decision, not all the facts will be known to his satisfaction. It therefore seems proper to publish the entire Petition for Rehearing in *Mapp v. Ohio*, in order to present the side of the prosecutor, who was caught in the middle, as well as to give the illuminating historical background of the "exclusionary rule." We thus present the Petition in its entirety.—EDITOR.

The appellee, the State of Ohio, respectfully petitions this Court for a rehearing in the above entitled case upon the following grounds and for the following reasons:

I.

The judgment, imposing for the first time the Weeks federal exclusionary rule upon the States, is a judgment that has been rendered without affording the appellee a fair and an adequate opportunity to be heard.

Just as this Court took the necessary time to search the decisions of the Court on federal process and federal procedure to discover if they present any analogies to support the judgment in the case at bar, so also the appellee should be given a like opportunity and a further hearing on the decisions of this Court construing the due process clause of the 14th Amendment.

The judgment calls for an extended argument on the decisions which have expounded the due process clause of the 14th Amendment in harmony with the essential reserved power of the States in enforcing their criminal laws. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. This due process of law should work both ways. It cannot be fairly said that the appellee was accorded due process of law in this Court, in the sense that an adequate opportunity was given to the appellee to present every available argument before the far-reaching judgment was entered.

There was no argument advanced by the appellant in their brief or orally, promulgating the Weeks exclusionary rule in this State criminal case. Indeed, there was no argument by the appellant establishing that the Wolf doctrine was unsound. Nor did the Civil Liberties Union give any argu-

ment in their brief or in the fifteen minutes allotted to them on the oral hearing, establishing that a construction of the due process clause of the 14th Amendment rendered the Wolf decision unsound. In fact, the judgment in this case amounts to a summary reversal of the Court's judgment in the Wolf case, without argument.

Under all of the circumstances, it may be said that the appellee was misled into a limited argument and briefing upon the issue upon which the Court has reversed. The Court in no way indicated from the bench that it disapproved of its judgment in Wolf. How was the appellee to know that the Court did not mean what it said, when it stated in Wolf: "The issue is closed."

Since the judgment raises a grave issue as to whether the States intended by the due process clause of the 14th Amendment, to give to Federal authority the power of prescribing what evidence is admissible or not admissible in trials for offenses against the States, we respectfully claim that a rehearing should be granted the appellee.

II.

No one questions the authority of this Court to rule that the 4th Amendment to the Constitution compels the exclusion in Federal tribunals of evidence obtained unlawfully. Nor do we dispute the fact that this Court, in the exercise of its supervisory power over the Federal courts and federal procedure, has authority to formulate rules of evidence governing federal trials, as established in the *Boyd*, *Weeks*, *Silverthorne* and *Byars* cases, discussed by the Court in its opinion in the instant case. And in the *McNabb* case, the court was exercising its supervisory power.

But none of the foregoing cases involved an interpretation of State criminal procedure. They would, therefore, have no application to the present judgment. Nor do the foregoing federal cases have any bearing upon whether or not the States intended by the due process clause of the 14th Amendment to relinquish their inherent, reserved power over State criminal process to Federal authority, on matters such as the admissibility of evidence discovered in a search.

The function of the due process clause of the 14th Amendment is negative, not affirmative, and it carries no mandate for particular measures of reform by Federal authority, of criminal jurisprudence developed by a sovereign state. In fact, this Court said in *Bute v. Illinois*, 333 U.S. 640, 647–649, 92 L.Ed. 986, 991–992 (1948), in the opinion by Mr. Justice Burton, on the effect of the Fourteenth Amendment:

> "The Fourteenth Amendment * * * does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. * * * This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state."

And again, in the *Bute* case, the Court stated, at pages 655–657, 333 U.S.:

> "There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. Unlike the Bill of Rights, the Fourteenth Amendment made no mention of any requirement of grand jury presentments or indictments as a preliminary step in certain criminal prosecutions; any universal prohibition against the accused being compelled, in a criminal case, to be a witness against himself; any jurisdictional requirement of juries in all criminal trials; any guaranty to the accused that he have a right to the assistance of counsel for his defense in all criminal prosecutions; or any need to observe the rules of the common law in the re-examination of all facts tried by a jury."

The legal import of the words "due process" in the 14th Amendment is State due process, not Federal due process. It is not open to question that it is within the established power of a State to prescribe the evidence which is to be received in the courts of its own government. *Adams v. New York*, 192 U.S. 585, 594–596, 48 L.Ed. 575, 24 S.Ct. 372 (1904); *Salsburg v. Maryland*, 346 U.S. 545, 98 L.Ed. 281, 74 S.Ct. 280 (1954). The *Adams* case distinguishes the *Boyd* case, cited by this Court in support of its holding in the case at bar. Further, this Court unequivocally stated in the *Bute* case, at pages 649–651, 333 U.S.:

> "One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between the state rights and those of a central government was fully considered in securing the ratification of the Constitution in 1787 and 1788. It was emphasized in the Bill of Rights ratified in 1791.

In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and *particularly upon procedure in the federal courts. None were placed upon the states.* On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments. * * * While there have been modifications made by the states, the Congress and the courts in some of the relations between the Federal Government and the people, *there has been no change that has taken from the states their underlying control over their local police powers and state court procedures. They retained this control from the beginning* and, in some states, local control of these matters long antedated the Constitution. The states and the people still are the repositories of the 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States * * *' *The underlying control over the procedure in any state court, dealing with distinctly local offenses such as these here involved, consequently remains in the state.*"

Since the power of the States to prescribe what evidence shall be received in the courts of the State derives its force, not from the Fourteenth Amendment, nor from the Fourth or Fifth Amendment, but from power originally belonging to the States and reserved to them by the Tenth Amendment, there can be no doubt that the judgment of this Court in the instant case is without constitutional basis.

In *Twining v. New Jersey*, 211 U.S. 78, 105–108, 53 L.Ed. 97, 109 (1908), the Court stated:

"* * * in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure *is the greatest security for liberty and justice*, this court has said in Hurtado v. California, 110 U.S. 516, 527, 28 L.Ed. 232, 235, 4 Sup. Ct. Rep. 111, 292. We are not invested with the jurisdiction to pass upon the expediency, wisdom, or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution, we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations. The question before us is the meaning of a constitutional provision which forbids the states to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision; * * *."

As said in the foregoing case, the power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice. When the citizens of Ohio decide that it is best for the courts of their State to exclude evidence obtained without a search warrant, theirs is the responsibility to make the change. A sounder theory of self-government could not be advanced.

III.

It is said by the Court that the Fourth Amendment secures a right of privacy as implicit in the concept of ordered liberty, and that the exclusionary rule, as an essential ingredient of that right, is therefore enforceable against the States under the due process clause of the 14th Amendment.

The "right of privacy" or the "right to privacy" (the Court uses the two phrases interchangeably) connotes a lawful use of that right. It cannot be supposed that the Constitution intended to guarantee the unlawful use of any right, whether it be the right of privacy, the right of free speech or the right to enter into a contract. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. Nor could it be supposed that the use of the right to enter into a contract for the purpose of committing a larceny by trick is protected by the Constitution. The character of every act depends upon the circumstances in which it is done. How then can it be logically concluded that the Fourth Amendment secures the use of the right of privacy for the purpose of committing a crime, which is the net result of the judgment in the instant case?

We do not find the right of privacy as one of the rights enumerated or guaranteed to an accused in a criminal prosecution, under the Sixth Amendment. Further, it is by the unlawful use of the right of privacy that many crimes are committed. You don't find narcotic peddlers, for example, operating out in the open for all the world to see.

You don't find rapists, racketeers, gangsters and other criminals operating in the open and in the face of the world. Crimes, for the most part, want discovery. Crimes, for the most part, are committed in secret with the aid of the unlawful use of the right of privacy.

Logic dictates that any right guaranteed by the Constitution cannot be used to commit unlawful acts. Since crime wants discovery, there is no reason to castigate police officers because they discover criminal evidence without a search warrant. This Court said in *United States v. Mitchell*, 322 U.S. 65 (April, 1944):

> "2. The power of this Court to establish rules governing the admissibility of evidence in the federal courts is not to be used to discipline law enforcement officers."

The police, from a local level of law enforcement experience in this county, knew with whom they were dealing in this case. Further, the sole function of a search warrant is to protect the police officer against a suit for trespass or against an action in tort. Obviously it does not serve the purpose of protecting the criminal, nor does the absence of a search warrant function as a defense to, or a condonation of, the crime. Nor does the Fourth Amendment contain any limitation or prohibition against the use of evidence of a crime on the trial of a charge of crime, whether the trial is in the State courts or in the Federal courts. The first federal case to adopt the exclusionary rule is based upon unfounded judicial reasoning.

IV.

As justification for imposing the Weeks evidentiary rule upon the States, the Court says that the factual grounds upon which its decision in Wolf was based have since changed, since more States now follow the Weeks rule. The Court cites the California case of *People v. Cahan*, 44 Cal.2d 434. The State of California did that on their own initiative and within their reserved powers so to do. The point is, that just as in the *Cahan* case, the sovereign states are constitutionally free to adopt or reject the rule, because there is nothing in the 14th Amendment delegating the power to Federal authority to decide that for the States. If a State questions the soundness of the exclusionary rule, that is the prerogative of the State. Whether it is constitutionally sound is debatable, for, as said by Justice McKenna in *Brown v. Elliott*, 225 U.S. 399, 56 L.Ed. 1136, 1140:

> "The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression; and its letter and spirit are satisfied if, where a criminal purpose is executed, the criminal purpose be punished."

In order to impose the exclusionary rule upon the States, the rule must be invoked as a constitutional mandate. In what respect has the 14th Amendment changed since it was held in Wolf that the evidence illegally obtained is not required by the Constitution to be excluded by the State courts? The Court emphasized its judgment in Wolf, in 1954 in *Irvine v. California*, 347 U.S. 128, 134 (1954), wherein Mr. Justice Jackson said in the main opinion:

> "We think that the Wolf decision should not be overruled for the reasons so persuasively stated therein."

It is said by the Court that "time has set its face" against Justice Cardozo's decision in *People v. Defore*. In what respect? In the *Defore* case, Justice Cardozo gave some clear-cut, sensible reasons why a State chooses not to follow the exclusionary rule. Further, the problems of the States in coping with crime have, if anything, increased since that decision. Recently, the FBI released a report which reveals that although the population in this country has increased 18 per cent since 1950, the crime rate has increased 98 per cent. Murder, rape, or assault to kill occurs every three minutes. A burglary is perpetrated every thirty-nine seconds. Robberies and burglaries in 1960 were 18 percent higher than in 1959.

In the main opinion in the instant case, the Court quotes from the *Elkins* case in which the Court noted that the federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. However, it is significant to note that the foregoing F.B.I. statistics deal primarily with crimes against the States. The frequency of their occurrence against the States establishes that local police investigations, police procedure and subsequent prosecutions are of necessity far different from federal investigations and prosecutions, and no proper comparison can be made.

The Court cites its decisions in *Elkins*, *Jones* and *Rea* as vitiating the force of the reasoning in *People*

v. *Defore*. In those cases, not only was the court exercising its supervisory power over the administration of criminal justice in the federal courts, but in the majority opinion in *Elkins*, 4 L.Ed.2d 1669, 1680, the Court stated:

"The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way."

V.

The Court reasons that State due process requires that physical evidence of a crime obtained unlawfully be excluded from a State criminal trial because of a right of privacy under the Fourth Amendment, and for the same reason that coerced testimony or a coerced confession is properly excluded under the Fifth Amendment; that these two Amendments enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty (secured) * * * only after years of struggle" and together assure that no man is to be convicted on unconstitutional evidence.

By a curious admixture of the privilege against self-incrimination in the Fifth Amendment and a so-called right of privacy in the possession of evidence of a crime under the Fourth Amendment, the Constitution is being interpreted as protecting against the discovery of physical evidence of the commission of a crime because of the methods used in making the discovery.

Possession itself of the real or physical evidence taken in the search in this case, constituted the crime. And this is true whether or not there was a search warrant and whether or not the police met with resistance in the search. When real, physical or tangible evidence is offered to connect a defendant with a crime, the possession of which constitutes the crime, there is not the same reason for excluding the evidence as applies to prevent coerced or involuntary confessions, the truth of which might be doubtful because of the manner in which they are obtained.

The physical evidence does not vary by reason of the circumstances under which it is obtained, that is, whether it is discovered and seized with or without a search warrant. And the defendant in this case was not compelled to do or to say anything, or to make any admissions concerning the physical evidence. The evidence was discovered. She was not coerced into producing it, in the sense that the privilege against self-incrimination is understood. Further, the physical evidence spoke for itself on the trial. It is true that the evidence confiscated in this case had incriminating evidential significance, but the method by which it was obtained by the police did not give the evidence its incriminating character.

To read into either or both of these Amendments, a right to security in the unlawful possession of evidence of a crime is to interpret the Constitution as aiding and abetting criminal activity. The right of privacy is guaranteed to law abiding citizens, not to those who use it as a protective shield for the commission of crime.

The general object of the search and seizure clause is to protect the right of privacy as exercised by law abiding citizens, and to whatever degree and in whatever connection the right of privacy is unlawfully used for criminal activity, to that extent the protection of the Constitution should not apply. And, we submit, possession of evidence of a crime, especially where possession itself is the crime, no matter where the possession is had, whether on the person, in the house, among the papers or the effects of an individual, is not a lawful exercise of the right of privacy.

Furthermore, there was no coerced confession or coerced testimony in the instant case. The plain and unambiguous language of the Fifth Amendment shows that it accords a privilege against self-incrimination "as a witness." In the case at bar, the defendant voluntarily took the stand and testified and thereby waived any privilege against self-incrimination as a witness. That the protection against self-incrimination is not secured by any part of the Federal Constitution in the courts of the States was only recently emphasized by this Court in *Cohen v. Hurley*, 81 Sup. Ct. Rep. 954, 6 L.Ed.2d 156, 164–165 (April 24, 1961), in which case the Court stated:

"* * * it is suggested that the Fourteenth Amendment gave petitioner a federal constitutional right not to be required to incriminate himself in the state proceedings. * * * That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, Twining v. New Jersey, 211 U.S. 78; and such has been the position of the Court ever since. See Snyder v. Massachusetts, 291 U.S. 97; Brown v. Mississippi, 297 U.S. 278, 285; Palko v. Connecticut, 302 U.S. 319, 323–324; Adamson v. California, 332 U.S. 46; Knapp v. Schweitzer, 357 U.S. 371, 374. * * * These decisions do establish, at the very

least, that to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony."

We cannot have unbridled individual liberties and at the same time have a safe, stable society. The Court says, "Our decision, * * * gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." But the effect of the decision is: The Court has unconstitutionally taken from the State of Ohio and all of the States affected by the judgment, their reserved, inherent power over local police powers and state court procedures in matters of evidence in State criminal trials.

We cannot have "domestic tranquillity" and "promote the general welfare," as prescribed in the Preamble to the Constitution, when all the concern is upon "individual civil liberties." Individual rights and liberties cannot exist in a vacuum. Alongside of them, we must have a stable society, a safe society; otherwise there will be no medium in which to exercise such rights and liberties. To have "rights" without safety of life, limb, and property is a meaningless thing. Individual civil liberties, considered apart from their relationship to public safety and security are like labels on empty bottles.

The Court infers that police officers are asking for something to which they are not entitled when they come upon evidence of a crime without a search warrant. The inference is in the Court's decision also that the police are not entitled to any short-cut methods in ferreting out crime.

Crime flourishes in great volume in these our times and the modern methods available to criminals to execute their criminal purposes require fast and prompt action by law enforcement officers. The trafficking in narcotics that goes on, for example, calls for "on the spot" action by the police. If police officers took the time to protect themselves with a search warrant, and that is the sole function of a search warrant, narcotic criminal evidence could and does very easily elude seizure. Under the statutes of the State of Ohio, Revised Code Section 3719.22 expressly gives power to any one empowered to enforce the narcotic laws, to enter and search any room, rooms, or other place wherein a violation of the narcotic laws is believed to exist; and further provides that any one so empowered, may arrest without a warrant.

The securing of a search warrant presupposes knowledge on the part of the police that a crime is being committed. The fact that they have no prior knowledge concerning the crime and discover criminal evidence without a search warrant, or meet up with resistance in the search, does not import conscious illegality in their actions. They are but performing their duties on behalf of the rights of the public and the required protection demanded of them by the public.

We submit that the decision of the Court in the instant case lies outside its constitutional sphere of authority, for the judgment places the criminal jurisprudence of one sovereignty under the control of another. Under the circumstances, the appellee respectfully requests a rehearing to present every available argument on that issue. Other States which are affected by the decision did not even have an opportunity to be heard, and the appellee has an obligation not only on behalf of the State of Ohio, but also on behalf of those States in similar circumstances.

The undersigned hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorney,
Attorneys for The State of Ohio.