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Criminal Law--Search and Seizure--Retroactivity of Mapp

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band. It could not be returned to the aggrieved party despite the illegal seizure. On this basis, the court made a distinction as to *McDonald* where the decision as to the defendant's conviction turned upon the fact that there was error in not returning the evidence to the aggrieved party. The court considered its decision to be in complete agreement with the *McDonald* decision.¹⁸

To adopt the proposition that evidence seized in violation of A's rights is admissible against B where contraband is involved would be to create an inconsistency in the law and a clear discrimination favoring certain defendants over others. Where the unlawfully seized evidence consisted of property other than contraband, such as lottery tickets as in *McDonald*, B would be protected as an incidental beneficiary to A's rights under the fourth amendment. B would not be so protected where, as in *Lee Wan Nam*, the seized property consisted of narcotics or other such contraband.

The analysis of these alternative propositions leads to the conclusion that to broaden the exclusionary rule, as defendants sought in *Granello*, and to include as incidental beneficiaries of the deterrence policy persons whose rights were unaffected by the official legality would be to render the rule a far more inefficient sanction. As the court points out, whether or not the rule is to be so broadened is a matter ultimately for the Supreme Court, and in light of present policies and authorities it is difficult to anticipate it doing so.

David W. Crumbo

CRIMINAL LAW—SEARCH AND SEIZURE—RETROACTIVITY OF *Mapp*.—Petitioner was convicted of robbery by a Louisiana court on May 20, 1959. At his trial he contested the use of certain evidence on the ground that it had been illegally seized, but the trial court held the seizure valid. The Louisiana Supreme Court affirmed. In June 1961, immediately after the *Mapp* decision¹ making the federal exclusionary rule mandatory upon state courts, petitioner filed an application for habeas corpus in the state court. The writ was denied and on appeal the denial was affirmed. Petitioner then filed habeas corpus proceedings in the federal district court; again the writ was denied and petitioner appealed to the circuit court of appeals. There, the court ruled the search and seizure invalid, but refused to apply the *Mapp* rule to petitioner's case. The Supreme Court granted certiorari. *Held*: Af-

¹⁸ *Id.* at 866.

¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

firmed. The *Mapp* rule does not apply retrospectively to cases finally decided before its enunciation.²

The real controversy in the case is not whether the *Mapp* rule applies retrospectively; it clearly does for Mrs. Mapp's conviction was reversed, but rather *where* to draw the retrospective line. The Court drew the line at June 19, 1961, the date of the *Mapp* decision. To any case finally decided before this time the *Mapp* rule does not apply.³ This writer suggests that the Court has made a wise decision.

There is a legal theory that judges discover law rather than create it,⁴ and following that theory one can easily reach the conclusion that a court must apply any judicial rule retroactively. The application of that theory to this case would be something as follows. Nothing in the Constitution which the Court thought controlling in *Mapp* has been changed since before *Wolf*,⁵ thus if the protections were there for Mapp they must have been there for all persons convicted before Mapp.⁶ This legal theory reached its pinnacle in *Norton v. Shelby Co.*⁷ where the Court, when invalidating municipal bonds because the act issuing them had been held unconstitutional by the supreme court of the state, said "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."⁸ This theory was rejected in subsequent cases. In *Chicot County Dist. v. Baxter State Bank*⁹ the Court said of the *Norton* case: "It is quite clear however that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. . . . The past cannot always be erased by a judicial decision."¹⁰

Relying mainly on language in *Chicot*,¹¹ the majority in *Linkletter* reached the conclusion that "the Constitution neither requires nor prohibits retrospective effect."¹² Then, looking at the purpose of the *Mapp* rule, the effect on the administration of justice retrospectivity

² *Linkletter v. Walker*, 381 U.S. 618 (1965).

³ "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*." *Linkletter v. Walker*, *supra* note 2 n.5.

⁴ 1 Blackstone, Commentaries 69 (1769).

⁵ *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁶ *Hall v. Warden of Maryland Penitentiary*, 313 F.2d. 483, 495 (1963).

⁷ 118 U.S. 425 (1886).

⁸ *Id.* at 442.

⁹ 308 U.S. 371 (1940).

¹⁰ *Id.* at 374.

¹¹ [T]he effect of the subsequent ruling of invalidity on prior judgments when collaterally attacked is subject to no set principle of absolute retroactive

¹² 381 U.S. at 629.
invalidity. . . ." *Chicot County Dist. v. Baxter State Bank*, *supra* note 9, at 374.

would have, and the reliance placed on the *Wolf* doctrine, the Court determined the June 19 cutoff date as opposed to general retrospectivity. This writer submits that the Court need have looked no further than the purpose of the rule. The purpose of the *Mapp* rule was to deter police from making illegal searches and seizures;¹³ that purpose will not be served by the wholesale release of prisoners convicted prior to *Mapp*. The only police conduct which can be deterred is future conduct. If the rule was never intended to directly relieve those who have suffered a violation of their constitutional rights then there is no reason for making the rule retrospective.¹⁴

Granted this is the first of the constitutional rules in the criminal law area which has not been given general retrospectivity,¹⁵ but in the previous cases the rules dealt with something which struck at the heart of a fair trial. It is suggested that one is more apt to have a fair trial, *i.e.*, the truth is more likely to be reached where illegally seized evidence is used rather than where one is without counsel, or has confessed through coercion, or has been denied a trial transcript for an appeal. With illegally seized evidence there perhaps is no question as to the guilt of the accused, and this is what distinguishes it from *Eskridge*, *Gideon*, and that line of cases.¹⁶ The only reason any collateral attack should be allowed is to eliminate the risk of innocent convictions.¹⁷ In the illegal search and seizure cases, there is no threat

What does *Linkletter* foreshadow for *Escobedo*¹⁸ and related cases? On the basis of *Linkletter*, it would seem that the Court would deny general retrospectivity of *Escobedo*. Like the guilt of Mrs. Mapp and *Linkletter* there was little doubt as to the veracity of *Escobedo's* confession. The right to counsel rule "did not emanate from the inherent unreliability of the confessions introduced in the trials. . . . The Court

¹³ "[O]nly last year the Court itself recognized that the purpose of the exclusionary rule is 'to deter—to compel respect for the constitutional guarantee in the only effective available way—by removing the incentive to disregard it. . . .'" *Mapp v. Ohio*, 367 U.S. 643, at 656 (1961).

¹⁴ Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. Pa. L. Rev. 650 (1962).

¹⁵ *Jackson v. Denno*, 378 U.S. 368 (1964) (coerced confession rule applied retrospectively); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (a collateral attack itself requiring counsel to be appointed in felony cases); *Eskridge v. Washington*, 357 U.S. 214 (1958) (applying right of indigent to have free transcript of trial in order to appeal).

¹⁶ *Eskridge v. Washington; Gideon v. Wainwright; Jackson v. Denno*, *supra* note 15.

¹⁷ Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 317, at 340.
of this.

¹⁸ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

sought to discourage oppressive police practices. . . ."¹⁹ But there have been other interpretations of *Escobedo* and for the final answer we will have to await the Court's decision.

Charles A. Taylor

CONSTITUTIONAL LAW—TRIAL ON TWO OFFENSES ARISING FROM THE SAME ACT—NO DOUBLE JEOPARDY INVOLVED.—Appellant was indicted by the grand jury on charges of embezzlement. Prior to his trial for embezzlement, the grand jury returned thirty-two indictments against appellant for submitting false claims to the Pike County Board of Education, a political subdivision of the Commonwealth of Kentucky. Both the false claim and the embezzlement indictment covered the same moneys. The commonwealth attorney, feeling that appellant should be tried on a false claim indictment, filed a motion to dismiss the embezzlement charge. This motion was overruled, and trial proceeded on the embezzlement charge. The prosecution refused to introduce evidence, and the jury acquitted appellant. Shortly thereafter, appellant was tried on one of the false claim indictments and convicted.

On appeal, appellant contended, *inter alia*, that he had been put in double jeopardy by his conviction for submitting a false claim, maintaining his acquittal under the embezzlement indictment was a bar to the false claim action.

Held: Affirmed. The court found that embezzlement and falsifying a claim against a political subdivision are truly separate offenses, and also found that double jeopardy meant "a person may not be tried or prosecuted the second time for the same offense."¹ *Runyon v. Commonwealth*, 393 S.W.2d 877 (Ky. 1965).

The doctrine of double jeopardy is so ancient that it is impossible to trace its origin,² and its concept is firmly embedded in the common law and has been incorporated in most constitutions.³ The Kentucky Constitution, echoing the prohibition of the fifth amendment of the United States Constitution, states in section 13, "No person shall, for the same offense be twice put in jeopardy of his life or limb. . . ."

In order for the double jeopardy prohibition to be invoked successfully, the accused must be tried twice for the same offense. It must

¹⁰ *In re Lopez*, 42 Cal. 188, 398 P.2d. 380 (1965).

¹ *Moss v. Jones*, 352 S.W.2d 557, 558 (Ky. 1961).

² *Mullins v. Commonwealth*, 258 Ky. 529, 80 S.W.2d 606 (1935).

³ *Burch v. Commonwealth*, 240 Ky. 519, 42 S.W.2d 714 (1931).