Nebraska Law Review

Volume 42 | Issue 3 Article 6

1963

Constitutional Law—Nebraska Views *Mapp v. Ohio*—*Erving v. State* (Neb. 1962)

Marvin D. Keller
University of Nebraska College of Law

CONSTITUTIONAL LAW—Nebraska Views Mapp v. Ohio — Erving v. State (Nebraska 1962)

I. STATEMENT OF THE CASE

At appellant's trial for first degree murder the prosecution attempted to place in evidence certain bullets which were of the same type as those used in the slayings. These bullets had been obtained by police officers engaged in a search of appellant's home without a warrant. The trial court allowed the bullets to be received in evidence over objection as "incompetent, irrelevant, no proper foundation laid."[1] Appellant was convicted and sentenced to life imprisonment.[2]

After the conviction *Mapp v. Ohio*[3] was decided by the United States Supreme Court. In the *Mapp* case police officers broke into the defendant's apartment without a search warrant and discovered pornographic material on the premises. On the basis of such evidence the defendant was convicted of violating an Ohio obscenity statute.[4] On appeal, the Supreme Court reversed, holding for the first time that the federal exclusionary rule,[5] as a requirement of the fourth amendment, was applicable to state courts through the fourteenth amendment.[6] *Mapp* effectively established that evidence obtained by illegal search and seizure was inadmissible in a state criminal prosecution.

Erving appealed to the Nebraska Supreme Court assigning as error[7] the admission in evidence of the illegally obtained bullets contrary to the rule announced in *Mapp*. The court, citing footnote 9 in the *Mapp* majority opinion, ruled that states could apply their own procedural requirements.[8] As Erving had failed to object to the admission of the bullets on the specific grounds of illegal search

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[1] Erving v. State, 174 Neb. 90, 103, 116 N.W.2d 7, 16 (1962).

[2] Erving v. State, 174 Neb. 90, 116 N.W.2d 7 (1962).

[3] 367 U.S. 643 (1961).

[4] OHIO REV. CODE ANN. § 2905.34 (Page 1954).

[5] This rule, excluding illegally obtained evidence, was first applied to the federal courts in Weeks v. United States, 232 U.S. 383 (1914). For the historical development of the rule prior to *Mapp* see, Broeder, *Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1962).

[6] 367 U.S. at 657.

[7] Other assignments of error involved discovery, impeachment and admissibility of testimony, which are beyond the scope of this note.

[8] See note 64 *infra* and following.

and seizure, under Nebraska's procedural requirements he was deemed to have waived the same and the conviction was affirmed.[9]

II. THE RETROACTIVITY DOCTRINE

In holding that Erving waived his constitutional rights under *Mapp*, the Nebraska Supreme Court avoided determining whether that decision should be applied retroactively. Before the *Mapp* decision and at the time of Erving's trial, the rule concerning illegally obtained evidence in Nebraska was that the fourth amendment applied to the states, but that the federal exclusionary rule did not.[10] Retroactive application of the *Mapp* holding was necessary, therefore, to sustain Erving's contention.[11]

A. THE EFFECT OF WARRING V. COLPOYS

With some exceptions,[12] overruling decisions apply retroactively. Retroactivity in criminal law apparently depends upon the nature of the overruling decision and the manner in which the

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[9] 174 Neb. 90, 106, 116 N.W.2d 7, 18 (1962). For further examination of the Nebraska requirements for raising and preserving issues on appeal see Pulliam v. State, 167 Neb. 614, 94 N.W.2d 51 (1959); Turpit v. State, 154 Neb. 385, 48 N.W.2d 83 (1951).

[10] *Mapp* overruled Wolf v. Colorado, 338 U.S. 25 (1949). *Wolf* had made the fourth amendment applicable to the states, but at that time the Court refused to apply the federal exclusionary rule to the states, preferring that the states find their own solution to the problem. The majority in *Mapp*, however, found that the states had been lax in enforcing the promise of the fourth amendment and overruled *Wolf*, stating that the exclusionary rule was a necessary part of the fourth amendment guarantee. For a complete examination of the historical background of the exclusionary rule, the developments in search and seizure law up to the time of the *Mapp* decision, and the problems left unsolved by that decision, see Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1962); Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 432 (1961).

[11] It should be noted that a case such as *Erving v. State* presents the best possible situation for retroactive application of *Mapp*. To reverse *Erving* required no greater degree of retroactivity than was actually applied in remanding the *Mapp* case for a new trial. That this is a valid analogy seems to be indicated by the New York decisions. *Mapp* is considered to apply prospectively in New York but the decision is applied retroactively to cases involving the *Erving* facts. See note 53 *infra*.

[12] The main exceptions to the retroactivity rule have come in the vested property and contract areas. See, *e.g.*, Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853). For an exhaustive survey of the exceptions see Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940).

issue is presented to the court.[13] One area in which retroactivity is not applied is presented by *Warring v. Colpoys*.[14] Warring was convicted of violating a federal contempt statute. Subsequent to his conviction the court re-examined the statute and overruled a prior construction given to it.[15] Although Warring would not have been convicted under the new construction, the federal court, invoking the doctrine of res judicata, refused to apply such construction retroactively. The rationale frequently given for this result is that when a defendant knowingly violates a present law he should not be benefited by a subsequent change as his actions alone precipitated the conviction.[16] Obviously this rationale does not apply to the principal case.

Gaitan v. United States,[17] a recent collateral attack case, appears, however, to extend the *Warring* doctrine beyond the above rationale. Defendant in *Gaitan* was convicted in federal court on evidence obtained through illegal search and seizure by state authorities. This evidence was received in reliance on the so-called "silver platter" doctrine.[18] Gaitan asked for relief in federal district court under Section 2255[19] on grounds that the "silver platter" doctrine had subsequently been destroyed,[20] and retroactivity made the convicting evidence inadmissible. The district court, in denying relief, stated that the exclusionary rule was a

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[13] *E.g.*, Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958); Gaitan v. United States, 295 F.2d 277 (10th Cir. 1961); Runnels v. United States, 138 F.2d 346 (9th Cir. 1943); Gros v. United States, 136 F.2d 878 (9th Cir. 1943); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941).

[14] 122 F.2d 642 (D.C. Cir. 1941).

[15] Nye v. United States, 313 U.S. 33 (1941).

[16] "[T]here is little reason to give the benefit of the subsequent construction of the statute to one who deliberately committed an act even now punishable by indictment. . . ." Comment, *Jurisprudence — Shall Overruling Decisions be Given Retrospective Operation*, 27 IOWA L. REV. 315, 320 (1942).

[17] 295 F.2d 277 (10th Cir. 1961), *cert. denied*, 369 U.S. 857 (1962); *accord*, Pearson v. United States, 305 F.2d 34 (7th Cir. 1962).

[18] The "silver platter" doctrine permitted state police officers who had obtained evidence through illegal search and seizure to turn the evidence over to federal officers. Elkins v. United States, 364 U.S. 206 (1960), destroyed the doctrine.

[19] 28 U.S.C. § 2255 (1958), provides: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

[20] Elkins v. United States, 364 U.S. 206 (1960).

court conceived rule of evidence rather than a constitutional requirement and, therefore, was beyond the reach of collateral attack.[21] The court, however, did state that *"if the admission of this evidence was in itself a violation of the Constitution, Sec. 2255 would undoubtedly be applicable."*[22] Then *Mapp* decided that the exclusionary rule did have a constitutional basis which presumably gave Gaitan grounds for collateral attack. On appeal to the Tenth Circuit Court of Appeals, however, the court, applying the doctrine of res judicata, affirmed the conviction. Using *Warring v. Colpoys* as authority the court stated: "And a change thereafter in the rule relating to the admissibility of evidence obtained in that manner did not arrest or suspend application of the principle of res judicata to such judgments and sentences."[23]

Thus, the doctrine of res judicata was extended into an area outside the rationale of the *Warring* case, and it is questionable whether this effect was originally intended by the court deciding *Warring*.[24]

B. Application of Retroactivity

A leading case involving the retroactive application of a constitutional decision is *Eskridge v. Washington Prison Bd.*[25] In 1956 the Supreme Court held that the refusal of the state to provide means for an indigent prisoner to obtain a transcript of his trial for purposes of appeal was unconstitutional under the fourteenth amendment.[26] The *Eskridge* case applied this decision retroactively to a prisoner who had been convicted 21 years before his constitutional rights had been ascertained, and held that the state

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[21] United States v. Gaitan, 189 F. Supp. 674 (D. Colo. 1960).

[22] *Id.* at 676. (Emphasis added.)

[23] 295 F.2d 277, 280 (10th Cir. 1961), *cert. denied*, 369 U.S. 857 (1962).

[24] See, *e.g.*, Reck v. Pate, 367 U.S. 433 (1961); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958); Jordan v. United States, 352 U.S. 904, *reversing* 233 F.2d 362 (D.C. Cir. 1956); Walker v. Johnston, 312 U.S. 275 (1941); Fransworth v. United States, 232 F.2d 59 (D.C. Cir. 1956); Smallwood v. Warden, 205 F. Supp. 325 (D. Md. 1962); United States v. Di Martini, 118 F. Supp. 601 (S.D.N.Y. 1953).

[25] 357 U.S. 214 (1958). Eskridge was convicted of murder in 1935 and immediately applied for a transcript for the purpose of prosecuting an appeal. He was unable to pay the cost of obtaining the transcript and the trial judge refused to provide a free one, resulting in his being unable to appeal. After *Griffin, infra* note 26, Eskridge asked for habeas corpus in the Washington Supreme Court, the petition being denied without opinion. The United States Supreme Court reversed basing the decision on *Griffin v. Illinois.*

[26] Griffin v. Illinois, 351 U.S. 12 (1956).

must furnish the transcript in order to provide the prisoner his constitutional safeguards. The case noted that the transcript in question was still available and could be provided to the prisoner. The doctrine of retroactivity might therefore have been argued to be limited by the reasonableness of its results.[27]

In 1962, however, the Supreme Court applied the doctrine of retroactivity to an involuntary confession case despite the state's specific objection that none of the original evidence was available for retrial.[28] The clear implication of the case is that, in situations involving constitutional interpretation, the doctrine of retroactivity must apply to safeguard the individual regardless of the burden imposed upon the state from such application. This rationale would require retroactive operation in the *Erving* situation and would appear to extend to any case involving illegal search and seizure. The burden on the state could hardly be more severe in search and seizure cases than that imposed above.

The vitality of the retroactivity doctrine outside the *Warring v. Colpoys* area is indicated by two cases which applied the doctrine even though no constitutional issue was involved. In *Gros v. United States*[29] and *Runnels v. United States*[30] defendants were convicted of murder with the use of confessions elicited while they were illegally detained.[31] Subsequently, in *McNabb v. United States*,[32] the Supreme Court held that a confession obtained during a period of illegal detention must be excluded. On appeal the court ruled

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[27] People v. Norvell, 25 Ill. 2d 169, 182 N.E.2d 719 (1962), *cert. granted,* 31 U.S.L. WEEK 3129. *Contra,* Patterson v. Medberry, 290 F.2d 275 (10th Cir. 1961), *cert. denied,* 368 U.S. 839 (1962). In *People v. Norvell,* the court stenographer died before transcribing the trial record. No one else was able to transcribe his notes, and because a transcript was unavailable, defendant was unable to prosecute an appeal from his conviction. The Illinois court refused to remand the case for a new trial, distinguishing *Eskridge,* where a transcript was available.

[28] Reck v. Pate, 367 U.S. 433 (1961); *accord,* United States *ex rel.* Caminite v. Murphy, 222 F.2d 698 (2d Cir. 1955).

[29] 136 F.2d 878 (9th Cir. 1943).

[30] 138 F.2d 346 (9th Cir. 1943).

[31] FED. R. CRIM. P. 5(a) provides: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith." (Emphasis added.)

[32] 318 U.S. 332 (1943).

that *McNabb* applied retroactively and remanded for a new trial with the confessions excluded. These confessions were not excluded because they were coerced and thus violated the Constitution, but simply because they were obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. These cases indicate that the retroactivity doctrine should be applied to changes in the law by judicial decisions, other than the *Warring v. Colpoys* situation, and extended to acts of persons other than the defendant, such as those in *Erving v. State.*

C. INDICATIONS FROM MAPP

Unfortunately, *Mapp* gives very little indication of the intent of the Court concerning its possible retroactive effect. The only clue to possible retroactivity seems to be contained in footnote 9 of the majority opinion where Mr. Justice Clark states:[33]

> 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, Griffin v. Illinois, and Herman v. Claudy. In those cases the same contention was urged and later proved unfounded. [citations omitted.]

It will be observed that Mr. Justice Clark directed his attention not to future state court action, but to the question of the effect of the case on previous convictions. In *Griffin v. Illinois*[34] Mr. Justice Frankfurter, in a concurring opinion, strongly urged the Court to limit the decision to prospective application,[35] and Mr. Justice Clark's use of the phrase "the same contention was urged" in connection with *Griffin* seems to refer to the arguments against retroactive operation. The phrase "of relatively narrow compass", however, appears to limit retroactive application considerably. But, as will be shown below, once retroactive operation be admitted, no valid reason appears for classifying prisoners, permitting one class the benefit of the rule and denying it to another.[36]

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[33] 367 U.S. 643, 659 n.9 (1961).

[34] 351 U.S. 12 (1956).

[35] "We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion . . . for proceedings . . . upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted . . . cannot be asserted now. . . .

We should not indulge in the fiction that the law now announced has always been the law and . . . that those who did not avail themselves of it waived their rights." *Id.* at 25 (Frankfurter, J. concurring).

[36] The scope of this paper does not permit the classification of prisoners into various groups depending upon what they did or did not do.

Even with limited retroactive operation, those cases in which defendants objected to admission of the evidence, and particularly those who took the point to the Supreme Court, should be entitled to the benefit of the doctrine. In nearly the same position are those who objected to the evidence at the trial and again on appeal prior to *Mapp* and who now wish to attack the convictions collaterally either through habeas corpus or Section 2255 proceedings.[37]

Such previous convictions can be sustained only if the courts apply *Mapp* prospectively. One argument which is often advanced in favor of prospective operation is that there is no question of the guilt of the prisoner.[38] The evidence is not tainted with unreliability. The persons convicted with such evidence are clearly guilty and should not be given the opportunity to avoid the sentence imposed.[39] As stated by one writer:[40]

> The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of conviction of the innocent. . . . The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search and seizure is that he is clearly guilty.

The above arguments for prospective operation ignore the effect of *Mapp* making the exclusionary rule an essential element of constitutional protection, available to innocent and guilty alike.[41]

> Any solution short of this result [retroactive operation] would put the court in the position of admitting to two constitutional provisions — one applying to persons convicted on unconstitutionally seized evidence before the *Mapp* rule, and another applying to those convicted after *Mapp*.

Additionally, unreasonable searches and seizures were expressly equated with involuntary confessions in *Mapp*.[42] The Supreme Court has uniformly held that a conviction obtained with an involuntary confession must be set aside whether or not the

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[37] The requirements for granting relief under either habeas corpus or Section 2255 are that the prisoner be unconstitutionally imprisoned.

[38] Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L. J. 319, 341 (1962); Note, 16 RUTGERS L. REV. 587 (1962).

[39] Note, 16 RUTGERS L. REV. 587 (1962).

[40] Traynor, *supra* note 38, at 340, 341.

[41] Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 432 (1961).

[42] "And nothing could be more certain than that when a coerced confession is involved, 'the relevant rules of evidence' are overridden without regard to 'the incidence of such conduct by the police,' slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?" Mapp v. Ohio, 367 U.S. 643, 656 (1961).

confession was necessary to sustain the conviction,[43] and even if it is probably true.[44] The involuntary confession requirement and the exclusionary rule are both means of assuring that constitutional promises are safeguarded,[45] and should stand on equal footing.

An argument for prospective application might be based on a theory of state reliance on the prior law of *Wolf v. Colorado*,[46] in admitting unreasonably seized evidence.[47] The Court at that time, however, refused to apply the exclusionary rule to the states, assuming the states would act to enforce the fourth amendment in a way most applicable to the particular requirements of each state. But if the state courts did not so act they "cannot plead reasonable reliance, let alone hardship, who may have relied on the now displaced law in violating the Constitution."[48]

D. Cases Applying Mapp

The argument for retroactive operation of *Mapp* is further bolstered by *Hall v. Warden*.[49] Hall did not object to introduction of illegally obtained evidence during the trial, nor did he raise the question on appeal. His conviction was affirmed on appeal, and final judgment was entered. Subsequently, Hall attempted to attack the conviction collaterally relying on *Mapp*. The Maryland federal district court refused to issue a writ of habeas corpus,[50] being re-

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[43] "Consequently, we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession." Blackburn v. Alabama, 361 U.S. 199, 206 (1960). See also Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959).

[44] "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21 (1959).

[45] *Ibid.*; Bender, *The Retroactive Effect of an Overruling Constitutional Decision; Mapp v. Ohio*, 110 U. Pa. L. Rev. 650, 660-61 (1962).

[46] 338 U.S. 25 (1949).

[47] Traynor, *supra* note 38, at 338.

[48] *Ibid.*

[49] 31 U.S.L. Week 2410 (4th Cir. 1963), *reversing* 201 F. Supp. 639 (D. Md. 1962). See also Hurst v. California, 211 F. Supp. 387, 395 (N.D. Cal. 1962).

[50] "I conclude that Mapp v. Ohio was not intended to require that a new trial or release must be granted . . . where the point was not raised at the trial and the judgment had become final before the decision of the Supreme Court in the Mapp case." 201 F. Supp. 639, 643 (D. Md. 1962).

luctant to apply *Mapp* to cases where judgment became final prior to the date of that decision. The 4th Circuit Court of Appeals, sitting en banc, however, reversed the district court saying: "If the protections are there now, were they not present when Wolf was decided. . . . An affirmative answer would appear to be inescapable."[51] In addition federal courts in two cases declined to discuss retroactive effect until the state court had been given an opportunity to make the determination.[52] The state courts are split on the question.[53]

If the rule is to be applied prospectively, a defendant's rights will depend upon the mere fortuity of the time of trial. Defendants tried prior to *Mapp* will be deprived of the constitutional rights granted by that case, but those tried after that decision will be accorded its full protection. It would seem, therefore, that *Mapp* should apply retroactively.

III. THE WAIVER DOCTRINE

A different problem is posed by prisoners who, relying on *Wolf*, pleaded guilty, failed to object to illegal evidence when admitted, or failed to appeal from their convictions.[54] Under the

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[51] 31 U.S.L. WEEK 2410 (4th Cir. 1963).

[52] United States v. Fay, 199 F. Supp. 415 (S.D. N.Y. 1961); United States v. New York, 195 F. Supp. 527, 528 (N.D. N.Y. 1961).

[53] I. Retroactive operation: Commonwealth v. Spofford, 180 N.E.2d 673 (Mass. 1962); People v. Winterheld, 366 Mich. 428, 115 N.W.2d 80 (1962); State v. Masi, 72 N.J. Super. 55, 177 A.2d 773 (Super. Ct. 1962); State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962); State v. Watson, 73 N.J.Super. 477, 180 A.2d 206 (Essex County Ct. 1962); People v. Carafas, 219 N.Y.S.2d 52 (Sup. Ct. 1961); People v. Loria, 10 N.Y.2d 368, 233 N.Y.S.2d 462, 179 N.E.2d 478 (1961); People v. McNeil, 11 N.Y.2d 148, 227 N.Y.S.2d 416, 182 N.E.2d 95 (1962); People v. West, 14 App. Div. 2d 601, 218 N.Y.S.2d 971 (Sup. Ct. 1961); People v. Wingate, 34 Misc. 2d 483, 225 N.Y.S.2d 920 (Sullivan County Ct. 1962).
II. Prospective operation: State v. Long, 71 N.J. Super. 583, 177 A.2d 609 (Essex County Ct. 1962) (1960 Conviction); People v. Angelet, 221 N.Y.S.2d 834 (New York County Ct. 1961) (1951 conviction); People v. Figueroa, 220 N.Y.S.2d 131 (Kings County Ct. 1961) (1957 conviction); People v. Oree, 220 N.Y.S.2d 121 (Bronx County Ct. 1961) (1954 conviction).

[54] Although there has been no attempt to discuss applicability of the waiver rule to various classes of prisoners, the possibility exists that some distinctions might be drawn. See, *e.g.*, Alexander v. United States, 290 F.2d 252 (5th Cir. 1961). Defendant in that case pleaded guilty after a motion to suppress evidence was overruled in reliance on the "silver platter" doctrine. After Elkins v. United States, *supra* note 18, which destroyed the "silver platter" doctrine, defendant asked for Section 2255

waiver doctrine failure to comply with the procedural requirements for raising and preserving constitutional issues constitutes a waiver of the right to raise such issues at a later time. The Supreme Court has held that constitutional issues may be waived by failure to raise the question at the proper time,[55] failure to follow correct appellate procedure,[56] or failure to state the constitutional issues specifically.[57] In applying the waiver doctrine, however, the Court has demanded that the rules for raising and preserving constitutional questions should not be so strict as to constitute a denial of due process.[58] The doctrine should not be applied in a manner to preclude absolutely a chance to have constitutional questions considered.[59]

Appellant in *Mapp* did not, either in the brief or in oral argument, present the question of admissibility of the evidence.[60] In a brief paragraph near the end of the amicus curiae brief of the American and Ohio Civil Liberties Union, the Court was urged to re-examine and overrule *Wolf*.[61] Considering the subordinate role which that question was given, the Court could justifiably have applied the waiver doctrine. Since the Court, nevertheless, chose

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relief. The court denied relief but said, "If the appellant had submitted his guilt or innocence to a jury and had been convicted, we would, of course, guided by Elkins, reverse the conviction." 290 F.2d at 254.

[55] Michel v. Louisiana, 350 U.S. 91 (1955), where the requirement that defendant challenge composition of grand jury within three days after end of term was found not to deprive defendant of due process; Herndon v. Georgia, 295 U.S. 441 (1935).

[56] Brown v. Allen, 344 U.S. 443 (1953); Parker v. Illinois, 333 U.S. 571 (1948); Sunal v. Large, 332 U.S. 174 (1948).

[57] Bowe v. Scott, 233 U.S. 658 (1914).

[58] Reece v. Georgia, 350 U.S. 85 (1955) (challenge of composition of grand jury); Marino v. Ragen, 332 U.S. 561 (1947); Carter v. Texas, 177 U.S. 442 (1900).

[59] "[T]he right to object to a grand jury presupposes an opportunity to exercise that right." Reece v. Georgia, 350 U.S. 85, 89 (1955). See also Marino v. Ragen, 332 U.S. 561 (1947); Carter v. Texas, 177 U.S. 442 (1900); People v. Kitchens, 46 Cal. 2d 260, 262, 294 P.2d 17, 19 (1956); Bender, *supra* note 45.

[60] "Counsel for appellant on oral argument, as in his brief, did not urge that *Wolf* be overruled. Indeed, when pressed by questioning from the bench whether he was not in fact urging us to overrule *Wolf* counsel expressly disavowed any such purpose." 367 U.S. 643, 674 n.6 (1961) (Harlan, J. dissenting).

[61] 367 U.S. 643, 646 n.3 (1961).

to consider *Wolf*, it is arguable that state courts should be extremely hesitant in applying the waiver doctrine.[62]

A. An Argument From Footnote 9

The principal case holding is illustrative of state court holdings which have envoked the waiver doctrine to cut off possible retroactive operation of *Mapp*.[63] In a footnote to the majority opinion in *Mapp* the Court said: "As is always the case . . . state procedural requirements governing assertion and pursuance of direct and collateral challenges to criminal prosecutions must be respected."[64] Using this language, a number of state courts have concluded that if a defendant fails to object to the admission of illegally obtained evidence, state procedural requirements can prevent him from raising the question for the first time on appeal.

It seems unlikely that the Supreme Court intended to restrict retroactive effect through the waiver rule considering the treatment of other areas involving constitutional rights such as the use of involuntary confessions,[65] the denial of the right to a transcript on the basis of inability to pay,[66] and the denial of the right to counsel.[67] The footnote refers to "challenges to criminal prosecutions" not challenge of a conviction. It appears more likely that the court was expressing an intent to allow the states to set their own requirements in future search and seizure situations concerning the time and method of moving to suppress, and the requirements for attacking denial of such motions.

This analysis is apparently accepted by the Supreme Court. Although the Court has never been presented with an opportunity to rule directly on this question, the majority opinion in *Sunal v.*

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[62] "A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." People v. Kitchens, 46 Cal. 2d 260, 263, 294 P.2d 17, 19 (1956).

[63] See, *e.g.*, Banks v. Maryland, 228 Md. 130, 179 A.2d 126 (1962); Belton v. State, 228 Md. 17, 178 A.2d 409 (1962); Erving v. State, 174 Neb. 90, 116 N.W.2d 7 (1962); People v. Friola, 11 N.Y.2d 157, 227 N.Y.S.2d 423, 182 N.E.2d 100 (1962).

[64] 367 U.S. 643, 659 n.9 (1961).

[65] Reck v. Pate, 367 U.S. 433 (1961); United States *ex rel.* Caminite v. Murphy, 222 F.2d 698 (2d Cir. 1955).

[66] Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958); Patterson v. Medberry, 290 F.2d 275 (10th Cir. 1962).

[67] Fransworth v. United States, 232 F.2d 59 (D.C. Cir. 1956); Smallwood v. Warden, 205 F. Supp. 325 (D. Md. 1962).

Large[68] appears to rule out the use of waiver in the *Mapp* situation. The majority in that case clearly indicated that the waiver rule should not be applied to bar collateral attack relief "where the law was changed [by the Court] after the time for appeal had expired."[69] The *Mapp-Erving* situation is a clear and distinct example of this principle.

The application of the above exception to the waiver rule in the *Mapp* area is further bolstered by *Hall v. Warden.*[70] Although defendant in that case failed to raise the illegal search and seizure objection until he petitioned for habeas corpus, the Court of Appeals for the Fourth Circuit expressly rejected applicability of the waiver rule and granted the writ.[71]

B. CRITICISMS OF THE WAIVER RULE

Although the courts have applied the waiver doctrine rather strictly,[72] the recent trend is to make an exception where important constitutional rights are involved.[73] The possible use of waiver to cut off retroactive application of *Mapp* has been severely criticized by one writer:[74]

> The application of constitutional law cannot under any meaningful doctrine of waiver be conditioned upon the defendant having raised arguments which, at the time they should have been raised, had been fully and expressly rejected by the Supreme Court. . . . A broad distinction among prisoners who now claim a constitutional right on the basis of whether they did or did not acquiesce in *Wolf* before *Mapp* seems untenable.

As applied in *Erving v. State,* the doctrine forces the defendant in a criminal case to object on contingencies. He must clairvoyantly anticipate future changes in the law by judicial decision.[75]

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[68] 332 U.S. 174 (1947).

[69] *Id.* at 181 (dictum).

[70] 31 U.S.L. WEEK 2410 (4th Cir. 1963).

[71] See discussion at note 49, *supra.*

[72] Brown v. Allen, 344 U.S. 443 (1953) (appeal filed one day late).

[73] Jordan v. United States, 352 U.S. 904, *reversing* 233 F.2d 362 (D.C. Cir. 1956); United States v. Harpole, 263 F.2d 71 (5th Cir. 1959).

[74] Bender, *supra* note 45, at 657.

[75] "Under the majority decision [Herndon v. Georgia, 295 U.S. 441 (1935)], however, lawyers will have to burden every record with contingent constitutional arguments lest they be confronted later with the announcement that some current decision had laid down a rule which, they should have anticipated, could have been applied to their case." Fraenkel, *Constitutional Issues in the Supreme Court, 1934 Term,* 84 U. PA. L. REV. 345, 386 (1936).

This forces a defendant to make objections in the trial court which he knows will be overruled.[76] Such a result places a heavy burden on the defense counsel who wishes to present every possible defense for his client. Since there still remain unanswered questions concerning which, if any, of the rules of federal criminal procedure will eventually be applied to the states, *Erving v. State* provides a host of reasons for objections in every criminal trial.[77]

IV. CONCLUSION

The court in the principal case should have applied *Mapp* retroactively. *Mapp* placed the exclusionary rule on a constitutional basis and made the exclusion of illegally obtained evidence an essential element of due process. Defendant could not take advantage of that element of due process unless *Mapp* were to apply retroactively.

Retroactivity should not be defeated by the waiver rule. This places on the criminal defendant the burden of anticipating possible judicial changes which might be of benefit to him. This is true even where the possibility of change is extremely remote, as evidenced by the principal case. Here the defendant was deemed to have waived a right even though he was not aware of its existence.[78]

Marvin D. Keller '64

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[76] Bender, *supra* note 45, at 657.

[77] Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1962).

[78] *Cf.* Moore v. Michigan, 355 U.S. 155 (1957) (defendant must knowingly and intelligently waive the right to counsel, or conviction without representation of counsel is in contravention of the sixth amendment and void).