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## Illegally Obtained Evidence

Norman B. Miller\*

IT IS IMPOSSIBLE TO MAKE an historical study and exhaustive research on the decision of the Supreme Court of the United States in *Dollree Mapp, etc., Appellant v. Ohio*<sup>1</sup> because of the lack of sufficient time from the date of that decision on June 19, 1961 until the deadline for the publication of this Law Review. It seems imperative, however, that the attention of all those who subscribe should be alerted to this important decision.

In this case the Supreme Court of the United States in a five to three decision revised its earlier thinking on the problem of evidence illegally obtained by State police officers in a State criminal case and held that evidence obtained through an illegal search and seizure is inadmissible in a state criminal trial even though the illegal means was used by other than Federal law enforcement officers. The author's original reaction to the decision was one of regret in that the court had decided this case when the precise issue on which it turned had been neither adequately argued nor briefed so that the justices could have the benefit of legal thinking on that issue other than their own.<sup>2</sup> Mr. Justice Clark, in the majority opinion of the court, comments that at the trial no search warrant was produced by the prosecution nor was the failure to produce one explained or accounted for,<sup>3</sup> when at the time of the trial before the Ohio courts such evidence or explanation would have been pure surplusage because of the Lindway doctrine. This is particularly true since the Lindway doctrine in Ohio<sup>4</sup> permitting evidence obtained by an illegal search and seizure to be admissible in a criminal prosecution conformed to the then existing federal case law as expressed in *Weeks v. United States*<sup>5</sup> and *Wolf v. Colorado*.<sup>6</sup>

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<sup>1</sup> 81 S. Ct. 1684, 29 L. W. 4798 (1961).

<sup>2</sup> See dissenting opinion of Mr. Justice Harland 29 L. W. at page 4807 particularly footnotes 5 and 6.

<sup>3</sup> 29 L. W. at pages 4798 and 4799.

<sup>4</sup> *State v. Lindway*, 131 Ohio St. 166, 2 N. E. (2d) 490, 5 O. Op. 538 (1936).

<sup>5</sup> 232 U. S. 383, 58 L. Ed. 652, LRA 1915 B, 834, Ann. Cas. 1915C, 1177, 34 S. Ct. 341 (1914).

<sup>6</sup> 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949).

The author has been advised by the prosecutor's office of Cuyahoga County that Justice Black has granted an extension of time for the State of Ohio to file a motion for review and that a motion for review will be filed. And from communications coming to the attention of that office there will undoubtedly be a number of *amici* siding with the State of Ohio in opposition to the American and Ohio Civil Liberties Unions, original *amici* in the case espousing the Appellant's cause.

There has been no unanimity of opinion on the admissibility of evidence obtained by illegal means.<sup>7</sup> The basic concept expressed by the courts that has permitted relevant evidence obtained by illegal means to be admissible, is that it is a rule of evidence primarily and that the court is concerned only with its relevancy and not the manner in which it was obtained. The converse is based on the theory that evidence so obtained is unconstitutional evidence and is inadmissible as the necessary implication to our constitutional rights, for only in that way can the individual's constitutional safeguards be adequately protected.

The ramifications of these two basic rules were many.<sup>8</sup> And even in Ohio the rule announced in the *Lindway* case was not all encompassing. Attention is directed to *State v. Miclau, Jr.*<sup>9</sup> wherein the judgment of the trial court was reversed because of error in admitting evidence obtained by unlawful means, although it might well be said that in this case the evidence was obtained in violation of public policy, or let us say, by a trespass against the public generally rather than an individual defendant. The Supreme Court of Ohio, when the *Mapp* case was before it,<sup>10</sup> recognized that there were limitations imposed upon the admissibility of evidence obtained by illegal search and seizure by the federal Constitution when such evidence was taken from the defendant's person by the use of brutal or offensive force.<sup>11</sup>

<sup>7</sup> See *Weeks v. United States*, supra note 5; See appendix to *Elkins v. United States*, 364 U. S. 206, 226 (1960); See Secs. 2183 and 2184(a) of Vol. 8 *Wigmore on Evidence* (McNaughton rev. 1961).

<sup>8</sup> For interesting discussion see 43 *Minnesota Law Review* 1083, Article by Yale Kamisar, Assistant Professor of Law, University of Minnesota Law School entitled, "Wolf & Lustig, Ten Years Later: Illegal State Evidence in State and Federal Courts."

<sup>9</sup> 104 O. Abs. 347; 5 O. Op. (2d) 36; Affirmed 167 Ohio St. 38; 14 N. E. (2d) 596 (1957).

<sup>10</sup> *State v. Mapp*, 170 Ohio St. 427, 11 O. Op. 2d 169, 166 N. E. (2d) 387 decided March 23, 1960, prob. juris noted 364 U. S. 686 (1960).

<sup>11</sup> *Rochin v. California*, 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A. L. R. (2d) 1396 (1952).

The Ohio court then said that the methods employed in this case were not such as to offend a "sense of justice," since the evidence was not obtained by use of brutal and offensive force against the defendant's person.<sup>12</sup> Could not the Ohio court have found from the facts that the police "laid seige" to the defendant's home so that it offended the traditional concepts of fair play and thereby violated Federal due process?

The Fourth and Fifth Amendments to the Federal Constitution are either individually or collectively discussed in the majority and concurring opinions in the *Mapp* case. To effectively safeguard the rights therein expressed would require that evidence obtained by an unlawful search and seizure be suppressed or returned which, according to existing procedure, is accomplished by a motion for the same seasonably made. Irrespective of the two views as to whether the Fourth and Fifth Amendments are limitations only on the Federal Government or are incorporated by reference into the "due process" clause of the Fourteenth Amendment and thereby become equally applicable to the states, should not the meaning and interpretation of the Fourth Amendment (unreasonable search and seizure) and the Fifth Amendment (self-incrimination) be construed in the light of the common law in existence at the time of the adoption of the constitution? If at that time other methods were available to perpetuate the individual's civil liberties, should the court now say that they can only be effectively protected in another way?

According to John Henry Wigmore,<sup>13</sup> the historical concept was that our courts do not attempt to enforce penalties by indirect means and therefore the manner in which evidence was obtained is ignored in the defendant's trial, but that does not mean that it was condoned, because the problem would be directly considered in an action involving the defendant against the offending police officers. The impact of the federal rule brought about a change in the thinking in many of the states that had previously followed the common law doctrine.<sup>14</sup> But again, should not the constitution be construed in the light of the common law as it then existed?

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<sup>12</sup> *Irvine v. California*, 347 U. S. 128, 98 L. Ed. 561, 74 S. Ct. 381 (1954).

<sup>13</sup> Sec. 2183, Vol. 8 Wigmore on Evidence, (McNaughton rev. 1961) at page 6.

<sup>14</sup> See note 7 *supra*.

The rule as announced in the *Mapp* case is based entirely on constitutional considerations, and therefore wire tapping evidence in violation of Section 605 of the Federal Communications Act might very well be construed in a different manner since it is of statutory origin rather than constitutional origin. In this area, the Supreme Court of the United States has held that under Section 605 evidence obtained as a result of wire tap by either State or Federal officers is inadmissible in Federal courts but held that a state court may permit wire tap evidence gathered by State officers.<sup>15</sup>

The problem of illegally obtained evidence also becomes involved with the concept of self-incrimination because in most instances it is the papers or property of the defendant that were obtained. At common law self-incrimination meant testimonial incrimination, namely, that a person is privileged from testifying. This referred to the testimonial act or utterance of the person either on the witness stand or in response to process since there is testimonial disclosure implicit where the defendant is required to produce papers under a subpoena *duces tecum*.<sup>16</sup> This was a privilege of the person from producing the evidence but not from its production.<sup>17</sup> It would appear therefore that the problem of self-incrimination at least historically should not enter into the problem of illegally obtained evidence.

Comparisons have been made with the problem of involuntary confessions, which were inadmissible because of their unreliability.<sup>18</sup> Since this principle existed at common law the admission into evidence of an involuntary confession in either a state or federal case does violence to due process of law, but even here there is a different test applied by the Supreme Court of the United States to state confessions and federal confessions. In the former the confession becomes involuntary due to fear or favor and there is no problem as to mere lapse of time as in the latter. In a federal case a confession of the defendant made without any promise or threat but merely after the time that he should have been arraigned before the Federal Commissioner is

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<sup>15</sup> Vol. 8 Wigmore on Evidence, Sec. 2184 b (McNaughton rev. 1961) at page 53 et seq.

<sup>16</sup> Vol. 8 Wigmore Evidence, Sec. 2263, (McNaughton rev. 1961) at page 378 et seq.

<sup>17</sup> *Johnson v. United States*, 228 U. S. 457, 458 (1913).

<sup>18</sup> Vol. 3 Wigmore on Evidence, Section 822 et seq., at page 246 et seq.

inadmissible as involuntary.<sup>19</sup> If this dual standard exists here, might it not also exist in the realm of evidence obtained by unreasonable search and seizure?

The decision of the Supreme Court of the United States following a full dress hearing, argument and briefing of the problem will be welcome. Would it not have been better for the Supreme Court to have ordered a rehearing on its own motion on such a vital principle of law rather than deciding the same without the benefit of comprehensive argument and briefs?

It will be interesting to see whether the Supreme Court of the United States will now permit the State of Ohio to introduce evidence that the police did have a search warrant, which is quite possible, and further if the police did have such a warrant, will it make any difference if it was issued for something other than obscene literature?

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<sup>19</sup> *McNabb v. United States*, 318 U. S. 382, 63 S. Ct. 608, 87 L. Ed. 819 (1943).