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Constitutional Law—Prospective Limitation of Mapp v. Ohio

Unlawfully seized evidence was presented at petitioner's trial and a conviction was obtained. The following year *Mapp v. Ohio*, 367 U.S. 643 (1961), was announced. In *Mapp*, the Court held that the exclusion of evidence obtained in violation of the search and seizure provisions of the fourth amendment was required in state criminal trials by the due process clause of the fourteenth amendment. Petitioner filed an application for habeas corpus in the United States District Court on the ground that he decision in *Mapp* acts retrospectively upon cases finally decided in the period prior to *Mapp*. Relief was denied and the Court of Appeals for the Fifth Circuit affirmed. *Held*, affirmed. The majority stated that in determining whether a decision should be applied retrospectively, the merits and demerits of the particular case must be weighed. The court should examine the history of the rule in question, its purpose and effect and whether retrospective application would further or retard its operation. The purpose of *Mapp* is to deter unreasonable police action. The majority justified its result on the basis that the abuse of police power had already occurred and could not be corrected. Furthermore, applying *Mapp* retrospectively would tax the administration of justice. Consequently, the purpose of *Mapp* would not be advanced by making the rule retrospective. Mr. Justice Black, in a sharp dissent, stated that *Mapp*'s purpose was to protect defendants' constitutional rights; therefore, persons convicted by unconstitutional procedure should have the right to challenge their conviction. *Linkletter v. Walker*, 85 Sup. Ct. 1731 (1965).

Prior to the decision in *Linkletter*, widespread controversy existed as to whether the decision in *Mapp* should be applied retrospectively. Two of the federal circuit courts applied the rule in *Mapp* retrospectively. On the other hand, four of the federal circuit courts limited the rule prospectively. Currier, *Time and Change in Judge-Made Law; Prospective Overruling*, 51 VA. L. REV. 201 (1965). The state courts almost unanimously limited the decision in *Mapp* prospectively. *Dowing & Gunther, Cases and Materials on Constitutional Law* 803 (7th ed. 1965). Furthermore, there was a wide split among legal commentators as to whether *Mapp* should be applied retrospectively. Compare Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962) with Torcia & King, *The Mirage of Retro-

It is generally acknowledged that the Constitution does not provide an answer to the question of retrospectivity of judicial decisions. The Constitution has no voice upon the subject. Each court may decide for itself whether to apply a ruling retrospectively. Greater No. Ry. v. Sunburst Oil & Ref. Co., 287 U. S. 358 (1932).

In Ross v. Oregon, 227 U.S. 150 (1913), the defendant urged that retrospective application of a judicial decision violated article I, section 10 of the Constitution, which provides that “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . .” The Court rejected this contention, enunciating the rule that this section of the Constitution only prohibits legislative action and not judicial decisions.

Furthermore, where a judicial decision is applied retrospectively there is no impairment of the due process clause of the fourteenth amendment. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924). When land is taken through the retrospective application of a judicial decision, the unsuccessful party is not deprived of due process of law. Central Land Co. v. Laidley, 159 U.S. 103 (1895).

In granting or denying retrospective operation of judicial decisions prior to Linkletter, most courts took into consideration the effect the decision would have on the party affected by the earlier decision. Where the decision would affect contract rights, the courts usually limited the decision prospectively. The rationale is that a party who relies on a judicial decision when entering into a contract should know with certainty that his rights will not be destroyed by a new interpretation of the law. In Gelpcke v. City of Dubuque, 1 Wall. 175 (1863), a city issued municipal securities relying on a state decision construing the securities as valid. The Supreme Court of the United States overruled the state decision but refused to apply its new holding retrospectively because such application would be an unjust punishment on the city.

Although the Supreme Court has not expressly settled the question of retrospectivity, it has recently applied its decisions retrospectively in criminal cases where the retrospective application would best benefit the imprisoned person. In Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958), the prisoner had been convicted of murder. Upon appeal he
motioned for a free transcript of the trial. The motion was denied. Subsequently, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court held that a state must provide a free trial transcript to those who cannot afford to pay. The prisoner in *Eskridge* was then granted certiorari. The Court reversed and remanded, thereby applying Griffin retrospectively. Similar treatment was afforded a prisoner who had pleaded guilty without the assistance of counsel and was convicted as a result of this omission. After his conviction, the Supreme Court of the United States announced *Gideon v. Wainwright*, 372 U.S. 335 (1963), establishing that the right to counsel is a fundamental right. The prisoner attached his conviction collaterally and the Court in *Doughty v. Maxwell*, 376 U.S. 202 (1964), in a per curiam opinion, ordered the prisoner a new trial and thus made the *Gideon* decision retrospective.

The Court, however, distinguished the above cases from *Linkletter* by applying a test suggested by some legal commentators. The court must look to the purpose of the decision in question and decide whether retrospective operation would further or retract this purpose. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 *Yale L.J.* 907 (1962). Using this criterion, the Court stated that retrospectivity was upheld in the other constitutional areas because the principle they applied went to the fairness of the trial. However, the *Mapp* decision could not be retrospective because the purpose there was to deter abusive police action which could not be corrected; consequently, retrospective application would not further the purpose of *Mapp*.

It is doubtful that the Court's primary concern in *Linkletter* was to deter abusive police action. It seems that the Court did not give *Mapp* a retrospective application because to do so would put a great stress on existing judicial machinery. A retrospective application of *Mapp* would crowd criminal dockets with hearings on the excludability of evidence, create additional expense and result in the release of many guilty prisoners.

One of the major objections raised in the dissenting opinion was that the majority is more concerned with the stress that a retrospective application of *Mapp* would put on the judicial process than with personal liberties. "If such is the result of enlightened opinion, so be it. Such fears have not deterred courts before." *Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963). In other words,
protection guaranteed by the Constitution should not be limited lest our judicial machinery should become overburdened.

Moreover, the dissent points out that if the Court must limit Mapp prospectively, it should at least allow Mapp to be applied retrospectively in cases where the offense was committed after the Mapp offense, but the conviction was made final before Mapp was decided. Linkletter's offense was committed after the Mapp offense, but his conviction was made final before Mapp. Is the conviction of Linkletter impregnable to collateral attack because his trial and appeal were pushed along at a faster pace than Mapp's? If the Ohio courts had proceeded with the same speed as the Louisiana courts, Linkletter's case would not have been decided before the decision in Mapp; consequently, Linkletter would have received direct relief after Mapp was decided.

The Linkletter decision represents the first time the Supreme Court has limited its decision prospectively in a criminal case involving constitutional rights. This raises the question of whether the Court will limit its decisions prospectively in the future, where constitutional issues similar to the one in Mapp are involved. In trying to determine how the Court will decide in these areas, one should be cautious when relying on precedent. The cases before Linkletter indicated a retrospective application might be given Mapp; however, the Court distinguished these precedents and limited the rule in Mapp prospectively. Consequently, no generalization should be drawn in regard to retrospectivity in criminal cases not yet adjudicated by the Supreme Court.

Menis Elbert Ketchum, II

Criminal Law—Administrative Law and the Right to Trial by Jury

Ds were indicted for evasion of taxes owed for the years 1944, 1945, and 1946. The taxes were duly assessed by the commissioner in 1955. The indictment charged Ds with wilfully attempting to evade and defeat the payment of income taxes. In the criminal prosecution, the jury was instructed that the assessments were valid as a matter of law because the validity of an administrative order cannot be passed upon by a jury. Held, reversed. In a criminal prosecution of one charged with the commission of a