SECOND DRAFT TO BLACK, J.

No. 236 - October Term, 1960 4/25/61

Dollree Mapp, etc., Appellant, v. Ohio.	)	On Appeal from the Supreme Court of Ohio.

[April , 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] As officially stated in a syllabus to its opinion the Supreme Court of Ohio has found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio Stat. 427. The State says that even though under our cases the search violated the Fourth Amendment, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v. Colorado, 338 U.S. 25 (1949). This Court did indeed hold "that in a

prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." On this appeal, wherein we have noted probable jurisdiction, 346 U.S. 868, we therefore have once again presented for our consideration the recurring question of whether it is now timely to review that holding.

Not long after the Wolf decision, in Irvine v. California, 347 U.S. 128 (1954), this Court indicated that the States had not yet had "adequate opportunity to adopt or reject the doctrine" of Weeks v. United States, 232 U.S. 383 (1914), since "Never until June 1949 did this Court hold the basic search and seizure prohibition in any way applicable to the states under the Fourteenth Amendment." At p. 134. Only last Term in Elkins v. United States, 364 U.S. 206, the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement

in Wolf "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the Weeks case. (At p. 213) At the same time, as the Court pointed out, "the underlying constitutional doctrine which Wolf established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers . . . operated to undermine the logical foundation of the Weeks admissibility rule . . . ." That it likewise operated to overturn the constitutionality of the double standard of admissibility of illegally seized evidence as between state and federal courts -- which had existed under Weeks because this Court had not previously held that the Fourteenth Amendment incorporated the Fourth against the States -- we now conclude as a necessary concomitant.

Seventy-five years ago this Court in Boyd v. United States, 116 U.S. 616, 630 (1886), held that the doctrines of the Fourth Amendment "apply to all invasions, on the part of

the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of the doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ." The Court declared that within the condemnation of the Amendment was the illegal taking of "private papers to be used as evidence" and it specifically prohibited the use of such evidence as being "unconstitutional." Less than thirty years later, in Weeks v. United States, 232 U.S. 383 (1914), the Court stated explicitly that

> "[T]he Fourth Amendment . . . put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints . . . and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

> " . . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his righ t to be secure against such searches and seizures is of no value, and, so far as those placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. 383, 391-393.

This Court has required of federal law enforcers a strict adherence to this command of the Fourth Amendment ever since. More than a mere rule of evidence, the mandate of the Weeks case is a clear, specific, and constitutionally required "judicial implication" of a safeguard without insistence upon which the Fourth Amendment is reduced to "a form of words." Holmes, J., in

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). It means, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts. . . . " 232 U.S. at 392.

Although the Court in Wolf, supra, held "that were a State affirmatively to sanction . . . police incursion into privacy [without authority of law] it would run counter to the guaranty of the Fourteenth Amendment," at p. 28, it found that a State might nevertheless use the evidence so seized in a criminal prosecution. It authorized this double standard of admissibility although it previously held in the same opinion, p. 27, that the Fourth Amendment was "enforceable against the States through the Due Process Clause." The reasons for not enforcing the exclusionary rule, which had been recognized as a party of the prohibitions of the Fourth Amendment since Boyd, supra, against the States were bottomed on factual considerations.

The Court said that the "contrariety of views" of the States on the adoption of the exclusionary rule of Weeks was "particularly impressive." And, in this connection, that it could not "brush aside the experience of the states which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overruling the relevant rules of evidence." At pp. 31-32. We note that now, however, the scales are weighted against the Wolf doctrine on admissibility. Of the 37 states that have passed on the Weeks exclusionary rule since the Wolf decision, 21 have either adopted or adhered to the exclusionary rule. While in 1949 almost two-thirds of the states were opposed to the rule, now 57% of those passing upon it approve. See Elkins v. United States, supra, Appendix pp. 224-232. Significantly, among those now following the rule is California which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." People v. Cahan, 44 Cal. 2d 434 (1955).

We note that the second basis elaborated in Wolf in support of its failure to find the exclusionary doctrine unenforceable is that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states. In fact, only one case [Monroe v. Pape, 365 U.S. ___] has come to this Court in which private remedies have been pursued in an effort to redress such invasions of privacy. The obvious futility of relegating the Fourth Amendment to the protection of other remedies was well stated by Mr. Justice Frankfurter, dissenting in Harris v. United States, 331 U.S. 145 (1947), in which he said: "Freedom of speech, of the press, of religion easily summon powerful support against encroachment. The prohibition against seizure is normally invoked by those accused of crime, and criminals have few friends"; by Mr. Justice Jackson dissenting in Brinegar v. United States, 338 U.S. 160, 181 (1949), "Courts can protect the innocent against such invasions only indirectly

and through the medium of excluding evidence obtained against those who frequently are guilty," by Mr. Justice Douglas dissenting in Draper v. United States, 358 U.S. 307, 314 (1959), "A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminal"; by Mr. Justice Brennan, dissenting in Abel v. United States, 362 U.S. 217, 248 (1960), "The Amendment's protection is thus made effective for everyone only by upholding it when invoked by the worst of men."

Likewise, time has set its face against the "weighty testimony" of People v. Defore, 242 N.Y. 13, 22 (1926), cited by the Court in support of its reasoning in Wolf. The criticism there that "The Federal Rule as it stands is either too strict or too lax" has been entirely demolished by Elkins, supra, and recent cases of this Court. These include the overruling of the "silver platter" doctrine (Elkins) and the former requirements as to standing (Jones v. United States, 362 U.S. 257) as well as the state use of illegally seized evidence by federal agents (Rea v. United States, 350 U.S. 214.

It seems apparent that none of these bases have factual support at this time. Nor can the Wolf theory be supported by the long established constitutional doctrine of the Fourth Amendment. When the Court held in Wolf that the Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment against the states, the doctrine that the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions was long established and "stoutly adhered to." Wolf, at 28. The doctrine was not a divisible one wherein its sanctions could "be stricken from the Constitution." Therefore, in extending the substantive protections of due process to all unreasonable searches -- state or federal -- it was but logical and necessary that the exclusion doctrine -- part and parcel of the Amendment -- be also a concomitant of the new right. In short, the creation of the new constitutional right could not admit the denial of its most important constitutional privilege, namely, the exclusion of the evidence constitutionally protected from seizure. To hold otherwise is but to grant the right but withhold its privilege.

Indeed, we know of no such restraint being placed upon the enforcement of any other basic constitutional right. The right to privacy, "second to none in the Bill of Rights," Harris v. United States, 331 U.S. 145, 157 (dissenting opinion), would therefore stand in marked contrast to all other rights declared by the same instrument as "basic to a free society." This Court has not hesitated to enforce as strictly against the States as it does against the federal government the right of free speech and of a free press, the right to a fair trial, including, as it does, the right not to be convicted by use of a coerced confession, however "logically relevant" it be, and without regard to its reliability. Cf. Rogers v. Richmond, 365 U.S.____ (1961). 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.

Our cases show that the honest and real enjoyment of such rights is wholly determined by the aggregate strength of the available remedies and enforcement devices which an individual and his community are able to muster in their defense. In violations of what other right do we abide unfettered judicial employment of the fruits of official lawlessness" In none, save those of the "core of the Fourth Amendment."

Moreover, such a conclusion not only follows our cases but makes good sense. Presently, a federal prosecutor may take no benefit from evidence illegally seized, but a state's attorney across the street, operating under the enforceable prohibitions of the same Amendment, may. Thus the state, by admitting evidence unlawfully seized, serves to encourage disobedience to the federal Constitution which it is bound to uphold. Moreover, as was said in Elkins, "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." At p. 221. Yet the double standard now recognized hardly

puts such a thesis into practice. Federal officers, being human, are thus invited and do, as our cases indicate, step across the street, in non-exclusionary states, to the state's attorney with their unconstitutionally seized evidence. The prosecution on the basis of that evidence is then had in a state court in utter disregard of the Fourth Amendment. If the fruits of an unconstitutional search were inadmissible in both state and federal courts, this inducement to evasion would be eliminated. Federal-state cooperation in the solution of crime under constitutional standards would be promoted, if only by recognition of their then mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." Miller v. United States, 357 U.S. 301, 313 (1958). Barring shortcuts to only one of two cooperating law

enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. Cf. Byars v. United States, 273 U.S. 28 (1927); Anderson v. United States, 318 U.S. 583.

There are those who say, as did Mr. Justice (then Judge) Cardozo, that under such a doctrine "The criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But, as was said in Elkins, "There is another consideration -- the imperative of judicial integrity." The criminal goes free, if he must, but it is under the law. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis said in Olmstead v. United States, 277 U.S. 438, 469: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites everyman to become a law unto himself; it invites anarchy." The ignoble but doubtless

shortcut to conviction left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right is nothing less than constitutional in origin, we can no longer abstain from drawing upon the same source for the only concept which will safeguard the right against reduction to the level of a qualified privilege. The judgment is reversed.