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# CONSTITUTIONAL LAW-DUE PROCESS-SEARCH AND SEIZURE-USE IN STATE COURTS OF EVIDENCE OBTAINED ILLEGALLY

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CONSTITUTIONAL LAW—DUE PROCESS—SEARCH AND SEIZURE—USE IN STATE COURTS OF EVIDENCE OBTAINED ILLEGALLY—Petitioner was convicted of bookmaking under the anti-gambling laws of California[1] by the use of evidence obtained through unreasonable search and seizure and through disclosures petitioner made when purchasing a federal wagering tax stamp. While petitioner and his wife were away, police concealed a microphone in the hall of his home, later moving it to the bedroom and finally to a bed-

[1] Cal. Pen. Code (Deering, 1951) §§337a(1), (2), (3), and (4).

room closet. The instrument was connected to a receiver in a neighboring garage where other officers monitored all conversations for more than a month. Petitioner exhausted all state remedies in his attempt to have the evidence so obtained declared inadmissible. On certiorari the United States Supreme Court *held,* affirmed, four justices dissenting. The Fourteenth Amendment does not prevent the use in a state court of evidence acquired illegally. *Irvine v. People of State of California,* 347 U.S. 128, 74 S.Ct. 381 (1954).

The problem presented by the principal case lies in the area between *Wolf v. Colorado*[2] and *Rochin v. California,*[3] and this is the first decision in which the Supreme Court has attempted to reconcile the two cases. In the *Wolf* case local police officers entered the private office of a practicing physician without warrant and seized his records. As a result the physician was convicted of conspiracy to commit an abortion. The Supreme Court held that the right of privacy secured by the Fourth Amendment was protected from state action by the Fourteenth Amendment,[4] but that the exclusion of such evidence was not required to effectuate this guarantee. In the *Rochin* case three state police officers entered Rochin's house and forced their way into a bedroom occupied by him and his wife. Rochin put two capsules which had been lying on a bedside table into his mouth. After an unsuccessful attempt to extract them by force the officers took him to a hospital where by the use of an emetic solution he was made to vomit the two capsules which, as determined by subsequent analysis, contained morphine. He was convicted of possessing a preparation of morphine,[5] but the Supreme Court reversed on the ground that the method used by the state police "shocks the conscience."[6] The principal case was more similar to *Wolf* in that the officers did not assault petitioner and did not enter his home while he was there, but counsel for petitioner attempted to persuade the Court that the conduct of the officers was so shocking that *Rochin* should apply.[7] Justice Jackson made it clear in the majority opinion that the principal case differed from *Rochin* in that here there had been no assault on the petitioner's person,[8]

[2] 338 U.S. 25, 69 S.Ct. 1359 (1949). For penetrating analyses of this case, see Allen, "Wolf Case: Search and Seizure, Federalism, and the Civil Liberties," 45 ILL. L. REV. 1 (1950); Desky, "Wolf v. Colorado and Unreasonable Search and Seizure in California," 38 CALIF. L. REV. 498 (1950).

[3] 342 U.S. 165, 72 S.Ct. 205 (1952). See 37 CORN. L.Q. 483 (1952); 25 So. CAL. L. REV. 357 (1952).

[4] The traditional view is that the Fourteenth Amendment does not include all the guarantees of the first eight amendments, but only those which are "implicit in the concept of ordered liberty . . . ," or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Palko v. Connecticut, 302 U.S. 319 at 325, 58 S.Ct. 149 (1937); Snyder v. Massachusetts, 291 U.S. 97 at 105, 54 S.Ct. 330 (1934). Justices Black and Douglas have consistently maintained that the Fourteenth Amendment makes the first eight amendments applicable to the states directly. See the dissent in Adamson v. California, 332 U.S. 46 at 68, 67 S.Ct. 1672 (1947).

[5] Cal. Health and Safety Code (Deering, 1952) §11,500.

[6] Rochin v. California, note 3 supra, at 172.

[7] "An effort is made, however, to bring this case under the sway of Rochin v. California." Principal case at 133.

[8] "That case involved, among other things, an illegal search of the defendant's person.

although he did admit, "Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the . . . Fourth Amendment. . . ."[9] The majority also summarily disposed of the contention that the acts of the police constituted wiretapping and thus violated the Federal Communications Act.[10] Perhaps the greatest importance of the case lies in the dissenting and concurring opinions. Justice Frankfurter, who wrote the majority opinions in both *Wolf* and *Rochin*, thought that the principal case was sufficiently different from *Wolf* to declare that the state had overstepped the bounds of decency as they had in *Rochin*.[11] Justice Frankfurter's broad interpretation of *Rochin* gives it a significance which is far more extensive than that of the majority. Justice Black in his dissent expressed the belief that the disclosures made by petitioner in purchasing a federal gambling tax stamp[12] amounted to self-incrimination and so violated the Fifth Amendment as applied to the states by the Fourteenth Amendment.[13] *Wolf* was decided by a divided Court, six to three,[14] while the decision in the instant case rests upon a bare majority.[15] This assumes appreciable importance since Justice Clark wrote a separate concurring opinion in this case in which he indicated that he adhered to the doctrine of *Wolf* only because he believed precedent should be followed.[16] It appears that state law enforcement agencies might do well to use a higher degree of caution in obtaining evidence, for it is not at all inconceivable that the tendency of the justices to qualify the *Wolf* case might lead to its being overruled in substance if not in form.

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But it also presented an element totally lacking here—coercion . . . , applied by physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in Rochin contrary to that in Wolf." Principal case at 133.

[9] Principal case at 132. Justice Jackson, joined by Chief Justice Warren, suggests that the erring officials be indicted under the Civil Rights Act, 62 Stat. L. 696 (1948), 18 U.S.C. (Supp. V, 1952) §242. Principal case at 137. For a discussion of the effectiveness of other remedies which petitioner might use, see Desky, "Wolf v. Colorado and Unreasonable Search and Seizure in California," 38 CALIF. L. REV. 498 (1950).

[10] 48 Stat. L. 1103 (1934), 47 U.S.C. (1946) §605. See also Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928); Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939).

[11] "While there is in the case before us, as there was in Rochin, an element of unreasonable search and seizure, what is decisive here, as in Rochin, is additional aggravating conduct which the Court finds repulsive." Principal case at 144.

[12] See 65 Stat. L. 529 (1951), 26 U.S.C. (Supp. V, 1952) §3285 et seq.

[13] By comparison it is well to note that in the Wolf case Justice Black concurred on the basis that the *Fourth* Amendment was binding on the states through the Fourteenth Amendment, but that the federal exclusionary rule was only a rule of evidence and not a constitutional right.

[14] In the Wolf case Justices Douglas, Murphy, and Rutledge dissented on the ground that exclusion of evidence secured through unreasonable search and seizure was the only effective way to enforce the right of privacy.

[15] Chief Justice Warren and Justices Jackson, Minton, Reed, and Clark formed the majority, while Justices Black, Douglas, Frankfurter, and Burton dissented.

[16] "Had I been here in 1949 when Wolf was decided, I would have applied the doctrine of Weeks v. United States . . . to the states. But the Court refused to do so then, and it still refuses today. Thus Wolf remains the law and, as such, is entitled to the respect of this Court's membership. . . . In light of the 'incredible' activity of the police here,

it is with great reluctance that I follow Wolf. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance." Principal case at 138-139.