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The Federal Rules Of Criminal Procedure And Joint Searches

prohibit impeachment by prior conviction where the probative value is outweighed by the possibility of jury misuse of the evidence.[73]

By restricting, as the *Frey* court did, prior conviction evidence to proceedings in which final sentencing has been passed, the possibility of jury prejudice has been reduced. Admittedly, this is not in accord with the historical rationale of impeachment, that being to demonstrate a witness's questionable veracity through the fact of prior guilt.[74] However, in requiring the technical interpretation of conviction, and thus making it more difficult to introduce prior convictions as impeaching evidence, the *Frey* court has refused to support the basic premise that mere ascertainment of guilt in a prior proceeding necessarily demonstrates an absence of credibility on the part of the defendant in a subsequent proceeding.

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THE FEDERAL RULES OF CRIMINAL PROCEDURE AND JOINT SEARCHES

The duality of the federal system has frequently provided a way for law enforcement officials to avoid restrictive rules governing the procurement of evidence which are enforced in federal courts but not in state courts, and vice versa.[1] The Supreme Court's response to this situation has been to control, through an exclusionary process, the admission in federal courts of evidence illegally obtained by federal[2] and state[3] officials. Further, the Court has applied limits to the illegally obtained evidence that state courts may admit.[4] There remain, however, situations where evidence obtained in violation of prescribed law enforcement procedures may continue to be used by law enforcement officers of one jurisdiction in the courts of another. The restraints upon federal officers in state court proceedings with regard to evidence obtained in violation of the Federal Rules of Criminal Procedure are somewhat unclear.[5] There has been no

[73]*E.g.*, United States v. Perea, 413 F.2d 65 (10th Cir. 1969); United States v. Hildreth, 387 F.2d 328 (4th Cir. 1967); Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965); State v. Coca, 80 N.M. 95, 451 P.2d 999 (1969).

[74]Notes 60-62 *supra*.

[1]*See* Eichner, *The "Silver Platter"—No Longer Used for Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311 (1960).

[2]*E.g.*, Weeks v. United States, 232 U.S. 383 (1914).

[3]*E.g.*, Elkins v. United States, 364 U.S. 206 (1960).

[4]*See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[5]*Compare* Rea v. United States, 350 U.S. 214 (1956) *with* Wilson v. Schnettler, 365 U.S. 381 (1961) *and* Cleary v. Bolger, 371 U.S. 392 (1963).

Supreme Court ruling that a state is required to exclude evidence which is the product of violations of the Federal Rules,[6] unless, of course, such violations also exceed constitutional standards.[7] The federal courts have been consistently reluctant to use their injunctive power to disrupt state criminal proceedings.[8] There is however, an avowed policy favoring increased cooperation between federal and state law enforcement officials,[9] and the injunctive supervision of federal officials by the federal courts[10] may result in interference with state proceedings when a federal-state endeavor does not conform to the Federal Rules.

A recent decision of the Fifth Circuit Court of Appeals[11] gives an indication of the fine distinctions that are being drawn in this area. In *United States v. Navarro,*[12] a city narcotics officer received a call from an informer advising the officer that he had seen heroin in Navarro's home. The officer prepared an affidavit which stated that he knew the informer, had previously received information from him which proved correct, and that the officer therefore had reason to believe that narcotics were in Navarro's home.[13] The procedure was in accordance with state law,[14] and

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[6]Cleary v. Bolger, 371 U.S. 392, 403-404 (1963) (concurring opinion). *Id.* at 413 (dissenting opinion).

[7]Note 65 *infra.*

[8]*See* Dombrowski v. Pfister, 380 U.S. 479, 484-85 (1965); Cleary v. Bolger, 371 U.S. 392 (1963); Pugach v. Dollinger, 365 U.S. 458 (1961); Stefanelli v. Minard, 342 U.S. 117 (1951); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

[9]An indication of the scope of federal-state cooperative actions can be seen in the following:

> The area where Federal and state crimes overlap is large. It covers much of the more common criminal activity including *inter alia* possession and sale of narcotics, some types of embezzlement, sending threatening or extorting communications in interstate commerce or the mails, interstate fleeing from justice, various sorts of fraud, transportation of liquor into dry states, interstate transportation or mailing of lottery tickets or obscene matter, racketeering affecting interstate commerce, transportation in interstate commerce of stolen goods or vehicles or falsely made or forged securities, sale or receipt of these items and interstate white slave traffic. State and Federal officers necessarily cooperate to a large extent in crime prevention and law enforcement.

Parsons, *State-Federal Crossfire In Search and Seizure and Self Incrimination,* 42 CORNELL L. REV. 346, 348-49 (1957). Congress has specifically encouraged cooperative action in the enforcement of narcotic drug violations. *See* 21 U.S.C. § 198 (a) (1964); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-53, § 503 (Oct. 27, 1970).

[10]*See* Rea v. United States, 350 U.S. 214 (1956).

[11]United States v. Navarro, 429 F.2d 928 (5th Cir. 1970).

[12]*Id.* The fact situation is supplemented by the prior decision of *Navarro v. United States,* 400 F.2d 315 (5th Cir. 1968).

[13]The Supreme Court in Jones v. United States, 362 U.S. 257 (1960) indicated the prerequisites for a "reliable informer" as a basis for the probable cause needed in obtaining a search warrant. *See also* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 265-74 (1965).

[14]*See* TEX. CODE CRIM. PROC. art. 18.10 (1966). Navarro was convicted by a federal

a search warrant was granted by a judge of a court not of record.[15] The officer then asked local agents of the Federal Bureau of Narcotics to join in the search, which resulted in the discovery of heroin by a city officer, who in turn handed it over to the federal agents. Navarro was prosecuted in a federal court and convicted of illegal possession of heroin; however, his conviction was reversed on the grounds that the heroin was seized under the authority of a search warrant which failed to meet the requirements of Rule 41 (a) of the Federal Rules of Criminal Procedure since it was not issued by a court of record.[16] This violation of the Federal Rules, which bind federal courts and federal law enforcement officers, required suppression of the evidence by the federal court.[17] Since federal agents had participated in the search, federal procedural standards applied to the admissability of the evidence in the federal courts.[18]

Navarro's freedom was short lived, however, for the United States Attorney who prosecuted him in his original federal trial became, in the interim, a state district attorney. He initiated state criminal proceedings against Navarro for violation of state narcotics laws arising from the same circumstances which formed the basis for the overturned federal conviction.[19]

Navarro brought suit in a federal district court to enjoin the federal officers from testifying in the state prosecution regarding the fruits of the illegal search and from turning over the physical evidence to state authorities or, in the alternative, requiring the officers to recapture that evidence if already in state hands.[20] The district court refused to issue the

district court of illegal possession of heroin but this was reversed on the basis of a violation of Rule 41 (a) of the Federal Rules of Criminal Procedure. The circuit court of appeals did not deal with the validity of the search under the constitutional requirements of the fourth amendment but did note that the district court had addressed the issue stating "that this procedure just barely qualifies." Navarro v. United States, 400 F.2d 315, 316 n.1 (5th Cir. 1968).

[15]Navarro v. United States, 400 F.2d 315, 316 (5th Cir. 1968).

[16]Navarro v. United States, 400 F.2d 315 (5th Cir. 1968). Rule 41 (a) of the Federal Rules of Criminal Procedure reads as follows:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial *court of record* or by a United States commissioner within the district wherein the property sought is located.

FED. R. CRIM. P. 41 (a) (emphasis added).

[17]Navarro v. United States, 400 F.2d 315, 318-19 (5th Cir. 1968). The Federal Rules of Criminal Procedure provide for harmless error. *See* FED. R. CRIM. P. 52 (a).

[18]Navarro v. United States, 400 F.2d 315, 318-19 (5th Cir. 1968). For an explanation of the participation doctrine and its effects see notes 44 and 45 *infra*.

[19]United States v. Navarro, 429 F.2d 928, 929, 933 n.2 (5th Cir. 1970). For a discussion of the propriety of successive prosecutions by state and federal courts see L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 97-127 (1968).

[20]Rule 41 (e) of the Federal Rules of Criminal Procedure provides for the return of

injunctions. The court of appeals affirmed the decision as to the physical evidence, but, relying on *Rea v. United States*,[21] held that the federal agents should have been enjoined from testifying.[22] In *Rea* there had also been a violation of the Federal Rules of Criminal Procedure, and the Supreme Court based its decision requiring the federal officers to be enjoined on its "supervisory powers over federal law enforcement agencies."[22] If the violation in the principal case had been of constitutional dimensions, *Mapp v. Ohio*[24] would have required the exclusion of the fruits of the search in state criminal proceedings whether gathered by state or federal officers. However, in the case under analysis, the search was conducted in accordance with constitutional mandates; the only violation was the failure to obtain a search warrant from a judge of a court of record as required by the Federal Rules.[25]

In considering the question of enjoining the federal officers from turning over the heroin to state authorities, the circuit court was faced with a dichotomy in precedent. The Supreme Court has steadfastly adhered to the principle that federal courts should refuse to enjoin the use in state criminal proceedings of evidence obtained in violation of federal law by state officers.[26] Furthermore, federal courts may not enjoin state officers from testifying in state criminal proceedings concerning the fruits of their searches which fail to meet the standards of the Federal Rules.[27] On the other hand, the Supreme Court in *Rea* enjoined a federal officer from making the fruits of an illegal search available to the state prosecutor.[28] Based on this "double standard" for the admissability of evidence and considerations of comity in the federal system, the circuit

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illegally acquired property when a motion to suppress is granted. It "shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial." FED. R. CRIM. P. 41(e). The heroin in the principal case would be subject to lawful detention, but it has been argued that the "any trial" provision should include a subsequent state trial. *See* Eichner, *Impact of the Rea Case on the Law of Illegal Search and Seizure*, 9 U. FLA. L. REV. 178, 181, 188 (1956).

[21]350 U.S. 214 (1956). The *Rea* decision was limited in *Wilson v. Schnettler*, 365 U.S. 381 (1961) to situations in which an indictment had been instituted in a federal court and a suppression order had been granted by that court. But *Rea* was still controlling in the principal case and required the enjoining of the federal agents. United States v. Navarro, 429 F.2d 928, 930-31 (5th Cir. 1970).

[22]United States v. Navarro, 429 F.2d 928, 929 (5th Cir. 1970).

[23]Rea v. United States, 350 U.S. 214, 217 (1956).

[24]367 U.S. 643 (1961). "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissable in a state court." *Id.* at 655.

[25]United States v. Navarro, 429 F.2d 928, 932 (5th Cir. 1970).

[26]*Id.* at 931. Pugach v. Dollinger, 365 U.S. 458 (1961); Stefanelli v. Minard, 342 U.S. 117 (1951). *See also* Schwartz v. Texas, 344 U.S. 199 (1952).

[27]429 F.2d at 931. Cleary v. Bolger, 371 U.S. 392 (1963).

[28]429 F.2d at 921. Rea v. United States, 350 U.S. 214 (1956).

court in the principal case concluded that the state officers were entitled to recover the evidence which they had *first* discovered in the joint search.[29] Since the state warrant was constitutionally valid, the state officials who made the discovery were acting lawfully, and the court held that they had not lost the right to possession of the evidence by allowing the federal prosecution to proceed initially. Based on the fact situation of the case, the federal agents were not required to retain control of the federally suppressed evidence.[30] Furthermore, an injunction in these circumstances would have threatened the express command of Congress that federal and state enforcement agencies cooperate in investigations and prosecutions of narcotic violations.[31] Likewise, an injunction was not necessary in this case to protect either the integrity of the Federal Rules or the court's prior decision to suppress the evidence in the federal prosecution of Navarro.[32]

While there was no dissent in the principal case, the concurring judge expressed "considerable disinclination"[33] with the decision which he characterized as representing the "reverse silver platter"[34] doctrine. He contended that the decision permits forum shopping and felt that the long delayed state prosecution should be enjoined on the grounds of public policy. Furthermore, the concurring judge stated that the "reverse silver platter" doctrine should be laid to rest just as the "silver platter"[35] doctrine which grew up under *Wolf v. Colorado*[36] was extinguished in *Elkins v. United States.*[37]

The traditional common law doctrine was that evidence otherwise competent was not objectionable even though it had been procured by illegal means.[38] Following this approach both federal and state courts

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[29]429 F.2d at 932. It should be noted that possession of heroin is both a federal and state crime.

[30]*Id.* at 932.

[31]*Id.* at 932. *See* 21 U.S.C. § 198 (a) (1964).

[32]United States v. Navarro, 429 F.2d 928, 932 (5th Cir. 1970). Obvious attempts of federal agents to use state officers in a joint search as a means of circumventing federal requirements would meet with little success. *See* Cleary v. Bolger, 371 U.S. 392, 399-401 (1963). In the principal case there had been no evidence of bad faith on the part of either federal or state officers. *See* Navarro v. United States, 400 F.2d 315, 319 (5th Cir. 1968).

[33]429 F.2d at 932.

[34]"Reverse silver platter" situations exist when the illegally procured evidence of federal agents has been handed over to state officers for state prosecution. *See* Cleary v. Bolger, 371 U.S. 392, 404 (1963). For a possibly more accurate description of the situation of the principal case see note 45 *infra.*

[35]This phrase was coined in Lustig v. United States, 338 U.S. 74, 79 (1949). A "silver platter" situation exists when the illegally procured evidence of state officers has been handed over to federal agents for federal prosecution. *See* note 44 *infra.*

[36]338 U.S. 25 (1949).

[37]364 U.S. 206 (1960). United States v. Navarro, 429 F.2d 928, 932-33 (5th Cir. 1970).

[38]C. MCCORMICK, EVIDENCE § 137 (1954); 8 J. WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).

freely received evidence obtained through illegal search and seizure[39] until the decision of *Weeks v. United States*[40] barred from federal courts any evidence seized by federal officers in violation of the fourth amendment.[41] Since this federal exclusionary rule had no application to state officers,[42] the federal courts would admit in federal prosecutions evidence which state officers had illegally seized and handed over to federal authorities[43] on a "silver platter."[44] Such a procedure was allowed so long as there was no participation by federal agents in the unlawful search and seizure.[45] In

[39]*See* Eichner, *Impact of the Rea Case on the Law of Illegal Search and Seizure*, 9 U. FLA. L. REV. 178, 182 (1956).

[40]232 U.S. 383 (1914). Prior to this decision the Supreme Court had fluctuated in its position with respect to illegally seized evidence. *Compare* Boyd v. United States, 116 U.S. 616 (1886) *with* Adams v. New York, 192 U.S. 585 (1904). *See* Parsons, *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L. REV. 346, 352-53 (1957).

[41]The fourth amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[42]Weeks v. United States, 232 U.S. 383, 398 (1914).

[43]The following expresses the general rule that governed the admission of illegally seized evidence of state officers in federal prosecutions:

> Generally speaking, in the federal courts State officers are considered as strangers as far as the use of evidence procured by search and seizure is concerned; and although search and seizure by State officers may be illegal, if made entirely independent of any cooperation with federal officers, the evidence seized is usually admissable in prosecutions in the federal courts..

United States v. Haywood, 208 F.2d 156, 158 (7th Cir. 1953).

[44]A "silver platter" situation exists when the illegally seized evidence of state officers has been handed over to federal agents for federal prosecution. It differs from the participation doctrine.

> The crux of [the participation] doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a *silver platter.*

Lustig v. United States, 338 U.S. 74, 78-79 (1949) (emphasis added). For the development and extension of the participation doctrine see note 45 *infra.*

[45]Byers v. United States, 273 U.S. 28 (1927), held that unlawfully obtained evidence of a joint search would be inadmissable in federal prosecutions "when the federal government itself, through its agents acting as such, *participates* in the wrongful search and seizure." *Id.* at 33 (emphasis added). In *Gambino v. United States*, 275 U.S. 310 (1927), the illegally seized evidence of state officers was suppressed in the federal courts without any federal participation. The state officers were viewed as acting solely on the behalf of the federal government. There had been no state crime committed but only a federal offense. Such evidence by state officers will be suppressed if there is only a federal intention in their actions.

the 1949 decision of *Wolf v. Colorado*,[46] the Supreme Court stated that unreasonable searches and seizures by state officers are prohibited by the fourteenth amendment's Due Process Clause, but the admission of such evidence in a state court was held not to violate the Constitution.[47] Thus while a state did not have to follow the federal exclusionary rule of *Weeks*, it should not affirmatively sanction unreasonable searches and seizures.[48] At the date of the *Wolf* decision some states had voluntarily adopted the exclusionary rule, whereas others continued to follow the common law rule of admissibility.[49]

The *Wolf* doctrine, that unreasonable state searches were violative of the fourteenth amendment, was unsuccessfully invoked by the petitioner in *Stefanelli v. Minard*.[50] In that case the petitioner attempted to utilize the federal injunctive process to prevent the use of illegally seized evidence by officials of a state which followed the common law rule of admissibility, and thus secure the benefits of the federal exclusionary rule.[51] The Supreme Court, recognizing the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law,"[52] affirmed the denial of the injunction and ruled that federal courts should not intervene in state criminal proceedings in such a situation. However, in *Rea v. United States*,[53] the Court was less hesitant to enjoin a federal agent from testifying in a state court concerning illegally obtained evidence that had previously been suppressed in a federal court. The suppression had been ordered due to a violation of the Federal Rules of Criminal Procedure, but no attempt was made by the Court to justify the injunction as a protection of the rights given the petitioner by these Rules.[54] All constitutional questions were put aside and the

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Thus where federal and state crimes overlap, *Gambino* is of little force. The concurring judge's characterization of the principal case as "reverse silver platter" might be more accurately described as "reverse participation doctrine." *See* notes 34 and 44 *supra*.

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

[47]*Id.* at 33. The appendix to this case enumerates those jurisdictions following the common law rule of admissibility and those following the federal exclusionary rules. The *Wolf* rule was qualified by *Rochin v. California*, 342 U.S. 165, 172 (1952), where the means used by the state prosecution was sufficient to "shock the conscience," and the Court reversed the conviction. *But see* Irvine v. California, 347 U.S. 128 (1954).

[48]*See* Eichner, *The "Silver Platter"—No Longer Used for Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311, 313 (1960).

[49]Note 47 *supra*.

[50]342 U.S. 117 (1951).

[51]*See* Eichner, *The "Silver Platter"—No Longer Used For Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311, 314 (1960).

[52]Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

[53]350 U.S. 214 (1956).

[54]The Federal Rules of Criminal Procedure were meant to apply only in federal courts. *See* 18 U.S.C. § 3771 (1964). Rea's rights in the state proceedings were at issue.

injunction was based on federal courts' supervisory powers over federal law enforcement agencies.[55]

Other considerations were noted by the Court in *Cleary v. Bolger*[56] where a state official witnessed a confession obtained from the defendant, Bolger, by federal agents during an illegal detention under the Federal Rules and following an unconstitutional search and seizure.[57] No federal charges were brought, but when the state decided to prosecute, Bolger sought and obtained a federal injunction, based on the authority of *Rea*, to prevent both federal and state officials from testifying or introducing the illegally obtained evidence. However, the enjoining of a federal agent when the Federal Rules had been transgressed, as in *Rea*, did not support the enjoining of the state official in *Cleary*. The Supreme Court held that the injunction against the state officer was improvidently granted on the grounds that the comity principles espoused in *Stefanelli* were still controlling.[58] By reaffirming the independence of *Stefanelli*[59] from the then overruled *Wolf*,[60] the Court added emphasis to principles of comity which a federal court should consider when presented with a collateral attack on state criminal proceedings. *Cleary* was distinguished from *Rea* on the basis that the requested injunction would be against a state officer rather than a federal one.[61] The Court chided the circuit court of appeals[62] for not appreciating the effect of *Mapp v. Ohio*[63] upon the propriety of the injunction against the state officer where constitutional rights were involved. *Mapp* provided Bolger "the opportunity for federal correction of any denial of federal constitutional rights in the state proceeding."[64]

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[55]Rea v. United States, 350 U.S. 214, 216-17 (1956).

[56]371 U.S. 392 (1963).

[57]Bolger's confession was procured through violations of both Rule 5 (a) of the Federal Rules of Criminal Procedure and the fourth amendment. Bolger v. Cleary, 293 F.2d 368, 371 (2d Cir. 1961) (dissenting opinion).

[58]371 U.S. 392, 396-400 (1963).

[59]*Stefanelli v. Minard*, 342 U.S. 117 (1951) held that a federal court should not enjoin the introduction in a state trial of evidence seized by state officials in violation of the fourth amendment. But the prior decision of *Wolf v. Colorado*, 338 U.S. 25 (1949) had permitted the states to formulate their own rules regarding the admissability of illegally seized evidence.

[60]*Mapp v. Ohio*, 367 U.S. 643 (1961) overruled *Wolf v. Colorado*, 338 U.S. 25 (1949) which had declined to extend to the states the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914).

[61]371 U.S. 392, 399 (1963).

[62]*Id.* at 398 n.9.

[63]367 U.S. 643 (1961).

[64]371 U.S. 392, 400-01 (1963). Bolger's adequate remedy at law which precluded the equitable remedy of injunction here was a violation of his constitutional rights which should be raised in the state court.

But *Mapp* offers no guarantee of the exclusion of evidence obtained in violation of the Federal Rules.[65]

In light of the preceding discussion concerning the use of evidence by federal and state officers, the dilemma of the court in the principal case is apparent. For reasons of comity and a policy against piecemeal review, federal courts have been reluctant to use their injunctive power to disrupt state criminal law enforcement.[66] On the other hand, federal courts also have a duty to supervise federal law enforcement agents.[67] In the joint search of the principal case, federal agents had violated the Federal Rules and the evidence was suppressed by the federal court. The wisdom of basing the decision in part on the question of whether a federal or state officer first found the evidence when these policies conflict is questionable. Undoubtedly courts must become more involved in elaborate fact finding when faced with similar cases in order to ascertain the circumstances under which the evidence was discovered or received.[68] An additional consideration which militates against the use of the "first found" rule is that such use could encourage "convenient" explanations of how the evidence was seized.[69] Furthermore, federal and state law enforcement officials, when confronted with evidence, should not have to concern themselves with the question of who should "discover" it first. It would appear that the court in the principal case took advantage, in part, of a fortuitous fact situation to escape an admittedly difficult dilemma. Nonetheless, the question as to what should be the general rule governing the introduction of evidence procured by a joint search in a state court by state officers where there has been a violation of the Federal Rules of Criminal Procedure remains unanswered.[70]

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[65]*Mapp v. Ohio*, 367 U.S. 643 (1961) held "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissable in a state court." Id. at 655. But violations of Federal Rules do not necessarily rise to constitutional stature. Herein is the "double standard" of the admissability of evidence in state and federal courts. The joint search brings into play the question of which standard should govern.

[66]Note 8 *supra*.

[67]*See* Rea v. United States, 350 U.S. 214, 217-18 (1956).

[68]To appreciate the possible scope of the problem, consider the overlapping areas of federal and state crimes listed in note 9 *supra*.

[69]For a notation of the possibility of the accommodation by law enforcement officials of their stories, and not necessarily their actions, to the law see Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York*, 148 N.Y.L.J. 4 n.2 (Sept. 19, 1962).

[70]It is difficult to devise a uniform rule which protects those rights of an accused which are of less than constitutional stature while preventing the choice of forum from varying those same rights. A former district court judge has offered his solution to the problem.

> To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have

A rule which emphasizes the factual situation as to the discovery of the evidence in joint searches, such as the "first found" rule of the principal case, would seem to discourage the cooperative actions between state and federal officials which have been encouraged by Congress.[71] Under this rule, if the state official was not the first to discover the evidence, noncompliance with the Federal Rules could disrupt the state criminal law enforcement endeavor, since the state may not be able to use the evidence due to the Federal Rules violation. If the state officials continue to pursue state-federal cooperation, such a restriction would tend to have the practical result of forcing compliance with the Federal Rules upon the state officials in situations involving joint searches. For example, to avoid disruption of its proceedings, the state officials in the principal case would have had to obtain the search warrant from a court of record as prescribed by the Federal Rules or rely on federal agents to obtain the warrant. Such an indirect imposition of the requirements of the Federal Rules upon the states would seem to be "a long step toward the destruction of the division of powers"[72] in our federal system.

On the other hand, it is not questioned that the federal courts have a valid interest in enforcing the Federal Rules through their supervisory power over federal law enforcement officials. An overriding factor, however, which must be weighed is the legislative encouragement of

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> been assisted in whole or in part by federal agents; *or the law should be that the admissability of such evidence in the state courts shall be left wholly in the power of the state courts.* . . . [Advocating] the former principle means that in every case where there has been any degree of "commendable cooperation" between federal and state enforcement officers, and there are involved federal constitutional rights which the state must recognize, the states are also bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward the destruction of the division of powers . . . .
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> Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had an opportunity to hear and decide the matter. It takes no major prophet to envisage the "insupportable disruption" which would result.

Bolger v. Cleary, 293 F.2d 368, 372-73 (2d Cir. 1961) (dissenting opinion) (emphasis added), *rev'd*, 371 U.S. 392 (1963).

[71]Note 9 *supra*.

[72]Bolger v. Cleary, 293 F.2d 368, 372 (1961).