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THE RETROACTIVE REACH OF LEARY V. UNITED STATES

Throughout the past decade the United States Supreme Court has been extraordinarily active in expanding the constitutionally protected rights of citizens accused of crime.[1] During this period the Court has dealt with problems arising at every stage of the criminal process, from search and seizure in *Mapp v. Ohio*, to an indigent's right to counsel on appeal in *Douglas v. California*. But one problem that has remained a constant in these diverse landmark rulings is the problem of retroactivity.[2]

When the Supreme Court announces a new constitutional rule of criminal procedure, it does not usually deal with the question of what effect the new rule is to have on parties in cases other than the one at bar.[3] Thus, it generally devolves first upon the inferior courts to determine the extent to which a new rule will operate retroactively. The Supreme Court takes up the retroactivity issue only when it reveiws a lower-court decision in which the issue has been presented in concrete terms. In *United States v. Scott*,[4] the Court of Appeals for the Ninth Circuit gave full retroactive effect to the new rule announced in *Leary v. United States*.[5] It remains to be seen whether the Supreme Court will uphold the Ninth Circuit's disposition.

The New Rule Announced in Leary

In December of 1965 Dr. Timothy Leary, along with his minor daughter, was arrested after having been found in possession of mari-

1. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

2. At the outset it is helpful to define some terms that are frequently misused: a new decision is fully retroactive when it applies to all cases, even to those in which the judgment has become final; a decision is purely prospective when it applies only to cases which have arisen after the date of decision of the new ruling—such rulings do not even apply to the parties whose case served as the vehicle for the new rule; between these two extremes are rulings denominated partially retroactive, *i.e.*, the new ruling applies only to some stages of the judicial process and not others, and never to final decisions.

This article shall deal with retroactivity in the criminal area, but the problem is just as acute when dealing with civil litigation. *See, e.g.*, Comment, *Retroactive Application of New Decisions—Simpson v. Union Oil Co.*, 21 HASTINGS L.J. 877 (1970).

3. It is the theory of some that this is because of the article III "case or controversy" limitation of the Constitution. *See* Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 930-33 (1962).

4. 425 F.2d 55 (9th Cir. 1970).

5. 395 U.S. 6 (1969).

huana powder and cigarettes. Several months later they were tried and convicted in the United States District Court for the Southern District of Texas, *inter alia*[6] for violation of the Narcotic Drugs and Import Act section 2(h).[7] That section (hereinafter referred to as section 176a) makes it a crime to have facilitated the transportation, concealment or sale of marihuana knowing that such marihuana had been brought into the United States contrary to law. The Court of Appeals for the Fifth Circuit affirmed the conviction in 1967.[8]

On appeal to the Supreme Court,[9] Leary contended that his conviction was a denial of due process in violation of the fifth amendment inasmuch as a presumption authorized by that statute allowed the trier of fact to infer the defendant's knowledge of the imported nature of the marihuana from the mere fact of possession.[10] Leary argued that because knowledge of importation was a primary constitutive element of the offense, and because there was no rational connection between possession and knowledge of importation, therefore the presumption permitted conviction without proof of the crime.[11]

6. Leary was also convicted of violating 26 U.S.C. § 4744(a)(2) (1964), a section of the Marihuana Tax Act that prohibits transportation or concealment of marihuana by one who has acquired it without having paid the transfer tax as required by 26 U.S.C. §§ 4741-43 (1964). This conviction was also reversed by the Supreme Court on the grounds that it violated Leary's fifth amendment privilege against self-incrimination. The district court had earlier dismissed a smuggling count, also under 21 U.S.C. § 176a (1964), arising out of the fact that Leary was crossing the border at the time of his arrest. Leary's minor daughter was indicted on the same three counts but was convicted only of violating the Marihuana Tax Act; she was placed on probation and withdrew her appeal. For a discussion of the entire case, see 83 HARV. L. REV. 103 (1969).

7. 21 U.S.C. § 176a (1964), which provides in part: "[W]hoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years—and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, *such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.*" (emphasis added).

8. Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd*, 395 U.S. 6 (1969). In the appellate court Leary contended that the Federal laws concerning marihuana were violative of his right to the free exercise of his religion.

9. Leary v. United States, 395 U.S. 6 (1969).

10. See note 7 *supra*.

11. For an excellent discussion of the relationship between presumptions in a criminal trial and due process, see Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

The Supreme Court agreed and reversed Leary's conviction. It applied the formula previously set out in *Tot v. United States*[12] for determining the constitutionality of such a presumption; that is, there must "be a rational connection between the fact proved and the fact presumed."[13]

After reviewing the congressional hearings and supportive materials that lead to the passage of section 176a in 1956 and determining that there was indeed a basis in fact for a presumption that most of the marihuana found in this country has been imported, the *Leary* Court found the necessary "rational connection" between the fact of possession and knowledge of illegal importation lacking, and concluded:

> [T]he materials at our disposal leave us at large to estimate even roughly the proportion of marihuana possessors who have learned in one way or another the origin of their marihuana. It must also be recognized that a not inconsiderable proportion of domestically consumed marihuana appears to have been grown in this country, and that its possessors must be taken to have "known," if anything, that their marihuana was *not* illegally imported. In short, it would be no more than speculation were we to say that even as much as a majority of possessors "knew" the source of their marihuana.[14]

As was to be expected, *Leary* had an immediate impact on prosecutions for violations of section 176a.[15] The task of determining the extent of its retroactive application fell to the lower federal courts. Over the last several years, the Supreme Court has furnished the lower courts with various sets of guidelines with varying degrees of exactness. The Ninth Circuit's position on the retroactivity question is set forth in *Scott*; to understand this position fully, it is necessary to review only the broad contours of these guidelines.[16]

12. 319 U.S. 463 (1943); *cf.* United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965).

13. 319 U.S. at 467, *cited in* Leary v. United States, 395 U.S. 6, 33 (1969).

14. 395 U.S. at 52-53. The Court went on to "conclude that the 'knowledge' aspect of the § 176a presumption cannot be upheld without making serious incursions into the teaching of *Tot, Gainey,* and *Romano.*" *Id.* One year after *Leary*, in Turner v. United States, 396 U.S. 398 (1970), the Court upheld a presumption, identical to the one found in section 176a, that the possessor of heroin knew that the narcotic had been imported.

15. *E.g.*, Jordan v. United States, 416 F.2d 338 (9th Cir. 1969); United States v. Lopez, 414 F.2d 272 (2d Cir. 1969). *See also* United States v. Sorenson, 308 F. Supp. 1268 (E.D.N.Y. 1970), where the court applies the *Leary* standard to a similar presumption under an analogous statute.

16. Much has been written concerning the problem of retroactivity in the last several years. Among the leading articles are, Mishkin, *Foreword: The High Court, The Great Writ, and The Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

Supreme Court Guidelines on Retroactivity

Prior to 1965, the subject of retroactivity had been given little attention by the Supreme Court.[17] Recognizing, however, that the new constitutional rulings of the previous few terms were causing confusion in the lower state and federal courts, the Supreme Court felt constrained to deal with the retroactivity problem at some length.

In *Linkletter v. Walker*,[18] Mr Justice Clark reviewed in detail the history of retroactivity[19] and the philosophical rationales of the conflicting theories involved.[20] He concluded that there had indeed been certain definite criteria, albeit unstated, underlying the Court's application of retroactivity in the past.[21] Justice Clark then set forth what he hoped would be a definitive rule by which the lower courts might determine whether a particular new decision should be retroactively applied:

> [W]e must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.[22]

Justice Clark concluded with words that remain the touchstone in this

17. "It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." Linkletter v. Walker, 381 U.S. 618, 628 (1965); *e.g.*, Smith v. Crouse, 378 U.S. 584 (1964), giving retroactivity to Douglas v. California, 372 U.S. 353 (1963), which dealt with an indigent's right to counsel on appeal; Doughty v. Maxwell, 376 U.S. 202 (1964), giving retroactivity to Gideon v. Wainwright, 372 U.S. 335 (1963), which dealt with an indigent's right to counsel; Eskridge v. Washington State Bd., 357 U.S. 214 (1958), giving retroactivity to Griffin v. Illinois, 351 U.S. 12 (1956), which dealt with an indigent's right to have a trial transcript furnished for the purpose of an appeal.

18. 381 U.S. 618 (1965).

19. "Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." *Id.* at 628.

20. Justice Clark discussed the Blackstonian view that courts merely "discover" principles as they have always existed and the Austinian view that courts "make law" by filling in vague and indefinite terms. *Id.* at 622-24.

21. "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, . . . and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . , of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the danger both of the statute and of its previous application.'" 381 U.S. at 627, *citing* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

22. 381 U.S. at 629. The Court then applied these criteria to *Linkletter*, a habeas corpus proceeding. The Court denied Linkletter, who was convicted in 1960, the benefits of Mapp v. Ohio, 367 U.S. 643 (1961), even though conceding that Linkletter's search was unlawful by *Mapp* standards.

area. In all the cases, he observed, where the Court had granted full retroactivity to a new decisional rule, "the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process."[23]

Soon after *Linkletter*, it became obvious that these general guidelines required more precise formulation. Two years later, the Court restated its rule in *Stovall v. Denno*:[24]

> The criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retrospective application of the new standards.[25]

As questions concerning the retroactivity of various new Supreme Court decisions continued to be handled differently in the federal and state courts, the Court further refined its doctrine in 1969 in *Desist v. United States*.[26] Mr. Justice Stewart spoke the latest word on the subject when he referred to the three criteria in *Stovall*, and said, "Foremost among these factors is the purpose to be served by the new constitutional rule."[27] "It is to be noted also," he continued, "that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."[28]

In summary, by the time the Ninth Circuit rendered its decision in *Scott*, the Supreme Court had enunciated the three criteria of *Stovall*[29] and had laid down in *Desist* a primary emphasis upon the first criterion—the purpose to be served by the new rule. It is against this background that the Ninth Circuit's *Scott* decision must be evaluated.

United States v. Scott—Leary Held "Fully Retroactive"

The facts in *Scott* were uncomplicated. Defendant Phillip Scott,

23. 381 U.S. at 639.

24. 388 U.S. 293 (1967).

25. *Id.* at 297. Again, in a habeas corpus proceeding, Stovall was denied the effects of United States v. Wade, 388 U.S. 218 (1967), decided the same day, and which required counsel at any pre-trial confrontation. The Court in *Stovall* felt that the number of those convicted to whom retroactive application of *Wade* would apply and the resultant heavy burden on law enforcement officials outweighed any benefits to be gained by assigning full retroactivity to that decision. 388 U.S. at 299-300.

26. 394 U.S. 244 (1969).

27. *Id.* at 249.

28. *Id.* at 251. Once again, Desist himself was denied relief, the Court holding that the decision in Katz v. United States, 389 U.S. 347 (1967), was only to apply to cases in which the illegal electronic surveillance had occurred after the date of the *Katz* decision.

29. See text accompanying note 25 *supra*.

a resident of Los Angeles, was doing a used lumber business with a concern in Mexico. Federal narcotices agent Gordon, suspecting that the business was a front, arranged through a friend of Scott's (codefendant Walker) to make a purchase of fifty kilos (approximately 110 pounds) of marihuana from Scott. Gordon went with Walker to Scott's apartment to conclude the deal. While they were there, codefendant Rico arrived with a large trunk. Scott carried it into the apartment, opened it, counted out the bricks of marihuana and demanded his money. The three were then arrested by Gordon. Scott was tried and convicted[30] in the United States District Court for the Central District of California for violating section 176a. He took an appeal to the Ninth Circuit contending "that the inclusion in the instructions to the jury of the presumption contained in section 176a, held unconstitutional in part in *Leary v. United States* . . . compels reversal of his conviction. . . ."[31]

Scott's appeal was decided in early March 1970. The Ninth Circuit had first dealt with the question of the retroactivity of *Leary* 6 months earlier in *Jordan v. United States.*[32] The *Jordan* appeal was argued in May 1969, 6 days before the Supreme Court decided *Leary*. Consequently, the Ninth Circuit, when it decided *Jordan*, had not had the benefit of either briefs or oral argument on whether and to what extent *Leary* should be given retroactive application. The court, without discussing the problem at all, summarily applied *Leary* to *Jordan*, a direct-appeal case (thereby giving *Leary* at least partial retroactivity). At approximately the same time (July 1969), the Ninth Circuit determined to tackle head-on the problem of *Leary's* retroactivity. They withdrew *Scott*, the next section 176a case in line, from the three-judge panel to which it had been assigned, set it for rehearing en banc and at the same time requested supplementary briefs from counsel on both sides. This move was doubtless prompted by the considerable number of section 176a appeals then on file[33] (and, it can be assumed, by the anticipated number of habeas corpus peti-

30. United States v. Scott, 425 F.2d 55 (9th Cir. 1970). Codefendant Walker was convicted along with Scott; a mistrial was declared as to Rico.

31. *Id.* at 57. Scott also contended that section 167a was unconstitutional because it was an indirect enforcement of the Marihuana Tax Act. The court rejected this second contention, holding that although section 176a forbade traffic in marihuana "contrary to law," that law was not necessarily the Marihuana Tax Act—any existing law of the United States for which a penalty existed was sufficient, *e.g.*, the customs inspection statutes, 19 U.S.C. §§ 1461-62 (1964), and the provisions of section 176a itself relating to smuggling. *Id.* at 60.

32. 416 F.2d 338 (9th Cir. 1969).

33. Within 3 weeks after the date of decision in *Scott*, the Ninth Circuit handed down Plascencia-Plascencia v. United States, 423 F.2d 803 (9th Cir. 1970), and United States v. Leyva-Barragan, 423 F.2d 669 (9th Cir. 1970). There followed in

tions from prisoners whose convictions on section 176a had become final). Instead of simply reversing Scott's conviction on the authority of *Jordan*, the court felt constrained to determine the exact degree of the *Leary* rule's retroactive operation.

At his trial, Scott failed to except to the jury instruction based on the *Leary* presumption. The court of appeals nevertheless determined that Rule 52(b) of the Federal Rules of Criminal Procedure allowed them to hear an appeal from this instruction since the failure to object was excusable—defendant's counsel could be expected to do little but to go along with the great weight of authority on this subject at the time of trial.[34]

After reviewing the guidelines set forth in *Linkletter*, *Stovall* and *Desist*,[35] Judge Hufstedler, writing for the majority in *Scott*, said:

> Accordingly, where the new constitutional rule is fashioned to correct a serious flaw in the fact-finding process and therefore goes to the basic integrity and accuracy of the guilt-innocence determination, retroactive effect will be accorded.[36]

In applying this circuit's interpretation of the Supreme Court's retroactivity guidelines to the *Leary* rule, which overturned the section 176a presumption, Judge Hufstedler reasoned as follows:

> The invalidated portion of the presumption was an integral part of the fact-finding process. The use of the presumption affected the integrity of the determination of guilt, and its use was neither secondary in importance nor infrequent in occurance. The Government's use of the presumption permitted it to bypass proof of substantive elements of the offense, thus creating a "serious risk that the issue of guilt or innocence may not have been reliably determined."[37]

Finally, going much further than was strictly necessary for the purpose of this direct appeal, the court held that in the Ninth Circuit the *Leary* decision "partially invalidating the presumption is fully retroactive."[38] Although this must be classified as dictum,[39] it is nonetheless

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quick succession United States v. Cepelis, 426 F.2d 134 (9th Cir. 1970); United States v. Martinez, 425 F.2d 1300 (9th Cir. 1970); United States v. Buck, 425 F.2d 726 (9th Cir. 1970).

34. 425 F.2d at 57, *citing* Costello v. United States, 324 F.2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1964); Caudillo v. United States, 253 F.2d 513 (9th Cir.), *cert. denied sub nom.* Romero v. United States, 357 U.S. 931 (1958).

35. See text accompanying notes 22, 25, & 27 *supra*.

36. 425 F.2d at 58. The court continued: "Retroactivity has been denied or limited only in instances where the rule does not go to the fairness of the trial, or where the flaw in the fact-finding process is either of secondary importance or of infrequent occurrence." *Id.*

37. *Id.* at 59, *citing* Roberts v. Russel, 392 U.S. 293, 295 (1968).

38. *Id.*

39. This is the weakness in *Scott*. Although the circuit will undoubtedly follow

quite authoritative (eight judges of the court concurred therein). Given the elaborate hearing that the matter received, *Scott* most certainly indicates that the Ninth Circuit will hereafter apply *Leary*, at least insofar as it deals with the section 176a presumption, even to cases in which the judgment of conviction became final prior to *Leary*.

Scott was submitted to the jury on alternative theories—presumptive knowledge and proven knowledge. As one of the theories had been determined to be constitutionally invalid, the conviction had to be reversed[40] unless it could be shown on the basis of overwhelming evidence of actual knowledge produced at trial that the instruction on presumptive knowledge was harmless beyond a reasonable doubt.[41] The court then reviewed the evidence as to Scott's actual knowledge of the imported nature of the marihuana and found it "not overwhelming."[42]

There was a lengthy and well-reasoned dissent by Judge Trask,[43] with whom four others concurred. He too reviewed in great detail the history of the Supreme Court's application of the retroactivity guidelines and concluded that "justifiable prior reliance on the presumption by law enforcement officials and the potential massive burden placed on the administration of justice outweigh considerations arguing for full or partial retroactivity."[44] Judge Trask, however, did not express his views as to the purpose of the *Leary* ruling. In this respect he failed to adhere to the prior pronouncements of the Supreme Court.

Retroactivity—The Ninth Circuit's Interpretation

The majority in *Scott* seems to have followed quite consistently what has come to be the Ninth Circuit's interpretation of the Supreme Court's retroactivity criteria.[45] This circuit has adhered almost ver-

this line should a final judgment be collaterally attacked, the fact that this statement is dictum is perhaps one reason why the United States has chosen not to appeal.

40. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, *e.g.*, Stromberg v. California, 283 U.S. 359 (1931)." Leary v. United States, 395 U.S. 31, 32-33 (1969).

41. 425 F.2d at 59, *citing* Harrington v. California, 395 U.S. 250 (1969).

42. 425 F.2d at 60. The court felt that the testimony of agent Gordon, denied by Scott, was not sufficient to convict the defendant.

43. *Id.* at 62. Judge Kilkenny would have affirmed Scott's conviction because Scott had failed to except to the instruction at trial. *Id.* at 61 (dissenting in part).

44. *Id.* at 70. Judge Trask believed that the retroactive reach of *Leary* should extend only to cases in which the trial commenced after the date of the decision. *Id.* at 62.

45. "Retroactivity, indeed, has been denied in two classes of cases only. First, there are the cases where the clear purpose of the new rule is to deter conduct extrinsic to the trial itself and unlikely substantially to affect the reliability of the determination

batim to the guidelines in *Stovall* and *Desist* in deciding at what stage of the judicial process a new criminal ruling should apply. For example, if the purpose of the new rule "is to deter misconduct of police officers in conducting a search, the new exclusionary rule will not be given retrospective effect because that purpose is not advanced by penalizing conduct that has already occurred."[46] Accordingly, when the Ninth Circuit was recently called upon to determine the degree of retroactivity to be accorded *Chimel v. California*,[47] the court stopped far short of full retroactivity. In *Williams v. United States*,[48] Judge Hufstedler emphasized that the purpose of the ruling in *Chimel*—which held that the search of the house in which the defendant is arrested is not within the constitutional perimeter of a search incident to an arrest—was entirely procedural: to deter illegal police conduct. Because full retroactivity would not further such a purpose, the court held *Chimel* would apply only to cases in which the unlawful search occurred after the date of the Supreme Court decision.

On the other hand, where the purpose of the new rule is to insure the accuracy of the determination of guilt or to "correct an abuse that endangers 'the vary integrity of the fact-finding process,' then decisions announcing the new rules have been held fully retroactive."[49] In accordance with this principle, the Ninth Circuit has held that the Supreme Court's new rule in *Haynes v. United States*[50] would be fully retroactive. Under *Haynes*, a plea of the privilege against self-incrimination is a complete defense to a prosecution for possession of firearms not declared pursuant to a Federal registration statute. In *Meadows v. United States*,[51] a case in which the defendant's conviction had become final a full 2 years before the date of *Haynes*, the Ninth Circuit reversed the district court's denial of a motion to withdraw a plea of guilty to the identical charge found in *Haynes*. Judge Wright ruled that even though defendant Meadows had not asserted his self-incrimination privilege at the time of his plea, the defect in the judg-

of guilt. Such cases have principally involved the exclusion of evidence obtained by illegal searches and seizures. [Citations omitted.]

Second, there are the cases where the purpose of the new rule is ambiguous, but where the retroactive application would mean substantial disappointment of the rightful reliance on the old rule by law enforcement authorities, and place great burdens on courts called upon to reopen cases long since closed." Meadows v. United States, 420 F.2d 795, 798 (9th Cir. 1969).

46. Williams v. United States, 418 F.2d 159, 162 (9th Cir. 1969).
47. 395 U.S. 752 (1969).
48. 418 F.2d 159 (9th Cir. 1969).
49. Meadows v. United States, 420 F.2d 795, 798 (9th Cir. 1969).
50. 390 U.S. 85 (1968).
51. 420 F.2d 795 (9th Cir. 1969).

ment of conviction went "to the very center of the legal justification for the punishment imposed."[52]

As evidenced by *Williams* and *Meadows*, among others, the Ninth Circuit has taken great pains to determine the purpose of the new consitutional ruling and to accord or to deny full retroactivity on that basis alone. Such is the rule of *Desist*[53]—other factors should be taken into consideration only when the purpose is not clearly evident.

The Ninth Circuit seems in accord with the other circuits (as far as they have gone) with respect to interpretation of the *Leary* decision.[54] Every circuit that has dealt with a *direct appeal* of a section 176a case, no matter when the judgment of conviction was rendered, has held *Leary* applicable and has reversed the conviction—unless, of course, the presumption instruction was determined to be harmless beyond a reasonable doubt. But no circuit, including the Ninth, has as yet dealt with such a conviction that had already become *final* before the date of *Leary*. Hence, the exact degree of retroactivity to be accorded *Leary* remains very much in doubt.[55]

The Ad Hoc Approach in the Supreme Court

Should the line of reasoning in Judge Trask's dissent be picked up in another circuit or indeed should the Government decide to contest the application of the *Scott* dictum to a case that had already become final, what is the forecast concerning the Supreme Court's ultimate disposition of the retroactive reach of *Leary*?[56] If in the past the Court had been as willing as the Ninth Circuit has been to adhere to its own retroactivity guidelines, the answer would be much more certain. But, unfortunately, even a cursory examination of the results that the Court has reached in applying *Linkletter, Stovall* and *Desist*

52. *Id.* at 799.

53. See text accompanying note 28 *supra.*

54. See note 15 *supra.*

55. The Fifth Circuit in United States v. Scardino, 414 F.2d 925 (5th Cir. 1969) has held that "the principles announced in the *Leary* case are to be given prospective application." Although this case dealt with the section of *Leary* that was overturned by the Supreme Court (see note 6 *supra*), and the language of the entire opinion is somewhat loose, this may indicate that the Fifth Circuit will find itself in disagreement with the Ninth as far as the section 176a decision is concerned.

56. As mentioned above, the circuits have yet to deal directly with a section 176a conviction that has become final. Until they do, the Supreme Court is unlikely to take up the matter of *Leary*'s retroactivity. The Court apparently approves the appellate courts' actions so far as they have gone, for recently it denied certiorari to several post-*Leary* appeals of section 176a convictions in which the unconstitutional presumption instruction was held to be harmless beyond a reasonable doubt. Petley v. United States, 427 F.2d 1101 (9th Cir.), *cert. denied*, 39 U.S.L.W. 3147 (U.S. Oct. 13, 1970); United States v. Mahoney, 427 F.2d 658 (9th Cir.), *cert. denied sub nom.* United States v. Garcia, 39 U.S.L.W. 3149 (U.S. Oct. 13, 1970).

to its major constitutional rulings discloses what is essentially an ad hoc approach to the problem.[57]

Since *Linkletter*, the Court has ruled upon the retroactivity of over a dozen of its major criminal procedure decisions. In all but five, full retroactivity was denied. These five dealt with the problems of the use at trial of preliminary hearing testimony in lieu of an absent witness,[58] counsel at a preliminary hearing,[59] counsel at a probationary hearing,[60] admission of one defendant's confession against his co-defendant[61] and exclusion of jurors conscientiously opposed to capital punishment.[62] Certainly, as must be found according to *Linkletter*, in each of these cases the purpose of the rule held fully retroactive was to safeguard the very integrity of the guilt-adjudicating process.

However, in attempting to reconcile the rationale of these decisions with that of other cases denying full retroactivity to similar important constitutional rulings the Court's lack of consistency becomes apparent. It is difficult to understand why the purposes of a decision recognizing a defendant's right to trial by jury in a serious contempt case,[63] proscribing prosecutorial comment on a defendant's refusal to testify[64] or recognizing the right to counsel at a police line-up[65] is not clearly to insure "the fairness of the trial—the very integrity of the fact-finding process."[66] Yet the Supreme Court has declined to give full retroactive effect to decisions establishing these rules.

57. As Judge Trask pointed out in his dissent in *Scott*: "It is probably impossible to completely rationalize the decisions of the Supreme Court on the subject of retroactivity. A close reading of those decisions reveals an essentially ad hoc consideration of each newly articulated constitutional right." United States v. Scott, 425 F.2d 55, 68 (9th Cir. 1970).

58. Berger v. California, 393 U.S. 314 (1969), giving full retroactivity to Barber v. Page, 390 U.S. 719 (1968).

59. Arsenault v. Massachusetts, 393 U.S. 5 (1968), giving full retroactivity to White v. Maryland, 373 U.S. 59 (1963).

60. McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam), giving full retroactivity to Mempa v. Rhay, 389 U.S. 128 (1967).

61. Roberts v. Russell, 392 U.S. 293 (1968), giving full retroactivity to Bruton v. United States, 391 U.S. 123 (1968).

62. Witherspoon v. Illinois, 391 U.S. 510 (1968) (habeas corpus proceeding).

63. DeStefano v. Woods, 392 U.S. 631 (1968), allowing retroactivity only to cases in which trials had begun after the date of decision in Bloom v. Illinois, 391 U.S. 194 (1968).

64. Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966), limiting the rule of Griffin v. California, 380 U.S. 609 (1965), only to cases on direct review on the date of *Griffin*.

65. Stovall v. Denno, 388 U.S. 293, 297 (1967), which limited the effects of United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), to any pre-trial confrontation conducted after the decision date. See note 25 *supra*.

66. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

Certainly, when dealing with major constitutional interpretations that have invalidated criminal procedures operative for decades, the burden on criminal law enforcement would be substantial when any of these rulings would be held fully retroactive.[67] The Supreme Court declared as much in *Desist* when it held that such criteria are secondary in importance to the determination of purpose. Consequently, the purpose criterion should be the deciding factor between those rulings granted and those rulings denied full retroactivity. But an attempt to find a clear, consistent and convincing application of this factor fails. For example, the purpose of a decision forbidding the exclusion of jurors conscientiously opposed to capital punishment[68] appears to be indistinguishable from that of a decision recognizing a defendant's right to trial by jury in a serious contempt case.[69] One is led to the conclusion that despite its pronounced guidelines, the Supreme Court's approach to retroactivity remains uneven. It is perhaps Mr. Justice Harlan who has been most vocal on this point. Speaking of the Court's implementation of long overdue reforms in this field he has said:

> This in my opinion can only be done by turning our backs on the *ad hoc* approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle.[70]

The common denominator that guides the Court in these cases, which has eluded some, seems quite clear to others. Mr. Justice Black has said:

> It would be hard to find a more apt summary of this Court's holdings in the "retroactivity" cases than the statement that they "ex-al[t] the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights."[71]

67. "It has not been the usual thing to cut down trial protections guaranteed by the Constitution on the basis that some guilty persons might escape. There is probably no one of the rights in the Bill of Rights that does not make it more difficult to convict defendants. But all of them are based on the premise, I suppose, that the Bill of Rights' safeguards should be faithfully enforced by the courts without regard to a particular judge's judgment as to whether more people could be convincted by a refusal of courts to enforce the safeguards." Linkletter v. Walker, 381 U.S. 618, 650 (1965) (Black, J., dissenting).

68. Witherspoon v. Illinois, 391 U.S. 510 (1968).

69. DeStefano v. Woods, 392 U.S. 631 (1968). Sometimes the Court compounds the incongruities when it finds what seems to be a purpose directly and substantially affecting the guilt adjudicating process. For instance in this case the Court said: "One ground for the *Bloom* result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt. Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it." *Id.* at 634.

70. Jenkins v. Delaware, 395 U.S. 213, 224 (1969) (Harlan, J., dissenting).

71. Kaufman v. United States, 394 U.S. 217, 240 (1969) (Black, J., dissenting).

Whether or not the Court has unduly exalted the value of finality in its determination of retroactivity as Mr. Justice Black contends, one thing that can be said with assurance is that there is no guarantee of the certainty with which the lower courts can work in applying the Supreme Court's own guidelines to its criminal rights pronouncements.

The Future of Leary

In light of this uncertainty, can an intelligent forecast be made about the future of *Leary*? The answer must be yes. It would seem that the Court will have little choice but to hold fully retroactive that portion of the *Leary* decision which invalidated the section 176a knowledge presumption.

Although *Scott* will not be the case in which the Supreme Court resolves the issue of *Leary*'s retroactivity, it seems likely that the Court's approach to the issue will be similar to that of Judge Hufstedler in *Scott*.[72]

Assuming the Supreme Court adheres to its own guidelines in *Stovall* and *Desist* and looks first to the purpose underlying the new rule, it is difficult to see how it could arrive at any conclusion other than that the purpose of *Leary* was to correct a serious flaw in the fact-finding process:

> The premise of *Leary* is that the presumption is, in part, factually unsupportable. It follows that of those convicted of violating section 176a by use of the presumption, many are innocent of that crime.[73]

On the other hand, if the Supreme Court lapses into its unfortunate tendency to approach each retroactivity question on an ad hoc basis, the recent history of the *Leary* decision at the appellate level seems to indicate that even if the number of appeals and collateral attacks is great, the burden on the judicial system would be slight and would not, as is usual, stand in the way of its being held fully retroactive. As indicated by *Petley*[74] and *Plascencia-Plascencia*[75] in the Ninth Circuit, a review of the trial record in cases where evidentiary presumptions are involved[76] will rather quickly reveal whether the prosecution had produced sufficient evidence on which to base a determination that the defendant actually knew the imported nature of the marihuana, *i.e.*, whether the section 176a presumption instruction was harmless beyond a reasonable doubt. If evidence of actual knowledge was pro-

72. See text accompanying note 37 *supra*.
73. United States v. Scott, 425 F.2d 55, 59 (9th Cir. 1970).
74. Petley v. United States, 427 F.2d 1101 (9th Cir. 1970).
75. Plascencia-Plascencia v. United States, 423 F.2d 803 (9th Cir. 1970).
76. See note 11 *supra*.

duced, the appeal is swiftly ended. But where such evidence is lacking, even though the lack is due to the prosecution's reliance on the wording of section 176a, then the conviction cannot be allowed to stand. Even assuming that a substantial percentage of convictions have been based solely on the section 176a presumption, and consequently could not be affirmed on the harmless error theory,[77] the burden on court calendars resulting from full retroactive application of *Leary* seems outweighed by the necessity of vindicating the constitutional rights of defendants convicted on insufficient evidence.

Taking positive steps to unclog our crowded courts and to expedite the trial and appellate processes seems much more desirable than violating the time-honored presumption that a man is presumed innocent until convicted of the crime of which he is accused. Justice Douglas puts it very well:

> It still remains a mystery how some convicted people are given new trials for unconstitutional convictions and others are kept in jail without any hope of relief though their complaints are equally meritorious.[78]

*Stephen A. McFeely**

77. In his dissent in *Scott*, Judge Trask, through the use of the Annual Report of the Director of the Administrative Office for 1969, attempted to determine the impact of giving *Leary* full retroactivity. United States v. Scott, 425 F.2d 55, 69 (9th Cir. 1970).

78. Desist v. United States, 394 U.S. 244, 255-56 (1969) (Douglas, J., dissenting).

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