TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Constitutions.

Statutes.

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,

Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLANT ON THE MERITS.

REPORTS OF OPINIONS.

Opinion of the Ohio Supreme Court.

The Supreme Court of Ohio, on March 23rd, 1960, rendered an Opinion which is reported in Vol. 170 Ohio State Reports at page 427, wherein four (4) of the seven (7) judges of the Supreme Court of Ohio held that the judgment of the Court of Appeals should be reversed, because the statute under which the Defendant-Appellant was convicted was unconstitutional. However Sec. 2 of Article I of the Constitution of Ohio reads in part as follows:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of the Supreme Court of Ohio were of the opinion that no portion of the

Statute upon which defendant's conviction was based was unconstitutional and void, the judgment of the Court of Appeals affirming the judgment of the Common Pleas Court had to be affirmed. This Opinion can be found in the Record at pages 89 and 96.

Order of the Ohio Supreme Court.

The Order of the Ohio Supreme Court, which is dated March 23rd, 1960, is fully set forth in the Record at page 85.

Journal Entry of the Court of Appeals.

The Journal Entry of the Court of Appeals of Cuyahoga County, Ohio, dated March 31st, 1959, is fully set forth in the Record at page 81.

JURISDICTIONAL GROUNDS.

The Appellant was convicted of the crime that she "unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed on the records thereof" (Record "B.") in violation of Sec. 2905.34, Ohio Revised Code (App. "A") and was sentenced from one (1) to seven (7) years confinement in the Ohio State Women's Reformatory and is presently at large on bail in the sum of Two Thousand Five Hundred Dollars ($2,500.00). The judgment and sentence was appealed to the Court of Appeals, which on the 31st day of March, 1959, affirmed the judgment and sentence of the Common Pleas Court. This ruling was appealed to the Supreme Court of Ohio, which Supreme Court affirmed the decision of the Court of Appeals on

March 23rd, 1960, the Opinion being found in the Record at pages 89 and 96.

In the Ohio Supreme Court, on March 29th, 1960, pursuant to the rules of Court, the Court was notified that an Application for re-hearing was to be filed. On April 4th, 1960, the Application for re-hearing was filed. On April 13th, 1960, the rehearing was denied, and on June 15th, 1960, the Notice of Appeal to the United States Supreme Court was filed.

On October 24th, 1960, this Honorable Court made its order noting probable jurisdiction.

Jurisdiction in matters of this kind is conferred upon the Court by, and appeal is taken pursuant to 28 U. S. C. Sec. 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES.

The pertinent portions of the United States Constitution involved in this Appeal are:

Amendment IV; Amendment V; Amendment VI; Amendment XIV Section 1, all of which are set forth verbatim in Appendix "A" attached hereto and made a part hereof, and which can be found in the Appendix to Page's Ohio Revised Code Annotated, page 297, *et seq.*

The pertinent portions of the Ohio Constitution involved in this Appeal are as follows:

Article I Section 1; Article I Section 2; Article I Section 5; Article I Section 9; Article I Section 10; Article I Section 14; Article I Section 19; Article II Section 1; Article II Section 26; Article IV Section 2; Article IV Section 6 all of which are set forth verbatim in Appendix "A" attached hereto and made a part hereof, and which are set forth in the Appendix to Page's Ohio Revised Code Annotated.

The pertinent Statutes of the State of Ohio which are involved in this Appeal are as follows:

Sec. 2905.34; Sec. 2905.36; Sec. 2905.37; Sec. 2905.38; Sec. 2905.39; Sec. 2909.01; which Sections are set forth, verbatim, in Appendix "A" attached hereto and made a part hereof, and which can be found in Title 29 at Page's Ohio Revised Code Annotated at page 62, *et seq.*, and Sec. 3767.01 (C) which is set forth, verbatim in Appendix "A" attached hereto and made a part hereof, and which can be found in Title 37 of Page's Ohio Revised Code Annotated, at page 201.

QUESTIONS PRESENTED BY THIS APPEAL.

The questions presented by this Appeal are as follows:

(a) Is Sec. 2905.34 O. R. C. unconstitutional, and particularly is it unconstitutional when applied to the facts and circumstances of the case at bar under Amendment IV, Amendment V, Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, Article II Section 26, of the Ohio Constitution?

(b) Does a sentence of seven (7) years for violation of Sec. 2905.34 O. R. C. violate Amendment VIII of the United States Constitution and Article I Section 9 of the Ohio Constitution; and is this particularly so under the facts and circumstances of the case at bar?

(c) Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV, Amendment V and Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, and Article I Section 14, of the Ohio Constitution?

(d) Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution in holding that it could not review the sentence of the trial Court?

(e) Did the charge by the Court to the jury, on presumption, thereby effectively depriving the defendant of a trial by a jury, and did other charges by the Court to the jury, violate Amendment V, Amendment VI and Amendment XIV Section 1, of the United States Constitution; and Article I Section 5, Article I Section 10, of the Ohio Constitution?

STATEMENT OF THE CASE.

On the 23rd day of May, 1957, police officers, without the benefit of a search warrant, ostensibly looking for an individual who was wanted in connection with an extortion bombing (Record page 4), forced their way into defendant's private residence, which was the upper portion of a two (2) family house. (R. 3 and 4.) Twelve (12) police officers had surrounded the private residence of the defendant (R. 30) where she lived with her 13 year old daughter (R. 6 and 43), and forced their way into it (R. 30). Upon demand of a search warrant, a piece of paper was held before the defendant without giving her an opportunity to view or read same (R. 45). Her counsel, who had arrived at the scene by this time, was denied entrance to her residence during the unlawful search (R. 31). This alleged search warrant was never proved or even tendered in the trial court upon request of the defendant. Nor was there any evidence introduced that any search warrant was ever issued (Opinion of Ohio Supreme Court, R. 92).

Thereafter, the police officers, frustrated in their attempt to find any individual involved in an extortion bombing, illegally and in violation of defendant's Constitu-

tional rights, searched her private dwelling, and found lewd and lascivious documents *belonging to a former roomer*. The evidence showed that these documents were found by the defendant while she was cleaning a room which had been vacated by the former roomer (R. 39 and 47). She stored these documents until such a time as the roomer would have returned to claim his property (R. 48). It was for possession of the *roomer's* documents that the defendant was convicted of violation of Sec. 2905.34 O. R. C., and sentenced to from one (1) to seven (7) years in the Ohio State Women's Reformatory. Perversely, under Sec. 2909.01 O. R. C. (Appendix "A") had the defendant destroyed the documents instead of storing them, she would have been liable to a sentence of from one (1) to seven (7) years imprisonment. That Section reads in part as follows:

> "No person shall maliciously destroy or injure property not his own.
>
> Whoever violates this section shall be imprisoned not less than one (1) or more than seven (7) years if the value of the property destroyed, or the injury done, is One Hundred Dollars or more * * *."

ARGUMENT.

I. Is Section 2905.34 O. R. C. unconstitutional, and particularly is it unconstitutional when applied to the facts and circumstances of the case at bar under Amendment IV, Amendment V, Amendment XIV Section 1 of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, and Article II Section 26, of the Ohio Constitution?

Until 1955-56, there was declared by the law a requirement under which no one could possibly be accused under circumstances such as those in the case at bar. The following are some portions from the old law:

> "Sec. 13035. Disposing of, exhibiting, advertising, etc., obscene literature or drugs for *criminal purposes.* Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away, or exhibit, or publishes or offers to publish or *has in his possession for such purpose* an obscene, lewd or lascivious book, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, drawing * * *." (Italics ours.)

Now in Sec. 2905.34 O. R. C. we have such indefinite terms, with the cruelest and most unusual of punishments, under which anyone can be convicted, no matter how innocent of purpose. Is this statute constitutional? A strict construction of said statute which was done in the case at bar would subject the police officers making the arrest and taking said evidence into their possession, the Court attaches having said evidence in their possession and even the judges having said evidence in their possession guilty under the strict construction of this statute.

Sec. 2905.34 O. R. C. must be construed along with Sec. 3767.01 O. R. C. and in doing so, one will find that the same piece of literature and the same item of photography

can be subjected to two interpretations, causing a class exemption to be brought into being. This is set forth in *Nanny vs. Oregon Liquor Control Commission*, 171 Pac. (2d) 360:

> "Syl. 3: The policy of the law is not to punish the innocent, and Courts must look beyond the strict or literal sense of words in a statute to avoid an absurd or unjust result, and all laws shall receive a sensible construction.
>
> Syl. 4: The rule of construction according to the spirit of the law is applicable where adherences to the letter will result in absurdity or injustice."

There are distinct conflicts between the law under which the defendant was convicted and other existing statutes in the State of Ohio. We can not believe that one must deal with the property of another under circumstances like those at bar by destruction, when destruction of any contraband, is still a crime. We could find no decisions defining "possession of lewd literature." What was the defendant to do upon finding the documents owned by her former roomer, Jones? While defendant was convicted and sentenced to imprisonment for "possession of lewd literature" for a period of from one (1) to seven (7) years, had she destroyed this property, under Sec. 2909.01 O. R. C. (Appendix "A") she also would have been liable to a sentence of from one (1) to seven (7) years in prison for such destruction.

A most impelling argument can be found in the majority opinion of the Ohio State Supreme Court (R. 93), a portion of which, because of its force and pertinence is repeated herein.

> "The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. Ed. (2d) 2211. That annotation does not indicate

that there is any case decided by a court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited as it was under Sec. 2905.34 Revised Code (former Sec. 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even where the possessor does not have a purpose of again looking at the books or pictures; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her evidence that she had innocently acquired possession of the articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner. Cf. Lambert vs. Calif., 355 U. S., 25, 2 L. Ed (2d) 228, 78 S. Ct., 240, Weems v. U. S., 217 U. S., 349, 54 L. Ed. 793, 30 S. Ct. 544.

If, as defendant's evidence discloses defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for him, and while doing that, necessarily learned of their lewd and lascivious character, then at that instant, she had 'in' her 'possession' and 'under' her 'control' a 'lewd or lascivious book * * *, print (or) picture', as exhibited by this statute.

If such a legislative prohibition of possession of books and papers is valid, it may discourage law abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States.

Smith v. California (1959), _____ U. S. _____ 4 L. Ed. (2d) 205, 80 S. Ct., 215, held invalid a

legislative provision that made it 'unlawful for any person to have in his possession any obscene or indecent writing, (or) book * * * in any place of business where * * * books * * * are sold or kept for sale.'

In the Court's Opinion by Mr. Justice Brennan, it is said:

'We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and press. Roth vs. U. S., 354 U. S. 476, 1 L. Ed. (2d) 1498, 77 S. Ct. 1304. * * * Our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect by penalizing book sellers, even though they have not the slightest notice of the character of the books they sold. * * * If the book seller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * The book sellers' burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of book shops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The book seller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The book seller's self-censorship, compelled by the State would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through

it, the distribution of all books, both obscene and not obscene, would be impeded.'

It may be argued that the legislation involved in the instant case, unlike that involved in the Smith case, requires scienter because it only makes it unlawful to 'knowingly * * * have * * * possession.' However, this legislation is analogous in its effect to that in the Smith case. If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded. Cf. Benjamin vs. City of Columbus, 167 O. S. 103, 146 N. E. (2d) 854, where no question of freedom of press involved.

In the opinion of the Judges Taft, Bell, Herbert and Peck, the portion of Sec. 2905.34 Revised Code upon which defendant's conviction was based is constitutionally invalid, and, for that reason the judgment of the Court of Appeals should be reversed * * *."

Justice Herbert of the Ohio State Supreme Court in his dissenting opinion (R. 98) goes even further in indicating other reasons why Sec. 2905.34 O. R. C. should be held unconstitutional. Justice Herbert says:

"It is a basic principle that laws restraining the fundamental liberties of the individual must have as their foundation a broad basic public need which overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in the evidence in the present case is and should be against public morals and policy if for no other reason than that the immature mind which might be exposed to it could be greatly harmed, I can not agree that mere private possession of such

> literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual. Does the State have the power to prohibit the possession of chemistry books because from such books one might learn how to make a bomb or poisonous gas? Is the possession of medical books by a layman to be banned because of the possibility that he might learn about abortion and perhaps put such knowledge to use?"

The type of statute under consideration herein, making mere possession a felony, is rare in the United States, the penalty is usually a fine only, even where the defendant is a seller, publisher and an exhibitor for sale. Thus in a most recent ordinance case, reviewed in 6 O. O. (2d) 313, *City of Cincinnati vs. King,* the defendant possessing such literature for sale was tried under an ordinance with a maximum fine of One Hundred Dollars ($100.00) or sixty (60) days.

Until 2905.34 O. R. C. was enacted, possession itself was not enough, but it had to be "for the purpose of publishing or offering to publish" (O. G. C. 13035). Cognate statutes covering separately the acts embraced in detail in O. R. C. 2905.34 continued to exist in Ohio, under which the prosecution or grand jury may proceed to charge only a misdemeanor with fines and jail, a sentence of days or months, at their option.

In *Goldstein vs. Com.,* 104 S. E. (2d) 66, a statute containing similar language to that in 2905.34 O. R. C. was held invalid, though a misdemeanor, it had among other words, these (descriptive of the obscene materials):

"tending to corrupt the morals of youth, or introduce in any family, etc.", and the Court said:

> "Syl. 2. The crime of obscenity must be defined with appropriate definiteness and with clear and unequivocal tests to ascertain guilt.
>
> Syl. 4: * * * Statute prohibiting * * * was unconstitutional insofar as it undertook to provide a standard of judging obscenity depending upon the undesirable effect the offensive material may have upon youth."

We can not distinguish the case at bar (except that mere possession is not a crime) from that discussed and held invalid by the Supreme Court of the United States in *Winters vs. N. Y.*, 333 U. S. 507, 1948, which was based upon a misdemeanor, and in Ohio, a felony.

We quote the syllabus and the statute of New York and the Court's reason for holding the statute unconstitutional:

> "Subsection 2 of Sec. 1141 of the New York Penal law, as construed by the State Court of Appeals, to prohibit distribution of a magazine principally made of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against a person, held so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guarantee of free speech and press."
>
> Opinion Page 508,
>
> "Sec. 1141. Obscene prints and Articles.
>
> 1. A person * * * who
>
> 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his *possession with intent to sell*, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution,

any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or acts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime; * * *"

Page 519:

"* * * too uncertain and indefinite to justify the conviction of the prisoner * * *." (Italics ours.)

Until 1955, no one could possibly be accused under circumstances claimed by the State in the case at bar, because "possession had to be for the purpose of publishing or offering to publish" (See O. G. C. 13035) and the punishment was a fine or jail sentence, for it was a misdemeanor only. The Legislature under the new enactments gave a power of discrimination between persons for the same act, so a prosecutor or grand jury could make the act a felony with a penalty of seven (7) years, or a misdemeanor with a fine, etc. only. Such a power makes the statute unconstitutional, in view of O. R. C. 2905.38, O. R. C. 2905.39, O. R. C. 2905.36, under which the same acts covered in 2905.34 O. R. C. can be severally charged and punished as misdemeanors with fines and days, as in the statutes detailed.

Thus under O. R. C. 2905.36, sending obscene literature by mail or giving oral information where, how * * * lascivious articles or things can be purchased or obtained, may result only in a Fifty Dollar ($50.00) to One Hundred Dollar ($100.00) fine or not more than a year * * *.

Under O. R. C. 2905.38, delivering or depositing immoral literature * * * or mail to a child under sixteen (16) years of age * * * advertising drug or method of treatment * * * disease * * * Twenty-Five Dollars ($25.00) to One Hundred Dollars ($100.00) or thirty (30) to one hundred (100) days.

Under O. R. C. 2905.39, "a person who posts * * * publishes * * * exhibits on walls, etc. where it can be publicly seen, a picture or figure that is lascivious, indecent, immoral, or impure, or which represents crime or lust * * * can be fined for such first offense, Fifty Dollars ($50.00) to Five Hundred Dollars ($500.00)" and subsequent offenses thirty (30) days to six (6) months or both.

This type of prosecution is contained in reported State cases and we quote from one of them, *State vs. Pirkey,* 281 Pac. (2d) 698, page 702:

> "The Fourteenth Amendment operates to forbid discrimination by States against persons or classes in criminal cases.
>
> And it has been held that where a statute which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situations, is violative of the equal protection clause (citing cases).
>
> * * * There is no semblance of a classification which would enable one to ascertain under what circumstances he may be guilty of a felonious crime, or under what circumstances he may be guilty only of a misdemeanor.
>
> * * * It might be said that the statute classifies punishments, but does not classify the circumstances to which the diverse punishments are to be applied. This is not legal classification. It is legal chaos * * * the statute must be void."

The very nature of the situation in the case at bar shows none of the indicia of a vicious act, such as that of a seller or distributor who caters to depraved minds. The articles were not her property, but that of a roomer—they were packed away to await his disposition. In intoxicating liquor cases (other kinds not found) the Courts have held there is no possession and control in circumstances like that at bar (See: *People v. Archer*, 190 N. W. 622, Syl. 2;

Presont vs. U. S., 281 Fed. 131 (6th Circuit); *State v. Flint*, 269 Pac. 476; *Tearney v. State*, 185 Pac. 1104).

Mrs. Mapp was not chargeable because Jones did not remove his property. (See: *State v. Waxman*, 93 N. J. Law 27; *Com. vs. Guild*, 170 Atl., 699, Syls. 1 and 5.)

As we have indicated above, and as the Record divulges, Dollree Mapp committed no crime. She was not in possession and control of the articles belonging to the roomer, Jones. No person who happens to have possession, merely, could have been intended by the Legislature to have imposed upon them a seven (7) year sentence; especially is this to be observed from O. R. C. 2905.36, 2905.38, 2905.39, and 2905.41. Such a sentence provided by a statute makes not only the statute unconstitutional, but the punishment excessive.

II. Does a sentence of seven (7) years for a violation of Sec. 2905.34 O. R. C. violate Amendment VIII of the United States Constitution, and Article I Section 9 of the Ohio Constitution; and is this particularly so under the facts and circumstances of the case at bar?

Considering all of the facts and circumstances attendant to the case at bar, and respectfully calling the Court's attention to the fact that the property, the possession of which, resulted in the conviction of the defendant, was not her property; that had she destroyed said property instead of storing it she would have been liable to a sentence of from one (1) to seven (7) years under Sec. 2909.01 O. R. C.; that the defendant's record had previously been unblemished; that she was living peacefully and quietly in the premises which were violated, with her 13 year old daughter, the sentence in the case at bar was excessive, cruel and unusual.

In Article I Section 9 of the Constitution of the State of Ohio, it is provided:

> "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Amendment VIII of the United States Constitution reads as follows:

> "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishment inflicted."

In *Cincinnati vs. King,* 6 O. O. (2d) 313, is reflected the current ordinances which impose merely a fine of One Hundred Dollars ($100.00) or sixty (60) days, even for possession of obscene literature for sale. The Ohio statute is rare and unusual.

In *Weems vs. U. S.,* 217 U. S. 349, is laid down the test; we quote:

> "In determining whether a punishment is cruel and unusual as fixed by the Phillipine Commission, the Court will consider the punishment of the same or similar crimes in other parts of the United States as exhibiting the difference between the power unrestrained and that exercised under the spirit of constitutional limitation formed to establish justice." (See: 46 S. E. (2d) 273, State vs. Kimbrough, Syl. 2; 55 Atl. (2nd) 883, N. J. Mayor, etc. vs. Bauer, Syl. 4; 19 So. 457, State Ex. Rel. Garvey vs. Whittaker, Recorder; 104 Pac. 596, State vs. Roth; 254 N. Y. S. 786, People vs. Betts), where the Court said:
>
> "A free man shall not be amerced for a small offense, but only according to the degree of the offense * * *."

III. Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV, Amendment V and Amendment XIV Section 1, of the United States Constitution; and Article I Section 1 and Article I Section 14 of the Ohio Constitution?

Though Ohio has permitted evidence under circumstances of seizure, this does not, the Supreme Court of the United States has said, permit a conviction under circumstances of oppression—the Bill of Rights can not be intended to permit what "due process" forbids.

We need not review the Record—the conduct shown therein and mentioned above portrays a shocking disregard of human rights. In a case similar in principle, a conviction under a State law forbidding possession of morphine was reversed in spite of the claim by the State that evidence procured by illegal seizure could be used in "State Court," because obtained by methods violative of the due process, as the Fourteenth Amendment guarantees. See *Rochin vs. California,* 342 U. S. 165.

In that case, on information defendant was selling narcotics, State officers entered his home and forced their way into the bedroom occupied by him. He swallowed two (2) capsules. He was taken to the hospital, where an emetic was forced into his stomach. He vomited two (2) capsules which were found to contain morphine.

We quote from the Opinion in the *Rochin* case:

Page 172:

"This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner * * * offends even hardened sensibilities."

Page 179:

"It is a requirement of due process for a trial in the Federal Court House, it is impossible for me to say it

> is not a requirement of due process for a trial in the State Court House * * *. We can not in fairness free the State Courts from that command."

We respectfully call to the Court's attention the similarity in wording between Amendment IV of the United States Constitution and Article I Section 14 of the Ohio Constitution.

The case which distinguished the Federal rule from the State rule in Ohio is known as *State vs. Lindway,* 131 O. S. 166, 2 N. E. (2d) 490. Mr. Justice Herbert of the Ohio Supreme Court, not only joining in the majority opinion that the Statute is unconstitutional, but going one step further indicates why, in his opinion (R. 96) the case at bar should be distinguished from the *Lindway* case. Pertinent portions of Justice Herbert's dissenting opinion will be reproduced below:

> "The judgment in the Lindway case is not in conflict with this constitutional provision. Had I been a member of the Court at that time I would have joined in the judgment as all of the members of the Court then did because the evidence there clearly established that the defendant was operating a bomb manufacturing shop in the basement of their house. As stated by Jones, J., in the concurring opinion in that case: 'this defendant was suspected of manufacturing bombs and of being engaged in the night-time bombing of the homes of employees of a manufacturing company. If the search produced evidence of his projective crime, the evidence should have been admitted; for neither Constitution nor State law was intended to provide security for such dangerous enemies at our public peace.' The foregoing sentence contains ample legal foundation and justification for the judgment affirming the conviction there as to that portion of the Syllabus, however, relating to evidence obtained by an unlawful search,—in which only a bare majority concurred—it seems to me to be far

too comprehensive and susceptible to abuse by police and prosecution authorities. As a rule, abuse by such officials rarely occur; but when they do the constitutional rights of the private citizen should be fully protected. The broad scope of the rule relating to evidence obtained by an unlawful search, as stated in the Lindway syllabus, leads me to the inescapable conclusion that in too many instances it virtually sterilizes the constitutional guarantees provided by Section 14, Article I.

On the basis of the constitutionality of Sec. 2905.34, O. R. C., which is fully discussed and disposed of in the majority opinion, this case seems to me to afford a perfect opportunity for the Court to modify and limit the Lindway rule in the direction indicated by Jones, J., so as to bring it into accord with a more reasonable interpretation of the above quoted provisions of the Constitution and the requirements of the statutes enacted to implement it.

* * * * *

Ironically enough, there being no evidence of the issuance of a search warrant for obscene books, the provisions of this last sentence are not applicable to the disposition of evidence in the instant case.

* * * * *

Under the principles stated by Jones, J., in his concurring opinion in Lindway, a conviction could well be sustained in this case if books had been discovered in the home of defendant in quantities indicating a purpose to sell, lend, give away, exhibit or offer to do so (See 'for such purpose' supra) but on the facts here, it seems to the writer that the constitutional right of the defendant 'to be secured * * * against unreasonable searches and seizures' was violated.

It is a basic principle that laws restraining the fundamental liberties of the individual must have as their foundation a broad basic public need which

overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in evidence in the present case is and should be against public morals and policy, if for no other reason than that the immature mind which might be exposed to it, could be greatly harmed, I can not agree that mere private possession of such literature by an adult should constitute a crime * * *.

The foregoing paragraph is perhaps more applicable to discussion of the constitutionality of Sec. 2509.34 O. R. C. than to the issue on which I dissent, but since under another provision of the Constitution a bare majority of this Court is powerless to invalidate the portion of that section under which the defendant was convicted, we certainly should scan carefully the method by which the evidence was acquired for such conviction. I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of their criminal use or a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home from unlawful search and seizure had been lost by her own conduct (as in the Lindway case where a bomb factory was discovered), but on the undisputed facts, as disclosed in this Record, I can not so conclude. See, also, Paragraph 2 of the Syllabus in Fiano vs. State, 15 O. S. 229, 137 N. E. 11.

* * * * *

As Jones, J., stated in his concurrence in the Lindway case: 'It is not for the class of criminal element alluded to, but for the class embodying millions of citizens who are innocent of any offense or whose offenses are minor, that I urge protection under the Search and Seizure Clause of the State Constitution. The decision of this Court in the instant case is too broad, since it is made to apply to everyone suspected of committing any offense whatever. There is one

advantage the occupant of a bona fide dwelling now has and always has had—he could discover whether a search warrant had in fact been issued and for, his own protection, could demand its production.'

Here, the defendant did just that and the evidence is uncontradicted that she was not given an opportunity to read it, if any was issued. In fact, it was not even contended by the prosecution that a warrant was ever issued authorizing a search of her home for obscene literature. In my view, the Lindway rule which is being followed in this case should be modified and clarified so that there will no longer be a judicial stamp of approval on the use of unlawful means to justify an end result. Here an admittedly private home was unlawfully searched, and again concur in a judgment upholding conviction based solely on evidence so obtained.

Bell, J., concurs in the foregoing dissenting Opinion."

IV. Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution holding that it could not review the sentence of the trial Court?

Article IV Section 6 creates the Court of Appeals and gives jurisdiction of said court "to review, affirm, modify, set aside or reverse judgments or final orders of * * * Courts of record inferior to Courts of Appeals * * *." There is no exception of the kind claimed, anywhere, and the Court can not refuse to exercise its jurisdiction.

See *State vs. Kimbro,* 46 S. E. (2d) 273, Syl. 3:

"The power of an appellate court to review a sentence for the purpose of determining whether it finds the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from."

Page 275:

"The constitutional restrictions should be regarded as an admonition to both the legislature and the judiciary."

The Court of Appeals in the instant case said "* * * The question of punishment is within the exclusive jurisdiction of the trial Court. The judgment of the Court of Common Pleas is therefore affirmed * * *." (R. 81.)

Clearly, the judgment of the Court of Appeals is contrary to the Section of the Ohio Constitution set forth above.

V. Did the charge of the Court to the jury, on presumption, thereby effectively depriving the defendant of a trial by jury, and did other charges by the Court to the jury, violate Amendment V, Amendment VI, and Amendment XIV Section 1, of the United States Constitution; and Article I Section 5 and Article I Section 10, of the Ohio Constitution?

The Record at page 65 discloses that the Court charged the jury:

"The law presumes that a sane person intends the ordinary consequences of his own voluntary acts."

Overlooking the omission of the requisite words "natural and probable consequences" the Court further omitted the qualifications required by law—in a case where presumption may be charged. The case at bar was not a case admitting of any charge as to presumption, for both sides had given evidence, and the facts were to be judged by the jury without any charge as to presumption. The Ohio State Supreme Court stated as follows:

"Syl. 3. Where a litigant introduces evidence tending to prove a fact, either directly or by inference * * *

the presumption never arises and the case must be submitted to a jury without any reference to a presumption in either a special instruction or a general charge." (*Ayers vs. Woodard,* 166 O. S. 138.)

Also, in *State vs. Cook,* 282 S. W. (2d) 533, at page 535 (Criminal case), the Court said:

"We hold that in the presence of the actual facts, as testified to here by eye-witnesses, it was improper to instruct the jury concerning a presumption of intent and malice."

In *State vs. Martin,* 260 S. W. (2d) 536, at Syllabus 9, the Court said as follows:

"Presumption as to defendants' mental intent does not exist in the presence of facts disclosed to the jury, and in such instances, instruction on presumption should not be given."

See also, *Searles vs. State,* 3 O. C. D. 478, Syl. 15; and *Crobaugh vs. State,* 45 O. A. 410, Syl. 3.

Such a charge is a violation of due process, and has deprived the defendant of a right to a trial by a jury.

In *Marisette vs. U. S.,* 342 U. S. 246, the Court said:

"* * * The trial court may not withdraw or pre-judge the issue by insrtucting the jury that the law raises a presumption of intent from a single act * * *."

The Court, at page 275 went on to say:

"A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. * * *"

Thus, defendant was deprived of a trial by jury, one of the rights guaranteed under the Constitution of the United States and the State of Ohio, and the burden was placed upon her, instead of the State.

In addition to those instructions with which we have just taken issue, the one appearing in the Record at page 66, which in effect instructed the jury as to what was possession, should not have been given. This instruction reads as follows:

> "One who deposits articles in a place of concealment may still be deemed to have them in his possesion."

With a term so loose, and needing accuracy of pertinent applications, as "possession and control" the Court should not have given that charge.

The fact was that the defendant, in the usual way when a roomer left his things, put them in a box or bag so she could use his room, as he was no longer to occupy it. The items of personal property were to be called for by the roomer, Jones, as was his right, or to be called for by whomever the roomer, Jones, sent for them. Because of this set of circumstances, the trial judge implied that: "She was nevertheless in possession, they being concealed" even though she was obliged under the law to refrain from destroying them.

Use of words as "detaining" and "holding," at most a mere superficial act,—as "possession" in the sense of a substantial act of a real possessor for a guilty purpose was also misleading. Possession should have been defined as possession for some sinister or illegal purpose, otherwise, as indicated earlier, even the detectives who impounded the evidence would have been guilty under the statute.

The Court should not have given the charge:

> "The test is whether or not the defendant had *some degree* of possession and control over the material alleged in the indictment." (R. 66.)

Thus the jury was left to speculate as to what that "some degree" was which made criminal, "possession and control" as intended by the law. This type of charge is condemned in *State vs. Stewart,* 283 Pac. 630, the Court saying the word "some" specified nothing respecting the nature of the "right," power or control essential to possession."

It is fatal to a conviction from Constitutional standpoint when a Court does not correctly instruct a jury on essential elements of the crime charged. See: *Gerds vs. State,* Syl. 2, 64 So. (2d) 915; *State v. Collins* (Ohio) Syl. 2, 115 N. E. (2d) 844.

CONCLUSION.

Defendant-Appellant respectfully urges:

1. That this Honorable Court find and adjudicate that Section 2905.34 of the Ohio Revised Code be declared to be and is unconstitutional and that final judgment be rendered discharging this Defendant-Appellant.

2. That the evidence introduced in the trial of this cause in the Common Pleas Court was procured contrary to the provisions and in violation of Defendant-Appellant's constitutional rights under Amendment IV, Amendment V and Amendment XIV Section 1 of the United States Constitution and Article I Section 1 and Article I Section 14 of the Ohio Constitution and should not have been received in evidence and that by reason thereof, we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

3. That this Honorable Court adjudicate that the court below erred in overruling the Motion of Defendant-Appellant before trial on September 3, 1958, to suppress the evidence for the reasons above stated, and that by

reason thereof, we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

4. That this Honorable Court find and adjudicate that the errors of the trial court in its charge to the jury effectively deprived the Defendant-Appellant of due process of law and that said errors were prejudicial to this Defendant-Appellant and did deprive her of a fair trial and that by reason thereof, we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

5. That this Honorable Court find and adjudicate that the sentence imposed upon this Defendant-Appellant, to-wit: one (1) to seven (7) years is cruel and unusual punishment, particularly under the facts and circumstances in the case at bar and by reason thereof the constitutional rights of Defendant-Apppellant were violated, and therefore respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

6. That this Honorable Court find and adjudicate that the Court of Appeals violated the provisions of the Constitution of Ohio when it held that it could not review the sentence of the trial court, thereby prejudicing this Defendant-Appellant in her constitutional rights by reason of which we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

Respectfully submitted,

A. L. KEARNS & WALTER L. GREENE,

Attorneys for Defendant-Appellant.