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Recent Decisions: Criminal Law: Dismissal of Indictment Obtained in Violation of Constitutional Rights

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litigation be present; and that some awareness of the vulnerability to the later claim have existed, by reason of the "close relation," when the earlier litigation was being contested.

Liberalized application of collateral estoppel tends to alleviate the need for compulsory counterclaim, joinder, and cross-claim statutes. By one procedural avenue or another, therefore, the courts are moving toward their objectives: the final disposition of complex controversies in a single trial.

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Criminal Law: Dismissal of Indictment Obtained in Violation of Constitutional Rights: In *Jones v. United States,*[1] the United States Court of Appeals for the District of Columbia Circuit reversed the conviction of defendant for robbery, holding that, where substantial prejudice results, an indictment obtained in violation of federal constitutional rights must be dismissed. The court saw "neither reason nor authority"[2] for distinguishing between unconstitutional *composition* of a grand jury, which vitiated the indictment in *Cassell v. Texas,*[3] and unconstitutional *proceedings* of a grand jury in *Jones.*

The court observed that defendant did not consent to being brought before the grand jury and was taken there in handcuffs. No one informed him prior to his appearance before the grand jury that he need not testify if taken there, although police and the committing magistrate told him in general terms that he need not incriminate himself. The court also pointed out that when defendant actually faced the grand jury, the warning the prosecutor gave him was inadequate to protect his rights even if his presence had been voluntary. The prosecutor told defendant that he need not answer questions and that his answers could be used against him "at any future trial." However, defendant was not informed that the grand jury might use his answers as a basis for indicting him; nor was he told that he was entitled to consult counsel before being questioned by the grand jury. In light of the fifth amendment guarantee that "no person . . . shall be compelled in any criminal case to be a witness against himself," the court felt that the above procedure could not be justified.

In *Counselman v. Hitchcock*[4] the United States Supreme Court held that a grand jury investigation of a crime is "a criminal case"[5]at which *incriminating* questions need not be answered. In the *Jones* decision, the court declared that implicit in the Supreme Court's action in *Lawn v. United States*[6] was the proposition that the taking of an accused

[1] No. 17688, D.C. Cir., Feb. 6, 1964.
[2] *Id.* at 10.
[3] 339 U.S. 282 (1950).
[4] 142 U.S. 547 (1892).
[5] *Id.* at 562.
[6] 335 U.S. 339 (1958).

before a grand jury without his consent and asking him *any* questions violated his constitutional privilege against self-incrimination.

The court in *Jones* admitted that theirs might be a minority view, citing *United States v. Cleary*[7] in which it was held that the grand jury is basically a law enforcement agency and an important investigative instrument of the prosecutor, and that a grand jury proceeding is not closely analogous to a criminal trial. According to the *Cleary* decision, appearance before a grand jury is not in itself an unduly coercive situation, and the usual nervousness and confusion of the witness is not sufficient to render his testimony involuntary. "The important factor is the lack of even the slightest suggestion that government officials applied any pressure or engaged in any form of misconduct which contributed to his testifying."[8]

If *Cleary* represents the majority view, the court in *Jones* felt that it should now disregard the weight of authority and start with a rule of its own, "consistent with practical experience."[9] In justifying its position, the court pointed out that mere interrogation before a grand jury may harm the accused even if he makes no direct incriminating statement, as his appearance, manner, and voice may be incriminating in the minds of members of the jury.

Because grand jury investigations are secret, as observed in *Powell v. United States,*[10] one is "isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public."[11] Though one may be unqualified to decide for himself what questions to answer, he must decide at his peril. If he answers incriminating questions, he will be indicted. If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate him, the grand jury may draw conclusions. If he refuses to answer questions that are not incriminating, he may be guilty of contempt.

The court pointed out that defendant's schooling stopped with the third grade and that he could not read and could barely write. The prosecutor read aloud the confessions which defendant had made after prolonged questioning by police and asked him if they were his and true. As he acknowledged that they were, and as the grand jury subsequently indicted him, the court felt that he was plainly prejudiced by the interrogation.

In addition to the weight of authority as represented by the *Cleary* decision, the dissenting judge felt that four facts in *Jones* called for a contrary holding. First, defendant was advised four times before he

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[7] 265 F. 2d 459 (2d Cir.), *cert. denied,* 360 U.S. 936 (1959).
[8] *Id.,* 265 F. 2d at 462.
[9] Note 1 *supra,* at 5.
[10] 226 F. 2d 269 (D.C. Cir. 1955).
[11] *Id.* at 274.

spoke to the grand jury that he need not speak: twice by the arresting officer who questioned him, once by the committing magistrate in open court, and once by the prosecutor before the grand jury. Second, the evidence indicates that defendant wanted to speak and said so twice: once to the arresting officer and once to the grand jury. Third, the trial jury was not told what defendant said and did before the grand jury. Fourth, ample other evidence was available and presumably was presented to the grand jury.

The majority also declared that defendant's sixth amendment right "to have the assistance of counsel for his defense"[12] was violated, and that a defendant "requires the guiding hand of counsel at every step in the proceedings against him."[13] Because indictment is a crucial "step in the proceedings against" the accused, when defendant was about to be taken before the grand jury for questioning, the court felt he should have been permitted to consult with counsel appointed for him by the committing magistrate. In their opinion, however, the prosecution prevented defendant from doing so by failing to inform counsel of the impending examination. The court believed that counsel might have succeeded in preventing him from being taken before the grand jury, and that counsel certainly could have given him advice as to what questions he should answer if taken there.[14]

The dissenting judge admitted that taking defendant before the grand jury without notifying his lawyer "was bad practice and bad ethics and ought to be condemned."[15] However, he did not feel that a valid indict-

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[12] Congress has implemented the constitutional right to the assistance of counsel. The District of Columbia Code provides in section 2-2202 that the Legal Aid Agency "shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases," and that each court "will make every reasonable effort to provide assignment of counsel as early in the proceedings as practicable." Rule 44 of the Federal Rules of Criminal Procedure provides that "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Criminal Rule 24 of the Court of General Sessions is worded in the same fashion, and the committing magistrate in *Jones*, a judge of that court, appointed counsel for defendant in accordance with said rule.

[13] Powell v. Alabama, 287 U.S. 45, 69 (1932). A recent Second Circuit case implies that if the prosecutor questions the accused without notice to his counsel, at least in the absence of special circumstances, evidence so obtained should be excluded. United States v. Massiah, 307 F. 2d 62 (2d Cir. 1962), *cert. granted,* 374 U.S. 805 (1963). The Fifth Circuit has adopted the rule that counsel must be available whenever the accused is questioned after indictment. Lee v. United States, 322 F. 2d 770 (5th Cir. 1963). The New York Court of Appeals now recognizes an accused's right to counsel from the moment of arrest. People v. Donovan, 13 N.Y. 2d 148, 193 N.E. 2d 628, 243 N.Y.S. 2d 841 (1963).

[14] The court felt that it was most unlikely that defendant would have repeated his former confessions there if he had been counseled, and that the lawyer might have advised him that those confessions were illegally obtained and could not be used at any trial.

[15] Note 1 *supra,* at 32.

ment could be quashed on this ground, saying that "there is no rule . . . which says that a person must have a lawyer before he can be taken before a grand jury."[16] As the majority agreed that defendant could not have had a lawyer with him in the grand jury room,[17] the dissenting judge pointed out that counsel could only have advised him that he need not speak, and he had already received this advice from the committing magistrate. In addition, he was formally given a full warning by the prosecuting attorney before he spoke to the grand jury, and the judge felt that to require a lawyer in this situation would be "to assert the necessity of a ritual without substance."[18]

The dissenting judge emphasized that the majority's decision was in conflict with the rule pronounced by the Supreme Court in *Costello v. United States*[19] and *Lawn v. United States*[20] that "an indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."[21] However, the majority justified its dismissal of the indictment against defendant on the ground that this broad language only applies when the proceedings have not violated any constitutional rights of the accused.[22]

With the *Jones* decision now the law in the District of Columbia Circuit, either of the two constitutional grounds here asserted for dismissing a grand jury indictment, violation of the privilege against self-incrimination or violation of the right to the assistance of counsel, may be applied to numerous other cases. The dissenting judge predicted that the decision would "prove a vast impediment to the public interest in the administration of justice."[23]

The *Jones* holding could well affect the course of a John Doe proceeding[24] in Wisconsin. For example, a defendant who is informed

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[16] *Ibid.* Arguments that such a rule exists were rejected in Gilmore v. United States, 129 F. 2d 199, 203 (10th Cir.), *cert. denied*, 317 U.S. 631 (1942).

[17] *In re* Groban, 352 U.S. 330, 333 (1957). Federal Rule of Criminal Procedure 6(d) clearly forbids the presence of counsel by limiting those present while the grand jury is in session to "attorneys for the government, the witness under examination, interpreters when needed, and . . . a stenographer."

[18] Note 1 *supra*, at 33.

[19] 350 U.S. 359 (1956).

[20] 355 U.S. 339 (1958).

[21] *Id.* at 349; note 19 *supra*, at 363.

[22] The court said with reference to the *Costello* decision: "Due deference forbids us to interpret the opinion as containing a vast dictum to the effect that . . . the proceedings of a legally constituted and unbiased grand jury may violate any number of the defendant's constitutional rights, including his right to the assistance of counsel and his privilege against self-incrimination, without affecting the validity of the indictment. *Costello*, therefore, is no bar to our decision that an indictment obtained in violation of constitutional rights must be dismissed." Note 1 *supra*, at 11.

[23] *Id.* at 34.

[24] WIS. STAT. § 954.025 (1961): "*John Doe Proceeding.* If a person complains to a magistrate that he has reason to believe that a crime has been committed within his jurisdiction, the magistrate shall examine the complainant on oath and any witnesses produced by him and may, and at the request of the dis-

against as a result of his testimony before a Wisconsin circuit court judge conducting a John Doe investigation may rely upon this case in an attempt to invalidate the information. Assuming that the same lack of consent is present when the witness is subpoenaed to appear before a magistrate, as when he is taken before a grand jury in handcuffs—the situation in *Jones*, a strong argument could be made for the reversal of a resulting conviction on the ground that the information was obtained in violation of his state constitutional privilege against self-incrimination. A. WILLIAM FINKE

Torts: Intentional Infliction of Emotional Distress as a Separate Tort: Plaintiff sued for the recovery of damages incurred as a result of defendant's conduct in completing a contract to replace the wooden siding on plaintiff's home and to install combination aluminum windows and doors. Defendant delayed work on the contract, exposed the occupants of plaintiff's home to severe winter weather without adequate protection, and, through numerous personal contacts, intimidated, coerced, and bullied the plaintiff. The plaintiff's damage consisted of severe emotional distress brought on by a depressive reaction which left her unable to function effectively in her home or at her job. The trial court found defendant's conduct unreasonable, but refused to impose liability on the ground that such conduct was not extreme and outrageous, and of not sufficient flagrant character so as to be the basis for relief.

In *Alsteen v. Gehl*,[1] the court upheld the trial court's decision that the defendant's conduct would not be considered outrageous and extreme by the average member of the community. The court recognized the existence of an independent tort which heretofore had not been acknowledged in this jurisdiction:

> One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it.[2]

Four elements must be established before recovery is allowed:

1) The conduct must be intentional; that is, for the purpose of causing the plaintiff's emotional distress.

2) The conduct must be extreme and outrageous, characterizable by the average member of the community as a complete denial of the plaintiff's dignity as a person.

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trict attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the magistrate may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused."

[1] 21 Wis. 2d 349, 124 N.W. 2d 312 (1963).

[2] *Id.* at 358, 124 N.W. 2d at 317.