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APPENDIX
(Key Authority)

MCL 767.1, *et seq*.
MCL 767.3
MCL 767.4

Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672; 194 NW2d 693 (1972)

In re Colacasides, 379 Mich 69; 150 NW2d 1 (1967)

In re Murchison, 349 US 133 (1955)

In re Oliver, 333 US 257 (1948)

In re Slattery, 310 Mich 458; 17 NW2d 251 (1945)

Matter of Richardson, 247 NY 401; 160 NE 655 (1928)

People v Anderson, 501 Mich 175; 912 NW2d 503 (2018)

People v Bellanca, 386 Mich 708; 194 NW2d 863 (1972)

People v Duncan, 388 Mich 489; 201 NW2d 629 (1972), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001)

People v Gillis, 474 Mich 105; 712 NW2d 419 (2006)

People v Glass, 464 Mich 266; 627 NW2d 261 (2001)

People v Morrow, 214 Mich App 158; 542 NW2d 324 (1995)

People v Smith, 496 Mich 133; 852 NW2d 127 (2014)

People v Williams, 244 Mich App 249; 625 NW2d 132 (2001)

Williams v Pennsylvania, 579 US 1 (2016)

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THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

CHAPTER VII

GRAND JURIES, INDICTMENTS, INFORMATIONS AND PROCEEDINGS BEFORE TRIAL

767.1 Courts of record; jurisdiction over prosecutions upon information.

Sec. 1. The several circuit courts of this state, the recorders' courts and any court of record having jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon informations for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17215;—CL 1948, 767.1.

Former law: See sections 1 and 9 of Act 138 of 1859, being CL 1871, §§ 7937 and 7945; How., §§ 9548 and 9556; CL 1897, §§ 11933 and 11941; and CL 1915, §§ 15760 and 15768.

767.2 Applicability of indictment laws to informations.

Sec. 2. All provisions of the law applying to prosecutions upon indictments, to writs and process therein and the issuing and service thereof, to commitments, bail, motions, pleadings, trials, appeals and punishments, or the execution of any sentence, and to all other proceedings in cases of indictments whether in the court of original or appellate jurisdiction, shall, in the same manner and to the same extent as near as may be, be applied to informations and all prosecutions and proceedings thereon.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17216;—CL 1948, 767.2.

Former law: See section 4 of Act 138 of 1859, being CL 1871, § 7940; How., § 9551; CL 1897, § 11936; and CL 1915, § 15763.

767.3 Proceedings before trial; inquiry; summoning witnesses; notification to judge; taking testimony; legal counsel; disqualification of judge.

Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry. In any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony. The witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings. The witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the inquiry being conducted. Whenever a subpoena is issued by the judge conducting the inquiry, commanding the appearance of a witness before the judge forthwith upon the service of such subpoena, and, following the service thereof, the witness arrives at the time and place stated in the subpoena, the judge issuing the same shall be forthwith notified of the appearance by the officer serving the subpoena, and the judge forthwith shall appear and take the testimony of the witness. Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. The witness shall have the right to have counsel present in the room where the inquiry is held. All matters revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in section 4. No testimony shall be taken or given by any witness except in the presence of the judge.

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.

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History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17217;—CL 1948, 767.3;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1965, Act 251, Imd. Eff. July 21, 1965.

Former law: See section 1 of Act 196 of 1917.

767.4 Proceedings before trial; apprehension of suspect; disqualification as examining magistrate; finding as to misconduct in office; disclosures, penalty, exceptions; report of no finding of criminal guilt; period of inquiry; successor judge, appointment.

Sec. 4. If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. If upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against the officer. The finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against the officer shall proceed in the method prescribed by law for a hearing and determination of said charges. Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry otherwise than by issuing or executing processes prior to the indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court, and the offense when committed by a public official shall also constitute malfeasance in office. The limitations, restrictions and penalties relating to the uttering, publishing or disclosing of any statement pertaining to any information or evidence, imposed by this section, do not apply to disclosures of information or evidence made by a judge conducting such an investigation to another judge concurrently conducting an investigation as provided in section 3. Upon the termination of the inquiry if the judge shall make no presentment of crime or wrongdoing as to any person whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

No inquiry or proceeding under this chapter shall continue longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months.

In the event any judge conducting such inquiry shall be unable to continue because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17218;—Am. 1947, Act 33, Imd. Eff. Apr. 4, 1947;—CL 1948, 767.4;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1967, Act 70, Eff. Nov. 2, 1967.

Former law: See section 2 of Act 196 of 1917 and Act 395 of 1921.

767.4a Proceedings before trial; unlawful use or possession of testimony, exhibits or proceedings; exceptions, penalty.

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Sec. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

History: Add. 1951, Act 276, Eff. Sept. 28, 1951.

767.5 Proceedings before trial; failure of witnesses to appear or answer questions; hearing, penalty; commutation or suspension of sentence.

Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided, That if such witness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17219;—CL 1948, 767.5;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951.

Constitutionality: This section, in regard to a contemnor appearing before a judge to purge himself and the discretion of the judge to commute or suspend further execution of a sentence, insofar as criminal contempt is concerned, constitutes an unconstitutional delegation by the legislature to the judicial branch of government of a power which exists only in the executive. People v Joseph, 384 Mich 24; 179 NW2d 383 (1970).

Former law: See section 3 of Act 196 of 1917.

767.5a Disclosing identity of informant; privileged and confidential communications.

Sec. 5a. (1) a reporter or other person who is involved in the gathering or preparation of news for broadcast or publication shall not be required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry authorized by this act, except an inquiry for a crime punishable by imprisonment for life when it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted.

(2) Any communications between attorneys and their clients, between members of the clergy and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys, members of the clergy, or physicians to serve as such attorney, member of the clergy, or physician.

History: Add. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1986, Act 293, Imd. Eff. Dec. 22, 1986.

Compiler's note: At the beginning of subsection (1) of this section, “a” evidently should read “A”.

767.6 Incriminating answers of witnesses; order granting immunity; use of truthful testimony or other information against witness in criminal case; transcript; applicability of secrecy provisions; scope of order.

Sec. 6. (1) Upon inquiry, a witness shall not be required to answer any questions or be convicted for contempt upon refusal to do so If the answers might tend to incriminate him or her.

(2) Upon written motion by the prosecuting attorney or a duly authorized representative of the state in a proceeding described in section 3 of this chapter, the judge may enter a written order granting immunity to the witness. The order shall set forth verbatim the questions the witness refused to answer. A true copy of the motion and order shall be delivered to the witness before he or she answers the questions in the inquiry. The order granting immunity shall extend to all related questions which may be asked of the witness after entry of the order until the judge advises the witness that the immunity no longer applies.

(3) Truthful testimony compelled under the order granting immunity and any information derived directly or indirectly from that truthful testimony shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

(4) All questions and the witness's answers shall be transcribed under the judge's direction. A true copy of the transcript, duly certified by the judge, shall be delivered to the witness as soon as practicable.

(5) The provisions for secrecy provided for in section 3 of this chapter apply to all copies of the motion,

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order, and transcript delivered to the witness. However, the witness may disclose that information to his or her attorney if his or her testimony or any information derived directly or indirectly from that testimony is used against the witness in violation of subsection (3).

(6) An order granting immunity does not extend beyond the scope of an inquiry described in this section or beyond the particular questions set forth in the motion, order, or transcript.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17220;—CL 1948, 767.6;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1999, Act 250, Imd. Eff. Dec. 28, 1999.

Former law: See section 4 of Act 196 of 1917.

767.6a Docket, journal, transcript and record; seal and file; violation of secrecy; available in connection with appeal, order, receipt; destruction of transcripts, notes and records.

Sec. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

History: Add. 1951, Act 276, Eff. Sept. 28, 1951.

767.6b Public accounting by judge; time, filing.

Sec. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

History: Add. 1951, Act 276, Eff. Sept. 28, 1951.

767.7 Grand jury; summoning, procedure.

Sec. 7. Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17221;—CL 1948, 767.7.

Former law: See section 7 of Act 138 of 1859, being CL 1871, § 7943; How., § 9554; CL 1897, § 11939; and CL 1915, § 15766.

767.7a Grand jurors; term of service; recalling.

Sec. 7a. Notwithstanding the provisions of section 1343 of Act No. 236 of the Public Acts of 1961, as added, being section 600.1343 of the Compiled Laws of 1948, the term of service of grand jurors shall be 6 months unless extended by specific order of the judge who summoned such jurors or his successor for an additional period not to exceed 6 months, except that the grand jurors may be recalled at any time by the judge who summoned such jurors or by his successor to conclude business commenced during their term of service.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

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767.7b Grand jury; petition by attorney general or county prosecuting attorneys to convene; jurisdiction; contents of petition.

Sec. 7b. (1) The attorney general may petition the court of appeals of this state to convene a grand jury with jurisdiction over 2 or more counties in this state.

(2) Two or more attorneys who are county prosecuting attorneys in this state may, with the approval of the attorney general, petition the court of appeals of this state to convene a grand jury with jurisdiction over all of the counties in which they are prosecuting attorneys.

(3) A petition to the court of appeals under this section shall contain all of the following:

(a) The name and official title of each petitioner.

(b) The name of each county over which the grand jury is to have jurisdiction.

(c) A statement setting forth probable cause to believe that a crime, or a portion of that crime, has been committed in 2 or more of the counties named in the petition.

(d) A statement setting forth the reasons to convene a grand jury with jurisdiction over all of the counties named in the petition.

(e) The signature of each petitioner.

(f) The date of the petition.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7c Grand jury convened by court of appeals; procedure; jurisdiction.

Sec. 7c. The court of appeals of this state, acting in a 3-judge panel consistent with the Michigan court rules, may convene a grand jury with jurisdiction over 2 or more counties in this state as follows:

(a) If a petition is filed under section 7b(1) by the attorney general, the court of appeals may convene a grand jury with jurisdiction over 2 or more of the counties named in the petition.

(b) If a petition is filed under section 7b(2) by 2 or more attorneys who are county prosecuting attorneys in this state, the court of appeals may convene a grand jury with jurisdiction over 2 or more of the counties named in the petition in which the attorneys are prosecuting attorneys.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7d Grand jury convened by court of appeals; circumstances.

Sec. 7d. The court of appeals may convene a grand jury under section 7c with jurisdiction over 2 or more counties in this state if a petition is properly filed under section 7b, and all of the following circumstances exist:

(a) The petition establishes probable cause to believe that a crime, or a portion of that crime, has been committed in 2 or more of the counties named in the petition.

(b) The petition establishes reason to believe that a grand jury with jurisdiction over 2 or more of the counties named in the petition could more effectively address the criminal activity referred to in the petition than could a grand jury with jurisdiction over 1 of those counties.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7e Grand jury convened by court of appeals; duties of court of appeals.

Sec. 7e. If the court of appeals convenes a grand jury with jurisdiction over 2 or more counties, the court of appeals shall do all of the following:

(a) Designate a judge of the circuit court or of the recorder's court to preside over the grand jury proceedings.

(b) If the petition to convene the grand jury was filed under section 7b(2), designate the prosecuting attorney of 1 of the counties over which the grand jury is to have jurisdiction to assist the grand jury.

(c) Designate the counties from which the jurors shall be drawn from among the counties over which the grand jury is to have jurisdiction.

(d) Designate the number of jurors to be drawn for the grand jury and the number of jurors to be drawn from each county.

(e) Designate the locations for the grand jury proceedings.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7f Grand jury convened by court of appeals; term; extension; dismissal; recall.

Sec. 7f. (1) Except as provided in subsection (2), the term of a grand jury convened under section 7c shall not exceed 6 months.

(2) The court of appeals of this state may order the term of the grand jury extended for an additional period not to exceed 6 months, for good cause shown. The judge presiding over the grand jury proceedings shall

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dismiss the grand jury upon completion of the functions of the grand jury whether or not the maximum term of the grand jury has been met. The grand jurors may be recalled at any time by the presiding judge or his or her successor to conclude business commenced during their term of service.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7g Grand jury convened by court of appeals; expansion of jurisdiction; petition.

Sec. 7g. (1) If a grand jury has been convened under section 7c(a), and the attorney general seeks to expand the jurisdiction of the grand jury to include 1 or more additional counties, the attorney general may petition the court of appeals under section 7b(1) to convene a grand jury which includes the additional county or counties. If the petition is granted, the court of appeals shall convene a new grand jury pursuant to section 7e and shall dismiss the existing grand jury.

(2) If a grand jury has been convened under section 7c(b) and the prosecuting attorneys of all of the counties over which the grand jury has jurisdiction seek to expand the jurisdiction of the grand jury to include 1 or more additional counties, the prosecuting attorneys of the counties over which the grand jury had jurisdiction and the prosecuting attorneys of the additional counties may, with the approval of the attorney general, petition the court of appeals under section 7b(2) to convene a grand jury with jurisdiction over all of those counties. If the petition is granted, the court of appeals shall convene a new grand jury pursuant to section 7e and shall dismiss the existing grand jury.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.8 Grand jury; juror; grounds for discharge; summoning new juror.

Sec. 8. Any court in which a grand jury may be sitting, may discharge any of the grand jurors for intoxication or other gross misconduct; and in case of such discharge, or in case of the sickness, death or non-attendance of any grand juror, after he shall have been sworn, the court may cause another juror to be summoned from among the bystanders, or inhabitants of the city, township or village having the qualifications required by law, and to be sworn and to serve in his stead.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17222;—CL 1948, 767.8.

Former law: See section 1 of Ch. 164 of R.S. 1846, being CL 1857, § 6010; CL 1871, § 7879; How., § 9490; CL 1897, § 11875; and CL 1915, § 15702.

767.9 Grand jurors; alphabetical list; administration and form of oath.

Sec. 9. The clerk of the court shall prepare an alphabetical list of all the persons returned as grand jurors. When the jury is to be impaneled, the following oath shall be administered to the jurors: "You as grand jurors of this inquest do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God".

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17223;—CL 1948, 767.9;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

Former law: See sections 2 and 3 of Ch. 164 of R.S. 1846, being CL 1857, §§ 6011 and 6012; CL 1871, §§ 7880 and 7881; How., §§ 9491 and 9492; CL 1897, §§ 11876 and 11877; and CL 1915, §§ 15703 and 15704.

767.10 Grand jury; affirmation in lieu of oath.

Sec. 10. Any person returned as a grand juror shall be allowed to make affirmation, substituting the word "affirm" instead of the word "swear"; and also the words, "this you do under the pains and penalties of perjury", instead of the words "so help you God".

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17224;—CL 1948, 767.10.

Former law: See section 4 of Ch. 164 of R.S. 1846, being CL 1857, § 6013; CL 1871, § 7882; How., § 9493; CL 1897, § 11878; and CL 1915, § 15705.

767.11 Grand jury; size; foreman, appointment.

Sec. 11. There shall be no more than 17 persons nor less than 13 persons sworn on any grand jury; and after such jurors have been impaneled and have received their charge from the court, they shall retire with the officer appointed to attend them and before they proceed to discharge the duties of their office, the court shall appoint 1 of their number to be foreman and the clerk shall record the same.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17225;—CL 1948, 767.11;—Am. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

Former law: See section 5 of Ch. 164 of R.S. 1846, being CL 1857, § 6014; CL 1871, § 7883; How., § 9494; CL 1897, § 11879; and CL 1915, § 15706.

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767.12 Grand jury; foreman; term, vacancy.

Sec. 12. The foreman appointed by the court in the manner provided in the preceding section, shall be foreman during the whole time they are required to serve; but in case of his death or absence or if he shall be discharged, or excused before the grand jury shall be dismissed, another of such jurors shall be appointed foreman for the residue of such time of service.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17226;—CL 1948, 767.12.

Former law: See section 6 of Ch. 164 of R.S. 1846, being CL 1857, § 6015; CL 1871, § 7884; How., § 9495; CL 1897, § 11880; and CL 1915, § 15707.

767.13 Grand jury; juror; grounds of objection to competency.

Sec. 13. A person held to answer to any criminal charge may object to the competency of any 1 summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17227;—CL 1948, 767.13.

Former law: See section 7 of Ch. 164 of R.S. 1846, being CL 1857, § 6016; CL 1871, § 7885; How., § 9496; CL 1897, § 11881; and CL 1915, § 15708.

767.14 Grand jury; no challenge of array or individual juror in other cases.

Sec. 14. No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17228;—CL 1948, 767.14.

Former law: See section 8 of Ch. 164 of R.S. 1846, being CL 1857, § 6017; CL 1871, § 7886; How., § 9497; CL 1897, § 11882; and CL 1915, § 15709.

767.15 Grand jury; witnesses; administration of oath, list.

Sec. 15. The foreman of every grand jury, the attorney general and the prosecuting attorney, or other prosecuting officer who shall be before them, shall have authority to administer all oaths and affirmations, in the manner prescribed by law, to witnesses who shall appear before such jury for the purpose of testifying in any matter of which they may have cognizance, and the foreman shall return to the court, or deliver to the prosecuting officer, a list of all the witnesses sworn before the grand jury in each case in which an indictment shall be found.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17229;—CL 1948, 767.15.

Former law: See section 9 of Ch. 164 of R.S. 1846, being CL 1857, § 6018; CL 1871, § 7887; How., § 9498; CL 1897, § 11883; and CL 1915, § 15710.

767.16 Grand jury; clerk, stenographer; appointment, duties.

Sec. 16. The grand jury may appoint 1 of their number to be their clerk, to preserve minutes of their proceedings and of evidence given before them; which minutes shall be delivered to the prosecuting officer, when so directed by the grand jury. Whenever it appears to the judge that it is necessary he may appoint a stenographer to take the testimony given before the grand jury.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17230;—CL 1948, 767.16.

Former law: See section 10 of Ch. 164 of R.S. 1846, being CL 1857, § 6019; CL 1871, § 7888; How., § 9499; CL 1897, § 11884; and CL 1915, § 15711.

767.17 Grand jury; summoning after dismissal.

Sec. 17. When the grand jury attending any court shall have been dismissed before the court is adjourned without day, they may be summoned to attend again, in the same term at such time as the court shall direct, for the dispatch of any business that may come before them.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17231;—CL 1948, 767.17.

Former law: See section 11 of Ch. 164 of R.S. 1846, being CL 1857, § 6020; CL 1871, § 7889; How., § 9500; CL 1897, § 11885; and CL 1915, § 15712.

767.18 Grand jury; disclosure of indictment for felony.

Sec. 18. No grand juror, stenographer or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17232;—CL 1948, 767.18.

Former law: See section 12 of Ch. 164 of R.S. 1846, being CL 1857, § 6021; CL 1871, § 7890; How., § 9501; CL 1897, § 11886;

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and CL 1915, § 15713.

767.19 Grand jury; testimony to certain facts required.

Sec. 19. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon complaint against such person for perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17233;—CL 1948, 767.19.

Former law: See section 13 of Ch. 164 of R.S. 1846, being CL 1857, § 6022; CL 1871, § 7891; How., § 9502; CL 1897, § 11887; and CL 1915, § 15714.

767.19a Grand jury; order granting immunity to persons giving testimony; application; verified petition; entry of order.

Sec. 19a. The prosecuting attorney may apply to the judge who summoned the jury or his or her successor, or to the presiding judge, for an order granting immunity to any person designated by name and address in the application who might give testimony concerning any matter before the grand jury. The application shall be accompanied by a verified petition of the prosecuting attorney that sets forth the facts upon which the application is based. If the judge to whom the application is presented is satisfied that it is in the interest of justice that immunity be granted to that person, the judge shall enter an order granting immunity to the person, if the person appears before the grand jury and testifies under oath about any matter before the grand jury and set forth in the petition of the prosecuting attorney.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.19b Delivery of immunity order to witness; use of truthful testimony or other information against witness in criminal case; transcript; duration of order granting immunity.

Sec. 19b. (1) A true copy of the order granting immunity shall be delivered to the witness before he or she answers any questions before the grand jury.

(2) Truthful testimony or other information compelled under the order granting immunity and any information derived directly or indirectly from that truthful testimony or other information shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

(3) All questions asked of the witness and his or her answers shall be transcribed. If a witness who has been granted immunity subsequently alleges that he or she is being prosecuted for an offense in violation of the grant of immunity, a true copy of the transcript, duly certified by an officer authorized to administer oaths, shall be delivered to the witness as soon as practicable.

(4) The order granting immunity shall continue in effect until the judge who summoned the jury or his or her successor, in his or her discretion and upon the prosecuting attorney's application, enters an order terminating the order granting immunity and informs the witness of the order of termination.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1999, Act 250, Imd. Eff. Dec. 28, 1999.

767.19c Grand jury; witness, failing to appear, contempt; penalty; purging.

Sec. 19c. Any witness who neglects or refuses to appear or testify or both in response to a summons of the grand jury or to answer any questions before the grand jury concerning any matter or thing of which the witness has knowledge concerning matters before the grand jury after service of a true copy of an order granting the witness immunity as to such matters shall be guilty of a contempt and after a public hearing in open court and conviction of such contempt shall be fined not exceeding $10,000.00 or imprisoned not exceeding 1 year, or both. If the witness thereafter appears before the court to purge himself of such contempt, the court shall order the recalling of the grand jury to afford such opportunity, and after appearance of the witness before the grand jury upon a transcript of the testimony there and then given, the witness shall be brought before the court and after examination, the court shall determine whether the witness has purged himself of the contempt and shall commute the sentence upon a finding that the witness has purged himself.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

Constitutionality: In People v David Johnson, 407 Mich 134; 283 NW2d 632 (1979), the Michigan supreme court held that an indigent witness has a right under the due process clause of the Michigan constitution to the assistance and appointment of counsel at contempt proceedings in respect to a citizens' grand jury which may result in incarceration.

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767.19d Grand jury; perjury.

Sec. 19d. A person who wilfully swears falsely under oath in regard to any matter or thing upon which he is being examined is subject to the penalties of perjury as prescribed by law.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

767.19e Grand jury; right of witness to legal counsel; communications between witness and legal counsel.

Sec. 19e. A witness called before the grand jury is at all times entitled to legal counsel not involving delay. The witness may discuss fully with his or her legal counsel any matter relating to the witness's part in the inquiry without being subject to citation for contempt. The witness has the right to have legal counsel present in the room in which the inquiry is held. All communications between the witness and his or her legal counsel are subject to the requirements of section 19f, and any disclosure of those communications by the witness or his or her legal counsel in violation of section 19f is punishable as provided in section 19f.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.19f Grand jury; publication of testimony prohibited; penalty, exceptions.

Sec. 19f. (1) Except as otherwise provided by law, a person shall not publish or make known to any other person any testimony or exhibits obtained or used, or any proceeding conducted, in connection with any grand jury inquiry. A person who violates this subsection is guilty of a misdemeanor punishable by imprisonment in the county jail for not more than 1 year or by a fine of not more than $1,000.00, or both.

(2) Subsection (1) does not apply to any of the following:

(a) Communications between prosecuting officers for the purpose of presenting evidence before the grand jury, for the purpose of reviewing evidence presented to the grand jury for prospective prosecution, or for any other purpose involving the execution of a public duty.

(b) Communications between law enforcement officers in cases involving violations of chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z.

(3) Subsection (1) applies to, but its application is not limited to, applications and petitions for and orders of immunity and to any transcript of testimony that may be delivered to a witness pursuant to his or her grant of immunity, except that the witness may be privileged to disclose such application, petition, order, and transcript to his or her attorney.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 2002, Act 114, Eff. May 1, 2002.

767.19g Furnishing testimony of witness to person indicted by grand jury.

Sec. 19g. (1) The testimony of any witness before the grand jury shall not be made available to any person indicted by such grand jury prior to the time of trial of the indictment except as otherwise provided by this section.

(2) After the filing of an indictment returned by a citizen's grand jury but prior to trial, upon motion of the defendant made not later than 20 days after the arraignment of the defendant on the indictment, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony which the defendant gave before the grand jury relative to the offense with which he is charged and may direct the prosecuting attorney to furnish to the defendant the testimony which any witness who will testify at the trial gave before the grand jury relative to the offense with which the defendant is charged except those portions adjudged irrelevant, immaterial or excluded for other good cause shown. If the trial judge directs the prosecuting attorney to furnish to the defendant a copy of a witness's testimony, which has been requested in accordance with this subsection, the prosecuting attorney shall furnish such testimony not later than 10 days prior to the time of trial or shall not call that witness to testify at the defendant's trial.

(3) If the trial judge has not directed the prosecuting attorney to furnish a copy of a witness's testimony to the defendant prior to trial, then at such time during the course of the trial when the direct examination of such a witness has been completed, a copy of the witness's testimony before the grand jury relative to the offense with which the defendant is charged, upon the request of the defendant, shall be furnished by the prosecuting attorney to the defendant.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1972, Act 53, Imd. Eff. Feb. 21, 1972.

767.20 Grand jury; examination of witnesses; advice on legal matters.

Sec. 20. If requested by the grand jury, the prosecuting attorney or attorney general shall examine witnesses in the presence of the grand jury, and advise the grand jury on legal matters.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17234;—CL 1948, 767.20;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

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Former law: See section 14 of Ch. 164 of R.S. 1846, being CL 1857, § 6023; CL 1871, § 7892; How., § 9503; CL 1897, § 11888; and CL 1915, § 15715.

767.21 Grand jury; prosecutor to subpoena witness.

Sec. 21. The prosecuting attorney and other prosecuting officers, may, in all cases, issue subpoenas for witnesses to appear and testify on behalf of the people of this state; and the subpoena, under the hand of such officer, shall have the same force and be obeyed in the same manner and under the same penalties, as if issued by the clerk or any magistrate.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17235;—CL 1948, 767.21.

Former law: See section 15 of Ch. 164 of R.S. 1846, being CL 1857, § 6024; CL 1871, § 7893; How., § 9504; CL 1897, § 11889; and CL 1915, § 15716.

767.22 Grand jury; appearances to give information; deliberations or vote of grand jury.

Sec. 22. The prosecuting attorney, attorney general, or other prosecuting officer, shall be allowed at all times to appear before the grand jury on his or her request to give information to the grand jury regarding any matter cognizable by the grand jury. No person other than a grand juror shall be present during the deliberations of the grand jury or during the vote of the grand jury upon any matter before the grand jury.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17236;—CL 1948, 767.22;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

Former law: See section 16 of Ch. 164 of R.S. 1846, being CL 1857, § 6025; CL 1871, § 7894; How., § 9505; CL 1897, § 11890; and CL 1915, § 15717.

767.23 Grand jury; indictment, vote required; true bill.

Sec. 23. No indictment can be found without the concurrence of at least 9 grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17237;—CL 1948, 767.23;—Am. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

Former law: See section 17 of Ch. 164 of R.S. 1846, being CL 1857, § 6026; CL 1871, § 7895; How., § 9506; CL 1897, § 11891; and CL 1915, § 15718.

767.23a Grand jury; indictment; specifying county where offense took place.

Sec. 23a. A grand jury convened under section 7c may indict a person for an offense committed in any county over which the grand jury has jurisdiction. If the grand jury indicts a person under this subsection, the grand jury shall specify in the indictment the county or counties in which the offense took place.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.24 Indictment; crimes; "Theresa Flores's Law"; definitions; Brandon D'Annunzio's law; findings and filing; exceptions for victims under 18; extension or tolling.

Sec. 24. (1) An indictment for any of the following crimes may be found and filed at any time:

(a) Murder, conspiracy to commit murder, or solicitation to commit murder, or criminal sexual conduct in the first degree.

(b) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a, that is punishable by imprisonment for life.

(c) A violation of chapter LXVIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h, that is punishable by imprisonment for life.

(d) A violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, that is punishable by imprisonment for life.

(2) An indictment for a violation or attempted violation of section 13, 462b, 462c, 462d, or 462e of the Michigan penal code, 1931 PA 328, MCL 750.13, 750.462b, 750.462c, 750.462d, and 750.462e, may be found and filed within 25 years after the offense is committed. This subsection shall be known as "Theresa Flores's Law".

(3) Except as provided in subsection (4) for a violation of section 520c or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520d, in which the victim is under 18 years of age, an indictment for a violation or attempted violation of section 136, 136a, 145c, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136, 750.136a, 750.145c, 750.520c, 750.520d, 750.520e, and 750.520g, may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.

(b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any

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time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later.

(4) An indictment for a violation of section 520c or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520d, in which the victim is under 18 years of age may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 15 years after the offense is committed or by the alleged victim's twenty-eighth birthday, whichever is later.

(b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's twenty-eighth birthday, whichever is later.

(5) As used in subsections (3) and (4):

(a) "DNA" means human deoxyribonucleic acid.

(b) "Identified" means the individual's legal name is known and he or she has been determined to be the source of the DNA.

(6) An indictment for kidnapping, extortion, assault with intent to commit murder, attempted murder, manslaughter, armed robbery, or first-degree home invasion may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed.

(b) If the offense is reported to a police agency within 1 year after the offense is committed and the individual who committed the offense is unknown, an indictment for that offense may be found and filed within 10 years after the individual is identified. This subsection shall be known as Brandon D'Annunzio's law. As used in this subsection, "identified" means the individual's legal name is known.

(7) An indictment for identity theft or attempted identity theft may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 6 years after the offense is committed.

(b) If evidence of the offense is obtained and the individual who committed the offense has not been identified, an indictment may be found and filed at any time after the offense is committed, but not more than 6 years after the individual is identified.

(8) As used in subsection (7):

(a) "Identified" means the individual's legal name is known.

(b) "Identity theft" means 1 or more of the following:

(*i*) Conduct prohibited in section 5 or 7 of the identity theft protection act, 2004 PA 452, MCL 445.65 and 445.67.

(*ii*) Conduct prohibited under former section 285 of the Michigan penal code, 1931 PA 328.

(9) An indictment for false pretenses involving real property, forgery or uttering and publishing of an instrument affecting an interest in real property, or mortgage fraud may be found and filed within 10 years after the offense was committed or within 10 years after the instrument affecting real property was recorded, whichever occurs later.

(10) All other indictments may be found and filed within 6 years after the offense is committed.

(11) Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed.

(12) The extension or tolling, as applicable, of the limitations period provided in this section applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17238;—Am. 1935, Act 144, Eff. Sept. 21, 1935;—CL 1948, 767.24;—Am. 1954, Act 100, Imd. Eff. Apr. 14, 1954;—Am. 1987, Act 255, Eff. Mar. 30, 1988;—Am. 2001, Act 6, Imd. Eff. May 2, 2001;—Am. 2002, Act 119, Eff. Apr. 22, 2002;—Am. 2004, Act 458, Eff. Mar. 1, 2005;—Am. 2005, Act 35, Imd. Eff. June 7, 2005;—Am. 2011, Act 203, Imd. Eff. Oct. 20, 2011;—Am. 2012, Act 363, Eff. Mar. 28, 2013;—Am. 2014, Act 324, Eff. Jan. 14, 2015;—Am. 2017, Act 79, Eff. Oct. 9, 2017;—Am. 2018, Act 148, Eff. Aug. 14, 2018;—Am. 2018, Act 182, Eff. Sept. 10, 2018.

Compiler's note: Enacting section 1 of Act 6 of 2001 provides:

"Enacting section 1. The legislature intends that the extension or tolling, as applicable, of the limitations period provided in this amendatory act shall apply to any of those violations for which the limitations period has not expired at the time this amendatory act takes effect."

Former law: See section 18 of Ch. 164 of R.S. 1846, being CL 1857, § 6027; CL 1871, § 7896; How., § 9507; CL 1897, § 11892; and CL 1915, § 15719.

767.25 Indictment by grand jury; indorsement; presentment; return; filing; inspection.

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Sec. 25. (1) If a person is indicted by a grand jury, the grand jury shall indorse all of the names of the complainants and all of the names of the witnesses on the back of the indictment. The foreperson of the grand jury shall present the indictment to the court in the presence of the grand jury.

(2) If a person is indicted by a grand jury convened under section 7c, the indictment shall remain with the court having jurisdiction over the offense, after the indictment is certified and filed with that court.

(3) If the grand jury indicts a person under subsection (1), the judge presiding over the grand jury proceedings shall return the indictment to any court having proper jurisdiction over the offense.

(4) Except as otherwise provided in this section, the indictment shall be filed with the court and remain with the court as a public record.

(5) If a person is indicted for a felony and the person is not in custody, the indictment shall not be open to inspection by any person other than the attorney general or the prosecuting attorney until the defendant is in custody.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17239;—CL 1948, 767.25;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

Former law: See section 19 of Ch. 164 of R.S. 1846, being CL 1857, § 6028; CL 1871, § 7897; How., § 9508; CL 1897, § 11893; and CL 1915, § 15720.

767.26 Discharge of accused in absence of indictment.

Sec. 26. Any person held in prison on any charge of having committed a crime, shall be discharged if he be not indicted before the end of the second term of the court at which he is held to answer unless it shall appear to the satisfaction of the court that the witnesses on the part of the people have been enticed or kept away, or are detained and prevented from attending the court by sickness or some inevitable accident, and except in the case provided for in the next section.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17240;—CL 1948, 767.26.

Former law: See section 20 of Ch. 164 of R.S. 1846, being CL 1857, § 6029; CL 1871, § 7898; How., § 9509; CL 1897, § 11894; and CL 1915, § 15721.

767.27 Repealed. 1966, Act 266, Eff. Mar. 10, 1967.

Compiler's note: The repealed section pertained to procedure followed when person accused of felony was found to be insane or when he was acquitted of felony upon grounds of insanity.

767.27a-767.27c Repealed. 1974, Act 258, Eff. Aug. 6, 1975.

Compiler's note: The repealed sections pertained to persons incompetent to stand trial.

767.28 Indictment; right of indictee to copy.

Sec. 28. Every person indicted for any offense, who shall have been arrested upon process issued upon such indictment or who shall have duly entered into recognizance to appear and answer to such indictment shall, on demand, be entitled to a copy of the indictment and of all endorsements thereon.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17242;—CL 1948, 767.28.

Former law: See section 22 of Ch. 164 of R.S. 1846, being CL 1857, § 6031; CL 1871, § 7900; How., § 9511; CL 1897, § 11896; and CL 1915, § 15723.

767.29 Discontinuance or abandonment of indictment.

Sec. 29. A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes. If a defendant is charged with a major controlled substance offense, in addition to the requirements of this section, the requirements of section 7415 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7415 of the Michigan Compiled Laws, shall apply upon the prosecuting attorney's motion to dismiss the charge.

History: 1927, Act 175, Eff. Sept. 5, 1927;—Am. 1929, Act 24, Imd. Eff. Apr. 2, 1929;—CL 1929, 17243;—CL 1948, 767.29;—Am. 1978, Act 77, Eff. Sept. 1, 1978;—Am. 1988, Act 90, Imd. Eff. Mar. 30, 1988.

Former law: See section 23 of Ch. 164 of R.S. 1846, being CL 1857, § 6032; CL 1871, § 7901; How., § 9512; CL 1897, § 11897; and CL 1915, § 15724.

767.30 Warrant for arrest of indictee; issuance, persons.

Sec. 30. A warrant for the arrest of any person indicted may be issued by the court to which the indictment shall be presented, or by any justice of the supreme court, or judge of the court for the county in which such indictment shall be found, or judge of any recorder's court or any court of record having jurisdiction of criminal causes, either in vacation or during the sitting of any such court; but such warrant shall not be issued

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by any other officer.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17244;—CL 1948, 767.30.

Former law: See section 24 of Ch. 164 of R.S. 1846, being CL 1857, § 6033; CL 1871, § 7902; How., § 9513; CL 1897, § 11898; and CL 1915, § 15725.

767.31 Warrant for arrest of indictee; persons to whom directed; place of execution.

Sec. 31. Every warrant shall be directed to the sheriff, constable, police officer or peace officer of the county in which the indictment shall be found, and may be executed in any part of this state.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17245;—CL 1948, 767.31.

Former law: See section 25 of Ch. 164 of R.S. 1846, being CL 1857, § 6034; CL 1871, § 7903; How., § 9514; CL 1897, § 11899; and CL 1915, § 15726.

767.32 Subpoena; witness for defendant; issuance by county clerk, fee.

Sec. 32. The clerk of any county in which an indictment shall be found, upon the application of the defendant, and without requiring any fees, shall issue subpoenas as well during the sitting of any court as in vacation, for such witnesses as the defendant may require, whether residing in or out of the county.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17246;—CL 1948, 767.32.

Former law: See section 26 of Ch. 164 of R.S. 1846, being CL 1857, § 6035; CL 1871, § 7904; How., § 9515; CL 1897, § 11900; and CL 1915, § 15727.

767.33 Subpoena; witness for defendant; disobedience; penalty, civil liability.

Sec. 33. Disobedience to any subpoena issued pursuant to the foregoing provisions, shall be punished in the same manner and upon the like proceedings, as provided by law in other cases; and the person guilty of such disobedience shall be liable to the party at whose instance such subpoena issued in the same manner and to the like extent as in cases of subpoenas issued in any civil suit.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17247;—CL 1948, 767.33.

Former law: See section 27 of Ch. 164 of R.S. 1846, being CL 1857, § 6036; CL 1871, § 7905; How., § 9516; CL 1897, § 11901; and CL 1915, § 15728.

767.34 Witness; issuance of capias.

Sec. 34. Any circuit court or any court of record shall have power to issue capiases, in the first instance, for any witness or witnesses in criminal cases, when it shall satisfactorily appear that such witness or witnesses are material and that there will be danger of the loss of their testimony unless such writ be issued.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17248;—CL 1948, 767.34.

Former law: See section 1 of Act 209 of 1871, being CL 1871, § 7961; How., § 9574; CL 1897, § 11958; and CL 1915, § 15831.

767.35 Material witness in criminal case; danger of loss of testimony; requiring witness to enter into recognizance with surety; commitment to jail.

Sec. 35. When it appears to a court of record that a person is a material witness in a criminal case pending in a court in the county and that there is a danger of the loss of testimony of the witness unless the witness furnishes bail or is committed if he or she fails to furnish bail, the court shall require the witness to be brought before the court. After giving the witness an opportunity to be heard, if it appears that the witness is a material witness and that there is a danger of the loss of his or her testimony unless the witness furnishes bail or is committed, the court may require the witness to enter into a recognizance with a surety in an amount determined by the court for the appearance of the witness at an examination or trial. If the witness fails to recognize, he or she shall be committed to jail by the court, until he or she does recognize or is discharged by order of the court.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17249;—CL 1948, 767.35;—Am. 1980, Act 506, Imd. Eff. Jan. 22, 1981.

Former law: See sections 19, 20, and 22 of Ch. 163 of R.S. 1846, being CL 1857, §§ 5995, 5996, and 5998; CL 1871, §§ 7861, 7862, and 7864; How., §§ 9472, 9473, and 9475; CL 1897, §§ 11856, 11857, and 11859; CL 1915, §§ 15683, 15684, and 15686; and Act 77 of 1871.

767.36 Witness; subpoena by prosecution; necessity of fee.

Sec. 36. It shall not be necessary to pay or tender any fees whatever to any witness subpoenaed on the part of the people of this state in support of any prosecution, but such witness shall be bound to attend as if the fees allowed by law to witnesses in civil actions had been duly paid to him.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17250;—CL 1948, 767.36.

Former law: See section 28 of Ch. 163 of R.S. 1846, being CL 1857, § 6037; CL 1871, § 7906; How., § 9517; CL 1897, § 11902; and CL 1915, § 15729.

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767.37 Indictee; plea on arraignment.

Sec. 37. When any person shall be arraigned upon an indictment, it shall not be necessary in any case to ask him how he will be tried but if, on being so arraigned, he shall refuse to plead or answer or shall not confess the indictment to be true, the court shall order a plea of not guilty to be entered and thereupon the proceedings shall be the same as if he had pleaded not guilty to the indictment. At the arraignment of any person upon an indictment or upon the charge in a warrant, complaint or information the court may accept a plea of nolo contendere and if such a plea is accepted, the court shall proceed as if he had pleaded guilty.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17251;—CL 1948, 767.37;—Am. 1969, Act 334, Imd. Eff. Nov. 10, 1969.

Former law: See section 29 of Ch. 163 of R.S. 1846, being CL 1857, § 6038; CL 1871, § 7907; How., § 9518; CL 1897, § 11903; and CL 1915, § 15730.

767.37a Arraignments; use of 2-way interactive video technology; access to courtroom; court record.

Sec. 37a. (1) A judge or district court magistrate may conduct initial criminal arraignments and set bail by 2-way interactive video technology communication between a court facility and a prison, jail, or other place where a person is imprisoned or detained. A judge or district court magistrate may conduct initial criminal arraignments and set bail on weekends, holidays, or at any time as determined by the court.

(2) A 2-way interactive video technology system used under this section shall enable the accused and the judge or district court magistrate to see, hear, and communicate with each other simultaneously, and shall enable defense counsel and the prosecuting attorney, if present, to be heard by and to communicate simultaneously with the accused, the judge or district court magistrate, and opposing counsel.

(3) Except as otherwise provided by law, the public shall have access to the courtroom or other location, that allows them to view and hear the proceedings.

(4) If proceedings conducted under this section are not recorded by an individual certified by the state court administrative office, the court shall record and maintain an original audiovisual recording of the entire proceedings. A recording made under this subsection shall become part of the court record.

(5) This act does not prohibit the use of 2-way interactive video technology for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use.

History: Add. 1994, Act 229, Imd. Eff. June 30, 1994;—Am. 2006, Act 655, Imd. Eff. Jan. 9, 2007.

767.38 Indictee; right to trial or admission to bail.

Sec. 38. Every person held in prison upon an indictment shall, if he require it, be tried at the next term of court after the expiration of 6 months from the time when he was imprisoned, or shall be bailed upon his own recognizance, unless it shall appear to the satisfaction of the court that the witnesses on behalf of the people have been enticed or kept away, or are detained and prevented from attending court by sickness, or some inevitable accident.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17252;—CL 1948, 767.38.

Former law: See section 30 of Ch. 163 of R.S. 1846, being CL 1857, § 6039; CL 1871, § 7908; How., § 9519; CL 1897, § 11904; and CL 1915, § 15731.

767.39 Abolition of distinction between accessory and principal.

Sec. 39. Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17253;—CL 1948, 767.39.

Former law: See sections 3 and 5 of Ch. 161 of R.S. 1846, being CL 1857, §§ 5939 and 5941; CL 1871, §§ 7805 and 7807; How., §§ 9415 and 9417; CL 1897, §§ 11776 and 11778; CL 1915, §§ 15603 and 15605; and section 19 of Act 77 of 1855, being CL 1857, § 6065; CL 1871, § 7934; How., § 9545; CL 1897, § 11930; CL 1915, § 15757.

767.40 Information; filing; subscription.

Sec. 40. All informations shall be filed in the court having jurisdiction of the offense specified in the information after the proper return is filed by the examining magistrate and by the prosecuting attorney of the county as informant. The information shall be subscribed by the prosecuting attorney or in his or her name by an assistant prosecuting attorney.

History: 1927, Act 175, Eff. Sept. 5, 1927;—Am. 1929, Act 24, Imd. Eff. Apr. 2, 1929;—CL 1929, 17254;—CL 1948, 767.40;—Am. 1955, Act 184, Eff. Oct. 14, 1955;—Am. 1961, Act 11, Eff. Sept. 8, 1961;—Am. 1986, Act 46, Eff. July 1, 1986.

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Former law: See sections 2 and 3 of Act 138 of 1859, being CL 1871, §§ 7938 and 7939; How., §§ 9549 and 9550; CL 1897, §§ 11934 and 11935; and CL 1915, §§ 15761 and 15762.

767.40a Attaching list of witnesses to filed information; disclosing names of res gestae witnesses; sending list to defendant or defendant's attorney; additions or deletions from list; request for assistance in locating and serving process on witness; objection to request; hearing; impeachment or cross-examination of witness.

Sec. 40a. (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

(6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party.

History: Add. 1941, Act 336, Eff. Jan. 10, 1942;—CL 1948, 767.40a;—Am. 1986, Act 46, Eff. July 1, 1986.

767.41 Inquiry by prosecuting attorney into preliminary examination; statement of reasons for not filing information; direction by court to file proper information.

Sec. 41. The prosecuting attorney of the proper county shall inquire into and make full examination of all the facts and circumstances connected with a case of preliminary examination as provided by law, concerning the commission of an offense where the offender is committed to jail or becomes recognized or held to bail. If the prosecuting attorney determines in a case other than a major controlled substance offense that an information ought not be filed, he shall make and subscribe a statement, in writing, containing his reasons in fact and in law, for not filing an information in the case and shall file that statement with the clerk of the court at and during the term of the court at which the offender is held for appearance. The court may examine the statement, together with the evidence filed in the case and if, upon examination, the court is not satisfied with the statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17255;—CL 1948, 767.41;—Am. 1978, Act 77, Eff. Sept. 1, 1978.

Former law: See section 6 of Act 138 of 1859, being CL 1871, § 7942; How., § 9553; CL 1897, § 11938; CL 1915, § 15765; and Act 147 of 1863.

767.42 Preliminary examination as prerequisite to filing of information; remand where right waived without benefit of counsel; fugitives from justice.

Sec. 42. (1) An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination. If any person waives his statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a magistrate for a preliminary examination.

(2) An information may be filed without a preliminary examination against a fugitive from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17256;—CL 1948, 767.42;—Am. 1957, Act 38, Eff. Sept. 27, 1957;—Am. 1974, Act 63, Eff. May 1, 1974.

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Compiler's note: Section 2 of Act 63 of 1974 provides: "To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Former law: See section 8 of Act 138 of 1859, being CL 1871, § 7944; How., § 9555; CL 1897, § 11940; and CL 1915, § 15767.

767.43 Indictment; form generally.

Sec. 43. The indictment may be substantially in the following form:

In the ..... (here give the name of the court) ..... term, 19..... the People of the state of Michigan vs. (here give the name or the description of the accused.)

The grand jury of the county or counties of ..... presents that (here give the name or the description of the accused), (here set forth the offense and transaction, according to the rules herein enunciated).

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17257;—CL 1948, 767.43;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.44 Indictment; forms for particular offenses; bill of particulars.

Sec. 44. The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:

Adultery—A.B., a married man, committed adultery with C.D.; or A.B. committed adultery with C.D., a married woman.

Affray—A.B. and C.D. made an affray.

Assault—A.B. assaulted C.D.

Assault and Battery—A.B. committed an assault and battery on C.D.

Assault with intent—A.B. assaulted C.D. with intent to murder, or kill, or rob, or maim, or rape (as the case may be).

Arson—A.B. committed arson by burning the dwelling house of C.D.

Attempt—A.B. attempted to steal from C.D.; A.B. attempted to commit larceny of the goods of C.D.; A.B. attempted to commit burglary of a building belonging to C.D. (as the case may be).

Burglary—A.B. committed burglary of the house of C.D. A.B. broke and entered the dwelling house of C.D. in the night time with intent to commit larceny, or murder, or robbery therein (as the case may be).

Conspiracy—A.B. and C.D. conspired together to murder E.F. or to steal the property of E.F. or to rob E.F. (as the case may be).

Forgery—A.B. forged a certain instrument purporting to be a promissory note (or describe instrument or give its tenor or substance).

Larceny—Embezzlement and false pretenses. A.B. stole from C.D. 1 horse of the value of more than 100 dollars.

Murder—A.B. murdered C.D.

Manslaughter—A.B. killed C.D.

Perjury—A.B. appeared as a witness in a case between C.D. and E.F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony).

Rape—A.B. raped or ravished C.D.

Rape (statutory)—A.B. raped or ravished C.D., she C.D. being then under the age of (statutory age) years.

Robbery Armed—A.B. robbed C.D., A.B. being armed.

Robbery—A.B. robbed C.D., A.B. not being armed.

Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17258;—CL 1948, 767.44.

Former law: See section 2 of Act 77 of 1855, being CL 1857, § 6048; CL 1871, § 7917; How., § 9528; CL 1897, § 11913; and CL 1915, § 15740.

767.45 Contents of indictment or information; felony in which motor vehicle used.

Sec. 45. (1) The indictment or information shall contain all of the following:

(a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.

(b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.

(c) That the offense was committed in the county or within the jurisdiction of the court. No verdict shall be

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set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.

(2) If a person is accused of committing or attempting to commit a felony in which a motor vehicle was used, other than a felony specified in section 732(4) or 319(1)(a) to (f) of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.732 and 257.319 of the Michigan Compiled Laws, the prosecuting attorney shall include on the complaint and information the statement, "You are charged with the commission of a felony in which a motor vehicle was used. If you are convicted and the judge finds that the conviction is for a felony in which a motor vehicle was used, as defined in section 319 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.319 of the Michigan Compiled Laws, your driver's license shall be suspended by the secretary of state for a period of 90 days to 2 years." As used in this subsection, "felony in which a motor vehicle was used" means a felony during the commission of which the person accused operated a motor vehicle and while operating the vehicle presented real or potential harm to persons or property and 1 or more of the following circumstances existed:

(*i*) The vehicle was used as an instrument of the felony.

(*ii*) The vehicle was used to transport a victim of the felony.

(*iii*) The vehicle was used to flee the scene of the felony.

(*iv*) The vehicle was necessary for the commission of the felony.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17259;—CL 1948, 767.45;—Am. 1988, Act 123, Eff. July 1, 1988.

Former law: See sections 7 and 13 of Act 77 of 1855, being CL 1857, §§ 6053 and 6059; CL 1871, §§ 7922 and 7928; How., §§ 9533 and 9539; CL 1897, §§ 11918 and 11924; and CL 1915, §§ 15745 and 15751.

767.46 Indictment; amendment of certain parts.

Sec. 46. Any defect, error or omission in the caption, commencement or conclusion of an indictment may be amended.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17260;—CL 1948, 767.46.

767.47 Indictment; effect of repugnant and unnecessary allegations.

Sec. 47. No indictment is invalid by reason of any repugnant allegations contained therein, provided that an offense is charged. All unnecessary allegations shall be rejected as surplusage.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17261;—CL 1948, 767.47.

Former law: See section 8 of Act 77 of 1855, being CL 1857, § 6054; CL 1871, § 7923; How., § 9534; CL 1897, § 11919; and CL 1915, § 15746.

767.48 Indictment; necessity of negativing statutory exception.

Sec. 48. No indictment for any offense created or defined by statute shall be deemed objectionable for the reason that it fails to negative any exception, excuse or proviso contained in the statute creating or defining the offense. The fact that the charge is made shall be considered as an allegation that no legal excuse for the doing of the act exists in the particular case.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17262;—CL 1948, 767.48.

767.49 Indictment; statement of name of individual, association or corporation.

Sec. 49. In any indictment it is sufficient for the purpose of identifying the accused to state his true name, to state the name, appellation or nickname by which he has been or is known, to state a fictitious name, or to describe him as a person whose name is unknown or to describe him in any other manner. In stating the true name or the name by which the accused has been or is known or a fictitious name, it is sufficient to state a surname, a surname and 1 or more christian name or names, or a surname and 1 or more abbreviations or initials of a christian name or names. It is sufficient for the purpose of identifying any group or association of persons, not incorporated, to state the proper name of such group or association (if such there be), to state any name or designation by which the group or association has been or is known, to state the names of all the persons in such group or association or of 1 or more of them, or to state the name or names of 1 or more persons in such group or association referring to the other or others as "another" or "others". It is sufficient for the purpose of identifying a corporation to state the corporate name of such corporation, or any name or designation by which such corporation has been or is known. It is not necessary for the purpose of identifying any group or association of persons or any corporation to state or prove the legal form of such group or association of persons or of such corporation. In no case is it necessary to aver or prove that the true name of any person, group or association of persons or corporation is unknown to the grand jury, complainant or prosecuting officer. If in the course of the trial the true name of any person, group or association of persons or corporation identified otherwise than by the true name, is disclosed by the evidence, the court shall on motion

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of the accused or of the prosecuting attorney, and may without such motion, insert the true name in the indictment wherever the name appears otherwise.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17263;—CL 1948, 767.49.

Former law: See sections 8 and 14 of Act 77 of 1855, being CL 1857, §§ 6054 and 6060; CL 1871, §§ 7923 and 7929; How., §§ 9534 and 9540; CL 1897, §§ 11919 and 11925; and CL 1915, §§ 15746 and 15752.

767.50 Indictment; description of instrument.

Sec. 50. Whenever in an indictment an allegation relative to any instrument which consists wholly or in part of writing or figures, pictures or designs, is necessary, it is sufficient to describe such instrument by any name or description by which it is usually known or by its purport without setting forth a copy or facsimile of the whole or any part thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17264;—CL 1948, 767.50.

Former law: See section 10 of Act 77 of 1855, being CL 1857, § 6056; CL 1871, § 7925; How., § 9536; CL 1897, § 11921; and CL 1915, § 15748.

767.51 Indictment; allegation of time.

Sec. 51. Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17265;—CL 1948, 767.51.

Former law: See section 8 of Act 77 of 1855, being CL 1857, § 6054; CL 1871, § 7923; How., § 9534; CL 1897, § 11919; and CL 1915, § 15746.

767.52 Indictment; allegation of means of offense.

Sec. 52. The indictment need contain no allegation of the means by which the offense was committed except insofar as the means is an element of the offense.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17266;—CL 1948, 767.52.

767.53 Indictment; allegation of value or price.

Sec. 53. The indictment need not allege the value or price of any property unless the value or price is an element of the offense and in such case it is sufficient to aver that the value or price of the property is less than, equals or exceeds the certain value or price which determines the offense or grade thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17267;—CL 1948, 767.53.

Former law: See sections 8 and 16 of Act 77 of 1855, being CL 1857, §§ 6054 and 6062; CL 1871, §§ 7923 and 7931; How., §§ 9534 and 9542; CL 1897, §§ 11919 and 11927; and CL 1915, §§ 15746 and 15754.

767.54 Indictment; ownership; allegation; proof.

Sec. 54. The indictment need not allege the ownership of any property unless such ownership is necessary to indicate the offense. Proof of possession or right of possession or lien or special property in the person alleged to be the owner shall be sufficient to sustain an allegation of ownership in such person.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17268;—CL 1948, 767.54.

Former law: See section 10 of Ch. 161 of R.S. 1846, being CL 1857, § 5946; CL 1871, § 7812; How., § 9422; CL 1897, § 11783; and CL 1915, § 15610.

767.55 Indictment; allegation of certain matters in the alternative.

Sec. 55. In an indictment for an offense which is constituted of 1 or more of several acts, or which may be committed by 1 or more of several means, or with 1 or more of several intents, or which may produce 1 or more of several results, 2 or more of such acts, means, intents or results may be charged in the alternative.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17269;—CL 1948, 767.55.

767.56 Indictment; allegation of prior conviction.

Sec. 56. Whenever it is necessary to allege a prior conviction of the accused in an indictment, it is sufficient to allege that the accused was at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, if it have one, or stating the substantial elements thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17270;—CL 1948, 767.56.

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767.57 Pleading; statute or statutory right.

Sec. 57. In pleading a statute or a right derived therefrom it is sufficient to refer to the statute by its title, or in any other manner which identifies the statute and the court must thereupon take judicial notice thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17271;—CL 1948, 767.57.

Former law: See section 13 of Act 77 of 1855, being CL 1857, § 6059; CL 1871, § 7928; How., § 9539; CL 1897, § 11924; and CL 1915, § 15751.

767.58 Pleading; judgment or proceeding.

Sec. 58. In pleading a judgment or other determination of, or a proceeding before any court or officer, civil or military, it is unnecessary to allege the facts conferring jurisdiction on such court or officer, but it is sufficient to allege generally that such judgment or determination was duly given or made or such proceedings had.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17272;—CL 1948, 767.58.

Former law: See section 17 of Act 77 of 1855, being CL 1857, § 6063; CL 1871, § 7932; How., § 9543; CL 1897, § 11928; and CL 1915, § 15755.

767.59 Indictment; unnecessary formal words and phrases.

Sec. 59. The indictment need not allege that the offense was committed or the act done "feloniously" or "traitorously" or "unlawfully" or "with force of arms" or "with a strong hand," nor need it use any phrase of like kind otherwise than to characterize the offense, nor need it allege that the offense was committed or the act done "burglariously", "wilfully", "knowingly", "maliciously", "negligently" nor need it otherwise characterize the manner of the commission of the offense unless such description is necessary to indicate the offense. The indictment need not contain the words "contrary to the statute", "as appears by the record", or any other words of similar import.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17273;—CL 1948, 767.59.

Former law: See section 34 of Ch. 164 of R.S. 1846, being CL 1857, § 6043; CL 1871, § 7912; How., § 9523; CL 1897, § 11908; CL 1915, § 15735; and section 8 of Act 77 of 1855, being CL 1857, § 6054; CL 1871, § 7923; How., § 9534; CL 1897, § 11908; CL 1915, § 15735.

767.60 Indictment; allegations in embezzlement, larceny and false pretense cases.

Sec. 60. In any prosecution for the offenses of embezzlement, larceny, larceny by conversion, or obtaining money or property by false pretenses under the statutes of this state, it shall be sufficient to allege generally in the information or indictment the embezzlement, larceny, larceny by conversion or obtaining by false pretenses of personal property to a certain amount without specifying the particulars of such embezzlement, larceny, larceny by conversion or obtaining by false pretenses, and on the trial evidence may be given of any such embezzlement, larceny, larceny by conversion or obtaining money or property by false pretenses within 6 months next after the time stated in the information or indictment, and it shall be sufficient to maintain the charge in the information or indictment and shall not be deemed at variance if it shall be proved that any personal property was fraudulently embezzled, stolen or obtained by false pretenses within the said period of 6 months.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17274;—CL 1948, 767.60.

Former law: See section 9 of Ch. 161 of R.S. 1846, being CL 1857, § 5945; CL 1871, § 7811; How., § 9421; CL 1897, § 11782; CL 1915, § 15609; and Act 39 of 1927.

767.61 Indictment; description of money, bonds, mortgage and similar instrument in offense relating thereto.

Sec. 61. In an indictment for larceny, larceny by conversion, embezzlement, robbery, obtaining money by false pretenses, receiving stolen property or for any other criminal conversion or misappropriation where the offense relates to money or currency, it shall be sufficient to describe the same under the terms "money", "currency", or "dollars" without specifying the particular character, number, denomination, kind, species, nature or value thereof. Where such indictment relates to promissory notes, certificates of stock, bonds, bills of lading, mortgages or any other negotiable or non-negotiable instruments, or securities or evidence of debt or property, it is sufficient to designate the same by general description without specifying the particular number or denomination thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17275;—CL 1948, 767.61.

Former law: See section 15 of Act 77 of 1855, being CL 1857, § 6061; CL 1871, § 7930; How., § 9541; CL 1897, § 11926; and CL 1915, § 15753.

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767.61a Indictment; offense committed by sexually delinquent person; prosecution; expert testimony provided; examination of witnesses; testimony in open court; record; punishment.

Sec. 61a. In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in section 35 of chapter 8 of this act, and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense.

History: Add. 1952, Act 234, Eff. Sept. 18, 1952.

767.62 Place of indictment, trial and conviction; receiver of stolen property.

Sec. 62. In the cases where any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding such theft was committed in another county.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17276;—CL 1948, 767.62.

Former law: See section 31 of Ch. 164 of R.S. 1846, being CL 1857, § 6040; CL 1871, § 7909; How., § 9520; CL 1897, § 11905; and CL 1915, § 15732.

767.63 Place of indictment; removal of stolen property from another county.

Sec. 63. When any property shall be stolen in 1 county and brought into another, the offender may be indicted, tried and convicted in the county into which such stolen property was brought, in the same manner as if such property had been originally stolen in that county; and when such property shall have been taken by burglary or robbery the offender may be indicted, tried and convicted of said burglary or robbery, in the county into which such property was brought in the same manner as if such burglary or robbery had been committed in that county.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17277;—CL 1948, 767.63.

Former law: See section 32 of Ch. 164 of R.S. 1846, being CL 1857, § 6041; CL 1871, § 7910; How., § 9521; CL 1897, § 11906; and CL 1915, § 15733.

767.64 Place and manner of indictment, conviction and punishment; removing stolen property from another state or country; prior conviction or acquittal.

Sec. 64. Every person who shall feloniously steal the property of another, in any other state or country, and shall bring the same into this state, may be indicted, convicted and punished in the same manner as if such larceny had been committed in this state; and in every such case such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought: Provided, That every such person may plead a former conviction or acquittal for the same offense in another state or country; and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offense.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17278;—CL 1948, 767.64.

Former law: See section 1 of Act 119 of 1850, being CL 1857, § 5797; CL 1871, § 7606; How., § 9177; CL 1897, § 11592; and CL 1915, § 15347.

767.65 Place and manner of indictment; receiver of property stolen in another state or country.

Sec. 65. Every receiver of personal property that shall have been feloniously stolen, knowing the same to have been stolen, may be indicted, convicted and punished in any county where he received or had such property in the same manner that receivers of personal property stolen in this state are indicted, convicted and punished, notwithstanding such theft was committed in any other state or country.

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History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17279;—CL 1948, 767.65.

Former law: See section 2 of Act 119 of 1850, being CL 1857, § 5798; CL 1871, § 7607; How., § 9178; CL 1897, § 11593; and CL 1915, § 15348.

767.66 Place and manner of indictment; person aiding and abetting thief who removes stolen property from another state or country.

Sec. 66. Every person who shall aid and abet any thief, such thief having brought the stolen property into this state, may be indicted, convicted and punished in the same manner, notwithstanding such theft was committed in any other state or country, that aiders and abettors are punished, where the theft was originally committed within this state.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17280;—CL 1948, 767.66.

Former law: See section 3 of Act 119 of 1850, being CL 1857, § 5799; CL 1871, § 7608; How., § 9179; CL 1897, § 11594; and CL 1915, § 15349.

767.67 Indictment; charging accessory without principal; substantial felony.

Sec. 67. Any number of accessories after the fact, or receivers, buyers, or persons aiding in the concealment of any stolen money, goods, or property may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17281;—CL 1948, 767.67.

Former law: See section 5 of Act 77 of 1855, being CL 1857, § 6051; CL 1871, § 7920; How., § 9531; CL 1897, § 11916; and CL 1915, § 15743.

767.68 Indictment; charge of jointly receiving or concealing stolen property; conviction of less than all indictees.

Sec. 68. If 2 or more persons are indicted for jointly receiving, buying or aiding in the concealment of any stolen property, and the evidence shall be that 1 or more persons separately, knowingly received, bought or aided in the concealment of any part of such property, the jury may convict upon such indictment those who are proved to have received, bought or aided in the concealment of any part of such property.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17282;—CL 1948, 767.68.

Former law: See section 6 of Act 77 of 1855, being CL 1857, § 6052; CL 1871, § 7921; How., § 9532; CL 1897, § 11917; and CL 1915, § 15744.

767.69 Indictment for larceny; additional counts; conviction; election between counts unnecessary.

Sec. 69. An indictment for larceny may contain also a count for embezzlement, larceny by conversion, obtaining property by false pretenses or for receiving or having in possession, or aiding in concealing the same property, knowing it to have been stolen, and the jury may convict of any such offense; and the jury may find all or any of the persons indicted, guilty of any of the offenses charged in the indictment. The prosecuting attorney shall not be required to elect between the offenses so charged.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17283;—Am. 1931, Act 309, Eff. Sept. 18, 1931;—CL 1948, 767.69.

Former law: See section 20 of Act 77 of 1855, being CL 1857, § 6066; CL 1871, § 7936; How., § 9547; CL 1897, § 11932; and CL 1915, § 15759.

767.70 Indictment for libel; statement of application to party libelled.

Sec. 70. An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libelled of the defamatory matter on which the indictment is founded, but it is sufficient to state generally that the same was published concerning him.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17284;—CL 1948, 767.70.

Former law: See section 18 of Act 77 of 1855, being CL 1857, § 6064; CL 1871, § 7934; How., § 9545; CL 1897, § 11930; and CL 1915, § 15757.

767.71 Indictment for murder and manslaughter; charging act.

Sec. 71. In all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased; and it shall be sufficient in manslaughter to charge that the defendant did kill the deceased.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17285;—CL 1948, 767.71.

Former law: See section 1 of Act 77 of 1855, being CL 1857, § 6047; CL 1871, § 7916; How., § 9527; CL 1897, § 11912; and CL

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1915, § 15739.

767.72 Indictment for manslaughter; added count for abortion; admissibility of dying declaration under either count.

Sec. 72. An indictment or information for manslaughter may contain also a count for procuring or attempting to procure an abortion and the jury may convict of either offense. Dying declarations shall be admissible in evidence in proof of either count.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17286;—CL 1948, 767.72.

767.73 Indictment; perjury; sufficiency of statement.

Sec. 73. An indictment for perjury or for subornation of, solicitation, or conspiracy to commit perjury, is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before what court or officer the oath was taken or was to have been taken, without setting forth any part of the records or proceedings with which the oath was connected, and without stating the commission or authority of the court or other authority before whom the perjury was committed or was to have been committed or the form of the oath or affirmation or the manner of administering the same.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17287;—CL 1948, 767.73.

Former law: See section 3 of Act 77 of 1855, being CL 1857, § 6049; CL 1871, § 7918; How., § 9529; CL 1897, § 11914; and CL 1915, § 15741.

767.74 Indictment; motion to quash; dilatory plea; proof.

Sec. 74. No motion to quash, plea in abatement or other dilatory plea to the indictment, shall be received by any court unless the party offering such plea shall prove the truth thereof by affidavit, or by some other sworn evidence.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17288;—CL 1948, 767.74.

Former law: See section 33 of Ch. 164 of R.S. 1846, being CL 1857, § 6042; CL 1871, § 7911; How., § 9522; CL 1897, § 11907; and CL 1915, § 15734.

767.75 Indictment; certain defects; quashing not allowed; remedy.

Sec. 75. No indictment shall be quashed, set aside or dismissed for any 1 or more of the following defects: (First) That there is a misjoinder of the parties accused; (Second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein; (Third) That any uncertainty exists therein. If the court be of the opinion that the first and second defects or either of them exist in any indictment, it may sever such indictment into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17289;—CL 1948, 767.75.

Former law: See section 3 of Act 138 of 1859, being CL 1871, § 7939; How., § 9550; CL 1897, § 11935; and CL 1915, § 15762.

767.76 Indictment; time of objection to defect; amendment; discharge of jury; continuance of cause; double jeopardy; review of action by court.

Sec. 76. No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from

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consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17290;—CL 1948, 767.76.

Former law: See section 34 of Ch. 164 of R.S. 1846, being CL 1857, § 6043; CL 1871, § 7912; How., § 9523; CL 1897, § 11908; CL 1915, § 15735; and sections 9, 11, 12, and 14 of Act 77 of 1855, being CL 1857, §§ 6055, 6057, 6058, and 6060; CL 1871, §§ 7924, 7926, 7927, and 7929; How., §§ 9535, 9537, 9538, and 9540; CL 1897, §§ 11920, 11922, 11923, and 11925; CL 1915, §§ 15747, 15749, 15750, and 15752.

767.77 Commission to examine out-of-state witness; granting on application of defendant.

Sec. 77. When an issue of fact shall be joined upon any indictment, the court in which the same is pending may, on application of the defendant, grant a commission to examine any material witnesses residing out of this state, in the same manner as in civil cases.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17291;—CL 1948, 767.77.

Former law: See section 35 of Ch. 164 of R.S. 1846, being CL 1857, § 6044; CL 1871, § 7913; How., § 9524; CL 1897, § 11909; and CL 1915, § 15736.

767.78 Commission to examine out-of-state witness; interrogatories; reading of deposition.

Sec. 78. Interrogatories to be annexed to such commission shall be settled and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the deposition taken thereon and returned shall be read in the same cases, and with like effect in all respects, as in civil suits.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17292;—CL 1948, 767.78.

Former law: See section 36 of Ch. 164 of R.S. 1846, being CL 1857, § 6045; CL 1871, § 7914; How., § 9525; CL 1897, § 11910; and CL 1915, § 15737.

767.79 Conditional examination of witness for defendant; order; notice to prosecutor.

Sec. 79. After an indictment shall be found against any defendant, he may have witnesses examined in his behalf conditionally on the order of a judge of the court in which the indictment is pending, in the same cases upon the like notice to the prosecuting attorney, and with like effect in all respects as in civil suits.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17293;—CL 1948, 767.79.

Former law: See section 37 of Ch. 164 of R.S. 1846, being CL 1857, § 6046; CL 1871, § 7915; How., § 9526; CL 1897, § 11911; and CL 1915, § 15738.

767.80, 767.81 Repealed. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

Compiler's note: The repealed sections pertained to residents of this state being required to attend as a witness in a criminal action in another state and bringing out-of-state witnesses into Michigan.

767.82 Repealed. 1974, Act 266, Eff. Apr. 1, 1975.

Compiler's note: The repealed section pertained to charge of taking indecent liberties in indictment for rape or attempted rape.

767.83 Indictment involving intent to defraud; sufficiency of allegations and proof.

Sec. 83. In any prosecution where an intent to defraud is required to constitute the offense, it shall be sufficient to allege in the indictment an intent to defraud without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be deemed sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city or township, or any body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person.

History: Add. 1931, Act 309, Eff. Sept. 18, 1931;—CL 1948, 767.83.

767.91 Out of state witnesses; attendance; definitions.

Sec. 91. As used in sections 91 to 95 of this chapter:

(a) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

(b) "State" includes any territory of the United States and the District of Columbia.

(c) "Summons" includes a subpoena, order or other notice requiring the appearance of a witness.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.92 Attendance in another state; hearing; summons; custody; fee.

Sec. 92. (1) A judge of a court of record in a state which by law has provided for commanding persons within that state to attend and testify in this state may certify under seal of his court that for purposes of a

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criminal prosecution in his court or a grand jury investigation in his state, a person in this state is required as a material witness for a specified number of days.

(2) Upon presentation of a certificate issued pursuant to subsection (1) to a judge of a court of record in a county where such witness is found, the judge shall fix a time and place for a hearing and make an order directing the witness to appear at the hearing. At such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) The judge shall issue a summons with a copy of the certificate attached directing the witness to attend and testify in the court where the criminal prosecution is pending or a grand jury is investigating if he determines at the hearing that:

(a) The witness is material and necessary to the prosecution or investigation.

(b) The attendance and testifying in the prosecution or investigation will not cause undue hardship to the witness.

(c) The laws of the state where the prosecution or investigation is being held and the laws of any other state through which the witness may be required to pass by ordinary course of travel protect the witness from arrest and service of civil or criminal process.

(4) If a certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, the judge may direct that the witness be forthwith brought before him for a hearing without notice. If the judge at the hearing is satisfied of the desirability of custody and delivery, for which determination the certificate shall be prima facie proof of desirability, he may order that the witness be forthwith taken into custody and delivered to an officer of the requesting state without issuing a summons.

(5) If a witness, who is summoned pursuant to this section and is paid by an authorized person the sum of 10 cents for each mile of the ordinary traveled route to and from the court where such prosecution or investigation is being held and $5.00 for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.93 Attendance from without the state; certificate; fee.

Sec. 93. (1) If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents for each mile of the ordinary traveled route to and from the court where the prosecution or investigation is being held and $5.00 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state longer than the period stated in the certificate, unless otherwise ordered by the court. If the witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.94 Immunity of witness.

Sec. 94. (1) If a person comes into this state in obedience to a summons which is issued pursuant to section 93 he shall not while in this state pursuant to such summons be subject to arrest or the service of civil or criminal process in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of civil or criminal process in connection with matters which arose before his entrance into this state under the summons.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

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767.94a Disclosure of certain material or information by defendant to prosecuting attorney; compliance; motion for good cause.

Sec. 94a. (1) A defendant or his or her attorney shall disclose to the prosecuting attorney upon request the following material or information within the possession or control of the defendant or his or her attorney:

(a) The name and last known address of each witness other than the defendant whom the defendant intends to call at trial provided the witness is not listed by the prosecuting attorney.

(b) The nature of any defense the defendant intends to establish at trial by expert testimony.

(c) Any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or statement relates to the testimony to be offered by the witness.

(d) Any book, paper, document, photograph, or tangible object that the defendant intends to offer in evidence or that relates to the testimony of a witness, other than the defendant, whom the defendant intends to call.

(2) The defendant or his or her attorney shall comply with the disclosure provisions of subsection (1) not later than 10 days before trial or at any other time as the court directs.

(3) A defendant shall not offer at trial any evidence required to be disclosed pursuant to subsection (1) that was not disclosed unless permitted by the court upon motion for good cause shown. A motion under this subsection may be made before or during trial.

History: Add. 1994, Act 113, Eff. Oct. 1, 1994.

Compiler's note: On November 16, 1994, the Michigan Supreme Court entered Administrative Order No. 1994-10, which provides as follows:

"On May 4, 1994, the Governor signed House Bill 4227, concerning discovery by the prosecution of certain information known to the defendant in a criminal case. 1994 PA 113, MCL 767.94a; MSA 28.1023(194a). On November 16, 1994, this Court promulgated MCR 6.201, which is a comprehensive treatment of the subject of discovery in criminal cases.

"On order of the Court, effective January 1, 1995, discovery in criminal cases heard in the courts of this state is governed by MCR 6.201 and not by MCL 767.94a; MSA 28.1023(194a). Const 1963, art 6, § 5; MCR 1.104."

767.95 Short title; uniformity.

Sec. 95. Sections 91 to 95 constitute the uniform act to secure the attendance of witnesses from without a state in criminal proceedings and shall be so interpreted and construed as to effectuate their general purposes to make uniform the law of the states which enact them.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.96 Costs of grand jury.

Sec. 96. (1) Except as otherwise provided by law, the costs of a grand jury convened under section 7c(a) shall be borne by this state, and shall be paid from the general fund of this state.

(2) Except as otherwise provided by law, the costs of a grand jury convened under section 7c(b) shall be borne equally by each county over which the grand jury has jurisdiction, and shall be paid by those counties.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

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386 Mich. 672
Supreme Court of Michigan.

PEOPLE of the State of Michigan ex rel. Robert F. LEONARD, Prosecuting Attorney In and For the County of Genesee, Plaintiff-Appellant,
v.
The Honorable Elza H. PAPP, Genesee County Circuit Judge, 7th Judicial Circuit, Defendant-Appellee.

No. 10.
|
Feb. 25, 1972.

Synopsis

A prosecutor sought a writ of superintending control from the Court of Appeals, Div. 2, challenging the right of the Genesee County Circuit Court, Elza H. Papp, J., to accept, over the prosecutor's objection, a plea to an offense which was not charged nor a lesser included offense. The request was ‘dismissed for lack of jurisdiction,‘ and the People, upon leave granted, asked the Supreme Court to hold that the Court of Appeals had jurisdiction and asked the Supreme Court to retain jurisdiction and enter an order of superintending control. The Supreme Court, Williams, J., held that whether the action was to be viewed in the nature of certiorari, mandamus or prohibition, the Court of Appeals had jurisdiction to entertain the complaint for superintending control. The Court also held that the trial judge on her own initiative had no power to determine, over the objection of the prosecutor, under which of two admittedly applicable statutes prosecution would be instituted, where neither statute represented a lesser included offense of the other.

Plea of guilty annulled and sentence vacated and cause remanded.

Attorneys and Law Firms

***675 **694** Donald A. Kuebler, Chief Asst. Pros. Atty., Flint, Robert F. Leonard, Pros. Atty., Genesee County, for plaintiff-appellant.

Frederick E. Salim, Flint, for defendant-appellee.
Before the Entire Bench.

Opinion

WILLIAMS, Justice.

The matter-of-fact and unpretentious trial and appellate history of this case attests to the acceptance and confidence of the American people in the ability and integrity of the judiciary to exercise the authority of judicial supremacy in determining and delineating the basic constitutional doctrine of separation of

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legislative, executive and judicial powers. It is an awesome power and responsibility and must be exercised both courageously and with understanding and restraint.

There are two issues in this case:
I. Does the Court of Appeals have jurisdiction to entertain a complaint for superintending control which charges that a trial judge acted without authority in accepting, over the objection of the prosecutor, a plea of guilty to an offense not charged by the people or included within the offense charged in the information?

****695** II. Does a trial judge have the authority to accept an offer and plea of guilty over the objection of the ***676** prosecutor to an offense not charged or included in the information?

The defendant, Dana McBride, was bound over to the Genesee Circuit Court after a preliminary examination to stand trial on an information charging possession of a stolen motor vehicle in violation of M.C.L.A. s 257.254; M.S.A. s 9.1954.[1] On the day the case was to go to jury trial the trial judge, apparently on the basis of a previous discussion with defendant and his counsel, granted defendant's motion that he be allowed to plead guilty to unlawfully driving away the automobile of another in violation of M.C.L.A. s 750.413; M.S.A. s 28.645.[2] Before final acceptance of the plea the trial judge asked the prosecutor, 'I take it, Mr. Prosecutor, you are not going to make objections to this.' The prosecutor indicated that the facts supported the charge as originally bound over and that he intended to proceed to trial on the charge as bound over because it was a more serious offense than the typical 'joy riding' case. In overruling the prosecutor's objection the judge said 'Fine, but, Mr. Prosecutor, how many times have you already come up this term where the evidence would show—so you can't always play God as to ***677** which one you are going to permit to plead guilty to a lesser offense or not.'

The trial judge proceeded with the plea taking procedure wherein the defendant admitted that he had stolen a Volkswagen similar to his own, driven it away, exchanged the license plates with his own and taken the car to a farm. The judge concluded: 'Actually, you are really guilty of the higher offense, but the court will accept your plea to the lesser offense. . . .' Subsequently, McBride was sentenced to three and a half to five years at Jackson with execution suspended provided McBride entered the Army. The Army did not accept McBride and the original sentence was reinstated. Defendant was advised of his rights to appeal, 'indigent' counsel and transcript. Claim of appeal was filed in the Court of Appeals and defendant has been admitted to bail pending decision in that court.

In a separate proceeding, the prosecution sought a writ of superintending control from the Court of Appeals challenging the trial court's right over the prosecutor's objection to accept a plea to an offense not charged nor a lesser included offense. This request was 'dismissed for lack of jurisdiction,' on the ground that the proceeding was not one of the 'appeals' authorized by statute, citing M.C.L.A. s 770.12; M.S.A. s 28.1109[3] and Wayne County Prosecutor ****696** v. Recorder's Court Judge.[4] The People, upon leave ***678** granted, ask this Court to hold that the Court of Appeals has jurisdiction to entertain complaints for superintending control under facts such as these and further that we retain jurisdiction of the cause and enter an order of superintending control directing the defendant judge to vacate defendant McBride's guilty plea and sentence and reinstate criminal proceedings based on the information charging violation of M.C.L.A. s 257.254.

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I.—JURISDICTION

In response to the Court of Appeals holding that this proceeding was not an authorized 'appeal'[5] under the statute (M.C.L.A. s 770.12) the People answer that they do not claim the action of the trial judge is reviewable by an 'appeal' under M.C.L.A. s 770.12. The People in effect contend that a writ of superintending control under GCR 1963, 711.3[6] is not an appeal ***679** but rather is an original civil action, here in the nature of mandamus, and as such is a proper method for correcting abuses of jurisdiction by a trial judge.

In People v. Brundage, 381 Mich. 399, 403, 162 N.W.2d 659, 660 (1968), Justice O'Hara writing in a portion of his dissent concurred in by the majority, addressed the relationship between the limited rights of 'appeal' under M.C.L.A. s 770.12 and the writ of superintending control. Speaking of the statute he said:
'We feel obligated to point out that as an expression of legislative policy we accord the statute great weight. However, to the extent that it purports to limit our appellate jurisdiction, it is constitutionally infirm. Our appellate jurisdiction is constitutional. It can neither be enlarged nor restricted by legislative action. The constitution provides:

"The Supreme Court shall have * * * power to issue * * * prerogative and remedial writs; And appellate jurisdiction as provided by rules of the ****697** supreme court.' (Emphasis supplied.)' (Footnote omitted.)

Pursuant to the constitution this Court adopted GCR 1963, 711.3 which supercedes the writs of certiorari, mandamus and prohibition, providing one simplified procedure for reviewing or supervising the actions of lower courts and tribunals.

The use of the office of superintending control by the People in a criminal case to review excesses of jurisdiction was considered by this Court in People v. Flint Municipal Judge, 383 Mich. 429, 175 N.W.2d 750 (1970). In that case the prosecutor filed a complaint for superintending control against a municipal judge alleging an abuse of discretion in failing to bind over a defendant for trial. The court recognized that ***680** the writ of superintending control was a proper method for reviewing a claimed abuse of discretion by the trial judge but affirmed the Court of Appeals' denial of the complaint on the ground that GCR 1963, 711.4 required the writ to be addressed to the first tribunal having competence to hear and act upon it (in that case the circuit court). On the propriety of the use of the writ by the People in these circumstances, however, Chief Justice Brennan said for a unanimous court:
'No argument is made here as to the proper office of superintending control as a means of reviewing the discretion of an examining magistrate. The order of superintending control embraces the functions of the former writ of mandamus. GCR (1963,) 711.3(2).

'Superintending control, like mandamus, lies to require the magistrate to perform a function where the magistrate has a clear legal duty to act.

'The process is not, properly speaking, an appeal. It is rather a whole new lawsuit, with different parties and different purposes. People v. Yeotis is not a criminal case, but is rather an original civil complaint designed to require the defendant municipal judge to perform a clear legal duty.' 383 Mich. 429, 431—432, 175 N.W.2d 750, 751.

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The Supreme Court has by GCR 1963, 711 provided that the Court of Appeals has the power to issue superintending control orders which are in the nature of certiorari, mandamus and prohibition.

This superintending control has nothing to do with the general supervisory superintending control over all courts given to the Supreme Court by art. VI, s 4 of the 1963 Constitution or the supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance ***681** with rules of the Supreme Court, given the circuit courts by art. VI, s 13 of the 1963 Constitution.

No general control of inferior courts exists in the Court of Appeals.

Whether this action be viewed in the nature of certiorari, mandamus, or prohibition the writ of superintending control would lie. The writ of certiorari is for review of errors of law and our inquiry is limited to determining 'if the inferior tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law.' In re Fredericks, 285 Mich. 262, 267, 280 N.W. 464, 466 (1938). In Flint Municipal Judge, Supra, we noted that mandamus would lie to require the magistrate to perform a clear legal duty. Here it is contended that the judge acted without jurisdiction and therefore has a clear legal duty to vacate the guilty plea and reinstate the criminal proceedings as filed in the information. The writ of prohibition is a common law remedy designed to prevent excesses of jurisdiction. It is a proper remedy where the court exceeds the bounds of its jurisdiction or acts in a matter not within its jurisdiction. Hudson v. Judge of Superior Court, 42 Mich. 239, 248, 3 N.W. 850, 913 (1879). In this case the facts alleged also support a complaint for a writ ****698** of superintending control in the nature of prohibition.

In People v. Flint Municipal Judge, Supra, the magistrate indisputably had jurisdiction to exercise discretion with respect to the sufficiency of the evidence to bind over the defendant. Without passing on the merits, however, this Court said that the writ of superintending control is a proper method for the People to seek review of the discretion of the examining magistrate.

If the writ may be used to review an exercise of discretion where it is unquestioned that the judge ***682** had the power to exercise some discretion then, A fortiori, the writ may be used to review the action of a lower court when it is claimed that the court lacked the power to exercise Any discretion with respect to the ruling in question.

The Court of Appeals had jurisdiction to entertain the complaint for superintending control for the purpose of determining whether the trial judge acted without jurisdiction or in excess of jurisdiction.[7] Since the cause is now properly before us we retain jurisdiction under our power of superintendence, Const.1963, art. 6, s 4.

II.—THE AUTHORITY OF THE TRIAL JUDGE TO AMEND THE INFORMATION AND ACCEPT A PLEA OVER THE OBJECTION OF THE PROSECUTOR

Whether the trial judge may amend an information and accept a plea Sua sponte and over the objection of the prosecutor raises the question of constitutional separation of powers between the judicial and executive branch.

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At the outset we note that we are not concerned here with the power of a trial judge to permit the amendment of an information where there is no objection by the prosecutor and the defendant waives any necessary arraignment and examination. In addition, because of the trial judge's determination that McBride was 'actually guilty of the higher offense,' we are not concerned with any question of the scope of authorized power under M.C.L.A. s 767.76; ***683** M.S.A. s 28.1016 to amended informations for technical defects or because of variance with the evidence.

The sole question here is whether the trial judge on her own initiative has the power to determine, over the objection of the prosecutor, under which of two admittedly applicable statutes a prosecution will be instituted, where neither statute represents a lesser included offense of the other.

The prosecutor is a constitutional officer whose duties are as provided by law. Const.1963, art. 7, s 4. Lawrence Scudder & Co. v. Emmet County, 288 Mich. 181, 184, 284 N.W. 691 (1939). Schneider v. Shepherd, 192 Mich. 82, 88, 158 N.W. 182 (1916). The conduct of a prosecution on behalf of the People by the prosecutor is an executive act, People v. Dickerson, 164 Mich. 148, 153, 129 N.W. 199 (1910).

We have held in the past that the prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted. ****699** People v. Lombardo, 301 Mich. 451, 453, 3 N.W.2d 839 (1942); People v. Thrine, 218 Mich. 687, 690, 691, 188 N.W. 405 (1922); People v. Mire, 173 Mich. 357, 364, 138 N.W. 1066 (1912). See also People v. Graves, 31 Mich.App. 635, 636, 188 N.W. 87 (1971); People v. Eineder, 16 Mich.App. 270, 271, 167 N.W.2d 893 (1969); People v. Byrd, 12 Mich.App. 186 (1968) concurring opinion of Levin, J. at 197, particularly footnote 7, 162 N.W.2d 777; People v. Ryan, 11 Mich.App. 559, 561, 161 N.W.2d 754 (1968).

'Acting as prosecutor, judge and jury' is a common description of an unfair and unlawful operation. However innocently and mistakenly, this is what happened in this case. The trial judge assumed the right over the objection of the prosecutor to determine under which of two applicable statutes a prosecution will be instituted. As already indicated such determination is an executive function and a part of ***684** the duties of the prosecutor. For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. Const1963, art. 3, s 2. It also violates our fundamental sense of fair play.

We therefore hold that the trial judge acted without authority in amending the information over the objection of the prosecutor in this case.

It is to be noted that the trial judge in this case apparently thought her authority to amend the information (adding the count of unlawfully driving away the automobile) was justified by the fact that the added offense was, in her opinion, 'lesser included.' Unlawfully driving away the automobile of another in violation of M.C.L.A. s 750.413 is not a lesser offense included in the violation of M.C.L.A. s 257.254 which proscribes possession of a motor vehicle known to be stolen. For an offense to be lesser included it must contain some, but not all of the elements of the higher offense and there must be no additional elements in the 'included' offense which are not a part of the 'higher' offense. The supposed 'lesser' offense here requires proof of driving away the automobile but proof of 'driving away' is not required of the prosecution to secure a conviction of unlawful possession of a motor vehicle known to be stolen. Although related, the two offenses are separate and distinct and the prosecutor has discretion to

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proceed under one or the other or both, if warranted by the facts. People v. Morton, 16 Mich.App. 160, 167 N.W.2d 834 (1969), reversed on other grounds, 384 Mich. 38, 179 N.W.2d 379 (1970); see also People v. Kruper, 340 Mich. 114, 121—122, 64 N.W.2d 629 (1954).

In our holding that the judge here acted without authority we express no opinion on the propriety of ***685** accepting a plea over the objection of the prosecutor where both offenses are charged by the prosecutor, nor do we express an opinion on the propriety of accepting a plea over the objection of the prosecutor to an offense which Is a lesser included offense.

The plea of guilty to M.C.L.A. s 750.413; M.S.A. s 28.645 is annulled and the sentence imposed pursuant to that plea is vacated. The cause is remanded to the trial court for proceedings upon the information as filed by the prosecutor on July 13, 1970.

T. M. KAVANAGH, C.J., and BLACK, ADAMS, BRENNAN, T. G. KAVANAGH and SWANSON, JJ., concur.

All Citations

386 Mich. 672, 194 N.W.2d 693

Footnotes

1 M.C.L.A. s 257.254 provides in pertinent part:
'Sec. 254. Any person who . . . with intent to procure or pass title to a motor vehicle which he knows or has reason to believe has been stolen, shall receive or transfer possession of the same from or to another, or who shall have in his possession any motor vehicle which he knows or has reason to believe has been stolen, . . . shall be deemed guilty of a felony and upon conviction shall be punished by a fine of not more than $5,000.00 or by imprisonment . . . for not more than 10 years . . ..'
In People v. Morton, 384 Mich. 38, 179 N.W.2d 379 (1970) we held that a conviction for possession of a vehicle known to be stolen requires proof of possession with intent to fraudulently transfer title.

2 M.C.L.A. s 750.413 provides in pertinent part:
'Sec. 413. Taking Possession of and Driving Away a Motor Vehicle—Any person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.'

3 M.C.L.A. s 770.12 provides for limited situations in which a writ of error, an 'appeal,' may be brought by the People direct to the Supreme Court. An appeal may be brought because of (a) a decision quashing an information because of alleged invalidity of a statute on which it is based, (b) from a decision staying a judgment of conviction for insufficiency of the indictment because of the invalidity of the statute on which it was based, or (c) from a decision sustaining a special plea in bar before the defendant has been placed in jeopardy.

4 This case recognized that the writ of superintending control '. . . must be viewed as an appeal in the nature of Certiorari. . . . The scope of review upon such an appeal 'is limited to determining if

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the inferior tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law'. In re Fredericks (1938), 285 Mich. 262, 267, 280 N.W. 464, 466.

FN* * *

'The fact that the state may not appeal in a criminal case does not preclude the issuance of a writ of Certiorari (superintending control) by an appellate court in favor of the state in a criminal case to determine whether an inferior tribunal is acting without jurisdiction, or in excess of jurisdiction. People v. Price, Supra (People v. Price, 23 Mich.App. 663, 179 N.W.2d 177). See also, State v. Coleman (1937), 58 R.I. 6, 190 A. 791, 109 A.L.R. 787 (and annotation).' 27 Mich.App. 251, 253—254, 183 N.W.2d 333, 335 (1970).

In the Wayne County Prosecutor v. Recorder's Court Judge case, the Court of Appeals held that the trial court had jurisdiction and that the writ did not lie.

5 This case also does not present any question of the right of the People to seek leave to appeal from an adverse decision of the Court of Appeals. On numerous occasions we have granted leave under those circumstances. People v. Earegood, 383 Mich. 82, 173 N.W.2d 205 (1970); People v. Paille #2, 383 Mich. 621, 178 N.W.2d 465 (1970); People v. Brundage, 381 Mich. 399, 162 N.W.2d 659 (1968); People v. Hobdy, 380 Mich. 686, 158 N.W.2d 392 (1968).

6 GCR 1963, 711.3:

'Writs Superseded by Order of Superintending Control. The following writs are superseded and an order of superintending control shall be used in their place:

'(1) Certiorari;

'(2) Mandamus, when directed to an inferior tribunal or officer thereof; and

'(3) Prohibition.'

7 See generally, People v. Brundage, 381 Mich. 399, 403, 162 N.W.2d 659 (1968); In re Huff, 352 Mich. 402, 417—418, 91 N.W.2d 613 (1958); Recorder's Court Judge v. Wayne Circuit Judge, 347 Mich. 567, 572, 80 N.W.2d 481 (1957); People v. Karcher, 322 Mich. 158, 162—163, 33 N.W.2d 744 (1948); Second National Bank & Trust Co. v. Wayne Circuit Judge, 321 Mich. 28, 45, 32 N.W.2d 34 (1948); Wayne County Prosecutor v. Wayne Circuit Judge, 27 Mich.App. 257, 258, 183 N.W.2d 336 (1970); Wayne County Prosecuting Atty. v. Recorder's Court Judge, 27 Mich.App. 419, 421, 183 N.W.2d 577 (1970); People v. Recorder's Judge, 23 Mich.App. 126, 178 N.W.2d 146 (1970); People v. Price, 23 Mich.App. 663, 667, 671, 179 N.W.2d 177 (1970).

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379 Mich. 69
Supreme Court of Michigan.

In the Matter of Gus COLACASIDES.

No. 5.
|
April 19, 1967.

Synopsis
Prosecution for contempt. The Circuit Court for the County of Wayne, Charles Kaufman, J., entered a judgment of conviction of contempt and there was an appeal on leave granted. The Supreme Court, Souris and O'Hara, JJ., held, inter alia, testimony taken from witness who appeared before one-man grand jury and who was ordered to give testimony on promise of immunity from prosecution could not be used in any pending prosecutions against that witness.

Affirmed.

Attorneys and Law Firms

****3** Joseph W. ***74** Louisell and Ivan E. Barris, Detroit, for defendant-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., by Robert C. Goussy, Asst. Atty. Gen., Lansing, for appellee.

Before the Entire Bench.

Opinion

SOURIS and O'HARA, Justices.

This is an appeal on leave granted by this Court from the circuit court for Wayne county, by-passing the Court of Appeals pursuant to GCR 1963, 852.*

Appellant was found guilty of contempt, by the Honorable Charles Kaufman, a judge of the Wayne circuit court, for refusal to testify in a one-man grand jury proceeding presided over by the Honorable George E. Bowles, also a judge of the Wayne circuit court. Judge Kaufman sentenced appellant to six months' confinement in the Detroit house of correction, or until the expiration of the above designated grand jury, or until such time as he should purge himself of such contempt by answering the questions addressed to him in the grand jury proceeding. Upon his initial refusal to answer the questions, appellant was ordered so to do under a grant of immunity by the grand juror. The grant of immunity was from all subsequent prosecution for any offense concerning which any responsive answer to such questions may

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have tended to incriminate appellant.

Appellant challenges his conviction for contempt on multiple grounds. He contends that the one-man grand jury proceeding from which his contempt conviction resulted is an illegal extension of a prior one-man grand jury beyond the one-year period allowed ***75** such juries by statute and that his contempt conviction, therefore, is void. He also contends that the immunity granted him is not coextensive with his privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution; that, furthermore, the State failed to demonstrate to him the nature and extent of the immunity granted; and that, therefore, his contempt conviction for refusing to answer the grand juror's questions violates his rights guaranteed him by the Fifth Amendment. Finally, he urges that his contempt conviction is void because it arose out of proceedings conducted under our one-man grand jury statute which he claims violates 'the doctrine of separation of powers', by which we presume he means that it violates Article III, s 2, Constitution of 1963 and, as well, that it violates the due process clause of the Fourteenth Amendment to the United States Constitution.

The questions put to him by the grand juror all relate to so-called 'little black books' seized in the appellant's restaurant-tavern. In it are entries purported to be in the handwriting of appellant and allegedly showing payments of money to Detroit police officers presumably as bribes to induce the officers to refrain from enforcing the law as to defendant.

We conclude that the Bowles grand jury is not an illegal extension of a preceding ****4** one-man grand jury; that the immunity granted appellant is as broad as is required by the Fifth Amendment's guarantee against self-incrimination; that the State performed its obligation of advising appellant of its grant of immunity to him; that the one-man grand jury statute does not violate either our State Constitution's separation of powers provision or the Fourteenth Amendment's due process clause; and that, therefore, the appellant's contempt conviction for refusal ***76** to answer the grand juror's questions must be affirmed.

I.

Appellant contends that Grand Juror Bowles exceeded the permissible scope of his inquiry when he put questions to appellant relating to the 'little black books' seized by a previous one-man grand jury presided over by the Honorable Edward S. Piggins, another of the judges of the Wayne circuit court, and that appellant's refusal to answer those questions, therefore, was not conduct punishable as contempt. His theory is that the statute, C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944), imposes a 12-month time limit upon grand juror inquiry into the subject matter of any granted petition for such inquiry and that no subsequent grand juror thereafter can investigate the same subject matter. The pertinent portion of the cited statute, added by P.A.1951, No. 276, reads as follows:

> 'No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.'

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The record before us discloses that while Grand Juror Piggins was conducting his inquiry certain documents came into his possession on the basis of which this appellant and another person were indicted for conspiracy to bribe a Detroit police officer. Judge Piggins served as grand juror for two successive six-month periods ending in August of 1966. Shortly before expiration of the Piggins grand jury, the judges of the Wayne circuit court granted a petition by the Attorney General for another Wayne county one-man grand jury inquiry and Judge Bowles thereafter, on September 8, 1966, was designated by his colleagues to conduct it. On ***77** January 6, 1967, upon Judge Bowles' petition, this Court ordered transferred to Judge Bowles certain of the records of the Piggins grand jury which had been filed with the Clerk of this Court pursuant to C.L.S.1961, s 767.6a (Stat.Ann.1954 Rev. s 28.946(1)). Our order of January 6, 1967 is set forth, in full, in the margin.[1]

****5** Later in January, 1967, appellant was subpoenaed to appear before Grand Juror Bowles and was asked the questions for his refusal to answer which he was cited and subsequently convicted of contempt. The questions related to certain documents transferred by our order to the Bowles grand jury from those deposited with us by the Piggins grand jury. These documents were the evidentiary basis upon which ***78** appellant had been indicted by Grand Juror Piggins for conspiracy to bribe a police officer. Appellant has not yet been tried on this indictment.

We do not accept as correct appellant's construction of the above-quoted provision of the statute, that is to say, that no grand juror may investigate the subject matter of a prior one-man grand jury. The quoted language added to the statute by P.A.1951, No. 276, does not indicate intrinsically the Legislature's purpose, nor has our attention been directed to anything extrinsic of the statutory amendatory language from which we can discern that legislative purpose. We must determine the Legislature's meaning from the statutory language alone, therefore. While it may be conceded that the language is not literally inconsistent with the construction put upon it by appellant, that is not the only construction consistent with its terms, nor is it the construction we believe most consistent with the permissible objectives sought to be achieved by the one-man grand jury law.

We construe the above quoted statutory language to mean that no judicial officer designated to serve as a one-man grand juror to investigate specified allegations of crime may do so for more than two consecutive six-month periods. By this provision we believe the Legislature manifested its intent to limit the time within which a particular judge could exercise the extraordinary powers of a grand juror. That a grand juror's powers are extraordinary, for a judicial officer, will be considered subsequently in this opinion. That the Legislature was aware of the possible political consequences of such power is manifest in that part of C.L.1948, s 767.3, as amended, P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943) quoted in the margin.[2] We perceive no rational legislative ***79** purpose in foreclosing one-man grand jury inquiry into any particular criminal activity beyond the period of one year, but we do perceive a rational purpose, manifested by the above-quoted provision from P.A.1951, No. 276, and that portion of C.L.1948, s 767.3, as amended, quoted in the margin, to limit to one year the exercise by any particular judge of the extraordinary powers of inquiry authorized by our one-man grand jury law. Thus construed, the time limitation of C.L.S.1961, s 767.4 is a time limitation upon the judicial officer performing duties as a one-man grand juror, and not a time limitation upon grand juror inquiry into a specific subject of criminal activity. So construed, the statute would not preclude a grand juror's investigation of the subject matter investigated by a prior grand juror, provided, of course, that the subject of inquiry is within the proper scope of inquiry of the second grand juror.

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Because we construe the time limitation as affecting the grand juror, rather than the inquiry, another issue is presented: may one grand juror utilize the evidence produced by a predecessor grand juror? ****6** Pertinent to this issue are the so-called secrecy provisions of C.L.1948, s 767.3, as amended (Stat.Ann.1965 Cum.Supp. s 28.943), C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944), and C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946), the pertinent provisions of which are italicized in the margin.[3] ***80** We construe the statutory provisions ****7** italicized in the margin to permit access by one grand juror to ***81** the records of a prior grand juror upon order of this Court, but subject to the secrecy provisions of C.L.S.1961, s 767.4 which attach to all information or evidence coming to the attention of a grand juror's inquiry. We perceive no reason for requiring a grand juror to retrace the path of a predecessor grand juror, considering the availability of the desired evidence and the convenience of the witnesses.

On the foregoing basis, this Court entered its order of January 6, 1967.[4] On the basis of tangible evidence obtained initially by the Piggins grand jury, Grand Juror Bowles asked certain questions appellant refused to answer notwithstanding the immunity granted to him. We conclude that appellant's conviction for contempt for refusal to answer is not vulnerable to attack because predicated upon evidence obtained in the first instance by another grand juror.

II.

A.

Appellant's principal argument on this appeal is that the immunity granted him, to induce his answering the questions put to him, is not coextensive with the Fifth Amendment to the United States Constitution, ***82** and therefore, that he could not be convicted legally of contempt for invoking the Fifth Amendment's privilege against self-incrimination. He insists that the immunity granted was not coextensive with his Fifth Amendment privilege because it failed to specify that this immunity extended to a prosecution presently pending in the recorder's court of the city of Detroit; to a possible prosecution on a charge which was theretofore dismissed as to appellant on preliminary examination, and as to which he was not in jeopardy; and to possible forfeiture proceedings aimed at revoking his restaurant and alcoholic beverage licenses. The prosecutions in recorder's court are for conspiracy to bribe and bribery of Detroit city police officers.

The order of immunity granted by Grand Juror Bowles reads, in pertinent part, as follows:

> 'IT IS THEREFORE ORDERED that said GUS COLACASIDES be and he hereby is directed to forthwith responsively answer said questions and all related questions which may hereafter be put to said witness, and, in accordance with said statute, this Court

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> does hereby grant immunity to said GUS COLACASIDES from all subsequent prosecution for any offense concerning which any responsive answer to such questions may have tended to incriminate him.'

Appellant argues that the phrase 'subsequent prosecution' is too narrow in view of the scope of the self-incrimination rights granted by the State[5] and Federal constitutions. The People counter by arguing that In re Watson (1940), 293 Mich. 263, 291 N.W. 652, a case with facts paralleling this Colacasides case, ***83** settles the issue in favor of the validity of the grant of immunity.

Looking to the language of the order, one notes that immunity is granted 'in accordance ****8** with said statute.' The statute earlier in the order was described as 'the statute in such case made and provided', which means C.L.S.1961, s 767.6 (Stat.Ann.1954, Rev. s 28.946), set forth in the margin, supra, at p. 6

Appellant does not challenge the validity of section 767.6; rather, his attack is upon the immunity order that was issued pursuant to the statutory provision. That order, however, must be read in the light of the statute as it, in turn, was interpreted by this Court in Watson, supra.

In Watson, the Court used broad language in finding the one-man grand jury immunity provision constitutional. Said the Court:

'The grant of immunity from crime is a large responsibility. The legislature, acting in the public interest for the detection and suppression of crime, has lodged this extraordinary power in the discretion of the magistrate, and the immunity granted extends to any prosecution by the State for any offenses that may be disclosed by the answers of the witness or for any offenses to which such testimony may lead.' (p. 277, 291 N.W. p. 658).

Earlier the Court had said:

'The witness shall not 'thereafter be prosecuted for Any offense concerning which such answers may have Tended to incriminate him'; and we construe the statute to afford a protection against prosecution by the State As broad as the Constitutional provision securing the privilege against self-incrimination.' (p. 276, 291 N.W. p. 658, emphasis added).

***84** Although the present immunity statute differs from the one quoted in Watson, the present statute contains parallel language:

> '* * * No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him * * *.'

Watson, then, gives C.L.S.1961, s 767.6 as broad a scope as the Federal privilege against self-incrimination. See Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. We conclude that the following statement, from Malloy, is a principle of law binding upon us:

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'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement-the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining (Twining v. New Jersey (1908), 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97), for such silence.' 378 U.S. 1, at p. 8, 84 S.Ct. at p. 1493.

and that Watson gives Michigan's immunity statute a scope as broad as the Malloy decision requires.

Thus we conclude that Watson, instead of being a 'judicial relic', as appellant contends, construes section 767.6 to be consistent with our Federal and State constitutional requirements. The immunity order explicitly says the immunity grant is in accordance with the statute, and the statute, as interpreted by Watson, gives immunity coextensive with the privilege. The statute, and the order issued thereunder, thus are constitutionally valid. We need determine only whether the privilege and, thus, the granted immunity apply to preclude use of the evidence sought from appellant in criminal proceedings now pending and in any subsequent license forfeiture proceedings.

***85** The Watson case has specific application to the pending prosecution, for the defendant in that case was already a defendant in a criminal case when the grand juror called upon him for testimony. In Watson the Court referred to ****9** In re Kittle, 180 F. 946 (1910) as a case which 'properly announces the rule.' The following language from Judge Learned Hand's opinion in Kittle supports our conclusion that testimony taken from appellant by the grand juror may not be used in the pending prosecution:

'* * * I shall assume that the inquiry is of the subject matter of some crime, and, indeed, of the crime laid in the existing indictment. When so questioned, the witness must answer * * *. And, when given, his answer will thereafter protect him from further prosecution. It will be a good bar to this very pending prosecution, if it be pertinent to the subject-matter.' (p. 947, emphasis added.)

The Watson decision adopted the foregoing language as its own, and its application to the present situation means that matter obtained by the grand juror would not be useable-either by itself or as a lead-in the pending prosecution. Appellant's fears concerning the pending case against him thus are unfounded-at least insofar as they are based on information the grand juror has requested.

The Watson case, by its express terms, applied to the pending prosecution against the defendant Watson. We do not believe we are obligated to anticipate that the judge in the pending prosecution will incorrectly apply the law of that case, and we decline to do so. The grand juror, in granting immunity, is not required to list every proceeding covered by the immunity for the rather obvious reason that the statute and the Watson case, by their terms, apply to prosecution for Any offense, directly or indirectly ***86** growing out of any testimony given by him. The prosecution which appellant complains is not covered by the grant of immunity is 'pending.' Since it is 'pending' it has not taken place. Since it has not taken place it can be nothing but 'subsequent' to the proceedings before the grand juror. The grant of immunity extended to it.

The next question is that of the use of the compelled answers in any possible future license forfeiture proceedings. The following language of the revised judicature act, presumably based upon the Federal

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and State privileges against self-incrimination, is in point:
'Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses.' C.L.S.1961, s 600.2154 (Stat.Ann.1962 Rev. s 27A.2154).

This statute states the Legislature's understanding of the scope of the privilege against self-incrimination. Although the statute may not be all-inclusive, according to constitutional standards, it expressly prohibits a witness from being exposed to a forfeiture if he is required to give testimony. We draw two conclusions from the provision: first, that a license forfeiture may not be imposed because of testimony or leads from such testimony if appellant is required to testify despite his assertion of the privilege against self-incrimination; and, second, that the immunity granted under section 767.6 must ***87** be at least as broad as the judicature act provision, thus precluding a forfeiture of license after immunity has been granted, that is, a forfeiture ordered solely on the basis of information or leads gained by the grand juror after such grant of immunity.

B.

Another aspect of appellant's immunity argument merits our attention. He ****10** claims that before a witness who has been granted immunity can be convicted of contempt for refusal to answer questions put to him, he must be apprised of 'the nature and extent of said immunity.' For this proposition appellant relies upon Raley v. State of Ohio (1959), 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344, and Stevens v. Marks (1966), 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724. He concludes that because he was not advised by the grand juror whether the grant of immunity extended to the currently pending criminal prosecution against him and to alcoholic beverage license forfeiture proceedings, his contempt conviction was invalid.

Neither Raley nor Stevens stands for the proposition for which appellant cites them. In Raley, the witnesses were not advised at a legislative hearing that a state statute granted them immunity. In Stevens, investigators tried to hold the witness to a waiver of immunity. In both cases the Supreme Court reversed contempt convictions, not because, as appellant asserts, the witnesses were not advised of 'the nature and extent' of the immunity granted them but, rather, because the witnesses were left in doubt as to whether they had any immunity whatsoever. In this case of Colacasides, on the other hand, appellant was not only advised orally that he was granted immunity but, as well, and pursuant to ***88** statutory requirement,[6] a copy of the order granting immunity was given to appellant who, at all times, was represented by counsel. Nor does appellant deny that he was advised of the grant of immunity. His attack on this point is that the grand juror failed to specify exactly what lies within the scope of the immunity granted. Furthermore, he claims that Federal requirements are not met by our determination

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now of the scope of the immunity granted but, instead, that its scope should have been 'demonstrated' to him by the grand juror at the time of the grant of immunity.

As authority for this proposition he relies on the following language in footnote 11 in Stevens:

> 'The suggestion that we should remand the case to the New York courts for a finding of whether or not petitioner was misled is, we think, wide of the mark. A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. Whether the State has met its burden must be measured at the time of the alleged contempt. A declaration that there was a valid immunity uttered for the first time on appeal would come too late.'

We think appellant misreads Stevens. Of course the 'burden' must be measured at the time of the alleged contempt. But the 'burden' the United States Supreme Court alluded to in Stevens was whether any grant of immunity was in fact made, not the legal construction of its scope, nor the specific proceedings to which it applied. These were and remain, and of necessity by the nature of things have to be, matters of judicial construction. We do ***89** not interpret Stevens to mean that a grand jury witness can vitiate the express terms of the immunity provision of the statute by a subjective declaration that the grand juror did not 'demonstrate' to his satisfaction that the immunity offered extended to a specific proceeding then in being or to some possible proceeding in the future. The argument, while ingenious, is not supported by the language relied upon. Neither Raley nor Stevens requires more than was done here-merely that the grand juror advise the witness of the existence of immunity if immunity be, in fact, granted.

III.

Finally, we come to appellant's contentions that this State's one-man grand jury law violates the separation of powers ****11** doctrine, as set forth in Article III, s 2, Constitution of 1963, and the due process clause of the Fourteenth Amendment.

A.

In this country it is not normally the function of a judge to investigate the occurrence of crime. That function normally is performed by the executive branch of government as part of its duty to enforce the laws. Experience has demonstrated, however, that regularly constituted law enforcement agencies sometimes are unable effectively and lawfully to enforce the laws, particularly with respect to corrupt

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conduct by officers of government and conspiratorial criminal activity on an organized and continuing basis. Our experience also has demonstrated that the common law 23-man grand jury is unwieldy and ineffective for the investigation of such crimes in a modern, industrialized and mobile society.[7] It has ***90** demonstrated also that corruption in government and organized crime are susceptible to discovery and prosecution if the investigative body has the power to compel some participants therein to testify by enforcing attendance of witnesses by subpoena and granting immunity from prosecution, but police agencies in this country do not possess such extraordinary power. The ineffectiveness of the common law grand jury considered, and absent the power lawfully to compel testimony, police agencies are thwarted too frequently, for society's safety, in their efforts to investigate such criminal activity. Traditionally in this country, such extraordinary power has been intrusted only to judicial officers. Absent constitutional authority therefor, such essentially judicial power cannot be granted validly to police agencies without violating the separation of powers provision of our Constitution. Art. III, s 2, Const. of 1963.

This dilemma has been resolved in this State by its unique one-man grand jury, comprised of a judicial officer who can properly exercise the subpoena power and the power to grant immunity in order to compel testimony. Appellant, however, contends that a judicial officer cannot also perform investigative duties without violating the separation of powers mandate of Art. III, s 2 of our Constitution of 1963.[8] That constitutional provision, however, contains a significant exception, 'except as expressly provided in this constitution.' In Art. VI, s 29,[9] we find ***91** that circuit judges are among those judicial officers granted the powers of conservators of the peace. If conservators of the peace possessed the powers now exercised by circuit judges as one-man grand jurors, Whether executive or judicial in nature, the exercise of such powers would not violate Art. III, s 2, either because they are judicial in nature or because, if executive, they are expressly authorized by Art. VI, s 29 and, thus, within the exception stated in Art. III, s 2. We find, for reasons to be stated, that conservators of the peace at common law possessed the power to investigate crime for the purpose of apprehending offenders. We hold, therefore, that circuit judges now possess such investigative power, as conservators of the ****12** peace, and their exercise of such power in the performance of duties as one-man grand jurors does not violate Art. III, s 2 of our Constitution of 1963.

The nature of the conservator's power was considered by this Court in In re Slattery (1945), 310 Mich. 458, 17 N.W.2d 251, in another unsuccessful challenge to the constitutionality of our one-man grand jury law. A few years earlier, in In re Sanderson (1939), 289 Mich. 165, 286 N.W. 198, the Court traced the historical development of the office of conservator of the peace from its origin in England to its ultimate merger in the office of justice of the peace. Little more need be added to what was written in Slattery and Sanderson in support of the conclusions we have reached, conclusions which are consistent with those to be found in those two cases.

Taswell-Langmead's English Constitutional History, 11th ed. by Theodore F. T. Plucknett, summarizes this historical development:

***92** 'Conservators of the peace. In the appointment of knights to receive the oaths may probably be discerned the germ of the office of conservator, later justice, of the peace. Custodes pacis were assigned in 1252, 1253 and 1264 and from 1285 were closely associated with the enforcement of the Statute of Winchester. They afterwards appear to have been occasionally chosen by the landholders of the county, but were finally appointed to their office by the royal writ or commission. Their constant function was to

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take indictments of felonies and misdemeanors, and to hold the accused until trial by royal judges. In 1329, 1332, 1338, and from 1350 to 1364 they were given powers to try their prisoners, and this became permanent in 1368. Their early functions of supervising the militia were soon transferred to separate commissions of array, but after the Black Death they frequently dealt with the new labour and price-control legislation. The local courts paled before them, the sheriff became their servant, and parliament (where many J.P.s sat in the House of Commons) constantly confided new and important tasks to them.' (p. 126).

'* * * The principal organ (of county government) in fact had come to be the justices of the peace. Their early history has already been mentioned; as time went on their duties were immensely increased by statute, not only in the sphere of criminal administration but also in that of poor law and general local government. A vast and confused mass of legislation which defies analysis conferred wide and very miscellaneous powers.' (Pp. 685, 686).

Another historian, discussing Criminal Jurisdiction in England, reports these conclusions about the office of justice of the peace:
'The remedy was found in the office of justice of the peace. This office has late twelfth-century origins, but the important steps were taken in the fourteenth century. A statute provided that 'worthy' men were to be appointed to keep the peace ***93** and hear and determine felonies. Further statutes enacted that they were to hold their sessions four times a year. Before these statutes these worthy men were more conservators of the peace than justices; the duty of hearing and determining felonies made them 'justices of the peace', or more simply 'justices'.

'* * * The powers of justices were extended somewhat in the fifteenth century, and increased greatly in the sixteenth century. * * * Thirdly, the justices were instructed to hold preliminary inquiries into allegations of crime that might lead to trial at Assizes or Quarter Sessions. This was in the nature of police powers in 'getting up' a case, not really a judicial activity and suitable only for a society that lacked an adequate police force. No substantial change took place until the middle of the ****13** nineteenth century.' The Machinery of Justice in England, R. M. Jackson, LLD, 4th Ed.1964; at pp. 92-93.

History adds weight to the reasoning of Justice Butzel's opinion in Slattery. Conservators of the peace, historically, were empowered to make investigations and 'get up' a case. Circuit judges, possessing the conservator's powers by virtue of Art. VI, s 29, therefore, do no violence to our separation of powers doctrine, Art. III, s 2, by exercising such powers of investigation as one-man grand jurors.

While we recognize that in Slattery this Court said that a judge conducting a one-man grand jury proceeding acts in a judicial capacity, 310 Mich. at 467, 17 N.W.2d 251, we do not believe it necessary to re-examine that question in this case. We mention the matter only because appellant asserts, without citing any supporting authority, that if grand jury proceedings are not judicial, appellant cannot be held in contempt. Whether a circuit judge acts in a judicial capacity or in an executive capacity as grand juror, there is no constitutional bar to the Legislature's ***94** providing by law, as ours has, that a witness who fails to appear or to answer questions asked of him may be punished for contempt, The contempt proceedings to be conducted in public by another judge and not by the grand juror. Such procedure customarily is followed in enforcing by contempt process refusals to obey lawful orders of disclosure

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made by agencies of the executive branch of government. See Penfield Company of California v. Securities and Exchange Commission (1947), 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117. See, also, Interstate Commerce Commission v. Brimson (1894), 154 U.S. 447, 485-486, 14 S.Ct. 1125, 38 L.Ed. 1047.

The debates of the recent constitutional convention which produced our Constitution of 1963 disclose that the delegates considered omitting from the new Constitution all reference to the conservators of the peace. Indeed, the convention's judiciary committee so recommended, but when it was brought to the delegates' attention in debate that omission of the grant to judges of conservator's powers might affect adversely the validity of our one-man grand jury law, the delegates voted to include in their final proposal the language which now appears as Art. VI, s 29 of the Constitution of 1963. The official record of the convention's proceedings reports the following introductory comment on the 'conservator' proposal by the chairman of the convention's judiciary committee:

'MR. DANHOF: Mr. President, members of the convention, some time back, we had an exclusion report to strike the provision in the 1908 constitution which made the supreme court judges, the circuit judges and the justices of the peace conservators of the peace within their respective jurisdiction. I might state at the time we considered this matter, none of the attorneys nor the circuit judges serving on my committee could see any particular ***95** advantage to the section, nor did research indicate that there was any reason that it be retained. The governor's advisory committee likewise recommended its removal. But we received a letter from Detroit from Circuit Judge Joseph Sullivan in which he brought to our attention a case involving the validity of the one man grand jury system in the state of Michigan.* In this particular case, the question was on the validity of the one man grand jury and Justice Butzel, writing the majority opinion of the court, pointed out the difference between Michigan and New York, and the reason why Michigan could sustain a one man grand jury system and why New York could not. And one of the items which Justice Butzel referred to constantly in about 3 pages of his opinion was the fact that circuit judges by the Constitution of 1908 were authorized to be conservators of the peace and that their duties and functions sitting ****14** as a grand jury would be within this particular section. Now, the odd part of it is that he went on to state that even in spite of this provision, he did not feel that sitting as a one man grand jury was a non judicial function. But in going over it with Mr. Joiner and other members of the staff, and in talking with Mr. Ford, we came to this conclusion: that we should not endanger the one man grand jury system; that if it is to be abolished, it should be abolished by the agency and the body which created the one man grand jury system, namely, the legislature, and that we would not be worried if Justice Butzel had not spent approximately 3 pages of the opinion pointing out that Michigan could have a one man grand jury system while New York could not because we had this provision making the judges conservators of the peace.

'Now, we have amended it slightly to read supreme court, court of appeals and circuit judges and other judges as provided by law, so that the ***96** legislature, if it deems, in its wisdom, to have the judges of courts of limited jurisdiction be conservators of the peace, it can so do. The committee considered this at the time that it was brought before the committee. We had about 14 people. We got 10 votes in favor. Eleven are needed on a committee proposal. I did not get the 11. However, Mr. Ford was absent. He joined with me in this particular amendment. We would urge the adoption thereof.' 2 Constitutional Convention 1961 Record, p. 2703.

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In addition to the chairman of the convention's judiciary committee, others expressed the view that if the State's one-man grand jury system were to be changed, it should be accomplished by the Legislature. The convention then approved the 'conservator' clause by a 58-55 margin. Shortly afterward, a delegate specially proposed a clause to be added to the article on the judiciary, to provide as follows:

> 'One man grand juries are hereby abolished.'

The proposal was defeated, 73-32. 2 Constitutional Convention 1961 Record, pp. 2709-2710.

The significance we place upon the foregoing actions of the constitutional convention is that the delegates correctly regarded the 'conservator' clause important to the constitutional validity of our one-man grand jury law. When the convention and, thereafter, the people of this State approved the document that was to become the Constitution of 1963, including both the 'separation of powers' clause (Art. III, s 2) and the 'conservator' clause (Art. VI, s 29), they declared in legal effect that a judge exercising the powers of a conservator of the peace was not thereby violating the separation of powers clause.

***97** B.

Relying generally upon Mr. Justice Rutledge's concurring opinion in Re Oliver (1949), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed 682, appellant invites our reconsideration of the constitutionality of Michigan's one-man grand jury law. It is his claim that our law is incompatible with current concepts of due process, citing recent United States Supreme Court decisions[10] applying guarantees of the Fourth, Fifth and Sixth Amendments of the United States Constitution to the States by incorporation into the due process clause of the Fourteenth Amendment. In Oliver a contempt conviction under the then Mighigan grand jury statute was reversed, but not on the ground contended for by Mr. Justice Rutledge. In ****15** short, the Rutledge opinion suggests the unconstitutionality of the statute and postulates that the majority opinion in that case demonstrated how far the Federal Supreme Court (p. 280, 68 S.Ct. p. 511)
'* * * departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights. In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, 'in spite of the absolutism of continental governments,' their 'ideas and processes of civil justice' in place of the time-tried 'principles and institutions of the common law' perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this case. * * *'

***98** After paying tribute to Mr. Justice Rutledge's foresight, appellant then urges that the quoted language is (or at least should be) considered the present view (though not yet expressed) of the present United States Supreme Court. This conclusion, it is urged, can be reached by a process of judicial

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osmosis. While acknowledging that the law as originally enacted, in 1917, has been amended from time to time to correct potential evils disclosed by court decisions, appellant contends that the law still reposes in the one-man grand jury such 'awful authority' that we should strike it down as violative of our current concepts of due process.

Judicial declarations of statutory unconstitutionality we think should be made of sterner stuff. We cannot, by the suggested process, strike down a presumptively constitutional legislative act. The fact is that the one-man grand jury law, as it appears on our statute books today, is very much different from that which heretofore has been reviewed for constitutional validity by this Court and by the United States Supreme Court in Re Oliver, supra.

Today, a witness called before the grand juror is entitled to the presence and assistance of counsel in the room where he is being examined. C.L.1948, s 767.3, as amended by P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943). The grand juror no longer may act as the examining magistrate at a hearing on a complaint or indictment resulting from the inquiry,[11] nor may he hear any motions to dismiss or quash any such complaint or indictment; he may not hear any charge of contempt arising out of the inquiry,[12] except for neglect or refusal ***99** to appear in response to a summons or subpoena issued by him; and he may not preside at a trial resulting from the inquiry. C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944). No longer does the statute permit a grand juror to search out criminal conduct generally[13] but, instead, it requires the order authorizing the inquiry, and the complaint upon which such order is based, to 'be specific to common intent of the scope of the inquiry.' C.L.1948, s 767.3, as amended by P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943). Moreover, to forestall abuse of witnesses by grand jury staff personnel, the statute now prohibits the taking of any testimony in the absence of the grand juror and it requires that, upon arrival of a witness in response to a subpoena, the grand juror be ****16** notified thereof forthwith and that he forthwith take the witness' testimony. C.L.1948, s 767.3, as amended by P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943). The statute, despite an early interpretation,[14] has permitted the grant of immunity to a witness who invokes his privilege against self-incrimination and the scope of the immunity granted, as we have noted above, is as broad as the privilege itself. C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946). Finally, to reduce the risk of unwarranted damages to the reputations of witnesses appearing before the grand juror, as well as to enhance the likelihood of the inquiry's success, proceedings before the grand juror are prohibited from disclosure by any person participating therein as an official or as a witness or counsel for a witness, except when necessary in judicial proceedings or in disciplinary proceedings against an attorney, and violation of such requirement ***100** of secrecy constitutes a misdemeanor punishable by fine and imprisonment. C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944).[15] The statute specifically provides that the transcript and record as to any witness be made available to him when relevant ***101** to any appeal or other judicial proceeding. C.L.S.1961, s 767.6a (Stat.Ann.1954 Rev. s 28.946(1)).

However deficient this State's one-man grand jury statute once may have been, when measured against now recognized standards of due process, appellant has failed to persuade us that, as now written, it denies due process.

****17** We find the present statute meets all of the requirements of the Michigan Constitution of 1963 and the Constitution of the United States. No rights of appellant guaranteed thereby have been denied him. The judgment of contempt entered by the Wayne circuit court and the sentence imposed pursuant thereto are affirmed. No costs, constitutional issues being involved.

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DETHMERS, C.J., and BLACK and BRENNAN, JJ., concurred with SOURIS and O'HARA, JJ.

ADAMS, Justice.

I join in the opinion of Justices Souris and O'Hara except for Section III-A of said opinion. As to the question of separation of powers, I believe that the decision of this Court in In re Slattery (1945), 310 Mich. 458, 17 N.W.2d 251, that a judge conducting a one-man grand jury proceeding acts in a judicial capacity is controlling and disposes of this question.

KELLY, J., concurred with ADAMS, J.

KAVANAGH, Justice.

I concur in the result reached in the opinion of Justices Souris and O'Hara, except that I limit such concurrence with reference to the separation of powers question to the decision of this Court in In re Slattery, 310 Mich. 458, 17 N.W.2d 251, which held that a judge conducting a one-man grand jury proceeding acts in a judicial capacity.

All Citations

379 Mich. 69, 150 N.W.2d 1

Footnotes

* See In re Colacasides (On Application for Bail), 6 Mich.App. 298, 148 N.W.2d 898.

1 'In the Matter of the Petition of George E. Bowles, Grand Juror
'The petition of George E. Bowles, Grand Juror, for an order of this Court authorizing Petitioner or any member of his staff to take custody of boxes 1 through 13 of the Judge Edward S. Piggins Grand Jury records from the Clerk of this Court having been duly considered,
'IT IS ORDERED BY THE COURT, That the Clerk of this Court is hereby directed to deliver to Grand Juror George E. Bowles, or a member of his staff designated therefor by Grand Juror George E. Bowles in writing, boxes 1 through 13 of the records of the Edward S. Piggins Grand Jury and to take a receipt for such records;
'IT IS FURTHER ORDERED, That Grand Juror George E. Bowles shall obtain all synopses of testimony, dockets, journals, reporters' notes, transcripts, exhibits, and all other records, originals or duplicates, not heretofore filed by the Edward S. Piggins Grand Jury with this Court, whether in the hands of the Michigan State Police or the Detroit Police Department or any other person or persons, and shall deliver an inventory of the same and a receipt therefor to the Clerk of the Supreme Court;
'IT IS FURTHER ORDERED, That said records be kept in the possession of Grand Juror Bowles

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until the further order of this Court in the same manner and subject to the same conditions of secrecy as are provided by statute for all other records acquired during the course of the Grand Jury inquiry and that, pursuant to statute, they be made available to the State of Michigan for its lawful use thereof in prosecutions and

2 'Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.'

3 '* * * Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. The witness shall have the right to have counsel present in the room where the inquiry is held. All matters revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in section 4. No testimony shall be taken or given by any witness except in the presence of the judge.' (C.L.1948, s 767.3, as amended in P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943)).

'* * * Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of such judge or after his services with such judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry if the judge shall make no presentment of crime or wrongdoing as to any person or persons whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.' (C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944)).

'No witness shall upon such inquiry be required to answer any questions, or shall be convicted for contempt upon refusal to do so, when the answers might granted by the State[FN5] and Federal

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constitutions. granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such judge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.' (C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946)).

4 See footnote 1, supra.

5 'No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.' Art. 1, s 17, Const. of 1963.

6 C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946), see footnote 3, supra.

7 Even in 1850 the common law grand jury was subjected to devastating criticism. See Constitutional Convention Debates, 1850, remarks by Delegates Sullivan (pp. 54-55), Pierce (pp. 55-56) and McLeod (pp. 197-201). The constitutional language concerning the common law grand jury was deleted in 1850, although the Legislature has perpetuated the institution. (C.L.1948, ss 767.7-767.25; Stat.Ann.1954 Rev. ss 28.947-28.965).

8 'The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.'

9 'Justices of the supreme court, judges of the court of appeals, circuit judges and other judges as provided by law shall be conservators of the peace within their respective jurisdictions.'

* In re Slattery (1945), 310 Mich. 458, 17 N.W.2d 251.

10 Mapp v. People of State of Ohio (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; Gideon v. Wainwright (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Douglas v. People

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of State of California (1963), 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; and Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

11 A practice the statute allowed formerly and upheld in People v. McCrea (1942), 303 Mich. 213, 247, 248, 6 N.W.2d 489. See, also, September 1948 Michigan State Bar Journal, p. 66 (vol. xxvii, No. 9).

12 See In re Oliver (1947), 318 Mich. 7, 27 N.W.2d 323, rev'd, (1949), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, and In re Murchison (1954), 340 Mich. 151, 65 N.W.2d 301, rev'd, (1955), 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942.

13 Another practice the statute allowed formerly and upheld by an equally divided court in People v. St. John (1938), 284 Mich. 24, 27, 28, 278 N.W. 754.

14 People v. Willson (1919), 205 Mich. 28, 43, 44, 171 N.W. 474.

15 On December 9, 1966, this Court issued the following order directed, by its terms, to all judges of courts of record 'now conducting or hereafter authorized to conduct' proceedings under our one-man grand jury law, to assure full compliance with the secrecy provisions of the statute:

'STATE OF MICHIGAN IN THE SUPREME COURT

'In the Matter of One Man Grand Jury Proceedings

'To All Judges of Courts of Record:

'On this Court's own motion, all judges now conducting or hereafter authorized to conduct one-man grand jury proceedings hereby are directed to order all members of their grand jury staffs and other persons admitted to such inquiries to comply fully with the following provisions of C.L.S.1956, s 767.4:

"* * * Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of such judge or after his services with such judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00 or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. * * *'

'The foregoing direction of full compliance with section 767.4 shall apply equally to the judges

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performing duties as grand jurors. Any violations hereof shall be deemed to be contempt of this Court.
'/sgd. Thomas M. Kavanagh/
Chief Justice
'Dated: December 9, 1966'

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75 S.Ct. 623
Supreme Court of the United States

In the Matters of Lee Roy MURCHISON and John White, Petitioners.

No. 405.
|
Argued April 20, 1955.
|
Decided May 16, 1955.

Synopsis

Contempt proceedings arising out of witnesses' conduct before a Michigan grand jury. The Reporter's Court of Detroit entered judgments of conviction and defendants appealed. The Supreme Court of Michigan, 340 Mich. 140, 65 N.W.2d 296 and 340 Mich. 151, 65 N.W.2d 301, affirmed the convictions, and certiorari was granted. The Supreme Court, Mr. Justice Black, held that fact that same judge who had sat as the Michigan 'judge-grand jury' before which witnesses had testified presided at contempt hearing wherein witnesses were adjudged in contempt for their conduct before the 'one-man grand jury' constituted a violation of due process.

Reversed and remanded with directions.

Mr. Justice Reed, Mr. Justice Minton and Mr. Justice Burton dissented.

Attorneys and Law Firms

****624 *133** Mr. William L. Colden, Detroit, Mich., for petitioner.

Mr. Edmund E. Shepherd, Lansing, Mich., for respondent.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

Michigan law authorizes any judge of its courts of record to act as a so-called 'one-man grand jury.'[1] He can compel witnesses to appear before him in secret to testify about suspected crimes. We have previously held that such a Michigan 'judge-grand jury' cannot consistently with the Due Process Clause of the Fourteenth Amendment summarily convict a witness of contempt for ***134** conduct in the secret hearings. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. We held that before such a conviction could stand, due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his

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own behalf, and be represented by counsel. The question now before us is whether a contempt proceeding conducted in accordance with these standards complies with the due process requirement of an impartial tribunal where the same judge presiding at the contempt hearing had also served as the 'one-man grand jury' out of which the contempt charges arose. This does not involve, of course, the longexercised power of courts summarily to punish certain conduct occurring in open court.[2]

The petitioners, Murchison and White, were called as witnesses before a 'one-man judge-grand jury.' Murchison, a Detroit policeman, was interrogated at length in the judge's secret hearings where questions were asked him about suspected gambling in Detroit and bribery of policemen. His answers left the judge persuaded that he had committed perjury, particularly in view of other evidence before the 'judge-grand jury.' The judge then charged Murchison with perjury and ordered him to appear and show cause why he should not be punished for criminal contempt.[3] White, the other petitioner, was ***135** also summoned to appear as a witness in the same 'one-man grand jury' hearing. Asked numerous questions about gambling and bribery, he refused to answer on the ground that he ****625** was entitled under Michigan law to have counsel present with him. The 'judge-grand jury' charged White with contempt and ordered him to appear and show cause. The judge who had been the 'grand jury' then tried both petitioners in open court, convicted and sentenced them for contempt. Petitioners objected to being tried for contempt by this particular judge for a number of reasons including: (1) Michigan law expressly provides that a judge conducting a 'one-man grand jury' inquiry will be disqualified from hearing or trying any case arising from his inquiry or from hearing any motion to dismiss or quash any complaint or indictment growing out of it, or from hearing any charge of contempt 'except alleged contempt for neglect or refusal to appear in response to a summons or subpoena'; (2) trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The trial judge answered the first challenge by holding that the state statute barring him from trying the contempt cases violated the Michigan Constitution on the ground that it would deprive a judge of inherent power to punish contempt. This interpretation of the Michigan Constitution is binding here. As to the second challenge ***136** the trial judge held that due process did not forbid him to try the contempt charges. He also rejected other constitutional contentions made by petitioners. The State Supreme Court sustained all the trial judge's holdings and affirmed.[4] Importance of the federal constitutional questions raised caused us to grant certiorari.[5] The view we take makes it unnecessary for us to consider or decide any of those questions except the due process challenge to trial by the judge who had conducted the secret 'one-man grand jury' proceedings.[6]

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

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***137** It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings.[7] A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been ****626** a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.[8] Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.[9] It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. See Cooke v. United States, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 396, 69 L.Ed. 767. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here. For we held in the Oliver case (333 U.S. 257, 68 S.Ct. 501) that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.

***138** As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. That it sometimes does is illustrated by an incident which occurred in White's case. In finding White guilty of contempt the trial judge said, 'there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand. * * * Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record.' In answer to defense counsel's motion to strike these statements because they were not part of the original record the judge said, 'That is something * * * that wouldn't appear on the record, but it would be very evident to the court.' Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

This incident also shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness. There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge. If there had been they might have been able to refute the judge's statement about White's insolence. Moreover, as shown by the judge's statement here a 'judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the Charge should be heard before ***139** that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which ****627** he must finally pass in determining the guilt or innocence of the defendant.[10] In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.

We hold that it was a violation of due process for the 'judge-grand jury' to try these petitioners, and it was therefore error for the Supreme Court of Michigan to uphold the convictions. The judgments are reversed and the causes are remanded for proceedings not inconsistent with this opinion.

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Reversed.

Mr. Justice REED and Mr. Justice MINTON, dissenting, with whom Mr. Justice BURTON joins.

The Court holds that it is unconstitutional for a state judge to punish a contempt, previously committed before him while acting as a so-called one-man grand jury, after a full hearing in open court. It holds that White, in being so punished for his blanket refusal to answer any questions before the grand jury, and Murchison, in being so punished for perjury before the same body, were deprived of their liberty without due process of law.

This conclusion is not rested on any irregularity in the proceedings before either the grand jury or the court. Under Michigan procedure a single state judge makes the ***140** grand jury investigation, not in secret, but with other public officials to aid him, and a transcript is made of the testimony. There is certainly nothing unconstitutional about this. A State may reduce the customary number of grand jurors to one, and impart the investigatory duty to a member of its judiciary if it so desires. Further, the accused is afforded a full hearing in open court, with a statement of charges, benefit of counsel, and a full opportunity to explain his conduct before the grand jury, before being held in contempt. Thus all the requirements set down in In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, are met.

The Court's determination is rested on the sole fact that the same judge first cited petitioners for contempt committed in his presence, and then presided over the proceedings leading to the final adjudication. It is neither shown nor alleged that the state judge was in any way biased. Nor is this required by the Court, for it holds, as a matter of law, that the judge's 'interest' in a conviction makes the proceedings inherently prejudicial and thus constitutionally invalid. The fact that the 'interest' of the state judge in this procedure is no different from that of other judges who have traditionally punished for contempt leads us to dissent.

In Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 454, 96 L.Ed. 71, we upheld the power of a federal district judge to summarily punish a contempt previously committed in his presence. In that case, after a trial which had extended for some nine months, the trial judge issued a certificate summarily holding defense counsel in contempt for their actions during the trial. There were no formalities, no hearings, no taking of evidence, no arguments and no briefs. We held that such a procedure was permitted by Rule 42 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which codified the "prevailing usages at law." The Court specifically rejected the contention that the judge who heard the contempt was disqualified from punishing it and should be required ***141** to assume the role ****628** of accuser or complaining witness before another judge. In Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, the Court simply stated an exception: when the trial judge becomes personally embroiled with the contemnor, he must step aside in favor of another judge. That decision was rested upon our supervisory authority over the administration of criminal justice in the federal courts. The Court now holds, even though there is no showing or contention that the state judge became enbroiled or personally exercised, or was in any way biased, that as a matter of constitutional law—of procedural due process—a state

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judge may not punish a contempt previously committed in his presence. This seems inconsistent with all that has gone before.

The Court, presumably referring to the situation in the federal courts, states that the 'adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here.' The reason that it cannot, we are told, is because 'we held in the Oliver case that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.' This is hardly explanatory, for the question of whether the hearing is to be summary or plenary has no bearing on the attitude or 'interest' of the judges in the two situations, which is indistinguishable. The simple fact is that in the federal courts we allow the same judge who hears the contempt and issues the certificate to punish it subsequently and summarily, but in this case we do not allow such punishment even after a full court trial. The only factual difference between Sacher and this case is that the contempt in Sacher was committed at a public trial. When the contempt is not committed in open court, we require that the criminal conviction be in public and that he individual be given a full hearing, with an opportunity to defend himself against the charges proffered and to make a record from which to appeal. ***142** In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. Petitioners had all this. They are not entitled to more.

We do not see how it can be held that it violates fundamental concepts of fair play and justice for a state judge after a full court trial to punish a contempt previously observed when acting as a grand jury, when it has been held that it is perfectly proper for a federal judge to summarily punish a contempt previously observed in open court. It seems to us that the Court has imposed a more stringent requirement on state judges as a matter of due process than we have imposed on federal judges over whom we exercise supervisory power.

The Court relies heavily on Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. There we held that it deprives a defendant of due process to 'subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.' Id., 273 U.S. at page 523, 47 S.Ct. at page 441. It is one thing to hold that a judge has too great an interest in a case to permit the rendition of a fair verdict when his compensation is determined by the result he reaches. It is quite another thing to disqualify a state judge as having too great an interest to render a due process judgment when his sole interest, as shown by this record, is the maintenance of order and decorum in the investigation of crime—an interest which he shares in common with all judges who punish for contempt.

The State of Michigan has decided that in the administration of its criminal law it is wise to have the investigating power in the hands of a judge. It has also decided that the judge who observes the contempt is to preside at the trial of the contemnor. It does not seem that there is here such a violation of accepted judicial standards as to justify this Court's determination of unconstitutionality.

We would affirm.

All Citations

349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942

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Footnotes

1 Mich.Stat.Ann.1954, ss 28.943, 28.944, Comp.Laws 1948, ss 767.3, 767.4.

2 Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717; Cooke v. United States, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 396, 69 L.Ed. 767; Ex parte Savin, 131 U.S. 267, 277, 9 S.Ct. 699, 701, 702, 33 L.Ed. 150. See also In re Oliver, 333 U.S. 257, 273—278, 68 S.Ct. 499, 507—510, 92 L.Ed. 682.

3 The contempt charge signed by the judge reads in part as follows:
'It therefore appearing * * * that the said Patrolman Lee Roy Murchinson (sic) has been guilty of wilfull and corrupt perjury, which perjury has an obstructive effect upon the judicial inquiry being conducted by this court and the said Patrolman Lee Roy Murchinson (sic) obstructed the judicial function of the court by wilfully giving false answers as aforesaid, and did also tend to impair the respect for the authority of the court, all of which perjury and false answers given by the said witness aforesaid was committed during the sitting of, in the presence and view of this court and constitutes criminal contempt;
'It is therefore ordered that the said Patrolman Lee Roy Murchinson (sic) appear before this court on the tenth day of May, 1954, at 10:00 o'clock in the forenoon and show cause why he should not be punished for criminal contempt of this court because of his aforesaid acts.'

4 In re White, 340 Mich. 140, 65 N.W.2d 296; In re Murchison, 340 Mich. 151, 65 N.W.2d 301.

5 348 U.S. 894, 75 S.Ct. 216.

6 That we lay aside certain other federal constitutional challenges by petitioners is not to be taken as any intimation that we have passed on them one way or another.

7 See, e.g., Note, 50 L.R.A.,N.S., 933, 953-954, 970-971.

8 Apparently the trial judge here did consider himself a part of the prosecution. In passing on a request by Murchison's counsel for a two-day postponement of the contempt trial the judge said, 'There are two points that suggest themselves to me.
'One is that if the respondent is going to claim that he was in Shrewsberry, Ontario, Canada, on March 9, 1954, that we ought to be furnished with information so that we could between now and two days from now, which I am going to give you, we could do some checking and investigating ourselves.' (Emphasis supplied.)
Because of the judge's dual position the view he took of his function is not at all surprising.

9 See, e.g., Queen v. London County Council, (1892) 1 Q.B. 190; State ex rel. Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172, 37 L.R.A. 289.

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[10] See Hale v. Wyatt, 78 N.H. 214, 98 A. 379. See also, Witnesses—Competency—Competency of a Presiding Judge as Witness, 28 Harv.L.Rev. 115.

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68 S.Ct. 499
Supreme Court of the United States

In re OLIVER.

No. 215.
|
Argued Dec. 11, 1947.
|
Decided March 8, 1948.

Synopsis

Habeas corpus proceeding by William Oliver. To review a judgment of the Supreme Court of Michigan, 318 Mich. 7, 27 N.W.2d 323, dismissing that petition, the petitioner brings certiorari.

Reversed and remanded with directions.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON, dissenting.

On Writ of Certiorari to the Supreme Court of Michigan.

Attorneys and Law Firms

****500 *258** Messrs. William Henry Gallagher, of Detroit, Mich., and Osmond K. Fraenkel, for petitioner.

Mr. Edumund E. Shepherd, of Detroit, Mich., for respondent.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

A Michigan circuit judge summarily sent the petitioner to jail for contempt of court. We must determine whether he was denied the procedural due process guaranteed by the Fourteenth Amendment.

In obedience to a subpoena the petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a 'one-man grand jury' investigation into alleged gambling and official corruption. The investigation presumably took place in the judge's chambers, though that is not certain. ***259** Two other circuit judges were present in an advisory capacity.[1] A prosecutor may have been present. A stenographer was most likely there. The record does not show what other members, if any, of the judge's investigatorial staff participated in the proceedings. It is certain, however, that the public was excluded—the questioning was secret in accordance with the traditional grand jury method.

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****501** After petitioner had given certain testimony, the judge-grand jury, still in secret session, told petitioner that neither he nor his advisors believed petitioner's story—that it did not 'jell.' This belief of the judge-grand jury was not based entirely on what the petitioner had testified. As will later be seen, it rested in part on beliefs or suspicions of the judge-jury derived from the testimony of at least one other witness who had previously given evidence in secret. Petitioner had not been present when that witness testified and so far as appears was not even aware that he had testified. Based on its beliefs thus formed—that petitioner's story did not 'jell'—the judge-grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross examine the other grand jury witness or to summon witnesses to refute the charge against him.

Three days later a lawyer filed on petitioner's behalf in the Michigan Supreme Court the petition for habeas corpus now under consideration. It alleged among other ***260** things that the petitioner's attorney had not been allowed to confer with him and that, to the best of the attorney's knowledge, the petitioner was not held in jail under any judgment, decree or execution, and was 'not confined by virtue of any legal commitment directed to the sheriff as required by law.' An order was then entered signed by the circuit judge that he had while 'sitting as a One-Man Grand Jury' convicted the petitioner of contempt of court because petitioner had testified 'evasively' and had given 'contradictory answers' to questions. The order directed that petitioner 'be confined in the county jail * * * for a period of sixty days * * * or until such time as he * * * shall appear and answer the questions heretofore propounded to him by this Court * * *.'

The Supreme Court of Michigan, on grounds detailed in the companion case of Petition of Dohany (In re Hartley), 317 Mich. 441, 27 N.W.2d 48,[2] rejected petitioner's contention that the summary manner in which he had been sentenced to jail in the secrecy of the grand jury chamber had deprived him of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment ***261** requires.[3] Petition of Dohany (Ex Parte Oliver), 318 Mich. 7, 27 N.W.2d 323. We granted certiorari, 332 U.S. 755, 68 S.Ct. 76, to consider these procedural due process questions.

The case requires a brief explanation of Michigan's unique one-man grand jury system.[4] That state's first constitution ****502** (1835), like the Fifth Amendment to the Federal Constitution, required that most criminal prosecutions be begun by presentment or indictment of a grand jury. Art. I, s 11. This compulsory provision was left out of the 1850 constitution and from the present constitution (1908). However, Michigan judges may still in their discretion summon grand juries, but we are told by the attorney general that this discretion is rarely exercised and that the 'One-Man Grand Jury' has taken the place of the old Michigan 16 to 23-member grand jury, particularly in probes of alleged misconduct of public officials.

The one-man grand jury law was passed in 1917 following a recommendation of the State Bar Association that, in ***262** the interest of more rigorous law enforcement, greater emphasis should be put upon the 'investigative procedure' for 'probing' and for 'detecting' crime.[5] With this need uppermost in its thinking the Bar Association recommended a bill which provided that justices of the peace be vested with the inquisitorial powers traditionally conferred only on coroners and grand juries. The bill as passed imposed the recommended investigatory powers not only on justices of the peace, but on police judges

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and judges of courts of record as well. Mich.Laws 1917, Act 196.

Whenever this judge-grand jury may summon a witness to appear, it is his duty to go and to answer all material questions that do not incriminate him. Should he fail to appear, fail to answer material questions, or should the judge-grand jury believe his evidence false and evasive, or deliberately contradictory, he may be found guilty of contempt. This offense may be punishable by a fine of not more than $100, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the judge-grand jury. If after having been so sentenced he appears and satisfactorily answers the questions propounded by the judge-jury, his sentence may, within the judge-jury's discretion, be commuted or suspended. At the end of his first sentence he can be resummoned and subjected to the same inquiries. Should the judge-jury again believe his answers false and evasive, or contradictory, he can be sentenced to serve sixty days more unless he reappears before the judge-jury during the second 60-day period and satisfactorily answers the questions, and the judge-jury within ***263** its discretion then decides to commute or suspend his sentence.[6]

In carrying out this authority a judge grand jury is authorized to appoint its own prosecutors, detectives and aides at public expense,[7] all or any of whom may, at the discretion of the justice of the peace or judge, be admitted to the inquiry. Mich.Stat.Ann. s 28.944 (Henderson 1938). Comp.Laws 1929, s 17218. A witness may be asked questions on all subjects and need not be advised of his privilege against self-incrimination, even though the questioning is in secret.[8] And these secret interrogations can be carried on day or night, in a public place or a 'hideout,' a courthouse, an office building, a hotel room, a home, or a place of business; so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the 'portable grand jury.'[9]

It was a circuit court judge-grand jury before which petitioner testified. That ****503** judge-jury filed in the State Supreme Court an answer to this petition for habeas corpus. The answer contained fragments of what was apparently a stenographic transcript of petitioner's testimony given before the grand jury. It was these fragments of testimony, so the answer stated, that the 'Grand ***264** Jury' had concluded to be 'false and evasive.' The petitioner then filed a verified motion with the State Supreme Court seeking to have the complete transcript of his testimony before the judge-jury produced for the habeas corpus hearing. He alleged that a full report of his testimony would disclose that he had freely, promptly, and to the best of his ability, answered all questions asked, and that the full transcript would refute the charge that he had testified evasively or falsely. In his answer to the motion the circuit judge did not deny these allegations. However, he asserted that the fragments contained in the original answer showed 'all of the Grand Jury testimony necessary to the present proceeding' and that 'the full disclosure of petitioner's testimony would seriously retard Grand Jury activities.' The State Supreme Court then denied the petitioner's motion. Thus when that Court later dismissed the petition for habeas corpus it had seen only a copy of a portion of the record of the testimony given by the petitioner.

The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge, and therefore we do not concern ourselves with that question. It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy. See, e.g., Hale v. Henkel, 201 U.S. 43, 58—66, 26 S.Ct. 370, 372-375, 50

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L.Ed. 652; State v. Branch, 68 N.C. 186, 12 Am.Rep. 633. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. ***265** They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all.[10] Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature,[11] the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional ****504** standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both. Thus our first question is this: ***266** Can an accused be tried and convicted for contempt of court in grand jury secrecy?

First. Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal,[12] state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alleged misconduct called contempt of court[13] have not been regarded as an exception to this universal rule against secret trials, unless some other Michigan one-man grand jury case may represent such an exception.

This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.[14] In this country the guarantee to an accused of ***267** the right to a public trial first appeared in a state constitution in 1776.[15] Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *' most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions.[16] Today almost without exception[17] every state by constitution[18] ****505 *268** statute,[19] or judicial decision,[20] requires that all criminal trials be open to the public.

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition,[21] to the excesses of ***269** the English Court of Star Chamber,[22] and to the French monarchy's abuse of the lettre de cachet.[23] All of these institutions obviously symbolized a ****506** menace to liberty. In ***270** the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the

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right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society,[24] the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[25] One need not wholly agree with a statement made on the subject by ***271** Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: '* * * suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'[26]

In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial.[27] But, unless ****507** in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches.[28] And without exception all courts have held ***272** that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.[29] In Gaines v. Washington, 277 U.S. 81, 85, 86, 48 S.Ct. 468—470, 72 L.Ed. 793, this Court assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause, although its actual holding there was that no violation had in fact occurred, since the trial court's order barring the general public had not been enforced. Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts,[30] but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.

In the case before us, the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to ***273** prison—still without any break in the secrecy. Even in jail, according to undenied allegations, his lawyer was denied an opportunity to see and confer with him. And that was not the end of secrecy. His lawyer filed in the State Supreme Court this habeas corpus proceeding. Even there, the mantle of secrecy enveloped the transaction and the State Supreme Court ordered him sent back to jail without ever having seen a record of his testimony, and without knowing all that took place in the secrecy of the judge's chambers. In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Second. We further hold that failure to afford the petitioner a reasonable opportunity to defend himself

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against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, ****508** to offer testimony, and to be represented by counsel.[31] Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge, ***274** namely, a contempt of court, committed, the State urges, in the court's actual presence.

It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat. 204, 5 L.Ed. 242, which had marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.' Id., at page 231 of 6 Wheat. And see In re Michael, 326 U.S. 224, 227, 66 S.Ct. 78, 79, 90 L.Ed. 30.

That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, a contempt case arising in a federal district court. There it was pointed out that for a ***275** court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the Terry rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.' Id., at page 536 of 267 U.S., at pages 394, 395 of 45 S.Ct.

Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses ****509** in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges

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of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority * * * before the public.' If some essential elements of the offense are not personally observed by the judge, so that the must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the ***276** Cooke case, that the accused be accorded notice and a fair hearing as above set out.

The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public. Furthermore, the answer of the judge-grand jury to the petition for habeas corpus showed that his conclusion that the petitioner had testified falsely was based, at least in part, upon the testimony given before him by one or more witnesses other than petitioner. Petitioner and one Hartley both testified the same day; both were pin-ball machine operators; both had bought or had in their possession certain so-called bonds purchased from one Mitchell; both were sent to jail for contempt the same day. Petition of Dohany (In re Hartley), 317 Mich. 441, 27 N.W.2d 48. The judge-grand jury pressed both petitioner and Hartley to state why they bought bonds which were patently worthless. The petitioner was also repeatedly asked what he had done with the worthless bonds. He answered every question asked him, according to the fragmentary portions of his testimony reported to the Michigan Supreme Court, most of which is included in that court's opinion. He steadfastly denied that he knew precisely what he had done with the worthless bonds, but made several different statements as to how he might have disposed of them, such as that he might have thrown them into the wastebasket, or trash can, or might have burned them.

In upholding the judge-grand jury's conclusion that petitioner had testified falsely and evasively, the majority of the Michigan Supreme Court gave as one reason a statement in the judge-grand jury's answer 'That the Grand Jury, after investigation, is satisfied that the bonds ***277** sold by the said Carman A. Mitchell to the said William D. Oliver are the same as those sold by the said Carman A. Mitchell to Leo Thomas Hartley.' Nothing in the petitioner's testimony as reported could have remotely justified the judge-jury in drawing such a conclusion. The judge-jury was obviously appraising the truth of Oliver's testimony in light of testimony given the same day in petitioner's absence by Hartley and possibly by other witnesses. The Terry case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence. This case would be like the Terry case only if the judge there has not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify.

Nor is there any reason suggested why 'demoralization of the court's authority' would have resulted from giving the ****510** petitioner a reasonable opportunity to appear and offer a defense in open court to

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a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts.[32] The practice that has always been followed with recalcitrant grand jury witnesses ***278** is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of other testimony to be perjurers, have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense. The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'

It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716. The petitioner was convicted without that kind of trial.

The judgment of the Supreme Court of Michigan is reversed and the cause is remanded to it for disposition not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice RUTLEDGE, concurring.

I join in the Court's opinion and decision. But there is more which needs to be said.

Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, namely, the rights 'to be informed ***279** of the nature and cause of the accusation;[1] to be confronted with the witnesses against him;[2] to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.' It takes away the security against being twice put in jeopardy for the same offense[3] and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal.[4] U.S.Const.Amends. V. and XIV.

This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government. They cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property. There is no semblance of due process of law in the scheme when it is used for those ends.[5]

****511 *280** The case demonstrates how far this Court departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights.[6] In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, 'in spite of the absolutism of continental governments,' their 'ideas and processes of civil justice' in place of the time-tried 'principles and institutions of the common law'[7] perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in

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this case. It is the immediate offspring of Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232, and later like cases.[8]

So long as they stand, so long as the Bill of Rights is regarded here as a strait jacket of Eighteenth Century procedures rather than a basic charter of personal liberty, like experimentations may be expected from the states. And the only check against their effectiveness will be the agreement of a majority of this Court that the experiment violates fundamental notions of justice in civilized society.

I do not conceive that the Bill of Rights, apart from the due process clause of the Fifth Amendment, incorporates all such ideas. But as far as its provisions go, I know of no better substitutes. A few may be inconvenient. But restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive ***281** one of it, are always inconvenient—to the authority so restricted. And in times like these I do not think substitutions imported from other systems, including continental ones, offer promise on the whole of more improvement than harm, either for the cause of perfecting the administration of justice or for that of securing and perpetuating individual freedom, which is the main end of our society as it is of our Constitution.

One cannot attribute the collapse of liberty in Europe and elsewhere during recent years solely to the 'ideas and processes of civil justice' prevailing in the nations which have suffered that loss. Neither can one deny the significance of the contrast between their success in maintaining systems of ordered liberty and that of other nations which in the main have adhered more closely to the scheme of personal freedoms the Bill of Rights secures. This experience demonstrates, I think, that it is both wiser and safer to put up with whatever inconveniences that charter creates than to run the risk of losing its hard-won guaranties by dubious, if also more convenient substitutions imported from alien traditions.[9]

****512 *282** The states have survived with the nation through great vicissitudes, for the greater part of our history, without wide departures or numerous ones from the plan of the Bill of Rights. They accepted that plan for the nation when they ratified those amendments. They accepted it for themselves, in my opinion, when they ratified the Fourteenth Amendment. Adamson v. California, 332 U.S. 46, dissenting opinions, at pages 68, 123, 67 S.Ct. 1672, 1683, 1684, 171 A.L.R. 1223. It was good enough for our fathers. I think it should be good enough for this Court and for the states.

Room enough there is beyond the specific limitations of the Bill of Rights for the states to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions, unless or until the people have authorized them by the constitutionally provided method. This is no time to experiment with established liberties. That process carries the dangers of dilution and denial with the chances of enforcing and strengthening.

It remains only to say that, in the face of so broad a departure from so many specific constitutional guaranties or, if the other view is to control, from their aggregate summarized in the concept of due process as representing fundamental ideas of fair play and justice in civilized society, such as the record in this case presents, this Court's eyes need not remain closed nor its hand idle until the case is returned to the state supreme court for reaffirmation of its position or confirmation of our views expressed in the Court's opinion. Neither Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, nor Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397, presented a situation like the one tendered here, whether ***283** in relation to the disentanglement of constitutional issues from questions of state law or, consequently, in

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respect to the breadth and clarity of the state's departure from federal constitutional commands. Neither case therefore requires or justifies the disposition of this cause according to the procedure there followed. This case is neither unripe for decision nor wanting of sufficient basis in the record for exercise of that function.

Mr. Justice FRANKFURTER:

Under the Fourteenth Amendment, a State may surely adopt as its own a procedure which was the established method for prosecuting crime in nearly half the States which ratified that amendment. And so, it may abolish the grand jury,[1] or it may reduce the size of the grand ***284** jury, and even to a single member. A State has great leeway in devising its judicial instruments for probing into conduct as a basis for charging the commission of crime. It may, at the same time, surround such preliminary inquiry with safeguards, not only that crime may be detected and criminals ****513** punished, but also that charges may be sifted in secret so as not to injure or embarrass the innocent.

Flouting of such a judicial investigatory system may be prevented by the hitherto constitutionally valid power to punish for contempt. There must, however, be such recalcitrance, where the basis of punishment is testimony given or withheld, that the administration of justice is actively blocked. See Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656, 11 A.L.R. 333. And the procedural safeguards of 'due process' must be observed. Due notice of the charge and a fair opportunity to meet it, are indispensable. This involves an opportunity to canvass the charge in the open and not behind closed doors. So long as a man has ample opportunity to demonstrate his innocence before he is hustled off to jail, he cannot complain that a State has seen fit to devise a new procedure for satisfying that opportunity. Just as it is not violative of due process for a State to take private property for public use and leave to a later stage the constitutional vindication of the right to compensation, it does not seem to me that it would be violative of due process to allow the judge-grand juror of Michigan to find criminal contempt for conduct in his proceedings without the familiar elements of an open trial, provided that the State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding.

But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes ***285** handicapped with a finding against him which he did not have an adequate opportunity of resisting.

We are here dealing with the attempt of a State having the seventh largest population in the Union to curb or mitigate the commission of crimes by effective prosecution. This procedure has been in operation for over thirty years. It was not heedlessly entered into nor has it been sporadically pursued. In a series of cases it has had the sanction of the highest court of Michigan. While there are indications in the opinion of the Supreme Court of Michigan from which we could infer the constitutional inadequacy of the procedure pursued in this case, we should not decide constitutional issues and conclude that the Michigan system offends the Constitution of the United States, without a clearer formulation of what it is that actually happens under this system, or did happen here, than the case before us reveals.

It is to me significant that the precise issues on which this Court decides this case have never been explicitly challenged before, or passed on, by the Supreme Court of Michigan in the series of cases in which that court had adjudicated controversies arising under the Michigan grand jury system. If a State

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has denied the due process required by the Fourteenth Amendment, it is more consonant with the delicate relations between the United States and the courts of the United States, and the States and the courts of the States, that the courts of the States be given the fullest opportunity, by proper presentation of the issues, to make such a finding of unconstitutionality.

I do not think that we have had that in this case. For instance, while I could regard it inadmissible under the Fourteenth Amendment to have only a partial and mutilated record of the proceedings before the grand juror-judge when the contemnor for the first time has the opportunity to meet the accusation against him publicly, the petitioner himself in this case seems to repel the ***286** suggestion that that is his complaint.[2] Certainly, as Mr. Justice JACKSON points out, the first ground of the Court's opinion was not made the basis ****514** for inviting our review here. I agree with him in concluding that in the light of our decision the other day in Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397, in conjunction with Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, the cause should be returned to the Supreme Court of Michigan to enable that court to pass upon these issues.

Mr. Justice JACKSON, with whom Mr. Justice FRANKFURTER agrees, dissenting.

The principal ground assigned for reversal of the judgment of conviction is the alleged secrecy of the contempt procedure. That ground was not assigned for review in the petition for certiorari to this Court. Nor was it raised in the petition for writ of habeas corpus in the state courts. Therefore, it has not been litigated and the record has not been made with reference to it. On the other hand, the principal question raised by the petition to this Court and argued by the State is not decided by the Court's opinion.

When a case here from a state court involves a question not litigated below, not raised by petitioner here and which the state court has had no opportunity to pass upon, we should remand the case for its further consideration, as was just done in Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397.

All Citations

333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682

Footnotes

1 Under certain circumstances Michigan law permits circuit judges to sit with other circuit judges in an advisory capacity. Mich.Stat.Ann. s 27.188 (Henderson 1938), Mich.Comp.Laws 1929, s 13666.

2 In giving reasons in its Hartley opinion for rejecting this petitioner's constitutional contentions, the State Supreme Court said it would have been an 'idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith.
'Plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in 3 Comp.Laws of 1929, s 13912, Stat.Ann. s

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27.513. It was properly dealt with summarily. 3 Comp.Laws 1929, ss 13910, 13911, Stat.Ann. ss 27.511, 27.512.' 317 Mich. at pages 444, 445, 27 N.W.2d at page 50.

[3] By a four to four vote the court also held that there was 'evidence to support the finding' of the judge-grand jury that petitioner had testified falsely. Petitioner has argued here that there was not a shred of evidence which under any circumstances could have conceivably supported this finding and thus that he was deprived of his liberty without due process of law. In the view that we take of this case we find it unnecessary to consider this constitutional contention.

[4] The laws authorizing the system are found in Michigan Comp.Laws 1929, s 17217 et seq., Mich.Stat.Ann. s 28.943 et seq. (Henderson 1938). A summary of the ten states' statutes which have some similarities to Michigan's appears in Winters, The Michigan One-Man Grand Jury, 28 J.Am.Jud.Soc. 137. See, e.g., Conn.Gen.Stat. s 889f (Supp.1941); McCarthy v. Clancy, 110 Conn. 482, 148 A. 551; Okla.Stat.Ann. tit. 37, s 83; tit. 21 s 951; Ex parte Ballew, 20 Okl.Cr. 105, 201 P. 525.

[5] Proceedings of the Twenty-sixth Annual Meeting of the Michigan State Bar Association 101—105 (1916).

[6] In re Ward, 295 Mich. 742, 747, 295 N.W. 483, 485. (First 60-day conviction May 31, 1940, followed by second 60-day conviction July 29, 1940. A $100 fine was also imposed in each instance.)

[7] In re Petition for Investigation of Recount, 270 Mich. 328, 331, 258 N.W. 776, 777; In re Slattery, 310 Mich. 458, 479, 17 N.W.2d 251, 259.

[8] People v. Wolfson, 264 Mich. 409, 413, 250 N.W. 260, 262; In re Watson, 293 Mich. 263, 269, 291 N.W. 652, 655; People v. Butler, 221 Mich. 626, 631, 632, 192 N.W. 685, 687.

[9] Winters, The Michigan One-Man Grand Jury, 28 J.Am.Jud.Soc. 137, 143; Unprecedented Success in Criminal Courts, 26 J.Am.Jud.Soc. 42—43.

[10] See cases collected in 8 A.L.R. 1579—1580; Orfield, Criminal Procedure from Arrest to Appeal 161 (1947).

[11] In re Slattery, 310 Mich. 458, 466—468, 17 N.W.2d 251, 254—255; Kloka v. Brake State Treasurer, 318 Mich. 87, 90, 27 N.W.2d 507, 508; cf. Todd v. United States, 158 U.S. 278, 284, 15 S.Ct. 889, 891, 39 L.Ed. 982; Interstate Commerce Commission v. Brimson, 154 U.S. 447, 481, 489, 14 S.Ct. 1125, 1134, 1137, 38 L.Ed. 1047; United States v. Ferreira, 13 How. 40, 44—48, 14 L.Ed. 42.

[12] Cases within the jurisdiction of courts martial may be regarded as an exception. Ex parte Quirin, 317 U.S. 1, 43, 63 S.Ct. 2, 18, 87 L.Ed. 3; King v. Governor of Lewes Prison, 61 Sol.J. 294, 30 Harv.L.Rev. 771. Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to

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exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel.

13 Under Michigan law contempt proceedings against a witness before a one-man grand jury are criminal in nature. In re Wilkowski, 270 Mich. 687, 259 N.W. 658. But this characterization is not material in resolving this due process question. Cf. Gompers v. United States, 233 U.S. 604, 610, 611, 34 S.Ct. 693, 695, 58 L.Ed. 1115.

14 Radin, The Right to a Public Trial, 6 Temp.L.Q. 381—384. Early commentators mention that public trials were commonly held without attempting to trace their origin. Sir Thomas Smith in 1565Smith in 1565 in his De Republica Anglorum bk. 2, pp. 79, 101 (Alston ed.1906); Sir Matthew Hale about 1670 in his History of The Common Law of England 343—345 (Runnington Ed.1820). In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial. Trial of John Lilburne, 4 How.St.Tr. 1270, 1274. 'By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.' 2 Bishop, New Criminal Procedure s 957 (2d Ed.1913).

15 Penn.Const., Declaration of Rights IX (1776); N.C.Const. Declaration of Rights IX (1776) (criminal convictions only by jury verdict in 'open court').

16 See, e.g., Vt.Const., ch. I, art. 11 (1787); Dela.Const. art. 1, s 7 (1792); Ky.Const. art. XII, cl. 10 (1792); Tenn.Const. art. XI, s 9 (1796); Miss.Const. art. I, s 10 (1817); Mich.Const. art. I, s 10 (1835); Tex.Const. art. I, s 8 (1845).

17 Four states, Massachusetts, New Hampshire, Virginia and Wyoming, appear to have neither statutory nor constitutional provisions specifically requiring that criminal trials be held in public, although all have constitutions guaranteeing an accused the right to a jury trial. Mass.Const. Pt. I, art. XII; N.H.Const. Pt. I, arts. XVN.H.Const. Pt. I, arts. XV, XVIXVI: Va.Const. art. I, s 8; Wyo.Const. art. I, s 10. Massachusetts by implication has recognized that an accused has a right to a public trial as well. A statute of that state permits the exclusion of spectators in only a limited category of cases. Mass.Gen.Laws c. 278, s 16A (1932). In New Hampshire and Wyoming no statute or decision has been found in which the right of an accused to a public trial is mentioned. In Virginia, although no decision has been discovered, a statute provides: 'In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any or all persons whose presence is not deemed necessary.' Va.Code Ann. s 4906 (1942).

18 Forty-one states: Ala.Const. s 6; Ariz.Const. art. II, s 24; Ark.Const. art. II, s 10; Cal.Const. art. I, s 13; Colo.Const. art. II, s 16; Conn.Const. art. I, s 9; Del.Const. art. I, s 7; Fla.Const. Declaration of Rights, s 11, F.S.A.; Ga.Const. art. I, s 1, par. 5, Code, s 2-105; Idaho Const. art. I, s 13; Ill.Const. art. 2, s 9, Smith-Hurd States.; Ind.Const. art. I, s 13; Iowa Const. art. I, s 10; Kan.Const. Bill of Rights, s 10; Ky.Const. s 11; La.Const. art. I, s 9; Me.Const. art. I, s 6; Mich.Const. art. 2, s 19; Minn.Const. art. I, s 6, M.S.A.; Miss.Const. s 26; Mo.Const. art. I, s 18 Mo.R.S.A.; Mont.Const. art. I, s 16; Neb.Const. art. I, s 11; N.J.Const. art. I, par. 8, N.J.S.A.; N.M.Const. art. II, s 14; N.C.Const. art. I, s 13 (no convictions for crime except by jury verdict in 'open court');

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N.D.Const. art. I s 13; Ohio Const. art. I, s 10; Okl.Const. art. 2, s 20, Okl.St.Ann.; Or.Const. art. I, s 11; Pa.Const. art. I, s 9, P.S.; R.I.Const. art. I, s 10; S.C.Const. art. I, s 18; S.D.Const. art. 6, s 7; Tenn.Const. art. I, s 9; Tex.Const. art. I, s 10, Vernon's Ann.St.; Utah Const. art. I, s 12; Vt.Const. ch. I, art. 10; Wash.Const. art. I, s 22; W.Va.Const. art. III, s 14; Wis.Const. art. I, s 7.

19 Two states: Nev.Comp.Laws Ann. s 10654 (1929); N.Y. Civil Rights Law, Consol.Laws, c. 6, s 12.

20 The Maryland Court of Appeals has apparently interpreted the state constitution as prohibiting secret trials. Dutton v. State, 123 Md. 373, 386—388, 91 A. 417, 422, 423, Ann.Cas.1916C, 89.

21 Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 389. The criminal procedure of the civil law countries long resembled that of the Inquisition in that the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused were conducted in secret. Esmein, A History of Continental Criminal Procedure 183—382 (1913); Ploscowe, Development of Inquisitorial and Accusatorial Elements in French Procedure, 23 J.Crim.L. & Criminology 372—386. The ecclesiastical courts of Great Britain, which intermittently exercised a limited civil and criminal jurisdiction, adopted a procedure described as 'in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind * * *.' 2 Stephen, History of the Criminal Law of England 402 (1883). The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts. See e.g., 3 Blackstone, Commentaries *373; 1 Bentham Rationale of Judicial Evidence, 594—595, 603 (1827). The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction, even in civil suits. See, e.g., Scott v. Scott, (1913) A.C. 417.

22 Davis v. United States, 8 Cir., 247 F. 394, 395, L.R.A.1918C, 1164; Keddington v. State, 19 Ariz. 457, 459, 172 P. 273, L.R.A.1918D, 1093; Williamson v. Lacy, 86 Me. 80, 82, 83, 29 A. 943, 944, 25 L.R.A. 506; Dutton v. State, 123 Md. 373, 387, 91 A. 417, 422, Ann.Cas.1916C, 89; Jenks, The Book of English Law 91 (3d Ed.1932). Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agreed that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession and that the most objectionable of the Star Chamber's practices was its asserted prerogative to disregard the common law rules of criminal procedure when the occasion demanded. 5 Holdsworth, A History of English Law, 163, 165, 180—197 (2d Ed.1937); Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 386—388; Washburn, The Court of Star Chamber, 12 Am.L.Rev. 21, 25—31.

23 Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 388. The lettre de cachet was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the eighteenth century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign. This device

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was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesquieu, among others denounced the use of the lettre de cachet, and it was abolished after the French Revolution, though later temporarily revived by Napoleon. 13 Encyc. Brit. 971; 3 Encyc. Soc. Sci, 137.

[24] Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony. 6 Wigmore, Evidence s 1834 (3d Ed.,1940); Tanksley v. United States, 9 Cir., 145 F.2d 58, 59, 156 A.L.R. 257.
(2) The spectators learn about their government and acquire confidence in their judicial remedies. 6 Wigmore, Evidence s 1834 (3d Ed. 1940); 1 Bentham, Rationale of Judicial Evidence 525 (1827); State v. Keeler, 52 Mont. 205, 156 P. 1080, L.R.A.1916E, 472, Ann.Cas.1917E, 619; 20 Harv.L.Rev. 489.

[25] Jenks, The Book of English Law 91 (1932); Auld, Comparative Jurisprudence of Criminal Process, 1 U. of Toronto L.J. 82, 99; Radin, The Right to a Public Trial, 6 Temp.L.Q. 381; Criminal Procedure in Scotland and England, 108 Edinburgh Rev. 174, 181—182; Holmes, J. in Cowley v. Pulsifer, 137 Mass. 392, 394, 50 Am.Rep. 318; State v. Osborne, 54 Or. 289, 295—297, 103 P. 62, 64—66, 20 Ann.Cas. 627. People v. Murray, 89 Mich. 276, 286, 50 N.W. 995, 998, 14 L.R.A. 809, 28 Am.St.Rep. 294: 'It is for the protection of all persons accused of crime—the innocently accused that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule (as to public trials) must be observed and applied to all.' Frequently quoted is the statement in 1 Cooley, Constitutional Limitations (8th Ed.1927) at 647: 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions * * *'

[26] 1 Bentham, Rationale of Judicial Evidence 524 (1827).

[27] Compare People v. Murray, 89 Mich. 276, 50 N.W. 995, 14 L.R.A. 809, 28 Am.St.Rep. 294, and People v. Yeager, 113 Mich. 228, 71 N.W. 491, with Reagan v. United States, 9 Cir., 202 F. 488, 44 L.R.A., N.S., 583. For collection and analysis of the cases, see 6 Wigmore, Evidence s 1834 (3d Ed.1940); Orfield, Criminal Procedure from Arrest to Appeal 385—387 (1947); Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 389—391; Note, 35 Mich.L.Rev. 474; 8 U. of Det.L.J. 129; Tanksley v. United States, 9 Cir., 145 F.2d 58, 156 A.L.R. 265.

[28] 'For the purposes contemplated by the provision of the constitution, the presence of the officers of the court—men whom, it is safe to say, were under the influence of the court—made the trial no more public than if they too had been excluded.' People v. Hartman, 103 Cal. 242, 244, 37 P. 153, 154, 42 Am.St.Rep. 108.

[29] See, e.g., State v. Beckstead, 96 Utah 528, 88 P.2d 461 (error to exclude friends and relatives of accused); Benedict v. People, 23 Colo. 126, 46 P. 637 (exclusion of all except witnesses,

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members of bar and law students upheld); People v. Hall, 51 App.Div. 57, 64 N.Y.S. 433 (exclusion of general public upheld where accused permitted to designate friends who remained). 'No court has gone so far as affirmatively to exclude the press.' Note, 35 Mich.L.Rev. 474, 476. Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community. Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 394—395; 20 J.Am.Jud.Soc. 139.

30 Cases are collected in 27 Ann.Cas. 35.

31 The following decisions of this Court involving various kinds of proceedings are among the multitude that support the above statement: Snyder v. Massachusetts, 291 U.S. 97, 116, 54 S.Ct. 330, 336, 78 L.Ed. 674, 90 A.L.R. 575; Powell v. Alabama, 287 U.S. 45, 68—70, 53 S.Ct. 55, 63, 64, 77 L.Ed. 158, 84 A.L.R. 527; Hovey v. Elliot, 167 U.S. 409, 418, 17 S.Ct. 841, 844, 42 L.Ed. 215; Holden v. Hardy, 169 U.S. 366, 390, 391, 18 S.Ct. 383, 387, 42 L.Ed. 780; Morgan v. United States, 304 U.S. 1, 14, 15, 58 S.Ct. 773, 774, 775, 82 L.Ed. 1129, and cases there cited.

32 See note 10 supra.

1 The requirement, of course, contemplates that the accused be so informed sufficiently in advance of trial or sentence to enable him to determine the nature of the plea to be entered and to prepare his defense if one is to be made. Cf. White v. Ragen, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348; Powell v. Alabama, 287 U.S. 435, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

2 The only 'witness' in this case was the grand jury-judge who, so far as the record discloses, did not submit to cross-examination.

3 As the Court's opinion notes, the state supreme court has held that the witness may be reexamined and recommitted for a further 60-day period after serving the first sentence of that length, unless he reappears and answers the same questions to the satisfaction of the one-man grand jury. In re Ward, 295 Mich. 742, 747, 295 N.W. 483.

4 Cf. Cochran v. Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453. So far as appears, only persons committed or fined by a one-man grand jury are subjected in Michigan to this attenuated appellate procedure. Others convicted of crime, including criminal contempt, apparently are afforded rights to complete and non-discretionary records on appeal.

5 The immediate shift of the proceeding from inquisitorial to punitive function converts it from a grand jury investigation to a proceeding in criminal contempt.

6 Cf. Adamson v. California, 332 U.S. 46, at page 68, 67 S.Ct. 1672, 1684, 171 A.L.R. 1223, dissenting opinion of Mr. Justice Black.

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7 See Hurtado v. California, 110 U.S. 516, 531, 4 S.Ct. 111, 118, 28 L.Ed. 232.

8 E.g., Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97; Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 171 A.L.R. 1223.

9 I do not think it can be demonstrated that state systems, free of the Bill of Rights' 'inconveniences,' have been more fair, just, or efficient than the federal system of administering criminal justice, which has never been clear of their restraints.
Notwithstanding Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, and its progeny, I cannot imagine that state denial of the right to counsel beyond that permissible in the federal courts or indeed of any other guaranty of the Sixth Amendment could bring an improvement in the administration of justice.
The guaranties seemingly considered most obstructive to that process are those of the Fifth Amendment requiring presentment or indictment of a grand jury and securing the privilege against self-incrimination; the rights to jury trial and to the assistance of counsel secured by the Sixth Amendment; and the requirements relating to suits at common law of the Seventh Amendment. Whatever inconveniences these or any of them may be thought to involve are far outweighed by the aggregate of security to the individual afforded by the Bill of Rights. That aggregate cannot be secured, indeed it may be largely defeated, so long as the states are left free to make broadly selective application of its protections.

1 In sustaining this power of the States, the Court enunciated a principle the force of which has not lessened with time: 'The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, suum cuique tribuere. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.' Hurtado v. California, 110 U.S. 516, 530, 531, 4 S.Ct. 111, 118, 28 L.Ed. 232.

2 'Neither in our brief nor in our argument before the court have we urged this court to reverse this conviction merely because the partial return of the witness's testimony to the Supreme Court constituted a denial of due process. * * * The questions we present are much more basic,—the denial of due process in the original commitment. * * * (To) us it is much more shocking that an accused charged with contempt not committed in open court be denied any trial in the lower court than that he be given a trial only upon an incomplete record in the appellate court.' Petitioner's 'Brief in Answer to Brief of State Bar of Michigan,' pp. 13, 14.

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310 Mich. 458
Supreme Court of Michigan.

In re SLATTERY.

No. 397.
|
Jan. 4, 1945.

Synopsis
Certiorari to Circuit Court, Ingham County; Leland W. Carr, Judge.

In the matter of Francis P. Slattery, petitioner, who was examined by the circuit judge under the one man grand jury statutes. Having refused to give satisfactory answers to certain questions, petitioner was adjudged in contempt and sentenced to jail, and he petitions for habeas corpus and ancillary writ of certiorari.

Petitions dismissed and petitioner remanded to custody.

Attorneys and Law Firms

****252** Before the Entire Bench.

***461** Wm. Henry Gallagher, of Detroit, and Harry D. Hubbard, of Lansing, for petitioner.

Kim Sigler, Special Prosecutor and Asst. Pros. Atty., Ingham County, Victor Anderson, Pros. Atty., Ingham County, and H. H. Warner, Special Counsel, all of Lansing, for respondent

Fred R. Walker, of Detroit, amicus curiae.

Pierce, Planck & Ramsey, of Lansing, amicus curiae.

Opinion

BUTZEL, Justice.

In accordance with section 3 et seq. of chapter 7 of the Code of Criminal Procedure of the State of Michigan, the same being section 17217 et seq., 3 Comp.Laws 1929, Stat.Ann. § 28.943 et seq., the Honorable Leland W. Carr, a circuit judge of the county of Ingham, required the attendance of Francis P. Slattery, referred to herein as petitioner, as a witness to testify in regard to certain crimes that were alleged in a formal complaint to have been committed within the jurisdiction of the Ingham county circuit court. Petitioner makes no objection to the sufficiency of the complaint or the proceedings that led up to his examination. An examination by the circuit judge, under the statutes above cited, is similar to that of a grand jury. It is popularly known as a ‘one man grand jury’ proceeding. Even though this term may be a misnomer, it nevertheless is descriptive and we refer to the examination as that of a ‘one

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man grand jury.' These statutes provide for the summoning of witnesses and their examination, and that any witness neglecting or refusing to answer questions shall be guilty of contempt punishable by a fine not to exceed $100 or imprisonment in the county jail not to exceed 60 days, or both, in the discretion of the court. They further provide that no witness shall be required to answer questions which might ***462** tend to incriminate himself unless he is granted immunity, et cetera. According to the brief filed by petitioner he was a vice president of the Michigan National Bank. He spent some months in Lansing lobbying against a bank bill, the purpose of which, if enacted, was to restrict chain banking generally in the State of Michigan. It is not claimed that petitioner was a professional lobbyist, or that he ever lobbied for any other measure. While thus engaged in lobbying as to this particular bill, he repeatedly contacted various members of the legislature in Lansing. In the course of his examination, to which later we shall refer with more particularity, petitioner testified that he could not remember or recall a conversation with a certain legislator who, in order to retain the secrecy of the proceedings except as it becomes necessary to divulge them, is described as 'A' ****253** in the return of the judge. The gist of the conversation was to the effect that 'A' made an offer to petitioner that he would change his vote for a consideration. The approximate time when, and the definite place where, the conversation took place and the real name of 'A' were set forth in the questions to petitioner. He refused to affirm or deny that the conversation took place and repeatedly asserted words to the effect that he had no memory of such a conversation and finally in his memory 'it didn't happen.' After futile efforts to obtain a more satisfactory answer, and an answer of Yes or No to the particular question, the judge adjourned the one man grand jury proceedings and, in open court, adjudged petitioner guilty of contempt and sentenced him to serve 60 days in the county jail in accordance with 3 Comp. Laws, 1929, § 17219 (Stat. Ann. § 28.945). Petitioner thereupon filed a petition for habeas corpus and ancillary writ of ***463** certiorari. The judge, as part of his return, filed a transcript of such portion of the testimony as he deemed sufficient to show the grounds for the contempt order. Obviously because of the secrecy of the proceedings, as provided by law, the transcript of the entire proceedings was not included in the return.

Petitioner assails the constitutionality of the 'one man grand jury statutes,' claiming that they impose non-judicial duties on a judge, and that one cannot be held in contempt if he testifies before a non-judicial body. Petitioner's counsel, as well as those who appear as amici curiae, base their claims largely on the case of In the Matter of Richardson, 247 N.Y. 401, 160 N.E. 655, 658, the opinion of which was written by the late Justice Cardozo in his characteristically learned and lucid style. We are much impressed but not bound by the opinion. Some of the statements therein, if wrested from the context, might be applicable to the instant case, were the issues the same. The sole issue in the Richardson case was whether a New York statute which provided that the governor of New York, in a proceeding before him for the removal of a public officer, might as governor take the evidence, or at his option direct that the taking of proofs be delegated to a judicial officer or commissioner for the purpose of taking testimony and reporting his findings to the governor. The law was held to be unconstitutional on the ground that it was a delegation of the administrative powers to the judiciary. It is axiomatic that under our Constitution and the American system of jurisprudence, the executive, legislative and judicial departments of the government must be kept separate and one department cannot delegate its duties to the other. In discussing the cases where duties in addition to ***464** holding court were imposed upon the judge, he stated: 'Superficial analogies are suggested, but superficial only. A magistrate before whom there is laid an information of the commission of a crime may take the depositions of the informant and prosecutor and of any witnesses produced. Code Crim. Pro. § 148. His inquiry is judicial. If he finds that a crime has been committed and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest. Code Crim. Pro. § 150, subd. 2. He does not keep to himself the knowledge thus acquired, but embodies it in depositions which are exhibited to the defendant like

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any other public record.' He stated, so that the decision would not be misapprehended, its tenor was to deny the power of the legislature to charge a justice of the Supreme Court with the duties of a prosecutor in aid of the executive. We might add that under the laws of this State, hereinbefore referred to, the testimony is kept secret, but if the judge finds that a crime has been committed, he orders a warrant to be issued, and an examination held in open court before a magistrate and, if probable cause is shown, the accused is bound over for trial in the proper court. It will be noted that under the Constitution of the State of New York, a grand jury investigation precedes a criminal complaint. This is likewise true in the Federal courts, in accordance with Article 5 of the Amendments to the Constitution of the United States. The Constitution of the State of New York contains no similar provision to that of the State of Michigan which makes the circuit judge a conservator of the peace.

***465** In Cobbledick . United States, 309 U.S. 323, 60 S.Ct. 540, 542, 84 L.Ed. 783: 'The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it it attached and to which, from time to time, ****254** it reports its findings. The proceeding before a grand jury constitutes 'a judicial inquiry', Hale v. Henkel, 201 U.S. 43, 50 S.Ct. 370, 375, 50 L.Ed. 652, of the most ancient lineage. See Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann.Cas.1912D, 558. The deration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other.'

The statutes of this State, invoked in the instant case, serve the same purpose as the constitutional provisions in regard to grand juries in other jurisdictions. They do not impose non-judicial duties upon the judiciary and are in strict conformity with the Constitution of this State which in Article 7, under the heading of 'Judicial Department,' makes due provision in regard to judicial power. In section 18 of Article 7, under the heading 'Conservators of the peace,' it is stated that justices of the Supreme Court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions. Certain statements in the case of Allor v. Wayne County Auditors, 43 Mich. 76, 4 N.W. 492, were in a measure overruled and must be restricted ***466** by the holding in the subsequent case of Averill v. Perrott, 74 Mich. 296, 41 N.W. 929, in which, speaking of conservators of the peace, we said: 'As such conservators, they had, when the constitution took effect, the authority to apprehend offenders against the criminal laws of the state, and to hold examinations, and commit, bind over, or hold to bail, as well as other authority exercised by conservators of the peace.'

Petitioner claims that the office of a conservator of the peace is a different position from that of a judicial officer. Under section 9 of Article 7 of our Constitution, a circuit judge would be ineligible for any other office than a judicial office for the term for which he is elected and for one year thereafter. Under section 18 he is a conservator of the peace by virtue of the fact that he is a circuit judge. Averill v. Perrot, supra. The one man grand jury proceedings, in accordance with law, were instituted in the circuit court for the county of Ingham. When a complaint had been filed by the attorney general, it became incumbent upon the judge as a circuit judge to make an investigation. He was neither a prosecuting attorney, policeman or detective. He had judicial duties to perform and he proceeded in a judicial capacity. In order to dispel any doubt as to the finding of petitioner guilty of contempt, he proceeded to

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act as a circuit judge in regard to proceedings which he himself had conducted while acting as a one man grand jury.

Because of the importance of the question, we have re-examined it with extreme care although the questions raised have been heretofore decided by this court a number of times. In Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398, the case of Johnson v. Morton, 94 Mich. 1, 53 N.W. 816, was referred to, and we held that the defendant, a circuit judge, acted ***467** in a judicial capacity in conducting an examination in proceedings for the discovery of crime, similar to the circumstances in the instant case. In the case of People v. Doe, 226 Mich. 5, 196 N.W. 757, while the decision of the trial court was upheld by an equally divided court, the question upon which there was a disagreement was not as to the constitutionality of the act but whether defendant, an attorney, was obliged to disclose information which he claimed was confidential. Mr. Justice Fellows, in writing the opinion upholding the trial court, stated that he found no merit in appellant's objection to the constitutionality of the act on the ground that it conferred non-judicial duties upon circuit judges. In People v. Wolfson, 264 Mich. 409, 250 N.W. 260, a like objection was raised by defendant who had been adjudged guilty of contempt by a circuit judge, sitting as a one man grand jury, and we again upheld the act in a unanimous opinion of the court. Also see, Johnson v. Morton, 94 Mich. 1, 53 N.W. 816. In People v. St. John, 284 Mich. 24, 278 N.W. 754, wherein defendant's conviction for perjury before a one man grand jury was affirmed by an evenly divided court, the only point on which the court disagreed was the form of the complaint. See, also, People v. O'Hara, 278 Mich. 281, 270 N.W. 298; In re Watson, 293 Mich. 263, 291 N.W. 652. There are many other cases wherein we have affirmed convictions for contempt in one man grand ****255** jury proceedings similar to the one in the instant case. See People v. Bommarito, 270 Mich. 455, 259 N.W. 310; In re Wilkowski, 270 Mich. 687, 259 N.W. 658; In re Schnitzer, 295 Mich. 736, 295 N.W. 478; In re Ward, 295 Mich. 742, 295 N.W. 483; In re Cohen, 295 Mich. 748, 295 N.W. 481. So that there may be no further question, we hold that the judge conducting a one man grand jury proceeding is acting in a judicial capacity.

Petitioner was not entitled to a full inspection of the records of his examination by the grand jury, under 3 Comp.Laws 1929, § 17218 (Stat.Ann. ***468** § 28.944); People v. Prevost, 219 Mich. 233, 189 N.W. 92; People v. McCrea, 303 Mich. 213, at page 244, 6 N.W.2d 489, 501, and cases therein cited.

Judge Carr in his return to the writ of certiorari certified that the petitioner was summoned to testify as a witness in the one man grand jury proceeding, the judge adjudged petitioner guilty of contempt of court and imposed a sentence upon him of 60 days in the county jail. The clerk inadvertently inserted in the sentence the words ‘at hard labor,’ but these words were stricken out immediately and an amended order was made, when the judge's attention was called to the error. Petitioner was denied bail. He was refused a copy of his lengthy testimony before the grand jury because it involved many subjects which could under no circumstances be divulged or disclosed without seriously interfering with and jeopardizing the work of the grand jury, and it involved a number of individuals about whom petitioner had been questioned. The circuit judge further stated that petitioner made untruthful answers to the questions put to him; that, without giving any good and sufficient reason for such failure, he avoided disclosing information within his knowledge sought to be elicited from him; that his attitude was contemptuous and his answers were evasive; that he refused to answer proper questions propounded to him; that his typewritten testimony covers 139 pages; that he was examined particularly regarding his activities in connection with the passage of a certain bill in the legislature and was interrogated with regard to his conversation and relations with certain senators and representatives, certain ones having appeared in the

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proceedings and given full confessions concerning conversations with petitioner in regard to bribery; that one of the legislators confessed to a conversation with petitioner concerning ***469** a bribe requested from petitioner, and for reasons hereinbefore indicated this legislator is referred to in the transcript as 'A'. The return of the judge gives a transcript of portions of petitioner's testimony. He testified that he probably talked with 'A' but did not recall the time or the place of the conversation or that he talked with him in the lobby of the Olds Hotel, when 'A' stated: 'Mr. Slattery, I have decided to change my mind about the (blank) bill, if I get some money.' Petitioner testified: 'I don't recall any such thing,' and when he was asked if it did not happen, he stated: 'I don't recall it happening.' When further asked whether a thing of that sort court take place and he would not remember it, he stated: 'I don't remember it.'

We give a further excerpt from his testimony as follows:

'Q. Do you say that it didn't happen? A. Not to my knowledge.

'Q. Will you say now that it didn't happen? A. I don't recall it happening.

'Q. Do you mean to sit here and tell me, Mr. Slattery, that a thing of that sort could occur and you not recall it? A. I don't know. I can't recall the incident happening at all.

'Q. The facts are now Mr. 'A' voted Yes on the 15th of May. He heard about the fact that money was floating around, just the same as some of the rest of them heard about money that your boy friends who were working with you on this bill had money to spend, and were spending it, and so he stepped up to you, because he had seen you over there in the House time and time again, and in the lobby of the Olds Hotel he said to you, 'I have decided to change my vote,' or words to that effect, 'for a consideration,' or 'for some money.' ***470** A. I don't recall him ever saying that to me, or ever hearing him say it.

'Q. I am asking you again now, and I want an answer, Yes or No. A. I don't know.

The judge further certified that to many of the questions put to Slattery concerning the incident referred to, as well as others, he repeatedly replied: 'I said I don't remember.' Another excerpt from his testimony is as follows:

****256** 'Q. Your Honor, I insist that I have an answer to that question.

'The Court: Mr. Slattery, if anything like that happened, you would know it, wouldn't you? * * *

'A. If I was listening, I would.

'The Court: If you were listening. Don't you think that you would listen, if any member of the legislature stepped up to you and talked to you? A. Oh, I could be interrupted, lots of times, your Honor, and I——

'The Court: Well, that is utter nonsense. You know whether this incident happened or did not. A. Well, I can't recall any such thing happening.

'The Court: Do you want to tell us now, then, that nothing of the kind happened? A. I can't remember any such thing happening. You want me to tell the truth, don't you?

'The Court: You are now willing to say that it didn't happen, are you? A. I don't say that it did or didn't happen. I don't say that it didn't happen; I don't say that it did.

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'The Court: You want to leave your testimony just like that, that you are unwilling to say now here under oath, on the stand, that that did not happen? A. I am willing to say that I don't remember any such thing happening, your Honor.

'The Court: Well, that is sheer nonsense. Do ***471** you expect us to believe for a moment that you can't remember a thing of that kind—— A. I don't know. * * *

'The Court: So I say we come back to the proposition you will not say here and now under oath that this did not happen? A. I will say that——

'The Court: I want an answer to that question, Yes or No. A.—in my memory, it never happened, your Honor.'

Then after some testimony that was omitted, the following colloquy took place:

'The Court: You can answer the question, Yes or No. I am entitled to an answer to it in that form. Do you say now that that didn't happen? A. Do I have to answer any question that might incriminate me?

'The Court: Do you wish to decline to answer the question on the ground that the answer might incriminate you? A. I don't know. I don't even know my rights, your Honor. I am trying to be honest, and to tell you that I don't remember any such incident happening.

'The Court: Well, we are entitled to know now what your claim is with reference to this occurrence. * * *

'The Court: I want to know right here and now, Mr. Slattery, and this is the last time I am going to ask you that question. Is it your claim now,—do you say now, here under oath, that that did not happen? A. Your Honor, I don't—I won't swear to anything that I don't know to be a fact, and you don't want me to, do you?

'The Court: But I want you to answer these questions here, that you should be prepared to answer, ***472** and are prepared to answer. You know whether that happened or not. A. I don't remember any such thing happening, your Honor, and you want me to tell the truth, and that is my memory of it, so help me God, I wouldn't lie to you for anything.

'The Court: Then you mean to say that it didn't happen do you? A. Not in my momory, it didn't happen.'

Later, when pressed for an answer:

'Mr. Sigler: I ask the court right now to commit him for contempt of court in the presence of the court. A. I have answered every question I could as hohestly as I can.

'Q. You haven't answered this, and Judge Carr has been very particular to give you a chance to answer. I am going to give you one more chance. (Again testimony is omitted.)

'Do you say that it did or did not happen? A. I won't say that it did happen; I won't say that it didn't happen, because I can't remember. * * *

'Q. Upon receipt of this subpoena today, with whom did you talk? A. I talked with my attorney.'

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The judge further certified that the answers thus given, as well as the answers to other questions, indicated beyond question the intention upon his part to refrain from testifying to facts obviously within his knowledge. The judge stated that Slattery was interested in a certain bill pending before the legislature and devoted the major portion of his time over a period of several months to lobbying in regard to the bill and that, as a lobbyist on behalf of certain parties interested in the bill, he was in close touch with members ****257** of the legislature. The contempt consists in the giving false or evasive answers and evading replies to questions propounded ***473** by the subterfuge of the answers, 'I don't remember,' or 'recall,' or 'it did not happen in my memory.' Such answers might be truthful in regard to trivial events and particularly so if they happened some time in the past, but it does not seem reasonable that a man of petitioner's position, who devoted several months of his time to lobbying in regard to a certain bill and thus trying to win over legislators to his point of view, could not possibly remember whether or not 'A' had approached him and stated he would change his vote for a consideration. An additional return by the judge discloses that the question propounded by him immediately before the subject of self-incrimination arose was similar to the previous one to which petitioner had replied that he did not remember or that it did not happen within his memory. When the judge insisted that petitioner give an answer of Yes or No to the question of whether Mr. 'A' had made an offer to petitioner to change his vote for a consideration, or words to that effect, notwithstanding petitioner's previous statement that he could not remember, he raised the question of self-incrimination. This indicates that he did remember but he feared that the answer might incriminate him. The judge asked him whether he declined to answer on that ground, and petitioner replied that he did not know what his rights were. We realize he was without counsel, although he had consulted counsel both in Detroit and in Lansing before taking the witness stand. Preliminary questions put to him as to what some one else said ordinarily would not involve self-incrimination. The witness himself is not the sole arbiter of the incriminating nature of the testimony he is asked to give. Where it is perfectly clear that an answer cannot incriminate, silence is contumacious. ***474** In re Schnitzer, 295 Mich. 736, 295 N.W. 478. Also see, United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037, 51 A.L.R. 1020. Remote denger of incrimination as a rule is not sufficient to excuse a witness from testifying. We need not pass upon the question of whether an answer, 'Yes, it did happen,' or 'No, it did not happen,' would have been incriminating, as the judge did not have an opportunity to rule on it. The question of self-incrimination is not involved. We only mention that the inquiry made by witness as to self-incrimination does indicate that his previous answers as to lack of memory were untrue, and in that respect he was wilfully evasive in his previous answers.

Petitioner stresses the case of Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 339, 63 L.Ed. 656, 11 A.L.R. 333, wherein the petitioner was adjudged guilty of contempt for falsely swearing, stating that he could not recollect ever seeing a certain party write or sign his name, although he believed from having seen his writing that the writing shown him was of the same party. The witness persisted in saying that he could not recall seeing a certain party write, that he would not say that he had or had not. In the above case, the lower court had found that from other testimony in the case the witness was wilfully refusing to testify truthfully, that he was committing perjury. There was no reference in the case to show any circumstances or conditions showing that such perjury had an obstructive effect. The court, however, stated: 'Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when

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committed ***475** in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt.'

The court cited with approval In re Rosenberg, 90 Wis. 581, 63 N.W. 1065, 64 N.W. 299, and a number of other cases including United States v. Appel, D.C., 211 F. 495, in which Judge Learned Hand stated: 'The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at ****258** all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry.'

We quote from O'Connell v. United States, 2 Cir., 40 F.2d 201, 204: 'His contumacy was further established by the character of his responses to question to which he did make formal answer. Since Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656, 11 A.L.R. 333, we have held that, though a witness make formal answer, it may be apparent that he is withholding the truth, and that such obstruction of justice may be punished as contempt even if it be also perjury. Loubriel v. United States, 2 Cir., 9 F.2d 807. See, also, ***476** In re Schulman, 2 Cir., 177 F. 191; In re Kaplan Bros., 3 Cir., 213 F. 753; Haimsohn v. United States, 6 Cir., 2 F.2d 441; United State v. Karns, D.C., 27 F.2d 453. * * * His parrying with the examiner and his constant reiteration of 'I don't remember' in respect to matters of which he must have had some recollection indicate to our minds, as they did to grand jury and the District Court, a determination not to give his best recollection of facts about which he was being interrogated. Such conduct, coupled with his refusal to answer some questions at all, under a claim of privilege which the court had previously instructed him to be inapplicable, furnishes a typical example of recalcitrancy. His attitude was clearly obstructive and contemptuous of judicial authority.'

The refusal to answer or the giving of an evasive reply obstructs the work of a judge or jury which in an orderly manner is seeking to ascertain whether a complaint is true and certain crimes have been committed. If the witness could hide behind the answer 'I don't remember,' or words to that effect, when such statement was manifestly untrue, it would emasculate the one man grand jury proceedings and make them of little or no value.

In Finkel v. McCook, 247 App.Div. 57, 286 N.Y.S. 755, 760, Finkel was adjudged guilty of contempt of court because as a witness before the grand jury he gave testimony which was plainly inconsistent, manifestly contradictory and conspicuously unbelieveable so as to make it apparent that he had deliberately concealed the truth and given answers which were replies in form only and substantially as useless as a complete refusal to answer. The court held that on his own admission he was chargeable with perjury and subject to punishment for that crime, ***477** but there was nothing to prevent the court from treating it as a contempt. The court said: 'The distinction is very clearly illustrated in Edwards v. Edwards, 87 N.J.Eq. 546, 548, 100 A. 608, where it was said: 'It is a contempt and may be punished as such. It may also be punished as a crime. The one act constitutes two offences, one against the court, the other against the state, just as an assault committed in court may be both a contempt and a crime.''

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The return of the judge shows that there was evidence indicating that Slattery was obstructing the work of the court by wilfully giving evasive answers. The judge had the advantage of seeing the witness and the manner in which he testified.

The case is presented to us also on certiorari. The court in its return stated that the attitude of the witness upon the stand was contemptuous, that his answers to questions propounded were evasive and that he refused to give proper answers to the questions put to him. The law is stated by Mr. Justice Fellows, speaking for the court in People v. Doe, 226 Mich. 5, 196 N.W. 757, 759: 'The return must be taken as true. In this certiorari proceeding we are not the triers of the facts. We do not weigh the testimony. We may, and it is our duty to, examine the testimony, to see if there is any evidence to support the finding. If there is, we cannot measure it. The finding must be accepted as true. This is settled law.'

He also quoted from In re Rosenberg, supra, as follows: 'Whether the petitioner's answers were untruthful, evasive, or prevaricating, so as in effect to amount to a refusal to answer and to give the discovery called ***478** for, or whether it was fairly within his ability to make the discovery required of him; whether his conduct was innocent or contumacious—were questions which the exigency of the case required the circuit court to determine. The power to determine is jurisdiction. The correctness or justice of the determination of these questions by the circuit court is not open for consideration here. That determination is conclusive in this proceeding.'

We have examined the record as submitted to us and we find there is evidence to support the judge's finding.

Other questions raised have been considered. We do not believe they are of merit or that it is necessary to discuss ****259** them in detail. It was proper for Judge Carr to make the order finding petitioner guilty of contempt, not as a one man grand jury but as a circuit judge. It would have been a idle gesture for him to have the record of a case in which he had sat, first written up and then submitted to himself. The sentence of 60 days was in accordance with the statute.

In a brief of an amicus curiae, distinction is sought to be made between a court and a judge. When a judge sits in court, the words 'court' and 'judge' are used interchangeably. It was pointed out that there are two judges in Ingham county. Judge Carr took jurisdiction. Two men are not a one man grand jury. It is claimed that imposing that extra work upon a judge prevents him from performing his other judicial duties. We know of no more important duty than to sit as a one man grand jury called to uncover criminal malfeasance in office. Under the judicial system of this State, judges from other judicial districts can be assigned to sit in judicial circuits that need assistance. It is further claimed that a proceeding of this nature may cause a very ***479** large financial burden upon the taxpayer of the county. We shall consider such question, when and if it arises. In the instant case, the State has made provision for the expense of the one man grand jury. It is further claimed that the special prosecutor, assistant prosecuting attorney of Ingham county and special counsel have no standing in court. A similar question arose in regard to an investigation of a one man grand jury in In re Investigation of Recount, 270 Mich. 328, 258 N.W. 776, and it was held that the judge in making this investigation might call assistance from the bar or otherwise as he might desire.

Petitions for habeas corpus and certiorari are dismissed and petitioner is remanded to the custody of the sheriff to complete his sentence for contempt unless he purges himself of such contempt to the satisfaction of the circuit judge, as provided by law.

STARR, C. J., and NORTH, BUSHNELL, SHARPE, and BOYLES, JJ., concurred with BUTZEL, J.

WIEST, Justice.

I concur in the result on the ground that petitioner was contumacious.

REID, J., concurred with WIEST, J.

All Citations

310 Mich. 458, 17 N.W.2d 251

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New York Official Reports

247 N.Y. 401, 160 N.E. 655

In the Matter of the Application of JAMES F. RICHARDSON et al., Appellants.
TOWNSEND SCUDDER, Respondent.
In the Matter of MAURICE E. CONNOLLY, Appellant,
v.
TOWNSEND SCUDDER, a Justice of the Supreme Court, Respondent.

Court of Appeals of New York.
Argued February 23, 1928.
Decided March 1, 1928.

CITE TITLE AS: Matter of Richardson

***401 Constitutional law**

Judges -- Prohibition -- Officers -- Provision of section 34 of Public Officers Law charging justices of the Supreme Court with the duty of acting as delegate of Governor in investigation of acts of public officer invalid -- Justice may not assume performance of such duties in his private capacity -- Disqualified while retaining office to act as delegate of Governor -- Subpœnas issued by justice in such capacity vacated and order of prohibition granted directing him to desist from further action -- Executive or commissioner appointed by him may be charged with such duties -- Function of inquisition not divorced from that of hearing and decision by provisions of sections 122 and 382 of New York City Charter providing for hearing before removal of borough President

1. Section 34 of the Public Officers Law (Cons. Laws, ch. 47), both before and after its amendment by chapter 15 of the Laws of 1928, in so far as it attempts to charge a justice of the Supreme Court with the mandatory performance of duties non-judicial, by making him the delegate of the Governor in aid of an executive act, the removal of a public officer, is invalid. There is no inherent power in Executive ***402** or Legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfillment of judicial duties and the essence of the judicial function may not be destroyed by turning the power to decide into an opportunity to consult and recommend.

2. Nor may a justice of the Supreme Court assume the performance of such duties in his private or individual capacity as if named as a commissioner. Service as commissioner in removal proceedings under section 34 of the Public Officers Law is acceptance of a public trust within the prohibition of section 19 of article 6 of the State Constitution providing that "justices of the Supreme Court shall not

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hold any other public office or trust, except that they shall be eligible to serve as members of a constitutional convention."

3. A justice of the Supreme Court is, therefore, disqualified, while retaining his office, to act as the delegate of the Governor, either in his official or private capacity, and subpœnas issued by him to witnesses to attend a hearing before him of charges against a public officer, under section 34 of the Public Officers Law, should be vacated and an order of prohibition commanding him to desist from further action in the investigation or hearing of the charges, granted.

4. While the Legislature has no power to charge a justice of the Supreme Court with the duties of a prosecutor in aid of the Executive it may lay such duties on the Executive himself or on a commissioner appointed as his agent or adviser, and neither the one nor the other is subject to supervision of the courts. Nothing in sections 122 and 382 of the Charter of the City of New York (L. 1901, ch. 466), providing that the President of a borough is not to be removed without an opportunity of being heard in his defense, amounts to a direction that in the performance of an executive act, the function of inquisition shall be divorced from that of hearing and decision.

Matter of Richardson (sub nom. Matter of Rice), 131 Misc. Rep. 220, reversed.

Matter of Connolly, 222 App. Div. 591, reversed.

APPEAL, in the first entitled proceeding, on constitutional questions only, from an order of a Special Term of the Supreme Court, in and for the county of Kings, entered January 27, 1928, denying an application to vacate subpœnas.

Appeal in the second entitled proceeding, by permission, from an order of the Appellate Division of the Supreme ***403** Court in the second judicial department, entered February 1, 1928, denying an application for an order of prohibition.

Joseph S. Frank and *William H. Robbins* for James F. Richardson et al., appellants. Section 34 of the Public Officers Law in so far as it empowers the Governor to assign a Supreme Court justice to the duties there specified, conflicts with article 6, section 19, of the State Constitution prohibiting a Supreme Court justice from holding any other public office or trust, and confuses the judicial and executive functions of the State government. (*Matter of Supervisors of Election*, 114 Mass. 247; *Attorney-General v. Pelletier*, 240 Mass. 264; *Matter of Wood*, 8 Hopk. Ch. 6;*Matter of Wood*, 8 Hopk. Ch. 6; *People v. Hall*, 169 N. Y. 184; *Daily Register Printing Co. v. Mayor*, 52 Hun, 542; *People v. Bard*, 209 N. Y. 403; *Citizen's Savings Bank v. Town of Greenburgh*, 173 N. Y. 215; *Matter of State Industrial Comm.*, 224 N. Y. 13; *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447; *Matter of Sanborn*, 148 U. S. 222; *Matter of Gordon*, 117 U. S. Appx. 697; *U. S. v. Ferreira*, 13 How. [U. S.] 39; *Hayburn's Case*, 2 Dall. [U. S.] 409.) The legislative authorization to the Executive to assign a Supreme Court justice to the duties specified in the act, is also in conflict with article 6, section 2, of the Constitution. (*People v. O'Shea*, 147 N. Y. 78; *People v. Gillette*, 191 N. Y. 107; *Matter of Reynolds v. Cropsey*, 241 N. Y. 389; *People ex rel. Saranac Land & Timber Co. v. Supreme Court*, 200 N. Y. 487; *People v. Draper*, 15 N. Y. 523; *Rathbone v. Wirth*, 150 N. Y. 459; *Matter of Fraser v. Brown*, 203 N. Y. 136; *Ford v. Clarke*, 204 App. Div. 5; 236 N. Y. 606.)

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Max D. Steuer, Aaron Steuer and *Ben Herzberg* for Maurice E. Connolly, appellant. Under the statute Mr. Justice SCUDDER is acting only in an advisory capacity. Neither the Legislature nor the Governor can impose the duty on him to render an advisory opinion, as a judge, and article 6, section 19, of the Constitution prohibits ***404** him from acting in this matter in any other capacity. (*United States v. Todd*, 13 How. [U. S.] 52;*United States v. Todd*, 13 How. [U. S.] 52; *United States v. Ferriera*, 13 How. [U. S.] 39; *Matter of State Industrial Comm.*, 224 N. Y. 13; *Hayburn's Case*, 2 Dall. [U. S.] 409; *Matter of MacFarland*, 30 App. [[[[D. C.] 365; *Divan v. Swig*, 223 Mass. 516; *State ex rel. Smith v. District Court*, 145 Pac. Rep. 721; *Case of Supervisors of Election*, 114 Mass. 247.) If the statute bestows the power upon the Supreme Court justice individually and not as a judge, it violates article 6, section 19, of the Constitution. (*Seymour v. Ellison*, 2 Cow. 13; *People ex rel. Kelly v. Common Council of Brooklyn*, 77 N. Y. 503; *Case of Supervisors of Election*, 114 Mass. 247; *State v. Chase*, 5 Har. & Johns. 297; *Board of Supervisors v. Todd*, 97 Md. 247; *Curtis v. Cornish*, 109 Me. 385; *People v. Hall*, 169 N. Y. 184; *Matter of Davies*, 168 N. Y. 89; *People ex rel. Washington v. Nichols*, 52 N. Y. 478; *People ex rel. Welch v. Bard*, 209 N. Y. 307.) The power to conduct an investigation is an administrative and not a judicial function and under the Constitution it may not devolve upon a justice of the Supreme Court. (*Wright v. Chicago*, 48 Ill. 285; *Johnston v. Chicago, etc., R. Co.*, 130 Wis. 492.) The duty to conduct this investigation and prepare the case for the public hearings is an administrative function. (*People v. Dickerson*, 164 Mich. 148; *McQuade v. City of Joliet*, 293 Ill. 515.) The removal of a public officer is an executive act. There is no authority for holding that a judge may discharge non-judicial powers in aid of an executive act. (*Matter of Guden*, 171 N. Y. 529; *Matter of Mitchell v. Cropsey*, 177 App. Div. 663; *Matter of State Indus. Comm.*, 224 N. Y. 13; *Kilbourne v. Thompson*, 103 U. S. 168; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463.)

Emory R. Buckner, John M. Harlan and *Herman T. Stichman* for respondent. Mr. Justice SCUDDER is not holding another public office or trust. (***405** *Gordon v. United States*, 117 U. S. 697; *United States v. Ferreira*, 13 How. [U. S.] 39; *Matter of Mitchell v. Cropsey*, 177 App. Div. 663; *Matter of Davies*, 168 N. Y. 89; *Dunham v. Ottinger*, 243 N. Y. 423; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463; *People ex rel. Welch v. Bard*, 209 N. Y. 304; *Citizen's Savings Bank v. Town of Greenburgh*, 173 N. Y. 215; *People ex rel. Washington v. Nichols*, 52 N. Y. 478.) Section 34 does not subordinate the judicial to the executive branch of the government. (*United States v. Ferreira*, 13 How. [U. S.] 39; *Ex parte Gans*, 17 Fed. Rep. 471; *Field v. Clark*, 143 U. S. 649; *People ex rel. Welch v. Bard*, 209 N. Y. 304; *Kingman v. Met. Sewerage Comm.*, 153 Mass. 566.)

CARDOZO, Ch. J.

On December 15, 1927, a citizen of the State filed with the Governor charges against Maurice E. Connolly with a view to his removal from office as President of the Borough of Queens. On the following day the Governor, by an instrument in writing, which recited the filing of these charges, addressed a direction to a justice of the Supreme Court to hear the charges, and make report to the Governor thereon. "Pursuant to section 34 of the Public Officers Law, I do hereby direct that Honorable TOWNSEND SCUDDER, one of the justices of the Supreme Court in and for the second judicial district of the State of New York, within which said Maurice E. Connolly resides, take evidence as to said charges with all the powers as by law provided, and I hereby further direct said Justice to report to me said evidence taken in such proceedings with his findings of the material facts deemed by him to be established in connection with said charges, together with his conclusion thereon." Mr. Justice

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SCUDDER gave notice to the accused officer on December 30, 1927, that he would take the evidence at the County Court House in Long Island City on February 1, 1928, and at such adjourned hearings as might be from time to time announced. He signed ***406** the notice with the addition of his official title as Justice of the Supreme Court.

Even in advance of this notice, preparations had begun. Judge SCUDDER informs us that on December 20, 1927, he retained Mr. Emory R. Buckner, a lawyer of distinction, as his counsel in the proceeding; that thereafter he appointed seven associate counsel, two consulting engineers, a firm of accountants, a number of process servers, and suitable clerical assistants, and rented offices for the use of his staff in the city of New York. With the approval of his advisers he laid out at the beginning a comprehensive plan of action. The work was to be separated into two stages or divisions. The first was to be the stage of preliminary investigation. At this neither the accused officer nor counsel for such officer was to be permitted to be present. Witnesses subpœnaed for this branch of the inquiry were to give their testimony *in camera*. The credible was to be sifted from the incredible, the true from the false. Following this investigation was to come the stage of public hearing. Accused and counsel would then be present. So much of the evidence as had already received from the judge the stamp of credibility would be offered anew as if upon a trial. This would be done impartially, regardless of the outcome. "It is my purpose to require all evidence which I regard as credible secured in the course of the preliminary investigation and which is relevant to any of the matters involved in the charges against said Maurice E. Connolly to be presented at the public hearing whether or not said evidence supports said charges." Everything heard by the judge during the first stage of the inquiry was to be shut from his mind except in so far as it might be repeated at the second. He would base his report to the extent of his capacity upon the evidence forthcoming in connection with the hearing to the exclusion of anything that had come to him before.

Such was the program. No sooner was it laid out than ***407** it was put into execution. Witnesses were subpœnaed to attend before Judge SCUDDER in aid of the preliminary investigation and were examined in his presence after being placed under oath. Counsel for the accused official was denied the opportunity to be present, and denied a transcript of the minutes or other information as to the substance of the testimony. The depositions of witnesses procured by the judge under the compulsion of a writ were treated as equivalent to the office notes of counsel, memoranda for private use in a prospective litigation (*People ex rel. Lemon v. Supreme Court*, 245 N. Y. 24). They were not embodied in a public record subject to public scrutiny or to inspection by opposing counsel. They will never be so embodied except in so far as it may happen that their contents will hereafter be repeated at the hearing. A preliminary investigation, thus restricted, is not a hearing by a judge. It is a search by an inquisitor.

The assumption of these powers evoked challenge and resistance. On January 9, 1928, divers witnesses, subpœnaed to attend a preliminary session, made application to the Supreme Court to vacate the subpœnas on the ground that they had been issued without warrant of law. On January 24, 1928, Connolly, the accused official, made application to the Appellate Division in the Second Judicial Department for an order of prohibition. Upon the first of these applications, the Supreme Court at Special Term upheld the validity of the subpœnas and denied the motion to vacate them. The witnesses, giving notice that only constitutional questions would be raised, have appealed directly to this court (Constitution, art. VI, § 7, subd. 3; Civil Practice Act, § 588, subd. 3). Upon the second application, the Appellate Division, by its first decision, made an order dated February 6, 1928, commanding Mr. Justice SCUDDER to "desist and refrain from any further proceedings in the matter of the charges against the petitioner by way of taking and hearing the ***408** evidence of witnesses except at a hearing at which the

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petitioner is afforded an opportunity of being present." To the extent that the proceeding was public, prohibition was denied.

We have said that this was the ruling of the Appellate Division by its first decision. At that time, section 34 of the Public Officers Law (Cons. Laws, ch. 47) was in the following form:

"The governor may take the evidence in any proceeding for the removal by him of a public officer or may direct that the evidence be taken before a justice of the supreme court of the district, or the county judge of the county in which the officer proceeded against shall reside, or before a commissioner appointed by the governor for that purpose by an appointment in writing, filed in the office of the secretary of state. The governor may direct such judge or commissioner to report to him the evidence taken in such proceeding, or the evidence and the findings by the judge or commissioner of the material facts deemed by such judge or commissioner to be established. The commissioner or judge directed to take such evidence may require witnesses to attend before him, and shall issue subpœnas for such witnesses as may be requested by the officer proceeded against.

"The governor may direct the attorney-general, or the district attorney of the county in which the officer proceeded against shall reside to conduct the examination into the truth of the charges alleged as ground for such removal. If the examination shall be before a commissioner or judge, it shall be held at such place in the county in which the officer proceeded against shall reside as the commissioner or judge shall appoint, and at least eight days after written notice of the time and place of such examination shall have been given to the officer proceeded against.

"All sheriffs, coroners, constables and marshals to whom process shall be directed and delivered under this ***409** section shall execute the same without unnecessary delay."

The ruling by the Appellate Division was swiftly followed by legislation enlarging the powers of the delegate of the Governor in the matter of such charges. By Laws of 1928, chapter 15, which became a law on February 8, 1928, section 34 of the Public Officers Law was amended so as to provide that in any proceeding for the removal of a public officer, the Governor may direct his delegate, whether a judge or a commissioner, to conduct an investigation into the charges, or to take evidence as to the truth thereof at a hearing for such purpose, or both. If such a direction is made, the Governor may require the Attorney-General or the district attorney of the county in which the officer resides to assist the person so appointed both in the conduct of the investigation and thereafter in the hearing. Neither the officer so proceeded against nor the counsel of such officer shall have any right to be present at the investigation unless expressly so permitted. The judge or commissioner is authorized to employ counsel in any case where the Attorney-General or district attorney has not been directed to assist, and to employ such other assistants as may be necessary for the performance of his duties. Whoever is named by the Governor to conduct the inquiry is to be paid the fair value of his services unless he is already employed by the State or by a county or city, in which case he is to serve gratuitously. The expenses are made a county or city charge where the proceeding is one for the removal of a county or city officer. All acts theretofore performed by one designated by the Governor in a pending proceeding are legalized and confirmed.

Upon the adoption of this statute a motion was made to the Appellate Division to vacate its order of prohibition which had been limited, as we have seen, to the inquiry *in camera*. The motion was granted, and prohibition was denied. There is a recital in the order that the denial ***410** was on the law and not in the exercise of any discretionary power.

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The two appeals, one by the witnesses from the order upholding the subpœnas, and the other by Connolly from the refusal of the order of prohibition, are here before us now.

We think there has been an attempt by section 34 of the Public Officers Law, both in its original and in its amended form, to charge a justice of the Supreme Court with the mandatory performance of duties non-judicial. He is made the delegate of the Governor in aid of an executive act, the removal of a public officer (*Matter of Guden*, 171 N. Y. 529). At the word of command he is to give over the work of judging, and set himself to other work, the work of probing and advising. His findings when made will have none of the authority of a judgment. To borrow Bacon's phrase, they will not "give the rule or sentence." They will not be preliminary or ancillary to any rule or sentence to be pronounced by the judiciary in any of its branches. They will be mere advice to the Governor, who may adopt them, or modify them, or reject them altogether. From the beginnings of our history, the principle has been enforced that there is no inherent power in Executive or Legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfilment of judicial duties (*People v. Hall*, 169 N. Y. 184; *Matter of State Indust. Comm.*, 224 N. Y. 13, 16). The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed by turning the power to decide into a pallid opportunity to consult and recommend (cf. Frankfurter and Landis, Power of Congress, etc.; a Study in the Separation of Powers, 37 Harvard Law Review, 1010, 1020). The question arose ***411** as far back as 1792. An act of Congress required the Circuit Courts of the United States to examine into the pension claims of soldiers and seamen of the Revolution, and to certify their opinion to the Secretary of War with a view to corrective legislation. The judges of the several circuits concurred in a determination that the duty was not judicial (*Hayburn's Case*, 2 Dall. 409). In 1851 the Supreme Court of the United States considered that determination and approved it, declining jurisdiction under an act not widely different (*U. S. Ferreira*, 13 How. [U. S.] 40, 44). There was an opinion by TANEY, C. J., which has become a landmark of the law (*Gordon v. U. S.*, 117 U. S. 697; *Matter of Sanborn*, 148 U. S. 222; *Int. Com. Comm. v. Brimson*, 154 U. S. 447, 481; *Muskrat v. U. S.*, 219 U. S. 346, 353; *Tutun v. U. S.*, 270 U. S. 568, 576; *Liberty Warehouse v. Grannis*, 273 U. S. 70, 74). Nowhere has the doctrine thus established been applied more steadily or forcefully than in the courts of New York. (*Matter of Davies*, 168 N. Y. 89; *Matter of State Ind. Comm., supra*). The function of the judges "is to determine controversies between litigants" *(Matter of State Ind. Comm., supra).* They are not adjuncts or advisers, much less investigating instrumentalities, of other agencies of government. Their pronouncements are not subject to review by Governor or Legislature (*Dinan v. Swig*, 223 Mass. 516). They speak "the rule or sentence."

The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within ***412** his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself.

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Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court.

Superficial analogies are suggested, but superficial only. A magistrate before whom there is laid an information of the commission of a crime may take the depositions of the informant and prosecutor and of any witnesses produced (Code Crim. Pro. § 148). His inquiry is judicial. If he finds that a crime has been committed and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest (Code Crim. Pro. § 150, subd. 2). He does not keep to himself the knowledge thus acquired, but embodies it in depositions which are exhibited to the defendant like any other public record. A justice of the Supreme Court upon proof by affidavit that the moneys of a town or village have been unlawfully or corruptly expended, shall make a summary investigation of the affairs of such town or village, and the accounts of such officers, and in his discretion may appoint experts to make such investigation and may cause the result thereof to be published in such manner as he may deem proper (Gen. Municipal Law [Cons. Laws, ch. 24], § 4). The validity of that statute has been assumed, though never questioned or determined (*Matter of Taxpayers of Plattsburgh*, 157 N. Y. 78; *Matter of Town of Hempstead*, 36 App. Div. 321; 160 N. Y. 685; *Matter of Davies, supra*). There are adversary parties. On the one side are the taxpayers, not less than twenty-five in number, submitting the petition; on the other the suspected officers, to whom notice must be given. Like an examination by ***413** a magistrate, the inquiry is preliminary or ancillary to action unmistakably judicial. "If such justice shall be satisfied" that any of the moneys of such town or village are wasted or misapplied, "he shall forthwith grant an order" restraining such unlawful use. An Appellate Division, charged with a duty to supervise the conduct of its officers, the members of the bar, orders an inquiry into abuses believed to have developed. It may act of its own motion upon a showing of wrongdoing by one member of the bar. There is authority for the view that it may act upon a like showing of wrongdoing by an indeterminate group, whether the group be large or small (*Matter of the Petition of the Assn. of the Bar*, 222 App. Div. 580; *State ex rel. Reynolds Circuit Court for Milwaukee County*, 193 Wis. 132; 214 N. W. Rep. 396; *Rubin v. State*, 216 N. W. Rep. 513). Once more, as with an examining magistrate, inquiry is pursued in aid of a judicial function. We have no occasion to determine with finality whether jurisdiction was legitimately assumed in all these cases or in any of them. However far they go, they do not reach the case at hand. No doubt there are peripheral zones where the judicial and the administrative merge into each other (C. W. Pound, The Judicial Power, 35 Harv. L. R. 787, 789). Other instances can be cited (Greater N. Y. Charter, § 1534; *People ex rel. Mitchel v. Cropsey*, 177 App. Div. 663). The hinterland may be plain when the frontier is uncertain.

The range of our decision will not be misapprehended. We deny the power of the Legislature to charge a justice of the Supreme Court with the duties of a prosecutor in aid of the Executive. We do not question its power to lay such duties on the Executive himself or on a commissioner appointed as his agent or adviser. Just as the Governor may investigate and afterwards remove, so his commissioner may investigate and later recommend removal. Neither the one nor the other is subject to the ***414** supervision of the courts *(Matter of Guden, supra)*. The argument is made that by a provision of the charter (Greater N. Y. Charter, §§ 122, 382), a president of a borough is to be removed in the same manner as a sheriff, and a sheriff is not to be removed without "an opportunity of being heard in his defense" (Constitution, art. 10, § 1). Nothing in that requirement amounts to a direction that in the performance of an executive act, the function of inquisition shall be divorced from that of hearing and decision. Other answers are available, but they do not have to be developed.

We reach the final stage in the course of the respondent's argument. Granting that functions non-judicial

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may not be cast upon a judge so as to impose a duty of acceptance, the privilege, we are told, is his to assume the performance of the duty, not in his capacity of judge, but in his private or individual capacity as if named as a commissioner. The action of the circuit judges who refused to hold themselves bound by the act of Congress of 1792 is cited as a precedent. Some of the judges, declining to serve in the capacity of judges, "agreed to construe the power as conferred on them individually as commissioners," and as commissioners reported to the Secretary of War (*U. S. Ferreira, supra* at p. 50; *U. S. v. Todd*, 13 How. [U. S.] 52;*U. S. Ferreira, supra* at p. 50; *U. S. v. Todd*, 13 How. [U. S.] 52; cf. *Matter of Gans*, 17 Fed. Rep. 471).

The Constitution of New York provides (Art. VI, § 19): "The judges of the Court of Appeals and the justices of the Supreme Court shall not hold any other public office or trust, except that they shall be eligible to serve as members of a constitutional convention." There is no equivalent provision in the Constitution of the United States. The appellants maintain that service as commissioner in removal proceedings under section 34 of the statute, if not the acceptance of an office, is the acceptance of a public trust.

The prohibition has an ancient history. It goes back ***415** for its origin to the Constitution of 1777. At that time it was limited to the acceptance of an "office." "That the Chancellor and judges of the Supreme Court shall not, at the same time, hold any other office, excepting that of Delegate to the general Congress, upon special occasions; and that the first judges of the County Courts, in the several Counties, shall not, at the same time, hold any other office, excepting that of Senator or Delegate to the general Congress" (Constitution of 1777, art. XXV.) The next Constitution, that of 1821, broadened the prohibition, at least in terms, so as to include not only an office, but any public trust. "Neither the chancellor nor justices of the Supreme Court, nor any circuit judge, shall hold any other office or public trust. All votes for any elective office, given by the legislature or the people, for the Chancellor or a justice of the Supreme Court, or circuit judge, during his continuance in his judicial office, shall be void" (Constitution of 1821, art. V, § 7). The depth of feeling on the subject can be gathered from the form of the resolution as first proposed to the convention by the judiciary committee: "They [the Chancellor and the judges] shall not, on any pretence, hold any other office or public trust, whether created under this constitution, or otherwise; and their acceptance thereof, shall vacate their judicial offices: Nor shall they be eligible to the office of governor, or lieutenant governor, within two years after the expiration, or resignation of their judicial offices" (Journal of Convention of 1821, pp. 101, 108; see also, p. 296). The Constitution of 1846 continued the prohibition without substantial change from that of 1821. "They [the judges of the Court of Appeals and the justices of the Supreme Court] shall not hold any other office or public trust" (Constitution of 1846, art. VI, § 8). A new prohibition was added. "They shall not exercise any power of appointment to public office" (Const. of 1846, art. VI, § 8). This latter prohibition was dropped in the amendment of 1874, very likely in ***416** the belief that it was sufficiently embodied in the clause prohibiting the acceptance of any other public trust (*People Hall*, 169 N. Y. 184). No change was made in respect of these provisions by the Constitution of 1894, and none of importance by the revision of the judiciary article of 1926.

The decisions construing the prohibition are halting and obscure. On the one side are *People ex rel. Washington Nichols* (52 N. Y. 478); *Matter of Hathaway* (71 N. Y. 238), and *People ex rel. Welch v. Bard* (209 N. Y. 304). On the other, *Matter of Davies* (168 N. Y. 89); *People v. Hall* (169 N. Y. 184); *Matter of Gilroy* (11 App. Div. 65); and in other States, *Case of Supervisors of Election* (114 Mass. 247), and *Board of Supervisors v. Todd* (97 Md. 247). One has difficulty in finding the common

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denominator that will bring them into harmony.

People ex rel. Washington Nichols (supra) brought before the court a provision of the appropriation bill of 1871 (L. 1871, ch. 715). The sum of $20,000 was to be paid for relics of George Washington upon the certificate of Martin Grover and two others that the relics were in their opinion genuine. Martin Grover was then a judge of this court, though the statute did not so describe him. He refused to join in a certificate of approval, and the question came up whether he was competent to act. The court defined an office (following an earlier definition in *Matter of Oaths by Attorneys, etc.*, 20 Johns. 492, 493) as "an employment on behalf of the government in any station or public trust not merely transient, occasional or incidental." Office was thus a species of which a public trust was the genus. The court went on to rule that the "doing of such an act, a single act like this," did not involve the "holding" either of an office or a trust within the fair intendment of the constitutional provision. The Legislature had not said that annexed to the judicial office there should be a continuing duty to certify or audit at the request of the Executive or of ***417** others. The power was exhausted by the performance of "a single act."

Matter of Hathaway (supra) brought before the court an act of 1830 (L. 1830, ch. 320), empowering the Supreme Court to appoint a commissioner to serve as a surrogate for the purpose of a particular proceeding, when the surrogate, and other officers having the powers of a surrogate, appeared to be disqualified. The case was decided by a closely divided court. No reference was made in the opinions to this provision of the Constitution. The only question considered was the effect of another provision, whereby the judges were prohibited from exercising any "power of appointment to public office" (Constitution of 1846, art. VI, § 8). The ruling was that since the office of surrogate was not vacant, the designation of a substitute to serve in a single case was not an appointment to "office" any more than an appointment of a referee or a commissioner of appraisal. The term office "embraces the idea of tenure, duration, emolument and duties fixed by law" (Per STONE, J., in *Metcalf & Eddy Mitchell*, 269 U. S. 514, 520). A "trust" is not an "office," unless clearly so recognized by Constitution or statute, if it lacks the quality of permanence.

People ex rel. Welch Bard (supra) brought before the court the provision of the Military Law of 1908 (§ 115) authorizing a justice of the Supreme Court to execute a certificate or order calling upon the military authorities for aid in case of any breach of the peace, riot, tumult, etc. Plainly there was here no office or public trust apart from that of judge. The certificate or order was incidental to the duty of a magistrate in the preservation of the peace. With equal reason the point might have been made that a magistrate should be denied the power of a peace officer in making an arrest. "The performance of administrative duties as to matters incidental to the exercise of judicial powers or which have some reasonable connection with a judicial purpose ***418** has repeatedly been sanctioned" (Per WILLARD BARTLETT, J., in *People ex rel. Welch v. Bard, supra*, at p. 309).

The foregoing are the chief decisions invoked by the respondent to sustain his assumption of the duties of a commissioner. We pass to the cases invoked by the appellants.

Matter of Davies (supra) brought before the court the monopoly act of 1899 (L. 1899, ch. 690) empowering a justice of the Supreme Court on the petition of the Attorney-General to make an order, in advance of any suit, for the examination of a witness. The statute was analyzed in an elaborate opinion. We upheld it for the reason that the examination was incidental to a judicial proceeding, prospective, if not pending. Except for this feature, the duties would be administrative, and the order could not stand. If

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the willingness of a judge to accept administrative trusts could avail without more to validate his action, the elaborate opinion was in the main a waste of effort. Enough that the order had been made, and the trusts had been accepted. The opinion is instinct with a ruling that acceptance would have been futile unless the duties were judicial.

People Hall (supra) brought before the court the statute empowering the justices of the Appellate Division to appoint a commissioner of jurors. We upheld it on the ground that the power, though a public trust, is one reasonably incidental to the performance of judicial duties. It is analogous to the one so often exercised by courts of appointing clerks and other officers "necessary to the transaction of their business" (*Case of the Supervisors of Election*, 114 Mass. 247, 250). Such a power involves a public trust, but not one "other" than the trust involved in the judicial office. It is, we said, "a public trust, because it is intrusted to public officers, to be exercised in behalf of the public, by clothing a private citizen with the powers and duties of public office" (Per VANN, J., 169 N. Y. at p. 195).

***419** *Matter of Gilroy (supra)*, a decision by the Appellate Division, is to the effect that one elected a justice of the Supreme Court vacates through his acceptance of the office an earlier appointment as commissioner of appraisal since by retaining it he would be holding another public trust.

The *Case of the Supervisors of Election (supra)* was decided by the Supreme Judicial Court of Massachusetts under a provision of the Massachusetts Constitution substantially the same as ours. It held void a statute whereby a justice of the Supreme Judicial Court was to be permitted, in term time or vacation to appoint two supervisors of election for each of the city wards. "We cannot exercise this power as judges, because it is not a judicial function; nor as commissioners, because the Constitution does not allow us to hold any such office."

Board of Supervisors

v.

Todd, decided by the Court of Appeals of Maryland, is in substance to the same effect.

The problem now before us must be viewed in the background of authority supplied by this summary of the precedents. So viewing it, we think that within the constitutional prohibition there was an acceptance of a "public trust."

The statute annexes or seeks to annex to the office of a judge, not a temporary power to be exhausted by a single act (as in the case of the Washington relics), but a continuing power to be exercised whenever occasion shall arise. As often as the Governor commands, the judge is to obey. As often as the need arises, the call is to be met. He is to be a standing commissioner whose function is to serve when summoned. In such circumstances, the public trust does not cease to be continuing and permanent because the judge may be willing to fulfill it on one occasion and unwilling on another. As well might one urge that a power conferred upon the judges to fill vacancies in office whenever they occurred would be something other than a public trust because ***420** the judges might act as to one office and refuse to act as to another. As well might one say that the order reviewed by this court in *Matter of Davies (supra)* would be upheld, though the statute had been read as conferring administrative powers, on the theory that when separate applications are separately considered, there is involved in respect of each the acceptance of a separate trust. In determining the quality of the trust, regard must be had to the

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intention of the Legislature in directing its creation. If the intention was, as here, to annex a permanent duty as an incident to the judicial office, a public trust has been created though the occasions for discharging it may be irregular or fitful.

The policy at the root of the constitutional prohibition reinforces this conclusion. The policy is to conserve the the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties. Some of these possibilities find significant illustration in the very cases before us now. Here is an inquiry which has already separated the respondent for more than two months from the discharge of his judicial duties, and which is likely to continue for many weeks to come. The charges as first submitted involved a scrutiny of the acts of the accused official in multifarious transactions for fifteen years or more. Supplemental charges have now been filed with the result that the issues are more involved than ever. The great staff of counsel and assistants engaged upon the work is a token of its complexity and its probable duration. Interference so prolonged with assignments to judicial duty is the very evil that was meant to be hit by the prohibitions of the Constitution directed dual office. True indeed it is that there may be times when the duties of a commissioner will be less onerous and protracted. Even so, the nature of the trust must be measured by its reasonable possibilities. Not what has ***421** been done under a statute, but what may reasonably be done under it, is the test of its validity (*Stuart v. Palmer*, 74 N. Y. 183).

The content of the duties tends with as much significance as their duration to point to performance as the acceptance of a public trust. A commissioner in these proceedings is more than a referee or an arbitrator, whose duties touch the parties affected by his decision, and concern the public interests remotely if at all. Here the very subject of the inquiry is one distinctively public, the tenure of a public officer. In pursuing that inquiry, the commissioner is authorized from time to time, so long as he functions as commissioner, to incur bills for his expenses and the expenses of his staff. These bills, subject to audit, will be payable from the public purse. If the power to incur such expenses and charge them on the public treasury is not a public trust, one is at a loss to understand how such a trust can be created.

We hold that the respondent is disqualified, while retaining the office of judge, to act as the delegate of the Governor under one name or another. The prohibitions of the Constitution are not to be evaded through the form of accepting as an individual what the judge must reject. At least that is so when what is done is official and not personal in its quality and incidents. In this instance neither Legislature nor Executive nor Judge had any thought of evasion. The Legislature did not intend when a commission was directed to a judge that he should act as an individual, his title as judge being mere *descriptio personæ*. It annexed the duty to the office (cf. *U. S. v. Todd*, 13 How. [U. S.] 52).*U. S. v. Todd*, 13 How. [U. S.] 52). The Governor in issuing the commission did not intend to invite co-operation by a private citizen as an act of grace or favor. The language of the designation is not the language of request or of appointment. It is the language of command, addressed by the Executive to a member of the judiciary who is expected to obey. Above all, ***422** the respondent himself had no thought to accept the designation in any new capacity. From first to last he has assumed to act as judge and nothing else. He has made his return and affidavits as a justice of the Supreme Court. He has issued his notices and subpœnas with recitals that describe him as a justice of the Supreme Court, and with the addition of his title as such justice he has signed his name thereto. We were informed by his counsel that in case of need he will exercise the power to punish a contumacious witness for a contempt of his authority, though such power does not exist unless the subpœna has been issued by a justice of the court (Civil Practice Act, § 406). Equivocal acts will be so interpreted as to escape a violation of the constitutional

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command, and even the risk of violation, when conduct, though permissible, is close to the line of danger. Here the acts are not equivocal. Nothing has been said and nothing has been done with the will to serve in any other capacity than that of a justice of the court.

We are satisfied that in so holding we do not misread the respondent's thought and purpose. The Governor, in selecting a judge so distinguished and experienced, was animated by a high sense of public duty, the desire to name a delegate of unquestioned ability and character. Mr. Justice SCUDDER was animated by a like sense of public duty in responding to a call to service. He thought, beyond a doubt, that the effect of the statute was to annex the duty to the office. If he was uncertain of its validity, he preferred to wait to condemn it until invalidity had been adjudged after argument and deliberation in appropriate proceedings. He supposed that he was discharging his duty as a judge in assuming a heavy burden incidental to the office. There is no reason to believe that his choice would have been the same if he had supposed that he was abandoning, *pro tanto*, his duty as a judge. His conduct is misinterpreted if we read it as evincing an election to step aside from his ***423** judgeship and take upon himself, with all the chances of illegality, the duties of a commissioner. He has been the judge throughout.

Upon the appeal by Richardson and others, the order of the Special Term should be reversed, and the motion to vacate the subpœnas granted.

Upon the appeal by the petitioner Connolly, the order of the Appellate Division should be reversed, and an order of prohibition granted commanding the respondent to desist from further action as a justice of the Supreme Court in the investigation or hearing of the subject-matter of these charges.

POUND, CRANE, ANDREWS, LEHMAN, KELLOGG and O'BRIEN, JJ., concur.

Ordered accordingly.

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501 Mich. 175
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Tremel ANDERSON, Defendant-Appellee.

No. 155172
|
Argued on application for leave to appeal January 10, 2018
|
Decided March 16, 2018

Synopsis

Background: Defendant was charged with assault with intent to commit murder, carrying a concealed weapon, felonious assault, and carrying a firearm during the commission of a felony. A magistrate dismissed the complaint after the preliminary examination, and the Circuit Court, Wayne County, denied State's appeal, which was treated as a motion. State appealed. The Court of Appeals, 2016 WL 6992198, affirmed. State sought further review.

Holdings: The Supreme Court, Stephen J. Markman, C.J., held that:

a magistrate's duty at a preliminary examination is to consider all the evidence, including the credibility of witnesses;

the standard for evaluating evidence on a motion for a new trial does not apply to a preliminary examination; and

conclusion that complainant's testimony was not credible and dismissal of complaint were not abuses of discretion.

Order of the District Court affirmed.

Attorneys and Law Firms

****505** Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Kym L. Worthy, Prosecuting Attorney, Jason W. Williams, Chief of Research, Training, and Appeals, and Deborah K. Blair, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by Kristin LaVoy) for defendant.

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Speaker Law Firm, PLLC (by Liisa R. Speaker), amicus curiae, for the Michigan District Judges Association.
BEFORE THE ENTIRE BENCH

OPINION

Stephen J. Markman, Chief Justice

***178** The issue in this case concerns the manner in which a magistrate may consider the credibility of witnesses' testimony in determining whether to bind over a defendant. We hold that a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant committed a crime, i.e., whether the evidence presented is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v. Yost*, 468 Mich. 122, 126, 659 N.W.2d 604 (2003) (quotation marks and citation omitted). Because the ***179** magistrate in this case did not abuse her discretion in determining that the complainant's testimony was not credible and there was no other evidence presented during the preliminary examination, we affirm the district court's order dismissing the charges against defendant.

I. FACTS AND HISTORY

Defendant, Tremel Anderson, was charged with assault with intent to commit murder, MCL 750.83; carrying a concealed weapon, MCL 750.227; felonious assault, MCL 750.82; and carrying a firearm during the commission of a felony, MCL 750.227b. At the preliminary examination, the complainant, Michael Larkins, testified as follows.

At approximately 11:30 p.m. on December 24, 2014, defendant was driving Larkins home when they got into an argument. Larkins and defendant had a newborn baby together, but they were not in a relationship. Defendant was angry because Larkins did not buy a swing for their infant son and because she believed that Larkins was in contact with his ex-girlfriend. During the argument, defendant threatened to kill Larkins, grabbed a gun from between her thighs, and pointed it at him. Defendant kept driving for five minutes with the gun pointed at Larkins but eventually pulled over to the side of the road approximately two blocks from Larkins's home. For five to seven minutes, defendant and Larkins continued to argue while defendant kept the gun pointed at Larkins. Defendant then demanded that Larkins return a spare set of keys to her car, while the latter sought to negotiate a trade of the keys for Christmas gifts that were in defendant's car. When Larkins refused to give ***180** defendant the keys, defendant called the police.[1] Larkins believed that defendant called the police in order to create a diversion. While defendant was on the phone with the police, Larkins yelled for help. Defendant then attempted to fire the gun at Larkins, but ****506** the gun failed to discharge. Larkins jumped out of the car and ran away as defendant fired three more shots in his direction, but none of the shots hit Larkins. Finally, defendant threw Larkins's belongings out of her car and drove away. Larkins reached a neighbor's home and called the police.

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Larkins's testimony constituted the only evidence presented at the preliminary examination. The magistrate found this testimony not credible and therefore dismissed the complaint:

> [W]ell, let me tell you what my issues are so that we can go straight to the point, huge issues with credibility. This young man wants me to believe that somebody had a gun on him; they pulled the car over; he asked to get out; but he wanted his Christmas gifts.
>
> He is afraid because this person had threatened to kill him and they're pointing a gun at him, but he wants to get his Christmas gifts for his family. I don't [sic] any testimony about a handgun. If I don't believe this witness, if I find him to not be credible, which in a preliminary examination, I have to determine the credibility of the witness.
>
> You've put on no witness to tell me that there was a handgun recovered. You've put on no witness to tell me that there was some spent casings, shell casings that were recovered.
>
> There's no witness, other than this young man, who is just all over the place everywhere and although he's claimed that this gun was pulled out, I'm just going to tell ***181** you, I am having a hard time believing that his life was at stake and we have no tape of the 911 call that supports that he felt that he was in danger.
>
> We have nothing else but his testimony that is, quite frankly, that is just incredible. He is not a credible witness.

The magistrate also noted that, despite having allegedly been threatened by defendant in the past, Larkins never called the police and that he entered the car with defendant even though he did not have a functioning cell phone with him to seek help. The prosecutor appealed the magistrate's decision in the circuit court, which treated the claim of appeal as a motion and denied it without further explanation,[2] and the Court of Appeals affirmed in a split decision. *People v. Anderson*, unpublished per curiam opinion of the Court of Appeals, issued Nov. 29, 2016 (Docket No. 327905), 2016 WL 6992198.

II. STANDARD OF REVIEW

This Court recently described the standard of review applicable to a magistrate's determination as to whether to bind over a defendant:

> In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony. This standard requires evidence of each element of the crime charged or evidence ***182** from which the elements may be inferred. Absent an abuse of discretion, a reviewing court should not disturb the district court's bindover decision. An abuse of ****507** discretion occurs when the trial court's decision falls outside the range of principled outcomes. [*People v. Seewald*, 499 Mich. 111, 116, 879 N.W.2d 237 (2016) (quotation marks and citations omitted).]

Questions of statutory interpretation are reviewed de novo. *People v. Calloway*, 500 Mich. 180, 184, 895 N.W.2d 165 (2017).

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III. ANALYSIS

A. PRELIMINARY EXAMINATIONS

While "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention," *Gerstein v. Pugh*, 420 U.S. 103, 126, 95 S.Ct. 854, 43 L.Ed. 2d 54 (1975), a defendant has no constitutional right to an adversarial hearing to challenge the existence of probable cause, *id.* at 120, 95 S.Ct. 854. However, in Michigan, "[t]he state and the defendant" do have a statutory right "to a prompt examination and determination by the examining magistrate in all criminal causes ...." MCL 766.1. Therefore, the proper role of a magistrate during a preliminary examination constitutes a question of statutory interpretation, the resolution of which begins with an examination of the language of the statute. *People v. Feeley*, 499 Mich. 429, 435, 885 N.W.2d 223 (2016). When interpreting a statute, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. "When the language ***183** of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Epps v. 4 Quarters Restoration LLC*, 498 Mich. 518, 529, 872 N.W.2d 412 (2015).

MCL 766.4(6) provides that "[a]t the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath ... concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent." The rules of evidence apply (with limited exceptions) to the proceeding, MCL 766.11b(1), and a defendant may cross-examine the prosecutor's witnesses and present witnesses on his or her own behalf, MCL 766.12.

> *If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony.* If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule. [MCL 766.13 (emphasis added).]

Thus, a magistrate is required to "determine at the conclusion of the preliminary examination" whether there is "probable cause" that the defendant has committed a crime. "Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Yost*, 468 Mich. at 126, 659 N.W.2d 604 (quotation marks and citations ***184** omitted). The relevant definitions of "determine" are "to settle or decide by choice of alternatives or possibilities" and "to find out or come to a decision ****508** about by investigation, reasoning, or calculation[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed.), defs. 1c and 4. The use of the word "determine" communicates that the magistrate must exercise some judgment in analyzing the evidence at the preliminary examination when deciding whether there is probable cause to bind over a defendant. Finally, a magistrate's "determin[ation]" regarding the existence of probable

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cause must be made "at the conclusion of the preliminary examination ...." MCL 766.13. This strongly suggests that a magistrate must consider the totality of the evidence presented at that juncture, and that a magistrate must do so even if evidence introduced at the outset of the preliminary examination initially appears to have satisfied the elements of a criminal offense. See *People v. King*, 412 Mich. 145, 154, 312 N.W.2d 629 (1981) ("The magistrate is required to make his determination *after* an examination of the whole matter[.]") (quotation marks and citation omitted; emphasis added). In sum, MCL 766.13 requires a magistrate to consider *all* the evidence presented and on that basis to "determine" whether there is "a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Yost*, 468 Mich. at 126, 659 N.W.2d 604 (quotation marks and citation omitted).

This Court has held that during a preliminary examination, "the magistrate ha[s] not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses." *People v. Paille #2*, 383 Mich. 621, 627, 178 N.W.2d 465 (1970); see also ***185** *King*, 412 Mich. at 153, 312 N.W.2d 629 (quoting *Paille*). We have also held that a magistrate may not decline to bind over a defendant "where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial." *Yaner v. People*, 34 Mich. 286, 289 (1876); see also *People v. Doss*, 406 Mich. 90, 103, 276 N.W.2d 9 (1979). In *Yost*, we stated that "[t]here is some tension between" these two principles, but we declined "to clarify the interplay between" these principles in that case. *Yost*, 468 Mich. at 128 n 8, 659 N.W.2d 604. The prosecutor argues that this Court should now resolve this "tension" by adopting the standard from *People v. Lemmon*, 456 Mich. 625, 576 N.W.2d 129 (1998)—limiting a judge's authority to assess witnesses' credibility in ruling on a motion for a new trial—in the context of preliminary examinations. Specifically, the prosecutor argues that a magistrate must accept the veracity of testimony offered at a preliminary examination unless the "testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or [the testimony] contradicted indisputable physical facts or defied physical realities ...." *Id.* at 645-646, 576 N.W.2d 129 (quotation marks and citations omitted).

We respectfully decline the prosecutor's invitation to incorporate the *Lemmon* standard into preliminary examinations. Initially, we disagree with the prosecutor that a magistrate's "duty" to consider the credibility of witnesses' testimony is inconsistent with the proposition that a magistrate should bind over a defendant if "there is a conflict of evidence or where there is a reasonable doubt as to his guilt." *Yost*, 468 Mich. at 128-129, 659 N.W.2d 604. Rather, we believe this proposition is essentially an alternative articulation of the probable-cause standard for binding over a defendant ***186** in contrast to the standard for conviction ****509** at trial.[3] That is, "where there is a conflict of evidence or where there is a reasonable doubt as to [a defendant's] guilt," *Yaner*, 34 Mich. at 289, there generally will be probable cause to bind over a defendant, even if "the magistrate may have had reasonable doubt that defendant committed the crime," *Yost*, 468 Mich. at 133, 659 N.W.2d 604. Accordingly, while there may indeed be "some tension" between these two principles, there is no actual conflict that requires resolution by this Court, but rather only clarification.

Nothing in MCL 766.1 *et seq.* suggests that a magistrate's consideration of credibility should be limited to whether "testimony was so far impeached that it was deprived of all probative value ... or contradicted indisputable physical facts or defied physical realities ...." *Lemmon*, 456 Mich. at 645-646, 576

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N.W.2d 129 (quotation marks and citations omitted). To the contrary, the adversarial nature of a preliminary examination would be largely meaningless if a magistrate were required to accept as true any testimony that is not patently incredible or that does not defy physical reality. See *People v. Richardson*, 469 Mich. 923, 938, 669 N.W.2d 797 (Markman, J., ***187** dissenting) ("[I]f a magistrate is obligated to accept at face value *any* testimony, there would be little reason to allow for cross-examination or for a defense presentation at all at the preliminary examination. ... Because MCL 766.12 specifically provides for the operation of the adversarial process at the preliminary examination, it is reasonable to conclude that the magistrate is not precluded altogether from assessing witness credibility."). Moreover, the *Lemmon* standard is designed in particular to prevent a court from acting as a "thirteenth juror and overrul[ing] the credibility determinations of the jury ...." *Lemmon*, 456 Mich. at 637, 576 N.W.2d 129. This limitation makes sense in the context of a motion for a new trial because it is the *jury's* constitutional duty as the trier of fact to assess credibility and to render the ultimate factual findings necessary to convict a defendant. *Id.* at 637-638, 642-643, 576 N.W.2d 129; Const. 1963, art. 1, § 14. By contrast, a preliminary examination is a statutory creation in which the magistrate is the trier of fact; it is thus the magistrate's duty to "determine" whether there is probable cause to bind over a defendant. MCL 766.13.[4] A necessary corollary ****510** of this general duty is "the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses." *Paille*, 383 Mich. at 627, 178 N.W.2d 465. We therefore conclude that the *Lemmon* ***188** standard is inapplicable to a magistrate's review of the evidence presented during a preliminary examination.

None of this is to suggest that a magistrate may weigh witnesses' credibility in the same manner as a jury. While a jury must find a defendant guilty *beyond a reasonable doubt*, a magistrate must only determine that there is *probable cause* to believe that the defendant has committed a crime. "[T]he gap between probable cause and guilt beyond a reasonable doubt is broad," *Yost*, 468 Mich. at 126, 659 N.W.2d 604, and therefore, unlike a jury, "a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt," *id.* at 133-134, 659 N.W.2d 604. Accordingly, in considering the credibility of witnesses, a magistrate may only decline to bind over a defendant if a witness's lack of credibility, when considered together with the other evidence presented during the examination, would preclude "a person of ordinary prudence and caution [from] conscientiously entertain[ing] a reasonable belief of the accused's guilt." *Id.* at 126, 659 N.W.2d 604 (quotation marks and citation omitted).

In sum, we decline to adopt the *Lemmon* standard in the context of preliminary examinations. Instead, we clarify that a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of both the prosecution and defense witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant has committed a crime, i.e., whether the evidence presented is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the accused's guilt." *Id.* (quotation marks and citation omitted). If a witness's lack of credibility, when considered together with the other evidence presented during the examination, is so ***189** lacking that "a person of ordinary prudence and caution [would not] conscientiously entertain a reasonable belief of the accused's guilt," a magistrate may not bind over the defendant for trial. *Id.* (quotation marks and citation omitted); see also MCL 766.13.

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B. APPLICATION

The magistrate in this case determined that the complainant's testimony was not credible and, absent any other evidence implicating defendant, declined to bind her over. This determination is reviewed for an abuse of discretion. *Seewald*, 499 Mich. at 116, 879 N.W.2d 237. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003) (quotation marks and citations omitted). Moreover, in reviewing a magistrate's credibility determination, an appellate court must remain mindful that "the judge who hears the testimony has the distinct advantage over the appellate judge, who must form judgment solely from the printed words." *Paille*, 383 Mich. at 627, 178 N.W.2d 465; see also *Lemmon*, 456 Mich. at 646, 576 N.W.2d 129 ("The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, ****511** all giving clues to the factfinder regarding whether a witness is telling the truth.").

The magistrate here articulated several reasons in particular for finding the complainant's testimony not credible. Specifically, she noted that: (1) the complainant ***190** had a gun pointed at him, yet he wanted his Christmas gifts and sat in the car negotiating for those gifts; (2) despite allegedly having been threatened by defendant in the past and not having access to a cell phone to seek help, the complainant freely entered the car with defendant; (3) the complainant never called the police to report defendant's earlier threats; and (4) the complainant's testimony was "all over the place everywhere." These reasons, considered in light of the magistrate's superior ability to observe the demeanor of the complainant while testifying, afforded the magistrate a "principled" basis for concluding that the complainant's testimony was not credible and therefore her credibility determination was not "outside the range of principled outcomes." Because there was no other evidence upon which the magistrate could find probable cause to bind over defendant, the magistrate did not abuse her discretion by dismissing the complaint.

IV. CONCLUSION

We reaffirm and clarify that a magistrate possesses a duty to consider the credibility of witnesses' testimony, in conjunction with all the other evidence presented at a preliminary examination, in determining whether there is probable cause to bind over a defendant, i.e., whether the evidence presented is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Yost*, 468 Mich. at 126, 659 N.W.2d 604 (quotation marks and citation omitted). We further hold that the magistrate in this case did not abuse her discretion in determining that the complainant's testimony was not credible and, in the absence of any other evidence, ***191** declined to bind over defendant. Accordingly, we affirm the district court's order dismissing the charges against defendant.

Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Kurtis T. Wilder, Elizabeth T. Clement, JJ.

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All Citations

501 Mich. 175, 912 N.W.2d 503

Footnotes

1 Larkins testified that he did not call the police because his phone's battery was dead.

2 As the Court of Appeals noted, the circuit court erred by treating the prosecutor's appeal as a "motion" and "denying" the "motion" without issuing an oral or written opinion. MCR 7.103(A)(1) (providing a circuit court jurisdiction over an appeal of a final judgment of a district court); MCR 7.114(B) (requiring a circuit court to decide such an appeal "by oral or written opinion and issue an order"). However, because the prosecutor does not seek any relief for this error, the issue must be deemed abandoned. *People v. Bean*, 457 Mich. 677, 685 n. 13, 580 N.W.2d 390 (1998), citing *Mitcham v. Detroit*, 355 Mich. 182, 203, 94 N.W.2d 388 (1959).

3 *Yaner*, 34 Mich. at 289 ("We do not desire to be understood that the magistrate must nicely weigh evidence as a petit jury would, or that he must discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial."); *People v. Medley*, 339 Mich. 486, 492, 64 N.W.2d 708 (1954) ("The object of the examination is not to determine guilt or innocence, and it is not as necessary to make strict proof as on the trial. The magistrate ... is not required to nicely weigh the evidence as a petit jury, or to discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt, as all such questions should be left to the jury upon the trial. It is not necessary to establish the respondent's guilt beyond a reasonable doubt before the examining magistrate, but only to offer proof that an offense ... has been committed, and there is probable cause to believe the defendant guilty thereof.").

4 In addition, where a magistrate declines to bind over a defendant for trial, the prosecutor may simply recharge the defendant and provide additional evidence at a subsequent preliminary examination. See MCR 6.110(F). By contrast, when a judge grants a motion for a new trial, the prosecutor must retry the defendant. Conducting two jury trials requires the expenditure of significantly more time and resources than conducting two preliminary examinations. These widely disparate consequences arguably justify providing a magistrate with greater authority to examine credibility during a preliminary examination than a judge has in entertaining a motion for a new trial.

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386 Mich. 708
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Peter J. BELLANCA, Defendant-Appellant.

No. 8.
|
March 3, 1972.

Synopsis

Defendant charged with perjury moved for order requiring production of transcript of his testimony and testimony of another witness before 'one man grand jury.' The Circuit Court, Oakland County, Arthur E. Moore, J., denied motion, and defendant appealed. The Court of Appeals, Levin, J., 20 Mich.App. 1, 173 N.W.2d 754, modified the Court's order to direct furnishing of a transcript of defendant's testimony and affirmed its refusal to order delivery of transcript of other witness' testimony, and defendant appealed. The Supreme Court, T. G. Kavanagh, J., held that a person accused of a crime by any grand jury, including so called 'one man grand jury,' has right to a transcript of his testimony and such parts of the record, including the testimony of other witnesses before the grand jury, touching on issue of his guilt or innocence of the crime charged, and to obtain it he must petition circuit court of county wherein grand jury was impaneled therefor.

Remanded.

Brennan, J., dissented and filed opinion in which Black, J., concurred and Adams, J., concurred in result.

Attorneys and Law Firms

***711 **863** Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Solicitor Gen., Peter D. Houk, Atty. Gen. Dept., Robert C. Goussy, Asst. Attys. Gen., Lansing, for plaintiff.

Louis J. Colombo, Jr., Birmingham, for defendant and appellant.
Before the Entire Bench.

Opinion

T. G. KAVANAGH, Justice.

This is an appeal from the affirmance by the Court of Appeals, 20 Mich.App. 1, 173 N.W.2d 754, of a trial court's order denying the defendant's motion for the production of the transcript of certain testimony given before a 'one man grand jury'.

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The defendant, an attorney at law, testified before the said 'one man grand jury' on August 10, 1967. He was questioned about his representation of a certain Ann Decker who had appeared before the 'grand jury' on July 18, 1967 with the defendant. ****864** Ann Decker also appeared before the 'grand jury' on August 4, 1967 without the defendant.

Under date of August 14, 1967 the 'grand juror' ordered the issuance of a warrant for the arrest of the defendant so that he might be prosecuted for perjury and such warrant issued on that day.

Thereafter the defendant made a motion for discovery asking under M.C.L.A. s 767.6a, M.S.A. s 28.946(1) for the full transcript of his evidence given before the 'grand jury' on August 10, 1967; the full transcript of the testimony of Ann Decker on any date, asserting that such transcripts were necessary for his preparation for preliminary examination.

A hearing on the motion was had in the circuit court. The judge held that the discovery requested, if necessary, should be granted only after the preliminary ***712** examination established probable cause, and denied the motion. $The Court of Appeals modified the circuit court's order to direct the furnishing of a transcript of the defendant's testimony and affirmed the court's refusal to order the delivery of transcripts of Ann Decker's testimony.

For the Court of Appeals, Judge Levin has carefully analyzed and accurately stated the law and, in our view, correctly construed section 6a.

His observation that 'transcripts of Ann Decker's testimony can only be obtained upon application to and order of the Supreme Court' is consonant with his construction of section 6a and is sound.

We explained in People v. Wimberly (1970) 384 Mich. 62, 179 N.W.2d 623 why we have come to favor pretrial discovery of material which may be essential to proper preparation of a defense. We were there dealing with a traditional grand jury, Here we are dealing with the so called 'one man grand jury', and we deem it of equal importance.

We are persuaded that a defendant charged with perjury before a 'one man grand jury' must have access to the transcripts of the testimony of all witnesses for or against him given before the 'one man grand juror' in order to be accorded due process.

In Michigan the preliminary hearing is a judicial proceeding designed to establish probable cause that a crime has been committed and probable cause to believe the accused committed it. It is a critical stage of our criminal process.

The pertinent parts of our code of criminal procedure, Chapter VI Examination of Offenders, M.C.L.A. s 766.1 et seq. provide:

'Sec. 1. The state and accused shall be entitled to a prompt examination and determination by the ***713** examining magistrate in all criminal causes. . . .

Sec. 2. Whenever complaint shall be made to any magistrate . . . that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him. . . .

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Sec. 4. The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace . . . shall examine the complainant and the witnesses in support of the prosecution. . . .

Sec. 12. After the testimomy in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution.

Sec. 13. If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable ****865** cause for charging the defendant therewith, he shall discharge such defendant. . . .'

These statutory provisions must be read in conjunction with the provisions in Const.1963, art. I s 20 that 'in every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him, . . . to have the assistance of counsel for his defense.'

We read this last provision to accord a defendant the same assistance of counsel contemplated in the sixth amendment to the United States Constitution which was considered by the United States Supreme Court in Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) wherein the court observed:

> '. . . Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent ***714** accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.'

We are convinced that to be truly effective, counsel must be properly prepared for cross-examination of the prosecution's witnesses and thus he must have access to the testimony of such witnesses before the grand jury touching on the matters in issue at the examination.

We believe the rationale of People v. Wimberly, Supra, has equal applicability here. 'These developments are entirely consonant with the growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice.' Dennis v. United States (1966) 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973, 984.

Here where the Legislature has provided that an accused shall be entitled to a transcript of his testimony before the Grand Jury and as the Court of Appeals observed 'There is nothing in the statute which permits a construction limiting the right there conferred so that it may not be exercised ***715** before the preliminary examination . . ..' 20 Mich.App. 7, 173 N.W.2d 757 (1969). We perceive no reason why

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the accused should not have the transcript of the testimony of any witness touching on the matter in issue at the preliminary examination.

The people argue that because a 'one man grand juror' is not limited to finding probable cause in individual cases, and his questioning of witnesses may cover a broad range of activities not relevant to a particular defendant, unlimited discovery of witnesses' testimony could hamper the grand juror's ongoing investigation. This simply underscores one weakness of this unique procedure.

We cannot condone the limitation of the constitutional right to the effective assistance of counsel in order to promote or preserve this singular procedure.

The constitutionality of a system whereby a Judge accuses a person of crime may not withstand our re-examination. This question was neither briefed nor argued in this case so we will not here consider it. Until we do, we are obliged to limit our attention to the questions raised.

We hold today that a person accused of a crime by any grand jury has the ****866** right to a transcript of his testimony and such parts of the record, including the testimony of other witnesses before the grand jury touching on the issue of his guilt or innocence of the crime charged. To obtain it he must petition the circuit court of the county wherein the grand jury was impaneled therefor.

In order to implement the procedure for obtaining custody of the material requested, we are today publishing a court rule. The rule provides that upon receipt of such petition the circuit judge shall direct the person having custody of the records to deliver same to him.

***716** The circuit judge shall thereupon examine the record and supply that material requested to the petitioner and cause the rest of the record to be returned to the custody of the person from whom the judge obtained it.

The bench and bar are hereby advised that the provisions of M.C.L.A. s 767.19g, Stat.Ann. 1971 s 28.959(7) are hereby superceded (See Perin v. Peuler (on rehearing) (1964) 373 Mich. 531, 541, 130 N.W.2d 4).

It is our determination that there is a need for immediate action and accordingly we dispense with the notice requirements of GCR 1963, 933.

This cause is remanded to the trial court for further proceedings consistent with this opinion.

T. M. KAVANAGH, C.J., and SWAINSON and WILLIAMS, JJ., concur.

BRENNAN, Justice (dissenting).

My Brother writes for a judicially declared rule that one indicted by a grand jury is entitled to discovery of all the grand jury proceedings which may bear upon his guilt or innocence. Marginally quoted are three sections of the statute, M.C.L.A. ss 767.4, 767.4a, and 767.6a.[1] ****868** The ***719** meaning of these statutes ought to be abundantly clear to anyone capable of reading and comprehending the English language.

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The statutes specifically prohibit the kind of discovery my Brother would allow. His arguments based upon fairness, need and desirability are considerations which should be addressed to the people's representatives in the legislature. For better or for worse, the elected representatives of the people have adopted, and despite numerous challenges have opted to retain, a one-man grand jury procedure and have declared it to be secret. By what authority do judges arguing from desirability annul this product of the democratic process?

BLACK, J.Concurs.

ADAMS, J., concurs in result.

All Citations

386 Mich. 708, 194 N.W.2d 863

Footnotes

[1] M.C.L.A. s 767.4
'Sec. 4. If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subponena. If upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against the officer. The finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against the officer shall proceed in the method prescribed by law for a hearing and determination of said charges. Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall

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disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry otherwise than by issuing or executing processes prior to the indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court, and the offense when committed by a public official shall also constitute malfeasance in office. The limitations, restrictions and penalties relating to the uttering, publishing or disclosing of any statement pertaining to any information or evidence, imposed by this section, do not apply to disclosures of information or evidence made by a judge conducting such an investigation to another judge concurrently conducting an investigation as provided in section 3. Upon the termination of the inquiry if the judge shall make no presentment of crime or wrongdoing as to any person whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

'No inquiry or proceeding under this chapter shall continue longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months.

'In the event any judge conducting such inquiry shall be unable to continue because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.'

M.C.L.A. s 767.4a

'Sec. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.'

M.C.L.A. s 767.6a

'Sec. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall

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pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.'

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388 Mich. 489
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Pat DUNCAN, Defendant-Appellant.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
James J. HARRIS, Defendant-Appellant.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Alvin O. BROWN, Jr., et al., Defendants-Appellants.

No. 11, May Term; Nos. 11, 12, June Term.
|
Oct. 31, 1972.

Synopsis

Appeals from decisions, 33 Mich.App. 241, 189 N.W.2d 813, 37 Mich.App. 179, 194 N.W.2d 414, 37 Mich.App. 292, 194 N.W.2d 563, raising issues as to right to preliminary examination and as to discovery of grand jury testimony. The Supreme Court, Adams, J., held that a person accused of a crime by any grand jury has the right to a transcript of his testimony and such parts of the record, including the testimony of other witnesses before the grand jury, touching on the issue of his guilt or innocence of the crime charged and to obtain it he must petition the circuit court of the county wherein the grand jury was impaneled therefor and further held that, in exercise of inherent power of Supreme Court to deal with the situation as a matter of criminal procedure, in instant cases and in all pending cases in which right to preliminary examination was asserted prior to trial and is presently being asserted, the right shall be accorded to the defendant and in all future cases wherein a defendant is accused of a felony, right to preliminary examination shall exist.

Reversed and remanded.

Brennan, J., dissented and filed opinion.

Black, J., not participating.

Attorneys and Law Firms

***491 **629** William L. Cahalan, Pros. Atty., Dominick R. Carnovale, Chief, Appellate Dept., Patricia J. Boyle, Asst. Pros. Atty., Detroit, for plaintiff-appellee in No. 11 May Term 1972.

Thomas G. Plunkett, Pros. Atty., Oakland County, by Dennis Donohue, Chief Appellate Counsel,

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Pontiac, for plaintiff-appellee in No. 11 June Term, 1972.

***492** Paul G. Miller, Jr., Chief Asst. Pros. Atty., Robert F. Leonard, Pros. Atty., Genesee ****630** County, Flint, for plaintiff-appellee in No. 12 June Term 1972.

Ernest Goodman, Neal Bush, Thomas M. Meyer, Elliott S. Hall, Detroit, for appellant Pat Duncan; David R. Hood, Detroit, of counsel; Sandra Kabboush, Gregory Snow, Law Students, on brief.

John N. O'Brien, Royal Oak, for appellant, James J. Harris.

Jerome F. O'Rourke, Flint, for appellants, Alvin O. Brown, Jr., and others.

Before the Entire Bench, except BLACK, J.

ADAMS, Justice.

I. Facts and Proceedings

A. People of the State of Michigan v. Pat Duncan

On October 25, 1970, Pat Duncan, along with 14 other persons, was arrested and charged with first degree murder and conspiracy to commit first degree murder. On October 28, 1970, over defense counsel's objection, a motion by the prosecutor was granted in Recorder's Court to adjourn the preliminary examination until November 5, 1970.

On November 4, 1970, a Wayne County citizens' grand jury issued an indictment charging the same crimes as were charged in the previous ***493** complaint and warrant. The complaint and warrant were dismissed. There was no preliminary examination.

Defendants filed a motion to quash the indictment or for a preliminary examination. It was denied. Defendants filed a motion for discovery, including a request for the grand jury testimony. Judge John R. Murphy granted the motion, allowing defense counsel to inspect the grand jury minutes one week prior to trial, and further ordering an In camera inspection of the minutes by the court for 'an independent determination on the question of probable cause.' The prosecutor was granted an emergency leave to appeal from this order by the Court of Appeals. That court affirmed the part of the discovery order which did not relate to the grand jury testimony but stayed the order as to both uses of the grand jury minutes 'pending formal decision on that point.'

The trial court entered a formal order allowing defense counsel to view the grand jury minutes and ordering an In camera inspection by the court to determine whether there was 'some legal basis in law and fact' for the indictments. Another appeal was taken and, on the basis of M.C.L.A. s 767.19g; M.S.A.

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s 28.959(7) (added by 1970 P.A. 9);1970 P.A. 9); and People v. Thompson, 122 Mich. 411, 81 N.W. 344 (1899), the Court of Appeals held that neither defendants nor the trial judge could see the grand jury transcript prior to trial. People v. DeSaussure, 33 Mich.App. 241, 189 N.W.2d 813 (1971).

Pat Duncan's case was severed from the trial of the other defendants on April 30, 1971 because of her physical condition. She was the only defendant to challenge the decision of the Court of Appeals. Her application for leave to appeal was granted by this Court (385 Mich. 786).

***494** B. People of the State of Michigan v. James J. Harris

On May 26, 1971, a citizens' grand jury in Oakland County filed an indictment charging defendant with the sale of heroin. Defendant's motion for preliminary examination was granted by the trial court. Upon emergency appeal by the People to the Court of Appeals, that court reversed. (37 Mich.App. 179, 194 N.W.2d 414). We granted defendant's application for leave to appeal. (386 Mich. 778).

C. People of the State of Michigan v. Alvin O. Brown, Jr., et al.

On May 14, 1970, a Genesee County citizens' grand jury returned a true bill charging Alvin O. Brown, Jr., and others, with the crime of conspiracy to violate various ****631** Michigan gambling laws. The cause was assigned to a circuit judge for trial. Several defendants filed motions seeking a preliminary examination. On November 5, 1970, the circuit court filed a written opinion holding section 19g of 1970 P.A. 91970 P.A. 9 unconstitutional and dismissed the indictment. On appeal to the Court of Appeals, 37 Mich.App. 292, 194 N.W.2d 563, that court reversed and remanded for trial. We granted leave to appeal. (386 Mich. 788).

II. Grand Jury Records-Discovery

In People v. Bellanca, 386 Mich. 708, 715, 716, 194 N.W.2d 863, 865, 866 (1972), a majority of this Court held that:

'* * * a person accused of a crime by any grand jury has the right to a transcript of his testimony and such parts of the record, including the testimony of other witnesses before the grand jury touching on the issue of his guilt or innocence of the crime charged. To obtain it ***495** he must petition the circuit court of the county wherein the grand jury was impaneled therefor.

'In order to implement the procedure for obtaining custody of the material requested, we are today publishing a court rule. * * *.

'The bench and bar are hereby advised that the provisions of M.C.L.A. s 767.19g, Stat.Ann.1971 s 28.959(7) are hereby superceded (See Perin v. Peuler (on rehearing) (1964) 373 Mich. 531, 541, 130

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N.W.2d 4).'

The decision in Bellanca and the adoption of GCR 1963, 787, Discovery of Grand Jury Proceedings, cover the issues with regard to discovery of grand jury testimony and the validity of section 19g of 1970 P.A. 91970 P.A. 9 raised in these cases.

III. Right to Preliminary Examination

The remaining critical issue in all three cases is whether a defendant indicted by a citizens' grand jury is entitled to a preliminary examination. The Federal Constitution does not require the states to initiate criminal prosecutions by grand jury indictment, Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), nor does it require a preliminary examination as a condition precedent to prosecution by the filing of an information, Lem Woon v. Oregon, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1913).

The Michigan Constitution of 1835 provided that criminal felony prosecutions should be initiated exclusively on a presentment or indictment by a grand jury.[1] Sections 13 and 14 of R.S.1846, ch. 163, ***496** provided for preliminary examinations in connection with such grand jury proceedings.[2]

If the original procedure in Michigan had been to have the preliminary examination After a grand jury indictment, the statutory history would be a persuasive reason to hold in favor of such a preliminary examination; but, historically, the purpose of the preliminary examination ****632** was to provide a means for proceeding against an accused Before presentation of the charge to a grand jury, not afterward. Turner v. People, 33 Mich. 363, 370 (1876). It is to be remembered that grand juries were not in continuous session and there was often a lapse of time between an arrest and an indictment. Thus, section 18 of 1846 R.S. ch. 163, provides for holding the prisoner until indictment or allowing him to be out on bail.[3]

The Michigan Constitution of 1850 omitted the requirement of a presentment or indictment by a grand jury, and by section 28, art. 6, Judicial Department, set forth the rights of an accused.[4] In 1859, ***497** the legislature enacted 1859 P.A. 138,1859 P.A. 138, which provided for prosecutions by information preceded by a preliminary examination. The new procedure was initiated to speed up the criminal process. It had the effect, in a large measure, of eliminating the grand jury since, although it was not abolished, prosecution by information replaced prosecution by a grand jury as a standard practice. Annis v. People, 13 Mich. 511, 514 (1865); Yaner v. People, 34 Mich. 286, 287 (1876). Grand jury proceedings continued to follow the former pattern of having no preliminary examination after presentment or indictment. Special Committee to Study and Report upon the One-Man Grand Jury Law, 26 MSBJ, September 1947, pp. 55, 59; 8 Michigan Law & Practice, Criminal Law, s 91, p. 114; Miller, Informations or Indictments in Felony Cases, 8 Minn.L.Rev. 379, 381-382 (1924). The only significant change was the statutory recognition of the increased importance of the preliminary examination.[5]

During the late 1920's, there was much public concern about the slowness of the administration of justice. Report of the Committee on Legislation and Law Reform, 6 MSBJ 105, January 1927; Webster, The Courts and Procedural Reform, 6 MSBJ 191, March 1927. Prosecution by information was seen as speedier, more economical and efficient than prosecution by indictment. Moley, ***498** The Initiation of

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Criminal Prosecutions by Indictment or Information, 29 Mich.L.Rev. 403 (1931); Moley, The Use of the Information in Criminal Cases, 17 ABAJ 292 (1931). Michigan already had provided for prosecutions by information but reform was still felt to be necessary. A Committee of Inquiry into Criminal Procedure published a report and schedule of revisions of the Code of Criminal Procedure in 1927. Their recommendations were incorporated in 1927 P.A. 175.1927 P.A. 175. Section 1 of chapter VI of 1927 P.A. 1751927 P.A. 175 read:

'The state and accused shall be entitled to a prompt examination and determination by the examining magistrate In all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection ****633** with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination.'[6] (Emphasis added.)

The Committee gave as their summary to this amendment:

'Sec. 1. Both state and accused entitled to speedy examination. (new) This section emphasizes the fact that a speedy examination by the magistrate is at all times essential.' (Schedule submitted by Committee of Inquiry into Criminal Procedure, p. 9).

The clear intent of the amendment was to provide for and stress the need of prompt examinations. If, by this section, the legislature had meant to add another preliminary examination After a grand jury indictment, it would have done so with more direct language than that just quoted as such a procedure would have been a radical change from past practices. When the legislature did ***499** intend to provide for a preliminary examination after a one-man grand jury indictment, it did so by specific statutory language. (1927 P.A. 175,1927 P.A. 175, ch. VII, s 4, and M.C.L.A. s 767.4; M.S.A. s 28.944).

Today, a preliminary examination is rarely accorded prior to a grand jury indictment since a grand jury is no longer the sole means by which the People can proceed against one accused of crime and its use is largely confined to investigating criminal activity. However, modern day practice cannot change the clear meaning of the phrase 'in all criminal causes.' Contrary to defendants' claim, the phrase did not create a new guarantee of a preliminary examination After a grand jury indictment. The phrase was simply a recognition of past practices where a preliminary examination was given Before the filing of an information or an indictment.

The conclusion is inescapable that, in the absence of a clear statutory provision for a preliminary examination following presentment or an indictment by a grand jury, there has never been such a right.

The primary function of a preliminary examination is to determine if a crime has been committed and, if so, if there is probable cause to believe the defendant committed it. People v. Bellanca, Supra. See, also, People v. McLean, 230 Mich. 423, 425, 202 N.W. 1005 (1925); People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953); People v. Hatt, 384 Mich. 302, 181 N.W.2d 912 (1970); People v. Walker, 385 Mich. 565, 189 N.W.2d 234 (1971).

The preliminary examination has grown in importance and significance both for the prosecution and a defendant. The advantage of a preliminary examination for a defendant was pointed out in In re Palm, 255 Mich. 632, 635, 238 N.W. 732, 734 (1931). Justice Wiest, writing for the Court stated:

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> ***500** 'It is urged, in behalf of Palm, that the first Constitution of the state, adopted in 1835, expressly required all criminal prosecutions for felonies to be by presentment or indictment of a grand jury (Const.1835, art. 1, s 11), and, subsequent constitutions being silent on the subject, the mandate still prevails * * *. The mandate in the Constitution of 1835 limited the legislative power in the respect mentioned, while subsequent Constitutions left the subject free to legislative control and, therefore, the Legislature rightly could and did provide for criminal prosecutions by information. See Act No. 138, Laws of 1859 (superceded by), (3) Compiled Laws 1929, s 17215. This affords an accused a preliminary examination before a magistrate, opportunity to come face to face with accusers, to question them, and to have knowledge of the evidence against him.'

In People v. Wilcox, 303 Mich. 287, 295-296, 6 N.W.2d 518, 521 (1942), this ****634** Court stated the advantage of a preliminary examination to the People as follows:
'The new criminal code, 3 Comp.Laws 1929, s 17193 (Stat.Ann. s 28.919) distinctly provides that the State and accused shall be entitled to prompt examination and determination by the examining magistrate in all criminal cases, etc. The State may be very much interested in determining whether or not there is sufficient probable cause to hold a respondent for trial, or it may desire to perpetuate the testimony in the event that a witness shall disappear or die before the trial. The rule is well expressed in Van Buren v. United States, D.C., 36 F. 77, 82, from which we quote the following excerpt:

"The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry; and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development ***501** of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one."

The nature and purpose of a preliminary examination is summed up in 21 Am.Jur.2d, Criminal Law, s 443, pp. 446-447, as follows:
'A preliminary examination before a magistrate is not a criminal prosecution or judicial trial of the accused. It is a mere judicial inquiry to determine whether there is 'probable cause' for the accusation, the nature of which is thereby made known to the accused.

'The primary purpose of a preliminary hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and whether there is just cause to believe the defendant committed it. Further purposes are said to be to perpetuate testimony, to determine the amount of bail to be given by the prisoner in case he is held for trial, to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial and of the deprivation of his liberty if there is no probable cause for believing that he is guilty of the crime.'

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Prior to organized police departments, the grand jury helped to find witnesses and collated community knowledge concerning a crime. However, in modern practice, a citizens' grand jury, consisting of laymen, may not understand the technical legal issues of a case or the rules of evidence. It must often rely upon the prosecutor as the sole legal interpreter allowed to aid it in its deliberations. Although it has the advantages of secrecy and the ***502** power to compel the appearance of witnesses, its effective use would appear to be limited.[7]

The preliminary examination is keyed to modern methods of investigation carried on by the police and the prosecutors. A defendant's rights are recognized and evidentiary rules are followed. Recently a majority of this Court found in People v. Bellanca, Supra, 386 Mich. 712, 194 N.W.2d 864, that:
'In Michigan the preliminary hearing is a judicial proceeding designed to establish probable cause that a crime has ****635** been committed and probable cause to believe the accused committed it. It is a critical stage of our criminal process.' (Emphasis added.)

There may well be serious questions of equal protection and due process involved in the present Michigan procedure, as counsel in these cases ably argue, since it denies to an accused indicted by a multiple-man grand jury what has become recognized as a fundamental right in most criminal cases-the right to a preliminary examination. Rather than attempting to rule on an issue of constitutional rights in these cases, we believe the better course is to exercise the inherent power of this Court to deal with the situation as a matter of criminal procedure, as was done in People v. Bellanca, Supra. We hold that in each case, and in all pending cases in which the right to a preliminary examination was asserted prior to trial and is presently being asserted, such right shall be accorded to the defendant. In all future cases wherein a defendant is accused of a felony, the right to a preliminary examination shall exist.[8]

The Court of Appeals is reversed in all three ***503** cases. The cases are remanded to the trial courts for further proceedings in accordance with this opinion.

T. M. KAVANAGH, C.J., and T. G. KAVANAGH, SWAINSON and WILLIAMS, JJ., concur.

BRENNAN, Justice (dissenting).

I dissent for the reasons given in the majority opinion. In particular, I adopt the following clear, concise and accurate statement of the law:

> 'The conclusion is inescapable that, in the absence of a clear statutory provision for a preliminary examination following presentment or an indictment by a grand jury, there has never been such a right.'

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Once again, the Court chooses to legislate by Court rule, Even where it concedes that a statutory provision is necessary!

Chief Justice Burger has proposed at the Federal level that the Congress prepare an 'impact statement,' outlining the effect of new rights upon the court system. If this Court persists in legislating, we ought to have the courtesy to adopt an 'impact statement,' setting forth the effect of our actions upon the public treasury.

All Citations

388 Mich. 489, 201 N.W.2d 629

Footnotes

[1] Art. 1, s 11:
'No person shall be held to answer for a criminal offence, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or militia when in actual service in time of war or public danger.'

[2] 'Sec. 13. The magistrate before whom any person is brought, upon a charge of having committed an offence, and not cognizable by a justice of the peace, shall proceed as soon as may be, to examine the complainant, and the witnesses in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent.'
'Sec. 14. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn and examined, and he may be assisted by counsel in such examination, and also in the cross examination of the witnesses in support of the prosecution.'

[3] 'Sec. 18. If it shall appear that an offence not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offence be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken, and the prisoner discharged; but if no sufficient bail be offered, or the offence be not bailable by the magistrate, the prisoner shall be committed to prison for trial.'

[4] Art. 6, s 28:
'In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.'

[5] Section 8 of 1859 P.A. 1381859 P.A. 138 reads:
'No information shall be filed against any person for any offence, until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination. * * *.'

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This section is now in M.C.L.A. s 767.42; M.S.A. 28.982.

6 This is the same wording as the present M.C.L.A. s 766.1; M.S.A. s 28.919.

7 Miller, Informations or Indictments in Felony Cases, 8 Minn.L.Rev. 379 (1923-1924); Mayers, The American Legal System (Harper & Row, N.Y.1964) pp. 67-71. Contra: Scigliano, The Grand Jury, the Information and the Judicial Inquiry, 38 Or.L.Rev. 303 (1959).

8 The bench and bar are respectfully advised that, pursuing GCR 1963, 933, the Court has this day notified the secretary of the State Bar and the Court Administrator of intent of the Court to consider, with view toward adoption, GCR 1963, 788, reading as follows:
'Rule 788. Preliminary Examination After an Indictment.
'Whenever an indictment shall be returned by a grand jury or a grand juror, the State and the person accused of a felony in such indictment shall be entitled to a preliminary examination before an examining magistrate unless such person shall waive his right to such examination. The procedure therefor shall be in conformity with Chapter VI of The Code of Criminal Procedure as far as applicable. This rule shall also apply to all pending cases in which the right to a preliminary examination has been and is presently being asserted.'

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474 Mich. 105
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellant,
v.
John Albert GILLIS, Defendant–Appellee.

Docket No. 127194.
|
Calendar No. 1.
|
Argued Oct. 18, 2005.
|
Decided April 5, 2006.

Synopsis

Background: Defendant was convicted in the Circuit Court, St. Clair County, James P. Adair, J., two counts of felony murder. Defendant appealed. The Court of Appeals, vacated and remanded.

Holdings: On grant of State's application for leave to appeal, The Supreme Court, en banc, Markman, J., held that:

evidence was sufficient to support finding that defendant's murder of victims was a continuous part of the commission or perpetration of the felony of home invasion in the first degree, as required to support conviction, and

defendant was not entitled to instruction on lesser-included offense of involuntary manslaughter.

Judgment of the Court of Appeals reversed and remanded.

Taylor, C.J., concurred in part, dissented in part, and filed a separate opinion in which Michael F. Cavanagh and Marilyn J. Kelly, JJ., joined.

Michael F. Cavanagh, J., concurred in part, dissented in part, and filed a separate opinion in which Marilyn J. Kelly, J., joined.

Attorneys and Law Firms

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Jacqueline J. McCann, Assistant Defender, Detroit, for State Appellate Defender Office, amicus curiae.

John R. Minock, Ann Arbor, for Criminal Defense Attorneys of Michigan, amicus curiae.

Opinion

MARKMAN, J.

***108** We granted leave to appeal to consider whether our state's first-degree murder statute permits a felony-murder conviction "in the perpetration of" a first—or second-degree home invasion in which the homicide occurs several miles away from the dwelling and several minutes after defendant departed from the dwelling.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), with home invasion in the first degree, MCL 750.110a, as the predicate felony. Defendant appealed the convictions, asserting that he was no longer "in the perpetration" of home invasion at the time of the automobile collision that killed the victims. The Court of Appeals concluded that the accident was not "part of the continuous transaction of or immediately ***109** connected to the home invasion[,]" and, therefore, vacated the convictions and remanded for a new trial on the charges of second-degree murder. *People v. Gillis,* unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 245012), slip op. at 3, 2004 WL 1837661. We conclude that "perpetration" encompasses acts by a defendant that occur outside the definitional elements of the predicate felony and includes acts that occur during the unbroken chain of events surrounding that felony. Because defendant at the time of the collision was attempting ****423** to escape detection after having been identified during the home invasion, a reasonable juror could conclude that he was still "in the perpetration of" the home invasion. We also conclude that the trial court did not err in failing to instruct on involuntary manslaughter, because no rational view of the evidence could support a finding that defendant acted in a grossly negligent manner or had an intent to injure without malice. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to that Court for consideration of defendant's other issues.

I. Facts and Procedural History

Just before 2:00 p.m. on May 24, 2001, Steven Albright observed a vehicle pull into his driveway, and then heard a noise in his garage. Upon investigating, he saw defendant standing in the doorway between the garage and the sunroom. When Albright confronted defendant, defendant closed the door and abruptly left the premises. Albright went back into the house, retrieved a handgun from his bedroom, and sought to confront defendant. As he went out of the front door, he observed defendant driving away in a small white car ***110** that he believed to be a Dodge Shadow. Albright then called 911, describing both defendant and the vehicle. After driving his own vehicle around the block for approximately five

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minutes in an unsuccessful attempt to locate defendant's vehicle, he returned home and called 911 a second time, adding that he had observed a large patch of gray primer on defendant's vehicle.

At 1:51 p.m., Trooper Steven Kramer was driving west on I–94, when he received a "be on the lookout" (BOL) call for a vehicle involved in a home invasion. Trooper Kramer testified that "a couple minutes before 2:00 o'clock" he observed defendant's vehicle, which matched the BOL description, traveling east on I–94. When Kramer first observed the vehicle, it was approximately ten miles from Albright's home. Kramer also testified that it was "a little bit hazy out" when he observed the vehicle. Kramer turned around, pulled up next to defendant's vehicle, and confirmed that both the vehicle and the driver matched the description provided in the BOL.

Kramer activated his vehicle's emergency lights and attempted a traffic stop. Defendant pulled to the shoulder and slowed down to approximately 30 miles per hour, but failed to stop. After driving on the shoulder for about one mile, defendant suddenly accelerated and took an exit off the interstate. After driving on an overpass, defendant quickly reentered I–94, and began driving east in the westbound lanes.[1] Kramer testified that he gave chase, hoping that his emergency lights would alert oncoming traffic to the presence of defendant's vehicle. Defendant stayed on the shoulder of what would be the far left lane for the oncoming traffic, ***111** traveling at around 60 to 70 miles per hour.[2] Still driving the wrong way on I–94, he then entered the I–69 eastbound entrance ramp to westbound I–94. Defendant began driving westward in the eastbound lanes of I–69. After driving the wrong way on I–69 for approximately one mile, defendant came upon a curve in the road which had guardrails on both sides and no shoulder. At this point, a vehicle occupied by Nicholas and Gayle Ackerman ****424** attempted to pass the vehicles slowing down in front of it by pulling into the left lane. Defendant's vehicle and the Ackermans' vehicle collided almost directly head on. Nicholas and Gayle Ackerman were killed instantly.[3] Trooper Kramer reported the accident at 2:09 p.m., 18 minutes from the time of the BOL call and approximately ten minutes from the time Kramer initially spotted defendant's vehicle. Defendant was prosecuted for two counts of first-degree felony murder, with the predicate felony of home invasion in the first degree. Defendant moved to quash the information on the felony-murder charges, arguing that the crime of home invasion was complete when defendant departed from Albright's home and eluded Albright's pursuit. The trial court denied the motion, holding that the home invasion and the accident were "continuous, uninterrupted by temporary safety action that was taken by this defendant." The trial court also denied defendant's motion for a directed verdict of acquittal, holding that the prosecutor had presented sufficient evidence to allow a reasonable juror to find defendant guilty beyond a reasonable doubt. Following a jury trial, ***112** defendant was convicted of two counts of felony murder and sentenced to life in prison without the possibility of parole.

Defendant appealed, contending that the Ackermans' deaths did not occur during the "perpetration or attempt to perpetrate" the home invasion. In a split decision, the Court of Appeals majority applied *People v. Thew,* 201 Mich.App. 78, 85–86, 506 N.W.2d 547 (1993), which held that, to convict a defendant of felony murder, the murder must be " 'committed as a part of a continuous transaction with, or [must be] otherwise "immediately connected" with[ ] the underlying felony.' " (Citation omitted.) The Court of Appeals majority concluded that "defendant had already escaped from the scene of the home invasion" and, therefore, that the Ackermans' deaths were not "part of the continuous transaction of or immediately connected to the home invasion." *Gillis, supra,* slip op. at 3. Judge Meter, who concurred in part and dissented in part, also applied *Thew*, but concluded that because defendant was "engaged in the flight only minutes after committing the home invasion," a rational jury could

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reasonably conclude that "defendant committed the murders ' "while attempting to escape from or prevent detection of the felony ... [and] as part of a continuous transaction with ... the ... felony." ' " *Id.*, slip op. at 2 (Meter, J., concurring in part and dissenting in part), quoting *Thew, supra* at 85–86, 506 N.W.2d 547, quoting *People v. Smith,* 55 Mich.App. 184, 189, 222 N.W.2d 172 (1974). The majority also concluded that the trial court erred in denying defendant's request for an instruction on involuntary manslaughter, that "[d]efendant should properly have been charged with fleeing and eluding and second-degree murder," and that the matter must be remanded for a new trial on those charges. *Id.,* slip op. at ***113** 4. This Court granted the prosecutor's application for leave to appeal. 471 Mich. 958, 691 N.W.2d 454 (2005).

II. Standard of Review

The first issue in this case concerns whether the trial court erred in denying defendant's motion to quash under the felony-murder statute, MCL 750.316(1)(b). The proper meaning of a statute constitutes a question of law that this Court reviews de novo. *People v.* ****425** *Law,* 459 Mich. 419, 423, 591 N.W.2d 20 (1999). While defendant argues that the trial court committed error by failing to quash the information, where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for directed verdict. *People v. Hall,* 435 Mich. 599, 601–603, 460 N.W.2d 520 (1990). In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to "determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v. Riley* (After Remand), 468 Mich. 135, 139–140, 659 N.W.2d 611 (2003).

The other issue concerns whether the trial court erred in denying defendant's request for an instruction on involuntary manslaughter. "[J]ury instructions that involve questions of law are also reviewed de novo." *People v. Schaefer,* 473 Mich. 418, 427, 703 N.W.2d 774 (2005). "But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v. Hawthorne,* 265 Mich.App. 47, 50, 692 N.W.2d 879 (2005).

***114** III. Analysis

A. Defendant's Motion for a Directed Verdict of Acquittal

MCL 750.316 states in pertinent part:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate ... home invasion in the first or second degree....[4]

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"[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co. v. Ward,* 460 Mich. 230, 236, 596 N.W.2d 119 (1999). "The words of a statute provide 'the most reliable evidence of its intent....' " *Id.,* quoting *United States v. Turkette,* 452 U.S. 576, 593, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley, supra* at 237, 596 N.W.2d 119, quoting *Bailey v. United States,* 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is ***115** clear that something different was intended." *Sun Valley, supra* at 237, 596 N.W.2d 119. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 236, 596 N.W.2d 119.

To describe under what circumstances a second-degree murder can be elevated to first-degree murder, the Legislature used the words "in the perpetration of, or attempt to perpetrate" an enumerated felony. MCL 750.316(1)(b). Home invasion in the first degree is one of these enumerated felonies. *Id.* "Perpetrate" is ****426** defined as "to carry out; enact; commit." Random House Webster's College Dictionary (1997), p. 972. To "carry out" is defined as "to effect or accomplish; complete." *Id.* at 201. Defendant argues that a felony is "complete" when the definitional elements of the crime have been satisfied. Thus, in the context of a home invasion, defendant argues that he was no longer "in the perpetration of" first-degree home invasion once he left Albright's home. Indeed, defense counsel admitted under questioning at oral argument that under his interpretation of the statute, if defendant had shot and killed a police officer who was trying to arrest him on the street outside Albright's home, the murder still would not have been "in the perpetration of" the home invasion.[5] However, defendant's theory fails to account for the fact that commission of the felony itself does not render the defendant's criminal plan complete. When a defendant plans to commit a felonious act, it is "a ***116** legitimate assumption that ... [the defendant] also planned to escape from the scene of his crime." *Commonwealth v. Kelly,* 337 Pa. 171, 175, 10 A.2d 431 (1940).[6] The Colorado Supreme Court has understandably opined that escape is "as important to the execution of the [felony]" as the elements of the crime itself. *Bizup v. People,* 150 Colo. 214, 218, 371 P.2d 786 (1962) (holding that the felony-murder rule applies to a murder committed after the elements of armed robbery were met); see also *People v. Boss,* 210 Cal. 245, 251, 290 P. 881 (1930) (holding that a murder committed during an escape from the scene of an armed robbery is felony murder because "[t]he escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property"). In other words, a felon has not "carried out" or "completed" the felony for felony-murder purposes until the felon has escaped. A murder committed during the attempt to escape is committed "in the perpetration of" that felony, because the felonious transaction has not yet been completed. Accordingly, "perpetration" ***117** includes not only the definitional elements of the predicate felony, but also includes those acts that are required to complete the felony—such as those that occur after the commission of the predicate felony while the felon is attempting to escape. To hold otherwise would make it " 'quite impracticable to ever convict for a murder committed in the perpetration of any of the [enumerated ****427** felonies].' " *Eddy v. State,* 496 N.E.2d 24, 28 (Ind., 1986), quoting *Bissot v. State,* 53 Ind. 408, 412 (1876).

In addition to its ordinary meaning, the phrase "in the perpetration of" has its roots in the common law. The crime of felony murder is derived from the English common law, which classified " 'all killing

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resulting from the commission of [a felony as] murder.' " *Fisher v. State,* 367 Md. 218, 248, 786 A.2d 706 (2001), quoting Moreland, The Law of Homicide (1952), p. 42. The felony-murder rule was adopted by the colonies and, following the American Revolution, "became a part of the common law or statutory provisions of [nearly] every American state." *Rodriguez v. State,* 953 S.W.2d 342, 346 (Tex.App., 1997). In most states, including Michigan, felony-murder statutes are premised upon the 1794 felony-murder statute of Pennsylvania.[7] Pennsylvania defined felony murder as

> "[a]ll murder ... which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary...." [*Id.,* citing Keedy, *History of the Pennsylvania statute creating degrees of murder,* 97 U. Pa. L.R. 759 (1949).]

***118** Michigan's original first-degree murder statute, enacted in 1838, used the same "in the perpetration of" language to describe a killing committed during the course of an enumerated felony. Our Legislature has continued to use this language, with few changes, over the past 178 years. However, neither the original statute nor the current murder statute defines this common-law term. "Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions." *People v. Riddle,* 467 Mich. 116, 125, 649 N.W.2d 30 (2002). Thus, in the absence of a clear legislative intent to change the common law, we "apply the common law as it was understood when the crime of murder was codified...." *Id.* at 126, 649 N.W.2d 30.

One of the first states to address the scope of "perpetration" for purposes of a felony-murder statute was Indiana in *Bissot.* In *Bissot,* the defendant shot and killed a town marshal who accosted him in the midst of a burglary. The defendant argued that, because the elements of burglary were complete before the shooting, the killing was not "in the perpetration of" that burglary. The Indiana Supreme Court opined:

> In this case, take away the elements of burglary which surround it, and the prisoner might plausibly contend that he had committed nothing more than excusable homicide; for it appears that the deceased shot at him first, and thus put his life in immediate jeopardy. It could not be higher than manslaughter, at most; and in such cases it might be accidental, and then, if held not to be "in the perpetration" of the burglary, would be excusable. If the charge was murder committed "in the perpetration" of a robbery, as soon as the accused had forcibly and feloniously, or by violence or putting in fear, taken from the person of another any article of value, the robbery would be consummated; yet, if immediately afterwards, in the struggle to release himself and escape, he had killed his victim, the ***119** degree of the homicide, unconnected with the robbery, would be no higher than manslaughter....
>
> ****428** Although we must construe criminal statutes strictly, adhere closely to the definition of crimes, and interpret technical words according to their fixed meaning, yet we cannot give to the section under consideration the construction contended for by the appellant. In our opinion, where the homicide is committed within the *res gestae* of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony, within the meaning of the statute; and, being convinced in this case that the burglary charged was committed, and that the homicide was committed within the *res gestae* of the burglary, we must hold that it was committed in the perpetration of the burglary, within the true intent and fair meaning of the statute. It seems to us that such a construction is safe to the State and the citizen, and the only one by which the intention of the legislature can be practically carried into effect. And we think, according to this view, that the evidence in this case fairly warrants the conclusion,

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> beyond a reasonable doubt, that the homicide alleged was committed "in the perpetration" of the burglary, as charged in the indictment. [*Bissot, supra* at 412–414.]

See, also, *State v. Brown,* 7 Or. 186, 208–209 (1879) (noting that in the context of a killing committed during the defendants' escape from the scene of a robbery, "[w]hen a person takes with force or violence the goods of another from his person or presence and against his will, he has committed robbery.... [B]ut it does not necessarily complete the crime. It constitutes robbery so far as to render the perpetrator liable to conviction for it; but the act of robbery itself may be prolonged beyond the time when that liability is fixed.").

In commenting on felony-murder statutes, Professor Francis Wharton opined that, in order for a murder to have been committed in the perpetration of a felony,

> ***120** it must have been done in pursuance of the unlawful act, and not collateral to it. The killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it; and when the act constituting the felony is in itself dangerous to life, the killing must be naturally consequent to the felony.... It is not enough that it occurred soon or presently after the felony was attempted or committed; there must have been such a legal relationship between the two that it could be said that the killing occurred by reason of, or as a part of, the felony, or that it occurred before the felony was at an end, and was concurrent with it, or at least part of it in an actual and material sense....
>
> Where a homicide is committed within the *res gestae* of a felony, however, it is committed in the perpetration of, or attempt to perpetrate, a felony within the meaning of such statutes. That the attempt to commit the felony was not far advanced does not lessen the offense. And a burglar who breaks into a building, or who shoots a person who discovers him in an effort to escape, cannot avoid punishment for murder in the first degree, upon the theory that the burglary consisted in breaking in, and was consummated before the killing. A burglar may be said to be engaged in the commission of the crime of burglary while making away with the plunder, and while engaged in securing it. So, a robbery within the meaning of a rule that a homicide committed in the perpetration of a robbery is murder in the first degree is not necessarily concluded by the removal of the goods from the presence of the owner; and it is not ****429** necessary that the homicide should be committed at the precise time and place of the robbery. As in the case of burglary, the robber may be said to be engaged in the commission of the crime while he is endeavoring to escape and make away with the goods taken. And a homicide committed immediately after a robbery, apparently for the purpose of preventing detection, is within the rule. [Wharton, Law of Homicide (3d ed.), § 126, pp. 184–186.]

Thus, both the common law, as it was understood when the crime of murder was codified, and the clear ***121** language of MCL 750.316(1)(b) lead to the same conclusion—a murder that occurs during the uninterrupted chain of events surrounding the commission of the predicate felony is committed "in the perpetration of" that felony for felony-murder purposes. Accordingly, we conclude that the term "perpetration" encompasses acts beyond the definitional elements of the predicate felony, to include those acts committed within the res gestae of that felony. *Bissot, supra; Brown, supra;* Wharton, *supra.*

Michigan courts have also routinely held that "perpetration" extends beyond those elements required to prove the predicate felony and includes a murder committed after the predicate felony has been committed or attempted. The res gestae principle, which holds that a murder committed during the

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unbroken chain of events surrounding the predicate felony is committed "in the perpetration of" that felony, was adopted by this Court in *People v. Podolski,* 332 Mich. 508, 52 N.W.2d 201 (1952). In *Podolski, supra* at 514, 52 N.W.2d 201, the defendant and two accomplices committed armed robbery at a bank and were attempting to escape, when they were intercepted by the police in the "immediate vicinity of the bank." During the ensuing gun battle, an officer was killed by a bullet from a fellow officer's gun. This Court expressly adopted the reasoning of the Pennsylvania Supreme Court in *Commonwealth v. Moyer,* 357 Pa. 181, 190–191, 53 A.2d 736 (1947), which stated:

> It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.... Every robber or ***122** burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible.

The Court, quoting Wharton, then concluded that because the homicide[8] occurred during the res gestae of the robbery, i.e., during the defendant's attempt to escape, he was properly convicted of first-degree felony murder. *Podolski, supra* at 517–518, 52 N.W.2d 201.[9]

****430 *123** The Court of Appeals, including both the majority and dissenting opinions in the instant case, has consistently applied the res gestae principle in felony-murder cases for at least four decades. The most common of these cases define "perpetration" in the context of a murder committed during an escape from the scene of an armed robbery. For example, in *People v. Oliver,* 63 Mich.App. 509, 234 N.W.2d 679 (1975), the defendant's vehicle was stopped by a Michigan State Police trooper half an hour after and "a few miles" away from the scene where the defendant had robbed a bank and kidnapped a teller. During the traffic stop, the defendant shot and killed the trooper. The defendant argued that he was no longer "in the perpetration" of the armed robbery, because he was not being pursued by the police at the time of the traffic stop and because of the time and distance between the robbery and the murder. Thus, according to the defendant, he had reached a place of "temporary safety" before the stop and, therefore, the robbery was completed *before* the murder. The Court of Appeals rejected this argument, holding:

> [The trooper] was shot only a few miles away from the scene of the robbery within a half an hour after its commission. [The trooper] had his gun drawn and was approaching defendant's car when Oliver discharged his revolver and then quickly sped away. It is incredible that the defendant even suggests that he had reached a point of temporary safety at this point. [*Id.* at 523, 234 N.W.2d 679.]

See, also, *People v. Bowen,* 12 Mich.App. 438, 440–441, 162 N.W.2d 911 (1968) (relying on the dictionary definition of "perpetrate" as " '[t]o carry through' " to conclude that a homicide committed while attempting to leave the bank was felony murder because "it cannot be said that the entire contemplated robbery, which would include escape, was as yet carried through") (citation ***124** omitted); *People v. Goree,* 30 Mich.App. 490, 495, 186 N.W.2d 872 (1971) (holding that a defendant who murdered a police officer who was attempting to arrest him for armed robbery is guilty of felony

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murder because "escape is part of the original felony [and] getting away with the contraband is as essential to the execution of an armed robbery as the theft itself. The escape ceases to be a continuous part of the original felony when the escaping felon reaches a point of at least temporary safety or [has been successfully taken into police custody]."") (citations omitted); *People v. Smith,* 55 Mich.App. 184, 189, 222 N.W.2d 172 (1974) (stating ****431** that "if a murder is committed while attempting to escape from or prevent detection of the felony, it is felony murder, but only if it is committed as a part of a continuous transaction with, or is otherwise 'immediately connected' with, the underlying felony"); *People v. Goddard,* 135 Mich.App. 128, 135, 352 N.W.2d 367 (1984), rev'd on other grounds 429 Mich. 505, 418 N.W.2d 881 (1988) (noting that Michigan's inclusion of murders committed while attempting to escape within the felony-murder rule "has been adopted in other jurisdictions").

The Court of Appeals has also applied the res gestae principle to murders committed "in the perpetration" of felonies other than armed robbery. In *People v. Gimotty,* 216 Mich.App. 254, 549 N.W.2d 39 (1996), the codefendant stole six dresses from a clothing store and he and the defendant sped away in the defendant's vehicle. The vehicle was identified by another driver, who called the police and then followed the vehicle until the police arrived. Once the police joined the pursuit, they identified the defendant's vehicle and gave chase. During the pursuit, the defendant failed to stop at a red light and struck another vehicle. A three-year-old passenger in the other vehicle died as a result of the collision. The defendant argued that the codefendant's commission of ***125** retail fraud was complete when he left the store and, therefore, that he had reached a point of temporary safety when he got into the car. The Court of Appeals disagreed, concluding that

> defendant sped out of the store's parking area and onto Coolidge Road, where he was observed by another driver, who called the police on his car phone and then followed defendant until the police began their pursuit. Defendant was in the midst of a high-speed police chase when the victim was killed; he had not reached a place of temporary safety. [*Id.* at 258–259, 549 N.W.2d 39.]

See, also, *Thew, supra* at 88, 506 N.W.2d 547 (holding that a murder committed 20 minutes after the commission of first-degree criminal sexual conduct was part of a continuous transaction and that "inculpatory inferences can be drawn that he killed the victim to prevent detection of the act of sexual intercourse with [the victim], and that the killing was 'immediately connected' with the act of sexual intercourse").

To summarize, "perpetration" as used in the felony-murder statute contemplates something beyond the definitional elements of the predicate felony. Michigan courts have recognized this broader common-law meaning through the adoption of the "res gestae" principle, which holds that a murder committed during the unbroken chain of events surrounding the predicate felony is committed "in the perpetration of" that felony.[10]

****432** ***126** Having concluded that "perpetration" encompasses acts beyond the definitional elements of the predicate felony, we must next assess what factors a jury should consider to determine whether a murder has, in fact, taken place during the unbroken chain of events arising out of the predicate felony.[11] As observed by the Ohio Supreme Court, those acts committed in the perpetration of the predicate felony "change with every case, and may be numerous." *Conrad v. State,* 75 Ohio St. 52, 70, 78 N.E.

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957 (1906). In *Goddard, supra* at 135–136, 352 N.W.2d 367, the Court of Appeals explained that, in order to determine whether a particular murder occurred within the res gestae of the predicate felony,

> ***127** [c]ourts have usually required that the killing and the underlying felony be "closely connected in point of time, place and causal relation." *State v. Adams,* 339 Mo. 926, 98 S.W.2d 632 (1936). The required relationship between the homicide and the underlying felony has been summarized as being "whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave & Scott, [Criminal Law, § 71, p. 557.]
>
> We hold that, to qualify as felony murder, the homicide must be incident to the felony and associated with it as one of its hazards. It is not necessary that the murder be contemporaneous with the felony. A lapse of time and distance are factors to be considered, but are not determinative.

Professor Wayne LaFave has also observed that a jury should look at four factors "in construing the scope of the expression 'in the perpetration of' ": (1) time; (2) place; (3) causation; and (4) continuity of action. 2 LaFave, Substantive Criminal Law (2d ed.), § 14.5(f), p. 463.[12] While not exclusive, we agree that these factors should be considered in determining whether there exists sufficient ****433** evidence to support a felony-murder conviction.[13]

***128** The first factor to be considered by the jury pertains to the time between the commission of the predicate felony and the murder. In discussing the "time" factor, Professor LaFave states that,

> even if it is clear beyond question that the crime was completed before the killing, the felony-murder rule might still apply. The most common case is that in which the killing occurs during the defendant's flight. A great many of the modern statutes contain language—typically the phrase "or in immediate flight therefrom"—making this absolutely clear. But even statutes without such language have rather consistently been construed to extend to immediate flight situations. [*Id.* at 464.]

For example, in *Oliver,* the Court of Appeals concluded that the defendant was still in immediate flight from an armed robbery when he murdered a State Police trooper 30 minutes after the commission of an armed robbery. See, also, *Thew* (affirming a felony-murder conviction for a murder committed 20 minutes after the predicate felony). At the same time, the Tennessee Supreme Court held that a killing that took place almost a month after the commission of the predicate felony was too remote in time to support a conviction of felony murder. *State v. Pierce,* 23 S.W.3d 289, 297 (Tenn., 2000). In *Pierce,* the defendant's girlfriend stole her parents' vehicle in Florida. The vehicle was reported stolen and a nationwide bulletin was issued for the vehicle. Twenty days later, while driving the vehicle, the defendant was identified by a Virginia police officer, who gave chase. When the defendant crossed into Tennessee, the Virginia police officer notified Tennessee law enforcement officers, who took over the pursuit. During the pursuit, the defendant struck a ***129** police car, killing a deputy sheriff. The Tennessee court rejected the prosecutor's argument that the killing occurred within the res gestae of the automobile theft, concluding that "the killing in this case was not closely connected in time or place to the taking of the vehicle." *Id.*

The second factor to be considered by a jury pertains to the physical distance between the scene of the predicate felony and the scene of the murder. For example, in *State v. Squire,* 292 N.C. 494, 512, 234

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S.E.2d 563 (1977), the defendants' vehicle was stopped for a traffic violation by a North Carolina State Police trooper 13 minutes after and ten miles away from the scene where the defendants had robbed a bank. A codefendant, under the apparent mistaken belief that the trooper was investigating the robbery, shot and killed the trooper. The North Carolina Supreme Court upheld the defendants' felony-murder convictions, holding that,

> [o]bviously, the defendants had not reached what they regarded as a place of temporary safety from pursuing officers when the shooting of [the trooper] occurred. Thus, the robbery was still in progress and the shooting occurred in the perpetration of it and was first degree murder. [*Id.* at 512–513, 234 S.E.2d 563.]

****434** At the same time, the Virginia Supreme Court held that a killing that took place 280 miles from the scene of the predicate felony was too remote to support a conviction of felony murder. *Doane v. Commonwealth,* 218 Va. 500, 502–503, 237 S.E.2d 797 (1977). In *Doane,* the defendant stole a vehicle from a car dealership. The next day, the defendant disobeyed a stop sign, striking another vehicle and killing the driver. The accident occurred 280 miles away from the scene of the predicate felony. The prosecutor argued that, because the defendant ***130** was still in possession of the stolen vehicle at the time of the killing, there was a sufficient nexus between the killing and the predicate felony to support a felony-murder conviction. The Virginia court rejected this argument, holding that "there is neither a showing of causal relationship nor a showing of nexus between the larceny ... and the accidental killing of [the victim 280 miles from the scene of the larceny.]" *Id.* at 502, 237 S.E.2d 797.

However, "more than a mere coincidence of time and place is necessary" for a murder to qualify as a felony murder. LaFave, *supra* at 465. The third factor to be considered by the jury pertains to whether there is "some causal connection" between the murder and the predicate felony. *Id.* For example, in *Gimotty,* the defendant collided with the victim's vehicle while attempting to avoid capture by the police after fleeing from the scene of a larceny. Likewise, in *Podolski,* the defendant engaged in a gun battle with the police in order to avoid capture after robbing a bank. However, in *Allen v. State,* 690 So.2d 1332, 1334 (Fla.Dist.Ct.App., 1997), the Florida District Court of Appeals held that a vehicle accident that occurred outside the context of a pursuit was not causally connected to the predicate felony. In *Allen,* the defendant stole a vehicle and, while driving the vehicle that evening, struck another car, killing the driver. At the time of the accident, the defendant was not being pursued by the police. The Florida court noted that, while the killing was close in time and place to the commission of the predicate felony, the prosecutor failed to show "that the death was causally related to the grand theft." *Id.* Thus, the Florida court held that because the killing did not occur while the defendant was trying to escape, "the death did not occur as a result of the perpetration of the grand theft." *Id.* at 1335.

***131** The fourth factor that the jury should consider pertains to whether there was continuity of action between the predicate felony and the murder. Professor LaFave notes that "perpetration"

> [has] consistently been construed to extend to immediate flight situations. In assessing what flight is sufficiently immediate, courts require that there have been "no break in the chain of events," as to which a most important consideration is whether the fleeing felon has reached a "place of temporary safety." [LaFave, *supra* at 464–465.]

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In *Oliver, supra* at 523, 234 N.W.2d 679, the Court of Appeals rejected the defendant's claim that he had reached a point of "temporary safety" by driving unpursued at normal highway speeds, holding that there was no interruption in the chain of events between the robbery and the murder of a State Police trooper who had stopped the defendant's vehicle for a traffic infraction. The Oklahoma Court of Criminal Appeals reached a similar conclusion in addressing a situation bearing a strong resemblance to the instant case in *Lampkin v. State,* 808 P.2d 694 (Okla.Crim.App., 1991). In *Lampkin,* the defendant had left the scene of an armed robbery when a police officer observed him disobey a stop sign. The defendant was ****435** spotted in the vicinity of the scene of the robbery, just minutes after he had committed the crime. When the officer attempted a traffic stop, the defendant accelerated and a high-speed chase ensued. It was only after the chase began that the officer learned that the defendant was a suspect in a robbery. The chase ended when the defendant struck another vehicle, killing the passengers. The Oklahoma court rejected the defendant's assertion that the robbery was "complete" at the time of the accident, noting that he "had not yet completed the robbery when the chase started; he was not yet in a safe haven, but rather was still in the ***132** process of leaving with the stolen money." *Id.* at 696. Therefore, because the accident was part of one continuing transaction stemming from the robbery, the defendant was properly convicted of felony murder. *Id.*[14]

In contrast, there can be no conviction for felony murder where an intervening act has broken the chain of events "between the killing and the crime committed or attempted...." *State v. Diebold,* 152 Wash. 68, 72, 277 P. 394 (1929). In *Diebold,* the defendant and his friend stole a vehicle and drove it to a café five miles away. The defendant testified that, during the meal, he decided to return the vehicle. On the way back to the scene of the larceny, the defendant lost control of the vehicle, striking and killing a pedestrian. The Washington Supreme Court determined that, because the killing took place after the defendant had stopped at the café, "[i]t cannot be held that, at the time appellant drove his car against the unfortunate victims of his carelessness, he was committing, or attempting to commit, or withdrawing from the scene of, a felony." *Id.* at 73–74, 277 P. 394. See, also, *Lester v. State,* 737 So.2d 1149, 1151–1152 (Fla.Dist.Ct.App., 1999) (The defendant, driving in a vehicle he had stolen the night before, saw a police car and drove away unpursued, eventually disobeying three stop signs before hitting another vehicle and killing the passengers. ***133** The Florida District Court of Appeals held that the theft of the vehicle had been "completed" the night before the accident and, therefore, that defendant's "reckless driving was too attenuated from the grand theft of the car the previous evening to support a felony murder conviction."); *People v. Ford,* 65 Cal.2d 41, 52 Cal.Rptr. 228, 416 P.2d 132 (1966) (The defendant kidnapped his estranged wife and burglarized the home she was living in. After "[driving] about the countryside without aim or purpose," *id.* at 48, 52 Cal.Rptr. 228, 416 P.2d 132, for approximately four hours, he shot and killed a police officer who attempted to disarm him. The California Supreme Court held that the defendant had "won his way to places of temporary safety" during the four-hour drive, because "there was here no direct evidence that defendant was endeavoring to escape the robbery when he shot the [officer]...." *Id.* at 56–57, 52 Cal.Rptr. 228, 416 P.2d 132.).

In light of this analysis, we conclude that the trial court here did not err in denying defendant's motion for a directed ****436** verdict of acquittal. The relevant question in the instant case is whether, viewing the evidence in a light most favorable to the prosecutor, a reasonable juror could conclude beyond a reasonable doubt that defendant was still in the midst of his escape from the home invasion when he struck and killed the Ackermans. After its review of the case law, and in particular *Gimotty,* the trial court correctly instructed the jury as follows:

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> Actions immediately connected with the felony of home invasion in the first degree, including attempts to escape or prevent detection[,] are a continuous part of the commission or perpetration of the felony of home invasion in the first degree.... [E]scape ceases to be a continuous part of the felony of home invasion in the first degree if and when the Defendant reaches a point of at least temporary safety.

***134** The facts elicited at trial support the jury's determination that the murder of the Ackermans was "a continuous part of the commission or perpetration of the felony of home invasion in the first degree." Here, the homeowner, Albright, confronted defendant in the doorway between the garage and the sunroom. Defendant closed the door and abruptly fled. Albright observed both defendant and his vehicle flee from the scene of the home invasion. A reasonable juror could infer from defendant's flight his intent to avoid apprehension by the police. Additionally, he was still in flight from the Albright home when Trooper Kramer spotted him approximately ten minutes after his abrupt flight. Under these facts, a reasonable juror could conclude that defendant had neither escaped nor reached a point of temporary safety when Trooper Kramer attempted the traffic stop.[15] Further, a reasonable juror could conclude that defendant had sped away from Trooper Kramer specifically in order to prevent detection of the home invasion. Therefore, such a juror could also conclude that when defendant collided with the Ackermans' vehicle during his flight from the police, that act was part of the res gestae of the home invasion. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict of acquittal.

Application of the LaFave factors lends further support to the jury's verdict. First, addressing the time and ***135** place factors, a reasonable juror could conclude that the murders and the predicate felony in the instant case were sufficiently connected in time and place to support the convictions of felony murder. Approximately ten minutes after the home invasion, defendant's vehicle was spotted by Trooper Kramer. Defendant struck and killed the Ackermans approximately 18 minutes after leaving the scene of the home invasion. The time frame in this case is completely unlike that in Pierce, in which there was a 20–day gap between the predicate felony and the killing. Indeed, the 18–minute gap in the instant case is significantly less time than the 30–minute interval between the bank robbery and the traffic stop in *Oliver*. Likewise, the distance between the home invasion and the murder of the Ackermans does not resemble ****437** the 280–mile gap between the theft of a vehicle and the killing in *Doane*. Rather, in the instant case, defendant was spotted by Trooper Kramer just over ten miles from Albright's home. The Ackermans were killed within a few miles of the place where defendant was first observed by Albright. Accordingly, we conclude that the scene of the murders was sufficiently close in both time and distance from the scene of the home invasion to support convictions of felony murder.

Likewise, the "causal connection" and "continuity of action" factors also support the jury's conclusion that defendant was "in the perpetration of" the home invasion when he murdered the Ackermans. The common thread running through the cases finding a lack of causal connection is that the defendant was not being pursued by the police when the defendant committed the murder. *Doane, supra; Allen, supra; Franks v. State,* 636 P.2d 361, 365 (Okla.Crim.App., 1981); *Diebold, supra; Lester, supra.* However, in the instant case, the ***136** record establishes that defendant was interrupted by Albright in the midst of the home invasion. Defendant's reaction was to abruptly flee. Albright testified that he relayed both a description of defendant and a description of the unique characteristics of defendant's vehicle to the police immediately after defendant fled the scene. Approximately ten minutes after the home invasion, defendant's vehicle was spotted by Trooper Kramer. The Court of Appeals concluded that because defendant was driving "in a normal manner" at the time he was spotted by Trooper Kramer, he had

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reached a point of "temporary safety." However, defendant had not stopped at any point between Albright's home and the point where he was observed by Trooper Kramer. Cf. *Diebold* (the defendant had stopped at a café between the theft and the killing of a pedestrian). Further, defendant's actions were not inconsistent with those of a person attempting to escape detection by the police, cf. *Ford* (the defendant's aimless driving for four hours after commission of the predicate felony demonstrated that he was not attempting to escape at the time he shot a police officer), and, in fact, defendant's act of speeding away from Trooper Kramer during the attempted traffic stop suggests both a causal connection and a continuity of action between the home invasion and the murders. The Court of Appeals failed to consider that defendant recognized that he had been identified as the perpetrator of a home invasion just minutes before. It is reasonable to infer from the testimony at trial that defendant failed to comply with Kramer's direction to stop and instead sped away precisely *because* of this knowledge. Had defendant assumed, for example, that he was being stopped for a broken headlight or for an improper left turn, it seems highly unlikely that he would have failed to stop and instead ***137** engage in the extremely reckless driving that followed. The evidence is consistent with the prosecutor's theory that when defendant led Kramer on a chase while driving the wrong way on I–94 and I–69, he did so in order to escape apprehension for the home invasion. As in *Gimotty,* defendant's act of colliding with the Ackermans' vehicle and killing the couple was part of an unbroken chain of events surrounding the home invasion. Because a reasonable juror could conclude beyond a reasonable doubt that the Ackermans' murders occurred as part of the res gestae of the home invasion, the trial court properly denied defendant's motion to direct a verdict of acquittal.[16]

****438** B. Failure to Instruct

Manslaughter is a necessarily included lesser offense of murder. *People v. Mendoza,* 468 Mich. 527, 544, 664 N.W.2d 685 (2003). "[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.* at 541, 664 N.W.2d 685. In the instant case, defendant requested an instruction on involuntary ***138** manslaughter.[17] In *People v. Holtschlag,* 471 Mich. 1, 21–22, 684 N.W.2d 730 (2004), we noted that

> "the sole element distinguishing manslaughter and murder is malice," *Mendoza* at 536, 664 N.W.2d 685, and that "[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.' " [*People v. Datema,* 448 Mich. 585, 594–595, 533 N.W.2d 272 (1995).] (Citation omitted.) If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.

"Malice" is defined as an act done "with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Mendoza, supra* at 540, 664 N.W.2d 685. Thus, defendant was entitled to an involuntary manslaughter instruction only if a rational view of the evidence would have supported a finding that the Ackermans' deaths were caused by an act of "gross negligence or an intent to injure, and not malice...." *Holtschlag, supra* at 21–22, 684 N.W.2d 730.

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The Court of Appeals majority concluded that it was "possible for a rational trier of fact to determine from the evidence that defendant only possessed the mindset of gross negligence." *Gillis, supra,* slip op. at 5. We ***139** disagree and hold that no rational juror, under these facts, could conclude that defendant's actions were anything other than acts that "create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Mendoza, supra* at 540, 664 N.W.2d 685. Defendant, in his attempt to get away from Trooper Kramer, knowingly entered I–94 going the wrong way. The ramp used by defendant was clearly marked with "Do Not Enter" ****439** and "Wrong Way" signs. Further, another officer assisting in the chase crossed over the median and began driving the proper way on I–94 in order to get in front of defendant. Finally, Trooper Kramer testified that he and defendant went past several vehicles on both I–94 and I–69, all of which were being driven the correct way. This was not a circumstance where a driver, through an act of gross negligence, accidentally drove the wrong direction on the highway. Rather, this defendant intentionally drove the wrong way on the freeway and continued to do so for approximately ten minutes before colliding with the Ackermans' vehicle. Trooper Kramer also testified that he was "quite certain [that oncoming traffic] would not have seen [defendant's] small white car...." In fact, this fear of a potential head-on collision was Kramer's primary reason for continuing his pursuit. In other words, by driving the wrong way on the interstate on a hazy day, defendant created a "very high risk" of a head-on collision—a collision that would certainly cause "death or great bodily harm." Further, it would be unreasonable to conclude that defendant did not know that a serious or fatal accident was the probable result of driving the wrong way on the interstate. No rational view of the evidence could support a finding of gross negligence or an intent to injure without malice.

Because the evidence does not support the conclusion that defendant drove the wrong way by accident or ***140** otherwise acted in a merely grossly negligent manner, we conclude that a rational view of the evidence does not support an involuntary manslaughter instruction. Therefore, the trial court did not err by failing to give an involuntary manslaughter instruction.[18]

IV. Conclusion

We conclude that "perpetration" encompasses acts by a defendant that occur outside the definitional elements of the predicate felony and includes acts that occur during the unbroken chain of events surrounding that felony. Thus, a felon "is engaged in the perpetration of the crime 'while he is endeavoring to escape ... [a]nd a [murder] committed immediately after a [felony], apparently for the purpose of preventing detection,' is felony murder." *Smith, supra* at 189, 222 N.W.2d 172, quoting *Podolski, supra* at 518, 52 N.W.2d 201 (emphasis omitted). In determining whether the defendant is still "in the perpetration of" the predicate felony when the defendant commits a murder, factors to be evaluated by the jury include: (1) the length of time between commission of the predicate felony and the murder; (2) the distance between the scene of the predicate felony and the ***141** scene of the murder; (3) whether there is a causal connection between the murder and the predicate felony; and (4) whether there is continuity of action between the predicate felony and ****440** the murder. LaFave, *supra* at 463, 464–465. Applying these factors to the instant case, we conclude that the trial court did not err in denying defendant's motion to direct a verdict of acquittal because, viewing the evidence in a light most favorable to the prosecutor, a reasonable juror could conclude beyond a reasonable doubt that the murders were within the res gestae of the predicate home invasion. We further conclude that the trial

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court did not err in refusing defendant's request for an involuntary manslaughter instruction. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's other issues.[19]

***142** ELIZABETH A. WEAVER, MAURA D. CORRIGAN and ROBERT P. YOUNG, JR., concur.

TAYLOR, C.J. (*concurring in part and dissenting in part*).
I concur with the majority opinion that a defendant is no longer "in the perpetration of" an enumerated felony when he or she has reached a place of temporary safety. I also agree with the majority that "perpetration" may encompass acts beyond the definitional elements of the predicate felony to include acts committed within the res gestae of that felony. I dissent, however, from the majority's application of this test to the facts of this case.

I

The facts are straightforward. Defendant was discovered by the homeowner right after he broke into the garage. Defendant fled the scene. The homeowner called 911 and was unsuccessful in an attempt to follow defendant, who got away in his car. Ten to fifteen minutes later, at a distance of at least ten miles from the scene of the home invasion, the police spotted a car matching the one the homeowner described and attempted to stop defendant. He did not stop, but fled and soon thereafter crashed into the Ackermans' car, resulting in their deaths.

Defendant was charged with two counts of felony murder, with first-degree home invasion as the enumerated felony. Defendant waived his right to a preliminary examination. Before trial defendant moved to quash the felony-murder charges, arguing that he was no longer "in the perpetration of" the home invasion when the ***143** Ackermans were killed. An evidentiary hearing was held in which the homeowner and the state trooper who attempted ****441** to stop defendant testified. The trial court denied the motion to quash, finding that "this was a continuous uninterrupted by temporary safety action that was taken by this Defendant."[1]

At trial, after the prosecutor rested his case, defense counsel moved for a directed verdict on the felony-murder charges, asserting that there was no nexus between the home invasion and the Ackermans' deaths. The trial court denied the motion, stating that one could determine beyond a reasonable doubt that defendant, while in the perpetration of or attempt to perpetrate the home invasion, murdered the Ackermans.

As previously noted, the jury subsequently convicted defendant of two counts of felony murder. On appeal, the Court of Appeals reversed the felony-murder convictions in a split decision because defendant had already escaped from the scene of the home invasion and the Ackermans' deaths were not a part of the continuous transaction of or immediately connected to the home invasion.

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***144** II

At the time of defendant's trial, MCR 6.419(A) provided:

> After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction.

When ruling on a motion for a directed verdict of acquittal, the trial court must determine whether, considering the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v. Hampton,* 407 Mich. 354, 368, 285 N.W.2d 284 (1979) (opinion by Coleman, C.J.). The test is not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Id.*

MCL 750.316 states in pertinent part:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, ... home invasion in the first or second degree....

Whether a defendant is still "in the perpetration of" an enumerated felony when a homicide occurs is either a question of law or a question of fact depending on the ***145** strength of the evidence presented to the jury.[2] Thus, if the evidence is ****442** such that a rational fact-finder could not conclude the defendant was still "in the perpetration of" an enumerated felony, the court should not submit the issue to the jury. The court is to decide the issue as a matter of law. I believe we deal with such a situation here.

This case implicates what it means to be in a place of temporary safety and should be a vehicle for establishing usable rules for cases in which a defendant takes flight in a car. I believe the majority in its opinion has really established no rule, or perhaps has created a rule that there is no rule and the question whether defendant has reached a place of temporary safety always goes to the jury. This uncabined rule is unwise because it obliterates any meaning that the point of temporary safety jurisprudence may have had. At least in situations in which the underlying enumerated felony does not involve the asportation of stolen property, I believe the rule should be as follows. Whether a defendant who is being chased has reached a point of temporary safety and, thus, is no longer engaged "in the perpetration of an enumerated felony" should be gauged by objectively assessing the state of the investigation at the time the arrest is attempted. If the investigation at that point ***146** was not the result of apprehenders hotly pursuing the defendant from the scene of the crime, but rather was the result of a fresh pursuit begun after having gathered information about the underlying crime, then the defendant can be said to have reached a point of temporary safety. Having reached a point of temporary safety, the defendant is no longer in the perpetration of the underlying crime.[3]

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Here, there is no question that defendant was spotted by the trooper after the victim's attempt to follow defendant had ended. The trooper, unlike the officers in many of the cases cited by the majority,[4] ****443** had not taken ***147** up the chase the homeowner had started. It was not, so to speak, a relay in which the baton was handed off from the citizen to the constable. Rather, the defendant here had gotten away cleanly, and no one trying to arrest him had any idea where he was, other than he had to be in an area bounded only by, at most, the limitations of time and the speed of his vehicle. The trooper could only make a stop on the basis of radio-conveyed identifying information, and that is what he did, more than ten miles away from, and more than ten minutes after, the aborted home invasion. In my view, a reasonable person could only conclude that the police were, uncontrovertibly at the point of the attempted stop, not in hot pursuit; rather, they were in the investigation phase of the case, putting together bits of information to try to determine which, if any, of the many motorists, or perhaps nonmotorists, they were observing might be the person who had committed a home invasion. Said ***148** another way, when hot pursuit had died ten minutes ago and ten miles away, the police were in the investigatory or "gumshoeing" phase that could produce results now, tomorrow, or perhaps never. That makes all the difference and must mean that the crime of home invasion was over, i.e., had been completed, when the defendant was driving with the flow of traffic. He had gotten away—at least at that time. The criminal in such a situation, if he or she is ever going to be at a point of temporary safety, is in one when he or she has lost the chasers and has slipped into traffic unobtrusively. Said conversely, if apprehension in the investigatory stage does not establish that the defendant was at a point of temporary safety, when would the defendant be? The majority has no answer that satisfies me.

Whether a defendant has reached a place of temporary safety should be based on what the state of the investigation was at the time immediately before the eventual attempt at apprehension. The question that must be asked is: Were the pursuers single-mindedly, without need of additional information, aware of whom they were after and where he was, or were they unclear on these things? If they were unclear and, as here, putting together available information to reestablish the pursuit, the defendant would be in a position of temporary safety.

Here, this defendant, lost among the cars on the highway, was, as a matter of law, in a place of temporary safety. The police had lost the scent and were using other techniques to find him. Thus, he was no longer "in the perpetration of" the ****444** crime. Indeed, when defendant refused to stop, he moved on to the new crime of fleeing and eluding, and it was "in the perpetration of" that crime, not the home invasion, that the Ackermans were killed.

***149** Under such circumstances, I believe that the trial court should have granted a directed verdict on the felony-murder charges because the evidence was insufficient that defendant was "in the perpetration of" the home invasion when the Ackermans were killed. Accordingly, the jury's verdict should be reversed.

III

In conclusion, the Court of Appeals properly vacated defendant's felony-murder convictions because defendant was no longer "in the perpetration of" first-degree home invasion when the Ackermans were killed. I believe the home invasion ended as a matter of law when defendant reached a point of

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temporary safety, i.e., driving unnoticed and unpursued in traffic. It was only after defendant had reached this point of temporary safety that defendant was spotted by the state trooper and fled when the trooper attempted to stop defendant. Given that fleeing and eluding is not an enumerated felony under our felony-murder statute, the felony murder charges should have been dismissed as a result of defendant's motion for directed verdict. Thus, defendant was improperly convicted of felony murder.[5]

Michael F. Cavanagh and Marilyn J. Kelly, JJ., concur.

MICHAEL F. CAVANAGH, J. (*concurring in part and dissenting in part*).
I concur with the opinion written by Chief Justice Taylor. I write separately only to reiterate my belief that when the evidence produced at a preliminary examination is legally insufficient to support binding a ***150** defendant over for trial, the defendant is entitled to automatic reversal. See *People v. Hall,* 435 Mich. 599, 616–629, 460 N.W.2d 520 (1990) (Cavanagh, J., dissenting). The inquiry is not dependent on whether the defendant nonetheless received a fair trial.

Marilyn J. Kelly, J., concurs.

All Citations

474 Mich. 105, 712 N.W.2d 419

Footnotes

1 Trooper Kramer testified that the exit ramp from westbound I–94 was clearly marked with "Do Not Enter" and "Wrong Way" signs.

2 Kramer testified that defendant "appeared not [to be] generally interfering with traffic or not trying to interfere with traffic other than the fact that he was going the wrong way on the road."

3 Defendant suffered a closed-head injury and had amnesia regarding the events of May 21, 2001.

4 The use of the term "perpetrate" within the context of the crime of felony murder dates back nearly to statehood. Michigan's original murder statute, 1838 R.S., part 4, title 1, ch. 3, § 1, defined first-degree murder as follows:

> All murder which shall be perpetrated by means of poison or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed *in the perpetration or attempt to perpetrate* any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and shall be punished by death.... [Emphasis added.]

5 Defense counsel was asked, "[I]f there had been a successful home invasion here and Mr. Gillis had left the home and was about to enter his car and the police had arrived upon the scene and he had shot one of the police, your view is that would not be 'in the perpetration of' the home invasion. Is that correct?" After clarifying that the hypothetical shooting occurred outside the curtilage of the home, defense counsel responded, "I think it can't take place there."

6 While not at issue in this case, we also note that a defendant's plan to "carry out" the predicate felony may also include acts leading up to the commission of that felony. Professor Wayne

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LaFave notes:

> "Where a causal connection between the killing and the underlying felony exists, courts generally have held that a killing may take place *sometime before* or after, as distinguished from during, the felony and yet still qualify as a killing 'in the commission or attempted commission of' the felony." [*Thew, supra* at 86, 506 N.W.2d 547, quoting *People v. Goddard,* 135 Mich.App. 128, 135, 352 N.W.2d 367 (1984), quoting LaFave & Scott, Criminal Law, § 71, p. 555 (emphasis supplied).]

See, e.g., *State v. Nelson,* 65 N.M. 403, 411, 338 P.2d 301 (1959) (rejecting the defendant's argument that a murder that precedes the predicate felony cannot be felony murder on the basis that "[i]f a killing is committed within the *res gestae* of the felony charged, whether the homicide occurred before or after the felony, is not determinative").

7 See, e.g., MCL 750.316(1)(b); Cal Penal Code § 189 (murder "committed in the perpetration of, or attempt to perpetrate" an enumerated felony is first-degree murder); Idaho Code § 18–4003(d) ("Any murder committed in the perpetration of, or attempt to perpetrate" an enumerated felony is first-degree murder.).

8 *Podolski* was decided before *People v. Aaron,* 409 Mich. 672, 727–728, 299 N.W.2d 304 (1980). In *Aaron,* we held that a homicide that occurred during the commission of a felony constitutes murder only if the prosecutor specifically proves the existence of malice. Thus, the more precise statement of *Podolski,* in light of *Aaron,* is that a *murder* "committed immediately after a robbery, apparently for the purpose of preventing detection, is [felony murder]." *Podolski, supra* at 518, 52 N.W.2d 201.

9 Defendant argues that the res gestae principle is no longer applicable in light of this Court's decision in *People v. Randolph,* 466 Mich. 532, 648 N.W.2d 164 (2002). In *Randolph,* this Court addressed the issue whether a completed larceny could be "elevated" to unarmed robbery if the defendant uses force before reaching a point of temporary safety. In a divided decision, this Court held that this "transactional approach" was contrary to the language of the statute and that in order for a larceny to be elevated to unarmed robbery, the force and the felonious taking must occur contemporaneously. According to defendant, *Randolph* applies by analogy to this case. The crime of home invasion was complete at the moment defendant entered the building, and the murders took place after defendant left the home and in a place several miles away. The crimes, he argues, were not contemporaneous and, therefore, the felony-murder statute should not apply.

However, we believe that *Randolph* has no applicability in the present context. The murder statute, unlike the unarmed robbery statute in *Randolph,* contains the word "perpetration"—a word that encompasses a broader range of activities than the core elements of robbery at issue in *Randolph.* We note that the Legislature responded to our decision in *Randolph* by amending the robbery statute, MCL 750.530, to include circumstances where force was used "in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." 2004 P.A. 128.

10 The concurrence/dissent would define "perpetration" to require that the police either be in hot pursuit following commission of the underlying felony or that they take up a chase initiated by a civilian. *Post* at 441. However, it fails to cite any authority for its definition, and, in fact, its definition has been rejected by a number of courts. See, e.g., *Oliver, supra* at 523, 234 N.W.2d 679 (rejecting as "incredible" the defendant's assertion that he had reached a point of temporary safety by driving unpursued for half an hour after committing a bank robbery and holding that his subsequent murder of a State Police trooper was committed "in the perpetration of" the bank

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robbery); *State v. Squire,* 292 N.C. 494, 512, 234 S.E.2d 563 (1977) (holding that the defendants who had left the scene of an armed robbery without pursuit had "[o]bviously ... not reached what they regarded as a place of temporary safety" when their vehicle was pulled over by a police officer 13 minutes after the robbery); *Lampkin v. State,* 808 P.2d 694 (Okla.Crim.App., 1991) (holding that a defendant who was observed disobeying a stop sign in the vicinity of a robbery, but who was not being pursued for the robbery, was still "in the perpetration of" that robbery when he led police on a high-speed chase that ended in a fatal collision); *People v. Salas,* 7 Cal.3d 812, 103 Cal.Rptr. 431, 500 P.2d 7 (1972) (holding that the defendants, who had left the scene of an armed robbery unpursued but were stopped by police just three minutes after leaving the scene, had not reached a place of temporary safety when one of the defendants shot and killed the officer).

11 The concurrence/dissent attempts to explain the nearly universal rejection of its novel definition of "perpetration" by theorizing that the term has a different meaning in the context of felonies involving the asportation of stolen property. *Post* at 442 n. 4. Specifically, it suggests that a defendant "must be engaged in some act that is required for the full execution of the underlying crime for the defendant to be considered still in perpetration of that felony." *Id.* (emphasis deleted), citing *Franks v. State,* 636 P.2d 361, 365 (Okla.Crim.App., 1981). Because defendant here was not transporting stolen property, he "was not engaged in some act required for the full execution of a home invasion when the trooper attempted to stop him." *Id.* However, in almost every circumstance escape is part of a defendant's plan to commit a felony. *Kelly, supra* at 175, 10 A.2d 431. Thus, the instant home invasion, as with any other felony, was not "fully executed" until defendant effected his escape.

12 While Professor LaFave only lists the first three factors, he makes clear that a jury must also consider whether the murder was committed within the same " 'chain of events' " as the predicate felony. *Id.* at 464–465. Thus, "continuity of action" is a distinct factor that should be considered by a jury. See, e.g., *State v. Pierce,* 23 S.W.3d 289, 295 (Tenn., 2000) (citing LaFave and stating that "we must evaluate the sufficiency of the evidence to determine if the [killing] and the felony ... are closely connected in time, place, and causation, and continuity of action").

13 While the LaFave factors have not been considered as a whole by Michigan courts, we note that the individual factors have been separately addressed in a number of cases. See, e.g., *Thew, supra* (discussing the time between the defendant's commission of criminal sexual conduct and the murder of the victim); *Gimotty, supra* (noting the causal connection between the commission of retail fraud and a murder committed while the defendant was attempting to flee from the scene); *Oliver, supra* (holding that a defendant who was driving unpursued at normal highway speeds had not broken the chain of events linking the commission of a robbery and the murder of a State Police trooper).

14 But see *Franks v. State,* 636 P.2d 361 (Okla.Crim.App., 1981). In *Franks,* the defendant was stopped by a police officer for a traffic violation ten blocks away from the scene of an armed robbery. The officer was unaware of the robbery at the time of the stop. The defendant managed to disarm the officer and leave without being arrested. While the defendant was driving unpursued, he disobeyed a stop sign, striking another vehicle and killing the driver. The Oklahoma Court of Criminal Appeals held that the accident was unrelated to the robbery, primarily because the defendant "was not pursued as he left the grocery store robbery nor was he being chased by a police car at the time of the accident." *Id.* at 365.

15 We are not holding that the jury may consider defendant's subjective understanding of whether he had reached a point of temporary safety. Instead, we are merely holding that the jury may

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consider all the objective facts surrounding defendant's flight, including reasonable inferences that may be drawn from this evidence. The question whether defendant has reached a point of temporary safety is a question of fact for the jury. Here, a juror could reasonably infer from defendant's actions that he was aware that Albright had spotted him at the scene of the home invasion. The jury properly considered this inference as evidence that defendant had not truly reached a point of temporary safety.

16 The concurrence/dissent asserts that we have created "a rule that there is no rule and the question whether defendant has reached a place of temporary safety always goes to the jury." *Post* at 442. However, we simply hold that "perpetration" constitutes an element of first-degree murder. As with any other element of any other crime, the trial court may direct a verdict in favor of the defendant when the prosecutor fails to "introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt...." *People v. Hampton,* 407 Mich. 354, 368, 285 N.W.2d 284 (1979). But, where a reasonable juror could find that a defendant was "in the perpetration of" the underlying felony when the defendant committed the murder, as is the case here, the question whether the defendant has reached a place of temporary safety does constitute a question for the finder of fact. *Smith, supra* at 190, 222 N.W.2d 172.

17 The Court of Appeals did not reach defendant's other claims of instructional error—that the trial court denied defendant's request for instructions on first-degree fleeing and eluding (causing death) and voluntary manslaughter.

18 Even if defendant was entitled to an involuntary manslaughter instruction, the trial court's failure to so instruct constituted harmless error. Harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *People v. Cornell,* 466 Mich. 335, 361, 646 N.W.2d 127 (2002). Such errors are deemed non-constitutional errors. *Id.* at 363, 646 N.W.2d 127. "[A] preserved, non-constitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v. Lukity,* 460 Mich. 484, 495–496, 596 N.W.2d 607 (1999). Here, defendant was charged with both first—and second-degree murder. The jury convicted of first-degree murder, the greater offense. Given the jury's refusal to either acquit or convict of the lesser offense, defendant has failed to demonstrate that a "miscarriage of justice" occurred when the trial court failed to instruct on involuntary manslaughter.

19 We also directed the parties to address the issue whether the Court of Appeals order of remand for a new trial violated the separation of powers doctrine. Const. 1963, art. 3, § 2. The power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests exclusively in the prosecutor. *People v. Williams,* 244 Mich.App. 249, 252–253, 625 N.W.2d 132 (2001), citing *Genesee Prosecutor v. Genesee Circuit Judge,* 386 Mich. 672, 683, 194 N.W.2d 693 (1972). The exercise of judicial power over the discharge of the prosecutor's duties "is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires." *People v. Morrow,* 214 Mich.App. 158, 161, 542 N.W.2d 324 (1995).

When the Court of Appeals remanded this case to the trial court, it noted that "[d]efendant should properly have been charged with fleeing and eluding and second-degree murder." *Gillis, supra,* slip op. at 4. We do not believe that this statement constitutes a usurpation of the prosecutor's powers. Rather, the Court of Appeals was simply advising the trial court as to the new trial in accordance with its holding that defendant could not be charged with first-degree felony murder. Had the Court of Appeals purported to substitute its judgment for that of the prosecutor by

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determining what criminal charges should be brought against defendant, we agree with the prosecutor that there would have been separation of powers implications.

[1] The trial court's decision after the evidentiary hearing was akin to a decision whether there was sufficient evidence to bind a defendant over for trial after a preliminary examination. The Court of Appeals concluded that the motion to quash should have been granted. I agree, but, given that defendant went to trial, appellate review is properly limited to the trial court's denial of his motion for directed verdict. *People v. Yost,* 468 Mich. 122, 124 n. 2, 659 N.W.2d 604 (2003), citing *People v. Hall,* 435 Mich. 599, 601–603, 460 N.W.2d 520 (1990) (an evidentiary deficiency at the preliminary examination is not a ground for vacating or reversing a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error). See also *People v. Wilson,* 469 Mich. 1018, 677 N.W.2d 29 (2004). In light of this principle, the Court of Appeals erred in analyzing whether the motion to quash should have been granted.

[2] As stated in Anno.: *What constitutes termination of felony for purpose of felony-murder rule,* 58 A.L.R.3d 851, 857:

> [T]he facts of a particular case may be such that there can be no doubt whether the felony and killing are part of one transaction, so that the question should not be submitted to the jury but should be decided by the court as a matter of law.

See, e.g., *Allen v. State,* 690 So.2d 1332 (Fla.App., 1997), *Doane v. Commonwealth,* 218 Va. 500, 237 S.E.2d 797 (1977), and *Franks v. State,* 636 P.2d 361 (Okla.Crim.App., 1981), all cases that determined as a matter of law that a defendant was no longer "in the perpetration of" a felony when a homicide occurred.

[3] I have no objection to the four factors the majority cites from Professor LaFave for determining whether a defendant is still "in the perpetration of" a felony, i.e., time, place, causation, and continuity of action, but simply contend that their application shows, as a matter of law, that defendant was no longer "in the perpetration of" the home invasion when defendant decided to flee rather than stop for the trooper.

[4] I note that many of the cases cited by the majority in which a defendant was determined to still have been "in the perpetration of" a felony involved situations in which the homicide occurred at, or immediately near, the scene of the crime or as a result of a hot pursuit. See, e.g., *People v. Podolski,* 332 Mich. 508, 514, 52 N.W.2d 201 (1952), which indicates that the bank robbers were about to escape when the police arrived. See, also, *People v. Gimotty,* 216 Mich.App. 254, 258–259, 549 N.W.2d 39 (1996), in which the defendant sped from the store's parking lot onto a road where he was observed by another driver who called the police on his car phone and followed the defendant until the police took over the pursuit. To the extent that *People v. Oliver,* 63 Mich.App. 509, 234 N.W.2d 679 (1975), is to the contrary, I would not follow it. But, I note that in *Oliver,* as in most of the cases cited by the majority, the underlying felony was a robbery where the defendant was making away with stolen goods. Under such circumstances, i.e., one of the elements of the underlying crime involves asportation of stolen property, a defendant may be considered to still be "in perpetration of" the underlying crime for a longer period than when a defendant, as here, commits a crime that is over no later than when the defendant leaves the scene. But, we are not required to decide that question here.

The majority cites *State v. Squire,* 292 N.C. 494, 234 S.E.2d 563 (1977), *Lampkin v. State,* 808 P.2d 694, 696 (Okla.Crim.App., 1991), and *People v. Salas,* 7 Cal.3d 812, 103 Cal.Rptr. 431, 500 P.2d 7 (1972), in support of the proposition that one may still be in the perpetration of a felony when there is no hot pursuit. But in each of these cases, the underlying crime was robbery

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where money was being asported away. In *Lampkin,* the court stated that the defendant was still in the process of leaving with the stolen money when he was observed by the police driving at a fast speed and disobeying a stop sign. In contrast, the defendant here was not in possession of any stolen property, and he was driving in a normal manner when the police spotted him. I also note that in *Franks, supra* at 365, the court said that at the time of a killing, the accused must be engaged in *some act that is required for the full execution of the underlying crime* for the defendant to be considered still in perpetration of that felony. Again, the defendant here was not engaged in some act required for the full execution of a home invasion when the trooper attempted to stop him. The *Salas* court specifically stated that the homicide "was committed before defendant had reached a place of safety while he 'was in hot flight with the stolen property....' " *Salas, supra* at 823, 103 Cal.Rptr. 431, 500 P.2d 7. In contrast, defendant in the case at bar was not in hot flight, and he was not transporting stolen property.

[5] I agree with the Court of Appeals that defendant could be charged with second-degree murder regarding the Ackermans' deaths, but not felony murder.

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464 Mich. 266
Supreme Court of Michigan.
PEOPLE of the State of Michigan, Plaintiff–Appellant, Cross–Appellee,
v.
Willie GLASS, Jr., Defendant–Appellee, Cross–Appellant.
Docket No. 114795.
|
Argued Nov. 14, 2000.
|
Decided June 12, 2001.

Synopsis

In prosecution for conspiracy to deliver 650 or more grams of cocaine, the Eaton Circuit Court, Calvin E. Osterhaven, J., denied defendant's motion to dismiss on basis of racial discrimination in selection of grand jury. Defendant filed application for leave to appeal from that decision, which Court of Appeals denied. Upon remand, the Court of Appeals ordered grand jury records unsealed so that defendant might obtain evidence to support his claim. State appealed. The Supreme Court, Weaver, J., held that: (1) rule creating substantive right to preliminary examination for grand jury indictees is invalid, overruling *People v. Duncan*, 388 Mich. 489, 201 N.W.2d 629, and (2) defendant could not establish that grand jury composition violated his right to equal protection or his alleged right to fair cross section on grand jury venire.

Court of Appeals' judgment reversed in part, case remanded.

Taylor, J., issued concurring and dissenting opinion.

Michael F. Cavanagh, J., issued dissenting opinion in which Marilyn J. Kelly, J., concurred.

Procedural Posture(s): Motion to Dismiss.

Attorneys and Law Firms

****263 *270** Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Jeffrey L. Sauter, Prosecuting Attorney, and William M. Worden and Hope E. Freeman, Sr., Assistant Prosecuting Attorneys, Charlotte, for the people.

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Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, and William E. Molner, Assistant Attorneys General, Lansing, for the Attorney General.

John D. O'Hair, Prosecuting Attorney, and Timothy A. Baughman, Chief, ***271** Research, Training and Appeals, Detroit, for the Prosecuting Attorneys Association of Michigan.

Opinion

WEAVER, J.

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Following his waiver of preliminary examination, the defendant was bound over to Eaton Circuit Court on the charge of conspiracy to deliver 650 or more grams of cocaine. Defendant, who is black, seeks to challenge the composition of the multicounty grand jury that indicted him, claiming that the selection process systematically excluded blacks from the multicounty grand jury. The prosecution responds that the information it filed after defendant waived preliminary examination purged any taint in the grand jury selection process.

****264** On remand from this Court, the Court of Appeals rejected the prosecution's argument and directed further proceedings on the selection issue, including the unsealing and inspection of certain grand jury documents that might be relevant to the claim of racial discrimination in selection of the composition of the grand jury.

We hold that this Court exceeded its criminal procedure rulemaking authority in *People v. Duncan*, 388 Mich. 489, 201 N.W.2d 629 (1972), by creating a substantive right to a preliminary examination for grand jury indictees. To the extent that *Duncan* exceeded this Court's rulemaking authority, it is overruled and its implementing court rules are rejected.

As to defendant's constitutional claims, we hold that he has not established and cannot establish a prima facie case of discrimination under either the Sixth or the Fourteenth Amendment. It was, therefore, ***272** an abuse of discretion for the Court of Appeals to order an in-camera inspection of the grand jury record.

The judgment of the Court of Appeals is reversed in part, and this case remanded to the circuit court for further proceedings consistent with this opinion.

I

Upon a petition filed by Clinton, Eaton, and Ingham County prosecutors, the Court of Appeals on January 13, 1995, formed a multicounty grand jury under M.C.L. § 767.7b *et seq.* The grand jury was given jurisdiction over the three counties. The Court of Appeals order provided that the grand jury would consist of seventeen jurors: six from Ingham County, six from Eaton, and five from Clinton County. The court's order granted the prosecutors' motion to suppress the grand jury proceedings.

On April 27, 1995, the grand jury indicted the defendant on a charge of conspiracy to deliver 650 grams or more of cocaine.[1] The indictment alleged that the conspiracy took place in Eaton County. A felony warrant was issued by the circuit judge on assignment by the Court of Appeals to the multicounty grand jury. Defendant was apparently arraigned on the indictment on May 12, 1995, and bond was set for $150,000.[2]

On September 8, 1995, the defendant appeared in the 56th District Court and waived preliminary examination on the indictment. Defendant was bound over ***273** to the Eaton Circuit Court, and his papers were filed with that court on September 11, 1995. Defendant waived arraignment in the circuit court on September 27, 1995 or September 28, 1995.[3]

On September 29, 1995, the Eaton County prosecutor filed an information in circuit court. The information was identical to the indictment, again alleging conspiracy to deliver 650 grams or more of cocaine. Attached to the information was a list of witnesses. There is no record of a complaint and

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warrant or a separate preliminary examination or waiver in the district court before the filing of the information.

Trial was scheduled and adjourned several times. On February 21, 1996, the defendant moved to dismiss, alleging, among other things, that the composition of the grand jury violated his due process rights, his Sixth Amendment right to a ****265** jury selected from a fair cross section of the community, and his Fourteenth Amendment right to equal protection. As the Court of Appeals summarized his allegations:

> Specifically, defendant indicated that the population of Clinton County is 3.85 percent African–American and 13.8 percent of the total population of the three counties, the population of Eaton County is 3.56 percent African–American and 21.47 percent of the total population of the three counties, and the population of Ingham County is 9.87 percent African–American and 65.16 percent of the total population of the three counties.[3] Defendant thus contended that this Court's order that five grand jurors be from Clinton County, six from Eaton County, and six from Ingham County amounted to a systematic overrepresentation of the counties with the smallest African–American population and a systematic underrepresentation of the county ***274** with the largest African–American population. Defendant further contended that if proper percentages had been used, Clinton County would have had two grand jurors, Eaton County would have had four grand jurors, and Ingham County would have had eleven grand jurors.[4] In addition to arguing for dismissal, defendant requested that the trial court order the prosecution to produce a copy of the petition for the establishment of the multicounty grand jury.
>
> [3] These population figures are based on the 1990 census.
>
> [4] Defendant also attached to his motion two affidavits from witnesses at the grand jury proceedings who stated that there were no African–Americans on the seventeen-person grand jury.
>
> [235 Mich.App. 455, 459–460, 597 N.W.2d 876 (1999).]

On March 12 and April 2, 1997, the circuit court held evidentiary hearings on defendant's motion to dismiss. The Court of Appeals summarized the testimony at the hearing as follows:

> Those witnesses who did testify shed little light on how the grand jury was selected and whether African–Americans were excluded from the grand jury.[5] The Eaton County deputy clerk and Ingham County deputy clerk indicated that their juror questionnaire did not contain questions pertaining to race. Both the Eaton County and Ingham County deputy clerks indicated that they did not know how the multicounty grand jury was selected. A member of the Clinton County jury board indicated that two panels of potential petit jurors from Clinton County were assigned to the multicounty grand jury pool. These panels were formed by use of the Secretary of State's list of licensed drivers in Clinton County, mailing questionnaires to the licensed drivers, and the jury board's review of the returned questionnaires to determine who could sit on the jury panels. Persons excluded were those who did not have appropriate citizenship, had a documented physical disability, were over the age of seventy, lacked competency, were currently under conviction of a felony; or served on a jury within the past ***275** twelve months. The Clinton County juror questionnaire also did not include questions about race.
>
> [5] We note that the Legislature requires that the names of grand jurors shall be drawn in the same manner and from the same source as petit jurors. MCL 600.1326.
>
> [*Id.* at 460–461, 597 N.W.2d 876.]

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The circuit court denied defendant's motion to dismiss on the basis of racial discrimination in selection of the grand jury, ****266** concluding that the defendant had failed to establish that blacks were systematically excluded.

Defendant filed an application for leave to appeal from that decision, which the Court of Appeals denied.[4] The defendant filed an application for leave to appeal to this Court, and on September 25, 1997, we issued an order remanding the case to the Court of Appeals for consideration as on leave granted.

On remand, the Court of Appeals concluded that defendant had not established a prima facie case of racial discrimination under either the Sixth or Fourteenth Amendment because he had not provided evidence regarding the racial composition of the grand jury venire, had not shown that underrepresentation of blacks was due to systematic exclusion during the selection process, and had not shown that the grand jury selection procedure was racially biased or susceptible to abuse. Nevertheless, the Court of Appeals agreed with defendant that the grand jury records should be unsealed so that he might obtain evidence to support that claim.[5] The Court of Appeals dissent ***276** concluded that any errors in the grand jury selection or proceedings were harmless because the prosecutor proceeded by information in the circuit court.

II

Michigan law provides that criminal prosecutions may be initiated in the court having jurisdiction to hear the cause by either indictment or information. MCL 767.1 *et seq.* Throughout the record in this case, there is confusion regarding whether the defendant is in circuit court on the indictment or the information.[6] The record does reveal that the prosecution filed an information in the circuit court after the grand jury indictment had already been returned and the defendant bound over. The effect of the prosecutor's decision to file an information after the defendant's bindover on the grand jury indictment has raised questions involving the interplay of the statutes, case law, and court rules governing informations and indictments. In our order granting ***277** leave, we requested that the parties brief three issues in addition to granting leave on the issues raised by the parties.[7] A ****267** brief overview of Michigan's two criminal charging procedures provides context for the discussion and conclusions that follow.

A

Criminal prosecutions may be initiated in the court having jurisdiction over the charge upon the filing of an information. MCL 767.1 *et seq.; People v. Simon,* 324 Mich. 450, 456, 36 N.W.2d 734 (1949). An information is predicated upon a signed complaint and warrant. A complaint must state the substance of the accusation and reasonable cause to believe that the person accused committed the offense. MCL 764.1d.

The accused has a right to a preliminary examination before the prosecutor files an information in the court having jurisdiction to hear the cause. MCL 767.42. The accused and the state are entitled to a "prompt" examination. MCL 766.1;. The primary function of a preliminary examination is to determine

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if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it. *People v. Bellanca,* 386 Mich. 708, 712, 194 N.W.2d 863 (1972). As to the timing of the preliminary examination, MCR 6.112(B) provides in pertinent part that

> ***278** [u]nless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives preliminary examination.

Once an information has been filed, the prosecutor may not enter a nolle prosequi "or in any other way discontinue or abandon the same, without stating on the record the reasons therefore and without leave of the court having jurisdiction to try the offense charged, entered into its minutes." *Genesee County Prosecutor v. Genesee Circuit Judge,* 391 Mich. 115, 120, 215 N.W.2d 145 (1974).[8]

Criminal prosecutions may also be initiated by grand jury indictment. MCL 767.1 *et seq.;* MCR 6.112(B). Grand juries may be convened over two or more counties upon petition filed with the Court of Appeals by the Attorney General or by prosecuting attorneys from each county named in the petition and upon an order of the Court of Appeals. MCL 767.7b. The Court of Appeals may convene the requested grand jury if the petition establishes probable cause to believe that a crime, or portion thereof, has been committed in two or more of the named counties and if the petition establishes that a grand jury could "more effectively address" that alleged criminal activity. MCL 767.7d.

There is no state constitutional right to indictment by grand jury; rather, indictment by grand jury is an alternative charging procedure created by the Legislature. ***279** *In re Palm,* 255 Mich. 632, 238 N.W. 732 (1931). Grand juror names are "drawn in the same manner and from the same source as petit jurors." MCL 600.1326. Indictment by grand jury establishes probable cause that a crime has been committed. *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). If an indictment is found, the foreperson presents the indictment to the ****268** court. MCL 767.25(1). The presiding judge then returns the indictment to the court having jurisdiction over the offense, where it is filed. MCL 767.25(3), (4). A prosecutor is prohibited from entering a nolle prosequi upon an indictment or discontinuing or abandoning an indictment without stating reasons on the record and without leave of the court having jurisdiction over the charge. MCL 767.29. The court to which the indictment is presented may issue a warrant for the arrest of the person indicted. MCL 767.30.

Duncan, supra at 502, 201 N.W.2d 629, granted indictees the right to a preliminary examination. In accordance with *Duncan,* MCR 6.110 provides a preliminary examination for a defendant indicted by a grand jury. Consistent with M.C.L. § 767.2; MCR 6.112(A) provides, except as otherwise provided by the court rules or elsewhere, "the law and rules that apply to informations and prosecutions on informations apply to indictments and prosecutions on indictments." MCR 6.112(B) also provides that when an indictment is returned and filed before a defendant's preliminary examination, "the indictment may substitute for the complaint and commence judicial proceedings."[9] The ***280** provision of subsection (B) reflects the requirement of *Duncan, supra,* that grand jury indictees be afforded a preliminary examination.

B

The confused procedural posture of this case raises fundamental questions regarding Michigan's current dual charging procedures. As noted above, the indictment had been returned to circuit court and

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the defendant had waived preliminary examination in district court before the prosecutor filed the information in Eaton Circuit Court. There was no complaint and warrant filed to support the information. Nor did the prosecutor seek to abandon or discontinue the indictment.[10] Consistent with MCR 6.112(B), the prosecutor treated the grand jury indictment as nothing more than a complaint initiating criminal proceedings, despite MCR 6.112(A) and M.C.L. § 767.2, which treat ***281** indictments as equivalent to informations. As a result of this confusion, we asked the parties to brief

whether this Court properly exercised its authority over criminal procedure in ****269** *People v. Duncan,* 388 Mich. 489 [201 N.W.2d 629] (1972), to grant defendants indicted by grand juries the right to a preliminary examination. [461 Mich. 1005, 610 N.W.2d 872.]

As noted above, *Duncan* provided grand jury indictees with the right to a preliminary examination after indictment. The Court then adopted implementing court rules, MCR 6.110 and MCR 6.112. Pursuant to Const. 1963, art. 6, § 5, this Court has exclusive authority to determine the rules of practice and procedure. *McDougall v. Schanz,* 461 Mich. 15, 26, 597 N.W.2d 148 (1999). However, this Court's constitutional rulemaking authority extends only to matters of practice and procedure:

> [T]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. [*Id.* at 27, 597 N.W.2d 148.][11]

We now address whether *Duncan* and the implementing court rules were a proper exercise of the Court's rulemaking authority.

Despite acknowledging that indicted defendants historically did not receive a preliminary examination, and that no statute so provided, *Duncan* declared such a right on the basis of policy. Regarding the significance of preliminary examination *Duncan* opined ***282** that "[t]here may well be serious questions of equal protection and due process involved in the present Michigan procedure ... since it denies to an accused indicted by a multiple-man grand jury what has become recognized as a fundamental right in most criminal cases—the right to a preliminary examination." *Id.* at 502, 201 N.W.2d 629. *Duncan* expressly declined to rely on due process principles in creating the right to a preliminary examination for indictees. Rather than addressing those constitutional questions, this Court seized upon its "inherent power" to deal with the situation as a matter of criminal procedure and granted all defendants accused of a felony the right to a preliminary examination, even in those cases following indictment by a grand jury. *Id.*[12] Rather than following the statutory scheme pertaining to prosecutions by indictment, *Duncan* instead rewrote it. We are persuaded that *Duncan* and the implementing court rules exceed this Court's rulemaking authority. As this Court previously recognized:

> The measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statutes of the State pertaining thereto, particularly the penal code and the code of criminal procedure. The powers of the courts with reference to such matters are derived from statutes. [*People v. Piasecki,* 333 Mich. 122, 143, 52 N.W.2d 626 (1952).][13]

The establishment of the right to a preliminary examination is more than a matter of procedure and ***283** beyond the powers vested in the Court by Const. 1963, art. 6, § 5; it is a matter of public policy for the ****270** legislative branch. *Shannon v. Ottawa Circuit Judge,* 245 Mich. 220, 222, 222 N.W. 168 (1928); *People v. Piasecki,* supra; *Glancy v. Roseville,* 457 Mich. 580, 590, 577 N.W.2d 897 (1998). *Duncan* and MCR 6.112(B) are also inconsistent with M.C.L. § 767.2, which provides for equivalency in the law between indictments and informations.

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We overrule *Duncan,* insofar as it afforded indictees the right to a preliminary examination. Additionally, we hold that the information filed in this case is null and void because it was filed pursuant to the invalid scheme set forth in MCR 6.112(B) that purported to allow an indictment to substitute for a complaint. There was no complaint stating the substance of the accusation or reasonable cause to believe the accused committed the offense as required by M.C.L. § 764.1d, nor was there a preliminary examination on a complaint as required by M.C.L. § 767.42. Finally, the prosecution never sought to discontinue the indictment under M.C.L. § 767.29. Because the information is null and void, we do not address the effect a properly filed information might have on a previously returned indictment.[14] This case stands filed in the circuit court on the grand jury indictment. We next address the ***284** defendant's constitutional challenges to the grand jury proceedings.

III

The grand jury was composed of seventeen people, five from Ingham County, five from Clinton County, and six from Eaton County. Defendant alleges that this composition violated his right to equal protection under the Fourteenth Amendment and his Sixth Amendment right to a fair cross section on the grand jury venire.

A

Defendant alleges that the seventeen member tricounty grand jury makeup of 6–6–5 from Eaton, Ingham, and Clinton Counties respectively violated his right to equal protection under the Fourteenth Amendment. There is no right to have a particular grand jury reflect the precise racial composition of a community. *Akins v. Texas,* 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). Furthermore, discriminatory effect is insufficient to establish a violation of the Fourteenth Amendment; defendant must show discriminatory intent. *People v. Ford,* 417 Mich. 66, 103, 331 N.W.2d 878 (1982); *Arlington Hgts. v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis,* 426 U.S. 229, 242–243, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). "Such an effect may permit an inference of an unlawful purpose, but, standing alone, it is not conclusive on the question whether governmental activity is racially discriminatory." *Ford, supra* at 103, 331 N.W.2d 878.

***285** In order to establish a prima facie case of racial discrimination in the selection of a grand jury under the Fourteenth Amendment, in addition to showing discriminatory purpose, defendant must show that the grand jury selection procedure resulted in a "substantial underrepresentation of his race." *Castaneda v. Partida,* 430 U.S. 482, 494, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). *Castaneda* articulated ****271** three steps to establish substantial underrepresentation. The defendant must show 1) that he belongs to a recognizable, distinct class singled out for different treatment under the laws as written or as applied; 2) that there was significant underrepresentation of that distinct class over a significant period of time; and 3) that the selection procedure was susceptible of abuse or that it was not racially neutral. *Id.* at 494, 97 S.Ct. 1272. Once a defendant establishes a prima facie case, the burden shifts to the state to rebut the inference of intentional discrimination. *Id.* at 495, 97 S.Ct. 1272.

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We agree with the judgment of the Court of Appeals that defendant has not presented a prima facie case of discrimination under the Fourteenth Amendment.[15] We go further and hold that defendant will be unable to establish a prima facie case upon further review of the grand jury proceedings because he will be unable to establish a discriminatory purpose. Defendant does not challenge the manner in which the jury impaneling was implemented. Defendant's claim is premised solely upon the allegedly disparate effect of the 6–6–5 composition of grand jurors ***286** from the three counties chosen by the Court of Appeals. Defendant does not present any evidence suggesting a discriminatory purpose, and nothing in the grand jury records could conceivably aid defendant in his effort to prove that the Court of Appeals acted with discriminatory purpose in establishing the 6–6–5 split.

The possibility of an adverse effect on the representation of blacks resulting from the 6–6–5 composition is relevant to discriminatory purpose, but is insufficient alone to establish that it was a purposeful device to exclude blacks from the grand jury. *Washington, supra* at 239, 96 S.Ct. 2040. We therefore conclude that defendant will be unable to establish a prima facie case of a discriminatory purpose in violation of the Fourteenth Amendment.

B

Defendant also alleges that the 6–6–5 composition of the grand jury denied him his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. To establish a prima facie violation of the fair cross section requirement, "a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process ." *People v. Smith,* 463 Mich. 199, 203, 615 N.W.2d 1 (2000), citing *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).[16]

***287** A preliminary issue is whether the fair cross section requirement applies to state grand jury venires. The Court of Appeals assumed it did, but this is the first state decision to hold that a defendant may challenge the grand jury selection process on the basis of the fair cross section requirement. 235 Mich.App. at 465–466, 597 N.W.2d 876. It is well established that the Sixth Amendment fair cross section requirement ****272** applies to state petit jury venires. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).[17] However, the Fifth Amendment does not require grand juries in state prosecutions, *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), and the United States Supreme Court has not imposed the fair cross section requirement on states that allow indictment by grand jury. See *Castaneda, supra* at 509–510, 97 S.Ct. 1272 (Powell, J., dissenting). The Sixth Circuit has held that due process for the purposes of state grand jury selection does not include the fair cross section requirement. *Ford v. Seabold,* 841 F.2d 677, 687–688 (C.A.6, 1988).

We need not decide whether Michigan should apply the fair cross section requirement to grand jury venires in this case because defendant has failed to allege a cognizable fair cross section claim. Defendant contends that Ingham County residents were underrepresented on the basis of the 1990 census figures. He argues that Ingham County should have had eleven positions on the grand jury rather than six. Defendant argues that the underrepresentation of ***288** Ingham County residents had the effect of systematically underrepresenting blacks. However, the fair cross section requirement does not guarantee that any particular jury chosen will literally mirror the community; rather, "jury wheels, pools

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of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups ... and thereby fail to be reasonably representative thereof....” *Smith, supra* at 214, 615 N.W.2d 1 (opinion of Cavanagh, J.). Because defendant’s challenge is relevant to the make up of his particular grand jury, he cannot succeed on his claim.

C

Next we address whether the Court of Appeals erred when it ordered an in-camera inspection of the record bearing on the claim of racial discrimination in the selection and composition of the grand jury and lifted part of the suppression order initially entered regarding the grand jury records so as to permit additional testimony by county officials or employees. The Court of Appeals reasoned: “in order to establish evidence, if any, of his claim of racial discrimination under the Sixth or Fourteenth Amendments, there must be some access to the record or other evidence regarding the selection and composition of the grand jury.” 235 Mich.App. at 472, 597 N.W.2d 876. The Court of Appeals concluded that there was no compelling reason to suppress information relating to “the racial composition of the multicounty grand jury venire and the grand jury, and the selection procedures used that produced the grand jury that indicted him.” *Id.* at 473, 597 N.W.2d 876. The Court of Appeals vacated its previous suppression order “to the extent that defendant’s claim ... can ***289** be explored and testified about by county officials or employees (such as those who would not previously testify).” *Id.* at 474, 597 N.W.2d 876.

Upon our review of defendants’ constitutional claims, we are resolved that the Court of Appeals abused its discretion by ordering the in-camera review and lifting the order of suppression. As in *People v. Wimberly,* 384 Mich. 62, 179 N.W.2d 623 (1970), we are faced with a conflict between the traditional reasons for secrecy of grand jury proceedings and the desirability of discovery. Because defendant cannot, upon further discovery, establish a ****273** prima facie case under either the Fourteenth or Sixth Amendment, we hold that the reasons for secrecy of grand jury proceedings outweigh the desirability of further discovery.

IV

The judgment of the Court of Appeals is reversed, and this case is remanded to the circuit court for proceedings consistent with this opinion.

CORRIGAN, C.J., and YOUNG, and MARKMAN, JJ., concurred with WEAVER, J.

TAYLOR, J. (concurring in part and dissenting in part).

I agree with the majority’s conclusion that the Court of Appeals erred in ordering further proceedings regarding the grand jury records. I also agree with the majority that this Court exceeded its criminal procedure rulemaking authority in *People v. Duncan,* 388 Mich. 489, 201 N.W.2d 629 (1972), by creating a substantive right to a preliminary examination for grand jury indictees and that *Duncan’s* implementing ***290** court rules should be rejected. The fact that *Duncan* and MCR 6.112(B) are inconsistent with M.C.L. § 767.29 supports overruling *Duncan* and rejecting the implementing court rules.

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However, unlike the majority, I would overrule *Duncan* and its implementing court rules prospectively. In my judgment, the prosecution was entitled to rely upon MCR 6.112(B), and file the information. Defendant's subsequent waiver of a preliminary examination on the information purged any taint in the grand jury proceedings. Because the alleged taint was purged,[1] I find it unnecessary to reach the constitutional issues decided in part III of the majority opinion. Because I would reject MCR 6.112(B) and overrule *Duncan* prospectively, I cannot agree with the majority that this case stands in circuit court on the grand jury indictment rather than the information. Having waived a preliminary examination defendant effectively conceded circuit court jurisdiction to hold him for trial by information.

MICHAEL F. CAVANAGH, J. (dissenting).

This case is yet another example of what has become a favored process of overruling established precedent. By overruling the part of *People v. Duncan,* 388 Mich. 489, 201 N.W.2d 629 (1972), that affords indictees the right to a preliminary examination, the majority has stripped criminal defendants of a necessary procedure in Michigan's ***291** criminal process. In addition to its disregard for Michigan precedent, the majority predicts that the defendant "will be unable" to prove his equal protection claim if given access to the grand jury records, when the majority has not read the content of those records. Because I would not overrule *Duncan* and would affirm the Court of Appeals decision to unseal the grand jury records so that defendant might obtain evidence to support his constitutional claims, I respectfully dissent.

I

The majority states that in *Duncan,* this Court exceeded its rulemaking authority ****274** under Const. 1963, art. 6, § 5. The majority reasons that the right to a preliminary examination is substantive and policy based. Therefore, the majority believes that this case involves more than a matter of procedure, and should be decided on the basis of the will of the Legislature. Thus, the majority claims that *Duncan* can be lightly cast aside as an usurpation of legislative power. However, the text of Const. 1963, art. 6, § 5 clearly states the principle recognized by *Duncan,* that this Court has the exclusive power to establish rules of procedure.

Quoting the section from *Duncan* that discussed the possible equal protection violations in Michigan's criminal procedure without affording an indictee the right to a preliminary examination, the majority summarizes the "policy" concerns this Court expressed when it established the right. Op. at 269. I disagree that due process considerations are "policy" concerns that we may not address when invoking our constitutional authority to establish procedure and that must ***292** be left to the Legislature. Due process considerations play a role in both procedural and substantive aspects of the law, thus making it difficult to avoid balancing substantive concerns when we implement procedures. The majority, however, expands its abdication of judicial authority in *McDougall v. Schanz,* 461 Mich. 15, 597 N.W.2d 148 (1999), by defining the due process policy considerations we discussed in *Duncan* as substantive law and strictly within the province of the Legislature. This expansion of *McDougall* effectively eradicates our ability to weigh due process concerns when using our constitutional authority to establish procedure and shrinks the constitutional boundary that separates our rulemaking powers from those of the Legislature. Thus, I raise the concerns I articulated in my dissent from *McDougall:* what procedures, then, may this Court establish under Const. 1963, art. 6, § 5? Under the majority's

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view in this case, "the Legislature would appear free to control any aspect of the judicial function it wishes, save perhaps the scheduling of dockets." *McDougall* at 59, n. 26, 597 N.W.2d 148. Moreover, the majority's view raises the issue whether we must revisit all previous established court rules to determine whether there were "improper" policy considerations made behind them.[1]

The valid concerns that we addressed in *Duncan* describe the substantive consequences that follow from the absence of a preliminary examination after a grand jury indictment. Thus, it seems the establishment of the right to a preliminary examination after a ***293** grand jury indictment effectuates substantive justice by dismissing equal protection concerns and assuring due process for criminal defendants. The majority fails to separate the preliminary examination's basic procedural nature in Michigan's criminal process from the procedure's substantive effects and concludes that the establishment of a preliminary examination is more than a matter of procedure. Op. at 269. Contrary to the majority's conclusion, however, just because this Court used its constitutional power to establish a procedure in Michigan's criminal process that has the effect of assuring substantive justice does not magically change the nature of the procedure to that of a substantive right.

****275** In *People v. Bellanca,* 386 Mich. 708, 194 N.W.2d 863 (1972), this Court addressed whether a criminal defendant faced with perjury charges before a one-man grand jury was entitled to the transcripts of witness testimony before that one-man grand jury. Although the Legislature had allowed access to such transcripts in a traditional grand jury situation, no such right was established in a one-man grand jury situation. This Court held that regardless of the Legislature's failure to add the right to grand jury transcripts in the statute governing one-man grand juries, both types of grand juries are of equal importance, and the reasoning behind allowing the right in the traditional grand jury setting applied in the one-man grand jury setting. This Court then proceeded to discuss what the majority in this case would likely label as mere "policy" concerns behind establishment of this right: because a criminal defendant is entitled to ***294** effective assistance of counsel at this stage, to be truly effective, "counsel must be properly prepared for cross-examination of the prosecution's witnesses and thus he must have access to the testimony of such witnesses before the grand jury touching on matters in issue at the examination." *Bellanca* at 714, 194 N.W.2d 863. Accordingly, this Court held that "a defendant charged with perjury before a 'one-man grand jury' must have access to the transcripts of the testimony of all witnesses for or against him given before the 'one-man grand juror' in order to be accorded due process." *Id.* at 712, 194 N.W.2d 863. To implement this holding, this Court treated the establishment of the right to grand jury records as a procedure and created MCR 6.107.[2]

Thus, in *Bellanca,* substantive concerns of due process pushed this Court to use its constitutional authority to establish a procedure in Michigan's criminal process, the right to transcripts from the grand juror proceeding, which had the substantive effect of assuring due process. I do not doubt that, given the proper factual scenario, the majority would jump at an opportunity to strip yet another right afforded criminal defendants and overrule *Bellanca,* claiming we exceeded our rulemaking authority by creating a substantive right that is policy based. However, until that day, *Bellanca* remains primary authority for the proposition that this Court may validly establish procedures, ***295** while considering the substantive effects of such procedures, under Const. 1963, art. 6, § 5. I, therefore, would hold that this Court was completely within its constitutional rulemaking authority in *Duncan* when it established that indictees are entitled to a preliminary examination.

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II

I also dissent from the majority's holding that it was an abuse of discretion for the Court of Appeals to order an in-camera inspection of the grand jury record. The purpose of the in-camera inspection was to allow defendant access to any possible evidence proving race discrimination. The majority denies defendant access to the grand jury record because it claims not only did defendant fail to prove a prima facie case of discrimination, but defendant *will be unable* to prove discrimination even with access to the record. In making this conclusion, the majority correctly states the requirements for proving a Fourteenth ****276** Amendment violation, which I agree defendant has not met. However, the majority takes its conclusion one step further and projects that defendant will be unable to prove a prima facie case because "upon further review of the grand jury proceedings ... he will be unable to establish a discriminatory purpose." Op. at 271. To support its prediction of defendant's future inability to prove discriminatory purpose, the majority states that defendant's claim is currently premised on the disparate impact of the 6–6–5 grand jury composition, which is insufficient alone to prove discriminatory purpose. Op. at 271.

The majority's reliance on this reason to support its prediction is misplaced because it is based solely on what was lacking in defendant's first attempt to prove ***296** the prima facie case. The evidence defendant has presented thus far and why it fails to prove a prima facie case of discrimination is irrelevant to what the grand jury records may provide in the future to prove the same claim.

Without the benefit of reading any additional information the grand jury record might provide, the majority hangs its hat on evidence that again has already been presented. Unlike the majority, I refuse to speculate on what evidence the grand jury records may contain. Perhaps the majority is correct and the record would reveal absolutely nothing to aid defendant in his constitutional claims. However, the majority could also be wrong, as the record would show how the grand jury venire was selected and thus could aid defendant in proving discriminatory intent behind the manner in which the grand jury was selected or composed. Whatever the result *may be* if defendant could investigate the record, however, cannot be predicted when we have not reviewed the record ourselves.

Contrary to the majority's position, I recognize that our mission to rule justly, although time-consuming on certain occasions, should not be easily cast aside simply because the journey to such a result may come up fruitless. We should not shut down the avenues available to a defendant seeking a just result, especially on the basis of an unfounded prediction that defendant will not prevail. I, therefore, would affirm the Court of Appeals conclusion that, although defendant did not prove a prima facie case, he is entitled to a remand to unseal the grand jury record to obtain any evidence it may contain to support his constitutional claims.

MARILYN J. KELLY, J., concurred with MICHAEL F. CAVANAGH, J.

All Citations

464 Mich. 266, 627 N.W.2d 261

Footnotes

[1] MCL 333.7401(2)(a)(i), 750.157a.

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[2] Court of Appeals order setting bond and remanding case to the 56–2 District Court for further proceedings.

[3] Two copies of what appear to be one waiver arraignment appear in the record with these dates stamped by the Eaton County Clerk.

[4] Unpublished order, entered July 21, 1997 (Docket No. 203592).

[5] The Court said that the defendant should request the grand jury record from the chief judge of the Court of Appeals, who was to conduct an in-camera inspection and, "certify the parts of the record bearing on the issue of defendant's claim of racial discrimination in the selection and composition of the grand jury...." 235 Mich.App. at 473, 597 N.W.2d 876. The Court directed a further evidentiary hearing in the circuit court on defendant's claims. The Court also lifted part of the suppression order initially entered regarding the grand jury records so as to permit additional testimony by county officials or employees (some of whom had previously refused to testify).

[6] At oral argument before this Court, the prosecution indicated that no complaint and warrant had been filed and yet seemed to argue that the information was validly filed in circuit court, thus mooting any taint in the grand jury proceeding. During a July 17, 1997, hearing on the prosecution's motion to endorse certain witnesses, the prosecutor stated that she was "not moving to amend the indictment." At that same hearing however, defense counsel included in a brief outline of this case's procedural history an "arraignment on the information."

[7] We asked: (1) whether the prosecutor's filing of an information under MCR 6.112 after the defendant waived the preliminary examination removed the taint of the alleged racial discrimination in the selection of the grand jury that indicted defendant, (2) whether MCR 6.112 conflicts with M.C.L. § 767.29, as construed in *People v. Curtis,* 389 Mich. 698, 209 N.W.2d 243 (1973), and (3) whether this Court properly exercised its authority over criminal procedure in *People v. Duncan, supra,* to grant defendants indicted by grand juries the right to a preliminary examination.

[8] *Genesee* noted that M.C.L. § 767.29, which discusses obligations of a prosecuting attorney upon any indictment, also applies to prosecutions by information pursuant to M.C.L. § 750.10, which provides "the word 'indictment' includes information." Further, *Genesee* noted that M.C.L. § 767.2 provides that all provisions of law applicable to prosecutions by indictment shall in general apply to prosecutions by information.

[9] This procedure, established by court rule and case law, is unique to Michigan. While our research reveals that twenty-eight states generally allow prosecutions by information or indictment and four other states require indictment by grand jury only in cases involving the most serious felonies, only Michigan and Oklahoma, Okla. Stat., tit. 22, § 524; see also *Stone v. Hope,* 488 P.2d 616 (Okla.Crim.App., 1971), grant a defendant a right to a preliminary examination following indictment. LaFave, Israel & King, Criminal Procedure (2d ed.), § 15.1(e), (g), pp. 239–240, 250–252. Although Oklahoma allows for a second determination of probable cause, the

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indictment remains the charging document. In Oklahoma, the grand jury returns the indictment to the trial court. A copy of the indictment is filed with the magistrate for preliminary examination purposes. Any resulting bindover is on the indictment. The prosecutor may not replace the indictment with an information. *Cunningham v. Tulsa Co. Dist. Court,* 399 P.2d 57 (Okla.Crim.App., 1965). Michigan thus stands alone in treating the indictment as a mere pleading that initiates criminal proceedings.

10 MCL 767.29 states that the prosecutor shall not discontinue or abandon the indictment "without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes." We asked the parties to brief "whether MCR 6.112 conflicts with M.C.L. § 767.29, as construed in *People v. Curtis,* 389 Mich. 698 [209 N.W.2d 243] (1973)." Because the indictment was not abandoned in this case, it is not necessary or appropriate to explore the interplay of *Curtis* and MCR 6.112.

11 Contrary to the dissent's assertion, *McDougall* in no way limits this Court's constitutional authority to prescribe procedural rules that vindicate constitutional rights; rather, *McDougall* only precludes the promulgation of procedural rules contrary to legislative enactments that involve nonconstitutional substantive policies.

12 Therefore, the dissent's suggestion that *Duncan* relied on due process principles is incorrect.

13 Obviously, this Court's authority regarding the rules of practice and procedure derives from Const. 1963, art. 6, § 5, and is not subservient to the Code of Criminal Procedure. *McDougall, supra,* pp. 26–27, 597 N.W.2d 148.

14 Further, we asked the parties to brief:

> [W]hether the prosecutor's filing of an information under MCR 6.112 after defendant waived the preliminary examination removed the taint of the alleged racial discrimination in the selection of the grand jury that indicted defendant.... [461 Mich. 1005, 610 N.W.2d 872.]

Because we hold the information is null and void, this harmless error issue is no longer relevant.

15 We agree with the Court of Appeals that a defendant can challenge the grand jury selection process on Fourteenth Amendment equal protection grounds, notwithstanding M.C.L. § 767.13, 767.14, which the prosecutor argued precluded such challenges.

16 In *People v. Smith,* we held that no method for measuring whether representation was fair and reasonable should be used exclusively, but rather we adopted a case by case approach. We stated, "[p]rovided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation [on the venire] was fair and reasonable." *Id.* at 204, 615 N.W.2d 1.

17 The right to a fair cross section in federal grand jury venires is derivative of the Fifth Amendment and 28 USC 1861. *Id.* at 528–529, 615 N.W.2d 1.

1 I believe this holding is consistent with *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88

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L.Ed.2d 598 (1986), because the United States Supreme Court affirmed a lower court ruling that allowed defendant Hillery to stand trial, notwithstanding a discriminatorily empaneled grand jury, upon the filing of a "new charging document." See *Hillery v. Pulley,* 563 F.Supp. 1228, 1252 (E.D.Cal., 1983). Thus, even if defendant Glass' grand jury was empaneled in a discriminatory fashion, Glass is in the same position as Hillery was, i.e., facing a charge under a new charging document.

[1] As I stated in my dissenting opinion in *McDougall* at 59, 597 N.W.2d 148:

> So we must wonder exactly how many of our court rules deal with items that might evoke considerations other than judicial dispatch, and thus be subject to alteration on the basis of those considerations, evidencing decisions of "substantive" law by the Legislature.

[2] MCR 6.107(A) states:

> Whenever an indictment is returned by a grand jury or a grand juror, the person accused in the indictment is entitled to the part of the record, including a transcript of the part of the testimony of all witnesses appearing before the grand jury or grand juror, that touches on the guilt or innocence of the accused of the charge contained in the indictment.

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214 Mich.App. 158
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Timothy MORROW, Defendant-Appellee.

Docket No. 179865.
|
Submitted Aug. 1, 1995, at Grand Rapids.
|
Decided Oct. 27, 1995, at 9:00 a.m.
|
Released for Publication Jan. 23, 1996.

Synopsis

The Circuit Court, Kent County, H. David Soet, J., dismissed rape charges against defendant after sole complaining witness recanted her preliminary examination testimony, and prosecution appealed dismissal. The Court of Appeals held that trial court exceeded its authority in dismissing charges against defendant, since decision whether to dismiss charges or proceed with prosecution after witness recanted her preliminary examination testimony was part of prosecutor's discretionary powers.

Reversed and remanded.

Attorneys and Law Firms

****325 *158** Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, William A. Forsyth, Prosecuting Attorney, Timothy K. McMorrow, Chief Appellate Attorney, and T. Lynn Hopkins, Assistant Prosecuting Attorney, for the People.

***159** Krause & Zambon, P.C., Grand Rapids (by Tonya L. Krause), for the defendant.
Before BANDSTRA, P.J., and MARKEY and HAMMOND,* JJ.

Opinion

PER CURIAM.

Defendant was bound over on four counts of first-degree criminal sexual conduct, M.C.L. § 750.520b(1)(f); M.S.A. § 28.788(2)(1)(f), and one count of second-degree criminal sexual conduct, M.C.L. § 750.520c(1)(f); M.S.A. § 28.788(3)(1)(f), on the basis of his girlfriend's testimony at the preliminary examination that defendant had repeatedly raped her. At the pretrial conference, however, defense counsel informed the court that the girlfriend had contacted counsel and stated her desire to recant her earlier testimony. The trial court permitted the girlfriend to testify under oath; she stated that she consented to have sex with defendant and that she lied during the preliminary examination about

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defendant forcefully raping her. Immediately thereafter, the trial court sua sponte dismissed the case with prejudice, and the prosecutor appeals. We reverse.

This case presents an issue of first impression for this Court: whether a trial court has the authority to dismiss the prosecution's case sua sponte where the sole complaining witness recants her preliminary examination testimony. We believe that under the unusual circumstances of this case, the trial court exceeded its authority and impinged on the prosecutor's executive-branch powers when it dismissed the information against defendant.

On two different occasions, the Michigan Supreme Court has recognized the varied and independent functions performed by the trial court and ***160** the prosecutor. *Genesee Prosecutor v. Genesee Circuit Judge,* 386 Mich. 672, 682-685, 194 N.W.2d 693 (1972) (*Genesee I);* *Genesee Prosecutor v. Genesee Circuit Judge,* 391 Mich. 115, 119-122, 215 N.W.2d 145 (1974) (*Genesee II*). In *Genesee I,* our Supreme Court held that the trial court acted without authority in amending the defendant's information and accepting a plea to a newly charged lesser offense over the prosecutor's objections. In addressing the prosecution's constitutional separation of powers arguments, our Supreme Court made the following observations that are directly applicable to the case at bar:

> The prosecutor is a constitutional officer whose duties are as provided by law. Const. 1963, art. 7, § 4. The conduct of a prosecution on behalf of the people by the prosecutor is an executive act.
>
> ****326** We have held in the past that the prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted.
>
> "Acting as prosecutor, judge and jury" is a common description of an unfair and unlawful operation. However innocently and mistakenly, this is what happened in this case. The trial judge assumed the right over the objection of the prosecutor to determine under which of two applicable statutes a prosecution will be instituted. As already indicated such determination is an executive function and a part of the duties of the prosecutor. *For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. Const 1963, art 3, § 2. It also violates our fundamental sense of fair play. [Id.* at 683-684, 194 N.W.2d 693. Emphasis added. Citations omitted.]

In *Genesee II, supra* at 121, 215 N.W.2d 145, the Michigan Supreme Court addressed issues that it had expressly refused ***161** to comment on in *Genesee I*[1] and reiterated that the trial court's authority is limited to reversing the prosecutor's decision only if it constitutes an abuse of power:

> A circuit judge does not enjoy supervisory power over a prosecuting attorney. He may reverse a magistrate's decision only for abuse of discretion. *He may not properly substitute his judgment for that of the magistrate or prosecuting attorney as if he were reviewing the magistrate's decision de novo or acting in a supervisory capacity with respect to the prosecuting attorney.* He may reverse or revise their decisions only if it appears on the record that they have *abused the power confided to them.* [Emphasis added.] [2]

Thus, the trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. *People v. Williams,* 186

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Mich.App. 606, 608-613, 465 N.W.2d 376 (1990). Put differently, a trial court does not have authority to review the prosecuting attorney's decisions outside this narrow scope of judicial function. *Id.* at 612, 465 N.W.2d 376.

Both our Supreme Court and this Court have adopted and repeatedly applied the principles enunciated in *Genesee I* and *Genesee II.* See, e.g., *People v. Siebert,* 450 Mich. 500, 510, 537 N.W.2d 891 (1995); *Williams, supra;* ***162** *People v. Nelson,* 66 Mich.App. 60, 64-66, 238 N.W.2d 201 (1975); *People v. Stewart,* 52 Mich.App. 477, 484, 217 N.W.2d 894 (1974). In *Siebert, supra* at 510, 537 N.W.2d 891, our Supreme Court held that if a trial court were permitted to accept a plea agreement but impose a lower sentence than that called for in the agreement, the court "would effectively assume the prosecutor's constitutional authority to determine the charge or charges a defendant will face." Thus, the Michigan Supreme Court prohibited the trial court from trespassing on the prosecutor's charging authority and required that the people be given an opportunity to withdraw from the sentence agreement if the court intended to impose a lower sentence. *Id.* at 504, 537 N.W.2d 891.

In both *Nelson* and *Stewart,* this Court found that in light of the *Genesee* cases and in the absence of statutory authority, the trial court exceeded its authority by dismissing sua sponte the charges against each defendant without the prosecutor's consent. As discussed in *Nelson, supra* at 63-66, 238 N.W.2d 201, a prosecutor may enter a nolle prosequi only by leave of the court after stating on the record the reasons for abandoning ****327** or discontinuing the prosecution. M.C.L. § 767.29; M.S.A. § 28.969; see also M.C.L. § 767.41; M.S.A. § 28.981. While the judge may veto the prosecutor's decision not to prosecute further, the court has no power to dismiss on its own motion over prosecutorial objection. *Stewart, supra* at 483, 217 N.W.2d 894. Accordingly, a trial court may grant a nolle prosequi on its own initiative and without the consent of the prosecutor only where it finds that the prosecutor or the examining magistrate abused its discretion, which is clearly not the case here. *Nelson, supra* at 65-66, 238 N.W.2d 201.

Notably, the *Stewart* decision cites a 1912 Kentucky Court of Appeals case for the proposition that "[o]nly where the evidence is insufficient has ***163** the court the power to dismiss over prosecutorial objection." *Stewart, supra* at 483, 217 N.W.2d 894, citing *Commonwealth v. Cundiff,* 149 Ky. 37, 147 S.W. 767 (1912): see also *Stewart, supra* at 483, n. 7, 217 N.W.2d 894.[3] Quite to the contrary, the *Cundiff* court reversed the trial court's decision to dismiss sua sponte a criminal sexual conduct indictment where the complaining witness (the defendant's minor cousin) stated, by affidavit, her inability to withstand trial and her parents also stated their desire that the case be dismissed. *Cundiff, supra* at 37, 147 S.W. 767. In its opinion, the *Cundiff* court eloquently explained the rationale behind prohibiting the court from acting on its own accord to dismiss a criminal prosecution where the complaining witness wishes not to take the stand against the defendant:

> The judge does not represent the state any more than he does the defendant in the prosecution. His right to control the prosecution goes only to the extent of determining whether or not the indictment is good on demurrer. If he holds it to be a good indictment, he is without power to direct its dismissal. Nor does the fact that the injured party ... want[s] the prosecution dismissed change the situation. The prosecution is not for their benefit, but for the public good. *While the party, who has suffered the immediate wrong at the hands of the accused, may be of material aid to the Commonwealth in*

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imposing upon the accused the punishment, which his offense merits, she is without power to direct or control the prosecution, much less to have the court discontinue it.

* * * * * *

***164** To uphold such a ruling, would be to put it in the power of a court to defeat the ends of justice at any time, where it was shown that the injured party did not desire the case prosecuted. *If such rule obtained, where one had committed a crime, it would only be necessary for him to procure the consent of the injured party or of the relatives of the injured party, that the prosecution should be dismissed.* Thus, a premium would be placed upon crime; for, not only would the original crime go unpunished, but the action of the court would be frequently brought about by the practice of corrupt or improper methods in procuring from the prosecuting witness, or her relative, the desired request that the prosecution be terminated or discontinued. *The mere statement of the condition, which such a course of practice might produce is sufficient to condemn it. [Id.* at 39-40, 147 S.W. 767. Emphasis added.]

We believe that the same concerns are present in the case at bar.

The victim's decision to recant before trial should not alone preclude the prosecution from reaching a jury.[4] *Cundiff, supra.* For ****328** example, if the victim had waited until trial to recant her preliminary examination testimony, the prosecutor could impeach the victim with her preliminary examination testimony or statements made to hospital staff who treated her to rebut her recanted testimony. MRE 801(d)(1)(A), 803(4). Alternatively, the prosecutor could use the victim's preliminary examination testimony in lieu of her testimony at trial. MRE 801(d)(1)(A).

***165** Defendant argues, however, that once the alleged victim recanted her first story, the prosecutor would have to rely on testimony that was known to be false if it decided to proceed against defendant; this would, therefore, constitute an abuse of power. To the contrary, the prosecutor could reasonably conclude that the victim's original account was the truth and argue to the jury that it was corroborated by evidence other than the victim's statement. It is the province of the jury to determine which of the victim's accounts is the truth, and there is no abuse of power in the prosecutor relying upon and arguing for the victim's earlier sworn testimony in support of the criminal charges against defendant. We find no reason to conclude that the prosecutor's decision to proceed with the case even after the sole complaining witness recanted her testimony was unconstitutional, illegal, or ultra vires.[5] That decision, that exercise of discretion, is, therefore, exempt from judicial review. *Williams, supra* at 611-612, 465 N.W.2d 376.

Thus, under the facts of this case, we find that the trial court exceeded its authority when it dismissed the information against defendant at the pretrial stage of the proceedings because the decision whether to dismiss a case or proceed to trial is within the prosecutor's sole discretion.[6] *Genesee* ***166** *II, supra* at 121, 215 N.W.2d 145; *Genesee I, supra* at 684, 194 N.W.2d 693; *Stewart, supra* at 482-483, 217 N.W.2d 894. On the basis of the foregoing analysis and the unique facts of this case, we reverse the trial court's decision to dismiss the charges against defendant and remand this case for further proceedings consistent with this opinion.

Reversed and remanded with instructions to reinstate the information charging defendant with criminal sexual conduct.

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All Citations

214 Mich.App. 158, 542 N.W.2d 324

Footnotes

[*] John T. Hammond, 2nd Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

[1] In *Genesee II,* the defendant was bound over on a murder charge but the trial court accepted the defendant's plea of guilty of manslaughter, a lesser included offense, over the prosecutor's objections. *Id.* at 118-119, 215 N.W.2d 145.

[2] Accordingly, the Supreme Court affirmed the prosecutor's power to refuse to authorize a plea of manslaughter where the preliminary examination testimony established that the defendant shot the victim twice, once after the victim had fallen to the ground, and the prosecutor was willing to accept a plea of second-degree murder, although first-degree murder would be a possible verdict at trial. *Id.* at 122, n. 13, 215 N.W.2d 145.

[3] This Court in *Stewart, supra* at 483, 217 N.W.2d 894, agreed that both *Genesee* cases framed this issue in terms of separation of powers principles and referred to *Goldberg v. Hoffman,* 225 F.2d 463 (CA 7, 1955), where the Seventh Circuit Court of Appeals cited *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), to support the proposition that "dismissing a prosecution otherwise evidentially sufficient violates separation of powers."

[4] We do not and need not address the credibility issue created when the alleged victim recants her testimony because under no circumstances was it appropriate for the trial court to dismiss the case at this pretrial stage of the proceeding over the prosecutor's objection. Such credibility issues raised by recanting witnesses are properly addressed in motions for a new trial. *People v. Canter,* 197 Mich.App. 550, 559-560, 496 N.W.2d 336 (1992); *People v. Bersine,* 48 Mich.App. 295, 298-299, 210 N.W.2d 501 (1973); *People v. Blair,* 44 Mich.App. 469, 470-472, 205 N.W.2d 183 (1973).

[5] While the recanting witness stated that the prosecution threatened her with criminal prosecution if she recanted her testimony and told her that the penalty for perjury was life imprisonment, this does not constitute prosecutorial misconduct, as defendant suggests. If, in fact, the recanting witness lied while under oath at the preliminary examination, she is subject to prosecution for criminal perjury and was fully and properly informed of this before placing her recanting testimony on the record. M.C.L. § 750.422 *et seq.;* M.S.A. § 28.664 *et seq.*

[6] We have found no formal prosecutorial objection on the record regarding the trial court's decision to dismiss the case on the basis of the victim's recanting of her testimony, although the record does not reflect discussions in chambers during the pretrial conference before the victim took the stand. We believe, nevertheless, that any objection was effectively rendered moot by the trial court's comments at the outset that it intended to dismiss with prejudice if the victim recanted and that the prosecution's case had "died" at that hearing. Indeed, it apparently would have been an exercise in futility to object to the hearing or the dismissal, as the tenor of the discussions on the record leads us to believe that the topic of dismissal was debated before the record was opened and that any dismissal was contrary to the prosecution's wishes, i.e., the objection was tacit. Stated otherwise, the absence of an express, formal prosecutorial objection on the record is not fatal to this appeal under the unusual circumstances of this case.

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496 Mich. 133
Supreme Court of Michigan.

PEOPLE
v.
SMITH.

Docket No. 147187.
|
Calendar No. 2.
|
Argued April 2, 2014.
|
Decided June 18, 2014.

Synopsis
Background: Although defendant pled guilty to carrying concealed weapon, the Wayne Circuit Court, Wayne County, Vera Massey–Jones, J., refused to sentence the defendant and dismissed the case because defendant's sentencing was "past a year," meaning that the court had lost jurisdiction. The prosecutor filed a delayed application for leave to appeal. The Court of Appeals denied the delayed application for leave to appeal for lack of merit, and Supreme Court granted leave to appeal.

Holdings: The Supreme Court, Young, C.J., held that:

trial court usurped the prosecutor's role in violation of separation of powers principles when it dismissed case, over the objection of the prosecutor, because defendant was not sentenced within one year, as required by statute;

after the one-year statutory limitation elapses, sentencing may no longer be delayed for the purpose of permitting a defendant the opportunity to prove that he is worthy of leniency, and the judge is required to sentence defendant as provided by law; and

statute, permitting a trial court to delay sentencing for up to one year for those defendants who are eligible for placement on probation, does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence; overruling *People v. McLott*, 70 Mich.App. 524, 245 N.W.2d 814; *People v. Turner*, 92 Mich.App. 485, 285 N.W.2d 340; *People v. Dubis*, 158 Mich.App. 504, 405 N.W.2d 181; *People v. Boynton*, 185 Mich.App. 669, 463 N.W.2d 174.

Reversed and remanded.

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Attorneys and Law Firms

****129** Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Kym L. Worthy, Prosecuting Attorney, Timothy A. Baughman, Chief of Research, Training and Appeals, and Ana I. Quiroz, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust, Redford, for defendant.

Opinion

YOUNG, C.J.

***134** The issue to be determined in this case is whether MCL 771.1(2) divests a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence. We hold that it does not.

***135** The unambiguous language of the statute provides that the court may delay sentencing "for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation...."[1] The one-year limitation designates the maximum amount of time that sentencing may be delayed in order to provide defendant the chance to establish his worthiness of leniency. After one year, sentencing may no longer be delayed for that purpose, and the judge is required to sentence defendant as provided by law.

Court of Appeals caselaw holding that a court may not sentence a defendant if the one-year period of delay is exceeded is overruled. We reverse the trial court's dismissal of the case, reinstate defendant's conviction, and remand to Wayne County Circuit Court for sentencing. Upon remand, the matter is to be assigned to a different judge.

I. FACTS AND PROCEDURAL HISTORY

On February 10, 2011, defendant was a passenger in an automobile that was stopped by the police for a traffic violation. As defendant exited the vehicle, officers observed defendant drop a silver automatic handgun into the map pocket of the car door and quickly close the door.[2] After establishing that defendant did not possess a permit to carry a concealed weapon, he was arrested and subsequently charged with the crime of carrying a concealed weapon (CCW) in violation of MCL 750.227. Defendant, age 21 at the time, was a college student with no prior criminal history.

***136** The prosecutor permitted defendant to plead guilty to the reduced charge of attempted CCW[3] and recommended a probationary sentence. Defendant tendered his guilty plea on May 12, 2011. At sentencing, defense counsel urged the court to delay sentencing for one year, at which ****130** time defendant would be "very close to graduating from college" and the prosecutor's office might change its mind and either dismiss the case entirely or permit defendant to plead guilty to a misdemeanor. The prosecutor objected to a delayed sentence and asked that defendant be sentenced to probation. The trial court expressed concern that defendant would "end up with a felony," thus limiting his employment

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opportunities. The court asked the parties to file sentencing memoranda and return to court to discuss whether delayed sentencing would be appropriate. Expressing its unhappiness with the prosecutor's position, the court stated that it would consider "the delayed sentence with one day over a year; then [the court] would have lost jurisdiction."[4]

The parties returned to court on June 17, 2011. Defense counsel requested that sentencing be delayed for one year under MCL 771.1 to give defendant the opportunity to show that he deserved "significant leniency" from the court. The prosecutor continued to object to delayed sentencing, stating that the prosecutor's office did not intend to reduce the criminal charge any further. The trial court stated that it found it "disturb[ing]" that the prosecutor opposed letting defendant's sentence "go a day over 365 days," which would allow defendant to "end[ ] up with no record" ***137** because the court would "lose jurisdiction."[5] The trial court announced that it would exercise its discretion and delayed the imposition of defendant's sentence for one year. On the record, the trial court scheduled defendant's sentencing for June 15, 2012, which would have occurred within the one-year statutory period. However, consistent with statements the trial judge had made on the record that she desired to "lose" jurisdiction in the case, the order signed that day, as well as the entry in the Register of Actions, reflect that the court scheduled defendant's sentencing for June 18, 2012—precisely one year *and one day later*.

At sentencing, defense counsel reminded the judge that delayed sentencing was sought so that defendant could prove "he was worthy of a dismissal." Counsel noted that defendant had complied with all court conditions, paid all fines and costs, and would graduate from college. Abruptly interrupting defense counsel's colloquy, the trial court stated that defendant's sentencing was "past a year," meaning that the court had "lost jurisdiction." Over the prosecutor's objection, the trial court not only refused to sentence the defendant, it dismissed the case entirely.

The prosecutor filed a delayed application for leave to appeal with the Court of Appeals, arguing that the trial court had no legal authority to dismiss the case over the prosecution's objections, because MCL 771.1 did not permit dismissal of the case. The Court of Appeals ***138** issued an order denying the delayed application for leave to appeal for lack of merit.[6] This Court ****131** granted leave to appeal.[7]

II. STANDARD OF REVIEW

The consequences, if any, for a trial court's failure to sentence a defendant within one year pursuant to MCL 771.1 is a question of statutory interpretation that this Court reviews de novo.[8]

The Court's primary responsibility in statutory interpretation is to determine and give effect to the Legislature's intent.[9] The words of a statute are the most reliable indicator of the Legislature's intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute.[10] Once the Legislature's intent has been discerned, no further judicial construction is required or permitted, as the Legislature is presumed to have intended the meaning it plainly expressed.[11]

III. ANALYSIS

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The statutory provision at issue in this case, MCL 771.1(2), is contained in Chapter XI of the Code of ***139** Criminal Procedure, which concerns probation. The statute provides in relevant part:

> (2) In an action in which the court may place the defendant on probation, the court *may delay sentencing the defendant for not more than 1 year* to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court.... When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. *The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay.*[12]

The plain language of the statute permits a trial court to delay sentencing for up to one year for those defendants who are eligible for placement on probation.[13] The purpose of delaying a defendant's sentence pursuant to this statutory provision is entirely for the benefit of the convicted defendant—it is to "give the defendant an opportunity to prove to the court" that he is worthy of "probation or other leniency compatible with the ends of justice" and rehabilitation. Read in its entirety, the statute provides a simple and straightforward time limit, indicating the maximum amount of time the court may delay sentencing in order to give the ****132 *140** defendant a chance to prove himself.[14] The statute also indicates that the imposition of a delayed sentence is not irrevocably binding upon the trial court, in that it does not "deprive the court of jurisdiction to sentence the defendant at any time during the period of delay."[15]

In urging this Court to uphold the actions of the trial court, defendant relies on a series of Court of Appeals cases holding that an unexcused violation of the one-year limit contained in MCL 771.1(2) results in the trial court losing jurisdiction to *sentence* a defendant.[16] However, the action taken by the trial court in this case was not simply limited to abstaining from sentencing defendant Smith. There is simply no basis in our law for the trial court to do as it did in this case. Without citing a scintilla of legal authority, the trial court *dismissed* the case over the objection of the prosecutor. Aside from flagrantly ignoring contrary Court of Appeals precedent in entirely dismissing the case,[17] the trial court usurped the prosecutor's role in violation of the separation of ***141** powers principles contained in our constitution.[18] It is axiomatic that the power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests *exclusively* in the prosecutor.[19] The trial court had no legal basis to trump the prosecutor's charging decision, much less dismiss the case *after* the defendant had pleaded to the charge and had never sought to withdraw his plea.

Furthermore, in so far as the Court of Appeals cases relied upon by defendant have construed MCL 771.1(2) to preclude sentencing when there is a failure to impose a sentence within 365 days of the imposition of a delayed sentence, those cases have incorrectly interpreted the statute. Nothing in the language of the statute requires this, and the Legislature is certainly capable of explicitly divesting a court of jurisdiction had such a remedy been intended.[20] Indeed, the only mention ****133** of the word "jurisdiction" in the entire statutory provision simply clarifies that a court *retains* its ability to sentence a defendant at any time during the period of delay. The fact that the Legislature explicitly permits a court to sentence defendant at any time during the ***142** period of delay simply does not create the affirmative pregnant underlying the rationale of the cases cited by defendant—namely, that the court is not permitted to sentence a defendant outside the period of delay. Thus, in the absence of a clear and

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unambiguous indication that the Legislature intended that a defendant avoid all punishment as a remedy for not being sentenced within one year when his sentence is delayed under MCL 771.1(2), we decline to impose such a remedy.[21] After the one-year statutory limitation elapses, sentencing may no longer be delayed for the purpose of permitting a defendant the opportunity to prove that he is worthy of leniency, and the judge is required to sentence defendant as provided by law. We overrule *People v. McLott, People v. Turner, People v. Dubis*, and *People v. Boynton* to the extent they hold that a court loses jurisdiction to sentence a defendant as a remedy for a violation of MCL 771.1(2).

This is not to say, however, that there are no limitations on a trial court's ability to delay the imposition of a defendant's sentence. Longstanding Michigan law requires that a defendant be sentenced within a reasonably prompt time as part of defendant's right to a speedy trial.[22] In determining whether a defendant's right to a speedy trial has been violated, a four-part balancing test is used that considers (1) the length of ***143** delay, (2) the reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant.[23]

Applying those factors to the facts of this case does not indicate that defendant's speedy trial rights were violated. Regarding the first factor, the length of the delay was a mere *one day* past the one-year limitation contained in MCL 771.1(2). Second, the reason for the delay, as can be inferred from the record before us, was a calculated effort by the trial court to circumvent the law[24] and avoid the charging decision of the prosecutor in order to spare defendant the consequences of acquiring a criminal record. Third, defendant makes no claim, and the record does not reveal, any indication that defendant ever asserted his desire to be sentenced before the one-year period of delay had elapsed. Indeed, such an assertion ****134** would have been antithetical to defense counsel's stated goal of having the case dismissed. Lastly, defendant makes no claim that he has been prejudiced by the one-day delay in sentencing. In short, application of the relevant factors militates against the conclusion that defendant's speedy trial rights were violated.

IV. CONCLUSION

Because the plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence, we overrule the Court of Appeals decisions in *People v. McLott, People v. Turner, People v. Dubis*, and *People v. Boynton* to the extent they hold otherwise. We reverse the trial court's dismissal of the ***144** case, reinstate defendant's conviction, and remand to the Wayne County Circuit Court for sentencing.

Because the trial judge in this case demonstrated overt hostility to the prosecution of this case by manipulating the scheduling of sentencing in order to thwart the prosecutor's charging decision and by entirely dismissing the case, thereby exceeding even the scope of incorrectly decided Court of Appeals precedent, we remand for sentencing before a different judge.

MARKMAN, MARK BETH KELLY, ZAHRA, McCORMACK, and VIVIANO, JJ., concur.

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MICHAEL F. CAVANAGH, J., I concur in the result only.

All Citations

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Footnotes

1 MCL 771.1(2).

2 An investigation revealed that the handgun had been previously stolen from a nearby police department.

3 MCL 750.227; MCL 750.92.

4 It was obvious from the beginning that the trial judge did not like the prosecutor's position and was entertaining ways of avoiding sentencing the defendant for the crime to which he had pleaded guilty.

5 The trial court's willingness to circumvent the prosecutor's insistence that the defendant be sentenced to probation for attempted CCW could not be more clear when the trial judge stated that she was unhappy with the prosecutor's position and suggested twice on the record at different hearings that she might schedule the delayed sentence in order to lose jurisdiction under the then prevailing interpretation of MCL 771.1.

6 *People v. Smith,* unpublished order of the Court of Appeals, entered May 7, 2013 (Docket No. 312242). Judge Murray would have peremptorily reversed the trial court's order of dismissal and reinstated defendant's conviction. He conceded that defendant could not be sentenced pursuant to binding Court of Appeals precedent, but would have "allow[ed] the parties to address the appropriate remedy on remand."

7 *People v. Smith,* 495 Mich. 858, 836 N.W.2d 497 (2013).

8 *People v. Koonce,* 466 Mich. 515, 518, 648 N.W.2d 153 (2002).

9 *Id.*

10 *People v. Morey,* 461 Mich. 325, 330, 603 N.W.2d 250 (1999).

11 *People v. Stone,* 463 Mich. 558, 562, 621 N.W.2d 702 (2001).

12 MCL 771.1(2) (emphasis added).

13 MCL 771.1(1) delineates the criminal offenses for which a defendant may be placed on probation rather than serve a term of imprisonment. The trial court has the discretion to impose a term of probation for all misdemeanors or felonies with the exception of murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses. The statute further requires that the court make the determination "that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law...."

14 The language providing that sentencing may be delayed "for *not more than* 1 year" indicates that sentencing could be delayed for a lesser period of time.

15 Thus, regardless whether defendant's behavior during the period of delay is abhorrent or exemplary, a sentencing judge is not required to wait until the period of delay has elapsed in order to sentence defendant in accordance with the law and dispense whatever leniency the Court is inclined to provide.

16 See *People v. McLott,* 70 Mich.App. 524, 245 N.W.2d 814 (1976) (jurisdiction to impose sentence was not lost where the delay was only six days and because the trial court could not be

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present); *People v. Turner,* 92 Mich.App. 485, 285 N.W.2d 340 (1979); *People v. Dubis,* 158 Mich.App. 504, 405 N.W.2d 181 (1987); *People v. Boynton,* 185 Mich.App. 669, 463 N.W.2d 174 (1990).

17 MCR 7.215(C)(2). See, *e.g.*, *Boynton* 185 Mich.App. at 671, 463 N.W.2d 174. There, the Court of Appeals reversed the trial court's dismissal of charges against defendant, emphasizing "that an unexcused violation of the one-year limit contained in the delayed sentencing statute affects *only* the court's authority to sentence the defendant, nothing more."

18 See Const 1963, art 3, § 2. "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." The trial judge's oath of office required her to solemnly swear to support the Michigan and federal Constitutions and to faithfully discharge the duties of a circuit court judge. See MCL 168.420; Const 1963, art 11, § 1.

19 *Genesee Prosecutor v. Genesee Circuit Judge,* 386 Mich. 672, 683, 194 N.W.2d 693 (1972).

20 See MCL 780.133, which provides the remedy for a violation of MCL 780.131: "In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, *no court of this state shall any longer have jurisdiction thereof,* nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (Emphasis added.)

21 See *Lash v. Traverse City,* 479 Mich. 180, 193, 735 N.W.2d 628 (2007); *People v. Anstey,* 476 Mich. 436, 445 n. 7, 719 N.W.2d 579 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create.").

22 See *People v. Kennedy,* 58 Mich. 372, 376–377, 25 N.W. 318 (1885); *People v. McIntosh,* 103 Mich.App. 11, 20–21, 302 N.W.2d 321 (1981); *People v. Bracey,* 124 Mich.App. 401, 335 N.W.2d 49 (1983). See also MCR 6.425(E)(1) ("The court must sentence defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law.").

23 *People v. Chism,* 390 Mich. 104, 111, 211 N.W.2d 193 (1973); *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

24 *In re Justin,* 490 Mich. 394, 809 N.W.2d 126 (2012).

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244 Mich.App. 249
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Anterio R. WILLIAMS, Defendant-Appellee.

Docket No. 224892.
|
Submitted Nov. 9, 2000, at Lansing.
|
Decided Jan. 2, 2001, at 9:05 a.m.

Synopsis
Defendant was charged with assault with intent to do great bodily harm less than murder, and third-offense habitual offender. After victim, who was defendant's girlfriend, failed to appear to testify, the Jackson Circuit Court, Alexander C. Perlos, J., dismissed charges. State appealed as of right. The Court of Appeals, Hoekstra, J., held that: (1) prosecutor had arguably viable basis to proceed, and thus, trial court usurped prosecutor's exclusive authority to decide whom to prosecute, and committed violation of constitutional separation of powers, by dismissing action; (2) rationale given by trial court in dismissing charges, that victim and defendant had personal relationship and assault amounted to private, rather than public crime, which victim had right to have dismissed, was not supported by law; and (3) trial court should have proceeded to make determination whether prosecution had shown due diligence in attempting to procure victim's attendance at trial, so that if due diligence were shown, testimony from preliminary examination or evidentiary hearing could have been utilized.

Reversed and remanded.

Attorneys and Law Firms

****133 *250** Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, John G. McBain, Prosecuting Attorney, and Jerrold Schrotenboer, Chief Appellate Attorney, for the people.

Robert D. Flack, Jackson, for the defendant on appeal.
Before DOCTOROFF, P.J., and HOEKSTRA and MARKEY, JJ.

Opinion

HOEKSTRA, Judge.

The prosecution appeals as of right the trial court's order dismissing the charges ****134** of assault with intent to do great bodily harm less than murder, M.C.L. § 750.84; MSA 28.279, and third-offense habitual offender, M.C.L. § 769.11; MSA 28.1083, because the victim, defendant's girlfriend, failed to appear to testify at trial. We reverse and remand.

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In this case, the victim appeared at the preliminary examination and testified regarding the events that led to this action. The victim stated that after refusing to leave a bar with defendant, she later was beaten severely in the parking lot and sustained a broken nose, a broken jaw, and numerous fractures in various facial bones. The victim testified that she did not see her attacker, but she thought it was defendant because he had wanted her to leave with him and she earlier had observed him waiting outside the bar. In addition, the victim described other incidents of physical abuse by defendant.

The victim also testified at an evidentiary hearing at which the prosecutor, in accordance with MRE 404(b), moved to admit at trial the victim's testimony ***251** regarding two prior incidents where defendant had beaten the victim. The victim discussed the two prior incidents in detail and stated that defendant has an alcohol problem and that they "both need help." During her testimony, the victim stated repeatedly that she did not want defendant prosecuted for the instant offense. Upon conclusion of the hearing, the trial court ruled that the victim could testify at trial regarding one of the prior incidents.

On the day of trial, the victim failed to appear to testify, despite being served a subpoena to appear. The prosecutor requested that the trial court grant a continuance and issue a bench warrant for the victim. In the alternative, the prosecutor offered to proceed with the trial using the victim's former testimony at the preliminary examination and evidentiary hearing. Defendant objected to both these suggestions and requested that the trial court dismiss the charges against defendant. After concluding that the victim did not want defendant prosecuted and that the present offense was a private crime rather than a public crime,[1] the trial court dismissed the charges.

On appeal, the prosecutor claims that the trial court erred in dismissing the charges against defendant. We agree. This case presents yet another instance where a trial court usurped the prosecutor's exclusive authority to decide whom to prosecute. In so doing, the trial court committed a violation of the ***252** constitutional separation of powers. See *Genesee Prosecutor v. Genesee Circuit Judge,* 386 Mich. 672, 683-684, 194 N.W.2d 693 (1972); *People v. Williams,* 186 Mich.App. 606, 609-612, 465 N.W.2d 376 (1990); Const 1963, art. 3, § 2. In a slightly different context, this Court in *People v. Morrow,* 214 Mich.App. 158, 542 N.W.2d 324 (1995), exhaustively surveyed the law in this area. That discussion need not be repeated here. The *Morrow* Court concluded that the decision whether to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. *Id.* at 165, 542 N.W.2d 324. In the present case, the trial court's decision constituted an invasion of the prosecutorial prerogative, and therefore the trial court's decision is necessarily an abuse of the trial court's judicial authority.

****135** Further, we take this opportunity to address the merits of the rationale that the trial court offered in support of its dismissal of the charges. The trial court relied on the notion that because the victim and defendant were involved in a personal relationship, this assault amounted to a private, rather than a public, crime. The trial court further opined that it was the victim's right to have the charges dismissed because she had evidenced a desire not to prosecute. This is a notion that has pervaded those criminal cases that are commonly known as domestic assaults, but is a rationale that is unsupported by the law.

Our Legislature enacted the Michigan Penal Code to, among other things, define crimes and prescribe the penalties for crimes. MCL 750.1 *et seq.;* MSA 28.191 *et seq.;* Preamble, 1931 PA 328, amended by 1991 PA 56, § 1. In other words, as a matter of public policy, the code defines what acts are offenses ***253** against the state. The authority to prosecute for violation of those offenses is vested solely and exclusively with the prosecuting attorney. Const. 1963, art. 7, § 4; MCL 49.153; MSA 5.751. A

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prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute or what charges to file. *People v. Jackson,* 192 Mich.App. 10, 15, 480 N.W.2d 283 (1991); *Williams, supra* at 609, 465 N.W.2d 376. The prosecution is not for the benefit of the injured party, but for the public good. See *Morrow, supra* at 163, 542 N.W.2d 324. Crimes not only injure the victim, but society in general, and the conviction of a crime results not only in a sentence enumerating the punishment in quantitative amounts, but also carries with it society's formal moral condemnation.

Although the prosecutor alone is granted the discretion to determine whether to prosecute an offender, this is not to say that crime victims do not have rights with respect to the prosecution of their offender. We acknowledge that both our constitution and the Crime Victim's Rights Act enumerate rights of crime victims. Const. 1963, art. 1, § 24; MCL 780.751 *et seq.;* MSA 28.1287(751) *et seq.* These provisions "were intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders." *People v. Peters,* 449 Mich. 515, 526, 537 N.W.2d 160 (1995). Moreover, these provisions require, for instance, notice to the victim about the processing of a criminal case and, if requested, notice of any scheduled court proceedings. MCL 780.756; MSA 28.1287(756). The act ensures the victim's participation in the criminal proceedings against the offender, if desired. For example, the act provides that a victim may submit an impact statement for use in the preparation ***254** of the defendant's presentence investigation report and may make an oral impact statement at the defendant's sentencing. MCL 780.764; MSA 28.1287(764), M.C.L. § 780.765; MSA 28.1287(765). However, nowhere in the laws of this state have crime victims been given authority to determine whether the code has been violated or whether the prosecution of a crime should go forward or be dismissed.

In the present case, for the trial court to characterize the offense as a private crime and to suggest that the victim has a legal right of any kind to decide whether defendant is prosecuted is clearly inconsistent with the concept of public prosecutions of criminal offenses. Certainly, in the context of civil proceedings for intentional torts, a private party may initiate and pursue a claim through our court system. However, a civil action is completely separate and independent from a criminal action. Put simply, in criminal ****136** cases, the prosecutor alone possesses the authority to determine whether to prosecute the accused. *Genesee, supra; Morrow, supra* at 165, 542 N.W.2d 324; *Jackson, supra; Williams, supra.*

Here, despite the victim's failure to appear on the trial date, the prosecutor arguably had a viable basis to proceed by showing that the victim was an unavailable witness. MRE 804(a)(5); MCL 768.26; MSA 28.1049. Rather than dismiss the charges, the trial court should have proceeded to make a determination whether the prosecution had shown due diligence in attempting to procure the victim's attendance at trial. MRE 804(a)(5); *People v. Bean,* 457 Mich. 677, 684, 580 N.W.2d 390 (1998). If due diligence were shown, the victim's testimony from the preliminary examination or the evidentiary hearing could have been utilized at ***255** trial if defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). Because the trial court erred in dismissing the charges against defendant, and as a result failed to undertake the appropriate analysis to determine whether the victim's former testimony could be utilized in her stead, we must reverse.

Reversed and remanded to allow the prosecutor to reinstate the charges against defendant. We do not retain jurisdiction.

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All Citations

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Footnotes

[1] The trial court concluded:

> This is not really what I would consider a public crime. This is a private crime.... But I think that [the victim] also has some rights too. This man [defendant] has rights. [The victim] has rights. If [the victim] wants to commit suicide and not prosecute this fellow, then that's her right, too, and I'm going to dismiss this case.

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136 S.Ct. 1899
Supreme Court of the United States

Terrance WILLIAMS, Petitioner
v.
PENNSYLVANIA.

No. 15–5040.
|
Argued Feb. 29, 2016.
|
Decided June 9, 2016.

Synopsis
Background: Following affirmance of his convictions and death sentence for first-degree murder and robbery, 524 Pa. 218, 570 A.2d 75, inmate petitioned for postconviction relief. The Court of Common Pleas, Criminal Division, Philadelphia County, M. Teresa Sarmina, J., vacated death sentence, and the Commonwealth appealed. The Supreme Court of Pennsylvania, Eakin, J., 629 Pa. 533, 105 A.3d 1234, reinstated the death sentence. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

under Due Process Clause there is an impermissible risk of actual bias when judge earlier had significant, personal involvement as a prosecutor in critical decision regarding a defendant's case;

Pennsylvania Supreme Court justice, who as district attorney had given approval to seek death penalty against inmate, violated due process by not recusing himself and participating in decision to reinstate death sentence; and

Pennsylvania Supreme Court justice's due process violation was structural error not subject to harmless-error review, regardless of whether his vote was dispositive.

Vacated and remanded.

Chief Justice Roberts filed dissenting opinion, in which Justice Alito joined.

Justice Thomas filed dissenting opinion.

Procedural Posture(s): On Appeal.

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****1901** *Syllabus*[*]

***1** Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

***2** *Held* :

1. Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. Pp. 1905 – 1909.

(a) The Court's due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which these precedents rest dictate the rule that must control in the circumstances here: Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208. A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. See *In re Murchison,* 349 U.S. 133, 136–137, 75 S.Ct. 623, 99 L.Ed. 942. No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if ****1902** inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion. Pp. 1905 – 1907.

(b) Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against

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Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today's decision will not occasion a significant change in recusal practice. Pp. 1907 – 1909.

2. An unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether ***3** the judge's vote was dispositive, *Puckett v. United States,* 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266. Because an appellate panel's deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to ensure that jurists can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. It does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position—an outcome that does not lessen the unfairness to the affected party. A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. Because Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below, Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation ... not to hold the balance nice, clear and true between the State and the accused," *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749. Pp. 1908 – 1910.

629 Pa. 533, 105 A.3d 1234, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which ALITO, J., joined. THOMAS, J., filed a dissenting opinion.

Attorneys and Law Firms

Stuart B. Lev, Philadelphia, PA, for Petitioner.

Ronald Eisenberg, Philadelphia, PA, for Respondent.

****1903** Leigh M. Skipper, Chief Federal Defender, Stuart B. Lev, Shawn Nolan, Matthew C. Lawry, Timothy P. Kane, Katherine E. Ensler, Federal Community Defender Office, Eastern District of Pennsylvania, Philadelphia, PA, for Petitioner.

Ronald Eisenberg, Deputy District Attorney, Hugh J. Burns, Jr., Chief, Appeals Unit, George D. Mosee, Jr., First Assistant District Attorney, R. Seth Williams, District Attorney, Philadelphia District Attorney's Office, Philadelphia, PA, for Respondent.

Opinion

***4** Justice KENNEDY delivered the opinion of the Court.

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In this case, the Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief. The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge " 'is too high to be constitutionally tolerable.' " *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal.

I

Petitioner is Terrance Williams. In 1984, soon after Williams turned 18, he murdered 56–year–old Amos Norwood in Philadelphia. At trial, the Commonwealth presented evidence that Williams and a friend, Marc Draper, had been standing on a street corner when Norwood drove by. Williams and Draper requested a ride home from Norwood, who agreed. Draper then gave Norwood false directions that led him to drive toward a cemetery. Williams and Draper ordered Norwood out of the car and into the cemetery. There, ***5** the two men tied Norwood in his own clothes and beat him to death. Testifying for the Commonwealth, Draper suggested that robbery was the motive for the crime. Williams took the stand in his own defense, stating that he was not involved in the crime and did not know the victim.

During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the memorandum, the then-district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

During the penalty phase of the trial, the prosecutor argued that Williams deserved a death sentence because he killed Norwood " 'for no other reason but that a kind man offered him a ride home.' " Brief for Petitioner 7. The jurors found two aggravating circumstances: that the murder ****1904** was committed during the course of a robbery and that Williams had a significant history of violent felony convictions. That criminal history included a previous conviction for a murder he had committed at age 17. The jury found no mitigating circumstances and sentenced Williams to death. Over a period of 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review.

In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons.Stat. § 9541 *et seq.* (2007). The petition was based on new information from Draper, who until then had refused to speak with Williams's attorneys. Draper told Williams's counsel that he had informed the Commonwealth before trial that Williams had been in a sexual relationship

with Norwood and that the relationship was the real motive for Norwood's murder. According to Draper, the Commonwealth ***6** had instructed him to give false testimony that Williams killed Norwood to rob him. Draper also admitted he had received an undisclosed benefit in exchange for his testimony: the trial prosecutor had promised to write a letter to the state parole board on his behalf. At trial, the prosecutor had elicited testimony from Draper indicating that his only agreement with the prosecution was to plead guilty in exchange for truthful testimony. No mention was made of the additional promise to write the parole board.

The Philadelphia Court of Common Pleas, identified in the proceedings below as the PCRA court, held an evidentiary hearing on Williams's claims. Williams alleged in his petition that the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams. At the hearing, both Draper and the trial prosecutor testified regarding these allegations. The PCRA court ordered the district attorney's office to produce the previously undisclosed files of the prosecutor and police. These documents included the trial prosecutor's sentencing memorandum, bearing then-District Attorney Castille's authorization to pursue the death penalty. Based on the Commonwealth's files and the evidentiary hearing, the PCRA court found that the trial prosecutor had suppressed material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and engaged in "prosecutorial gamesmanship." App. 168a. The court stayed Williams's execution and ordered a new sentencing hearing.

Seeking to vacate the stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court. By this time, almost three decades had passed since Williams's prosecution. Castille had been elected to a seat on the State Supreme Court and was serving as its chief justice. Williams filed a response to the Commonwealth's application. The disclosure of the trial prosecutor's sentencing memorandum in the PCRA proceedings had alerted Williams to Chief Justice Castille's involvement in the decision to seek a death sentence in his case. ***7** For this reason, Williams also filed a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the recusal motion to the full court for decision. The Commonwealth opposed Williams's recusal motion. Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral. Two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered full briefing on the issues raised in the appeal. The State Supreme Court then vacated the PCRA court's order granting penalty-phase relief and reinstated Williams's ****1905** death sentence. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred in the result without issuing a separate opinion. See 629 Pa. 533, ——, 105 A.3d 1234, 1245 (2014).

Chief Justice Castille authored a concurrence. He lamented that the PCRA court had "lost sight of its role as a neutral judicial officer" and had stayed Williams's execution "for no valid reason." *Id.,* at ——, 105 A.3d, at 1245. "[B]efore condemning officers of the court," the chief justice stated, "the tribunal should be aware of the substantive status of *Brady* law," which he believed the PCRA court had misapplied. *Id.,* at ——, 105 A.3d, at 1246. In addition, Chief Justice Castille denounced what he perceived as the "obstructionist anti-death penalty agenda" of Williams's attorneys from the Federal Community Defender Office. *Ibid.* PCRA courts "throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group," he wrote, lest Defender Office lawyers turn postconviction proceedings "into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow." *Id.,* at ——, 105 A.3d, at 1247.

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Two weeks after the Pennsylvania Supreme Court decided Williams's case, Chief Justice Castille retired from the bench. This Court granted Williams's petition for certiorari. 576 U.S. ——, 136 S.Ct. 28, 192 L.Ed.2d 999 (2015).

***8** II

A

Williams contends that Chief Justice Castille's decision as district attorney to seek a death sentence against him barred the chief justice from later adjudicating Williams's petition to overturn that sentence. Chief Justice Castille, Williams argues, violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.

The Court's due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor. For the reasons explained below, however, the principles on which these precedents rest dictate the rule that must control in the circumstances here. The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' " *Caperton,* 556 U.S., at 881, 129 S.Ct. 2252. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison,* 349 U.S., at 136–137, 75 S.Ct. 623. This objective risk of bias is reflected in the due process maxim that "no man can ***9** be a judge in his own case and no man is permitted to try cases where he has an interest ****1906** in the outcome." *Id.*, at 136, 75 S.Ct. 623.

The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. This conclusion follows from the Court's analysis in *In re Murchison*. That case involved a "one-man judge-grand jury" proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes. *Id.*, at 134. During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding. He charged one witness with perjury and then, a few weeks later, tried and convicted him in open court. The judge charged the other witness with contempt and, a few days later, tried and convicted him as well. This

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Court overturned the convictions on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137.

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow,* 421 U.S., at 57, 95 S.Ct. 1456. In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may ***10** carry far more weight with the judge than the parties' arguments to the court. *Murchison, supra,* at 138, 75 S.Ct. 623; see also *Caperton, supra,* at 881, 129 S.Ct. 2252.

Pennsylvania argues that *Murchison* does not lead to the rule that due process requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision in the case. The facts of *Murchison,* it should be acknowledged, differ in many respects from a case like this one. In *Murchison,* over the course of several weeks, a single official (the so-called judge-grand jury) conducted an investigation into suspected crimes; made the decision to charge witnesses for obstruction of that investigation; heard evidence on the charges he had lodged; issued judgments of conviction; and imposed sentence. See 349 U.S., at 135, 75 S.Ct. 623 (petitioners objected to "trial before the judge who was at the same time the complainant, indicter and prosecutor"). By contrast, a judge who had an earlier involvement in a prosecution might have been just one of several prosecutors working on the case at each stage of the proceedings; the prosecutor's immediate role might have been limited to a particular aspect of the prosecution; and decades might have passed before the former prosecutor, now a judge, is called upon to adjudicate a claim in the case.

These factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution. The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single ****1907** case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchison,* is nevertheless significant. A prosecutor may bear responsibility for any number ***11** of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

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B

This leads to the question whether Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision. The Court now concludes that it was a significant, personal involvement; and, as a result, Chief Justice Castille's failure to recuse from Williams's case presented an unconstitutional risk of bias.

As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

***12** Pennsylvania nonetheless contends that Chief Justice Castille in fact did not have significant involvement in the decision to seek a death sentence against Williams. The chief justice, the Commonwealth points out, was the head of a large district attorney's office in a city that saw many capital murder trials. Tr. of Oral Arg. 36. According to Pennsylvania, his approval of the trial prosecutor's request to pursue capital punishment in Williams's case amounted to a brief administrative act limited to "the time it takes to read a one-and-a-half-page memo." *Ibid.* In this Court's view, that characterization cannot be credited. The Court will not assume that then-District Attorney Castille treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part.

Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he "sent 45 people to death rows" as district attorney. Seelye, Castille Keeps His Cool in Court Run, Philadelphia Inquirer, Apr. 30, 1993, ****1908** p. B1; see also, *e.g.*, Brennan, State Voters Must Choose Next Supreme Court Member, Legal Intelligencer, Oct. 28, 1993, pp. 1, 12. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional *Brady* violations during Williams's prosecution. App. ***13** 131–145, 150–154. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

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The potential conflict of interest posed by the PCRA court's findings illustrates the utility of statutes and professional codes of conduct that "provide more protection than due process requires." *Caperton,* 556 U.S., at 890, 129 S.Ct. 2252. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See Brief for American Bar Association as *Amicus Curiae* 5, 11–14; see also ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b) (2011) (no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding"); ABA Center for Professional Responsibility Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (Dec. 14, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (as last visited June 7, 2016) (28 States have adopted language similar to ABA Model Judicial Code Rule 2.11); 28 U.S.C. § 455(b)(3) (recusal required where judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding"). At the time Williams filed his recusal motion with the Pennsylvania Supreme Court, for example, Pennsylvania's Code of Judicial Conduct disqualified judges from any ***14** proceeding in which "they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter...." Pa.Code of Judicial Conduct, Canon 3C (1974, as amended). The fact that most jurisdictions have these rules in place suggests that today's decision will not occasion a significant change in recusal practice.

Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the case "must be forbidden if the guarantee of due process is to be ****1909** adequately implemented." *Withrow,* 421 U.S., at 47, 95 S.Ct. 1456.

III

Having determined that Chief Justice Castille's participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. See *Lavoie, supra,* at 827–828, 106 S.Ct. 1580 (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett v. United States,* 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266

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(2009) (emphasis deleted). The deliberations of an appellate panel, as a general ***15** rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence,

> "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U.S., at 831, 106 S.Ct. 1580.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, at 831–832, 106 S.Ct. 1580 (Blackmun, J., concurring in judgment).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an ***16** essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional ****1910** level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. Brief for Respondent 51, 62. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation ... not to hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

* * *

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Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

***17** The judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice ALITO joins, dissenting.
In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams's fifth habeas petition—which raised a claim unconnected to the prosecution's decision to seek the death penalty—could be heard on the merits or was instead untimely. This Court now holds that because Chief Justice Castille made a "critical" decision as a prosecutor in Williams's case, there is a risk that he "would be so psychologically wedded" to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition. *Ante,* at 1905 – 1906 (internal quotation marks omitted). According to the Court, that conclusion follows from the maxim that "no man can be a judge in his own case." *Ante,* at 1905 – 1906 (internal quotation marks omitted).

The majority opinion rests on proverb rather than precedent. This Court has held that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). To overcome that presumption, the majority relies on *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). We concluded there that the Due Process Clause is violated when a judge adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case. Here, however, Williams does not allege that Chief Justice Castille had *any* previous ****1911** knowledge of the contested facts at issue in the habeas ***18** petition, or that he had previously made *any* decision on the questions raised by that petition. I would accordingly hold that the Due Process Clause did not require Chief Justice Castille's recusal.

I

In 1986, petitioner Terrance Williams stood trial for the murder of Amos Norwood. Prosecutors believed that Williams and his friend Marc Draper had asked Norwood for a ride, directed him to a cemetery, and then beat him to death with a tire iron after robbing him. Andrea Foulkes, the Philadelphia Assistant District Attorney prosecuting the case, prepared a one-and-a-half page memo for her superiors—Homicide Unit Chief Mark Gottlieb and District Attorney Ronald Castille—"request[ing] that we actively seek the death penalty." App. 424a. The memo briefly described the facts of the case and

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Williams's prior felonies, including a previous murder conviction. Gottlieb read the memo and then passed it to Castille with a note recommending the death penalty. *Id.,* at 426a. Castille wrote at the bottom of the memo, "Approved to proceed on the death penalty," and signed his name. *Ibid.*

At trial, Williams testified that he had never met Norwood and that someone else must have murdered him. After hearing extensive evidence linking Williams to the crime, the jury convicted him of murder and sentenced him to death. 524 Pa. 218, 227, 570 A.2d 75, 79–80 (1990).

In 1995, Williams filed a habeas petition in Pennsylvania state court, alleging that his trial counsel had been ineffective for failing to present mitigating evidence of his childhood sexual abuse, among other claims. At a hearing related to that petition, Williams acknowledged that he knew Norwood and claimed that Norwood had sexually abused him. 629 Pa. 533, ——, 105 A.3d 1234, 1240 (2014). The petition was denied. Williams filed two more state habeas petitions, which were both dismissed as untimely, and a federal ***19** habeas petition, which was also denied. See *Williams v. Beard,* 637 F.3d 195, 238 (C.A.3 2011).

This case arises out of Williams's fifth habeas petition, which he filed in state court in 2012. In that petition, Williams argued that he was entitled to a new sentencing proceeding because the prosecution at trial had failed to turn over certain evidence suggesting that "Norwood was sexually involved with boys around [Williams's] age at the time of his murder." Crim. No. CP–51–CR–0823621–1984 (Phila. Ct. Common Pleas, Nov. 27, 2012), App. 80a.

It is undisputed that Williams's fifth habeas petition is untimely under Pennsylvania law. In order to overcome that time bar, Pennsylvania law required Williams to show that "(1) the failure to previously raise [his] claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence." — Pa., at ——, 105 A.3d, at 1240. The state habeas court held that Williams met that burden because "the government withheld multiple statements from [Williams's] trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys," and Williams was unable to access those statements until an evidentiary proceeding ordered by the court. App. 95a.

The Commonwealth appealed to the Pennsylvania Supreme Court, and Williams filed a motion requesting that Chief Justice Castille recuse himself on the ground that he had "personally authorized ****1912** his Office to seek the death penalty" nearly 30 years earlier. *Id.,* at 181a (emphasis deleted). Chief Justice Castille summarily denied the recusal motion, and the six-member Pennsylvania Supreme Court proceeded to hear the case. The court unanimously reinstated Williams's sentence.

According to the Pennsylvania Supreme Court, Williams failed to make the threshold showing necessary to overcome the time bar because there was "abundant evidence" that ***20** Williams "knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present [Norwood] as unsympathetic before the jury." —— Pa., at ——, 105 A.3d, at 1241. The court pointed out that Williams was, of course, personally aware of Norwood's abuse and could have raised the issue at trial, but instead chose to disclaim having ever met Norwood. The court also noted that Williams had raised similar claims of abuse in his first state habeas proceeding. *Ibid.* Chief Justice Castille concurred separately, criticizing the lower court for failing to dismiss Williams's petition as "time-barred and frivolous." *Id.,* at ——, 105 A.3d, at 1245.

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II

A

In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere "in the very idea of free government" and are "the inalienable right of a citizen of such a government." *Twining v. New Jersey,* 211 U.S. 78, 106, 29 S.Ct. 14, 53 L.Ed. 97 (1908). A fair trial and appeal is one such right. See *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). In ensuring that right, "it is normally within the power of the State to regulate procedures under which its laws are carried out," unless a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.,* at 821, 106 S.Ct. 1580 (internal quotation marks omitted).

It is clear that a judge with "a direct, personal, substantial, pecuniary interest" in a case may not preside over that case. *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927). We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted "an insulting attack upon the integrity of the ***21** judge carrying such potential for bias as to require disqualification." *Mayberry v. Pennsylvania,* 400 U.S. 455, 465–466, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (internal quotation marks omitted); see *Murchison,* 349 U.S., at 139, 75 S.Ct. 623.

Prior to this Court's decision in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton,* however, the Court adopted a new standard that requires recusal "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.,* at 872, 129 S.Ct. 2252 (internal quotation marks omitted). The Court framed the inquiry as "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.,* at 883–884, 129 S.Ct. 2252 (internal quotation marks omitted).

****1913** B

According to the majority, the Due Process Clause required Chief Justice Castille's recusal because he had "significant, personal involvement in a critical trial decision" in Williams's case. *Ante,* at 1907.

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Otherwise, the majority explains, there is "an unacceptable risk of actual bias." *Ante,* at 1908. In the majority's view, "[t]his conclusion follows from the Court's analysis in *In re Murchison*." *Ante,* at 1906. But *Murchison* does not support the majority's new rule—far from it.

Murchison involved a peculiar Michigan law that authorized the same person to sit as both judge and "one-man grand jury" in the same case. 349 U.S., at 133, 75 S.Ct. 623 (internal quotation marks omitted). Pursuant to that law, a Michigan judge—serving as grand jury—heard testimony from two witnesses in a corruption case. The testimony "persuaded" the judge that one of the witnesses "had committed perjury"; the second witness refused to answer questions. *Id.,* at 134–135, 75 S.Ct. 623. ***22** The judge accordingly charged the witnesses with criminal contempt, presided over the trial, and convicted them. *Ibid.* We reversed, holding that the trial had violated the Due Process Clause. *Id.,* at 139, 75 S.Ct. 623.

The Court today, acknowledging that *Murchison* "differ[s] in many respects from a case like this one," *ante,* at 1906, earns full marks for understatement. The Court in fact fails to recognize the differences that are critical.

First, *Murchison* found a due process violation because the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge. As a result, the judge had made up his mind about the only issue in the case before the trial had even begun. We held that such prejudgment violated the Due Process Clause. 349 U.S., at 137, 75 S.Ct. 623.

Second, *Murchison* expressed concern that the judge's recollection of the testimony he had heard as grand juror was "likely to weigh far more heavily with him than any testimony given" at trial. *Id.,* at 138, 75 S.Ct. 623. For that reason, the Court found that the judge was at risk of calling "on his own personal knowledge and impression of what had occurred in the grand jury room," rather than the evidence presented to him by the parties. *Ibid.*

Neither of those due process concerns is present here. Chief Justice Castille was involved in the decision to seek the death penalty, and perhaps it would be reasonable under *Murchison* to require him to recuse himself from any challenge casting doubt on that recommendation. But that is not this case.

This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that "the information on which he relies could not have been obtained earlier with the exercise of due diligence." — Pa., at ——, 105 A.3d, at 1240. Even if Williams were to overcome the timeliness ***23** bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. The problem in *Murchison* was that the judge, having been "part of the accusatory process" regarding the guilt or innocence of the defendants, could not then be "wholly disinterested" when called upon to decide that very same issue. 349 U.S., at 137, 75 S.Ct. 623. In this case, in contrast, neither the procedural question nor Williams's merits claim in any way concerns the pretrial decision to seek the death penalty.

****1914** It is abundantly clear that, unlike in *Murchison,* Chief Justice Castille had *not* made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition.

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How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence.

Williams does not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over such evidence, and he does not argue that Chief Justice Castille had previously made any decision with respect to that evidence in his role as prosecutor. Even assuming that Chief Justice Castille remembered the contents of the memo almost 30 years later—which is doubtful—the memo could not have given Chief Justice Castille any special "impression" of facts or issues not raised in that memo. *Id.,* at 138, 75 S.Ct. 623.

The majority attempts to justify its rule based on the "risk" that a judge "would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of ***24** having erred or changed position." *Ante,* at 1906 (internal quotation marks omitted). But as a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams's fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an "objective risk of actual bias," *ante,* at 1909, that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

* * *

The Due Process Clause did not prohibit Chief Justice Castille from hearing Williams's case. That does not mean, however, that it was appropriate for him to do so. Williams cites a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as judge in a case that he has prosecuted. Because the Due Process Clause does not mandate recusal in cases such as this, it is up to state authorities—not this Court—to determine whether recusal should be required.

I would affirm the judgment of the Pennsylvania Supreme Court, and respectfully dissent from the Court's contrary conclusion.

Justice THOMAS, dissenting.

The Court concludes that it violates the Due Process Clause for the chief justice of the Supreme Court of Pennsylvania, a former district attorney who was not the trial prosecutor in petitioner Terrance Williams' case, to review Williams' fourth petition for state postconviction review. *Ante,* at 1906 – 1907, 1910. That conclusion is flawed. The specter of bias alone in a judicial proceeding is not a deprivation of due process. Rather than constitutionalize every judicial disqualification rule, the Court has left such rules to legislatures, bar associations, and the judgment of individual adjudicators. ***25** Williams, moreover, is not a criminal defendant. His complaint is instead that the due process protections in his state postconviction proceedings—an altogether new civil matter, not a continuation of his criminal trial—were lacking. ****1915** Ruling in Williams' favor, the Court ignores this posture and our precedents

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commanding less of state postconviction proceedings than of criminal prosecutions involving defendants whose convictions are not yet final. I respectfully dissent.

I

A reader of the majority opinion might mistakenly think that the prosecution against Williams is ongoing, for the majority makes no mention of the fact that Williams' sentence has been final for more than 25 years. Because the postconviction posture of this case is of crucial importance in considering the question presented, I begin with the protracted procedural history of Williams' repeated attempts to collaterally attack his sentence.

A

Thirty-two years ago, Williams and his accomplice beat their victim to death with a tire iron and a socket wrench. *Commonwealth v. Williams*, 524 Pa. 218, 222–224, 570 A.2d 75, 77–78 (1990) (*Williams I*). Williams later returned to the scene of the crime, a cemetery, soaked the victim's body in gasoline, and set it on fire. *Id.*, at 224, 570 A.2d, at 78. After the trial against Williams commenced, both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor's decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille's only involvement in Williams' criminal case. Thereafter, a Pennsylvania jury convicted Williams of first-degree murder, and he was sentenced to death. *Williams I*, 524 Pa., at 221–222, 570 A.2d, at 77. The Supreme Court of Pennsylvania affirmed his conviction and sentence. *Id.*, at 235, 570 A.2d, at 84.

***26** Five years later, Williams filed his first petition for state postconviction relief. *Commonwealth v. Williams*, 581 Pa. 57, 65, 863 A.2d 505, 509 (2004) (*Williams II*). The postconviction court denied the petition. *Id.*, at 65, 863 A.2d, at 510. Williams appealed, raising 23 alleged errors. *Ibid.* The Supreme Court of Pennsylvania, which included Castille in his new capacity as a justice of that court, affirmed the denial of relief. *Id.*, at 88, 863 A.2d, at 523. The court rejected some claims on procedural grounds and denied the remaining claims on the merits. *Id.*, at 68–88, 863 A.2d, at 511–523. The court's lengthy opinion did not mention the possibility of Castille's bias, and Williams apparently never asked for his recusal.

Then in 2005, Williams filed two more petitions for state postconviction relief. Both petitions were dismissed as untimely, and the Supreme Court of Pennsylvania affirmed. *Commonwealth v. Williams*, 589 Pa. 355, 909 A.2d 297 (2006) (*per curiam*) (*Williams III*); *Commonwealth v. Williams*, 599 Pa. 495, 962 A.2d 609 (2009) (*per curiam*) (*Williams IV*). Castille also presumably participated in those proceedings, but, again, Williams apparently did not ask for him to recuse.[1]

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Williams then made a fourth attempt to vacate his sentence in state court in 2012. 629 Pa. 533, ——, 105 A.3d 1234, 1237 (2014) (*Williams VI*). Williams alleged that the prosecution violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose exculpatory evidence. The allegedly exculpatory evidence was information about Williams' motive. According to Williams, the prosecution should have disclosed to ****1916** his counsel that it knew that Williams and the victim had previously engaged in a sexual relationship when Williams was a minor. ***27** *Williams VI,* —— Pa., at ——, 105 A.3d, at 1237.[2] The state postconviction court agreed and vacated his sentence. *Id.,* at ——, 105 A.3d, at 1239.

The Commonwealth appealed to the Supreme Court of Pennsylvania. Only then—the *fourth* time that Williams appeared before Castille—did Williams ask him to recuse. App. 181. Castille denied the recusal motion and declined to refer it to the full court. *Id.*, at 171. Shortly thereafter, the court vacated the postconviction court's order and reinstated Williams' sentence. The court first noted that Williams' fourth petition "was filed over 20 years after [Williams'] judgment of sentence became final" and "was untimely on its face." *Williams VI,* —— Pa., at ——, 105 A.3d, at 1239. The court rejected the trial court's conclusion that an exception to Pennsylvania's timeliness rule applied and reached "the inescapable conclusion that [Williams] is not entitled to relief." *Id.,* at ——, 105 A.3d, at 1239–1241; see also *id.,* at ——, 105 A.3d, at 1245 (Castille, J., concurring) (writing separately "to address the important responsibilities of the [state postconviction] trial courts in serial capital [state postconviction] matters").

Finally, Williams filed an application for reargument. App. 9. The court denied the application *without* Castille's ***28** participation. *Id.,* at 8. Castille had retired from the bench nearly two months before the court ruled.

B

As this procedural history illustrates, the question presented is hardly what the majority makes it out to be. The majority incorrectly refers to the case before us and Williams' criminal case (that ended in 1990) as a decades-long "single case" or "matter." *Ante,* at 1906; see also *ante,* at 1906 – 1907. The majority frames the issue as follows: whether the Due Process Clause permits Castille to "ac[t] as both accuser and judge in [Williams'] case." *Ante,* at 1905. The majority answers: "When a judge has served as an advocate for the State *in the very case* the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Ante,* at 1906 (emphasis added). Accordingly, the majority holds that "[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision *in the defendant's case,* the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Ante,* at 1910 (emphasis added). That is all wrong.

There has been, however, no "single case" in which Castille acted as both prosecutor and adjudicator. Castille was still ****1917** serving in the district attorney's office when Williams' criminal proceedings ended and his sentence of death became final. Williams' filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding "is

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not part of the criminal proceeding itself" but "is in fact considered to be civil in nature," *Pennsylvania v. Finley,* 481 U.S. 551, 556–557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and brings with it fewer procedural protections. See, *e.g., District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 68, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).

Williams' case therefore presents a much different question from that posited by the majority. It is more accurately ***29** characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner's criminal case was pending. For the reasons that follow, that different question merits a different answer.

II

The "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" are the touchstone of due process. *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927); see also *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 277, 15 L.Ed. 372 (1856). What due process requires of the judicial proceedings in the Pennsylvania postconviction courts, therefore, is guided by the historical treatment of judicial disqualification. And here, neither historical practice nor this Court's case law constitutionalizing that practice requires a former prosecutor to recuse from a prisoner's postconviction proceedings.

A

At common law, a fair tribunal meant that "no man shall be a judge in his own case." 1 E. Coke, Institutes of the Laws of England § 212, *141a ("[*A*]*liquis non debet esse judex in propiâ causâ*"). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, *e.g., Dr. Bonham's Case,* 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (C.P. 1610) (opining that a panel of adjudicators could not all at once serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"). Nor could he adjudicate a case in which he was a party. See, *e.g., Earl of Derby's Case,* 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K.B. 1614). But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of ***30** judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768) (Blackstone); see also, *e.g., Brookes v. Earl of Rivers,* Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

The early American conception of judicial disqualification was in keeping with the "clear and simple" common-law rule—"a judge was disqualified for direct pecuniary interest and for nothing else." Frank, Disqualification of Judges, 56 Yale L.J. 605, 609 (1947) (Frank); see also R. ****1918** Flamm, Judicial

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Disqualification: Recusal and Disqualification of Judges § 1.4, p. 7 (2d ed. 2007). Most jurisdictions required judges to recuse when they stood to profit from their involvement or, more broadly, when their property was involved. See *Moses v. Julian,* 45 N.H. 52, 55–56 (1863); see also, *e.g., Jim v. State,* 3 Mo. 147, 155 (1832) (deciding that a judge was unlawfully interested in a criminal case in which his slave was the defendant). But the judge's pecuniary interest had to be directly implicated in the case. See, *e.g., Davis v. State,* 44 Tex. 523, 524 (1876) (deciding that a judge, who was the victim of a theft, was not disqualified in the prosecution of the theft); see also T. Cooley, Constitutional Limitations 594 (7th ed. 1903) (rejecting a financial stake "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment"); *Moses, supra,* at 57 ("[A] creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit"); *Inhabitants of Readington Twp. Hunterdon County v. Dilley,* 24 N.J.L. 209, 212–213 (N.J.1853) (deciding that a judge, who had previously ***31** been paid to survey the roadway at issue in the case, was not disqualified).

Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legislatures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "ha[d] been of counsel for either party." Act of May 8, 1792, § 11, 1 Stat. 278–279. Many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule. See, *e.g., Wilks v. State,* 27 Tex.App. 381, 385, 11 S.W. 415, 416 (1889); *Fechheimer v. Washington,* 77 Ind. 366, 368 (1881) (*per curiam*); *Sjorberg v. Nordin,* 26 Minn. 501, 503, 5 N.W. 677, 678 (1880); *Whipple v. Saginaw Circuit Court Judge,* 26 Mich. 342, 343 (1873); *Mathis v. State,* 50 Tenn. 127, 128 (1871); but see *Owings v. Gibson,* 9 Ky. 515, 517–518 (1820) (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. See, *e.g., Terry v. State,* 24 S.W. 510, 510–511 (Tex.Crim.App.1893); *Mathis, supra,* at 128.

This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the *same case*. In *Carr v. Fife,* 156 U.S. 494, 15 S.Ct. 427, 39 L.Ed. 508 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. *Id.,* at 497–498, 15 S.Ct. 427. The Court left it to the judge "to decide for himself ***32** whether it was improper for him to sit in trial of the suit." *Id*., at 498, 15 S.Ct. 427. Likewise, in *Taylor v. Williams,* 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law, disqualified from sitting in a cause in which he had been of counsel" and concluded "that the fact that the presiding judge had been of counsel in the case did not necessarily render him ****1919** interested in it." *Id.,* at 585–586. *a fortiori,* the texas court held, a judge was not "interested" in a case " merely from his having been of counsel in *another cause* involving the same title." *Id.,* at 586 (emphasis added); see also *The Richmond,* 9 F. 863, 864 (C.C.E.D.La.1881) ("The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or

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controversy is not identical the disqualification does not exist"); *Wolfe v. Hines,* 93 Ga. 329, 20 S.E. 322 (1894) (same); *Cleghorn v. Cleghorn,* 66 Cal. 309, 5 P. 516 (1885) (same).

This limitation—that the same person must act as counsel and adjudicator in *the same case*—makes good sense. At least one of the State's highest courts feared that any broader rule would wreak havoc: "If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges." *Blackburn v. Craufurd,* 22 Md. 447, 459 (1864). Indeed, any broader rule would be at odds with this Court's historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. See Frank 622–625. The examples are legion; chief among them is *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), in which then-Secretary of State John ***33** Marshall sealed but failed to deliver William Marbury's commission and then, as newly appointed Chief Justice, Marshall decided whether mandamus was an available remedy to require James Madison to finish the job. See Paulsen, Marbury's Wrongness, 20 Constitutional Commentary 343, 350 (2003).

Over the next century, this Court entered the fray of judicial disqualifications only a handful of times. Drawing from longstanding historical practice, the Court announced that the Due Process Clause compels judges to disqualify in the narrow circumstances described below. But time and again, the Court cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey,* 273 U.S., at 523, 47 S.Ct. 437. And "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Ibid.*; see also *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications").

First, in *Tumey,* the Court held that due process would not tolerate an adjudicator who would profit from the case if he convicted the defendant. The Court's holding paralleled the common-law rule: "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case." 273 U.S., at 523, 47 S.Ct. 437 (emphasis added); see also *Ward v. Monroeville,* 409 U.S. 57, 59, 61, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (deciding that a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue). Later, applying *Tumey* 's rule in *Aetna Life Ins.,* the Court held that a judge who decided a case involving an insurance company had a "direct, personal, substantial, and pecuniary" interest because he had brought a ****1920** similar case against an insurer and ***34** his opinion for the court "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." 475 U.S., at 824, 106 S.Ct. 1580 (alterations and internal quotation marks omitted).

Second, in *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), the Court adopted a constitutional rule resembling the historical practice for disqualification of former counsel. *Id.,* at 139, 75 S.Ct. 623. There, state law empowered a trial judge to sit as a " 'one man judge-grand jury,' " meaning that he could "compel witnesses to appear before him in secret to testify about suspected

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crimes." *Id.,* at 133, 75 S.Ct. 623. During those secret proceedings, the trial judge suspected that one of the witnesses, Lee Roy Murchison, had committed perjury, and he charged another, John White, with contempt after he refused to answer the judge's questions without counsel present. See *id.,* at 134–135, 75 S.Ct. 623. The judge then tried both men in open court and convicted and sentenced them based, in part, on his interrogation of them in the secret proceedings. See *id.,* at 135, 138–139, 75 S.Ct. 623. The defendants appealed, arguing that the "trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of fair and impartial trial required by" due process. *Id.,* at 135, 75 S.Ct. 623. This Court agreed: "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.,* at 137, 75 S.Ct. 623. Broadly speaking, *Murchison* 's rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding.[3]

***35** Both *Tumey* and *Murchison* arguably reflect historical understandings of judicial disqualification. Traditionally, judges disqualified themselves when they had a direct and substantial pecuniary interest or when they served as counsel in the same case.

B

Those same historical understandings of judicial disqualification resolve Williams' case. Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as "counsel" in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief.

As discussed above, see Part I–B, *supra,* this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding. See *Finley,* 481 U.S., at 556–557, 107 S.Ct. 1990. Our case law bears out the many distinctions between the two proceedings. In his criminal case, Williams was presumed innocent, *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895), and the Constitution guaranteed him counsel, *Gideon v. Wainwright,* 372 U.S. 335, 344–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama,* 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), a public trial by a jury of his peers, *Duncan* ****1921** *v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and empowered him to confront the witnesses against him, *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), as well as all the other requirements of a criminal proceeding. But in postconviction proceedings, "the presumption of innocence [has] disappear[ed]." *Herrera v. Collins,* 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The postconviction petitioner has no constitutional right to counsel. *Finley, supra,* at 555–557, 107 S.Ct. 1990; see also *Johnson v. Avery,* 393 U.S. 483, 488, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969). Nor has this Court ever held that he has a right to demand that his postconviction court consider a freestanding claim of actual ***36** innocence, *Herrera, supra,* at 417–419, 113 S.Ct. 853 or to demand the State to turn over exculpatory evidence, *Osborne,* 557 U.S., at 68–70, 129 S.Ct. 2308; see also *Wright v. West,* 505 U.S. 277, 293, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (plurality opinion)

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(cataloguing differences between direct and collateral review and concluding that "[t]hese differences simply reflect the fact that habeas review entails significant costs" (internal quotation marks omitted)). And, under the Court's precedents, his due process rights are "not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne, supra,* at 69, 129 S.Ct. 2308.

Because Castille did not act as both counsel and judge in the same case, Castille's participation in the postconviction proceedings did not violate the Due Process Clause. Castille might have been "personal[ly] involve[d] in a critical trial decision," *ante,* at 1907, but that "trial" was Williams' criminal trial, not the postconviction proceedings before us now. Perhaps Castille's participation in Williams' postconviction proceeding was unwise, but it was within the bounds of historical practice. That should end this case, for it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 28, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (Scalia, J., concurring in judgment).

C

Today's holding departs both from common-law practice and this Court's prior precedents by ignoring the critical distinction between criminal and postconviction proceedings. Chief Justice Castille had no "direct, personal, substantial pecuniary interest" in the adjudication of Williams' fourth postconviction petition. *Tumey,* 273 U.S., at 523, 47 S.Ct. 437. And although the majority invokes *Murchison, ante,* at 1905 – 1907, it wrongly relies on that decision too. In *Murchison,* the judge acted as both the accuser and judge in the *same* proceeding ***37** . 349 U.S., at 137–139, 75 S.Ct. 623. But here, Castille did not. See Part II–B, *supra*.

The perceived bias that the majority fears is instead outside the bounds of the historical expectations of judicial recusal. Perceived bias (without more) was not recognized as a constitutionally compelled ground for disqualification until the Court's recent decision in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). In *Caperton,* the Court decided that due process demanded disqualification when "extreme facts" proved "the probability of actual bias." *Id.,* at 886–887, 129 S.Ct. 2252. *Caperton,* of course, elicited more questions than answers. *Id.,* at 893–898, 129 S.Ct. 2252 (ROBERTS, C.J., dissenting). And its conclusion that bias alone could be grounds for disqualification as a constitutional ****1922** matter "represents a complete departure from common law principles." Frank 618–619; see Blackstone 361 ("[T]he law will not suppose a possibility of bias or favor in a judge").

The Court, therefore, should not so readily extend *Caperton* 's "probability of actual bias" rule to state postconviction proceedings. This Court's precedents demand far less "process" in postconviction proceedings than in a criminal prosecution. See *Osborne, supra,* at 69, 129 S.Ct. 2308; see also *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) (concluding that the Due Process Clause does not demand "inflexible procedures universally applicable to every imaginable situation"). If a state habeas petitioner is not entitled to counsel as a constitutional matter in state postconviction proceedings, *Finley, supra,* at 555–557, 107 S.Ct. 1990 it is not

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unreasonable to think that he is likewise not entitled to demand, as a constitutional matter, that a state postconviction court consider his case anew because a judge, who had no direct and substantial pecuniary interest and had not served as counsel in this case, failed to recuse himself.

The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution. See, *e.g.*, *Aetna Life Ins.*, 475 U.S., at 821, 106 S.Ct. 1580 ("We need not decide ***38** whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal"). And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding" in its Code of Judicial Conduct. See Pa.Code of Judicial Conduct Rule 2.11(A)(6)(b) (West 2016). Officials in Pennsylvania are fully capable of deciding when their judges have "participated personally and substantially" in a manner that would require disqualification without this Court's intervention. Due process requires no more, especially in state postconviction review where the States "ha[ve] more flexibility in deciding what procedures are needed." *Osborne, supra,* at 69, 129 S.Ct. 2308.

III

Even if I were to assume that an error occurred in Williams' state postconviction proceedings, the question remains whether there is anything left for the Pennsylvania courts to remedy. There is not.

The majority remands the case to "[a]llo[w] an appellate panel to reconsider a case without the participation of the interested member," which it declares "will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Ante,* at 1910. The majority neglects to mention that the Supreme Court of Pennsylvania might have done just that. It entertained Williams' motion for reargument without Castille, who had retired months before the court denied the motion. The Supreme Court of Pennsylvania is free to decide on remand that it cured any alleged deprivation of due process in Williams' postconviction proceeding by considering his motion for reargument without Castille's participation.

* * *

***39** This is not a case about the " 'accused.' " *Ante,* at 1910 (quoting *Tumey, supra,* at 532, 47 S.Ct. 437). It is a case about the due process rights of the already convicted. Whatever those rights might be, they do not include policing alleged violations of state codes of judicial ethics in postconviction proceedings. The Due Process Clause does not require any and all conceivable ****1923** procedural protections that Members of this Court think "Western liberal democratic government ought to guarantee to its citizens." Monaghan, Our Perfect Constitution, 56 N.Y.U.L. Rev. 353, 358 (1981) (emphasis deleted). I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In 2005, Williams also filed a federal habeas petition, which the federal courts ultimately rejected. *Williams v. Beard,* 637 F.3d 195, 238 (C.A.3 2011) (*Williams V*), cert. denied, *Williams v. Wetzel,* 567 U.S. ——, 133 S.Ct. 65, 183 L.Ed.2d 711 (2012).

2 Setting aside how a prosecutor could violate *Brady* by failing to disclose information to the defendant about the defendant's motive to kill, it is worth noting that this allegation merely repackaged old arguments. During a state postconviction hearing in 1998, Williams had presented evidence of his prior sexual abuse, including "multiple sexual victimizations (including sodomy) during his childhood," to support his ineffective assistance claim. *Williams II,* 581 Pa. 57, 98, 863 A.2d 505, 530 (2004) (Saylor, J., dissenting). And he had "argued [that the victim] engaged in homosexual acts with him." *Williams VI,* —— Pa., at ——, 105 A.3d, at 1236. Then, in his federal habeas proceedings, Williams admitted that his plan on the night of the murder was to threaten to reveal to the victim's wife that the victim was a homosexual, and he contended that his attorney should have presented related evidence of the victim's prior sexual relationship with him. *Williams V, supra,* at 200, 225–226, 229–230.

3 The Court has applied *Murchison* in later cases involving contempt proceedings in which a litigant's contemptuous conduct is so egregious that the judge "become[s] so 'personally embroiled' " in the controversy that it is as if the judge is a party himself. *Mayberry v. Pennsylvania,* 400 U.S. 455, 465, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); see also *Taylor v. Hayes,* 418 U.S. 488, 501–503, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

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