UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : John Doar
First Assistant
Civil Rights Division

DATE: DEC 6 1962

JHF:seb
144-41-489
11,851

FROM : J. Harold Flannery
Attorney
Civil Rights Division

SUBJECT: Mississippi v. McShane; Grand Jury and Petit Jury.

This memorandum considers the Mississippi court's charge to the grand jury and the selection of the grand and petit juries. It does not consider McShane's habeus corpus contention to the effect that: "... if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime .... (emphasis original). In re Neagle, 135 U.S. 1,75 (1890).[1]

The Grand Jury

McShane can challenge the indictment on two grounds: (1) that Judge O'Barr's charge to the grand jury was illegally prejudicial; (2) that Negroes were systematically excluded in violation of the 14th Amendment.[2]

1/ Of course, for a writ of habeus corpus to issue, McShane would have to be in actual state custody, not out on bail. See memo of November 21, 1962 from Herzel Plaine to Norbert Schlei.

2/ The second ground assumes that the facts will support the allegation. Whether this is true should be investigated, perhaps by the FBI. I do not think that we can make anything out of the fact that O'Barr is engaged in federal civil litigation against President Kennedy for automobile injuries he allegedly suffered during the Los Angeles convention in 1960.

It is my understanding that Judge Clayton would prefer to nullify the proceedings against McShane on the ground that the Lafayette County indictment is invalid rather than on the basis of In re Neagle. Although I think it is clear from the discussion below that the indictment is a nullity under Mississippi law, there are difficult procedural obstacles to the raising of this purely state law question in a federal habeus corpus proceeding.[3] That is, clearly, McShane is entitled to be released on the ground that he was lawfully executing his federal duties, but the problem arises because Judge Clayton wishes to stop short of that determination and release him on a purely state law question.

The state will argue first that, under 28 U.S.C. 2241 (c) (2), the federal habeus corpus court is without jurisdiction to decide any but the federal duty question, and secondly that the sense of 28 U.S.C. 2254 should be a factor and it requires exhaustion of state remedies.[4] The arguments are

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[3] The obstacles would not be present after removal pursuant to 28 U.S.C. 1442 (a) (3) because that statute specifically contemplates that the proceedings shall include a resolution of all issues by federal procedure applying state substantive law. See Rule 54 (b) (1) F.R. Crim. P. and Notes of Advisory Committee on Rules, Note to Subdivision (b) (1), U.S. C.A. Federal Rules of Criminal Procedure, page 602.

[4] This is apart from the holdings that even federal constitutional claims must be exhausted in the state courts. As a federal officer McShane is not necessarily bound by this doctrine. Ex parte Royall, 117 U.S. 241, 251 (1886); and see Hart and Wechsler, The Federal Courts and The Federal System 1298-1299.

persuasive in view of the "federal right" basis of federal habeus corpus, unless we are prepared to make the novel and untenable claim that Judge O'Barr's charge was so prejudicial as to violate the 14th Amendment, 28 U.S.C. 2241 (c) (3). Of course, even that halfway position would require Judge Clayton to base his decision on federal rather than state grounds which he apparently does not want to do.

On the other hand, since the state law issue can unquestionably be raised in a trial after removal, it is really only comity and seemliness that bar raising it on habeus corpus -- if section 2241 (c) (2) is jurisdictional rather than substantive. That is, that provision may be only the requirement for applying for a federal writ, not the sole grounds for issuance of the writ.

In any event, we should raise it on habeus corpus on the theory that we have nothing to lose because Judge Clayton is more than likely to decline to decide it than to decide it against us.[5]

1. The Charge to the Grand Jury Under Mississippi Law.

Our newspaper reports indicate that Judge O'Barr's vituperative charge to the grand jury included the sentence:

5/ Of course, as you point out, the disadvantage to this narrow attack is that McShane can be reindicted without an illegal charge.

"This applies ... to John F. Kennedy, little stupid brother Robert Kennedy, Mr. (James) McShane or any other human being."[6]

Section 1781 of the Mississippi Code (1942) provides that: "The judge shall charge the grand jury concerning its duties and expound the law to it as he shall deem proper...." Pursuant to that authorization Judge O'Barr charged the Lafayette County grand jury, but in a manner clearly violative of Mississippi law.[7]

6/ The New York Times story, dated November 12 by the AP from Oxford, omits McShane's name, but the other stories, including those by the AP, name him. According to the Jackson Clarion - Ledger of November 13:

> The judge read his charge to juniors (sic) from a two and one-half page typed statement and later told a newsman 'lengthy thought went into this charge.'

Although I heard O'Barr say on TV that he departed from the text in describing the Attorney General, we should secure his prepared charge.

7/ See generally 24 Am. Jur. 864, Grand Jury, §45; 38 C. J. S. 1012, Grand Jury, §21 b; 105 A.L.R. 575; indictments resulting from vituperative charges in which individuals are singled out should be quashed. Compare United States v. Smyth, 104 F. Supp. 283, 292, note 36 (D. Calif., 1952) to the effect that the charging court has carte blanche. This is probably not the federal rule (see Walker v. United States, 93 F.2d 383, 390 (C.A. 8, 1937), and it is certainly dicta. There are model federal grand jury charges at 12 F.R.D. 495, 16 F.R.D. 93, 18 F.R.D. 211, and 19 F.R.D. 117.

Although there is no statutory restriction on the manner and content of grand jury charges in Mississippi, that state's courts have evolved limitations which Judge O'Barr transgressed. In Fuller v. State, 85 Miss. 199 (1904) the defendant appealed after conviction on the ground, among others, that the trial court had erred in denying a motion to quash the indictment. In charging the grand jury about liquor law violations the lower court had asked: "Have you ever heard the name of Charles Fuller?" In quashing the Supreme Court held at pages 204-05:

> The circuit judge being a conservator of the peace, and in the discharge of his duty, having the peace and quiet of the entire district much at heart, being well advised as to the conditions existing in every locality within his district, his charge to the grand jury is intended to direct their deliberations into the channel which will result in the greatest good to the people of the entire county where the grand jury is impaneled. But while it is the duty of the circuit judge to so direct the attention of the grand jury, and while he is vested with vast power and fullest discretion in choosing the statutes upon which he will base his charge to the grand jury, and while he stands as a sentinel to watch and guard the interest of the people, and has authority to suggest to the grand jury the course their investigation should take, he is not a prosecutor of any particular individual, no matter how flagrant and notorious his violations of the law by current report or popular rumor may be. It is the province of the circuit judge and his duty to inveigh against crime of all kinds and in every quarter, but it is a usurpation of power to denounce individuals, or to specifically direct the attention of the grand jury to any named person. It is not every man who is accused of crime who is guilty, and every man, whether accused or not, is entitled to the presumption of innocence until legally

> convicted. This presumption is binding upon the petit jury, and stands as a witness in favor of the defendant when on trial. It guards him before the grand jury until their investigations have produced proof believed by them which overthrows it. It protects him from the circuit judge in his charge to the grand jury, and forbids that any word from that high station, so apt, on account of its dignity and importance, to influence by its slightest utterance, should prejudice the grand jury when it enters upon the consideration of violations of the law. Every person accused of crime has the right to have his case investigated and passed upon by a fair and impartial grand jury, whose ears have never heard a suggestion of guilt from the presiding officer, and whose minds have not been prejudiced by any statement showing the opinion of the trial judge. If the grand jury is to be kept free, as has been repeatedly announced by this court, from all undue outside influences, of what grave importance is it that this undue influence should not proceed from the very officers to whom they must look for guidance, and whose decision and judgment they must take as the law?

In Blau v. State, 82 Miss. 514, 519-521 (1903) the court charged the grand jury at length about the criminal character of the defendants' business. The grand jury made its report, failed to indict defendant, and asked to be discharged. The court refused and charged them at length about the defendant, although it is not clear that he mentioned him by name. The Supreme Court reversed the conviction and quashed the indictment in excellent language about the necessity for non-inflammatory, non-prejudicial charges to an impartial grand jury.

Two other cases with excellent language about preserving the grand jury from improper influences prejudicial to defendants are Wilson v. State, 70 Miss. 595, 597 (1803) and Welsh v. State, 68 Miss. 341, 342 (1990), both reversing convictions and quashing indictments on the ground that private prosecutors representing the victims had appeared before the grand juries and induced the indictments. The court in Welsh said: "Illegal or insufficient evidence before the grand jury will not be inquired into, but the array may be excepted to for fraud; and improper influences to secure an indictment may be inquired into and should be, when properly alleged."

Fuller is the leading case and, although it has not been precisely relied upon subsequently to quash indictments, it has been cited approvingly by the Mississippi courts. In Price v. State, 152 Miss. 625 (1928) the appellant urged reversal of his conviction on the ground that a petition had been circulated in the grand jury room urging indictment. The conviction was affirmed, the court declining to inquire into the evidence considered by the grand jury. Fuller was cited in the dissent at page 650.

In Goss v. State, 205 Miss. 177 (1948) the appellant, citing Fuller, contended that the lower court erred in failing to charge the grand jury about the victims' illegal operations as apparently required by section 1781 of the Mississippi Code. The Supreme Court condemned the charge but, in affirming the conviction, distinguished Fuller on the ground that this case involved an omission not unduly prejudicial to the defendant.

In Coker v. State, 200 Miss. 535 (1946) the appellant urged that his conviction was enveloped in a variety of unfair circumstances. The appellate court reversed and cited Fuller with approval (at page 539).

Finally, in Wheeler v. State, 219 Miss. 129 (1953) the Supreme Court affirmed the conviction despite a clearly inflammatory grand jury charge. Fuller was acknowledged to be viable, but distinguished on the ground that the Fuller court

had referred to him by name. The persuasive dissent relied on Fuller, pointing out that the defendants in the instant case were in effect named by the narrowness of the description of the class referred to by the charging court.

From the foregoing cases I infer Mississippi law to be as follows: a court may charge a grand jury passionately, and perhaps it may name a prospective defendant in a dispassionate charge. But, it may not inveigh against a prospective defendant or accomplish the same indirectly by decrying a crime and then linking someone with it.

2. The Selection of the Grand and Petit Juries

Whoever is knowledgeable about Lafayette County, Mississippi (perhaps an assistant U.S.A.) should determine whether Negroes are systematically excluded from juries there. Although the jury selection cases focus on the right of the defendant not to have members of his own race excluded from the juries, I am persuaded that we can argue successfully -- on the facts of this case -- that McShane has a right not to have Negroes deliberately omitted.

3. Procedure

After removal of the case the federal district court would apply Mississippi substantive law and federal procedural law. ~~See note 2, above.~~[8] Therefore, with respect to the grand

See note 3, above.

8/ If for any reason the timing and manner of our motion should be regarded as substantive and governed by Mississippi law, we shall have to conform to section 2450, Mississippi Code (1942) which provides: "All objections to an indictment for an defect dehors the face thereof, presenting an issue to be tried by the court, shall be taken by motion to quash the indictment, and not otherwise, within the time allowed for demurrer, and with the right to amend, as provided in the last preceding section." Section 2449 provides that in non-capital cases the motion must be presented before the jury is impaneled, and in capital cases before the issuance

jury charge our course would be to move to dismiss the indictment under Rule 12 (b) (2), F.R. Crim. P. (See "Notes of Advisory Committee on Rules" stating that the motion includes"..., irregularities in grand jury proceedings ....").

A motion to dismiss after removal on account of the selection of the grand jury would be on 14th Amendment grounds and made under Rule 6 (b) (2), F.R. Crim. P. ("A motion to dismiss the indictment may be based on objections to the array....").

Finally, since the exhaustion of remedies doctrine does not apply to federal officers, we could base our application for a writ of habeus corpus on the jury selection ground, contending that McShane "... is in custody in violation of the Constitution or laws...of the United States....".

8/ Continued:

of the venire facias. I assume from the reference in the indictment to Gunter's death that this may be a felony-murder charge. If that is the case we shall want to determine whether the indictment itself meets Mississippi standards.

UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

LILLIAN BERGER,
Plaintiff

v.

CHARLES H. DYSON, et al.
Defendants

C.A. No. 942

PETITION FOR WRIT OF PROTECTION

Respectfully represents your petitioner, that he is a citizen of the of residing in and is a material witness in the above entitled cause now pending before this Honorable Court, and that he has been requested by the defendants in said cause to appear in said Court on the day of 1951, or soon thereafter, in his proper person, to testify and give evidence in behalf of said defendants; that your petitioner fears that some attempt may be made by the service upon him of civil process issuing out of this Court or out of some Court of the State of Rhode Island within this District to obstruct and interfere with his free coming and going to and from this Court as a witness in said causes; that he desires that full and absolute protection of this Court may be extended to him during his attendance as such witness.

WHEREFORE your petitioner prays that a writ of protection may issue out of this Honorable Court directed to the Marshal of the aforesaid District and his deputies and to all sheriffs, deputy sheriffs, constables, police officers, and other officers, commanding them and each of them to refrain from taking the body of him, arresting or detaining him, and from serving process on him or otherwise interfering with him while traveling from and to said Court or during his attendance in said Court during the hearing of said cause.

By his attorney

CKLEY, ALLEN, SALISBURY & PARSONS
PROVIDENCE, R. I.

June 7, 1957

Burke Marshall, Esq.
Messrs. Covington & Burling
Union Trust Building
Washington, D. C.

Dear Burke:

It was very nice to see you and Vi last weekend. We certainly had a wonderful time.

I enclose herewith a copy of the form which I used in obtaining a writ of protection and also a copy of the form of the writ. Apparently the Federal Courts are authorized to issue these writs under the "all writs" statute. I have not examined any cases, but you might look at 35 C.J.S. "Federal Courts", § 14 (pp. 805-7); see also, 73 C.J.S. "Protection" (p. 263). I would gather that the use of the writs has been abused in some jurisdictions. You might be interested to look at Regula Generalis, 11 Pick. (28 Mass.) 243 (1831), abolishing a writ in Massachusetts.

I hope you will find these references interesting, if not rewarding.

Sincerely yours,

STEPHEN B. IVES, JR.

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Enclosures (2)