Re v. McShane

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MTG:ls
93-1-3043

State of Mississippi v. McShane
Effect of Judge's Charge to Grand Jury

You have requested that I prepare a memorandum concerning whether Judge O'Barr's charge to the grand jury can serve as a basis for dismissal by Federal court of the captioned indictment.

FACTS

The charge commenced with a denunciation of the intervention of Federal troops in Oxford as unconstitutional, and of the administration and Supreme Court for allegedly violating the Constitution and attempting to impose a totalitarian dictatorship on the country. Specifically, the Court and administration were charged with attempting to crush the people of Mississippi "through the excuse of upholding and enforcing an unlawful order." The judge's language, both in this part and throughout the rest of the charge, was injudicious and vituperative, and he stated that his words were meant to sound harsh because "/t/his Court has a function to perform and the Grand Jury as a necessary part of the Court proceedings also has a function that it must perform" (emphasis added).

Next, the judge denounced as unconstitutional ("in violation of every Constitutional provision known to man") the search by the military of the students' rooms which had led to the discovery of hidden arms and ammunition. He in effect suppressed the evidence thereby obtained, but did so with the broader and more general instruction that the jurors were not to consider any evidence obtained by an unlawful search "such as" the one of which he had just spoken. It is apparent that he had heard no evidence or arguments as to the possible validity and justification for the search, since he stated that he had become cognizant of it through the newspaper and other news media.

Having delivered himself of these preliminaries, the judge then instructed that it was the duty of the jurors to investigate all violations of the laws of the state which had occurred in the county, and to return indictments against those who committed them. He immediately followed this instruction with the statement that no one is immune from prosecution because he works for Federal or state government, and that "/a/ny man who either pulls the trigger of a gun or orders some other person to pull the trigger or who is

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responsible for creating a situation, the ultimate outcome of which is the killing of a man . . . should be indicted." He then continued that this applies "to John F. Kennedy, little stupid brother, Robert Kennedy, Mr. McShane, or any other human being," and that if the jurors found that any individual had committed a violation they should indict "and let other officials worry about the prosecution."

Next he charged the President, the Attorney General, Congress and the Supreme Court with being politically motivated in their concept of civil rights and implied that "the Kennedys, (or) their relations and appointees" had limited the right of people in Mississippi to disagree publicly with them.

He then concluded this portion of his charge with a call for "positive action" to "show(ing) the world that you will no longer be trampled or allow stupid blunders and greed to precipitate murder, assault and battery with intent to kill, assault, criminal trespass, unlawful search and seizure and any other criminal acts against the Laws of this State, including our necessary Segregation Laws, to go unpunished" (emphasis added). Then, prior to reading the specific laws which state law required him to charge, he stated "I beg you to remember the first part of this charge when you consider the specific laws that I charge you."

FACTUAL ANALYSIS

It is a fair conclusion that the intent and effect of this charge was to instruct the Grand Jury that the Federal Government and those officers acting for it were acting illegally ("through the excuse of upholding an unlawful order"; political motivation for "unconstitutional" intervention in Oxford and attempt to impose a totalitarian dictatorship; unlawful attempt to upset "our necessary Segregation Laws"); that this unlawful action was the sole cause of the riot and the resultant fatalities; that the actions of Federal officials and the soldiers and marshals under their command constituted assault and battery with intent to kill, assault, and criminal trespass; and that it was the duty of the Grand Jury (the "function that it must perform"; "positive action . . . showing the world that you will no longer be trampled") to determine what Federal officials were responsible and should be indicted and to restrict themselves to that sole line of inquiry

("orders" the pulling of a trigger, which can only be done officially, but no inquiry directed into inciting a mob by harangue; suppression of evidence obtained by allegedly unlawful search "such as" the search of the students' rooms, which in context implied that the grand jury was not to consider any evidence gathered by the Government). Nevertheless, although the judge directed his charge at a specific class of persons, i.e., Government officials, and although he suggested by name possible individuals to indict (the President, the Attorney General, Chief Marshal McShane), he stopped short of actually calling for the indictment of any particular individual, and, indeed, his imprecations were directed at officials at a higher level than the Chief Marshal, the only official indicted.

QUESTIONS PRESENTED

(1) Whether this charge, if made by a Federal judge, would constitute in Federal law a basis for dismissing an indictment.

(2) Whether in Mississippi law this charge constitutes a basis for a state court to dismiss an indictment.

(3) Whether on the basis of this charge a Federal court can dismiss a state indictment:

(a) If the state indictment is removed for trial to Federal court, or

(b) On a writ of habeas corpus.

LEGAL ANALYSIS

1. There is little Federal law on the subject of overreaching by a judge in charging a grand jury and, probably as a compliment to the comparative restraint exercised by the Federal judiciary in this area, no case in which an indictment was actually dismissed as a result of such overreaching. Federal law requires only that the grand jury itself be unbiased, Costello v. United States, 350 U.S. 359, 363, properly constituted, and not show fraud or misconduct. United States v. Morse, 292 Fed. 273, 277-278 (S.D. N.Y., 1922). Beyond that, it may act on incompetent evidence, Holt v. United States, 213 U.S. 245, hearsay, Costello v. United States, supra, can hear opinions, United States v. Garsson, 291 Fed. 646, 648-649 (S.D. N.Y., 1923), and can show indignation at a defendant and give irregular expression to its feelings. Id., p. 649.

As to what would demonstrate bias or improper conduct on the part of a grand jury, few clear lines are drawn. In United States v. Violon, 173 Fed. 501 (S.D. N.Y., 1909), Judge Learned Hand suggested that "misconduct" would be limited to such extreme actions as the use of liquor inside the grand jury room. In United States v. Perrington, 191 F. 2d 246, 252 (C.A. 2, 1951), cert. den. 343 U.S. 907, he also indicated that undue influence exerted by a grand jury foreman who had a financial interest in an indictment being returned might be a basis for quashing the indictment, but held that the defendant has the burden of proving that such influence was exerted and could not inspect generally the grand jury minutes in order to develop such proof. Moreover, the judge gave no indication as to what sort of conduct on the foreman's part would constitute undue influence. The statement in Costello in regard to bias cited Pierre v. Louisiana, 306 U.S. 354, which dealt with a Negro defendant indicted by a state grand jury from which Negroes were systematically excluded. Such exclusion results in improper constitution of the grand jury, forbidden by the Constitution and from which bias against a Negro defendant can be conclusively presumed. Cf. Strauder v. West Virginia, 100 U.S. 303, 309.

The only case in which a Federal indictment was actually dismissed because of influence exerted on the grand jury was United States v. Farrington, 5 Fed. 343 (N.D. N.Y., 1881). There the indictments were prepared by an attorney for bank creditors, rather than by the district attorney, and the former used his appearance as a witness as an opportunity to exhort the grand jury to indict in language "animated, spirited, and excited," over the objections of the district attorney that improper evidence was being offered. The indictments were not read to the jury, nor were the substance of the counts explained. The indictments were quashed, but as pointed out by Judge Hand in the Circuit Court opinion in Costello, 221 F. 2d 668, 679 (C.A. 2, 1955), the ruling was confined to "extreme cases, when the court can see that the finding of a grand jury is based on such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused." Farrington at p. 348. Moreover, Judge Hand cast doubt on the continuing authority of even this limited holding by comparing the case, in a footnote (n. 20, p. 679), to Violon, Morse and Garsson.

From the foregoing, it would appear that in Federal law an indictment will be quashed only if bias can be imputed to the grand jury as a matter of law, as in the systematic exclusion cases, or

where it can be determined from all the facts that the jury must have been biased to bring in the indictment that it did. It is open to question whether an indictment returned after an overreaching charge by the judge will fit either category. The question has been raised only once directly and once indirectly. In United States v. United States District Court, 238 F. 2d 713, 721-722 (C.A. 4, 1956), cert. den. 352 U.S. 981, it was stated that it is a clear invasion of the grand jury's powers to tell it that it either must indict or that it cannot indict. The case did not involve an objection to an indictment, however, but rather to the action by the court in interfering with the grand jury's investigation.

The question was raised more directly in Walker v. United States, 93 F. 2d 383 (C.A. 8, 1937), cert. den. 303 U.S. 644. There, the charge of the trial judge to a grand jury investigating election frauds was a scathing condemnation of that type of crime, intemperate and oratorically expressed, summoning the grand jury to take action and indict. Pleas in abatement to indictments returned by the grand jury were made upon the ground that the charge was prejudicial, and were overruled by the trial court. The Court of Appeals, although commenting at p. 390 that the charge contained expressions that were "not to be commended as models in explaining to grand jurors the nature of their duties," found no showing of prejudice and sustained the ruling because the charge did "not go so far as to urge that any individual, guilty or innocent, named or unnamed, be accused by indictment." In arriving at this ruling, the Court quoted from a Mississippi case, Fuller v. State, 85 Miss. 199, 34 So. 749 (1904), that "it is a usurpation of power /for a judge/ to denounce individuals, or to specifically direct the attention of the grand jury to any named person," which would appear to imply a ruling that if the judge did go so far as to urge that any named individual be indicted, a resultant indictment of him would be subject to quashing.

It is, however, open to question as to what extent this implied dicta from Walker can be said to establish a rule whereby Judge O'Barr's charge, if made in Federal court, would have entitled Chief Marshal McShane to the dismissal of a Federal indictment. For one thing, the brunt of the judge's peroration was directed at the chief marshal's superiors, rather than at him himself. His name was inserted almost in passing. For another thing, the judge did not actually specifically urge that the chief marshal, or anyone else, be indicted. The most that can be said

is that he urged the grand jury to take some action in defense of what he deemed to be the rights of the State of Mississippi against the Federal Government, and merely mentioned the chief marshal's name as being among the specific persons who were not immune, because of their office, from indictment. Were a charge such as made by the judge to furnish the basis for quashing a Federal indictment, therefore, it would be an extension of even the implied doctrine of Walker.

There is, however, a ground for arguing that the instant charge affords a basis in Federal law for dismissal of the indictment. The basis, however, would be constitutional, rather than arising out of the control of Federal appellate courts over district courts, as does the implied Walker doctrine. The ground for dismissal would be on a parity of reasoning with the Negro exclusion cases. There it is presumed that the indictment of a Negro defendant by a grand jury from which Negroes have been systematically excluded is likely to have resulted from bias directed not at him personally, but at him as a member of a class; i.e., the Negro race. Cf. Strauder v. West Virginia, supra, 100 U.S. 303, 309. In the instant case, Judge O'Barr sought to stir up, and called upon the jurors to act upon, bias directed at another class; i.e., Government officials, or at least those Government officials whose performance of duties brought them into conflict with the cherished prejudices of the white people of Mississippi from whom the grand jurors were chosen. The judge directly appealed to the jurors to take "positive action" to uphold the rights of the State against allegedly wrongful Federal intervention, and the clear implication was that the "positive action" could best be taken by indicting some person from among the class of Government officials who had taken a part in the Oxford occurrences. Thus, although the charge may have stirred up no bias against the chief marshal personally, it did stir up bias against the class to which he belonged, and his indictment is likely to have resulted therefrom. Whether this provides a basis for dismissal of the indictment by a Federal court will be considered hereafter.

2. As noted, the implied Walker doctrine is based upon a Mississippi case, Fuller v. State, supra. Fuller, however, comprised the farthest point to which the doctrine extended, and the Mississippi courts have since receded materially from that point.

The first case to establish the principle in the state was Blau v. State, 82 Miss. 514, 34 So. 153 (1903). There, after a grand jury which had carried on an intensive investigation of bucket shop operations had failed to indict, made its final report and asked to be discharged, the district judge refused to accept the report or discharge it and instead delivered a lengthy charge in which he stated that the law was clear and the evidence sufficient and he did not know why the jury had not returned an indictment against "these parties," and that if it failed to do so the town would soon be overrun with bucket shops. The grand jury thereupon indicted defendant, and his motion to quash was denied. The Supreme Court of Mississippi held that this was a clear attempt to dictate to and coerce from the grand jury an indictment, that as such it was an abuse of discretion by the district judge, and that the motion to quash should have been sustained.

In Blau, the district judge apparently did not specify the defendant by name, but the charge was clearly directed against him and the pressure to indict was equally clear. In Fuller, which was decided a year later, the defendant's name was mentioned, but the words used were neither denunciatory nor accusatory. Rather, in charging the statute concerning the unlawful sale of alcoholic beverages, the judge said, "Have you never heard the name of Charlie Fuller?" The court held at 85 Miss. 205-206 that because the attention of the grand jury was at that time being specifically directed to the particular statute and the grand jury had impressed upon them their duty under oath to indict all violators, the fact that the words themselves were neither denunciatory nor accusatory was immaterial. The mere naming of a particular person in such direct connection was held to be tantamount to a statement that in the judge's opinion the person named was guilty of violating the statute, and hence he was deprived of his constitutional right to have his case investigated by a fair and impartial grand jury free of outside influences.

These two cases were part of the more general rule that among the functions of a Mississippi grand jury was to stand as a bulwark for the citizen against unfair accusation and as such it must be kept free from all outside influences. See discussion in Blau at 82 Miss. 518-521. In similar vein, an indictment was held subject to quashing where a private prosecutor appeared before the grand jury, Collier v. State, 104 Miss. 602, 61 So. 689 (1913);

Wilson v. State, 70 Miss. 595, 13 So. 225; Burr v. State, 53 Miss. 425, where the sheriff did so; Herrington v. State, 98 Miss. 411, 53 So. 783, where a private attorney procured himself to be summoned as a witness before the grand jury and upon appearing urged the finding of an indictment; Welch v. State, 68 Miss. 341, 8 So. 673, where a private attorney both appeared before the grand jury and drew the indictment; State v. Barnett, 98 Miss. 812, 54 So. 313, and where a bar association's report charging defendant, a justice of the peace, with extortion was present in the grand jury room and read by the jurors. State v. Owen, 156 Miss. 487, 126 So. 25 (1930); but see Price v. State, 152 Miss. 625, 120 So. 751 (1929), where an indictment was not quashed although, after a first grand jury had failed to indict, a petition was presented to the second grand jury containing unsworn statements and requesting that defendant be indicted. More recently, an indictment was quashed where the judge, in the absence of the district attorney due to sickness, presented the case to the grand jury, although he expressed no opinions on its merits. Sanders v. State, 198 Miss. 587, 22 So. 2d 500 (1945).

If Fuller were still the unquestioned rule in the state, Chief Marshal McShane would very probably be entitled, under state law, to have his indictment quashed. However, two recent cases have cast considerable doubt on the continuing vitality of Fuller, and even of Blau. The first is Goss v. State, 205 Miss. 177, 38 So. 2d 700 (1949), where the circuit judge began his charge by saying: "Gentlemen, it is hot and I did not intend calling the Grand Jury at this time, but there has been a series of outbreaks of crime in your community recently. I am going to therefore make only a short charge and want you to bring me these indictments by noon today." Although defendant found the charge to have clear enough application to him to move, prior to being indicted, to quash the grand jury and dismiss the panel, the State Supreme Court found, at 205 Miss. 186, that the reference to the recent crime wave could not have directed any undue influence to his particular crime, since it had been committed seven months previously. Of more significance, however, is the fact that the judge, in effect, clearly ordered the grand jury to return indictments, and the Supreme Court, although stating that it did not approve that type of charge, did not find in it a basis to quash. The case would thus appear to signal a retreat from the general principle that Mississippi grand juries are to be kept free from all outside influences, including pressure from the judge.

The retreat became a rout in Wheeler v. State, 219 Miss. 129, 63 So.2d 317 (1953). There, the judge, in charging a grand jury investigating the well publicized homicide of two policemen by two non-residents, first talked generally about the duty of grand jurors and compared them to soldiers who are called upon to make sacrifices for their country, and then continued: "I am informed, and it is no use for a man to stick his head in the sand like an ostrich and try to dodge, I am informed that recently in this county some people have come into the county and taken the lives of two soldiers who have paid the supreme sacrifice to uphold the law. Their blood cries out from the ground to you today. Will you be a good soldier, or will you hide in the dugout?"

The Supreme Court found no error in this charge. It limited Blau to the specific situation wherein the grand jury, after an intensive two or three week investigation, fails to indict, and "at this juncture" is sent back for further deliberations with a special charge calling for an indictment, and limited Fuller to the singling out of the defendant by specifically mentioning his name. See 219 Miss. 145-146. Then, over the objection of the dissent that because of the publicity the grand jurors clearly knew to whom the circuit judge referred and that his comparison of the duty of grand jurors to that of soldiers and question concerning hiding in the dugout were clearly understood as a call to indict, see 219 Miss. 151-155, it found that the judge did not specifically name either the policemen or the defendants and could not clearly be understood as referring to them, and therefore that he did not tell the jurors to indict defendants but merely called for an investigation of the homicide. See 219 Miss. 146.

Thus, although the majority did not specifically overrule Fuller and Blau but merely distinguished them, it seems clear that its ruling was based on the proposition that grand juries are merely inquisitorial and accusatory bodies and not the final determiners of guilt, see ibid., and therefore that pressure exerted upon them is not sufficiently prejudicial to a defendant to warrant quashing an indictment. Certainly the opinion precludes any contention from Mississippi law on behalf of Chief Marshal McShane based on the implications of Judge O'Barr's charge. In consideration of the fact that the Wheeler charge comprised a clearer call for the indictment of

~~the indictment of~~ the defendants therein than can be read from the judge's passing reference herein to the chief marshal, the opinion also makes questionable any contention based on the specific mention of the chief marshal's name. It is possible, of course, that the question is not finally settled, and that in a future case the State Supreme Court will veer back again in the direction of Fuller and Blau. But certainly it can not now be contended that Mississippi law clearly entitles the chief marshal to have his indictment quashed.

3. There are two ways that the indictment of Chief Marshal McShane can be brought into Federal court. One is by removal, pursuant to 28 USC 1442; the other on a writ of habeas corpus, pursuant to 28 USC 2241(c)(2). The former applies when action in state court is taken against an officer of the United States or of the Federal courts for any act done under color of such office. In such instance, the case is tried in Federal court with state officials conducting the prosecution. The latter applies to any person in custody for an act done or omitted in pursuance of an act of Congress or an order of a Federal court or judge. In such instance, upon proving that the act was of such nature the person is entitled to freedom from custody and state prosecution. In re Neagle, 135 U.S. 1. The effect that a Federal court can give to Judge O'Barr's charge differs in each proceeding.

a. Removal of a state prosecution to Federal court merely transplants the case from one court to another. The case remains a state prosecution charging violation of state law, and merely prosecuted in a Federal forum. Smith v. United States, 58 F. 2d 735, 736 (C.A. 5, 1932), cert. den. 287 U.S. 631; see also Tennessee v. Davis, 100 U.S. 257, 271-272. The Federal court uses Federal procedure in trying the case, but applies the substantive law of the state initiating the prosecution. Stinnett v. Commonwealth of Virginia, 55 F. 2d 644, 648 (C.A. 4, 1932); Carter v. State of Tennessee, 18 F. 2d 850, 855 (C.A. 6, 1927); Miller v. Commonwealth of Kentucky, 40 F. 2d 820, 822 (C.A. 6, 1930); State of Virginia v. Felts, 133 Fed. 85, 92 (W.D. Va., 1904); State v. Collins, 10 F. Supp. 1007, 1008 (S.D. Tex., 1935); State of North Carolina v. Connell, 74 Fed. 734, 735 (W.D.N.C., 1896).

The question of the effect of Judge O'Barr's charge presents, of course, an issue of substance, rather than of procedure, so that Mississippi law would appear to apply. However, it is not the same sort of substantive question as that with which the aforementioned cases were concerned. In those cases the rule was applied in regard to the definition of the elements of the crime, State of North Carolina v. Cosnell, supra, or the method for assessing punishment, whether by jury recommendation or court discretion, Stinnett v. Commonwealth of Virginia, supra; Miller v. Commonwealth of Kentucky, supra; State of Virginia v. Felts, supra, both of which issues proceed directly out of the theory of the prosecution itself. Here the issue, although substantive, is collateral to the prosecution. The only one of the foregoing cases which involved a collateral attack on the indictment was State v. Collins, supra, where, after conviction in Federal court, defendant attacked his state indictment on the grounds that an alien was on the grand jury that returned it. In disposing of the question, the court cited Federal cases, see 10 F. Supp. 1009, but the disposition was on the basis that defendant had not made a timely motion to quash and could not raise the issue for the first time after trial, which is a procedural point and hence governed by Federal law.

At this point, the reason for the rule should be noted. The rule would appear to be one of necessity. Compare Tennessee v. Davis, supra. That is to say, a Federal court, faced with a removed state prosecution, cannot avoid making decisions on either the substantive questions that proceed directly out of the indictment or the procedural questions incident to the trial itself. Since it is a Federal trial, Federal procedural law must apply, but since it is a state indictment, state substantive law--i.e., the state's determinations as to the elements of the crimes that it denounces and the punishments therefor--must also apply. Of necessity, however, if the Federal court is faced with an unresolved question of state substantive law in this regard, it must resolve it, drawing, of course, on whatever instruction can be obtained from prior state rulings, state legislative history, etc.

This same necessity does not obtain where a collateral attack is made on the indictment, for the defendant can move to quash in state court and, if he is unsuccessful, then remove the case to Federal court. This procedure would seem to be implied by State v. Collins, supra. To be sure, the defendant, if unsuccessful with his motion to quash, is faced with a

dilemma, for if state law deems the motion interlocutory and will not allow an immediate appeal he must either relinquish the issue or forego his right to trial in Federal court. But since the issue is entirely separate from the defense which gives him the right of removal--that his act was committed in line of duty--it is not unreasonable to force him to the choice. It is not the only such choice that defendants have to make; for example, the very act of removal may force the choice of foregoing a state procedure more favorable to him than Federal procedure.

It is possible that if state law clearly gave him the right to dismissal of the indictment he could make the motion in Federal court. The reason for removal is to allow a Federal officer a trial free from local prejudice, see Maryland v. Soper (No. 1), 270 U.S. 9, 32, and it could be argued that co-extensive with his right to removal is the right to present to Federal court for determination, and thus not be forced to relinquish, even a state issue that the state courts would clearly find in favor of any other defendant in his position but might not find in his favor due to local prejudice. But this argument falls if the Federal court, as here, must construe unclear, and not merely apply clear, state law.

A different situation is presented, however, if the motion to dismiss is grounded on the argument, comparable to the Negro exclusion from grand jury cases, that the effect of Judge O'Barr's charge was to create prejudice against the class to which Chief Marshal McShane belongs--i.e., Federal officials--sufficient to deprive him of his right to have his case heard by an unbiased grand jury. This, of course, presents a Federal constitutional issue. To be sure it is the rule, applied in the Negro exclusion cases as in others, that a contention of unconstitutional state action must first be made in state court, except in exceptional circumstances. But the reason for this rule is to prevent interference with "the due and orderly administration of justice in a state court," see United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17; Keegan v. State of New Jersey, 42 F. Supp. 922, 924 (D.N.J., 1941), which, after all, might itself sustain the constitutional objection. The rule is generally applied when resort is attempted to habeas corpus or other extraordinary remedies. But in the case of a removal there already has been an interference with the "due and orderly administration" by the state court, to the extent of supplanting its jurisdiction with Federal jurisdiction. The Federal court becomes, as explained above, the substitute for the state court for the purposes of disposing of the prosecution. Indeed, "due and orderly administration" would appear to require that it be the recipient of all motions based upon constitutional

contentions, for if the defendant is required to make such motion in state court before removal, he will be faced if it is denied with the dilemma of relinquishing his constitutional contention or foregoing his right to removal. This, of course, is the same dilemma that he is faced with if he wishes to make a collateral attack on the indictment based on state law. But it is one thing to say that he must make a choice between his Federal right of removal and his asserted state right to quash, and quite another thing to say that the choice must be made between the right of removal and an asserted constitutional right. This latter situation would appear to provide the "exceptional circumstance" permitting the motion to be made in Federal court.

This same rationale would allow a motion to dismiss to be made based upon the implied Walker doctrine if the doctrine were deemed to have a constitutional basis. But since, as noted, the authority cited for it in Walker was the Mississippi case of Fuller v. State, the doctrine, to whatever extent it exists in Federal law, would appear to be based upon no more than the powers of a Federal appellate court to set the standards that must be observed within the Federal judiciary. As such, of course, it is Federal substantive law which cannot be applied to a state prosecution removed from state court. For surely a Federal official cannot, merely because he is a Federal official and was acting as such, have greater rights against a state grand jury than any other person indicted by that grand jury.

b. Chief Marshal McShane will be entitled to a writ of habeas corpus freeing him from the Mississippi indictment upon a showing that the acts for which he was indicted were done by him in the line of his official duty. In re Neagle, supra. He need not show that any action that he took turned out, upon retrospect, to be actually necessary to achieve the results that he was commanded to obtain (i.e.— see to it that the court order for the enrollment of Meredith was carried out and not prevented by mob violence), but rather that he reasonably thought they were necessary. For, by way of comparison, Neagle killed Judge Terry when he thought that Terry was reaching for a bowie knife that he was known to carry upon his person, but it turned out that in that particular instance Terry did not have the Bowie knife with him.

The proceeding differs materially from removal. The latter is obtained upon a mere showing that the defendant was acting under color of authority when he allegedly committed

the act for which he was indicted. The issue is then brought to trial in normal fashion, except that trial is in Federal court instead of in a court of the state which brought the indictment. The defendant can offer as a defense that he didn't commit the act, see Maryland v. Soper (No. 1), supra, pp. 32-33, overruling State of Illinois v. Fletcher, 22 Fed. 776 (N.D. Ill., 1884), that the act is not criminal under state law, or that the act, if done and criminal under state law, was nevertheless within the scope of his authority and therefore he is immune to punishment by the state. Maryland v. Soper (No. 1), supra, p. 34. The state seeks to convict by showing that the act, although done under color of authority, was ultra vires and hence afforded no immunity. People of Puerto Rico v. Fitzpatrick, 140 F. Supp. 398 (D.P.R., 1956).

In the habeas corpus proceeding, there is no trial as such, although the judge can hear such evidence as he deems necessary to determine the truth or falsity of the allegations of the petition. See In re Neagle, supra, p. 75. However, the only issue that can be raised and heard by the petition is whether the indictment is for an act done in pursuance of Federal authority; the petition cannot raise other issues no matter how valid they may be as a defense or bar to the indictment. This is made clear in Neagle at pp. 53-54, where the Court set forth that had petitioner been a private citizen his killing of Terry in defense of Justice Field's life would have constituted justifiable homicide, but that this would have been a matter for the California courts to determine and would have afforded the Federal courts no authority to grant the writ.

On this basis it can be seen that Judge O'Barr's charge, whether it is deemed to have violated the chief marshal's constitutional rights or only his rights under state or Federal law, nevertheless violated his private rights and not his rights as a Federal official, and as such cannot sustain the grant of a writ pursuant to 28 USC 2241(c)(2). To the extent that the charge is deemed to have violated his constitutional rights, a writ can be sought pursuant to §2241(c)(3). But such petition would be barred until he had exhausted his state remedy. 28 USC 2254; United States ex rel. Kennedy v. Tyler, supra; Keegan v. State of New Jersey, supra. It is only as incident to the removal proceeding, and not by writ of habeas corpus, that the constitutional issue can be raised.

However, the charge, while it will not of itself sustain quashing the indictment by habeas corpus, can assist in that result in a petition brought pursuant to §2241(c)(2). Such a

petition must show that the indictment was for an act done in pursuance of Federal authority. This fact cannot be determined from the face of the indictment, although of course the necessary additional facts can be supplied by the allegations of the petition. But the charge, appended to the petition, can serve to make this fact even clearer. For the judge said not one word about the grand jury investigating to determine whether any person, acting under color of enforcing the court order, in fact committed acts beyond the scope of their authority to enforce that order. Rather, he categorized the order as unlawful, told the jurors that it is a violation of state law to create a situation the ultimate outcome of which is the killing of a man (without distinguishing between creating that situation by obeying a lawful court order, or otherwise), made numerous statements conveying the idea that every action in the premises taken by every major Federal official was unlawful and done in bad faith, and called for "positive action" to uphold state laws, including the segregation laws which Federal courts had declared unconstitutional. The indictment was a clear call to the grand jury to take action that they could take only by indicting some Federal official for performing his duty. With this background (unless, of course, the state can come in with positive proof that Chief Marshal McShane took some ultra vires action that incited to riot), the indictment would appear clearly to come within the purview of In re Neagle.

RECOMMENDATIONS

The two courses open are to bring a removal action and then move to dismiss the indictment as violative of the chief marshal's constitutional rights because of the bias created by the judge's charge, or to bring a Neagle petition with the charge as an aid to the petition's contentions. Of the two, the latter better commends itself. The constitutional theory would be new and an extension of existing doctrine, and for this reason might have difficulty in getting accepted. Moreover, it must be remembered that in the usual course of things we are on the other side. Considering that not all Federal judges are models of judiciousness in their charges (see, e.g., Walker v. United States, supra), success with the constitutional theory in this case could create a precedent that would come back in the future to haunt us. The Neagle theory, on the other hand, is sanctioned by precedent, and will not be overly extended by use of the charge in aid of it. It has more likelihood of success, ~~and success~~, and by its very

nature is not likely to create future problems for us. Furthermore, if we try the Beagle approach and fail, we can always remove and bring the constitutional motion, although it must be admitted that an initial failure (which almost certainly would involve a finding that the chief marshal had acted ultra vires) would make success on the alternative approach quite difficult.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

IN THE MATTER OF THE PETITION OF	)	
	)	
JAMES P. McSHANE	)	No. _____
	)	
FOR A WRIT OF HABEAS CORPUS	)	

MEMORANDUM IN SUPPORT OF PETITION

STATEMENT OF FACTS

Petitioner has been indicted by a grand jury of the State of Mississippi for committing physical acts on September 30, 1962, which allegedly led to a breach of the peace and incited a riot in violation of Miss. Code Ann. section 2087.5. He is now in custody pursuant to this indictment. According to the indictment, the unlawful act performed by petitioner consisted of "the ordering of tear gas to be fired into a crowd assembled at University, Mississippi, and thereby causing tear gas to be fired in said crowd".

The circumstances under which this act was committed are as follows: Petitioner is Head of the Executive Office for United States Marshals and was deputized as a Deputy United States Marshal for the Northern District of Mississippi. On September 30, 1962, the date in question, petitioner was stationed at the University of Mississippi in Oxford, Mississippi, and was assigned to command the various Deputy United States Marshals who were stationed at the University of Mississippi in order to execute orders of the United States Court of Appeals for the Fifth Circuit and of the United States District Court for the Southern

District of Mississippi relating to the admission of James H. Meredith to the University of Mississippi.

The court orders directed certain named individuals and persons acting in concert with them to admit James H. Meredith to the University of Mississippi and to refrain from interfering with his right to enter and attend the University. Since there was some violent opposition to Meredith's attendance at the University, it became necessary, in order to execute the court orders, to assign additional Deputy United States Marshals to the Oxford, Mississippi, area.

On September 30, 1962, officials of the United States Department of Justice met in the Lyceum Building of the University of Mississippi with University representatives in order to discuss the means whereby the court orders could effectively be carried out. During this meeting, Deputy United States Marshals stood guard near the Lyceum Building so as to protect those who were conferring from physical attack. A crowd which had assembled near the building, and which was steadily growing in size, became increasingly violent during the day and caused substantial property damage and physical injury. The crowd -- which could more accurately be described as a dangerous mob -- refused to desist despite repeated appeals that it permit the court orders to be peaceably executed. At approximately 8:00 p.m., petitioner perceived that there was no other means to keep the mob from attacking the building and its occupants and from otherwise continuing its vandalous, harmful and intimidatory course of conduct than to fire tear gas into its midst. Petitioner thereupon ordered tear gas to be fired into the mob in order to disperse it and restore order so that the court judgments might be executed.

Subsequently, on November 10, 1962, Circuit Judge Walter M. O'Barr of the Third Judicial District of Mississippi impaneled a grand jury in Lafayette County, State of Mississippi. He instructed the grand jury before it began its investigation in terms which were calculated to inflame and prejudice the grand jury against the petitioner and other officials who participated in the execution of the lawful orders of the United States Court of Appeals for the Fifth Circuit and of the United States District Court for the Southern District of Mississippi. Thereafter, the grand jury entered an indictment against the petitioner, and the petitioner surrendered to the custody of the Sheriff of Lafayette County. Upon the filing of a Petition for a Writ of Habeas Corpus to this Court, petitioner was ordered to be temporarily released from the custody of the Sheriff pending final disposition of this cause. Petitioner now contends that he is entitled to absolute release.

ARGUMENT

I.

PETITIONER IS ENTITLED TO RELEASE UNDER 28 U.S.C. 2241(c)(2) BECAUSE HE IS IN CUSTODY FOR AN ACT DONE PURSUANT TO A FEDERAL COURT ORDER.

A. Petitioner's instruction that tear gas be fired was "in pursuance of ... an order ... of a court ... of the United States."

The federal court orders were directed at certain named individuals, other persons acting in concert with them, and, in the case of the Court of Appeals' order, to "any and all persons having knowledge of the decree." Persons subject to the orders were prohibited from discriminating against James H. Meredith

and from frustrating or interfering with his rights to enter and attend the University of Mississippi. If these orders were to be executed, it was obviously necessary for those to whom responsibility for their execution was lawfully delegated to make every reasonable effort to prevent violent mobs from intimidating Meredith or officials of the University of Mississippi. To this end it was necessary for Deputy United States Marshals to be on the scene in order to protect the principal participants and to quell riots which would interfere or otherwise "impair, frustrate or defeat" Meredith's right to enter and attend the University.

The riot which occurred near the Lyceum Building on September 30, 1962, could not have been permitted to continue if the court orders were to be made effective. Had the mob been allowed to follow its own inflamed passions, it would have stormed the building, disrupted the conference which was then in progress, and substantially hindered the efforts which were being made to enroll Meredith at the University. The time-tested police device of firing tear gas into the midst of a threatening crowd -- which is used by most law enforcement agencies in such situations -- was the only reasonable method of controlling the situation.

Further proof that the act for which petitioner was indicted was performed "in pursuance" of federal court orders appears from the inflammatory charge given to the grand jury by Judge O'Barr. In his charge, the Judge informed the grand jury that the alleged unlawful acts which they were to investigate constituted attempts "to crush the people of this State through the excuse of upholding and enforcing an unlawful order that had not become final". It was petitioner's duty, as a result of

his official position, to uphold and enforce the court orders, and his authority to act was not affected by the circumstance that the order could be appealed (unless a lawful stay were entered) or by any disagreement regarding the merits of the controversy. A similar contention was summarily rejected in an analogous habeas corpus proceeding instituted by a Deputy United States Marshal in Anderson v. Elliott, 101 Fed. 609, 615 (4th Cir. 1900), cert. dismissed, 22 S. Ct. 930 (1902). Consequently, it appears clearly from the Judge's charge that the grand jury was, in effect, directed to enter indictments against persons who were acting within their authority "in pursuance" of orders of the federal courts, notwithstanding the fact that the State could not reach this conduct with its criminal law.

There can be no serious controversy as to whether petitioner's instruction to fire the tear gas was authorized. Section 547(b) of Title 28 of the United States Code commits to the United States Marshal of each district the authority "to execute all lawful writs, process and orders issued under authority of the United States," and section 547(c) subjects marshals to the supervision of the Attorney General of the United States. On instructions of the Attorney General, petitioner was placed in command of the Deputy Marshals in Oxford, Mississippi, on September 30, 1962, and it thereby became his duty to issue such reasonable directives concerning the preservation of order and the conduct of the marshals stationed at the University as the circumstances warranted. His order that tear gas be fired into the crowd was given "in the performance of a duty imposed by the Federal law," United States ex rel. Drury v. Lewis, 200 U.S. 1, 8 (1906), and its sole purpose was to facilitate the execution of the orders of the federal courts...

B. Habeas corpus is the appropriate remedy.

Sections 2241-2254 of Title 28 of the United States Code govern the issuance of habeas corpus on behalf of persons held in the custody of a State. Section 2241(c) enumerates the grounds on which such a writ may issue, and paragraph (2) thereof states that one permissible ground is if the prisoner "is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States".

This provision of law is one of the oldest of the statutes of the United States, having first been adopted as the Act of March 2, 1833, c. 57, § 7 [4 Stat. 634]. The principle underlying its enactment and the cases in which it has been applied "is that the state has no jurisdiction over a person when he is acting under the authority of the United States." In re Waite, 81 Fed. 359, 365 (N.D. Iowa 1897). As was said in In re Neagle, 135 U.S. 1, 75, (1890), where a United States deputy marshal was discharged by habeas corpus from the custody of the State of California, which was holding him for trial on the charge of murder as the result of his having killed an individual who was threatening a Circuit Justice whom he had been assigned to protect:

> To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, 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 under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. (Emphasis in the original.)

See also Ohio v. Thomas, 173 U.S. 276, 283-84 (1899).

This case is governed squarely by the principle of In re Neagle, and the petitioner is entitled to the same remedy as was afforded to the prisoner in Neagle. Indeed, the instant case is one in which the statutory remedy of habeas corpus is more clearly available than was true in Neagle. For in Neagle the Supreme Court divided over whether a United States Deputy Marshal was acting in pursuance of any law while he was accompanying a Circuit Justice and defending his person against physical attack. Two dissenters were of the opinion "that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers." 135 U.S. at 80. The majority of the Court held that "any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase." 135 U.S. at 59. In the present case, however, petitioner was acting within the limits of the authority, expressly delegated to him by statute, to "execute all lawful ... orders issued under authority of the United States." 28 U.S.C. 547(b).*/

Any contention to the contrary is inconsistent with the facts. It cannot be disputed that a large unruly crowd which refused to disperse surrounded the Lyceum Building at the University of Mississippi on September 30, 1962, while efforts were being made within the building to carry out orders of the federal courts. Nor can it be disputed that individuals in the crowd committed acts which endangered persons and property. Faced with this attempt to obstruct the execution of federal court orders, petitioner was obliged to use physical force. The language quoted in In re Neagle from Ex parte Siebold, 100 U.S. 371, 395 (1880), is most relevant:

*/ The decision in Neagle relied heavily on an earlier set of decisions applying the same provision of the habeas corpus statute, all reported together as Ex parte Jenkins, 13 Fed. Cas. 445 (No. 7,259) (E.D. Pa. 1853). 135 U.S. at 73-74. In that case certain Deputy Marshals performing their duties under the Fugitive Slave Act, sought to arrest a runaway slave and injured him seriously while doing so. The marshals were released by federal courts on the occasion of each of three arrests by Pennsylvania authorities. The court's remarks concerning the purpose of the statute, delivered on the occasion of the second release, are particularly appropriate here:

> He who has read the act of Congress of March 2nd, 1833, or who remembers the times to meet which it was passed, knows perfectly well that it looked to the contingency of a collision between the general and the state authorities. There were statesmen then, who imagined it possible that a statute of the United States might be so obnoxious in a particular region, or to a particular state, as that the local functionaries would refuse to obey it, and would interfere with the officers who were charged to give it force, even by arresting and imprisoning them. 13 Fed. Cas. at 449.

> Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course?
>
> Quoted in 135 U.S. at 61.

It is clearly established by the cases that one in petitioner's position should be denied a writ of habeas corpus only if the physical force he used was ultra vires, i.e., if it "exceeded the exigency of the process under which ... (he) acted." Ex parte Jenkins, 13 Fed. Cas. 445, 448 (No. 7,259) (E.D. Pa. 1853).*/ Contrariwise, if petitioner "did no more than what was necessary and proper for him to do" in the exercise of his federal authority, In re Neagle, 135 U.S. at 75, he is entitled to release on habeas corpus.

This does not mean that the State may apply hindsight in judging his conduct. If the officer acts within what he honestly believes to be the necessities of the situation, the writ will not be denied him even if his belief was mistaken. He is entitled to absolute release simply if "he was at no time possessed of any ulterior design or motive, or any intention of doing anything other than merely to perform his full duty toward his Government." Ex parte Beach, 259 Fed. 956, 960 (S.D. Cal. 1919). "For the mode or manner in which he performed the duty imposed upon him by the laws of the United States he cannot be called to account in a criminal case brought in a state court, based upon provisions of a state statute." In re Waite, 81 Fed. at 372.

Compare, for example, United States ex rel Drury v. Lewis, 200 U.S. 1 (1906), with Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944). In Drury it was held that the District Court properly exercised its

*/ The third opinion in the Jenkins case, discussed in the footnote on page 7A, supra, states the test as follows:

> If the evidence shall present the case of an imperfect justification; if it shall show that these relators, or any of them, have transcended the rightful limits of their authority, and have wilfully or ignorantly violated the law, no considerations of policy or sympathy will press upon this court to rescue them from punishment, by withholding them from the tribunal which demands their presence. But, on the contrary, if it shall appear before me that they honestly and rightfully sought to execute their writ; that they employed force only because it was needed, and no more than was needed; they must not be withdrawn from their daily recurring official duties, and sent away with the sanction of the court, under whose mandate they have acted, and by whom their action has been approved, to take their trial in a distant part of the country. 13 Fed. Cas. at 452.

discretion to deny the writ on behalf of two members of the armed forces charged with homicide when there was conflicting testimony concerning whether any force at all was needed to arrest the deceased, who was suspected of having committed a federal offense. In Brown v. Cain, on the other hand, the prisoner was released from custody on a similar charge upon a finding "that he had reasonable cause to believe and did honestly believe that the arrest was necessary to the performance of his duty in quelling a riot, and that his use of the weapon was reasonably necessary in order to make the arrest". 56 F. Supp. at 59-60. See also Castle v. Lewis, 254 Fed. 917 (8th Cir. 1918).

In the instant case, petitioner was under specific directions from his superiors to assist in the implementation of federal court orders. He found himself faced with a huge crowd of persons who had gathered to demonstrate their disapproval of said orders and who desired to obstruct the implementation of the orders. Since the crowd was acting violently and threatening to impede implementation of the orders, and since petitioner had reasonable cause to believe that it would hinder effective execution of the orders if immediate steps were not taken, he cannot be criminally punished by the State for acting as he did. The specific measures that he took to counter the threat are not open to question, so long as they were not inherently unreasonable. It is only if the State can demonstrate that the crowd was peaceful and unthreatening that it can be said that petitioner had no reasonable basis for taking the actions which form the basis of the State's indictment, and hence that such actions were not within his lawful scope of authority.

C. Habeas corpus is appropriate notwithstanding petitioner's additional right to have this case removed to the federal courts under 28 U.S.C. 1442(a)(1) and 1442(a)(3).

Congress enacted the removal statute contemporaneously with the habeas corpus provision in the Force Bill of 1833, 4 Stat. 633-34, and intended that both remedies be available under appropriate circumstances. In the years since 1833, Congress has expanded the removal provision to include other federal officers without altering the generally applicable habeas corpus provision, which it has re-enacted to date. Thus, in the case of removal, the provision was extended to internal revenue officers during and after the Civil War period. (See Act of March 7, 1864, ch. 20, sec. 9, 13 Stat. 14, 17; Act of June 30, 1864, ch. 173, secs. 50 and 173, 13 Stat. 223, 241, 303; Act of July 13, 1866, ch. 184, sec. 67, 14 Stat. 98, 171). The right of removal was further extended to officers of either House of Congress (Act of March 3, 1875, ch. 130, sec. 8, 18 Stat. 371, 401), to officers of the United States courts (Act of August 23, 1916, ch. 399, 39 Stat. 532), to soldiers in the military service (Act of August 29, 1916, ch. 418, sec. 3, Article of War 117, 39 Stat. 619, 650, 669; re-enacted by Act of June 4, 1920, ch. 227, sec. 2, Article of War 117, 41 Stat. 759, 787, 811; 10 U.S.C. 1589), and to those engaged in the enforcement of the National Prohibition Act (Act of October 28, 1919, ch. 85, title II, sec. 28, 41 Stat. 305, 307, 316). These enactments were largely combined in 28 U.S.C. 76, 77 (1940 Ed.); and their modern counterparts appear in 28 U.S.C. 1442 and 1442a, which is applicable to any officer of the United States or any agency thereof, or to a member of the armed forces of the United States, acting under color of office or under certain other enumerated conditions derived from the earlier statutes.

On the other hand, the habeas corpus remedy of the Force Bill of 1833 has been carried down through successive enactments to modern times almost in haec verba. See Revised Statutes, section 753; 28 U.S.C. 453 (1940 Ed.); and the current 28 U.S.C. 2241, particularly paragraph (c)(2).

The most reasonable inference from this gradual expansion of removal jurisdiction in the light of substantial retention of the habeas corpus remedy is that Congress was seeking to enlarge the class of cases which might be removed for trial to the federal courts when an act was committed by a federal official under "color of office" but may have been beyond the scope of his authority, while retaining in the federal courts full power to grant absolute releases to federal officers whose conduct was indisputably not ultra vires. See Ex parte Beach, 259 Fed. 956 (S.D. Cal. 1919). A situation like the one in United States ex rel. Drury v. Lewis, 200 U.S. 1 (1906), for example, would have been an appropriate one for the exercise of the removal power had the counterpart of the present 28 U.S.C. 1442a then been in force. See, for example, Colorado v. Symes, 286 U.S. 510, 519 (1932); Maryland v. Soper, 270 U. S. 9, 36, 44 (1926). But habeas corpus was unavailable because of the conflict in testimony, and the prisoner was remitted to the state courts.

In other words, the removal remedy enables a federal official who acted under "color of office" but who may have exceeded his authority to be tried in a less partial forum. The habeas corpus remedy entitles a federal official who can demonstrate conclusively that his acts were pursuant to federal authority to avoid a trial altogether. The purpose of the additional remedy of habeas corpus is so "that the business of the government of the United States, in which ... [the prisoner] is engaged, shall not be unduly interfered with through his further detention or compulsory attendance upon other tribunals". Ex parte Beach, 259 Fed. 956, 961 (S.D. Cal. 1919).

The existence of the alternative remedies was expressly recognized by the Supreme Court in Virginia v. Paul, 148 U.S. 107, 114 (1893):

> The prosecution and punishment of crimes and offenses committed against one of the states of the Union ... can be interfered with by the Circuit Court of the United States so far only as Congress, in order to maintain the supremacy of the Constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the Circuit Court of the United States for trial or a discharge of the prisoner by writ of habeas corpus issued by that court or by a judge thereof.

Boske v. Comingore, 177 U.S. 459 (1900), indicates that the habeas corpus jurisdiction was intended to extend to situations in which removal was available. In that case an Internal Revenue Collector was convicted of contempt in a Kentucky court for failing to produce documents which he was forbidden to reveal under the Regulations of the Commissioner of Internal Revenue. The Supreme Court sustained the issuance of a writ of habeas corpus releasing him from state custody after conviction in a state court but before he had appealed and did not advert to the fact that ever since 1864 internal revenue officials acting under color of office were authorized to remove state prosecutions against them to federal courts. E. g., Tennessee v. Davis, 100 U.S. 257 (1880). If the expansion of the removal remedy resulted in an implied pro tanto contraction of the habeas corpus remedy, the prisoner in Boske v. Comingore should have been denied habeas corpus because removal had been available to him before the case was tried in the Kentucky courts.*/

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*/ The fact that habeas corpus was not sought until after the state conviction should not have made any difference. Since a remedy was still available on appeal to the Supreme Court from the judgment of the highest state court, it could not be said that all avenues were closed.

D. Exhaustion of state remedies is not required.

This Court's jurisdiction to consider the instant petition on this ground is not affected by 28 U.S.C. 2254, which compels exhaustion of state remedies. Such exhaustion is required only where the application is in behalf of a person "in custody pursuant to the judgment of a state court." (Emphasis added.)

The word "judgment" was chosen with care, and means what it says. As originally drafted by the House of Representatives, section 2254 required exhaustion by those in custody pursuant to state court judgments and by those held under the "authority of a state officer". The latter phrase was dropped at the insistence of the Senate, because "it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty". See Senate Report No. 1559, 80th Cong., 2d Sess., 9 (1948).

Protecting federal officers against the harassment of lengthy state procedures is one of the principle reasons for the existence of the remedy provided by 28 U.S.C. 2241(c)(2). In Boske v. Comingore, supra, at 466-67, the Supreme Court asserted that state prosecutions of federal officials acting in their official capacities constituted situations of "urgency" warranting relief by habeas corpus even prior to "final action by the state courts". The reason given by the Court for granting relief at that stage, albeit that only the state appellate remedies remained unexhausted, was that the prisoner "was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the Department to which he belonged". Similarly, in Ex parte Beach, 259 Fed. at 961, it was suggested that habeas corpus was available in addition to removal so that the business of the federal government not be hampered by the compulsory attendance of its agents at unwarranted state trials. See p. 11 , supra.

Consequently, it would be totally inconsistent with the purpose of 28 U.S.C. 2241(c)(2) if petitioner were required in this case to return to the state courts and assert there the claim that his allegedly criminal act was in pursuance of a federal court order.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that he receive absolute discharge from the custody of J. W. Ford, Sheriff of Lafayette County, State of Mississippi, and that any further proceeding against petitioner growing out of the facts alleged in the instant petition be stayed.

Respectfully submitted,

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PETITIONER IS ENTITLED TO RELEASE UNDER 28 U.S.C. 2241(c)(3) BECAUSE HE IS IN CUSTODY IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. Petitioner's indictment by a grand jury which was prejudiced by inflammatory instructions given by a Circuit Judge violated the Due Process Clause.

In Beck v. Washington, 369 U.S. 541, 546 (1962), the Supreme Court refused "remotely [to] intimate any view" on the question whether "the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury." But see Douglas, J., dissenting, 369 U.S. 579-87.

Whatever may be the answer to that question, the instant case presents a much more flagrant disregard by the State of petitioner's procedural rights than was presented in Beck. In this case it was not external publicity beyond the control of the court which prejudiced the grand jurors; it was the charge of the impaneling judge which appealed to the emotions of the grand jurors and, in effect, incited them to indict the petitioner irrespective of the evidence.

Judge O'Barr's charge, set out in pertinent part as Exhibit C, began with a vituperative attack on the Supreme Court. The Judge then said, "This Court, together with the hungry, mad, ruthless, ungodly power-mad men who would change this Government from a Democracy to a Totalitarian dictatorship, have attempted to crush the people of this State through the excuse of upholding and enforcing an unlawful order that had not become final." Shortly thereafter the Judge told the grand jury, "Gentlemen, just because a man works for the Federal or State Government does not

give him immunity from prosecution for his crimes . . . This applies not only to the most ignorant human being on the face of the earth but also to John F. Kennedy, little stupid brother, Robert Kennedy, Mr. McShane, or any other human being." The Judge concluded this diatribe with a final appeal to prejudice: "The times have come to take positive action and I believe that you men of Lafayette County will take that action by showing the world that you will no longer be trampled or allow stupid blunders and greed to precipitate murder, assault and battery with intent to kill, assault, criminal trespass, unlawful search and seizure and any other criminal acts against the Laws of this State, including our necessary segregation laws, to go unpunished."

The total effect of this charge, including its final appeal to racial prejudice, was to excite the grand jurors' passions to the point where their decision would be based only partly, if at all, on evidence presented to them. In effect, it was an instruction to indict the petitioner, if not the Attorney General or the President of the United States. The grand jury was reluctant to follow this instruction with respect to either of the latter, but it forthwith presented an indictment against the petitioner.

The fact that the Constitution does not require States to use grand juries in order to bring criminal charges, e.g., Hurtado v. California, 110 U.S. 516 (1884), does not mean that a state defendant's constitutional rights can never be violated at the grand jury stage. See, e.g., Cassell v. Texas, 339 U.S. 282 (1950). Otherwise the Supreme Court would not have gone to the pains it did in Beck v. Washington, supra, to avoid deciding the question on which it refused to intimate a view.

In this case, the Court need not reach the broader question reserved in Beck. For whatever may be the duty of a State affirmatively to rid its grand jurors of prejudices they acquire from newspapers and other publicity, the State's obligation of fairness under the Due Process Clause certainly prohibits any acts committed by its agents to induce bias and prejudice on the part of grand jurors.

Analogous to this case are those in which state convictions have rested on testimony which the prosecution knew to have been false. E.g., Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942); Naupe v. Illinois, 360 U.S. 264 (1959). While the mere fact that perjured testimony was used by the prosecution in a state trial does not alone give rise to a cognizable Due Process claim, the State's knowing participation in such use entitles a convicted defendant to release on federal habeas corpus. Similarly, even if the State is not compelled by the Due Process Clause to rid its grand jurors of prejudices which they acquired elsewhere, it may not -- through the authoritative instructions of an impaneling judge -- instill the grand jury with bias against a prospective defendant.

B. Petitioner's indictment pursuant to judicial instructions which inflamed the grand jury against federal officials violated the Equal Protection Clause.

Judge O'Barr's instructions to the grand jury -- some of the more intemperate portions of which are quoted supra -- constituted an attack on a particular class of persons which he accused of violating the United States Constitution, subverting democracy, and attempting to crush the people of the State of Mississippi. The thrust of the entire charge was that members of this class, composed of the federal officers whose duty it is to interpret and enforce the United States Constitution

and laws of the United States, were "hungry, mad, ruthless, ungodly power-mad men" who were disposed "to precipitate murder, assault and battery with intent to kill, assault, criminal trespass, unlawful search and seizure and ... other criminal acts" by reason of their "stupid blunders and greed".

If these vituperative and inflammatory remarks had been directed by a judge instructing a state grand jury at some readily recognizable class such as a religious or racial group, there could hardly be any question but that an indictment against a member of that class following such a charge would violate the Equal Protection Clause of the Fourteenth Amendment. In other words, if a state judge singled out a particular class of persons and affirmatively prejudiced the grand jurors against this class by appealing to latent bias, and the grand jury thereupon entered an indictment against a member of the class, the indictment would be the product of the judge's discriminatory treatment of the class.

The guarantee of equal protection of the laws "means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in like circumstances". Carleton Screw Prods. Co. v. Fleming, 126 F. 2d 537, 541 (8th Cir.), cert. denied, 317 U.S. 634 (1942). The Equal Protection Clause applies to any action taken on behalf of and under the authority of a State, "by whatever instruments or in whatever modes that action may be taken" -- by the legislature, executive, or judiciary. Ex parte Virginia, 100 U.S. 339, 346-47 (1880); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958).

The circumstances of this case bring it within the principles enunciated by Yick Wo v. Hopkins, 118 U.S. 356 (1886). While the statute under which petitioner was indicted was impartial on its face, its use in this case was intentionally "applied by the public authorities charged with [its] ... administration ... with a mind so unequal and oppressive as

to amount to a practical denial by the State of the equal protection of the laws .... Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution". 18 U.S. at 373-74.

Judge O'Barr did not instruct the grand jury that if Mississippi citizens opposed to implementation of the court order violated Miss. Code Ann. 2087.5 they should be indicted. Nor did he even suggest that anyone other than those seeking to execute the federal court orders may have provoked riots or breach of the peace. Thus Mississippi, through a member of its judiciary acting in an official capacity, deprived the class of federal officials, of which petitioner was a member, of the equal protection of its laws by singling out that class in a charge appealing to bias and prejudice. Petitioner's detention pursuant to an indictment which resulted from such a charge accordingly violates the Fourteenth Amendment to the United States Constitution.

C. Exhaustion of state remedies is not required.

For the reasons given at pp. , supra, 28 U.S.C. 2254 does not apply when a prisoner is in custody prior to trial. The scope of 28 U.S.C. 2254 is limited to detention pursuant to judgments of a state court.

Nor is it desirable, as a matter of policy, to remit a federal official asserting a claim under 28 U.S.C. 2241(c)(3) to the state courts. The very same policy reasons which make it desirable that federal officials be released as quickly as possible under 28 U.S.C. 2241(c)(2) apply if a federal official seeks release under subsection (c)(3). See Whitten v. Tomlinson, 160 U.S. 231, 240-42 (1895); pp. , supra.

Moreover, the particular nature of the constitutional claim being asserted in this case militates against compelling the petitioner to resort to state remedies. In the first place, the gist of petitioner's constitutional claim is that because of a prejudiced charge to the grand jury he has been indicted and will, if this writ is not granted, be subjected to the indignity and harassment of an unwarranted trial. Since the essence of the detriment to the petitioner is not that he was unconstitutionally convicted and imprisoned, but rather that he has been unfairly accused and is being forced to stand trial on a baseless charge, his claim would become moot if he were forced to return to the state courts for the very trial to which he objects merely in order to assert his constitutional defense.

Second, one of petitioner's constitutional challenges is that the judge's instructions induced prejudice against him <u>for the very reason that he was a federal officer acting as such</u>. This claim is one that is particularly appropriate for a federal court, for the very same bias which infected the grand jury instruction is likely to appear elsewhere among the judiciary of the State of Mississippi.

V.

PROCEEDINGS ON THIS PETITION ARE GOVERNED BY THE FEDERAL RULES OF CIVIL PROCEDURE, EXCEPT TO THE EXTENT THAT SPECIFIC PROCEDURES ARE PRESCRIBED BY CHAPTER 153 OF TITLE 28

Rule 1 of the Federal Rules of Civil Procedure provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 81(a)(2) provides in significant part:

> In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in the statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States.*** (emphasis added)

A plain reading of the latter rule leads to the conclusion that where special procedures have been established by statute for the enumerated proceedings, the proceedings are governed by such special procedures, but in the absence thereof, the proceedings are governed by the Federal Rules of Civil Procedure. Decisions interpreting Rule 81 bear out this conclusion.

Thus, in Holiday v. Johnson, 313 U. S. 342, 353, the Supreme Court held that the provisions of the predecessor statute to 28 U.S.C. 2243 requiring the court to "summarily hear and determine the facts and dispose of the matter as law and justice requires" precluded referring the matter for hearing to a commissioner, despite the provisions of Rule 53 in regard to references to masters, since the practice contemplated in the habeas corpus statutes was set forth in terms "too plain to be disregarded." The same provision was interpreted in O'Keith v. Johnston, 129 F. 2d 889, 891 (C.A. 9, 1942), cert. den. 317 U.S. 680 to preclude a jury trial on the issues raised by the petition. Similarly, in Burleson v. United States, 205 F. Supp. 331, 334 (W.D.Mo., 1962) it was held that since this

the fourth paragraph of 28 U.S.C. 2255 (which the court held to be a proceeding in habeas corpus within the meaning of Rule 81) allows disposition of motions brought under that section "without requiring the production of the prisoner at the hearing," detailed and specific allegations are necessary in the motion and notice pleading as permitted by Rule 8 cannot be used. (See habeas corpus chapter)

On the other hand, chapter 153 makes no provision for or reference to the procedures for a rehearing or new trial, summary judgment, requests for admissions, or findings of fact and conclusions of law. It has therefore been held that Rule 81 does not preclude application of the Civil Rules in regard to a rehearing. Thomas v. Hunter 78 F. Supp. 925, 930 (D.Kan., 1948); Hunter v. Thomas, 173 F. 2d 810, 812 (C.A. 10, 1949), reversing the district court in regard to the applicable Civil Rule. In arriving at its decision, the district court stated:

> Part of the practice relating to habeas corpus is set out in the Statute. See 28 U.S.C.A. §§451 to 463 [now §§ 2241 to 2253]. To the extent that the Statutes prescribe the practice, the Rules of Civil Procedure do not apply. Rule 81(a)(2) would seem to indicate that in all other respects they do apply. There is no statute relating to motions for rehearing or new trials in habeas corpus proceedings. As to such matters, it would seem that the Rules do govern. (emphasis added),

and the Court of Appeals applied similar reasoning.

It has also been held, without discussion of Rule 81, that habeas corpus is a civil proceeding and therefore that Rule 35 applies in regard to requests for admissions, United States ex rel. Seals v. Wiman, 304 F. 2d 53, 64 (C.A. 5, 1962), and Rule 56 applies in regard to summary judgments. Bowldidge v. Lehman, 252 F. 2d 366, 368 (C.A. 6, 1958). See also Von Moltke v. Gillies, 332 U.S. 708, where a habeas corpus decision was remanded to the district court

to further make findings of fact, with no mention made of the fact that the statutes make no provision for such findings.

Reference can also be made to the other proceedings enumerated in Rule 81. The statutes in regard to naturalization also make no provision for findings of fact and conclusions of law. Nevertheless, in Application of Murra, 166 F. 2d 605, 607 (C.A. 7, 1948), the Court of Appeals, finding analogy in cases dealing with habeas corpus, reversed and remanded with directions that the district court make its findings of fact and conclusions of law as a basis for its judgment, as required by Rule 52. It stated that it found the Rule "not in conflict with, in fact it complements, the statutory procedure where a naturalization petition is heard in open court."

3 There have been some cases that have taken the opposite view. In United States ex rel. Jelic v. District Director of Immigration, 106 F. 2d 14, 20 (C.A. 2, 1939), it was stated on the basis of Rule 81 that the Civil Rules "have only a limited application by way of analogy to habeas corpus proceedings." The Rule there sought to be applied, however, concerned judicial notice of foreign law in lieu of proof of same. The habeas corpus was sought to review the relator's exclusion from this country by the Immigration Service, and the Court's actual holding was that the Civil Rules apply only to court hearings, not to administrative hearings, and therefore the Service could not rely on judicial notice to counteract lack of actual proof of foreign law in its own proceedings. The statement from Jelic was echoed in a footnote by the Court of Appeals for this circuit in United States ex rel. Coldsby v. Harmole, 249 F. 2d 417, 420 n. 3 (C.A. 5, 1957), but the footnote was dicta uttered in passing that had no bearing on the case. The Court of Appeals has since made it clear in Seals that in this circuit the Civil Rules do apply to habeas corpus proceedings.

The only case that actually held a Civil Rule inapplicable despite the lack of clear language in the statutes contrary to the Rule was

Sullivan v. United States, 193 F. Supp. 624 (S.D.N.Y., 1961), where the court refused to allow the use of interrogatories in connection with a section 2255 motion. It found the limited reference to interrogatories in section 2246 to preclude a right of general discovery, and stated that a section 2255 proceeding, although civil, was actually criminal in nature and civil discovery is alien to criminal procedure. The case can perhaps be distinguished upon that basis as being limited only to section 2255 proceedings and not applicable to other habeas corpus proceedings. The better view, however, is that the decision is erroneous. Section 2246 does not, to apply the Holiday test, contemplate a practice precluding general interrogatories that is "too plain to be disregarded." Rather, the use of interrogatories can be said to be, as in Murra, a procedure "not in conflict with, in fact it complements, the statutory procedure" set forth in the section. Sullivan not only stands alone, it is directly contradicted by United States v. McNicholas, 298 F. 2d 914, 915 (C.A. 4, 1962), cert. den. 369 U.S. 878, where it was noted that the district court, in making its decision in an ex parte hearing denying a section 2255 motion (which the Court of Appeals upheld), had before it, inter alia, "the appellant's answers to Government interrogatories," and Roddy v. United States, 296 F. 2d 9, 12 (C.A. 10, 1962), where interrogatories were served on the sentencing judge and his answers thereto formed part of the basis for denying relief under section 2255.

It follows, then, that the provisions of section 2243 in regard to summary hearing, of section 2246 in regard to the taking of evidence orally, by deposition or by affidavit, and of section 2247 in regard to the admissibility of documentary evidence, as well as any other applicable provisions of the statutes, shall govern this proceeding. Procedures in regard to rehearings, summary judgment, requests for admissions, findings of fact and conclusions of law, interrogatories, pre-trial conferences for formulating issues, and other pertinent procedures shall be governed by the Civil Rules.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that he receive absolute discharge from the custody of J. W. Wood, Sheriff of Lafayette County, State of Mississippi and that any further proceeding against petitioner growing out of the facts alleged in the instant petition be stayed.

Respectfully submitted,

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