DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

State of Mississippi v. McShane

Briefs

MISSISSIPPI STATUTES

§ 2444. Indictment--penalty on grand juror, witnesses, and officers for disclosing facts about.

If a grand juror, witness, district attorney, clerk, sheriff, or any other officer of the court, disclose the fact of an indictment being found or returned into court against a defendant, or disclose any action or proceeding had in relation thereto, before the finding of the indictment, or in six months thereafter, or until the defendant shall have been arrested or given bail or recognizance to answer thereto, he shall be fined not more than two hundred dollars.

SOURCES: Codes, 1857, ch. 64, art. 260; 1871, §2797; 1880, §2008; 1892, §1349; 1906, §1421; Hemingway's 1917, §1177; 1930 §1201.

CROSS REFERENCES: Juries §1790.

JUDICIAL DECISIONS

It is not permissible to inquire on the trial of the defendant what evidence the grand jury had when it indicted him. Baldwin v. State, 125 M 561, 88 So 162.

Form No. TX-1b
(Ed. 4-14-61)

DEPARTMENT OF JUSTICE

TO Mr. Marshall

- ☐ ATTORNEY GENERAL
  - ☐ EXECUTIVE ASSISTANT
  - ☐ OFFICE OF PUBLIC INFORMATION
- ☐ DEPUTY ATTORNEY GENERAL
  - ☐ EXECUTIVE OFFICE—U. S. ATTORNEYS
  - ☐ EXECUTIVE OFFICE—U. S. MARSHALS
- ☐ SOLICITOR GENERAL
- ☐ ADMINISTRATIVE DIVISION
  - ☐ LIBRARY
- ☐ ANTITRUST DIVISION
- ☐ CIVIL DIVISION
- ☐ CIVIL RIGHTS DIVISION
- ☐ CRIMINAL DIVISION
- ☐ INTERNAL SECURITY DIVISION
- ☐ LANDS DIVISION
- ☐ TAX DIVISION
- ☐ OFFICE OF LEGAL COUNSEL
- ☐ OFFICE OF ALIEN PROPERTY
- ☐ BUREAU OF PRISONS
- ☐ FEDERAL PRISON INDUSTRIES, INC.
- ☐ FEDERAL BUREAU OF INVESTIGATION
- ☐ IMMIGRATION AND NATURALIZATION SERVICE
- ☐ PARDON ATTORNEY
- ☐ PAROLE BOARD
- ☐ BOARD OF IMMIGRATION APPEALS
- ☐ ATTENTION: _____

☐ SIGNATURE	☐ NOTE AND RETURN
☐ APPROVAL	☐ SEE ME
☐ RECOMMENDATION	☐ PER CONVERSATION
☐ COMMENT	☐ AS REQUESTED
☐ NECESSARY ACTION	☐ NOTE AND FILE
☐ YOUR INFORMATION	☐ CALL ME

☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____

☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS:

Nov. 21, 1962

Mr. Marshall

Attached is a memo on removal prepared by Frank Michelman which may be of interest to you.

LFO

FROM ASSISTANT ATTORNEY GENERAL

Tax Division

Mr. Louis F. Oberdorfer

November 21, 1962
FIM:vab

Frank I. Michelman

Removal of Criminal Cases

I understand that an attempt to remove McShane's case into the Federal District Court for the Northern District of Missouri will probably not be made. One reason for this is the provision in 28 U.S.C., § 1447(d), that district court orders of remand are not reviewable--and the fear that Judge Clayton would order the case remanded. According to Professor Moore, 1A Moore's Federal Practice ¶0.169 [2.-1], this means that no method of review--appeal, extraordinary writ, or otherwise--is permissible. It may be going too far, but it seems safest to note that an attempt at removal followed by a remand order might, imaginably, lead to a bizarre holding that a petition for habeas corpus must be dismissed as an impermissible attempt to review the remand order indirectly. This does seem unlikely, though.

A second possible difficulty with removal is that it might not spare us the necessity of a full trial before a Mississippi jury. It is clear enough that the removal provisions do contemplate the possibility of state criminal prosecutions in federal courts, with state substantive law and federal procedural law controlling. Yet much remains which is not clear. Moore says (p. 833) that the allegations of the petition for removal may be controverted by the State, and I have encountered no indication that this is not so. In Tennessee v. Freeman, 13 F. Supp. 784 (W.D. Tenn. 1936), the court held that the State could challenge the allegations of the petition and that a fact issue was thereby raised which the court would try on the motion for remand (without a jury)--as to which issue the State had the burden of producing evidence and the defendant had the burden of persuasion. The judge stated that the issue was simply one of jurisdictional fact, and that he would not at this stage pass on guilt or innocence. But it is hard to see how, after a judge has

held that the defendant has sustained his factual claim that he acted under color of his office or in the performance of his official duty, a jury can be permitted to conclude that beyond a reasonable doubt he is guilty of crime--at least if Tennessee really means, as it seems to, that a federal officer cannot be prosecuted criminally for acts done in fulfillment of the responsibilities of his office.

Nevertheless, there have been cases where criminal trials and convictions have occurred in federal courts in cases removed under § 1442. In most of them, the explanation seems to be simply that removal never was controverted, so that the problem of retrying almost identical issues did not arise. In one case removal was controverted and the problem did arise. The judge's solution was to postpone determination of the jurisdictional fact until the trial, and then let the jury decide it along with the merits. Virginia v. Felts, 133 Fed. 85 (C.C. W.D. Va. 1904). This may support my impression that in a case like McShane's the removability issue and the merits are difficult to divorce--but it shows also that the procedure adopted to meet this problem could conceivably be disastrous rather than helpful. (Note, though, that the more modern Keenan case, supra, adopts the method we should prefer.)

In any event if Mississippi did not controvert removal, there would seem to be nothing to keep the case from going to trial except a possible pre-trial motion to dismiss. This was attempted in Shotwell, on grounds which smack of "immunity". The authority for such a tactic was, I presume, Rule 12(b) of the Federal Rules of Criminal Procedure, to the effect that "any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." In Shotwell the "immunity" issue certainly was distinct from the evasion issue (the general issue) and so may have met the test of Rule 12(b). However, as I have already suggested, McShane's immunity defense is difficult to distinguish from the issue of his guilt--if he is immune, he is immune on account of a certain characterization of the very conduct which, otherwise characterized, is said to establish his guilt. My impression from scanning the USCA annotations is that this immunity defense could not successfully be raised before trial.

My research has not been exhaustive inasmuch as removal doesn't seem to be the prime objective currently and nothing I have so far found suggests that by passing up removal we are blundering. If you wish me to pursue this further, please advise.

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : John Doar
First Assistant
Civil Rights Division

DATE: 12/3/62
JHF:ach
144-41-489
11,851

FROM F J. Harold Flannery
Attorney

SUBJECT: Mississippi v. McShane; Faneca v. United States, et al.

This memorandum deals with the legal questions you raised on 26 and 27 November about the above cases.

A. Scope of Examination on Deposition.

This issue is governed by Rule 26(b) of the F.R. Civ. P.:

> Unless otherwise ordered by the court as provided by Rule 30(b) or (d)[1/], the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

1/ Rule 30(b) and (d) provide:

> (b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown.

The "Notes of Advisory Committee on Amendments to Rules" (28 U.S.C. Federal Rules of Civil Procedure, Rules 17 to 33, pages 289-290) and the "Commentaries" (id., page 294) should be read, although they are too voluminous and discursive for reproduction here. See also 4 Moore's Federal Practice 1062-1183, §§ 26.15 - 26.25 [8].

The best way I can sum up Rule 26(b) is to say that it does not set out certain matters that may be inquired about, but rather, its thrust is that the deponent may be asked anything except: (1) about totally irrelevant matters, (2) about

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1/ continued

> the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.
>
> (d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the

privileged matters, and (3) questions that are patently designed solely to annoy and oppress him. Horizons Titanium Corp. v. Norton Co., 290 F.2d 421 425 (C.A.1, 1961): "This rule apparently envisions generally unrestrictive access to sources of information, and the courts have so interpreted it."

1. Limitations

(a) Relevance

At pages 1064-1071 of his treatise, Professor Moore indicates that the concept of relevance is much broader in discovery proceedings that at trial because (1) the parties' claims are still somewhat amorphous and relevancy is difficult to assess; (2) part of the purpose of discovery is to frame the issues and the proponent should get the benefit of the doubt because the deponent can exclude the material at trial if it turns out to be irrelevant; (3) the rule states that trial-type inadmissibility (on relevancy grounds as well as hearsay, conclusions, etc.) is not ground for objection if the material sought to be elicited "appears reasonably calculated to lead to the discovery of admissible evidence."

(b) Annoying or Oppressive Questioning

See Rule 30(b)(d), note 1, supra. This limitation is related to relevancy, above, in that the inference that a question is simply annoying would probably be drawn in part from its irrelevancy. However, this limitation usually requires the objector to show that the question is propounded in bad faith. See generally Moore, op. cit. supra, 2023-2044 and 2050-2052.

The applicability of this limitation is not clear, but I think questions to McShane about Dr. Soblen or his demotion by New York Commissioner Kennedy would be permitted because the answers might be relevant to his judgment or prudence. This limitation should be used, however, to block questions about his religion or heritage.

1/ continued

action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(c) Privilege

According to Professor Moore (at page 1085 of Vol. 4), three grounds of privilege may be invoked to deny discovery: (1) self-incrimination; (2) professional privilege, and (3) governmental privilege.2/

Obviously, McShane may plead the 5th Amendment (although not necessarily in the state criminal proceeding), and it is equally obvious that his communications to us and our work product are protected by the professional privilege doctrine.

The notion of governmental privilege presents a more difficult question. See 4 Moore's Federal Practice 1160-1183, §26.25, esp. pp. 1180-1182. See also 2 A Barron and Holtzoff, Federal Practice and Procedure 105-113, §651.1. Governmental privilege is at its narrowest in suits such as those under the Federal Tort Claims Act which (usually) do not involve the Government's regulatory or sovereign functions. To invoke the privilege successfully in cases involving its proprietary functions and where Congress has indicated that the Government should be amenable to ordinary processes, a strong showing must be made that disclosure will adversely affect the public interest.3/

5 U.S.C. 22, as amended in 1958, is the federal housekeeping statute which authorizes the heads of executive departments to prescribe regulations for the governing of the departments and their materials. Pursuant thereto the Attornal General has provided, in Order No. 3229, 28 CFR §51.71:

> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any

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2/ The cases indicate that the marital privilege and the corporate secret process privilege may also be relied upon, but neither is relevant here.

3/ Olson Rug Co. v. N.L.R.B., 291 F.2d 655 (C.A. 7,1961).

> officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a subpoena duces tecum is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

The courts have held this to mean that, although a subordinate cannot be held in contempt for refusing to divulge information pursuant to his superior's order, the information itself is not undiscoverable unless the superior can show that the data are privileged under traditional standards.

(d) Procedure

Rules 30(b)(d) and 37 lay out the methods for resisting discovery. Under the former, a party or deponent may seek a protective order from the court[4/] terminating, limiting, or setting down guidelines for the examination. Under Rule 37, the party or deponent simply refuses to answer a question and the proponent then applies to the district court where the deposition is being taken for an order compelling him to answer.

Under either procedure the hearing court passes upon the merits of the deponent's objection and directs him to answer it or not.

The principals differences between the alternative procedures appear to be: (1) Rule 37 specifically exempts the

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4/ Prior to the examination such orders must be sought from the court where the action is pending. During the examination that court or the one in which the deposition is being taken passes upon the application.

United States from its taxing or expenses provisions and Rule 30(d) does not;5/ (2) only Rule 37 contains judgment by default provisions in the event that a party or his agent disobeys an order.6/

B. Cross-Examination of the Deponent

This problem is governed by Rule 26(c) which provides: "Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b)." Rule 43(b) provides:

> (b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

Professor Moore's discussion (at pages 1184-1186 of Vol. 4) concludes (putting it in our context) that, read technically, the rule would allow us to cross-examine McShane only as to matters raised by Cates's examination. This is not disadvantageous, however, for two reasons.7/ First, any matters

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5/ It appears that the United States is liable for 30(d) type expenses. North Atlantic & Gulf S.S. Co., Inc. v. United States, 209 F.2d 487 (C.A. 2,1954).

6/ Of course, Rule 30(b)(d) orders would, upon continued refusals to answer, become a Rule 37 issue.

7/ "Thus the only practical effect in discovery examinations of the restriction upon the scope of cross-examination is to prevent the use of leading questions when the interrogation is upon issues which were not the subject matter of the examination in chief, if the deponent is neither an unwilling nor a hostile witness nor an adverse party nor an officer, director or managing agent of a public or private corporation or of a partnership or association which is an adverse party."

that we shall want to clarify or amplify will be in that category because Cates raised them, at least by implication.8/ Second, Cates does not make McShane his witness by taking his deposition (Rule 26(f)), so at the same proceeding we can examine McShane on direct without giving a prior notice that we are going to take his deposition.

C. Objections to be Entered.

We should probably not make any relevancy objections (at deposition) because we shall want unlimited cross-examination without having to argue for it to a Mississippi judge.

We may want to object some questions as being annoying and oppressive, but this raises some problems. If Cates withdraws the question and secures a ruling later we shall have been able to correct or modify on cross-examination any misleading statements by McShane immediately after they were made. However, if we seek a protective order during the proceedings or if Cates suspends his examination to secure a ruling, some damaging statements may gain currency before we can scotch them when the depositions are resumed and exclude or clarify them at trial. (A protective order in advance of deposition is next to impossible to secure because courts are loath to assume that irrelevant or oppressive questions will be asked.)

If you concluded that we should avoid this dilemma we can, under Rule 30(b) secure an order that the examination be private, the deposition be sealed, and that no participant shall disclose any part of the proceedings. Unfortunately, this course would not advance our purpose of making McShane's testimony an effective counter-punch to Faneca's allegations and the grand jury's report.

I shall deal with governmental privilege possible objections in a supplemental memo after further research.

D. Was the Provocative Presence of the Marshals at the Lyceum on Unreasonable Act for which McShane is Liable?

If the plaintiff raises this point, his position will be that the marshals should have been removed from the area of the Lyceum when it was decided that Meredith would not be registered on September 30, because their continued presence

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8/ We may also be able to base an argument on Rule 43(a) which provides that the most liberal applicable admissibility rule, federal or state, shall govern the receipt of evidence. Professor McCormick, Evidence 43, §21, cites Mask v. State, 32 Miss. 405 (1856) for the proposition that Mississippi is one of about ten states that allow unlimited cross-examination.

at McShane's direction was unnecessary, provocative, and proximately caused the riot. Similarly, the use of Negro personnel was inflammatory and unreasonable, and McShane is liable if the decision to use them was his.

It is our position not only that the presence of marshals was factually defensible and therefore reasonable under the circumstances, but that as a matter of law, even the unwise presence of a public officer cannot make him liable for injuring the plaintiff during a riot which ensued on account his presence.9/

Understandably, there appear to be no cases directly in point. However, our argument can be based on established principles of tort law. One is not liable to another in tort unless he breaches a duty to him and the act or ommission causes foreseeably an injury. If any necessary element of liability is missing to the extent that no reasonable man could judge it to be present the defendant is not liable as a matter of law.

Foreseeability is perhaps the necessary element most obviously missing. As a matter of law, a peace officer cannot foresee that carrying out his duties -- even when his presence is unnecessary and resented -- will precipitate a riot. If the plaintiff answers that a riot became foreseeable at some point as the crowd grew and became uglier the question becomes what is the reasonable policeman's duty in the circumstances: to suppress the incipient riot or to withdraw? In answering this question two factors must be borne in mind: first, by the time a riot was foreseeable Meredith was at Baxter Hall, and second, a reasonable man could then conclude that the marshals presence anywhere on the campus would be provocative. That being the case, the marshals might prevent a riot at the Lyceum by withdrawing but that might produce a riot wherever else on campus they went or, if they withdrew entirely, the mob might turn its attention to Baxter Hall. In short, a riot was not foreseeable at the outset and therefore it was not negligent for the marshals to remain -- and once a riot became foreseeable they breached no duty to the plaintiff, both as matters of law.

9/ This does not consider the related doctrines that the United States is immune from suit under the Federal Tort Claims Act for discretionary acts by its officers and for assault and battery (28 U.S.C. 2680 (a)(h)). Nor does it consider the traditional tort immunity of public officers carrying out their duties. See Prosser, Torts 780, §109. Finally, the plaintiff's contributory negligence, assumption of the risk, "last clear chance" are highly relevant but beyond the scope of this discussion.

There are several other doctrines which can be invoked to defeat the plaintiff's allegation of negligence as a matter of law. See generally Prosser, Torts 79-115, Ch. 4, Defenses To Intentional Interference With Person Or Property. For instance, defendants who are repelling a battery with reasonable force are not liable to third persons injured in the melee. If you wish it I can explore these substantive defense doctrines in a supplemental memo.

B. Scope of Appellate Court Review of Evidence After Conviction.

On appeal from a criminal conviction the sufficiency of the evidence to support the verdict is a question of law chich the appellate court will review, 24A C.J.S. 790-792, §1880:

> Notwithstanding the foregoing expressions of policy as to noninterference with jury verdicts, the appellate court may examine the record and review the evidence to ascertain whether the verdict of the jury is sustained by sufficient evidence to support a conviction; that is, to appraise the legal value of the evidence or its legal sufficiency; and such a review involves a question of law rather than one of fact. Moreover, it may be the duty of the appellate court to pass on the legal sufficiency of the evidence to support the verdict, and the deliberate opinion and judgment of the appellate court on the questions whether guilt was sufficiently proved may be demanded by the accused (footnotes omitted).
>
> * * * *
>
> The province or function of the appellate court with respect to questions of fact is limited to ascertaining whether under the evidence the jury could reasonably find accused guilty as charged, or whether there is substantial evidence to support the verdict of the jury, taking the view of the evidence most favorable to the prosecution (footnotes omitted). Ibid., 794-95.
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> * * * *
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> Similarly, where the case is tried by the court, the rules as to review are the same as though there had been a jury . . . but it is the duty of the reviewing court to revise the determination of the trial judge on questions of fact where . . .

> the appellate court reaches a clear conclusion that the finding and judgment are wrong . . . Ibid., 810-11.

The federal cases are replete with holdings and dicta in accord with the foregoing. Badon v. United States, 269 F.2d 75, 79 (C.A. 5, 1959):

> It is not our duty to weigh the evidence or to pass upon the credibility of witnesses. We are called upon to determine only whether there is substantial evidence, viewed from its most favorable aspect to support the jury's verdict.

See also Glasser v. United States, 315 U.S. 60 (1942); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 400 (C.A. 4, 1958); Small v. United States, 255 F.2d 604, 605 (C.A. 1, 1958).

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

TO : Carl W. Belcher
Chief, General Crimes Section

DATE: December 14, 1962

RMT:sl:als

FROM : Robert M. Talcott

SUBJECT: Habeas Corpus:
Collateral Attack.

FACTS

On November 10, 1962, Circuit Judge O'Barr, in delivering the charge to the Lafayette County Grand Jury, Oxford, Mississippi, intoned a harsh and vituperative attack upon the Federal Government and exhorted the members of the Grand Jury to return an indictment. In the course of his charge the names of the President, the Attorney General and the Chief United States Marshal were specifically called to the attention of the Grand Jurors as not being exempt from prosecution.

On November 16, 1962, James P. McShane, Chief United States Marshal was indicted by this Grand Jury. The indictment charged McShane with a violation of Section 2087.5 of the Mississippi Code (Incitement to Riot).

On November 21, 1962, the defendant pursuant to a warrant of arrest surrendered himself to J. W. Ford, Sheriff of Lafayette County, Mississippi. Thereafter the defendant petitioned the United States District Court for the Northern District of Mississippi, Western Division, for a Writ of Habeas Corpus, which was issued by the Court. A hearing on the writ was noted for the early part of 1963.

QUESTION

Has a defendant's Sixth Amendment rights to indictment by a Grand Jury been denied by a Judge's extreme charge to the jury, so that collateral attack of the indictment by habeas corpus is an available remedy?

DISCUSSION

The following represents a survey of the principal cases in which habeas corpus was used to collaterally attack a conviction.

Historically, the limited function of the Writ of Habeas Corpus has been described as granting relief where there "is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void." Ex parte Siebold (1879), 100 U.S. 371 at 375.

I Review of an indictment by habeas corpus.

The earliest cases have indicated that habeas corpus is an appropriate remedy by which to collaterally attack a prosecution instigated by information, instead of indictment which was the proper method.

In Ex parte Wilson, 114 U.S. 419 (1884) a petition for a Writ of Habeas Corpus was based upon alleged violation of the Fifth Amendment of the Constitution in that the petitioner had been convicted in a Federal district court of an infamous crime (forging and uttering United States securities) without presentment or indictment by a Grand Jury.

The Court granting the Writ of Habeas Corpus stated at p. 422:

> /I/f the crime of which the petitioner was accused was an infamous crime, within the meaning of the Fifth Amendment of the Constitution, no Court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a Grand Jury.

Similarly, the objection that an indictment has been amended after it was found by the Grand Jury may be raised on habeas corpus.

In Ex parte Bain, 121 U.S. 1 (1886), the defendant petitioned for a Writ of Habeas Corpus on the ground that the indictment was void as it had been amended by the trial court in violation of his rights under the Fifth Amendment of the Constitution. The Supreme Court, in granting the writ, stated on p. 13:

> . . .We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment

> was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be "held to answer," he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. . . .

The Supreme Court has held that habeas corpus may be used to collaterally attack an indictment that charges a violation unknown or not cognizable under any Act of Congress.

In In re Coy, 127 U.S. 731 (1887) the defendant petitioned for a Writ of Habeas Corpus alleging that the crimes for which he was charged, if they were crimes at all, were crimes against the state, and not against the United States, and that consequently the District Court was without jurisdiction to proceed against him.

The Supreme Court, granting the petitioner's Writ of Habeas Corpus, stated in summary on p. 762, that:

> A violation of the state laws as to the election of persons to fill state offices cannot be made the

> subject of punishment by a federal court, nor, of course, a conspiracy to induce state officers to violate these laws. The judicial power of the United States does not extend to a case of that kind.

On the other hand, it is equally well settled that the sufficiency of the indictment is not deemed a jurisdictional question and is not subject to reconsideration or review in a habeas corpus proceeding. In Ex Parte Yarbrough, 110 U.S. 651 (1884), the Court reiterated the doctrine that the Writ of Habeas Corpus cannot test the sufficiency of the indictment:

> Its [the court's] decision on the conformity of the indictment to the provisions of the statute may be erroneous but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into in a Writ of Habeas Corpus limited to an inquiry into the existence of jurisdiction on the part of the court. Citing Ex parte Tobias Watkins, 3 Pet. 193, and Ex parte Parks, 93 U.S. 18, 23. See also In re Coy, 127 U.S. 731, 758; Knewel v. Egan, 268 U.S. 442. 445; Moore v. Shuttleworth, 180 F. 2d 889, 890 (C.A. 4, 1950). Snell v. Mayo, 173 F. 2d 705 (C.A. 5, 1949); Canada v. Jones, 170 F. 2d 606, 611 (C.A. 8, 1948); Kelly v. Johnston, 128 F. 2d 793, 794 (C.A. 9, 1942).

II Review of Grand Jury procedure.

A Federal judge may refuse to proceed under an indictment which reflects gross miscarriage of grand jury procedure. Thus in the case of United States v. Farrington, 5 Fed. 343 (N.D. N.Y., 1881), where the indictment was prepared by an attorney for the bank creditors, rather than by the district attorney; and where the former used his appearance as a witness as an opportunity to exhort the grand jury to indict, in language "animated, spirited, and excited" and where the indictments were not read to the jury nor the substance of the counts explained, the court, quashing the indictments, stated at p. 348:

> . . .It is not the province of the court to sit in review of the investigations of a grand jury

> as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon 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, the court should interfere and quash the indictment....

III State grand juries subject to Federal Constitutional requirements.

The Supreme Court in Hurato v. People of California, 110 U.S. 516, (1883) stated that "due process of law" under the Fourteenth Amendment of the Constitution does not require indictment by a grand jury in a state prosecution.

However, it is equally well established that when a state chooses to utilize a grand jury, its selection and composition is subject to Federal Constitutional requirements.

The legal precedent for this conclusion is based on a series of civil rights cases, the first being Strauder v. West Virginia, 100 U.S. 303 (1880) in which a Negro was indicted, tried and convicted of murder in a state court. The defendant alleged on appeal that he was denied the full and equal protection of the law in violation of the Fourteenth Amendment in that no Negro in the State of West Virginia was eligible to serve on a grand or petit jury.

The Supreme Court found that Strauder's rights had been substantially violated and stated:

> The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms and these are as comprehensive as possible. Its language is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection either for life, liberty or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

See also Eubanks v. Louisiana, 355 U.S. 584 (1958); Pierre v. Louisiana, 306 U.S. 354 (1939); Hernandez v. Texas, 347 U.S. 475 (1954) (concerning a person of Mexican descent); Reece v. Georgia, 350 U.S. 85 (1955); Norris v. Alabama, 294 U.S. 587 (1934); Carter v. Texas, 177 U.S. 442 (1900); Gibson v. Mississippi, 162 U.S. 565 (1896).

It should be noted that Article 3, Secs. 26 and 27 of the Mississippi State Constitution, requires that in all cases wherein the penalty is death or confinement in a penetentiary the charge must be by indictment.

IV Habeas corpus extends to those cases where the conviction has been in disregard of the constitutional rights of the accused.

(a) Excessive Sentence

In Ex parte Lange, 18 Wall 163 (1873), the defendant filed a petition for a writ of habeas corpus alleging that he was sentenced twice in the United States District Court for the same offense. On November 3, 1873, the petitioner was fined and imprisoned for theft of mailbags belonging to the Post Office Department, and on that day commenced the execution of the jail sentence. On November 8, 1873, the petitioner was brought before the same judge, where an order was entered vacating the former sentence, and the petitioner was again sentenced to imprisonment from that date. The case was brought to the Supreme Court on certiorari to review the denial of a petition for habeas corpus by a Federal court. The Court granted the writ held that the second sentence on the same verdict was, under such circumstances, void for want of power, and that it afforded no authority to hold the party a prisoner.

(b) Unconstitutional Federal and State Statute

In Ex parte Siebold, 100 U. S. 371 (1879), certain state judges supervising the election of state officials at different voting precincts in the City of Baltimore, Maryland, were convicted in the Circuit Court of the United States under sections of the revised statutes of the United States, for interfering with and resisting Federal supervisors and deputy marshals of the United States in the performance of their duty of policing the election of representatives to Congress. On a petition of habeas corpus the petitioners alleged that the statutes under which they were convicted were unconstitutional. The Court denied the writ but held that the question of the constitutionality of such laws is good grounds for the issue of a writ of habeas corpus to inquire into the legality of the imprisonment, and that if the laws are determined to be unconstitutional, the prisoner should be discharged. See also Neilsen, Petitioner, 131 U.S. 176 (1889).

Similarly in Ex parte Royall, 117 U.S. 241 (1886) it was held that the writ of habeas corpus is appropriate to review whether the law of a state under which a person has been convicted is a restraint on his liberty in violation of the Constitution of the United States.

(c) Denial of the Right to Counsel

In Johnson v. Zerbst, 304 U.S. 458 (1938), the petitioner was imprisoned in a Federal penitentiary for possessing and uttering counterfeit money. At the petitioner's trial he was not provided with assistance of counsel. The defendant petitioned the district court for a writ of habeas corpus which was denied. Later the district court granted petitioner a second hearing, but held, however, that the proceedings depriving petitioner of his constitutional right to assistance of counsel were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be constitutional on appeal."

The court of appeals affirmed and the Supreme Court granted certiorari. The Supreme Court held that "if the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty." The Supreme Court in this case did not grant the writ of habeas corpus, but reversed and remanded the case to the district court to ascertain if the defendant competently and intelligently waived his right to counsel. The case illustrates that a court can be divested of jurisdiction "in the course of the proceedings."

Many decisions since Johnson v. Zerbst have demonstrated that claims of denial of the right to counsel yield a basis for collateral attack on Federal convictions. See, e.g., Walker v. Johnston, 312 U.S. 275 (1941); Adams v. United States, ex rel McCann, 317 U.S. 269 (1942); United States ex rel McCann v. Adams, 320 U.S. 220 (1943); Von Moltke v. Gillies, 332 U.S. 708 (1948), 343 U.S. 922 (1952).

The same view has been taken respecting state convictions, in so far as a right to counsel is implied by the "due process" guaranteed by the Fourteenth Amendment. See, e.g., House v. Mayo, 324 U.S. 42 (1945); White v. Ragen, 324 U.S. 760, 764 (1945).

(d) Mob Domination of Trial

In Frank v. Mangum, 237 U.S. 309 (1915), the petitioner, convicted of murder in Georgia, alleged mob domination of his trial and argued that the deprivation of due process worked a loss of jurisdiction rendering the judgment void. The contentions had been advanced and rejected on the merits in the state courts and a writ of error to review the judgment of the Supreme Court of Georgia had been denied.

Thereafter, a defendant petitioned the United States District Court for a writ of habeas corpus upon the grounds that his constitutional rights under the Fourteenth Amendment, which declares that no state shall deprive any person of life, liberty, or property, without due process of law, had been violated. The District Court refused to award the writ.

On appeal to the Supreme Court of the United States the Court similarly denied the petitioner's writ of habeas corpus and said on page 335:

> We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

It should be noted that the Supreme Court did not grant the petitioner's writ because the State of Georgia had adopted such corrective processes as the Court deemed proper, in the form of the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court.

The case of Moore v. Dempsey, 261 U.S. 87 (1923), also presented claims of mob domination of a state court trial for murder. After being denied relief in the state courts, the defendant petitioned the United States District Court for a writ

of habeas corpus. The District Court dismissed the defendant's petition. On appeal from the District Court's order, the Supreme Court remanded the case to the District Court. However, observe on page 91 that, in the absence of sufficient corrective process afforded by the state courts when persons held under a death sentence allege facts showing that their conviction resulted from such a trial, habeas corpus is a proper remedy.

(e) Conviction on Perjured Testimony

In the case of Mooney v. Holohan, 294 U.S. 103 (1935), the defendant filed a petition for habeas corpus in the Supreme Court. The petitioner alleged that he was convicted of murder on the basis of perjured testimony. It was contended that "the state deprives him of his liberty without due process of law by its failure, in the circumstances set forth to provide any corrective judicial process by which a conviction so obtained may be set aside."

A petition for the writ in the District Court had been denied. On a motion for leave to file petition for writ of habeas corpus in the Supreme Court the Court stated on page 112 that "the requirement of due process" cannot be deemed to be satisfactory by mere notice and hearing as a state has contrived a conviction through a pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by a presentation of testimony known to be perjured in violation of the Fourteenth Amendment.

Leave to file was denied, however, on the ground the petition had not applied to the state court for a writ of habeas corpus and that "corrective judicial process" is "not shown to be unavailable." See also Pyle v. Kansas, 317 U.S. 213 (1942).

(f) Competency of Defendant to Understand Trial Proceedings

In Felts v. Murphy, 201 U.S. 123 (1906) the petitioner was tried for murder in a state court, convicted and sentenced to life imprisonment. He petitioned for habeas corpus in the circuit court, alleging that he was almost totally deaf and did not hear a word of the evidence against him. His application for habeas corpus had been denied by the state court. His petition in the United States District Court was similarly denied and the Supreme Court affirmed. The Court stated on page 129:

> We are unable to see how jurisdiction was lost in this case by the manner of trial. The accused was compos mentis. No claim to the contrary is made. He knew he was being tried, on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment mentioned, but he did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court.
>
> * * * we are entirely clear that * * * the most that can be urged is that their might have been an error committed by the trial court in omitting to have the evidence repeated to the appellant as it was given by the witnesses at the trial, even though no demand of the kind was made by petitioner or his counsel.

(g) Self-incrimination

In Matter of Moran, 203 U.S. 96 (1906) the petitioner was convicted of murder in the Oklahoma Territory. During the course of his trial he was required to stand up and walk before the jury in order to enable the jurors to observe his size and walk. The defendant petitioned the Supreme Court for a writ of habeas corpus on the grounds that he was compelled to be a witness against himself contrary to the Fifth Amendment of the Constitution. The petition was denied. The Court stated on page 105: "If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the court."

(h) Pleas of Guilty Induced by Trickery or Coercion

In Smith v. O'Grady, 312 U.S. 329 (1940), an inmate of a state prison serving a sentence imposed on him by a state court petitioned for a writ of habeas corpus alleging that he had been inveigled into pleading guilty by pre-arrangement with the prosecuting attorney on the basis that his sentence would not be

over three years. The defendant petitioned the trial court for a writ of habeas corpus alleging that his rights under the Fourteenth Amendment had been violated. The trial court declined to issue the writ. A motion for reconsideration, setting out additional facts, was similarly dismissed. On appeal, the Supreme Court of Nebraska affirmed, without opinion.

The case comes before the Supreme Court on certiorari to review the affirmance of a judgment dismissing an application for writ of habeas corpus. The Supreme Court held that in light of the surrounding circumstances, if these things happened, the petitioner was imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against state invasion by the Fourteenth Amendment. It concluded that the petition set forth sufficient grounds for granting a writ of habeas corpus.

In the case of Waley v. Johnston, 316 U.S. 101 (1942), the petitioner was serving a long sentence of imprisonment on a charge of violating the Federal kidnapping statute. The conviction had been on a plea of guilty. The petition for a writ of habeas corpus in the District Court alleged that the plea of guilty had been induced by threats of law enforcement officers to publish full statements and to manufacture false evidence against him to incite public feeling. The District Court denied the application for the writ without hearing evidence. The Court of Appeals for the Ninth Circuit affirmed the order of the District Court. The case was heard by the Supreme Court on a writ of certiorari to review the judgment denying the writ. The Supreme Court remanding the case for hearing in the District Court stated on page 104 that:

> . . . a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession. . . .
>
> The issue here was appropriately raised by the habeas corpus petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to

render it. It extends also to those exceptional cases where the connection has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. Moore v. Dempsey, 261 U.S. 68; Mooney v. Holohan 294 U.S. 103; Bowen v. Johnston, 306 U.S. 19, 24.

These cases are particularly interesting in the respect that the collateral attack on the conviction was based on activities of prosecuting and law enforcement officers outside of the court.

V. Exhaustion of Remedies

The general rule is that state remedies by one detained under state court judgment of conviction is a prerequisite to relief by habeas corpus in Federal court. Ex parte Hawk, 321 U.S. 114, 116 (1944); Mooney v. Holohan, 294 U.S. 103 (1935); Frank v. Mangum, 237 U.S. 309, 328-29 (1915); Urquhart v. Brown, 205 U.S. 179, 181-82 (1907); Ex parte Royall, 117 U.S. 241, 250-54 (1886).

In Ex parte Hawk (supra), the Supreme Court set forth the exhaustion doctrine as it stood at the end of its pre-statutory development. The court stated:

> Ordinarily all applications for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a Federal court only after all state remedies available, including all appellate remedies in the state courts and in this court by appeal or writ of certiorari, have been exhausted.

The foregoing statement of law was incorporated into Title 28, United States Code, Section 2254 of the judicial code.

However, the court continued at 321 U.S. at 118:

> * * * but where resort to state court remedies has failed to afford a full and fair adjudication of the Federal contentions raised, either because the state affords no remedy, see Mooney v. Holohan, supra, [294 U.S. 7 115 [55 S. Ct. 343, 79 L. Ed. 791, 98 A.L.R. 406 7, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. Moore v. Dempsey, 261 U.S. 86 [43 S. Ct. 265, 67 L. Ed. 543 7; Ex parte Davis, [318 U.S. 868 7, a Federal court should entertain his petition for habeas corpus, else he would be remediless.

Similarly, habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials. Dowd v. Cook 340 U.S. 206 (1950); De Meerler v. Michigan, 329 U.S. 663 (1946); Johnson v. Zerbst, 304 U.S. 458 (1937).

Ex parte Hawk, supra, prescribes only what should "ordinarily" be the proper procedure; many of the cases have recognized that much cannot be foreseen, and that "special circum-

stances" justify departure from rules designed to regulate the usual case. The exceptions are few but they exist. In Whitten v. Tomlinson, 160 U.S. 231 (1895), the court at page 240 discussed the exceptions to this generally applied rule:

> "Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." Ex parte Royall, 117 U.S. 241, 251-53; New York v. Eno, 155 U.S. 89, 93-95.

> In Ex parte Royall and in New York v. Eno, it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of habeas corpus.

> Such an exceptional case was In re Neagle, 135 U.S. 1, in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on habeas corpus from custody under commitment by a magistrate

of a State on a charge of homicide committed in the performance of that duty.

Such also was In re Loney, 134 U.S. 372, in which a person arrested by order of a magistrate of a State for perjury in testimony given in the case of a contested Congressional election, was discharged on habeas corpus, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal.

Such, again, was Wildenhaus' case, 120 U.S. 1, in which the question was decided on habeas corpus whether an arrest, under authority of a State, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the State, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. Ex parte Royall, 117 U.S. 241; Ex parte Fonda, 117 U.S. 516; In re Duncan, 139 U.S. 449; In re Wood, 140 U.S. 278; In re Jugiro, 140 U.S. 291; Cook v. Hart, 146 U.S. 183; In re Frederich, 149 U.S. 70; New York v. Eno, 155 U.S. 89; Pepke v. Cronan, 155 U.S. 100; Bergemann v. Backer, 157 U.S. 655.

Since Whitten additional examples of "special circumstances" have been noted.

In Ohio v. Thomas 173, U.S. 276 (1899) the Director of a Soldiers Home created under the authority of Congress was convicted

and fined for the use of oleomargarine in violation of the law of Ohio. On direct application for a writ of habeas corpus to circuit court and then to the Court of Appeals the granting of the writ was affirmed. On appeal to the Supreme Court one court affirmed the discharge on habeas corpus and held:

> that this is one of the cases where it is proper to issue a writ of habeas corpus from the Federal court instead of awaiting the slow process of a writ of error from this court to the highest court of the State where a decision could be had. One of the grounds for making such a case as this an exception to the general rule laid down in Ex parte Royall, 117 U.S. 241; Whitten v. Tomlinson, 160 U.S. 231, and Baker v. Grice, 169 U.S. 284, consists in the fact that the Federal officer proceeded against in the courts of the State may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal Government might in the meantime be obstructed.

In Boske v. Comingore, 177 U.S. 459 (1900), a United States collector of internal revenue was held in contempt of a state court in Kentucky because he refused to file copies of certain reports. His refusal was based on a Department of the Treasury regulation denying him the right to make the reports available. Without exhausting state remedies he appealed directly to the United States District Court of Kentucky on a writ of habeas corpus. The district court discharged the defendant and the case was directly appealed to the Supreme Court which quoting Ex parte Royall held:

> "When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations

> of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

In Hunter v. Wood, 209 U.S. 205 (1907) a circuit court of the United States issued an injunction against a state law regulating railroad rates. After the issuance of the injunction the defendant, a ticket agent, was arrested and convicted by state authorities for overcharging for a railroad ticket. The defendant applied to the United States Circuit Court for a writ of habeas corpus which court granted the writ and an appeal was taken to the Supreme Court which affirmed the discharge and held:

> Being detained in custody by virtue of this conviction by one of the police courts of the State, he had the right to apply for a writ of habeas corpus to the United States Circuit Judge, and that judge had power to issue the writ and discharge the prisoner under section 753 of the Revised Statutes of the United States (1 U.S. Comp. Stat., p. 592), as he was then in custody for an act done pursuant to an order, process or decree of a court or judge of the United States. See In re Neagle, 135 U.S. 1. The writ being properly issued, the judge had the right, and it was his duty, to examine into the facts, and he had jurisdiction to discharge the petitioner under the circumstances stated.

For a discussion of cases since In re Neagle see 65 A.L.R. 733 through 754, Discharge on Habeas Corpus in Federal Court from Custody Under Process of State Court for Acts Done Under Federal Authority.

More recently in United States v. Fay, 300 F. 2d 345 (1962), cert. granted 369 U.S. 869, Circuit Judge Waterman starting on p. 352 reviews the development of the Exhaustion of State Remedies principle. On page 354, the Court reviewed the exceptional cases in which a "petitioner's duty to exhaust available state remedies would be excused and the Federal court could forthwith entertain the Great Writ." The Court cited In re Neagle, 135 U.S. 1 (1890); In re Loney, 134 U.S. 372, (1890); and the Wildenhaus' Case, 120 U.S. 1 (1887) discussed earlier in the case of Whitten v. Tomlinson, supra.

The Court noted that: "It has been said that the exceptional character of these cases, which permitted the by-passing of the State remedial processes, was that they involved either the operations of the Federal Government or its relations with other nations." 300 F.2d at 354.

Therefore, in view of the foregoing threre is no doubt that as a general rule federal courts should deny the writ to state prisoners if there is " available State corrective process." As explained in Darr v. Burford, 339 U.S. 200(1950) at 210, this rule is not rigid and inflexible; district courts may deviate from it and grand relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. The cases setforth above represents the basis upon which courts have deviated from this general rule.

VI Prejudicial Publicity

The question has been raised whether the publicity attendant to the Mississippi riot and the role of the accused in it so prejudiced the public as to deprive him of a fair grand jury indictment.

With claims that newspaper publicity has prevented a fair trial, it has been said that "each case must turn in its special facts." Marshall v. United States, 300 U.S. 310, 312, (1958).

In Marshall, the defendant was convicted of unlawfully dispensing certain drugs. Some of the jurors read newspaper articles earlier denied admission as evidence alleging that he had a record of two previous felony convictions and reciting other defamatory matters about him. The Court reversed the conviction, holding the harm to petitioner that resulted when prejudicial information was denied admission into evidence was brought before jurors through newspapers.

However, in Stroble v. California, 343 U.S. 181 (1951), the defendant, who had been convicted of first degree murder, alleged that a fair trial was made impossible because of inflamatory newspaper reports that depicted him as a "werewolf" a "fiend" a "sex-mad killer." The Court ruled that there was no showing that the newspaper reports had aroused such prejudice as to "necessarily prevent a fair trial."

In Beck v. United States, 298 F. 2d 622 (C.A. 9, 1962), the defendant alleged that he was denied his right to an impartial grand jury. In dispensing of this issue the Court stated at p. 627:

> There was no evidence that in fact the grand jury was prejudiced or that any member thereof had been affected by the vast amount of publicity accorded Beck.

In Torrance v. Salzinger, 297 F. 2d 902 (1962), the defendant contended that prejudicial publicity had poisoned public opinion so as to deprive him of a fair trial. He moved to quash the indictment, which motion was denied. The Court noted at p. 904:

> Moreover, whatever view one may take of the claim of prejudice in the indicting process, it is difficult to see how the ultimate conviction of the accused can be a denial of due process so long as the case is tried to an unbiased petit jury.

In support of this statement, the court cited the "Brink's Robbers" case, Geagan v. Gavin, 292 F. 2d 244 (1961), where the appellants' contended that massive sustained publicity prejudiced the grand jury. This contention was dismissed.

In cases where great public emotion has been stirred by the press, as in the case of the slaughter by a husband of his wife and children, Ciucci v. State of Illinois, 356 U.S. 571 (1958); or multiple murders, Irvin v. Dowd, (U.S.); or the rape of a white woman by four armed Negroes, Shepard v. State of Florida, 341 U.S. 50 (1941); or the killing of a white man by Negroes in Arkansas, Moore v. Dempsey, 261 U.S. 86 (1923), the Court has held that a defendant's right to a fair trial was denied.

Such allegations have been raised on a pre-trial motion to quash the indictment, or via habeas corpus as a post conviction remedy.

Conclusion

As the cases have illustrated, habeas corpus can be used as a post conviction remedy to correct gross constitutional injustices. Nevertheless, in a situation where the indictment itself is so tainted as to destroy the procedural foundation which grants the court jurisdiction to proceed, a strong argument can be made urging the use of habeas corpus to collaterally attack the indictment as a pre-trial remedy. In the instant case Judge Barr's charge to the jury effectively usurped the jury's function in reaching an independent decision. The result of this action was to deny the accused his constitutional right to indictment by a grand jury.

In Mooney v. Holohan, 294 U.S. 103, where perjured testimony was used to convict the defendant, the Court stated:

> Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Thus, a grand jury intimidated by the judge to return an indictment is similarly inconsistent with the rudimentary demands of justice.

The Court in United States v. Farrington, supra p. 4, quashed an indictment where the indictment "resulted from prejudice, or was found in wilful disregard of the rights of the accused." Prejudice against the accused was encouraged by Judge Barr in the instant case.

Similarly, the "special facts" might be available to show that the local newspaper reports had aroused such prejudice as to necessarily prevent a fair grand jury.

However, whether collateral attack by habeas corpus is an available remedy in any of the aforementioned situations is an answer which the reader must weigh against the precedents in the preceding cases.