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failure to seek *certiorari* against the miscarriage of justice that might result from a failure to grant relief.⁵

Applying the new rule to *Wade v. Mayo*, the Court concluded that since the Supreme Court of Florida had dismissed the writ of *habeas corpus* in the state courts without opinion, it was doubtful at that time whether or not the constitutional issue had been decided. Thus had *certiorari* been sought at that time, the petition might well have been denied by reason of an adequate state ground underlying the decision.⁶ For that reason it was properly within the discretion of the district court judge to entertain the petition for *habeas corpus*, and the failure of Wade to seek *certiorari* in the Supreme Court of the United States should not prejudice his rights.

The decision in *Wade v. Mayo* thus appears to broaden the availability of the writ of *habeas corpus* brought in the federal courts for the purpose of testing the constitutionality of state decisions, in that it modifies the former rule of *Ex Parte Hawk*.⁷ The present rule as to the necessity for petitioning for *certiorari* for a review of the state court decision before bringing *habeas corpus* in the federal courts leaves the question in the discretion of the federal judge as to whether a denial of the writ for that reason will result in a substantial miscarriage of justice.⁸

THOMAS B. STIBOLT

Due Process in Summary Contempt Cases

The Supreme Court of the United States, which generally has been quite liberal in recognizing a sphere of activity in which the states may determine their own procedure in detecting and prosecuting crime, has announced several restrictive safeguards required by the due process clause of the Fourteenth Amendment in the recent case of *In re Oliver*.¹ This case arose out of Michigan's unique one-man grand jury system,²

⁵ It should be noted here that in the case of *White v. Ragen*, 324 U.S. 760 (1945), the Supreme Court stated that it was unnecessary to apply for a writ of *certiorari* to the United States Supreme Court in order to exhaust state remedies when an application for a writ of *habeas corpus* has been denied without opinion and it could not be said that the petition was denied on its merits rather than on adequate state grounds. Although the facts of that case are similar to those of the instant case, and it might be argued on the facts of the instant case that it goes no further than *White v. Ragen*, the language of *Wade v. Mayo* is much broader, and would seem to leave the question of whether or not to entertain the petition in the discretion of the district judge whether or not the state court had denied without opinion.

⁶ Wade had failed to appeal the conviction in the trial court. Thus the Florida court could have refused the writ on the ground that the petitioner had failed to make use of his remedy of appeal, and could not now challenge the decision by *habeas corpus*.

⁷ The Revised United States Code dealing with the judiciary and judicial procedure, Pub. L. No. 773, 80th cong., 2d Sess. (Sept. 1, 1948), 28 USC § 2254 (1948), does not seem to affect this result.

⁸ For a discussion of the evolution of the writ of *habeas corpus* prior to the instant case, see 61 Harv. L. Rev. 657 (1948).

¹ 333 U.S. 257 (1948).

² The Michigan Constitution does not require criminal prosecution to be begun by an indictment of a grand jury. A 16-23 member grand jury is discretionary. In 1917 a law was passed to afford a method, other than the unwieldy, cumbersome, expensive traditional grand jury, to investigate crime and in particular to cope with gambling and political racketeering. This bill conferred investigatory powers on

which has been the subject of considerable controversy in its three-decade life.³ Under this system all traditional grand jury powers may be conferred on a single judge for the investigation of crime.

The facts of the case are relatively simple. A circuit court judge, who together with two advisory judges was acting as a one-man grand jury, asked a witness certain questions in secret session. The judge, feeling the answers given were evasive, then cited the witness for contempt of grand jury and summarily sentenced him to 60 days' imprisonment. The Michigan Supreme Court rejected a petition for habeas corpus.⁴

The Michigan contempt statutes⁵ give every court of record power to punish persons guilty of certain acts of neglect or violation of duty or misconduct. Such contempt, when committed in the court's presence, is punishable summarily.⁶ The contempt power of a judge-grand jury is stated as follows:⁷ "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine . . . or imprisonment . . . or both . . ."

Two questions of construction of the above statutes led to the controversy in this case. The first is whether refusing to answer a question or answering falsely or evasively constitutes misconduct subject to summary contempt procedure. This type of question arose in the federal district court in New York in *U. S. v. Appel*.⁸ Judge Learned Hand in that case said that if the witness' conduct showed that he was refusing to tell what he knew, he was in contempt of court in spite of the fact that some answer was given to each question. The Michigan decisions of *In re Slattery*⁹ and *In re Ward*¹⁰ held likewise.

The second question, which arose in giving contempt power to the judge-grand jury, is whether the legislature intended to give, or in fact could give, the judge-grand jury itself power to punish a witness for contempt, or whether in stead it intended such contempt to be a crime punishable by a regular court of record. The general practice had been to cite for contempt a witness who refused to answer or gave

police judges, justices of the peace, and judges of courts of record. Mich. Law 1917, Act 196; Mich. Stat. Anno. § 28.943-6. As amended and construed, the bill, which allows the judge to hire prosecutors, detectives, and lawyers to aid him, confers all traditional grand jury investigatory powers on the judge, but the Michigan Courts construed the whole procedure as judicial in nature. *People v. Doe*, 226 Mich. 5, 196 N.W. 757 (1924); *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877 (1921); *In re Slattery*, 310 Mich. 458, 17 N.W. (2d) 251 (1945).

³ One-man grand jury investigations include the House of David investigation in 1923, the 1934 vote recount in the race for secretary of state, and the Ferguson Grand Jury investigation, which indicted 360 persons, including the former mayor of Detroit. For opposing views of the merits of this system, see Winters, *The Michigan One-Man Grand Jury* (1945) 28 J. Am. Jud. Soc. 137, and Gallagher, *The One-Man Grand Jury—A Reply* (1945) 29 J. Am. Jud. Soc. 20.

⁴ *Petition of Dohany (Ex parte Oliver)*, 318 Mich. 7, 27 N.W. (2d) 323 (1947).

⁵ Mich. Stat. Anno. (Henderson 1938) § 27.511; *Compiled Law of Michigan* (1929) § 13910.

⁶ Mich. Stat. Anno. (Henderson 1938) § 27.512. *In re Wood*, 82 Mich. 75, 45 N.W. 1113 (1890).

⁷ Mich. Stat. Anno. (Henderson 1938) § 28.945.

⁸ 211 Fed. 495 (S.D.N.Y. 1913).

⁹ 310 Mich. 458, 17 N.W. (2d) 251 (1945).

¹⁰ 295 Mich. 742, 295 N.W. 483 (1940).

a false or evasive answer and then to take him before a regular court and ask him the same question or give evidence of his refusal to answer before the judge-grand jury. But in cases involving secrecy that method is not very satisfactory.¹¹ Here the statute made certain acts punishable as contempt, and the Michigan Supreme Court, having declared one-man grand jury procedure judicial in nature,¹² decided it was more expedient for the judge-grand jury to try summarily the recalcitrant witness for contempt than to adjourn and the same judge open court to try the witness.

The United States Supreme Court decided the question of a judge-grand jury's power to punish summarily by stating that every contempt procedure must conform to the standards of due process applicable to regular court proceedings.¹³ Mr. Justice Black, speaking for the majority, said that while a grand jury may examine witnesses in secret, the effect of due process on the proceedings is very different when a witness becomes a defendant in a contempt case. The Court then reviewed the case as a criminal trial and not as a grand jury investigation, and it found that the conviction violated due process on two grounds.

The first cause for reversal was the secrecy of the trial.¹⁴ After a long tour of judicial history, from the English Star Chamber, through the Inquisition and the French *lettres de cachet*,¹⁵ and culminating in state cases where certain persons were excluded from the courtroom,¹⁶ the Court concluded that it is unconstitutional to exclude the public completely from any criminal trial, including summary contempt cases.¹⁷ Although no minimum requirement is set, it is implied that the accused is at least entitled to have his friends, relatives, and counsel present, no matter with what offense he may be charged. The fact that the proceedings were carried on in the judge's chambers was commented

¹¹ This difficulty is especially acute in investigations concerning highly confidential subject matter, such as in the field of atomic research.

¹² *In re Slattery*, 310 Mich. 458, 17 N.W. (2d) 251 (1945).

¹³ *In re Oliver*, 333 U.S. 257, 265 note 10 (1948). The Court cites 8 ALR 1579-1580 to support the argument that grand juries do not adjudge witnesses guilty of contempt. This article cites five cases: *In re Gannon*, 69 Cal. 541, 11 Pac. 240 (1886); *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961 (1892); *In re Clark*, 65 Conn. 17, 31 Atl. 522 (1894); *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. 1874); *In re Harris*, 4 Utah 5, 5 Pac. 129 (1884). None of these deals with a situation where the legislature of a state attempts to give summary contempt power to a grand jury. One case, *In re Clark*, *supra*, in the dictum seems to imply that the legislature could give this power validity as a quasi-legislative power, or at least to a case where the witness refuses to answer at all.

¹⁴ Mr. Justice Jackson, with whom Mr. Justice Frankfurter agreed, dissented on the ground that the Michigan Supreme Court had not passed on the issue of secrecy. 333 U.S. 257, 286 (1948) (Jackson, J. dissenting).

¹⁵ A *lettre de cachet* was an order of the King that one of his subjects be imprisoned or otherwise punished without trial or opportunity of defense. It was used extensively by French monarchs prior to the French Revolution.

¹⁶ *State v. Beckstead*, 96 Utah 528, 88 Pac. (2d) 461 (1939) (error to exclude friends and relatives of accused); *Benedict v. People*, 23 Colo. 126, 46 Pac. 637 (1896) (exclusion of all except witnesses, members of the bar, and law students upheld); *People v. Hall*, 64 N.Y.S. 433 (1900) (exclusion of general public upheld where accused permitted to designate friends who remained); *People v. Miller*, 257 N.Y. 54, 177 N.E. 306 (1931) (exclusion of general public but not their representatives, upheld); *Hogan v. State*, 191 Ark. 437, 86 S.W. (2d) 931 (1935) (exclusion of public while embarrassed girl testified, upheld).

¹⁷ Court martial cases are not included. *Ex parte Quirin*, 317 U.S. 1 (1942); *King v. Governor of Lewes Prison*, 61 Sol. J. 294 (1917).

upon, but no indication was given that this is a reason for reversal other than it evinces a tendency toward a secret trial.

The second cause for reversal was the failure to give the defendant a reasonable opportunity to defend himself, this not being a proper case, in the Court's view, for summary punishment. In stating the rights of a defendant, the Court enumerated, as a minimum, reasonable notice of the charge, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

A right of departure from these requirements was recognized in true summary contempt cases. The Court, in distinguishing this case from one which legally could be tried summarily, limited such cases to ones which charge misconduct in open court where all of the essential elements of the misconduct are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority . . . before the public." Since the Court already had decided this case on the point of excluding the public, it follows that the requirement of being essential to prevent demoralization of the court's authority "before the public" could not be met. But since the Court held that all summary contempt proceedings must be public, in all subsequent cases any demoralization will be before the public. The precise meaning of demoralization is yet to be determined. Presumably any false or evasive answer hinders the court and tends to demoralize it. When asked, as the witness was in this case, what he had done with certain bonds, an answer of "I don't know", if it is something that a reasonable man should remember, would undoubtedly demoralize a court before any person present, to some extent at least. The other requirements of being in the presence of the judge and observed by the court certainly would be met also in a case where a witness so answered.

The Court in this case purposely left such a question unanswered by saying that it was conceivable that a judge under some circumstances could correctly detect falsity and evasiveness from simply listening to a witness testify. This was held not to be such a case because the judge based part of his conclusion of the evasiveness of the defendant's testimony on prior testimony of other witnesses. The fact that a complete record of the judge-grand jury proceedings was never available on appeal made it more difficult to determine what testimony the judge found evasive. Mr. Justice Frankfurter in his dissent took the position that this lack of a complete record was in itself a violation of the Fourteenth Amendment, but the Court did not decide the question.¹⁸

Mr. Justice Rutledge, in a concurring opinion, reiterated the view which Mr. Justice Black himself expressed in his dissent in *Adamson v. California*¹⁹ that the Bill of Rights was made applicable to state as well as federal courts by adoption of the Fourteenth Amendment. This argument, which was never accepted by the Court, has its origin

¹⁸ Petitioner did not base his appeal on this point. His only mention of it was in stating the evils which had grown up through the use of the one-man grand jury system. Brief in Answer to Brief of State Bar of Michigan, p. 13. Petitioner also did not seek to have the statute giving investigatory powers to judges held unconstitutional, although a similar act in New York, Public Officers Law (Cons. Laws ch. 47) § 34, was so held by Chief Justice Cardozo as attempting to confer non-judicial duties on a justice of the supreme court. *Matter of Richardson*, 247 N.Y. 401, 160 N.E. 655 (1928).

¹⁹ 332 U.S. 46, 68 (1948) (Black, J., dissenting).

even prior to Justice Cardozo's contrary view in *Palko v. Connecticut*²⁰ that certain rights are basic to due process while others are not so essential that an "enlightened system of justice would be impossible without them."²¹ The Supreme Court has decided, in separate decisions as the issue arose, that freedom of speech,²² press,²³ religion,²⁴ assembly,²⁵ the right of fair hearing,²⁶ and the right not to be deprived of counsel²⁷ are essential, whereas the right of trial by a jury of twelve men,²⁸ grand jury indictment,²⁹ and freedom from double jeopardy³⁰ and some types of forced self-incrimination³¹ are not. This decision of *In re Oliver* adds the right of public trial³² to those essential to due process. It also restricts the use of summary contempt procedure to cases where the act constituting contempt occurs in the presence of a judge sitting in open court. The remedy available to a grand jury or any other secret investigatory body is limited to citing for contempt. The power to try and punish rests in the court alone.

While *In re Oliver* does not affect the validity of the one-man grand jury,³³ the decision may act to weaken the effectiveness of that procedure. One of the purposes of the one-man grand jury is to afford a more efficient method of combatting vice and racketeering. Without the power to elicit truthful information from witnesses except by regular contempt procedure, enforcement officials will have to weigh the factors and determine whether or not it will be for the public welfare to air the subject matter of the inquiry in open court. Sometimes an obvious perjurer will go free. But while this may often retard vigorous efforts to insure greater protection for the general public, it adheres to one of the dominant principles of American justice—guaranteeing the accused a fair and impartial trial.

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20 302 U.S. 319 (1937) (State appealed murder case).

21 *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (Harlan, J., dissenting).

22 *Gitlow v. New York*, 268 U.S. 652 (1925) (Inciting to overthrow government).

23 *Near v. Minnesota*, 283 U.S. 697 (1931) (Injunction against publishing newspaper).

24 *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Soliciting for religious cause).

25 *De Jonge v. Oregon*, 299 U.S. 353 (1937) (Meeting held under Communist auspices).

26 *Moore v. Dempsey*, 261 U.S. 86 (1923) (Negroes given trial "in form only").

27 *Powell v. Alabama*, 287 U.S. 45 (1932) (Illiterate negroes tried without counsel); *De Meerleer v. Michigan*, 329 U.S. 663 (1947) (Seventeen-year old convicted of murder without counsel). Cf. *Betts v. Brady*, 316 U.S. 455 (1942) (Refusal of state to appoint counsel in robbery case).

28 *Maxwell v. Dow*, 176 U.S. 581 (1900) (Eight-man jury).

29 *Hurtado v. California*, 110 U.S. 516 (1884) (Murder indictment by information); *Gaines v. Washington*, 277 U.S. 81 (1928) (Same).

30 *Palko v. Connecticut*, 302 U.S. 319 (1937).

31 *Twining v. New Jersey*, 211 U.S. 78 (1908) (Instruction that jury may draw inference from failure of accused to testify).

32 This right was granted in the federal courts by the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const. Amend. VI.

33 A three-judge federal court sitting in Michigan subsequently refused to enjoin proceedings of a one-man grand jury. The complaint alleged that the statute conferring investigatory powers on judges was unconstitutional on grounds that it conferred nonjudicial powers on the judiciary and was therefore a denial of equal protection and due process of law. The court declined to intervene since the plaintiff did not show that he would suffer greater damage because litigation proceeded in state rather than federal courts. *Society of Good Neighbors v. Groat*, 77 F. Supp. 695 (D.C. Mich., 1948).