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RECENT TRENDS IN THE CRIMINAL LAW

CONSPIRACY

In *United States v. Figueredo*,—F. Supp.—(M.D. Fla. 1972), the common law doctrine known as Wharton's (or the "concert of action"[1]) Rule was relied upon by the court to dismiss a conspiracy count against eight defendants for conspiring to conduct an illegal gambling business in violation of 18 U.S.C. § 1955.[2]

Wharton's Rule provides that conspiracy charges cannot be brought for crimes whose very nature requires concerted action by the participants.[3] In other words, where cooperation or conspiracy is an inherent element of a substantive offense, courts have deemed it unfair to also charge the parties with conspiracy to commit that crime.[4] The crimes of adultery, incest, abortion, and dueling, which necessarily require concerted action by two parties for their commission, are ones to which this doctrine has frequently been applied.[5]

Enacted as part of the Organized Crime Control Act of 1970,[6] § 1955, which the defendants were charged with both violating and conspiring to violate, prohibits illegal gambling businesses which involve, among other elements, "five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business."[7] Because of this requirement of five or more participants, the *Figueredo* court found § 1955 inherently conspiratorial and therefore within the logic of Wharton's Rule. As support for its position that Congress did not intend § 1955 to be an offense for which conspiracy could be charged, the court pointed to the existence of 18 U.S.C. § 1511 which was enacted with § 1955, but which expressly prohibits conspiracies to obstruct enforcement of gambling laws.[8]

Application of Wharton's Rule to § 1955 had been considered in two cases prior to *Figueredo*. In *United States v. Greenberg*[9] the United States District Court for the Northern District of Ohio applied the Rule to dismiss conspiracy charges against thirteen defendants. The *Greenberg* court held that concerted action was central to a violation of § 1955, while the number of participants was inconsequential, especially because five is expressed as a minimum number necessary to violate the statute. A contrary conclusion was reached by the United States Court of Appeals for the Second Circuit in *United States v. Becker*,[10] which held that the naming of seven defendants, or two more persons than required for a § 1955 violation, took the case out of the scope of Wharton's Rule.

Disagreeing with the holding of the *Becker* case, the *Figueredo* court claimed the *Becker* opinion improperly relied upon a line of cases which had applied one of the recognized limitations to Wharton's Rule—the third person exception[11]—which

[1] *See* United States v. Greenberg, 334 F. Supp. 1092 (N.D. Ohio 1971).

[2] 18 U.S.C. § 1955 (1970) makes operation of a gambling business a federal crime if it violates state law, involves five or more persons who conduct the operation, and has been in existence for over thirty consecutive days and grosses a revenue in excess of $2,000 per day.

[3] R. ANDERSON, 1. WHARTON'S CRIMINAL LAW AND PROCEDURE § 89 (1957).

[4] *See, e.g.*, Pinkerton v. United States, 328 U.S. 640, 643 (1946); Gebardi v. United States, 287 U.S. 112, 121 (1932); United States v. Katz, 271 U.S. 354, 355–56 (1926); Baker v. United States, 393 F.2d 604 (9th Cir. 1968).

[5] *See, e.g.*, State v. Law, 189 Iowa 760, 179 N.W. 145 (1920) (adultery); Shannon v. Commonwealth, 14 Pa. 226 (1850) (adultery); Commonwealth v. Bricker, 74 Pa. Super. Ct. 234 (1920) (abortion).

[6] Organized Crime Control Act of 1970, 18 U.S.C. §§ 1955–68 (1970).

[7] 18 U.S.C. § 1955 (1970). According to the *Figueredo* court, this element was added to make the statute federally cognizable.

[8] 18 U.S.C. § 1511 (1970).

[9] 334 F. Supp. 1092 (N.D. Ohio 1971).

[10] 461 F.2d 230 (2d Cir. 1972).

[11] There are three other common exceptions to Wharton's Rule. One exception states that the Rule does not apply when one of the conspirators alone could commit the offense. Conspiracy charges have been sustained, for instance, for conspiring to smuggle and defraud customs. United States v. Shevlin, 212 F. 343 (D. Mass. 1913). Wharton's Rule also does not apply to violations in which concerted action is not logically necessary, although as a practical matter cooperation is required to commit the crime. This exception was employed in Lisansky v. United States, 31 F.2d 846 (4th Cir. 1929), where two partners were prosecuted for conspiring to defraud the government by filing a false partnership tax return, because the statute specified that one partner could fill out the return. Another exception to the rule is applied to crimes in which the law defining the offense does not impose any sanctions on one of the essential participants. A conspiracy charge was allowed, for example, where a railroad employee conspired with a third person to provide him with free tickets, thus violating a federal law which punished the railroad and the person using the free tickets, but not the employee. United States v. Clark, 164 F. 75 (W.D. Mo. 1908). *See* ANDERSON, *supra* note 3.

the court argued is not applicable to § 1955. That exception states that when essential participants conspire with a third party to commit a crime, all are guilty of a conspiracy, the rationale being that an element has been added which was not part of the substantive offense. In one case involving a conspiracy by three persons to sell stolen goods, for example, the third party was simply a go-between for the thief and the buyer and consequently not a necessary participant in the crime.[12] That added element distinguished the conspiracy from the crime of selling stolen goods. According to the *Figueredo* court, however, the manner in which § 1955 was drafted renders the third person exception inapplicable because all participants are necessarily within the terms of the statute. In addition, the *Figueredo* court argued that the *Becker* reading of the Rule would provide prosecutors with an easy means to circumvent the Rule—simply by charging more than five people with participation in the crime.

If courts continue to apply Wharton's Rule to § 1955, the Government will no longer be able to resort to conspiracy charges when prosecuting gambling activities.

Grand Juries

In *United States v. Dionisio*, 93 S. Ct. 764 (1973), the United States Supreme Court resolved a conflict between two federal circuit courts by holding that a federal grand jury can subpoena voice exemplars without making a preliminary showing of the reasonableness of the request.[13] The grand jury in *Dionisio* subpoenaed approximately twenty people to produce voice samples for comparison with recorded conversations presented in the grand jury's investigation of possible violations of the federal gambling laws. Warned that they were potential defendants, Dionisio and other witnesses refused to furnish the voiceprints, claiming the requests violated their rights under the fourth and fifth amendments.

Writing for the majority, Justice Stewart rejected the argument that the defendants' fifth amendment rights were violated. He ruled that the compelled production of voiceprints fell within the holdings of *Gilbert v. California*[14] and *United States v. Wade*[15] which specified, respectively, that compelled handwriting exemplars and utterances in a line-up of words spoken by a bank robber did not violate the fifth amendment privilege because they were not evidence of a testimonial or communicative nature.

According to Justice Stewart, two inquiries were needed to determine whether the fourth amendment was violated by this compulsory production of voiceprints—whether the compelled appearance before the grand jury or the request for the voice exemplar constituted an unreasonable seizure prohibited by the fourth amendment. The subpoena to appear before the grand jury was held not to be a seizure because of the historically recognized obligation of citizens to make such appearances and the fact that no social stigma is attached to a grand jury appearance.[16] With regard to the directive to make voice recordings, the Court held that the constant exposure of one's voice to the public eliminates any feelings of privacy which a person might have in the sound of his voice and makes its disclosure a much less serious infringment of an individual's privacy than an intrusion into one's body, such as the extraction of a blood sample which was held not to violate the fourth amendment in *Schmerber v. California*.[17] The Court also stated that a seizure of voice exemplars is not as great an intrusion as a stop and frisk.[18] Because an appearance before the grand jury and the required voiceprint did not infringe upon any fourth amendment interest, the Court concluded that there was no justification for any reasonableness showing as the Seventh Circuit had required.[19]

In *Dionisio's* companion case, *United States v. Mara*, 93 S. Ct. 774 (1973), the Court applied the same rationale in recognizing the validity of a grand jury subpoena for handwriting and printing

[12] *See* United States v. Smolin, 182 F.2d 782, 786 (2d Cir. 1950).

[13] In United States v. Doe (Schwartz), 457 F.2d 895 (2d Cir. 1972), the Court of Appeals for the Second Circuit affirmed a contempt holding against a grand jury witness for refusing to furnish handwriting samples. Previously the Court of Appeals for the Seventh Circuit reversed findings of contempt against grand jury witnesses for refusing to furnish voice samples in *In re* Dionisio, 442 F.2d 276 (7th Cir. 1971), and handwriting samples in United States v. Mara, 454 F.2d 580 (7th Cir. 1971), to grand juries which did not make preliminary showings of reasonableness.

[14] 388 U.S. 263 (1967).

[15] 388 U.S. 218 (1967).

[16] Judge Friendly made a similar point concerning the absence of social stigma surrounding a grand jury appearance in United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972). The validity of this contention is questioned by the dissenting opinions of Justices Marshall and Douglas to *Dionisio* and *Mara*.

[17] 384 U.S. 757 (1966).

[18] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[19] *In re* Dionisio, 442 F.2d 276 (7th Cir. 1971).

exemplars. The grand jury in *Mara* was investigating thefts of interstate shipments. Its subpoena of Mara's handwriting samples was approved by the district court after an *in camera* inspection of the FBI affidavit. Subsequent contempt charges against Mara for refusing to produce the samples were overturned by the Seventh Circuit which held that the reasonableness of the subpoena had to be proved in an open court hearing.[20] As with the voiceprints in *Dionisio*, the Supreme Court found no expectation of privacy in the physical characteristics of one's handwriting. In addition, the Court commented that the subpoena of a single person in *Mara* seemed less suspect than the dragnet summons of twenty witnesses which the court of appeals found significant in *Dionisio*. Consequently the Court held that the fourth amendment does not require a showing of reasonableness when a grand jury requests handwriting exemplars solely for their physical characteristics.

Justice Brennan concurred in the Court's finding that the subpoenas did not violate the fifth amendment, but dissented in part because he believed that the fourth amendment requires a showing of reasonableness before compelling the production of voice and handwriting exemplars.

Justice Douglas dissented, arguing that the majority opinion failed to maintain the grand jury's historical function of protecting citizens from overzealous prosecutors. Instead he felt that the decision provided a means by which the government could usurp the powers of the grand jury whenever it could not establish probable cause for an arrest. Although not reaching the fifth amendment question, Justice Douglas noted his position that the protection of the fifth amendment is not restricted to testimonial compulsion.

In his dissent Justice Marshall stated that the fifth amendment should not be limited to testimonial evidence, but should protect a person against being required to affirmatively cooperate in furnishing evidence against himself. He shared Justice Douglas' concern over official usurpation of grand jury power, stating that the majority opinion will allow police to acquire evidence through the grand jury which could not otherwise be acquired. Justice Marshall also questioned the majority's statement that no stigma surrounds grand jury subpoenas and appearances, arguing that practical experience indicated otherwise. He also disagreed with the majority view that a "stop and frisk" was less an infringement of one's privacy than a grand jury appearance, pointing out the gravity with which society regards appearances before a grand jury. Agreeing with the Seventh Circuit, Justice Marshall felt that the fourth amendment would require a showing of reasonableness at an adversary hearing before allowing grand jury subpoenas of voice and handwriting exemplars.

As suggested by the dissenting opinions, *Dionisio*[21] and *Mara* ignore the realities of present day grand juries. Unless a showing of reasonableness is required for grand jury subpoenas of voice and handwriting exemplars, grand juries will become not only a means of getting publicity for prosecutors but also will become a tool for prosecutors to secure evidence which the Constitution would otherwise prevent them from obtaining.

Prison Disciplinary Hearings

While the entire area of prisoners' rights is being subjected to extensive litigation,[22] many challenges are being directed with varying degrees of success at prison disciplinary procedures for their violations of the right against self-incrimination and the due process guarantees.

In *Carter v. McGinnis*, ___ F. Supp. ___ (W.D.N.Y. 1972), the United States District Court for the Western District of New York held that punishment of inmates who chose to remain silent at prison disciplinary hearings because a grand jury was considering whether to bring criminal charges against them was an unconstitutional infringement upon the prisoners' privilege against self-incrimination. The court recognized that the inmates were faced with the dilemma that any statements made by them in their defense at the hearing might later be used against them in criminal proceedings, either directly or for impeachment purposes.[23]

The plaintiff inmates in *Carter* urged the court

[20] United States v. Mara, 454 F.2d 580 (7th Cir. 1971).

[21] The point is persuasively made in Judge Campbell's article, Campbell, *Eliminate the Grand Jury*, 64 J. Crim. L.&C. 174, *passim* (1973).

[22] *See generally Symposium: Prisoner's Rights*, 63 J. Crim. L.C. & P.S. 154 (1972).

[23] Because the disciplinary hearings constituted custodial interrogation, the *Carter* court states the plaintiffs should have been given the *Miranda* warnings. Although the failure to issue these warnings subjected any statements so obtained to the exclusionary rule, the court held that such a remedy provided insufficient protection for the right against self-incrimination.

to follow *Clutchette v. Procunier*,[24] which held that any prisoner undergoing disciplinary proceedings for actions which might later be the basis for criminal charges was entitled to counsel and to cross-examine and call witnesses. The defendants, however, argued that "use" immunity be applied, so that statements made in a disciplinary hearing could not be used affirmatively in subsequent criminal proceedings. Because the prisoners had already been punished for refusing to testify, the court was not forced to choose which contention should be followed in future situations, but it did hold that the punishment was an unconstitutional violation of the prisoners' fifth amendment privilege against self-incrimination.

Virtually all aspects of prison disciplinary hearings were examined in *Sands v. Wainwright*, ___ F. Supp. ___ (M.D. Fla. 1973), with the result that the United States District Court for the Middle District of Florida imposed far-reaching changes on such proceedings in Florida prisons.[25] The court reasoned that solitary confinement and loss of "gain time" [26] constituted sufficient deprivations to require the protections of due process. First, it ruled that hearing committee members should be impartial fact finders, and listed instances in which they should be disqualified.[27] The court even raised the possibility of having persons from outside of the prison community serve on the disciplinary committees, but indicated that good faith efforts by prison authorities to follow its mandate would negate the need for such outside participation.

The court also held that written notice has to be timely delivered to the accused inmate, detailing the charges and their factual basis. The inmate then has the right to explain his conduct and call witnesses on his behalf. Although the court recognized that an accused might seek revenge upon those prisoners who testify against him, it nevertheless viewed the punishments arising from disciplinary hearings severe enough to afford an inmate the rights of confrontation and cross-examination.

Although no need was seen for the prison to furnish counsel, the court ruled that the accused should be allowed to retain counsel or be assisted by voluntary counsel. Stressing that disciplinary decisions should be made solely upon the facts presented at the hearings, the court indicated that some abbreviated record of the proceedings should be made. While not holding that an avenue of appealing disciplinary hearings was necessary, any review of those proceedings was to be limited to this record. The court, however, rejected the contention that a public hearing is necessary to satisfy the due process requirement.

Finally, examining the self-incrimination dilemma discussed in *Carter*, the court disagreed with the *Clutchette* holding that counsel is indispensable in such situations. Instead the court ruled that "use" immunity in any subsequent prosecution would adequately protect a prisoner's fifth amendment rights.

Although the *Carter* and *Sands* opinions do not represent the attitudes of all courts,[28] their willingness to provide prison inmates with certain constitutional protections during disciplinary hearings are likely to carry over into other prison administrative actions.

Expunction of Records

In several recent decisions police retention of arrest and other records of defendants who have been acquitted, or suspects who are never prosecuted, has been challenged as an infringement of an individual's right to privacy. In *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972), the Colorado supreme court reversed a trial court's dismissal of a complaint which alleged that the retention of arrest records and fingerprints by the police department after the plaintiff had been acquitted of loitering charges was a violation of her right to privacy.[29]

[24] Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

[25] In Inmates v. Mullaney, ___ F. Supp. ___ (D. Me. 1973), the United States District Court for the District of Maine imposed new rules for Maine prisoners of a similarly broad scope, but gave prison authorities much more flexibility in implementing them.

[26] "Gain time" reduces a prisoner's sentence because of good behavior.

[27] Instances in which the court felt a hearing committee member should disqualify himself included when (1) he has participated as an investigating officer in the matter, (2) he is a witness in the proceedings, (3) his responsibilities include reviewing the committee decisions, (4) he has knowledge of a material fact, (5) he has a material involvement, or (6) he has a personal interest in the outcome. Carter v. McGinnis, ___ F. Supp. ___ (W.D.N.Y. 1972).

[28] In Sellers v. State, ___ S.C. ___, ___ S.E.2d ___ (1972), the Supreme Court of South Carolina held that prison disciplinary actions were not subject to judicial review. The court justified the denial of rights of notice and time to prepare an adequate defense on the grounds that the urgency of the situation required prompt action. Rights of confrontation were denied on the grounds that the guilty inmates could only be apprehended promptly if informers were assured their identity would not be revealed.

[29] United States v. Kutchman, No. 72-1582 (7th Cir.

Although having only recently recognized a tort action for violations of the right to privacy,[30] the Colorado court ruled that the invasion of such an important constitutional right warrants additional judicial control, even in the absence of legislative action on the subject. The court stated that the proper test for determining whether an arrest record should be expunged involves weighing the individual's interest in privacy and in preventing adverse consequences from the use of such records against the public interest in their retention by the police. The future use of the records, the facts contained in them, and the extent to which they could be expected to remain confidential were factors to be considered by the trial court in making that determination. In addition, even if the trial court found complete expunction unwarranted, the court expressed a willingness to shape alternative forms of relief to protect the plaintiff's right of privacy.

In *State v. Pinkney*, 12 BNA CRIM. L. REP. 2351 (C.P. Cuyahoga Cnty., Ohio, Jan. 8, 1973), again an individual's fundamental right of privacy was the basis for an order by the Court of Common Pleas for Cuyahoga County, Ohio, to destroy all county police and court records relating to a murder suspect whose trial had ended in a hung jury, after which another person had confessed to the crime. The court recommended that the defendant also request state and federal law enforcement agencies (including the FBI) to destroy related records in their possession.

One question left unanswered by both cases is the extent to which expunction depends upon the reason for a person's acquittal. The acquittal in the *Davidson* case, for example, may have been because the judge or jury felt there was insufficient evidence to prove the accused's guilt beyond a reasonable doubt. The guilt of the accused in the *Pinkney* case, on the other hand, was completely removed when someone else confessed to the crime for which Pinkney was charged. In several other major cases expunction was ordered because there was no probable cause for the arrests and because the arrests were principally for harassment purposes.[31] Although no standards have evolved, an individual's interest in having his records expunged seems less in cases in which he is released because he was not afforded the necessary constitutional procedural protections than in cases in which his arrest was initially groundless, as in cases of mistaken identity or harassment arrests.

Another unanswered question is whether alternatives to complete expunction will suffice in some cases to protect the right of privacy. In *Rodgers v. Slaughter*, 469 F.2d 1084 (5th Cir. 1972), the defendant was a school teacher who accidentally fired a pistol which he had taken to school. He was convicted for discharging a firearm, but the conviction was ruled unconstitutional because he had not been advised of his right to counsel. Although its per curiam decision was not explicit, the United States Court of Appeals for the Fifth Circuit vacated a federal district court order requiring expunction of all references to the arrest and conviction. Stating that the privilege of expunction is one of very narrow scope, the Fifth Circuit ruled the expunction order was overbroad.

Feb. 27, 1973), suggests the procedural vehicle employed by the plaintiff in seeking expunction may be important. In that case the United States Court of Appeals for the Seventh Circuit reversed a district court order of expunction on the ground that the acquitted petitioner's post-trial writ of error *coram nobis* did not present an adequate record for such a determination.

[30] Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970).

[31] United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).