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EXCLUSIONARY RULE

United States v. Dionisio, 410 U.S. 1 (1973)
United States v. Mara, 410 U.S. 9 (1973)

In two companion cases, *United States v. Dionisio*[1] and *United States v. Mara*,[2] the Supreme Court held that a grand jury subpoena to testify is not a seizure within the meaning of the fourth amendment. Additionally, the Court determined that the fourth amendment does not require the government to make a preliminary showing of reasonableness before a grand jury can compel a witness validly subpoenaed to produce physical evidence such as handwriting or voice exemplars.

Dionisio arose when the respondent and approximately nineteen others were subpoenaed by a special grand jury for the Northern District of Illinois which was investigating illegal interstate gambling operations. Durings its investigation the grand jury had received voice recording exhibits from authorized wiretaps.[3] Dionisio refused to comply with the grand jury's request for comparison voice exemplars, asserting both fourth and fifth amendment claims. The government obtained a district court order demanding compliance.[4] Dionisio again refused to comply and was held in civil contempt.[5]

The Court of Appeals for the Seventh Circuit reversed, holding that the fourth amendment applied to grand jury requests for physical evidence and that a witness may not be forced to comply without a showing of reasonableness of the grand jury's request.[6]

Mara arose from a grand jury investigation in the Northern District of Illinois of thefts from interstate shipments of goods. Mara was subpoenaed and requested to submit handwriting exemplars to the grand jury. He refused. The government then petitioned the district court to compel Mara's compliance, indicating that the exemplars were "essential and necessary" to the grand jury's investigation.[7]

After an *in camera* proceeding, the district court rejected Mara's contention that the grand jury's request constituted an unreasonable search and seizure and ordered him to comply. When Mara continued to refuse, he also was adjudged to be in civil contempt. The Seventh Circuit again reversed,[8] holding that its opinion in *Dionisio* required a showing of reasonableness which must be tested in an adversary proceeding. Further, the court held that the government must make a substantive showing:

> [t]hat the grand jury investigation was properly authorized, for a purpose Congress can order, that the information sought is relevant to the inquiry, and that . . . the grand jury process is not being abused. . . . [T]he Government's affidavit must also show why satisfactory handwriting and printing exemplars cannot be obtained from other sources without grand jury compulsion.[9]

Justice Stewart, writing for the Court in both *Dionisio* and *Mara*, rejected the Seventh Circuit's fourth amendment analysis.[10] He argued that the

[1] 410 U.S. 1 (1973).
[2] 410 U.S. 9 (1973).
[3] *See* 18 U.S.C. § 2518 (1971).
[4] 410 U.S. at 3. The district court opinions and orders in both *Dionisio* and *Mara* are unreported.
[5] This adjudication of contempt was made pursuant to 28 U.S.C. § 1826(a) (1971), which provides:
> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses *without just cause* to comply with an order of the court to testify . . . , the court upon such refusal may summarily order his confinement . . . until such time as the witness is willing to give such testimony.

410 U.S. at 4 (emphasis added).
[6] 442 F.2d 276 (7th Cir. 1971).
[7] 454 F.2d 580, 582 (7th Cir. 1971).
[8] *Id.* at 584.
[9] *Id.* at 584–85. The reasonableness standard the Seventh Circuit demanded required a showing of less than the probable cause standard for an arrest. *See* Terry v. Ohio, 392 U.S. 1 (1968).
[10] Both the Seventh Circuit and the Supreme Court rejected Dionisio's fifth amendment claims, relying on United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), in which the Court held that the privilege against compulsory self-incrimination does not reach handwriting exemplars or voice samples taken for their physical characteristics instead of communicative content. The *Wade-Gilbert* rule was derived from Schmerber v. California, 384 U.S. 757 (1966), and Holt v. United States, 218 U.S. 245 (1910). In *Schmerber*, the Court held that a blood sample could be withdrawn from a defendant for analysis of its alcoholic content without violating the fifth amendment privilege against self-incrimination. In *Holt* the Court said that compelling a defendant to put on a blouse for identification purposes also did not violate this privilege. Justice Holmes, writing for the Court in *Holt*, stated:
> [T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to exhort communications from him, not an exclusion of his body as evidence when it may be material.

218 U.S. at 252–53.

constitutionality of compulsory production of exemplars is measured by a two-step test: first, whether the initial compulsion of the witness to appear before the grand jury was valid; and second, whether the subsequent demand to produce physical evidence by itself was an unreasonable search within the meaning of the fourth amendment.[11]

Relying heavily on *Branzburg v. Hayes*[12] and *Kastigar v. United States*,[13] Stewart stated that there is an "historically grounded obligation of every person to appear and give his evidence before the grand jury."[14] The Court recognized that there are limits on the investigatory powers of a grand jury and that grand juries are subject to judicial control. The fifth amendment protects a grand jury witness from being required to testify against himself or produce private books or records which could be self-incriminating.[15] Similarly, the fourth amendment protects against a grand jury subpoena *duces tecum* which is overbroad in its terms and hence unreasonable.[16] General concepts of due process may also limit a grand jury when it can be shown that the purpose of the inquiry is official harassment.[17]

Justice Stewart stated that proof of harassment was impossible in *Dionisio*, even though twenty witnesses were summoned to give voice exemplars:

> The grand jury may well find it desirable to call numerous witnesses in the course of an investigation. It does not follow that each witness may resist a subpoena on the ground that too many witnesses have been called. Neither the order to Dionisio to appear, nor the order to make a voice recording, was rendered unreasonable by the fact that many others were subjected to the same compulsion.[18]

Justice Stewart argued that the grand jury must have broad investigatory powers to fulfill its historical task as an independent investigative[19] body interposed between the accused and the prosecutor.[20] The jury must be able to act on tips, rumors, and evidence offered by the prosecutor or on its own personal knowledge.

In *Wade* the Court interpreted *Holt* as limiting "exhorting communications" to testimony. *Schmerber* states that the fifth amendment privilege generally "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, *to write or speak* for identification, *to appear in court*, to stand, to assume a stance, to walk, or to make a particular gesture." 384 U.S. at 764 (emphasis added). In the instant case, the Court concluded that Dionisio's fifth amendment claim was clearly controlled by the above line of cases.

[11] Katz v. United States, 389 U.S. 347 (1967), and Terry v. Ohio, 392 U.S. 1 (1968), articulated the fourth amendment standard that "wherever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion." 392 U.S. at 9. The reasonable expectation of privacy in seizing physical evidence occurs at two levels—at the time the person is restrained by the government and at the time the evidence itself is "seized." *See* Terry v. Ohio, 392 U.S. 1 (1968); Schmerber v. California, 384 U.S. 757 (1966).

[12] 408 U.S. 665 (1972). In *Branzburg* the Court held that the first amendment does not provide a newsperson with a constitutional privilege to withhold relevant facts from a grand jury to protect his or her news sources. A foundation of the Court's opinion in that case was the need for wide investigatory powers for grand juries. Justice White, writing for the majority, stated:

> The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." Wood v. Georgia, 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970). 408 U.S. at 701. Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. Costello v. United States, 350 U.S. at 362.

See also United States v. Stone, 429 F.2d 138 (2d Cir. 1970); Wood v. Georgia, 370 U.S. 375 (1962).

[13] 406 U.S. 441 (1972). In *Kastigar* the Court held that giving transactional immunity is not required to compel a witness to testify before a grand jury over a claim of fifth amendment privilege once use and derivative use immunity are given. The Court thus affirmed the power of the government to compel testimony before the grand jury once the privilege against self-incrimination is effectively protected.

[14] 410 U.S. at 9–10.

[15] *See, e.g.*, Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[16] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Hale v. Henkel, 201 U.S. 43 (1906). *See also* Boyd v. Bell, 116 U.S. 616 (1886).

[17] Branzburg v. Hayes, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring). Powell's argument is intended to reach the problems raised by n. 19 *infra*.

[18] 410 U.S. at 13.

[19] The grand jury has been historically both an investigatory as well as an accusatory body. *See* Dession & Cohen, *The Inquisitorial Functions of the Grand Jurors*, 41 YALE L.J. 687 (1932); Comment, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961); Comment, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586 (1953).

[20] In recent years both professional and popular journals have questioned the reality of the theory that the grand jury is an independent body without political or social bias. *See, e.g.*, Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153

The Court concluded that since there is an historically grounded obligation to appear before a grand jury and since grand juries should have wide ranging investigatory powers, a "subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." [21] Thus a grand jury subpoena to testify is not the kind of governmental invasion of privacy protected by the fourth amendment. Applying this reasoning, the Court found that a testimonial appearance before a grand jury is compulsory even without a preliminary showing of reasonableness.

Justice Stewart also found that the subsequent demand to produce handwriting or voice exemplars was reasonable. He began his analysis by stating that the fourth amendment only protects against interferences with reasonable expectations of privacy.[22] Since a person reveals his voice or writing daily, he has no reasonable expectation of privacy in the physical characteristics of his voice or writing; consequently, the demand for the exemplar does not violate the fourth amendment unless the individual is illegally detained.

On these grounds the Court distinguished *Davis v. Mississippi*,[23] the primary case relied on by the Seventh Circuit in *Dionisio*. In *Davis*, the Court held that it was impermissible to admit fingerprints obtained while the defendant was being illegally detained without probable cause as one of twenty suspects arrested in a wholesale roundup. The Seventh Circuit in *Dionisio* stated that "the dragnet effect here . . . has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*." [24] Justice Stewart took a different view of *Davis*. He argued that the fingerprinting itself, not the unconstitutional method of detention, was attacked. Since it was not unconstitutional to require Dionisio to appear before the grand jury, *Davis* was inapplicable.

The Court also distinguished *Davis* on the grounds that the compulsion exerted on the individual by a grand jury subpoena differs from that exerted by an arrest or an investigative stop. Quoting *United States v. Doe* (*Schwartz*)[25] the Court maintained that:

> The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it reamins at all times under the control and supervision of a court.[26]

Because the Court found *Davis* inapplicable, and because neither Dionisio nor Mara had an expectation of privacy in the requested physical evidence, the Court concluded that once a witness is before the grand jury, the grand jury can obtain voice or handwriting exemplars without a preliminary showing of reasonableness.

Justice Douglas and Justice Marshall each wrote an opinion dissenting from the Court's fourth and fifth amendment holdings.[27] Justice Brennan con-

(1965); Donner & Cerutti, *The Grand Jury Network: How The Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*, 214 THE NATION 5 (1972); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AMER. CRIM. L. REV. 701 (1972). The experience with grand juries in "political" cases has been particularly troublesome. *See* Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971) (grand jury investigating the Kent State incident overstepped powers in its final report). As Chief Judge William Campbell of the District Court for the Northern District of Illinois has stated, the grand jury:

> [H]as long ceased to be the guardian of the people for which purpose it was created .... Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.

55 F.R.D. 229, 253 (1972). He believes that the institution has "outlived its usefulness and has degenerated into nothing but a convenient shield for the prosecutor." Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & C. 174, 182 (1973).

Judge Campbell was involved in one recent tumultuous encounter between a grand jury and political dissidents—the "Chicago 8 conspiracy" case. *See* J. EPSTEIN, THE GREAT CONSPIRACY TRIAL (1970); R. HARRIS, JUSTICE (1970). *See also* Schwartz, *Demythologizing the Grand Jury*, 10 AMER. CRIM. L. REV. 701, 752–754 (1972). For an exposition of the theory that the grand jury serves as an impartial buffer between accused and accusor in political cases, see *Ex Parte* Bain, 121 U.S. 1 (1887).

[21] 410 U.S. at 9.

[22] *See* Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967).

[23] 394 U.S. 721 (1969). Davis was one of forty Negro youths detained and interrogated immediately after the rape of a white woman. Ten days later, Davis was jailed without a warrant and fingerprinted. Davis claimed that these prints were obtained in violation of the fourth and fifth amendments.

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

[25] 457 F.2d 895 (2d Cir. 1972). The Supreme Court's opinion in the instant cases closely follows the Second Circuit's approach in *Doe*(*Schwartz*). The majority opinion in *Dionisio* and *Mara* adopts the Second Circuit's two step expectation of privacy test and its analysis of the type of stigma attendant in a grand jury subpoena.

[26] *Id.* at 898.

[27] Justice Douglas adhered to his dissents in United

curred with the majority's fifth amendment analysis while dissenting with Justice Marshall on fourth amendment grounds.[28]

Both Justice Marshall and Justice Douglas asserted that the Court's construction of the historically grounded obligation to appear before the grand jury was too broadly drawn when it included an obligation to produce physical evidence as well as oral or documentary testimonial evidence.[29] Marshall and Douglas believed that the duty to appear before the grand jury was limited to providing oral or documentary evidence.[30] Accordingly, both dissenters rejected Stewart's attempt to distinguish *Davis v. Mississippi*.[31] Marshall stated that like *Davis*, *Mara* and *Dionisio* involved official investigatory seizures which interfere with personal liberty. Rejecting Stewart's two-step test, Marshall argued that what happens to a witness before the grand jury is relevant in determining "what safeguards are to govern the procedures by which (the witness is) initially compelled to appear." [32] Marshall found the real question before the Court to be whether a fourth amendment exemption should be granted to grand juries to gather physical evidence.

Marshall rejected the majority's holding that an exception to the fourth amendment for grand jury subpoena is warranted by the relative unobtrusiveness of the grand jury process. He argued that the functional differences between an arrest or investigative "stop" and a grand jury subpoena are inconsequential; the same type of social stigma and interference with personal liberty occur with an arrest as with a grand jury subpoena. He therefore concluded that "the fourth amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause." [33]

Marshall also disagreed with the majority's conclusion that allowing grand juries to subpoena some physical evidence without a showing of reasonableness will aid in preserving the grand jury's traditional independence. In fact, such a practice will lead to prosecutorial abuse of the grand jury process. So long as the grand jury limits its investigations to testimonial inquiries, the fifth amendment privilege against self-incrimination protects against prosecutorial abuse. Since the grand jury is so limited, its processes "would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques." [34] However, when a grand jury seeks nontestimonial evidence to which no fifth amendment privilege applies, the government has the power to subvert the grand jury process and seek incriminating evidence otherwise unobtainable because of *Davis*. Marshall concluded that the majority's opinion "serves only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury." [35]

Justice Douglas' dissent paralleled that of Justice Marshall. Justice Douglas believed that the majority's approach would lead to further destruction of the independence of the grand jury because the government could use the grand jury to obtain evidence it could not now obtain without a showing of reasonableness. Douglas also attacked the majority's interpretation of the expectation-of-privacy test. He asserted that obtaining handwriting or voice exemplars required the cooperation or compulsion of the individual and thus the government does invade the individual's zone of privacy, which makes the fourth amendment applicable regardless of whether there is a full-blown search.[36]

The differences between the majority's and the minority's fourth amendment analyses are relatively slight and basically factual.[37] The dissenters

States v. Wade, 388 U.S. 218 (1967) and Schmerber v. California, 384 U.S. 757 (1966), which argued that the fifth amendment privilege against self-incrimination is not limited to testimonial compulsion. Justice Marshall similarly argued that the fifth amendment privilege prevents the government from obtaining incriminating evidence which can only be gained with the affirmative cooperation of the accused.

[28] 410 U.S. at 22 (Brennan, J., dissenting).

[29] 410 U.S. at 23 (Douglas, J., dissenting); *Id.* at 31 (Marshall, J., dissenting).

[30] *Id.* at 27 (Douglas, J., dissenting); *Id.* at 41 (Marshall, J., dissenting).

[31] 394 U.S. 721 (1969). Marshall's historical argument is constructed from Blair v. United States, 250 U.S. 273 (1919), in which the Court said:

> [T]he giving of *testimony* and the attendance upon court or grand jury in order to *testify* are public duties which every person . . . is bound to perform upon being properly summoned. . . .

Id. at 281 (emphasis added). Similar limiting language appears in many other Supreme Court opinions. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Kastigar v. United States, 406 U.S. 441 (1972); Piemonte v. United States, 367 U.S. 556 (1961); Ullmann v. United States, 350 U.S. 422 (1956); Blackmer v. United States, 284 U.S. 421 (1932).

[32] 410 U.S. at 42 (Marshall, J., dissenting).

[33] *Id.* at 44.

[34] *Id.* at 46.

[35] *Id.* at 47.

[36] *Cf.* Terry v. Ohio, 392 U.S. 1 (1968).

[37] Justice Marshall seems to admit as much. *See* 410 U.S. at 50 n.9.