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UNCONSTITUTIONALLY OBTAINED EVIDENCE BEFORE THE GRAND JURY AS A BASIS FOR DISMISSING THE INDICTMENT

The Supreme Court's rulings of the last decade in the area of criminal constitutional law reflect the reality of our commitment to the protection of the individual in criminal proceedings. These decisions assure additional protection for the accused by the imposition of the exclusionary rules which render evidence obtained in violation of the fourth, ¹

¹ The fourth amendment of the United States Constitution provides: "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." The fourteenth amendment of the United States Constitution provides: "...nor shall any State deprive any person of life, liberty, or property, without due process of law...." To assure to citizens of the United States their fourth amendment right to be free from unreasonable searches and seizures, the United States Supreme Court, in Weeks v. United States, 232 U.S. 383 (1914), held that evidence obtained during an unconstitutional search would be inadmissible in federal criminal trials. In so holding, the Court, at 394, said: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." The possibility that the Court might adopt such a rule was foreshadowed in Boyd v. United States, 116 U.S. 616 (1886), where the Court held that the fourth and fifth amendments together required a conviction to be overturned when evidence in the form of personal papers and other effects was admitted after the defendant had been compelled to produce them over his objection. The Weeks rule applied only to the federal courts; not until Wolf v. Colorado, 338 U.S. 25 (1949), did the Supreme Court rule on the right of individuals to this freedom against state action through
fifth, sixth, and fourteenth amendments inadmissible at trial, and the subject of this Comment will be whether the Constitution de-
the due process clause of the fourteenth amendment. In Wolf, the Court held that this right was basic to a free society and, therefore, was protected from state invasions. The Court, however, refused to hold that the exclusionary rule was part of the fourth amendment and, therefore, held that such unconstitutionally obtained evidence could be admitted in a state criminal trial. Following Weeks, the Court permitted the so-called "Silver Platter" doctrine to flourish. This doctrine permitted evidence obtained in an unconstitutional search by state officers to be admitted in evidence in a federal trial. The courts reasoned that since the federal officials had been guilty of no unconstitutional conduct, the conduct of state officers should not bar the use of evidence in federal prosecutions. Finally, in Elkins v. United States, 364 U.S. 206 (1960), the Supreme Court held that the use of evidence so obtained was as much a constitutional violation as if the federal officials had unlawfully seized the evidence themselves. Reading Weeks and Wolf together, the Court so held by stating that Wolf's holding that the right of the fourth amendment applied against state action meant that the unreasonable search by the state officers was the constitutional violation which brought the Weeks rule into play. The Court reiterated the often cited and much debated rationale of the exclusionary rule which compels respect for the constitutional guarantee in the only effective way, namely, by removing the incentive to disregard that guarantee. Thus, as a result of Elkins, all evidence obtained in an unconstitutional search was inadmissible in the federal courts.

The stage was set for Mapp v. Ohio, 367 U.S. 643 (1961). Mapp overruled Wolf by holding that all evidence so obtained in violation of the Constitution is inadmissible in a state criminal prosecution. The Court in Mapp stated that it felt that the Weeks rule was of constitutional origin and not a court-made rule of evidence, as many had argued. 367 U.S. at 655-56. The exclusionary rule was applicable in state courts, therefore, since Wolf had applied the fourth amendment to the states through the due process clause of the fourteenth amendment, and the Court was now holding that the exclusionary rule was implicit in the fourth amendment. That such was the reasoning of the Court is made clear by Mr. Justice Clark's majority opinion, at 655, where he states: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court." (Emphasis added.) See also Mr. Justice Harlan's dissenting opinion at 672. It should be pointed out that in this 5 to 4 decision, only three of the majority decided in favor of reversal of the conviction on the basis of the above reasoning. Mr. Justice Stewart felt the statute violated was unconstitutional because it is "not 'consistent with the rights of free thought and expression assured against state action by the fourteenth amendment.'" 367 U.S. at 672. Mr. Justice Black joined the majority because he thought the fourth and fifth amendments taken together required this result, but not necessarily the fourth itself.

The debate as to whether the exclusionary rules are constitutionally required or court-made rules of evidence continues. See 8 Wigmore, Evidence § 2184a (McNaughtonRev. 1961); Wolf, A Survey of the Expanded Exclusionary Rule, 32 Geo. Wash. L. Rev. 193 (1964).

2. The fifth amendment of the United States Constitution provides: "... nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, ..." See Miranda v. Arizona, 384 U.S. 436 (1966), where a voluntary confession obtained during police interrogation was held a violation of the privilege because of the absence of warnings and other procedural safeguards designed to protect the accused. See also Malloy v. Hogan, 378 U.S. 1 (1964), where the privilege was applied against the states through the due process clause of the fourteenth amendment. An exclusionary rule applying only to the federal courts bars the use of confessions made by defendants who are not arraigned "without unnecessary delay." McNabb v. United States, 318 U.S. 332 (1943), enunciated the rule in order to give effect to Congress' intent in enacting Rule 5(a) of the Federal Rules of Criminal Procedure, which provides: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." The Court was very careful to indicate that its decision was not based on the involuntary character of such statements, but was based on the Court's intention to effectuate Congress' purpose which was to grant federal prisoners arraignment "without unnecessary delay." The rule was clarified and reaffirmed in Mallory v. United States, 354 U.S. 449 (1957). See Note, 56 Harv. L. Rev. 1008 (1943).

3. The sixth amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of
mands that these rules be extended to the grand jury proceedings. The question, therefore, is whether an indictment, returned by a grand jury which has been presented with unconstitutionally obtained evidence, is fatally defective as a matter of constitutional principle.

The grand jury institution must be examined if the scope of the constitutional guarantee to grand jury indictment is to be properly determined. The American grand jury was intended to be substantially similar in its workings and purposes to its English progenitor, which had arisen in the Middle Ages as an investigatory aid to the King. The English grand jury became quite independent of the King and, on several historic occasions, refused to return indictments demanded by the King. By means of its ability to frustrate governmental attempts to prosecute arbitrarily, the grand jury became a protection and safeguard against tyranny. As a protective agency, the grand jury is to determine whether the person under investigation should be brought to trial, not whether he is innocent or guilty. An indictment returned calls for a trial on the merits and must be based on "probable cause," which has been customarily defined as a belief that the crime has been committed and that the person under investigation has probably committed it.

Counsel for his defense." See Johnson v. Zerbst, 304 U.S. 458 (1938), where it was held that any defendant in a federal criminal prosecution had the right to counsel, unless the right be competently and intelligently waived. Gideon v. Wainwright, 372 U.S. 335 (1963), held that the right to counsel applied against the states through the due process clause of the fourteenth amendment. After Gideon, a number of cases have extended the right to pre-trial circumstances. See White v. Maryland, 373 U.S. 59 (1963) (right held to be guaranteed at the preliminary hearing); Massiah v. United States, 377 U.S. 201 (1964) (right held to have been deprived when a statement to a purported friend who had been rigged with a microphone was made in the absence of counsel after indictment); Escobedo v. Illinois, 378 U.S. 478 (1964) (right held to have been deprived when a pre-indictment statement was made during a police interrogation after the defendant had requested and been denied access to his retained counsel).

4. The question will arise on a post-indictment motion to dismiss which must be made or will be deemed to have been waived, pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure. If the presentation of such evidence to the grand jury is a proper ground for dismissal and the judge erroneously denies the motion by finding that the evidence has been legally seized, the question will be raised but not decided on appeal unless it is assumed that the evidence in question was not presented at trial. This is true because if it was presented and admitted at trial, and the appellate court finds there had been an illegal search, a reversal is required solely on the ground of its erroneous admission at trial. Thus, the question will only be reached on appeal where the defendant has been convicted on wholly legal and competent evidence, and he seeks reversal on the ground that his indictment was rendered defective by unconstitutionally obtained evidence before the grand jury.

5. The fifth amendment of the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . ."

6. For the historical background of the grand jury institution, see United States v. Smyth, 104 F. Supp. 283 (1952); Holdsworth, History of English Law 323 (3d ed. 1922); Offield, Criminal Procedure from Arrest to Appeal 137-42 (1947); Pollock & Maitland, The History of English Law 641, 649 (2d ed. 1898); Note, 8 Baylor L. Rev. 194 (1956); Note, 26 Minn. L. Rev. 153 (1941). For discussion of the modern grand jury's important function as investigator of criminal activity, see Note, 74 Harv. L. Rev. 590 (1961); Note, 37 Minn. L. Rev. 586 (1953).

7. A discussion of this definition of "probable cause," as opposed to the notion that "probable cause" should mean probability of conviction, is undertaken at text accompanying notes 47-48 infra.
For the grand jury to successfully guard against despotic prosecution, its members must act independently and its witnesses must testify fully. Historically, therefore, the grand jury institution came to include an indispensable veil of secrecy which helped assure the attainment of those objectives. The indispensability of keeping grand jury proceedings secret has been continuously reflected by the courts' refusal to permit challenges to indictments on grounds that would require production and examination of the grand jury minutes. Thus, the courts have usually refused to examine the minutes to determine if sufficient evidence was before the grand jury.

The federal courts, in general, have adhered to the rule that only if the defendant can prove that there was no evidence at all presented to the grand jury can he attack the indictment on the ground that there was insufficient evidence to support the indictment. Motions attacking

8. The secrecy of the grand jury proceeding has been strenuously protected by the courts. The Federal Rules of Criminal Procedure provide for inspection of grand jury minutes in Rule 6(e), but the Supreme Court has stated that the grant or denial of such a motion is within the discretion of the trial judge and only where the moving party can show a “particularized need” for the minutes will denial of such a motion be reversed as an abuse of discretion. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958); see United States v. Johnson, 319 U.S. 503 (1943); Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Florida, 323 F.2d 233 (5th Cir. 1963), where the trial judge properly permitted inspection of grand jury minutes on a finding of “compelling need” for doing so. See generally Orfield, The Federal Grand Jury, 22 F.R.D. 343 (1958); Morse, A Survey of the Grand Jury System, 10 Ohio L. Rev. 101, 217, 295 (1931). The reasons for the rule of secrecy are summarized in United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954):

(1) to prevent the escape of those whose indictment may be contemplated;
(2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jury;
(3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
(4) to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crime;
(5) to protect innocent accused who is exonerated from the disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

See United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952), in which Judge Fee indicates that the requirement of secrecy is not solely for the defendant's protection but is for the benefit of the grand jurors themselves in saving them from embarrassment, pressure, threats, and reprisals for their part in finding the indictment and for the benefit of the prosecution since the entire case of the prosecution will not be readily discoverable by the defendant because of the secrecy requirement.

9. In United States v. Rosenburgh, 74 U.S. (7 Wall) 580 (1868), the Supreme Court held that a motion to quash an indictment on the ground that it was insufficient to support the charge against the defendant is directed to the sound discretion of the trial court and is usually not reviewable. A circuit by circuit analysis reveals the following:

Second Circuit: United States v. Ramsey, 315 F.2d 199 (2d Cir. 1963), indicates that no inquiry into the sufficiency of the evidence before the grand jury will be permitted, even if the defendant alleges that no evidence had been presented to the grand jury. See also United States v. Nunan, 236 F.2d 576 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957); United States v. Texeira, 162 F.2d 169 (2d Cir. 1947); United States v. Pappas, 134 F.2d 922 (2d Cir. 1943).

Third Circuit: United States v. Labate, 270 F.2d 122 (3d Cir. 1959), cert. denied, sub. nom., Sussman v. United States, 361 U.S. 900 (1959), permitted the defendant to attempt to show there was no evidence before the grand jury. Defendant was unable to sustain the burden of proof, and the indictment was upheld. This circuit follows the rule, therefore, that when there is no evidence before the grand jury to
indictments on the ground that incompetent\textsuperscript{10} evidence was presented to the grand jury and was either the sole or partial basis for the return of the indictment have also been raised on numerous occasions. Prior to \textit{Costello v. United States},\textsuperscript{11} the federal courts, for the most part basing their decisions on \textit{Holt v. United States},\textsuperscript{12} where an indictment had been upheld although very little competent evidence had been before the grand jury, almost unanimously have upheld indictments in the face of such attacks.\textsuperscript{13} This approach is consistent with the courts’ support the charge, such an indictment is open to challenge. Otherwise, no inquiry into the sufficiency of the evidence is permitted.

Fourth Circuit: In \textit{Allen v. United States}, 89 F.2d 954 (4th Cir. 1937), a challenge to the sufficiency of the evidence was dismissed as completely improper and the correctness of such a rule was thought by the court to be so obvious as to obviate the necessity for citing any authority for the rule.

Fifth Circuit: \textit{Shushan v. United States}, 117 F.2d 110 (5th Cir. 1941), \textit{cert. denied}, 313 U.S. 574 (1941), \textit{rehearing denied}, 314 U.S. 706 (1941), stated that no inquiry into sufficiency would be permitted. However, in \textit{Duarte v. United States}, 171 F.2d 971 (5th Cir. 1949), the court permitted the defendant to attempt to prove his allegation that no evidence had been presented to the grand jury. Such an allegation would not be entertained by the court today on the authority of \textit{United States v. James}, 290 F.2d 866 (5th Cir. 1961), where it was held that, even though there had been no direct evidence introduced on a material element of the offense to the grand jury, the indictment would stand because of the presumption of regularity in favor of the sufficiency of the evidence, as recognized in \textit{Costello v. United States}, 350 U.S. 359 (1956), where the Court held that an indictment based solely on hearsay evidence was sufficient to call for a trial on the merits.

Sixth Circuit: \textit{Chadwick v. United States}, 141 Fed. 225 (6th Cir. 1905), held that where there was any competent evidence before the grand jury, the sufficiency of such evidence to support the indictment could not be challenged and a motion made on such an allegation is addressed to the discretion of the trial court and if denied is not reviewable on appeal.

Seventh Circuit: \textit{United States v. Keig}, 334 F.2d 823 (7th Cir. 1964), held that an objection to defendant’s cross-examination was properly sustained where the defendant was trying to prove that no evidence had been presented to the grand jury.

Eighth Circuit: \textit{Smith v. United States}, 236 F.2d 260 (8th Cir. 1956), held that defendant’s contention that no evidence at all had been before the grand jury could not be meritorious in view of \textit{Costello v. United States}, \textit{supra}. \textit{But see Cochran v. United States}, 310 F.2d 585 (8th Cir. 1962), where the court indicated that if the defendant could prove no evidence had been presented, the indictment would be dismissed.

Ninth Circuit: \textit{Martin v. United States}, 335 F.2d 945 (9th Cir. 1964), recognized the presumption of regularity that the indictment itself raised and held that where defendant contended no evidence had been before the grand jury, he had not rebutted the presumption by proving that nineteen of twenty-four government witnesses had not been before the grand jury.

Tenth Circuit: In \textit{Cox v. Vaught}, 52 F.2d 562 (10th Cir. 1931), the court, in dictum, stated that if no evidence at all is put before the grand jury, an indictment returned should be quashed. In \textit{Czarlinsky v. United States}, 54 F.2d 889 (10th Cir. 1931), the court clarified the circuit’s position by stating that if any competent evidence was before the grand jury, the indictment should not be quashed. \textit{Accord}, \textit{Gates v. United States}, 122 F.2d 571 (10th Cir. 1941), \textit{cert. denied}, 314 U.S. 698 (1942).

10. Incompetent evidence, in this context, means evidence that would be inadmissible at trial because of the rules of evidence other than the constitutionally imposed exclusionary rules.
13. This is true in spite of early indications that only competent evidence should be considered by the grand jury. See Justice Field’s famous charge to the grand jury in 30 Fed. Cas. 992–93 (No. 18,255) (C.C.D. Cal. 1872): “In your investigation you will receive only legal evidence, to the exclusion of mere reports, suspicious, and hearsay evidence.” A circuit by circuit analysis reveals the following:

refusal to judge the sufficiency of the evidence, since here again the rule seems to be that if any competent evidence was presented to the grand jury, the indictment will pass muster.

Finally, in 1956, in Costello, the Supreme Court heard an attack on an indictment on the grounds that the only evidence before the

the incompetency of the evidence before the grand jury was addressed to the discretion of the trial court, and, finding no abuse of discretion, upheld the indictment since the defendant could not prove that all of the evidence before the grand jury was incompetent.

Second Circuit: In Kastel v. United States, 23 F.2d 156 (2d Cir. 1927), it was held that the defendant had failed to prove that no competent evidence had been before the grand jury. The court’s dictum indicates that such a showing would have resulted in the indictment’s dismissal. A showing that some of the evidence was incompetent would be insufficient for dismissal. See United States v. Nunan, 236 F.2d 576 (2d Cir. 1956).

Third Circuit: United States v. Holmes, 168 F.2d 888 (3d Cir. 1948), indicates that only a showing of no competent evidence before the grand jury would be sufficient for dismissal of the indictment.

Fourth Circuit: Cooper v. United States, 247 Fed. 45 (4th Cir. 1917), held that where some of the evidence was incompetent the indictment would not be quashed. See McGregor v. United States, 134 Fed. 187 (4th Cir. 1904), where the court indicates an inquiry into the evidence before the grand jury would rarely be warranted.

Fifth Circuit: Grace v. United States, 4 F.2d 658 (5th Cir. 1925), states that a motion raising this contention is addressed to the discretion of the trial court and that the denial of such a motion should be reversed only on a showing of abuse of discretion; see also Friscia v. United States, 63 F.2d 977 (5th Cir. 1933), where the court, in dictum, indicates that dismissal of the indictment is proper only where there is no competent evidence before the grand jury.

Seventh Circuit: In Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1937), the court held that the defendant had not sustained the burden of proving that no competent evidence had been before the grand jury and upheld the indictment.

Eight Circuit: In McKinney v. United States, 199 Fed. 25 (8th Cir. 1912), the court, in denying a motion based on the allegation that some of the evidence before the grand jury was incompetent, stressed the need for secrecy in the grand jury proceedings. Accord, Zacher v. United States, 227 F.2d 219 (8th Cir. 1955); Murdick v. United States, 15 F.2d 965 (8th Cir. 1926), cert. denied sub. nom., Clarey v. United States, 274 U.S. 752 (1927). In Brady v. United States, 24 F.2d 405 (8th Cir. 1928) and Nanfito v. United States, 20 F.2d 376 (8th Cir. 1927), the court quashed the indictments on a finding that no competent evidence had been before the grand jury.

Nine Circuit: In Herzog v. United States, 226 F.2d 561 (9th Cir. 1955), the court upheld the denial of a motion by defendant requesting inspection of the grand jury minutes. The court said that such a motion was within the discretion of the trial court and should only be granted “where there is a clear showing that the ends of justice require it.” Id. at 566. This viewpoint indicates a strict approach would be taken in handling motions based on the incompetency of evidence.

Tenth Circuit: Cox v. Vaught, 52 F.2d 562 (10th Cir. 1931), indicates by way of dictum, that the grand jury should consider only legal and competent evidence in its deliberations. But see Gates v. United States, 122 F.2d 571 (10th Cir. 1941), cert. denied, 314 U.S. 698 (1941), where the court refined the test to require the upholding of an indictment if there was any competent evidence before the grand jury on which it could have been based.

The district courts have refused to dismiss indictments on the grounds of either insufficiency or the incompetency of the evidence or to permit the inspection of grand jury minutes. See United States v. Frontier Asthma, 69 F. Supp. 994 (W.D.N.Y. 1947); United States v. Atlantic Commission Co., 45 F. Supp. 187 (E.D.N.C. 1942) (no inquiry into grand jury findings unless a “clear and positive showing” that impropriety in the evidence was so flagrant as to constitute a gross and prejudicial irregularity and fraud in the conduct of the grand jury proceedings); United States v. Herzig, 26 F.2d 487 (S.D.N.Y. 1928); United States v. Garson, 291 Fed. 646 (S.D.N.Y. 1923); United States v. Morse, 292 Fed. 273 (S.D.N.Y. 1922); United States v. Swift, 186 Fed. 1002 (N.D. Ill. 1911); In re Kittle, 180 Fed. 946 (S.D. N.Y. 1910). Contra, United States v. Rubin, 218 Fed. 245 (D. Conn. 1914) (some of the evidence was hearsay, quash allowed); United States v. Bolles, 209 Fed. 682 (W.D. Mo. 1913) (dictum, to the effect that indictment must be based on competent, legal evidence); United States v. Kilpatrick, 16 Fed. 765 (W.D.N.C. 1883) (some of the evidence was hearsay, quash allowed); United States v. Farning-ton, 5 Fed. 343 (N.D. N.Y. 1881) (some of the evidence incompetent, quash allowed).
grand jury had been inadmissible hearsay. In a prosecution for income tax evasion, the only evidence before the grand jury had been testimony of government witnesses having no first-hand knowledge of the transactions upon which they were basing their testimony. The Court unanimously rejected the appellant's argument that he had been deprived of his fifth amendment right to grand jury indictment. In so holding, the Court discussed the scope of the constitutional guarantee:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. 14

This broad dictum can easily be construed to foreclose any inquiry into either the sufficiency or competency of the evidence before the grand jury. The federal courts, in fact, have summarily dismissed such attacks on indictments since 

15. See, e.g., United States v. Ricciardi, 357 F.2d 91 (2d Cir. 1966), cert. denied, 384 U.S. 942 (1966); Crump v. Anderson, 352 F.2d 649 (D.C. Cir. 1965) (sole evidence may have been hearsay); United States v. Heap, 345 F.2d 170 (2d Cir. 1965) (sole evidence had been hearsay); Williams v. United States, 344 F.2d 264 (8th Cir. 1965) (some of the evidence had been hearsay); United States v. Cimino, 321 F.2d 509 (2d Cir. 1963), cert. denied, 375 U.S. 974 (1964) (some of the evidence had been hearsay); Cain v. United States, 239 F.2d 263 (7th Cir. 1956) (some of the evidence had been hearsay); Ford v. United States, 233 F.2d 56 (5th Cir. 1956) (sole evidence had been hearsay). Some of the district courts, however, have stated that a clear showing that no evidence had been presented to the grand jury would vitiate an indictment. See, e.g., United States v. Honer, 253 F. Supp. 400 (S.D.N.Y. 1966) (dictum); United States v. Nomura Trading Co., 213 F. Supp. 704 (S.D.N.Y. 1963) (dictum); United States v. James, 187 F. Supp. 439 (W.D. La. 1960) (indictment dismissed where clear proof that no evidence on a material element of the crime had been presented to the grand jury); United States v. Geller, 154 F. Supp. 727 (S.D.N.Y. 1957) (dictum), where the court states that the only evidentiary ground for dismissing indictment is a showing that no rationaly persuasive evidence had been before the grand jury.

See also United States v. Naughten, 195 F. Supp. 157 (N.D. Cal. 1961), where the court dismissed the indictment when it decided as a matter of law that the evidence the government would introduce at trial would be insufficient to support the charge.

16. United States v. Barnes, 313 F.2d 325 (6th Cir. 1963); Franano v. United States, 277 F.2d 511 (8th Cir. 1960).
17. See note 8 supra and accompanying text.
18. In Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962), reversed on other grounds, 369 U.S. 438 (1962), the court refused to dismiss the indictment when
cision, pointed out that the grand jury has historically been free from technical rules and could indict even on the basis of the grand jurors' own personal knowledge. It concluded therefore that the evidentiary rules should not be imposed because such a holding would be against this history and because the secrecy of the grand jury must be preserved. Further, it was felt that the delay in the administration of justice that might result from such a ruling would be unjustified since fairness to the accused at trial would in no way be promoted. Thus the Court seems to reject all evidentiary grounds for dismissal of indictments by stating that only a legally constituted and unbiased grand jury is required by the fifth amendment. However, Mr. Justice Burton, concurring in result, realized that the majority opinion might be construed to uphold an indictment returned where there had been no evidence presented to the grand jury. Accordingly, he stated that an indictment should be quashed if the grand jury had before it no "substantial or rationally persuasive" evidence upon which to base its indictment. He reasoned that if such an indictment would be permitted to stand, the constitutional protection would be completely nullified. Judge Hand had likewise seen the danger when Costello had come before the Second Circuit Court of Appeals. Judge Hand had stated that an indictment should be dismissed if there was no evidence presented to the grand jury which "rationally established the facts."

The Supreme Court had not addressed itself to the question of the nature and quantity of the evidence needed to support an indictment since Holt v. United States in 1910. In that case, a coerced confession of the murder of which the defendant was accused had been presented to the grand jury. The Court upheld the indictment when it found that other evidence of a competent nature had been presented as well. The argument that such evidence was unconstitutionally obtained and should render the indictment defective because of that fact was squarely met and fully rejected: "All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of

the defendant argued that any such evidence should vitiate the indictment; see also Way v. United States, 285 F.2d 253 (10th Cir. 1960); United States v. Aviles, 274 F.2d 179 (2d Cir. 1960).

19. Attacks on indictments on the grounds of systematic exclusion of members of the accused's race or nationality have been successful in state prosecutions. See Hernandez v. Texas, 347 U.S. 475 (1954), in which the accused successfully argued that he had been denied equal protection of the law when Mexicans were being systematically excluded from grand jury and petit jury duty. Accord, Cassell v. Texas, 339 U.S. 282 (1950), where Negroes systematically were excluded from grand jury. Mr. Justice Jackson's dissent argued that the nature of the grand jury as an accusatory body, not a trier of fact, should foreclose even the objection raised there. See also Pierre v. Louisiana, 306 U.S. 354 (1939); Strauder v. West Virginia, 100 U.S. 303 (1879), where the Court sustained similar denial of equal protection claims.

Similar cases in federal courts could reach the same result on the basis of the fifth amendment right to grand jury indictment articulated in Costello.

20. 350 U.S. at 364.
21. 221 F.2d 668 (2d Cir. 1955).
22. Id. at 677.
24. See note 2 supra and accompanying text.
criminal practice would be enhanced if indictments could be upset on such a ground. 25

The Court in Holt, by adopting the rule that if any competent evidence had been before the grand jury, the indictment would stand, thus refused to draw a distinction between unconstitutionally obtained evidence and other types of incompetent evidence. 26 The federal courts continued to follow this rule diligently until Costello. 27 Also, wherever it was proven that the only evidence before the grand jury was illegitimately obtained, the courts quashed the indictment, there being no competent evidence on which the indictment could have been based. 28 Only one court had quashed an indictment on this ground where there had also been competent evidence before the grand jury. 29 Costello has been construed by both the circuit 30 and district 31 courts to reaffirm the propriety of upholding indictments where any of the evidence before the grand jury was competent, regardless of the amount and probative force of the unconstitutional evidence presented. The Supreme Court addressed a closely related question in Lawn v. United States, 32 where it held that a defendant had no right to a preliminary hearing to determine if evidence obtained in violation of his privilege against self-incrimination had been presented to the grand jury. If there is

25. 218 U.S. at 248.
26. See notes 9-18 supra and accompanying text.
27. Hence, any competent evidence would sustain the indictment. See United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y. 1943); United States v. Harbin, 27 F.2d 892 (N.D. Miss. 1928); Olmstead v. United States, 19 F.2d 842 (9th Cir. 1927) (dictum); Anderson v. United States, 273 Fed. 20 (8th Cir. 1921), cert. denied, 257 U.S. 647 (1921); United States v. Gouled, 253 Fed. 242 (S.D.N.Y. 1918) (dictum); Hillman v. United States, 192 Fed. 264 (9th Cir. 1911), cert. denied, 225 U.S. 699 (1911).
29. United States v. Edgerton, 80 Fed. 374 (D. Mont. 1897), where some of the evidence had been obtained in violation of the privilege against self-incrimination, which had been held to be protected at grand jury proceedings in Counselman v. Hitchcock, 142 U.S. 547 (1892).
30. See Colella v. United States, 360 F.2d 792 (1st Cir. 1966); United States v. Grosso, 358 F.2d 154 (3d Cir. 1966); United States v. DiFronzo, 345 F.2d 383 (7th Cir. 1965); United States v. Thomas, 342 F.2d 132 (6th Cir. 1965); United States v. D'Angiolillo, 340 F.2d 453 (2d Cir. 1965), cert. denied, 380 U.S. 955 (1965), where the conviction had been based solely on lawfully obtained evidence, the court refused to reverse the conviction on the ground that illegally seized evidence had been presented to the grand jury; United States v. Lawrenson, 315 F.2d 612 (4th Cir. 1963), cert. denied, 373 U.S. 938 (1963).
32. 202 F. Supp. 705 (S.D.N.Y. 1962). In this case, the court suppressed the evidence but refused to dismiss the indictment even though it appeared that such evidence was the sole foundation for the indictment. The court refused to permit such proof to be presented, citing Costello. See also United States v. Avila, 227 F. Supp. 3 (N.D. Cal. 1963), where all of the evidence before the grand jury had been obtained in violation of a statute restricting re-examination of financial records, the court would not dismiss the indictment.
no significant distinction between unconstitutionally obtained evidence and hearsay, *Costello* would require a holding that even where the only evidence before the grand jury had been unconstitutionally obtained, the indictment would stand. Such an indictment was upheld in *United States v. Block* in 1962. However, in recent years a number of federal courts have sought to avoid the impact of the *Costello* and *Lawn* holdings when the evidence before the grand jury was obtained in violation of constitutional or substantial rights. In *United States v. Cleary*, the court dismissed an indictment, the substantial basis of which had been testimony obtained in violation of the privilege against self-incrimination. The court found that *Costello* in no way prevented such a result:

It would be an anomaly, indeed, if proceedings before a grand jury, one of the functions of which under the Fifth Amendment is to protect the citizen against unfounded accusation of crime, were to result in a valid indictment based upon evidence obtained in violation of the defendant's privilege against self-incrimination granted by the same amendment.

The strongest statement for a rule requiring dismissal of an indictment based, to any extent, on unconstitutionally obtained evidence was made in the concurring opinion of Judges Bazelon, Fahy, Wright, and Edgerton in *Jones v. United States*. This opinion reflected the

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33. 355 U.S. 339 (1958). Here, an indictment had been returned in 1952 which had been obtained in violation of the accused's right against self-incrimination. This indictment was dismissed on motion. In 1953, a new grand jury met and returned the present indictment. Petitioner did not appear before the grand jury. In the present action, he sought a hearing to determine if the government used any of the 1952 testimony or documents before the grand jury. The hearing was denied since there was no evidence that the 1953 grand jury had been presented with such evidence. The lower courts had also denied petitioner's motion to inspect the minutes. The Supreme Court affirmed the conviction, citing *Costello*, and restricted its holding to the ruling that the petitioner had no right in these circumstances to a preliminary hearing to determine what evidence had been before the 1953 grand jury.

34. See *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964). In this case, the dismissal of the indictment on the grounds that almost all of the evidence had been obtained as a result of an illegal wiretap was affirmed. The court stated that a motion to dismiss was addressed to the discretion of the trial court, and since there was no abuse here, the dismissal was not reversible error. See also *United States v. Laughlin*, 226 F. Supp. 112 (D.D.C. 1964), where the court dismissed an indictment where only a part of the evidence was the result of an illegal wiretap, and the competent evidence before the grand jury could have supported the indictment.


36. Id. at 339.

37. 342 F.2d 863 (D.C. Cir. 1964). In this case, the defendant had been arrested and questioned without being taken before a magistrate promptly for arraignment. The confessions elicited were read to the grand jury as the defendant confirmed making them. Following indictment and conviction at a trial where the confessions were admitted, the defendant appealed. The majority opinion reversed the conviction on the grounds that the confessions had been obtained in violation of the *McNabb-Mallory* rule which bars the admission into evidence of any confession obtained during a period of unreasonable delay before arraignment. See note 11 supra and accompanying text. The court then remanded to the district court for a determination of what testimony other than the confessions had been presented to the grand jury. The court indicated that dismissal of the indictment would be proper if the findings warranted such action. The court also stated that, irrespective of the constitutional question, the defendant's being taken before the grand jury should not be tolerated by the court in the exercise of its supervisory power over the administration of criminal justice. District judges
judgment that the mere appearance and questioning of the defendant before the grand jury amounted to a violation of the fifth amendment privilege against self-incrimination. The opinion also states that the defendant's right to counsel had been withheld in violation of the sixth amendment. Finally, the justices concluded that the unconstitutionality of the proceedings demanded dismissal of the indictment in the same manner that unconstitutional composition of the grand jury had been held to vitiate the proceedings and require the indictment to be set aside. The opinion expressly restricts the broad dictum of Costello and Lawn to cases where there have been no constitutional violations in the grand jury proceedings, and adds that merely because the grand jury clause of the fifth amendment requires "nothing more" than a validly constituted and unbiased grand jury, it does not follow that no other constitutional amendment requires "nothing more" for an indictment to be constitutionally returned. Costello may be argued to support such a result because Costello was based on the premise that there had been no unconstitutionality in the return of the indictment, implying that if there had been some unconstitutionality, the indictment would have been quashed.

As stated above, one of the grand jury's functions is to afford both symbolic and real protection against tyrannical prosecutions. If this is true, it is apparent that an indictment obtained as a result of unlawful conduct by the government should have no legal effect in a free society striving to preserve such protection. Moreover, an examination of the grand jury's practical purpose, which is to determine if the defendant should be brought to trial, leads to the same conclusion. The grand jury is to determine if "probable cause" exists. Does probable cause mean that the defendant is probably guilty of the crime or that he will probably be convicted of the crime? The distinction is important, since if "probable guilt" is meant, then only materiality and relevancy should be limitations on the evidence presented to the grand jury. Thus, it would be proper for the grand jury to be presented with unconstitutionally obtained evidence because of its highly probative nature. But if "probable conviction" is the proper definition, then indictments based on such evidence should not stand. Since such evidence is not admissible at trial, it has no relation whatever to the verdict that the petit jury will ultimately find. To permit such an indictment to call for a trial in such circumstances would either evince a wanton disregard of an individual's right to

are, therefore, instructed to inform themselves of the grand jury proceedings and to dismiss resulting indictments if they deem such action proper under the circumstances. Thus, the majority opinion does not reach the possible constitutional question of whether an indictment obtained in part as a result of a violation of constitutional rights should be permitted to stand.


39. The judges reasoned that the absence of the advice of counsel which would have been of benefit to the defendant as he went before the grand jury amounted to a deprivation of the constitutional right. The court recognized that the defendant had no right to the presence of counsel in the grand jury room with him. Accord, United States v. Kane, 243 F. Supp. 746 (S.D.N.Y. 1965).

40. See note 19 supra and accompanying text.
be free from arbitrary trial or recognize a right of the prosecution to initiate proceedings and to worry later about obtaining the evidence needed to convict. Both of these alternatives are antithetical to a system of justice dedicated to the protection of individual rights. In addition, the "probability of conviction" definition seems more consistent with the history of the grand jury than does the "probability of guilt" formulation.

Many courts, as in Costello, have argued that considerations of expediency demand that the evidence before the grand jury not be subject to attack. They contend that the resultant delay would be too great for the courts if such challenges were permitted. However, when constitutional rights are involved, no considerations of expediency should take precedence. The courts, as in United States v. Blue,41 have argued that the accused is entitled to protection at trial by the rule of exclusion, but not at the grand jury proceeding. That the Court permitted expediency to influence its decision is clear from the following language:

Our numerous precedents ordering the exclusion of illegally obtained evidence assume implicitly that the remedy does not extend to bar the prosecution altogether. So drastic a step might advance marginally some of the ends secured by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.42

A strong argument can be made that the Court in Blue erred by its implicit approval of the proposition that the exclusionary rules are court-made rules of evidence43 and may be applied to whatever situations the Court deems proper. In Mapp v. Ohio,44 the Court held that the fourteenth amendment required that evidence obtained in violation thereof be inadmissible in state prosecutions. The Mapp court indicated that the exclusionary rule was of constitutional origin. Further, the Supreme Court has no supervisory power over criminal justice in the state courts as it does over the federal courts and therefore could impose such a rule on the state courts only through constitutional authority. If the exclusionary rules are constitutionally demanded, it is arguable that no use of illegally obtained evidence is permitted, and, therefore, the courts are not at liberty to decide at what stages of a criminal prosecution such evidence may be utilized by not applying the exclusionary rules throughout.

41. 384 U.S. 251 (1966). In this case, the defendant had been granted a dismissal of the indictment, with prejudice, by the lower court on the ground that he had been compelled to be a witness against himself while testifying before the grand jury. The Supreme Court reversed the dismissal and reinstated the indictment, finding there had been no violation of defendant's privilege. The Court, by way of dictum, indicated that even if the privilege had been violated, dismissal of the indictment would have been improper. The defendant's remedy would only be to have such evidence suppressed if offered at trial.
42. Id. at 255.
43. See note 1 supra and accompanying text.
Historically, the courts have held that the requirement of secrecy demands that indictments not be disturbed on evidentiary grounds. This secrecy is designed to benefit both the accused and the grand jurors. However, the use of secrecy to prevent attacks on indictments is inconsistent with the protection that secrecy is intended to afford the accused. Furthermore, it is difficult to understand how Costello preserves secrecy for the grand jurors when the defenses of bias and invalid constitution of the grand jury are read into the fifth amendment guarantee to grand jury indictment. For a defendant to prove either of these defenses, the veil of secrecy would necessarily be completely cast aside.

The opponents of the rule being advocated here fear that many criminals will go free if such a rule is adopted. Upon reflection, such a fear is seen to be substantially without basis. If the indictment is dismissed before trial, the prosecution can easily seek to reindict the defendant. If the indictment is erroneously upheld when the pre-trial motion is made and the prosecutor fails to present the evidence at trial, only a minimal probability exists that the accused will not be convicted of the crime at re-trial. This is true because he has been found guilty beyond reasonable doubt in the first trial at which only properly admissible evidence had been considered by the jury.

Implicit in the proposition here that unconstitutionally obtained evidence should render an indictment based thereon defective is the necessary distinction between the Costello situation where the incompetent evidence was hearsay and case situations in which the evidence is incompetent because it has been unconstitutionally obtained. The reasons for each type of evidence being inadmissible at trial afford such a distinction. Hearsay evidence is inadmissible at trial largely because the declarant is not subject to cross-examination. Since the defendant has no right to cross-examine at the grand jury proceeding, the reason for exclusion before the grand jury does not operate as it does at trial where the defendant has this right. Evidence obtained in violation of constitutional rights is excluded at trial because the Constitution requires such exclusion to deter those governmental practices which would render the constitutional guarantees empty verbiage. To imply that this reason for exclusion no longer operates at the grand jury proceeding is an obvious falsity. Though the deterrent effect on illegal police practices would only be marginal if the exclusionary rules rendered unconstitutionally obtained evidence inadmissible before a grand jury, nevertheless, the existence and salutariness of such an effect would be undeniable. Therefore, since the reason for exclusion continues to operate at the grand jury proceeding, unconstitutionally obtained evidence should not be drawn within the Costello rule.

A fundamental principle of our constitutional government is that arbitrary and unfounded prosecutions be prevented. One of the factors motivating such a principle is that a free nation should not permit the harmful consequences of an indictment to be wrongfully imposed.

45. See note 8 supra and accompanying text.
46. See note 4 supra and accompanying text.
on its citizens. The consequences of being indicted include the hazard of being wrongfully convicted, the humiliation and loss of reputation that usually follow, and the expenses of the defense. Judge Frank's eloquent language in *In re Fried* dramatizes the dangers of wrongful indictment:

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\ldots [A] \text{ wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.}^{47}
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The availability of pre-indictment motions to suppress unconstitutionally obtained evidence\(^48\) reflects a disapproval of indictments being based in whole or in part on such evidence. It would seem logical that the policy which has elicited acceptance of pre-trial motions to suppress unconstitutional evidence would likewise require indictments based on such evidence to be dismissed promptly before trial in order to minimize the harmful effects of wrongful indictment.

What is proposed here, therefore, is that any indictment based wholly or in part on evidence obtained in violation of constitutional rights should be subject to dismissal on that ground. This result is required either on a pre-trial motion to dismiss or after a conviction on appeal, notwithstanding the fact that the conviction had been obtained on the basis of evidence all of which was properly admitted at trial. It is contended that the exclusionary rules of the fourth, fifth, and sixth amendments demand this result and not the grand jury clause of the fifth amendment, as defined in *Costello*. Since the principle of "harmless error" has no application when constitutional rights have been violated, indictments based only in part on unconstitutionally obtained evidence must nevertheless be dismissed. Furthermore, since

\[47. 161 F.2d at 458.\]
\[48. \text{Pre-trial suppression of evidence obtained in violation of the fourth amendment is permitted by motion pursuant to Rule 41E of the Federal Rules of Criminal Procedure. The rule, which codifies prior case law, permits such motions to be made either before or after the indictment. See, e.g., Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). The courts, for many years, refused to suppress allegedly coerced confessions prior to trial. See United States v. Lydecker, 275 Fed. 976 (W.D.N.Y. 1921); Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1937). In 1947, the Second Circuit Court of Appeals permitted pre-indictment suppression of a confession obtained in violation of the accused's constitutional rights in *In re Fried*, 161 F.2d 453 (2d Cir. 1947), writ dismissed, 332 U.S. 807 (1947). Since *In re Fried*, the federal courts have split on the permissibility and propriety of granting such relief. See, e.g., Austin v. United States, 297 F.2d 356 (4th Cir. 1961) (permitting suppression); United States v. Garnes, 258 F.2d 530 (2d Cir. 1958) (permitting suppression by implication); contra, Biggs v. United States, 246 F.2d 40 (5th Cir. 1957); Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952), cert. denied, 344 U.S. 866 (1952) (dictum). It should be pointed out that the grant or denial of a 41E motion is not appealable immediately but is reviewable on appeal. See DiBella v. United States, 369 U.S. 121 (1962); Carroll v. United States, 354 U.S. 394 (1957); Cogen v. United States, 278 U.S. 221 (1929). See generally *Developments in the Law — Confessions*, 79 Harv. L. Rev. 935, 1055 (1966); Note, 60 Harv. L. Rev. 1145 (1942).}\]
the rules of exclusion have been applied to the states, the same results are called for in state prosecutions notwithstanding the fact that the fifth amendment guarantee to grand jury indictment has been held not to apply to the states through the due process clause of the fourteenth amendment.

The McNabb-Mallory rule renders confessions obtained during a period of unnecessary delay before arraignment inadmissible in the federal courts. This rule is not of constitutional origin. Instead, it is a court-made rule of evidence designed to safeguard a federal statutory right and was created by the Supreme Court in the exercise of its supervisory power over criminal justice in the federal courts. Whether an indictment based on such a confession should be subject to dismissal is a matter also within the supervisory power. It would seem that the proper result in such a case would be to dismiss the indictment since prosecution tainted by illegal governmental activity does not recommend itself to a democratic conception of justice.

49. See notes 1-3 supra and accompanying text.
50. See, e.g., Hurtado v. California, 110 U.S. 516 (1884).
51. See notes 2 and 42 supra and accompanying text.