

June 1956

Constitutional Law--Due Process--Waiver of Right to Object to Composition of Grand Jury

B. F. D.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

B. F. D., *Constitutional Law--Due Process--Waiver of Right to Object to Composition of Grand Jury*, 58 W. Va. L. Rev. (1956).

Available at: <https://researchrepository.wvu.edu/wvlr/vol58/iss4/10>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

Education of City New York, 24 U.S.L. WEEK 4178 (U.S. April 10, 1956) (5-4 decision). Although it is not readily ascertainable, the future effect of this decision may prove to be extreme. Hence former cases discussed above may be overruled. But it is the opinion of the writer that if this case is to be applied as a comprehensive rule and not easily distinguishable on its facts, it is unsound in principle. It should also be noted that this was a 5 to 4 decision which although binding law at the present, may cast some doubt as to the future.

M. J. P.

CONSTITUTIONAL LAW—DUE PROCESS—WAIVER OF RIGHT TO OBJECT TO COMPOSITION OF GRAND JURY.—*D* (Poret), arrested in 1951 and charged with rape, eluded officers and fled the State of Louisiana. He was indicted for the crime of rape shortly thereafter, but his location was not discovered until about a year later when it was learned that he was in prison in Tennessee. Upon completion of the Tennessee prison term in 1953, *D* was returned to Louisiana where he was arraigned. He pleaded to the indictment and entered a motion for severance, another defendant (Labat) having been joined with him. The motion was denied and *D* then entered a motion to quash the indictment because of the systematic exclusion of Negroes from the grand jury which had returned the indictment. The motion was denied upon the ground that it was made too late. The Louisiana supreme court affirmed, holding that § 202 of the *Louisiana Criminal Code* as interpreted, required that all such objections be made before the end of the third judicial day following the term of the grand jury by which the attacked indictment had been returned and that *D*'s motion, therefore, came more than a year and a half too late. *Held*, that a state may attach reasonable time limitations to the assertion of federal constitutional rights. "The test is whether the defendant has had a reasonable opportunity to have the issue as to the claimed right heard and determined by the State court." The fact that *D* was a fugitive does not give him immunity from the operation of a valid state statute. The fact that *D* had no lawyer during the eighty-seven day period from his indictment to the expiration of his time to file the motion to quash does not alter the situation for he, by his own voluntary action, "failed to avail himself of Louisiana's adequate remedies." Conviction affirmed. *Poret and Labat, Petitioners v. Louisiana*, 350 U.S. 91 (1955).

The test as to whether an accused is denied a constitutional right by state restrictions on the time or method of asserting some right guaranteed by the Constitution was clearly set forth in the case of *Parker v. Illinois*, 333 U.S. 571 (1947), where the court said, "The question turns on whether the party has 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the State court." By way of dictum in *Williams v. Georgia*, 349 U.S. 375, 382 (1955), dealing with a question involving a petit jury the court stated, "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method has been recognized as a valid exercise of state power." Another very recent case illustrates the application of the test above set forth. *Reece v. Georgia*, 350 U.S. 85 (1955), involved an objection to the composition of a grand jury which the state maintained was made too late since it came after indictment, a statute providing that such objections must be made prior to the return of the indictment. It was provided by statute that the order impaneling or reconvening a grand jury must list all those against whom a case was to be presented. The court reversed accused's conviction because he was not given a "reasonable opportunity" to exercise his federal right to object to the composition of the grand jury since (1) he was not apprised of the fact that charges against him were to undergo grand jury investigation and, (2) he was without assistance of counsel until after the indictment was returned.

The general test then, as well as its application, is clear.

Another very important consideration in the *Poret* case is that of waiver. The question of waiver underlies the basic "reasonable opportunity" issue in this case. The Louisiana statute provides a definite method for attacking the composition of a grand jury but whether in fact *D* had a reasonable opportunity to take advantage of that procedure and whether he voluntarily waived this opportunity were the decisive questions before the court. Actually, since *D did* flee, the answers to these questions depend upon facts which never developed and about which only conjecture is possible. In deciding upon the law applicable to any concrete factual issue, however, the court cannot speculate as to what might have happened had *D* not fled nor assume any illegal denial of *D*'s rights in the absence of any attempt by him to assert such rights. It seems then that a necessary step in the court's process of decision was the making of an assumption that but for *D*'s disappearance such "reasonable opportunity"

would have existed. Therefore *D* can be said to have waived his rights by failing to avail himself of the "existing adequate remedy." Any other hypothesis which would serve as well in expediting the administration of justice could not easily be formulated, although, as the dissenting opinion indicates, such hypothesis might on another set of facts permit an accused to be deprived of his right to be indicted by a fairly constituted grand jury. This problem, however, can be met and decided when it arises; the facts may well deny the use of the same hypothesis.

While commencement of a state criminal prosecution by indictment through grand jury action is not essential under the Constitution, *Hurtado v. California*, 110 U.S. 516 (1884), if this form of accusatory procedure is used the grand jury must be fairly chosen, *Cassel v. Texas*, 339 U.S. 282 (1950). The court did not change nor did it detract from this rule in the *Poret* case; it only recognized that justice cannot be thwarted nor public protection from crime made a mere sham through allowing criminals to voluntarily procrastinate in the assertion of their constitutional rights. *D* was fairly tried and convicted and by his own action waived the right to later object to matters preliminary to such trial and conviction.

B. F. D.

COURTS--SUPERVISORY POWERS--ENJOINMENT OF FEDERAL NARCOTICS AGENT FROM TESTIFYING IN STATE COURT.--A federal narcotics agent obtained narcotics from the petitioner under a defective search warrant. Consequently in a federal prosecution this evidence was suppressed and the indictment based thereon was dismissed. Thereafter petitioner was charged with possession of narcotics in violation of state law. He filed a motion in the federal district court to enjoin the agent from testifying in the state action and thereby submitting the same evidence against him in the state court which was suppressed in the federal prosecution. Relief was denied and the United States Supreme Court granted certiorari. *Held*, that injunctive relief should be granted. Viewing the question as solely concerning the federal court's supervisory power over federal law enforcement officers, the majority took the view that the policy of the Federal Rules of Criminal Procedure governing searches and seizures would be defeated if a federal officer could use the fruits of an unlawful search in state proceedings. Four Justices dissented, expressing the view that the holding of the majority could not properly be rested on