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Courts--Supervisory Powers--Enjoinment of Federal Narcotics Agent From Testifying in State Court

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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

the federal court's supervisory powers over federal law enforcement officers, and that the withholding of equitable relief in the instant case was a proper exercise of the lower court's discretion. *Rea v. United States,* 76 Sup. Ct. 292 (1956).

It is commonly recognized that courts have inherent powers to supervise and to correct the errors or abuses of their officers and subordinates, but it has been held that the Supreme Court of the United States is invested with judicial powers only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in the judicial article of the Constitution. It cannot give decisions which are merely advisory; nor can it exercise, or participate in the exercise of functions which are essentially legislative or administrative. *Federal Radio Comm'n v. General Electric Co.,* 281 U.S. 464 (1929). Chief Justice Taney stated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." *Decatur v. Paulding,* 39 U.S. (14 Pet.) 497, 515 (1840); *accord, Keim v. United States,* 177 U.S. 290 (1899); see also, *Boynton v. Blaine,* 139 U.S. 306 (1890), *United States ex rel. Redfield v. Windom,* 137 U.S. 636 (1891); *United States ex rel. Dunlap v. Black,* 128 U.S. 40 (1888). Consequently it would at first glance appear that a federal narcotics agent, who is an employee of the Treasury Department, a subdivision of the executive branch of the government, would be beyond the jurisdiction of the generally recognized supervisory powers of the federal courts. One would therefore be inclined to agree with the dissent that the courts do not share with the executive department the responsibility of supervising law enforcement activities as such. However, a closer examination of the authorities reveals that in an important decision the Supreme Court, though refusing to admit certain evidence as illegally obtained, stated that, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States,* 318 U.S. 332 (1942). Therefore it is apparent that the *McNabb* decision furnished the basis for the extension of the supervisory powers of the federal courts to a point beyond the inherent supervisory powers of courts in general. Since the Federal Rules of Criminal Procedure are now the standards of procedure and evidence in federal courts it follows from the *McNabb* decision that

under the supervisory duty to maintain such standards the court may enjoin any abuse of these rules by federal law enforcement officers. However, the instant decision seems to go one step further. Here a federal officer was enjoined from testifying in a state proceeding because his evidence was inadmissible in federal court. There is no specific section of the Federal Rules of Criminal Procedure forbidding this practice. Nevertheless the majority was of the opinion that to allow a federal agent to use, in the state court, the fruits of his unlawful act would defeat the policy of the rules, which in this instance is to protect the privacy of the citizen unless the strict standards set for searches and seizures are satisfied. Query whether the supervisory powers as set forth in the *McNabb* case should be extended this far. In that case the Court itself placed a limitation upon its supervisory jurisdiction in stating, "We confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement." Therefore the question seems to be whether the court in the principal case was necessarily in a position to become such an "instrument." As the dissent points out, it does not seem to be enough that an invalid court process was involved for there is no indication that the result would have been different had there been no warrant at all. The majority seems to ignore completely this limitation of the *McNabb* decision.

The dissent also takes the view that the majority opinion results in a serious departure from the concepts which have formerly been considered to govern state and federal relationships. It has been held that the Supreme Court will not interfere with state agencies or the enforcement of state law unless there is involved a violation of the Federal Constitution. *Stefanelli v. Minard,* 342 U.S. 117 (1951). Technically, the Court in the instant case is not violating the rule of the *Stefanelli* decision since the only action of the Court is that of enjoining a federal officer. However, it is obvious that by enjoining this testimony which forms the basis for the state prosecution, the Court is doing indirectly what it has refused to do directly. *Steffanelli v. Minard, supra.*

While it is recognized that it may be as important to protect and uphold the policy behind the Federal Rules of Criminal Procedure as it is to supervise their direct application, query as to the advisability of doing so in this manner, which seems to infringe

upon state law enforcement to an extent generally thought to be beyond the authority of federal courts.

T. E. P.

CRIMINAL LAW—FELONY-MURDER—STATUTORY INTERPRETATION. —*D* and *B* committed an armed robbery upon *X*. As they fled from the scene *X* killed *B*. *Held*, (remanding the case for a new trial), that *D* can be convicted of murder under the felony-murder statute (4-3 decision). *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

Decisions in the United States on the felony-murder rule are divided into four categories: (1) Some states follow the rule that, if a killing occurs in the commission of a felony it is murder. The states which follow this rule do not require that the felony be one of violence. (2) A homicide committed in the perpetration of certain dangerous felonies is ipso facto declared to be murder. (3) A homicide committed in the commission of a felony is murder only when the act itself is one involving extreme risk to human life, and it is believed that the risk must be known to the actor. (4) Apparently Ohio refuses to recognize the felony-murder doctrine in any form. MORELAND, LAW OF HOMICIDE 48-49 (1952).

Pennsylvania would seem to be in the second category. According to the language of PA. STAT. ANN. tit. 18, § 4701 (Purdon 1939) "All *murder* . . . which shall be committed in the perpetration of any . . . robbery . . . shall be murder in the first degree". (Emphasis supplied.)

The principal case presents two problems. First, how far can the courts go in imputing to the defendant the occurrence of death, where such occurrence was not intended and only remotely connected with the defendants scheme? Second, as a matter of statutory interpretation, is it necessary that the occurrence of death be (common law) murder in order to be raised to felony-murder (first degree), or does any killing, short of common law murder, satisfy the statute?

In earlier cases the Pennsylvania judges had specifically charged the juries that, if they believe that the death during commission of a felony resulted from another's act, they should acquit the defendant. *Commonwealth v. Thompson*, 321 Pa. 327, 184 Atl. 97 (1936); *Commonwealth v. Mellor*, 294 Pa. 339, 144 Atl. 534 (1928). Two later cases, *Commonwealth v. Moyer (Byron)*, 357 Pa.