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Court Examines Grand Jury Role

Bert Riddell Cramer

stitutionality issue again, now that the proper route has been clearly delineated as one of writ of certiorari. Likewise, this 5-4 decision regarding the "status" of D.C. statutes will have to be addressed by Congress in future legislative provisions concerning the nation's capital.

Court Examines Grand Jury Role

by Bert Riddell Cramer

An unindicted co-conspirator is denied due process when a Federal grand jury accuses him, by name, of criminal misconduct in an indictment, and then fails to return an indictment against him. This was the holding by the United States District Court for the Southern District of West Virginia in *Application of Jordan*, 439 F. Supp. 199 (S.D.W.Va. 1977).

In his Memorandum and Order, Judge J. H. Young found that the Fifth Amendment protects not only those who are to be prosecuted, but those not to be as well, and ordered that all references to George B. Jordan, Jr. in the grand jury's indictment and other official documents be expunged.

In December of 1975, petitioner Jordan, then Commissioner of Banking from the State of West Virginia, and another person were named as "co-conspirators but not as defendants" in a Federal grand jury indictment. Jordan was not indicted, and those named as defendants were acquitted. Jordan subsequently petitioned the District Court, arguing, *inter alia*, that he was (1) deprived of his due process right to be either formally charged and permitted to defend himself at trial, or charged and permitted to defend himself at trial, or else remain uncharged and unstigmatized; and that (2) the grand jury's naming him as an unindicted co-conspirator was *ultra vires*.

Judge Young began consideration of these arguments by tracing the history of the grand jury, noting that it historically had two functions: 1) to protect individuals from arbitrary or malicious governmental prosecution; and 2) to ferret-out and present for trial persons suspected of criminal wrongdoing. The shielding function of the grand jury found Constitutional expression in the Fifth Amendment's requirement of a presentation or indictment by a grand jury as a *sine qua non* for federal prosecution for serious crimes. 439 F.Supp at 202.

Acknowledging the lack of case law on this particular issue, the court relied primarily on a Fifth Circuit case, *United States v. Briggs*, 514 F.2d 794 (1975), which held that the federal courts can expunge the names of unindicted co-conspirators from indictments and related official material when the stigma which inevitably attaches is part of an overall governmental tactic directed against disfavored persons or groups, or when, as in Jordan's circumstances, all avenues of redress have been effectively eliminated. *Briggs, supra*, at 806.

Judge Young stated that none of the historical or modern-day functions of the grand jury encompasses public accusations directed at persons not named as defendants, and he noted that the grand jury's function ceases when probable cause is not found to return an indictment. "There is no place in a criminal indictment," he wrote, "for mention of a person accused of a crime who is not *formally* accused of that crime by being indicted." 439 F.Supp. at 204.

Thus, whether the grand jury failed to indict Jordan because 1) there was no probable cause; 2) the prosecutor did not ask for an indictment; or 3) the grand jury simply chose not to indict Jordan for whatever reasons, "its only course of action was to *remain silent* (his emphasis) as to Jordan." *Id.* at 204.

In determining the nature and extent of the grand jury's power, practical considerations were of some weight. The Court noted the decline of the independence of the grand jury in the wake of the increasing complexity of criminal matters, and the concomitant expansion of the prosecutor's role in examining witnesses, presenting documents and requesting indictments. While recognizing that federal prosecutors had, in the past, obtained grand jury indictments naming unindicted co-conspirators, Judge Young reasoned that this alone should not "dull judicial sensibilities to the impropriety of the action." 493 F.Supp. at 203.

Distinguishing earlier cases dealing with named co-conspirators not indicted, including the *Nixon Grand Jury case (see*

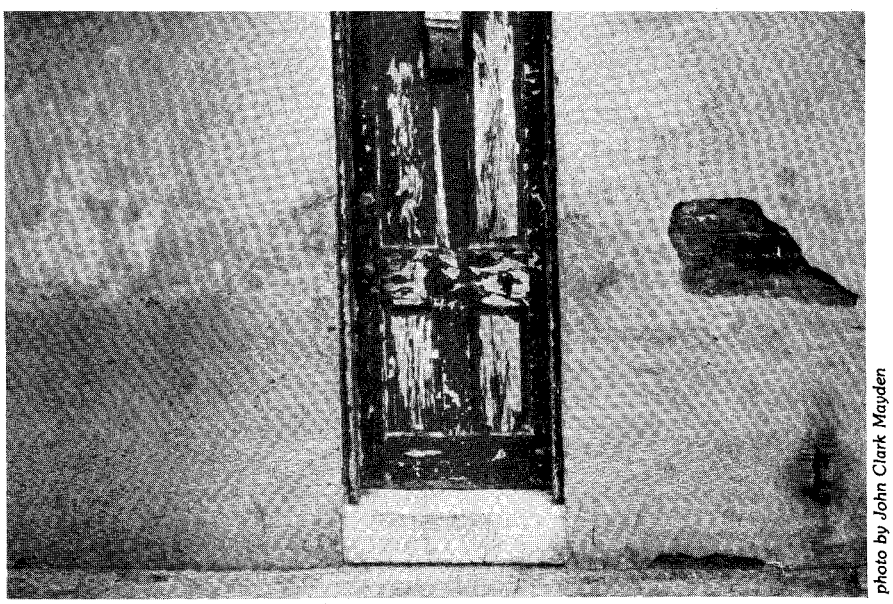

photo by John Clark Mayden

In Re Report and Recommendation of June 5, 1972 Grand Jury, 370 F.Supp. 1219 (D.D.C. 1974)), the court stressed that here, unlike other reported cases upholding the naming of unindicted co-conspirators, all legal remedies were inadequate, and all forums of redress were closed. 439 F.Supp. at 205, 209.

Clearly then, Judge Young wrote, the indictment and related material naming Jordan as a co-conspirator involved in criminal activity was an improper exercise of the grand jury function. 439 F.Supp at 205.

Jordan's Fifth Amendment argument turned on his alleged deprivation of his due process rights to be permitted the protection of the federal indictment process secured under the Fifth Amendment and the Federal Rules of Criminal Procedure. The Court agreed, noting that whether or not the Supreme Court has effectively eliminated due process protection of reputation claims arising out of state action under 42 U.S.C. 1983, see *Paul v. Davis*, 424 U.S. 693 (1976), where, as here, a federal grand jury fails to establish a finding of probable cause by naming, but not indicting the named co-conspirators, there is an injury transgressing the "guarantee of a right to be free of injury secured by the federal Constitution in the indictment clause of the Fifth Amendment and by other federal laws." 439 F.Supp. at 208.

photo by Ronald Gravitz

Since the "only legitimate means by which the federal grand jury could publicly indicate such a finding of probable cause was by the action of indicting Jordan," and since Jordan lacked totally any form or forum in which to challenge the grand jury's action, the Fifth Amendment's protection was properly invokable. 439 F.Supp. at 208, 209.

Usury: Case of First Impression

by Richard McCormick

The unique facts of *Tri-County Federal Savings and Loan Association v. Lyle*, 280 Md. 69, 371 A.2d 424 (1977), make it one of first impression in Maryland. According to the Maryland Court of Special Appeals, 33 Md.App. 46, 363 A.2d 642, 645, the peculiarities of Maryland law in this case render the holdings of other jurisdictions of little assistance in its interpretation.

In April, 1974, Lyle and his wife executed a note to Tri-County for $60,000 at an interest of 8%,[1] in return for a loan commitment from that financial institution to enable the Lyles to build a home. The note was secured by a deed of trust, with the Savings & Loan as a beneficiary. Tri-County's check for $60,000 was endorsed by the Lyles at settlement, and $15,000 was immediately disbursed to the seller of the lot, upon which the Lyles were to construct their house. The remainder, $45,000, was paid over to the defendant, Tri-County, where it was placed into a non-escrow account. The $45,000, according to the loan agreement, was to be paid in nine installments as work on the house progressed. Tri-County also collected a $60 appraisal fee, $10 for a credit report, and $90 for inspection fees, the first two fees being paid to third parties. *See generally, B.F. Saul Co. v. West End Park*, 250 Md. 707, 246 A.2d 591 (1968). Subsequently, the Lyles abandoned the project, and in September, 1974, repaid the $15,000 plus $573.29 interest which had accrued on the full $60,000.[2] Credit was given for the $45,000 retained by the defendant, and the $90 in inspection fees was returned to the plaintiffs. Because it was paid in accordance with the agreed-upon schedule, interest was computed on the full $60,000.

The Lyles sued, contending that the $60 appraisal fee, the $10 credit report fee, and the 8% interest charged on the $45,000 were usurious. Their claim of $4,911.75 was based on the remedy enunciated by the Maryland statute.[3] The trial court found that the fees were not in excess of that allowed by the law and dismissed the suit.

The Court of Special Appeals reversed the trial judge's disposition of the claim regarding the interest on the $45,000 and remanded the case. 33 Md.App. 46, 363 A.2d 642.

The Court of Appeals, after granting certiorari, affirmed the lower appellate court's holding that the credit appraisal and inspection fees played no role in the alleged usury. Secondly, the court held that the Lyles were required to pay interest only on the unpaid balance of the loan, $15,000, because they did not have control of the remaining $45,000. Requiring the plaintiffs to pay interest on the full $60,000 rendered the agreement usurious. Id. at 76, 371 A.2d at 427.

[1] MD. ANN. CODE, Art. 49, §3 (1972) permits simple interest not in excess of 6% annually to be charged, except where there is a written agreement between lender and borrower, in which case 8% simple interest annually may be charged on the unpaid balance.

[2] In order to obtain relief in equity against a usurious contract, ancient doctrine holds that the plaintiff must tender moth the principal and the legal interest which has accrued. *Wilson v. Hardesty*, 1 Md.Ch. 44 (1847).

[3] MD. ANN. CODE, Art. 49, §8 (1972) articulates the current usury law which might have allowed Tri-county to charge an interest rate of 10% because the loan here was secured by residential real property. In this case, however, this section was inapplicable because the loan was executed before May 31, 1974, the statute's effective date.

This section also allows a forfeiture of three times the amount of interest and charges collected on any loan in excess of the authorized interest and charges, or the sum of $500.00, whichever is greater.

See MD. COMM. LAW CODE ANN. §§12-114(a), 12-103(b) (1975).