1966

The State of Utah v. The Honorable Henry Ruggeri, District Judge : Brief of Defendant

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff,

vs.

THE HONORABLE HENRY RUGGERI, DISTRICT JUDGE,
Defendant.

Case No. 10730

BRIEF OF DEFENDANT

On Petition for Extraordinary Writ

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STATEMENT OF NATURE OF CASE

This is an original proceeding in this Court to show cause why the extraordinary writ prayed for in plaintiff's petition should not be granted. The writ prayed for is to compel the defendant District Judge to withdraw an order made on the trial court level suppressing certain evidence. The proceeding is a novel one and so far as we are informed is without precedent in this Court.

DISPOSITION IN LOWER COURT

The order on motion to suppress was entered in criminal action No. 19531, District Court, Salt Lake County, Utah, The State of Utah, plaintiff, vs. C. W.

Brady, Jr., defendant. A copy of the order is attached to defendant's answer herein designated as Exhibit 3. A copy of the motion to suppress is also attached to defendant's answer herein indicated as Exhibit 1. A copy of a supplement to the motion is attached to defendant's answer herein marked as Exhibit 2.

The order suppressed the testimony of Mr. Brady as set forth in the indictment in criminal action No. 19531, and prohibited the use of the same at the trial of said action. The trial setting was vacated at the request of the State, the counsel for the plaintiff having in open court stated that he could not proceed with the trial of the action without the evidence so suppressed. The State of Utah filed an appeal to this Court in criminal action No. 19531 and subsequently, upon its motion, the appeal was dismissed. There has been no further proceeding at the trial court level in criminal action No. 19531.

RELIEF SOUGHT ON APPEAL

The State is the moving party ostensibly seeking a writ of mandate to require the defendant District Judge to withdraw the ruling made at the trial court level.

STATEMENT OF FACTS

The indictment in criminal action No. 19531 charges the defendant Brady with having given false testimony before the Grand Jury of the County of Salt Lake on the 16th day of August, 1965. Mr. Brady was inter-

rogated concerning matters the subject of a subsequent indictment against him in what is known as criminal action No. 19558, a conspiracy charge. At the time of the alleged testimony Mr. Brady was under subpoena but was not advised that he was suspect or that his alleged conduct was the target of the investigative functions and powers of the Grand Jury. The subject of the inquiry on the 16th day of August, 1965, was whether Mr. Brady had violated Title 76, Chapter 28, Sections 3, 4, 7, 21, 48, 59(1) and 61, Utah Code Annotated 1953, and Article 13, Section 8 of the Constitution of Utah. This is evidenced by the bill of particulars furnished by the State in criminal action No. 19531. The conspiracy indictment known as criminal action No. 19558, followed, charging the defendant Brady and others with having conspired to commit and with having committed crimes in violation of the specific statutes mentioned.

At the time of the ruling now complained of the Court, the defendant District Judge, made findings as follows:

> "The court finds that the grand jury is a court of this State and that this defendant, that Mr. Brady, the defendant in this case, was in substance and effect a target. He was the cynosure of neighboring eyes. He was the focal point or one of the focal points of investigation against him, and that the State of Utah knew it at the time that they called him as a witness and he testified in that case and the perjury charges which are now, perjury charge which is now found against him by the indictment is the result of the

investigation that was made and the calling of that man as a witness.

"The court finds that he was not an ordinary witness, but that he was a witness in substance and effect a defendant in the proceeding.

"The . . . effect of a subpoena. One who is brought into court under subpoena and testifies pursuant thereto acts under compulsion." (R-88)

Counsel for the State in his brief herein distorts the record by a personal reference. He states that Mr. Brady when appearing before the Grand Jury on August 16, 1965, was "well coached" in making his request for counsel, and implies that defendant's counsel herein was counsel for Mr. Brady at the said time and place. Mr. Brady at the time of his appearance before the Grand Jury was not represented by counsel herein. Counsel now appearing for the defendant District Judge represent the defendant Brady in the criminal actions referred to, but such employment did not occur until after the 1st of January, 1966. Furthermore, the portions of plantiff's petition that are denied by the defendant District Judge on lack of information and belief are denials in good faith.

The arguments that follow are tailored to the exactitude expressed by the defendant herein at the time of the ruling:

"Gentlemen, the court has maybe extended itself in its remarks here, but the court wants to make it plain that the court's ruling does not affect the innocence or guilt of this defendant. This is a matter of whether or not the defendant's

rights have been violated under Article 1, Section 12 of the Constitution and the Laws of this Land, and the court finds that it has been and the motion to quash and suppress are, or to suppress the evidence is granted." (R-94)

ARGUMENT

1. *There is no extraordinary writ that can properly issue.*

Writs of mandamus and certiorari are recognized by the Constitution of this State but special forms are abolished by Rule 65 B(a), *Utah Rules of Civil Procedure*. Article VIII, Section 4 of the *Constitution of Utah* provides in part:

> "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. * * *"

(a) *Certiorari.*

Plaintiff's petition prays for a coercive writ, a function not that of certiorari which is merely a writ of review to determine legality. The difference between the two writs is succinctly stated in 14 *Am. Jur. 2d, Certiorari, Section* 4, *page* 781.

The time honored rule in this jurisdiction is to the effect that on certiorari the question for determination by this Court is whether the district court had or exceeded its jurisdiction, and not the question of whether the lower court did or did not speak correctly "by the law". This was the pronouncement of this Court in following

a number of prior decisions when in *Mann v. Morrison*, 106 Utah 15, 144 P.2d 543 (1943) it was stated:

> "This court is limited in the scope of its review on certiorari. The only matter for determination is whether the district court had jurisdiction or whether having jurisdiction it exceeded that jurisdiction.
>
> "Justice Wolfe speaking in the case of Atwood v. Cox, District Judge, 88 Utah 437, 55 P.2d 377, 380, makes the following statement: 'Many definitions of jurisdiction are given in 15 C.J. 723, Section 13. They all mean, fundamentally, the power or capacity given by the law to a court, tribunal, board, body, or officer to entertain, hear, and determine certain controversies. * * * It does not mean that the court must speak correctly by the law. What it says may be incorrect. * * *'
>
> "Whether the court was in error is not to be determined in this proceeding." (Certiorari)

Among the several cases cited in *Mann v. Morrison* supra is *State v. Salmon*, 90 Utah 512, 62 P.2d 1315, where the court stated:

> "There is some indication that courts view the writ of certiorari, when used in this manner, as being an appeal in itself, and it is not uncommon to find language in the cases to the effect that the state should not be permitted to accomplish by certiorari what it cannot do by appeal."

The Supreme Court of the State of Washington in the recent case of *State v. Whitney*, 418 P.2d 143 (Sept. 8, 1966) departs from the philosophy of this Court and of its own prior decisions and vastly enlarges upon the

writ of certiorari. The trial court signed an order rejecting the state's offer of proof by granting a continuance and the respondent consented to a dispersal of the jury for the purpose of allowing the state to apply to the Washington Supreme Court for a writ of certiorari to review the trial court's ruling on the motion. It remains to be seen whether the plaintiff in the instant matter would advocate in this Court and whether this Court would subscribe to the philosophy of the Washington court.

(b) *Mandamus.*

The writ of mandamus cannot be used to correct errors of judgment however gross. This is the ruling of this Court in a number of cases, and more particularly in *Utah Copper Co. v. District Court,* 91 Utah 377, 64 P.2d 241 (1937):

> "The reasons for such holdings are that where a court has jurisdiction of the subject-matter and of the parties, rulings made on demurrers, permitting or refusing amendments to pleadings, motions to strike, etc., involve and invoke jurisdiction not only requiring but demanding judgment of the court with respect thereto, and no matter how erroneous the rulings may be in such particular, they may not be reviewed on any of the extraordinary remedies. This court is firmly committed to that doctrine. And where a court has jurisdiction of the subject-matter and of the parties, it indeed would be strange to adopt a different doctrine, that whenever a ruling is made on a demurrer or with respect to amendments to pleadings or motions

> to strike, resort may be had to one or more of the extraordinary remedies to review or annul such rulings."

The rule is stated in *Albert v. United States District Court,* 283 F.2d 61 (6th Cir. 1960):

> "Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. Ex parte Flippin, 1876, 94 U.S. 348, 24 L.ed. 194, or to compel him to decide according to the dictates of any judgment but his own, United States v. Lawrence, 1795, 3 Dall. 42, 1 L.ed. 502, or to control the exercise of his discretion. Gottliev v. Rubenstein, 6 Cir., 1958, 252 F.2d 779. This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. Roche v. Evaporated Milk Association, 1943, 319 U.S. 21, 63 S.Ct. 938, 87 L.ed. 1185; Beneke v. Weick, 6 Cir., 1960, 275 F.2d 38."

The general rule is stated in 35 Am.Jur., *Mandamus,* Sec. 294, page 52:

> "A judge or court will not be compelled by mandamus to entertain a criminal proceeding where no duty to do so is imposed by law, as where the prosecution is had under a void law. In so far as the court or judge acts in a judicial capacity in criminal matters, and does not abuse the powers conferred, mandamus will not lie to direct or review the action taken."

The case of *Higgins v. Burton,* 64 Utah 550, 232 Pac. 915 (1924), permitted certiorari from an order quashing the information. The motion to quash was made upon the sole ground that there was a civil action

pending to determine the ownership of the stock. The precise question was whether the defendant judge exceeded his jurisdiction in quashing the information upon grounds other than the stated statutory grounds therefor. On rehearing a further explanation was made to the effect that the motion to quash was based "entirely upon matter dehors the criminal record" and that a civil suit pending is no ground for quashing an information under Comp. Laws 1917, Section 8878. In the petition for rehearing it was explaned that "that statute was exclusive, and unless the ground relied on was within the statute the motion to quash should not prevail."

The writ of certiorari in *Higgins v. Burton* supra was premised upon the proposition that the lower court had exceeded its jurisdiction. In the instant matter it is not contended that the lower court did not have the judicial prerogative to suppress the evidence upon the grounds claimed. The subject is extensively annotated in 109 *A.L.R.* 793 and 91 *A.L.R.* 2*d* 1095.

2. *The order suppressing the testimony of Mr. Brady before the Grand Jury was proper.*

The order of the defendant District Judge herein was based upon the arguments of counsel, the consideration of the records and files in criminal action No. 19531 together with the records and files in the action identified as criminal action No. 19558, the stipulation made in open court by counsel for the State that the defendant was at all times before the Grand Jurors under the compulsion of a subpoena, and upon the precise findings as follows:

"1. That the subject of inquiry before the Grand Jurors of Salt Lake County, Utah at the time of and in connection with the testimony set forth in the indictment in the instant action was whether a crime had been committed by the defendant in violation of Title 76, Chapter 28, Sections 3, 4, 7, 21, 48, 59(1) and 61, Utah Code Annotated 1953, and Article 13, Section 8 of the Constitution of Utah.

"2. That the defendant (Brady), with others, was thereafter charged by said Grand Jurors with having conspired to commit the identical crimes, the subject of the aforesaid inquiry, the indictment for which now pends in the above entitled court, identified as Criminal No. 19558.

"3. That the defendant herein was compelled over his objection and in the absence of counsel, notwithstanding his demand and request therefor, to give evidence against himself as set forth in the indictment herein, which evidence in whole or in part is the basis of or within the overt acts set forth in the indictment in said action, Criminal No. 19558." (R-53 and 54)

Inherent in the order are the findings of fact as set forth above which include the compulsory self-incrimination under circumstances where Mr. Brady was in name a witness before the Grand Jury but in fact a defendant and the target of its investigation.

Article I, Section 12 of the *Constitution of Utah* provides in part, "the accused shall not be compelled to give evidence against himself." The case of *State v. Byington*, 114 Utah 388, 200 P.2d 723 (1948) is controlling even in the absence of *Massiah v. United States*, 377 U.S. 201,

Escobedo v. Illinois, 378 U.S. 478, both decided in 1964, and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In *State v. Byington* the defendant was convicted of perjury in the second degree and upon appeal the conviction was set aside with directions to dismiss the action. The charge of perjury grew out of a hearing on an order to show cause in a divorce action. The defendant was before the court without an attorney, and after the wife had testified the court told defendant that he could cross-examine her and when he declined the court told the defendant that he could take the witness stand in his own behalf. This he also refused. Thereupon the court said, "Well, come up here. I want to ask you some questions then." After being sworn opposing counsel examined the defendant and the upshot of the situation was that both the defendant and the so-called wife committed perjury as to the fact of the marriage. At the trial on the perjury charge the court received in evidence over defendant's objections the transcript of his testimony in the hearing on the order to show cause to the effect that he was married to a woman whom he claimed to be his wife. On the appeal the defendant contended that under the circumstances indicated and by the use of the transcript of his testimony in the hearing on the order to show cause he was compelled to be a witness and to give evidence against himself "in a criminal case" in violation of the 5th Amendment of the Federal Constitution and of Article I, Section 12 of our State Constitution.

After a pronouncement to the effect that the privilege against self-incrimination protects a witness as well

as a party accused of crime in a civil as well as in a criminal action from being required to give testimony which tends to incriminate him and that such includes "any fact" which is a necessary or essential part of a crime, this Court stated:

> "Generally such question is raised on objection to giving of testimony but that is not necessarily the case. Here the witness did not claim the privilege when the question was asked. But he did decline to testify and testified only when required to do so by the court. He was a layman without experience with courts, without advice of counsel or knowledge of his right to refuse to give self-incriminating testimony."

When the defendant was asked whether he had remarried he was openly and notoriously living as husband and wife with the woman who was not his wife and a child born from that relationship. "When this question was put to him he was required to either refuse to answer or to admit one of the elements of such crime or give false testimony." Being placed in such position the court stated:

> "Since he did not know that he had the right to refuse to answer his only alternative was to admit his guilt or give false testimony. That persons shall not be placed in such a position is one of the purposes of these constitutional provisions. Under such circumstances such evidence is not admissible in a subsequent prosecution for perjury otherwise the immunity from giving self-incriminating testimony would be of no value to him."

This court quoted at length from *State v. Caperton*, 276 Mo. 314, 207 S.W. 795. There the defendant was required to give testimony before a Grand Jury which was investigating whether he was living with a woman not his wife in open and notorious adultery without any warning of his immunity from giving self-incriminating evidence. He testified that he was married to the woman and was later convicted of perjury in so testifying. The court set aside the conviction on the ground that evidence of his testimony before the Grand Jury was not admissible in such prosecution because his immunity from giving self-incriminating evidence would thereby be violated. This court quotes in part from the *Caperton* case as follows:

> "'As a basis for this prosecution defendant was haled before a grand jury of his county, and there under oath compelled to answer certain questions, truthful answers to which would (as the state is now here insisting) have required a confession of his guilt of another crime then under investigation by this jury. When defendant was thus compelled by these proceedings before the grand jury, either "to confess and be hanged" or to swear a lie, he took refuge (again, as the state now here contends) in the latter alternative. Promptly he was indicted for perjury, and this prosecution and conviction followed.
>
> "'It is plain to be seen that the inquisition whereat the alleged perjury was committed was in a most serious aspect a violation of defendant's constitutional right not to be compelled to testify against himself. . . . The least that may be said of the proceedings by which this defendant was

induced to perjure himself is that the state, in thus compeling either a sworn confession or perjury, was morally an aider and abettor in the perjury charged.

"'The law which governs inquisitions before grand juries does not contemplate that an accused person, whose alleged crimes are at the time the subject of inquiry may be compelled to come before such a jury and there in secret and on oath, without counsel or friends be required either to confess his guilt or to commit perjury. . . . No objection was made that defendant's testimony before the grand jury, being involuntary, was inadmissible, but so much is said in palliation of defendant's guilt, if in fact he be guilty, and in criticism of the proceeding adopted to compel him to commit the crime herein complained of.'"

This court in the *Byington* case commented with approval on *Twiggs v. State,* Tex. Cr. R., 75 S.W. 531, and attributed to that court the following:

"There defendant was convicted of perjury before a grand jury which was investigating a charge of rape against another man. In the course of his testimony, he denied having committed adultery with a sister of the woman involved in the rape charge, of which offense he was later convicted. The court held that the testimony given before the grand jury was not admissible in evidence on his trial for perjury, because he was denied his privilege to not give incriminating evidence against himself, even though he did not claim such privilege."

This Court points out that the testimony given by Byington was not in the course of an investigation

against him for a criminal offense as in the *Caperton* case supra, but nevertheless states:

> "But the constitutional provisions grant the immunity from giving such testimony in a criminal case and under that provision, even though he first gave such testimony in a civil action, evidence thereof may not be used against him in a criminal case. See references to Wigmore above cited. Under the circumstances of this case, he was compelled to answer questions which, if answered truthfully, he would have to give evidence of one element of a crime which he had committed. Here, as in the two cases above cited, he did not object to answering but he did not know that he had a right to make such objection. If such testimony can be used against him in a case of this kind then his privilege against self-incrimination may be violated and he can still be convicted as a result of such violation by the court. Such was not the intention of the framers of our Constitutions."

Plaintiff in the instant matter attempts to distinguish the *Byington* case and the companion case of *State v. Hutchinson*, 114 Utah 409, 200 P.2d 733 (1948), on the theory that Mr. Brady was a "voluntary" witness before the Grand Jury. This attempted distinction ignores the express finding in the order complained of to the effect that Mr. Brady was at all times under compulsion of a subpoena and the stipulation of the State's attorney to that effect. An attempt is made to distinguish the *Byington* and *Hutchinson* cases on the premise that Mr. Brady was "thoroughly advised of his right to refuse to answer incriminating questions." This is a specious argument

and is contrary to the fact as found by the defendant District Judge after full consideration of the matter. The plaintiff in its brief does not attempt to rationalize the *Caperton* and *Twiggs* cases.

In *United States v. Winter,* 348 F.2d 204 (2nd Cir. 1965) a case cited by plaintiff as reflecting the same argument as made by the witness Brady, is not in point. The defendant Winter, as is the usual practice with witnesses appearing before a federal grand jury, signed a "waiver of immunity" which he indicated as being a considered act on his part. Furthermore, he was informed by the United States attorney in charge of the inquiry that he was a subject of the grand jury investigation. The foreman of the grand jury also advised Winter that he was the subject of an investigation into his conduct as an employee of F.H.A., and that as "a prospective defendant" anything that he might say would be used against him at a later proceeding and that he need not testify as to those matters which might tend to incriminate him.

Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.ed.2d 678, 84 S.Ct. 1594 (1964), attributes to *Malloy v. Hogan,* 378 U.S. 1, 12 L.ed.2d 653, 84 S.Ct. 1489 (1964) decided the same day, the holding that the Fifth Amendment privilege against self-incrimination must be deemed fully applicable to the States through the Fourteenth Amendment. In *Murphy* the court rejects all earlier cases limiting the Fifth Amendment privilege against self-incrimination to the exertion of the power of the

Federal Government to compel incriminating testimony with a view to enable that same government to convict a man out of his own mouth. In an article appearing in the May 1966 *American Bar Association Journal,* Vol. 52, page 443, by Richard A. Givens, Assistant United States Attorney, Southern District of New York, entitled "Reconciling the Fifth Amendment with the Need for More Effective Law Enforcement," the author states in part:

> "The major purposes considered to be served by the privilege today are discussed in the opinion of Mr. Justice Goldberg in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55-57 (1964), and in Erwin N. Griswold's *The Fifth Amendment Today*:
>
> > "1. Protection of the suspect from a trilemma in which he is faced with the alternatives of (a) giving incriminating answers, (b) being prosecuted for contempt for refusing to answer or (c) being prosecuted for perjury if he denies wrongdoing and the denial, whether true or not, is disbelieved."

Within the concept of the foregoing is the case of *People v. Schwarz,* 248 Pac. 990 (Calif. 1926):

> "The weight of authority clearly supports the proposition that one who is brought into court under a subpoena and testifies pursuant thereto acts under compulsion."

In *United States v. BiGrazia,* 213 F.Supp. 232, (D.C. N.D. Ill, 1963) the court stated that the real question was whether in the absence of a warning the defendant

may have tended to incriminate himself by his testimony before the grand jury.

> "If so, the indictment must be quashed, for it would violate the constitutional precept embodied in the Fifth Amendment's privilege against self-incrimination, and all the Government's most self-serving characterizations of Calzavara's status could not save it in the face of this. Nor could it be saved by the subsequent discovery of independent information warranting his indictment.
>
> "This, of course, forces the Government to determine when a warning is appropriate. But, after all, it is not an unreasonable burden, especially since the U. S. Attorney or his assistant is in a good position to know what testimony can be expected. If the Government chooses to call a witness before the Grand Jury who is or may be a defendant, its own self-interest as well as a proper regard for constitutional due process would seem to dictate the issuance of a warning and the securing of an immunity waiver. The risk it runs in failing to warn is a quashed indictment. In order to avoid this contingency, the fair and wise practice would seem to call for a warning and the securing of an immunity waiver whenever it is even remotely possible that the testimony of a witness might tend to incriminate him."

In *Powell v. United States,* 226 F.2d 269 (Cir.Ct. D.C. 1955) the court states:

> "On the one extreme it would seem to be clear that a prosecutor could not even call to the stand in a criminal trial the person being tried. On the other extreme it would seem to be clear that a person summoned to appear before a Grand Jury could not validly ignore the subpoena merely

> because an indictment against him might eventuate from the inquiry. Somewhere between the two extremes is a line. No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure. However, in the view which we take of the case at bar, we do not reach this constitutional question, avoiding it as we should when it is possible to do so."

In connection with the next to the last sentence of the above quote the court refers to *United States v. Lawn*, 115 F.Supp. 674 (D.C., N.Y. 1953) and 38 A.L.R. 2d 290.

In the *Lawn case the court said*:

> "The court has inherent power, in its discretion, to dismiss indictments obtained in violation of the rights of the defendants. It is also evident that such evidence as is obtained in violation of those rights may be ordered suppressed and returned. In re Fried, 2 Cir., 1947, 161 F.2d 453, 1 A.L.R. 2d 996."

We take excerpts from the annotation in 38 A.L.R. 2d 290 as follows:

> "Where the situation is such that in view of the general theory or practice obtaining in the particular jurisdiction as to the scope and effect of grand jury investigations, or by reason of such factors as the extent to which the prosecuting or investigating officials have expressly named the

witness in the presentment or other paper instituting the investigation, the court can see that the investigation was directed against the witness later indicted, then a holding that the indictment was invalid is common. (In this situation the view is frequently taken, not only that the witness is protected from being asked incriminating questions while a witness before the grand jury, but even against being called as a witness before that body at all. Furthermore, it is frequently indicated in cases involving this situation that the witness can attack the indictment even if he failed to assert his constitutional privilege before the grand jury.)''

"Where the defendant was compelled to be a witness before the grand jury in an investigation directed against him, and out of which he was subsequently indicted, and he did not execute a waiver of immunity, and he testified after being advised of his constitutional privilege to refuse to testify, the court in People v. Seaman (1940) 174 Misc. 792, 21 NYS 2d 917, ordered the indictment dismissed, on the ground that the rule in New York State was that a person's constitutional privilege was violated where he was compelled to appear before a grand jury and testify in an investigation directed against him, and that an indictment thereafter found should be set aside, even though he was warned and failed to claim his privilege. The court went on to say that it did not decide whether this rule applied where a person was called in a proceeding directed against others.

"Indictments against the defendants were quashed on the ground that they had been denied their constitutional right not to be compelled to give evidence against themselves, by being ques-

tioned before the grand jury which indicted them, in *Commonwealth v. Bane* (1940) 39 Pa D & C 664, 3 Fayette Leg J 291, where the defendants were subpoenaed to appear before the grand jury, and at the time they were subpoenaed they had been accused in a petition to the court of the specific crimes to be investigated, and the defendants were compelled to take the stand, and after being told that they could refuse to answer the questions on the ground of self-incrimination, they were forced to elect what course they would take. The court stated that they were thus placed in a situation where not to speak in answer would seem to confess guilt, and probably be more prejudicial than to give full utterance. The witnesses were compelled to give specific and detailed evidence against themselves."

"In United States v. Edgerton (1897, D C Mont) 80 F 374,it was held that an indictment would be quashed where the defendant was require by subpoena to appear before the grand jury as a witness, and was sworn and examined and required to testify to material matters, without being informed or having knowledge that the grand jury had under consideration any matter involving a criminal charge against him, the court stating that where a witness was compelled to testify against himself, the injury inhered in the violence done to his rights."

"Although stating that the question was not involved in the instant case, the court in State v. Faulkner (1903) 175 Mo 546, 75 SW 116, said: 'It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge should, in view of our constitutional mandate, be summoned to testify against himself and furnish evidence upon which he may

> be indicted. It is a plain violation both of the letter and spirit of our organic law.' The court said that such a practice could not be too strongly condemned."

Plaintiff cites *In Re Groban*, 352 U.S. 330 (1957) to the effect that there is no constitutional right for an individual to have counsel before an administrative investigation held before a fire marshall. The Supreme Court developments in the right to counsel privilege against self-incrimination area have been so momentous and so striking in the last two years that *Groban*, although only nine calendar years old, is now "ancient history". The four dissenters in that case along with former Justice Goldberg emerged as the majority in *Escobedo*. In *Escobedo* it is held that the attorney is required when the investigation has "begun to focus on a particular suspect." Furthermore, the majority court in *Miranda v. Arizona*, ... U.S. ....., 16 L.ed2d 694 (1966) at footnote 36 cites with apparent approval from the dissenting opinion of Justice Black in the *Groban* case.

The case of *Directory Services, Inc. v. United States*, 353 F.2d 299 (8th Cir. 1965), contains a gratuitous expression clearly dictum that there was no right to counsel before a grand jury citing *In Re Groban* and other pre-Escobedo decisions without even mentioning *Escobedo*.

The New York court in *People v. Tomasello*, 264 N.Y.S. 2d 686 (1965) dealt with the subject of the charge of perjury having been committed before the grand jury where it was demonstrated that the witness was in fact

the "target" of the investigation. The New York court in dismissing the indictment stated:

> "It can hardly be gainsaid that one who is named by the Grand Jury as one who aided and abetted the commission of crimes and conspired to commit crimes that were under investigation by that Grand Jury was a target of the investigation. If a possible defendant or target of an investigation is subpoenaed before a Grand Jury and there testifies, whether or not he claims or asserts his privilege against self incrimination, his constitutional privilege is deemed volated. 'An automatic result of the violation of this constitutional privilege is that the defendant is protected not only from indictment based on any incriminating testimony which he may have given, but also from use of such evidence.' Fuld, Jr., in People v. Steuding, 6 N.Y. 2d 214 at 217, 189 N.Y.S. 2d 166 at 167, 160 N.E. 2d 468 at 469, 470.
>
> The instant perjury indictment is based upon the testimony of the defendant before the Grand Jury. It having been given under subpoena by a possible defendant, it was testimony under compulsion in violation of the defendant's constitutional privilege. That testimony may not be used against the defendant for any purpose. Such immunity is complete and includes immunity against a charge of perjury for falsely testifying before the Grand Jury. (People v. DeFeo, 308 N.Y. 595, 127 N.E. 2d 592; People v. Gillette, 126 App. Div. 665, 111 N.Y.S. 133). The exception as to perjury and contempt contained in Section 2447 of the Penal Law has no application here.
>
> The motion to dismiss the indictment must perforce be granted."

Plaintiff in its brief herein states that the *Tomasello* case and other New York cases do not have comparable constitutional provisions. We do not believe this to be true and point to the reference in *Massiah* to *Spano v. New York,* 360 U.S. 315, as indicating that the New York court and the United States Supreme Court are in accord.

In *People v. Ianiello,* decided by the New York Supreme Court on June 24, 1966, and reported on in 35 *Law Week,* page 2003, the Sixth Amendment is held to bar a criminal contempt indictment based on testimony of a grand jury witness that the witness was compelled to give after he had been denied access to his counsel who was outside the grand jury room. We quote in part from the report of the case as contained in the above referred to *Law Week.*

> "During the early stages of the accused's testimony before the grand jury, he sought permission to consult his attorney with reference to questions that were put to him. His requests to consult with his attorney were refused by both the foreman of the grand jury and the assistant district attorney. He was then compelled to answer numerous questions; most of his answers are now the subject matter of the indictment.
>
> "In Miranda v. Arizona, 34 LW 4521 (16 L.ed.2d 694) the Supreme Court stated; 'If the individual states that he wants an attorney the interrogation must cease until an attorney is present * * *.' While this statement referred to interrogation by the police of an accused suspected of the commission of a crime, the refusal to allow the witness to speak to his counsel outside the

grand jury room to ascertain his rights deprived him of counsel in violation of both the state and federal Constitutions. Since the indictment is predicated upon the statements made by him after the requests for counsel were denied, the denial of the requests when defendant most needed counsel violated his constitutional rights.

"This court is not suggesting that a witness before a grand jury in every case may be afforded the right to consult with counsel before answering any questions posed by the district attorney. In the instant case, had the accused refused to answer questions on advice of counsel, he would have had the opportunity of having the court pass upon the propriety of his remaining silent and refusing to answer questions. 'The statement made by the assistant district attorney to the witness "that there is no legal question involved" is a function for the court to pass upon as well as the decision of the foreman of the grand jury that before permitting the accused to consult with his attorney that "permission could not be given without the consent of the assistant district attorney."' While this court does not intend to limit the right of the grand jury to investigate crime in this county, nevertheless the rights of a witness as well as of an accused must be fully honored."

CONCLUSION

The extraordinary writ prayed for, whether it be mandamus or certiorari, should not issue. To do so would run counter to the many unbroken expressions of this Court since statehood. That the defendant District Judge acted within the perimeter of judicial discretion having jurisdiction in the premises is not questioned. Right or

wrong, the ruling in the absence of appeal must stand. The correctness of the ruling is nevertheless vouched for by the authorities cited above.

Counsel for the State erroneously contends that the ruling if allowed to stand "would effectively emasculate the grand jury system in the State of Utah." This is an exaggerated concept. All the prosecuting attorney has to do, he being familiar with the evidence that he intends to adduce before the grand jury, is to avoid the compulsory attendance of the "target" of the investigation. Knowledge and experience are the parents of finesse and sophistication, and as in other places the grand jury system is workable here when the proper procedural tools are applied. Just what counsel means when he refers to "political pressures and election" as inhibiting or controlling prosecuting attorneys is unclear, but judges always, and practicing attorneys whether in private or public life it is hoped, will never subordinate legal standards to fear or favor no matter what pressure is exerted. Plaintiff's petition should be rejected.

Respectfully submitted,

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