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S. Whitehead

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CRIMINAL PROCEDURE

Bills of Indictment: Limit Presentations to Grand Jury

CODE SECTION:	O.C.G.A. § 17-7-53.1 (new)
BILL NUMBER:	HB 653
ACT NUMBER:	583
SUMMARY:	The Act limits to two the number of times a prosecutor can offer a true bill of indictment to a grand jury for the same offense where that indictment was previously quashed by a court.
EFFECTIVE DATE:	July 1, 1987

History

On September 9, 1986, Gwinnett County State Judge Howard Cook was indicted by a Richmond County grand jury for allegedly selling fraudulent securities in violation of the Georgia Securities Act.[1] The indictment against Judge Cook included six counts of fraudulent securities transactions.

The indictment mandated that Judge Cook either suspend himself voluntarily within fourteen days, or risk the Judicial Qualifications Commission dismissing or suspending him.[2] On Friday, September 26, the Judicial Qualifications Commission decided to suspend Judge Cook with pay.[3] Subsequently, Judge Cook's attorney filed motions to dismiss the indictment because the district attorney of Richmond County "presented a true

1. Laccetti, *Gwinnett Judge Accused of Securities Fraud*, Atlanta Const., Sept. 10, 1986, at 1D, col. 2. Judge Cook was apparently one of a group of persons indicted who were connected with James Henry "Sam" Durrence and his firm, Sam Durrence and Associates, Inc. of Augusta.

2. *Id.* Georgia law requires that a public official voluntarily suspend himself within fourteen days of the issuance of an indictment against him. GA. CONST. art. II, § 3, ¶ 1(d). If the public official fails to do so, the matter is turned over to a special commission. GA. CONST. art. II, § 3, ¶ 1(b) (1983, amended 1986). In the case of a judge, the Judicial Qualifications Commission would determine the particular suspension. *See* GA. CONST. art. VI, § 7, ¶ 6.

3. Laccetti, *Gwinnett's Judge Cook Suspended with Pay*, Atlanta Const., Sept. 27, 1986, at 6D, col. 1. Evidently Judge Cook did not voluntarily suspend himself as provided in the Georgia Constitution, *see supra*, note 2, and instead waited for the decision of the Commission. The length of a suspension is until acquittal, or if the indicted public official is not tried at the next regular or special term after the indictment has come down, then the suspension is terminated and the public official can resume his office. GA. CONST. of 1983, art. II, § 3, ¶ 1(h) (1984).

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bill of indictment without any testimony presented to the grand jury."[4] The trial judge implied that he would grant that motion.[5]

Following Judge Cook's motion to quash the indictment, the Richmond County grand jury reindicted him on all six counts. The reindictment came while Judge Fleming was considering whether to quash the first indictment.[6]

The reindictment had a secondary effect with respect to Judge Cook. Under the Georgia Constitution, an indicted public official must be tried within the term of the court under which the indictment is brought.[7] If the public official is not so tried, his suspension, whether voluntary or mandated by the Judicial Qualifications Commission, terminates and the public official is allowed to return to office.[8] However, because of the reindictment, the Richmond County District Attorney was given an additional term to try Judge Cook.[9] By being reindicted, Judge Cook was forced to endure additional suspension time, maintaining all the while he was innocent of the charges.

On December 3, 1986, Governor Joe Frank Harris appointed an interim judge to replace Judge Cook while Cook awaited trial.[10] On January 8, 1987, however, Judge Fleming announced his decision to quash the second indictment against Judge Cook.[11] Although the indictment was quashed, the Richmond County District Attorney announced that a second reindictment of Judge Cook would be sought.[12]

Since a public official cannot remain in active office while under indictment, an indictment is an effective tool for keeping a public official from his or her appointed duties. An indictment must contain substantial evi-

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4. Laccetti, *Gwinnett Judge's Lawyers Ask Indictment Based On Taped Testimony Be Dismissed*, Atlanta Const., Oct. 16, 1986, at 2D, col. 1 (quoting Alan Mullinax, attorney for Judge Cook). The district attorney had presented taped testimony from a different grand jury presentment to the grand jury which indicted Judge Cook. The district attorney, however, claimed that "[t]he indictment was not based on the tapes but was based on our investigation." *Id.* (quoting Chief Assistant District Attorney George Guest).

5. *Id.* Judge William Fleming, Richmond County Superior Court judge hearing the Cook case, stated that "Cook would have a strong appeal if the state proceeded with the case under this indictment."

6. Laccetti, *Gwinnett Judge Cook Is Reindicted*, Atlanta Const., Oct. 29, 1986, at 9C, col. 3. The Atlanta Constitution characterized this reindictment as "an effort to ensure an airtight case." *Id.*

7. GA. CONST. of 1983, art. II, § 3, ¶ 1(h) (1984).

8. *Id. See also* Laccetti, *Commission To Continue Suspension of State Court Judge Cook*, Atlanta Const., Nov. 25, 1986, at 18A, col. 1.

9. Laccetti, *Commission To Continue Suspension of State Court Judge Cook*, Atlanta Const., Nov. 25, 1986, at 18A, col. 1.

10. *Judge Named Until Cook Case Resolved*, Atlanta Const., Dec. 4, 1986, at 66A, col. 1.

11. *Fraud Indictment Against Judge Dismissed*, Atlanta Const., Jan. 9, 1987, at 15A, col. 1.

12. *Id.*

dentiary elements which support the allegations. Thus, an indictment which has inadequate support may be quashed by the trial judge. Under prior law, there was no limit to the number of reindictments which could be filed after the original indictment was quashed. To the average citizen, such unfettered ability on the part of the district attorney would be extremely harassing. To a public official the constant indictment, dismissal, and reindictment could effectively prevent that public official from acting in his or her official capacity. The unlimited ability of a district attorney to seek numerous reindictments for the same offense created a legal, yet potentially harassing, procedure. The situation with Judge Cook demonstrated the injustice of this rule.

HB 653

The repeated indictments of Judge Cook, despite what appeared to be a lack of any substantial evidence supporting them, prompted the drafting and passing of HB 653.[13] Because the current law did not specify or limit the number of times an indictment could be sought after the original was quashed,[14] it was ineffective in preventing this type of "harassing" prosecution.[15] In response to the inadequacy of O.C.G.A. § 17-7-53,[16] the sponsors drafted section 17-7-53.1 to protect against repeated indictments when previous indictments on the same offense are quashed.[17]

HB 653 adds a new section 17-7-53.1. This new section provides that if a grand jury returns two "true bills"[18] on the same offense, and those indictments are quashed,[19] the prosecution of that offense is barred as to

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13. Telephone interview with Representative O.M. (Mike) Barnett, House District No. 59 (May 1, 1987) [hereinafter Barnett Interview].

14. *See* O.C.G.A. § 17-7-53 (1982). Section 17-7-53 provides:

> Two returns of "no bill" by grand juries on the same charge or allegation shall be a bar to any future prosecution of a person for the same offense under the same or another name provided, however, that if the returns have been procured by the fraudulent conduct of the person charged or there is newly discovered evidence, upon proof, the judge may also allow a third bill to be presented, found, and prosecuted.

Id.

15. Telephone interview with Representative E. Charles Bannister, House District No. 62 (May 1, 1987) [hereinafter Bannister Interview].

16. In Lowry v. Thompson, 53 Ga. App. 71, 184 S.E. 891 (1936), the court held that this section was passed to protect against vexatious litigation when a grand jury refuses to find true bills. Thus, section 17-7-53 was a protective measure against harassing prosecution.

17. Bannister Interview, *supra* note 15; Barnett Interview, *supra* note 13.

18. A "true bill" is "[t]he indorsement by a grand jury upon a bill of indictment when they find it sustained by the evidence laid before them and are satisfied by the truth of the allegation." BLACK'S LAW DICTIONARY 1680 (4th ed. 1968).

19. The indictment or presentment may be quashed by ruling on a motion by the defendant, by demurrer, by special plea or exception, by other pleadings, or by a motion by the court under the statute.

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that defendant in the future.[20] In other words, if the district attorney procures a true bill indicting a defendant for a particular offense, and that indictment is subsequently quashed, the district attorney is allowed only one additional chance to find supporting evidence for the indictment. If the second indictment is subsequently quashed, that defendant may not, under the Act, be indicted again for that particular offense. The Act went through the legislature with no revisions. The District Attorneys of Georgia, however, accepted the Act provided it pertained only to situations where an indictment for the same offense is twice quashed.[21]

This Act was in response to the dilemma of Judge Cook. Because a public official may not serve while under indictment, unlimited indictment power by the district attorney would have kept Judge Cook off the bench indefinitely. This situation would not only create a strain for him personally, but would be a strain on the judicial system, which would have to cover the position with an interim judge and pay both the interim judge and Judge Cook.[22]

S. Whitehead

20. HB 653, § 1, 1987 Ga. Gen. Assem.
21. Barnett Interview, *supra* note 13.
22. Barnett Interview, *supra* note 13; Bannister Interview, *supra* note 15.