Washington Law Review

Volume 42 | Number 3

4-1-1967

Felony Information: Due Process and Preliminary Hearing on Probable Cause

anon

RECENT DEVELOPMENTS

FELONY INFORMATION: DUE PROCESS AND PRELIMINARY HEARING ON PROBABLE CAUSE

Defendants were charged with manslaughter by an information filed directly in superior court. They made timely motion to dismiss, contending that the information was defective because not found before a grand jury, or alternatively that due process required a determination before either a grand jury or a committing magistrate that probable cause existed to hold the defendants for trial. The motion was granted. On appeal, the Washington Supreme Court reversed. *Held:* Due process does not require persons charged with an infamous crime to be indicted by a grand jury or afforded a preliminary hearing on the issue of probable cause, *State v. Kanistanaux,* 68 Wash. Dec. 2d 647, 414 P.2d 784 (1966).

There are four modes of commencing felony prosecution in Washington: grand jury indictment,[1] direct information,[2] coroner's inquest,[3] and felony complaint.[4] In urban areas of the state, the standard practice is to refer the decision on probable cause to a committing magistrate, and to reserve the grand jury for cases requiring use of its inquisitorial powers.[5] In rural areas, however, the direct filing procedure is the prevalent mode of commencing prosecutions.[6] Although indictment by grand jury is constitutionally required to commence federal prosecutions for infamous crimes,[7] the U.S. Supreme Court in *Hurtado v. California*[8] held that states may prosecute such crimes by

[1] WASH. CONST. art. I § 25; WASH. REV. CODE ch. 10.28 (1956) *passim;* WASH. REV. CODE § 10.37.015 (1956).

[2] WASH. CONST. art. I, § 25; WASH. REV. CODE § 10.37.026 (1956).

[3] WASH. REV. CODE § 36.24.070-.080, .100 (1963).

[4] WASH. REV. CODE §§ 10.16.010, .070-.080 (1956); WASH. R. CRIM. CTS. LTD. JURISDICTION 2.01, 2.03e(2).

[5] Brief of the Washington State Association of Prosecuting Attorneys as Amicus Curiae, p. 4, *Kanistanaux.*

[6] *Ibid.* The direct information procedure places the accused on trial without indictment or preliminary hearing to inquire into probable cause. It consists of the filing by the prosecutor with the court of a signed and verified statement charging the accused with commission of the offense in ordinary and concise language comprehensible to a person of common understanding. WASH. REV. CODE § 10.37.050 (1956).

[7] U.S. CONST. amend. V.

[8] 110 U.S. 516 (1884). The California constitution required as a prerequisite to filing a felony information that an accused be examined before a committing

information. The constitutionality of a prosecution for infamous crime commenced solely at the prosecutor's discretion has never been properly presented to the United States Supreme Court.[9]

The Washington supreme court, relying on *Hurtado*,[10] reasoned that there was no right to grand jury indictment in state prosecutions. Following dictum in *Lem Woon v. Oregon*,[11] where preliminary hearing was waived, the court concluded that there was no right to preliminary hearing in state prosecutions. While the court recognized that *Hurtado* had been limited insofar as its reasoning purported to apply to fundamental rights,[12] it concluded that failure to overrule *Hurtado* in cases limiting it could only mean that due process did not require grand jury indictment because denial of grand jury indictment did not violate fundamental principles of liberty and justice. The court reasoned that as denial of grand jury indictment did not involve fundamental rights, *Lem Woon*[13] sustained the direct information procedure. If filing a direct information was constitutional, the court concluded the prosecutor must be able, consistently with due process, to determine probable cause. The court noted that *Ocampo v. United States*,[14] arising under the so-called Philippine Bill of Rights, held that determination of probable cause was "quasi-judicial" and could be vested in the prosecutor. This confirmed the court's conclusion that use of a direct information did not deny due process.

Analysis of the principal case must rest on a thorough examination of *Hurtado* and the cases following it. The *Hurtado* case is usually cited for its negative implication—that there is no right to a grand

---

magistrate. The accused had been examined in accordance with this procedure, and bound over for trial.

In addition to its holding, *Hurtado* was considered a *tour de force* on the meaning of due process. The opinion rejected the theory that 'due process' required specific modes of procedure. See also Maxwell v. Dow, 176 U.S. 581 (1900) and Walker v. Sauvinet, 92 U.S. 90 (1875).

[9] See note 23 *infra*.

[10] 110 U.S. at 534-35.

[11] 229 U.S. 586 (1913).

[12] See Powell v. Alabama, 287 U.S. 45, 67 (1932):

> [N]otwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some cases may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. Louisiana, 272 U.S. 312) is obviously one of those compelling considerations which must prevail....

See also Gideon v. Wainwright, 372 U.S. 355, 342 (1963).

[13] 229 U.S. at 590.

[14] 234 U.S. 91 (1914).

jury indictment in state prosecutions[15]—although *Hurtado* held only that an accused may be prosecuted for an infamous crime by information, if he has received a preliminary hearing on the issue of probable cause.[16] The reasoning in *Hurtado* derived much of its force from the Court's exclusion of the fifth amendment grand jury right in interpreting fourteenth amendment due process. That exclusion rested on the use of the words "due process" in the fifth amendment. As these words appeared in addition to the grand jury guarantee in the fifth amendment, the words "due process" in the fourteenth amendment could not include the grand jury guarantee.[17] Such analysis, founded on rules of construction, was limited by *Powell v. Alabama*,[18] which concluded such construction was valid only when fundamental rights were not involved.

A general, ostensive definition of a fundamental right has been avoided by the Court.[19] Descriptions,[20] and various summaries of rights,[21] have been given. Until *Hurtado* is overruled, it must be con-

[15] 110 U.S. at 520-37. See *e.g.*, ANTINEAU, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 168 (1960); FORKOSCH, CONSTITUTIONAL LAW § 427 (1963); ROTTSCHAEFFER, CONSTITUTIONAL LAW §§ 319-20, at 781 (1939). *But see* Library of Cong., *The Constitution of the United States-Analysis and Interpretation*, S. Doc. No. 39, 88th Cong., 1st Sess. 1217-18 (1964), for a concise statement of *Hurtado* and its relation to *Lem Woon v. Oregon*.

[16] 110 U.S. at 538. [Emphasis added]:

> Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding *by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant*, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

[17] 110 U.S. at 534-35.

[18] 287 U.S. 45 (1932).

[19] Davidson v. New Orleans, 96 U.S. 97, 104 (1877). See, *e.g.*, Adamson v. California, 332 U.S. 46 (1947). The majority of the Court flatly rejected the contention that the first eight amendments of the federal Constitution had been made applicable to the states by the fourteenth amendment. Justices Black and Douglas, dissenting, argued that the fourteenth amendment had been enacted for that very purpose. 332 U.S. at 71-72. Justices Murphy and Rutledge indicated agreement with Black's position, but did not wish to restrict the rights protected by the due process clause to those enumerated in the Bill of Rights. Mr. Justice Frankfurter, concurring, provided an excellent summary of the arguments against "incorporation." 332 US.. at 59-68. See also Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

[20] Powell v. Alabama, 287 U.S. 45 (1932), (fundamental principles of liberty and justice); Palko v. Connecticut, 302 U.S. 319 (1937), (implicit in the concept of ordered liberty). The *Palko* test of due process is often quoted but its content is evasive. For example, the privilege against self-incrimination is not within *Palko's* coverage (302 U.S. at 325, citing Twining v. New Jersey, 211 U.S. 78 (1908)) but was held to bind the states on due process grounds. Malloy v. Hogan, 378 U.S. 1 (1964). And *compare* Betts v. Brady, 316 U.S. 455 (1942) *with* Gideon v. Wainwright, 372 U.S. 335 (1963).

[21] *Compare* the concurring opinion of Mr. Justice Goldberg in Pointer v. Texas, 380 U.S. 400, 410 (1965), *with* Frankfurter, *supra* note 19.

ceded that a right to grand jury indictment, standing alone, is not fundamental.

It must be noted, however, that *Hurtado* held that an information preceded by a preliminary hearing on probable cause might be substituted for grand jury indictment. It is entirely consistent with this holding to assert that there is a fundamental right in state prosecutions for infamous crimes to either indictment or preliminary hearing. This vitiates the court's reasoning in the principal case that if *Hurtado* had involved fundamental rights, it would necessarily have been overruled. A concise statement of the asserted right would be that there is a fundamental right to an independent determination of probable cause in cases involving infamous crimes, even though the states are free to select their own procedure for that determination.

This hypothetical right is contrary to dictum in *Lem Woon v. Oregon*,[22] the only case following *Hurtado* which even perfunctorily examined the right to a preliminary hearing.[23] Unfortunately the fundamental rights doctrine was not considered in *Lem Woon*, because the case antedated *Powell v. Alabama*.

In *Lem Woon*, a preliminary hearing not required by statute was offered the accused and was waived. The Supreme Court chose to ignore the waiver.[24] From the premise that there is no right to grand jury indictment in state prosecutions—the negative implication of *Hurtado*—the Court deduced a fortiori that there could be no right to a preliminary hearing.[25] Since the decision in *Powell v. Alabama*, this

---

[22] 229 U.S. 586 (1913).

[23] In the following cases, *Hurtado* was cited as directly in point: Hodgson v. Vermont, 168 U.S. 262 (1897); Maxwell v. Dow, 176 U.S. 581 (1900); *cf.* Davis v. Burke, 179 U.S. 399 (1900). *Hurtado* was cited as controlling, and standing denied to assert lack of preliminary hearing in an effort to distinguish *Hurtado*, in: Dowdell v. United States, 221 U.S. 325 (1911); Bolln v. Nebraska, 176 U.S. 83 (1899); McNulty v. California, 149 U.S. 645 (1892). In Gaines v. Washington, 277 U.S. 81 (1928), challenge to an information filed without a return of the coroner's jury was termed frivolous, without further discussion. The issue had not been raised in the state court. See State v. Gaines, 144 Wash. 446, 258 Pac. 508 (1927). All of the cases pre-date *Powell*.

[24] In only four sentences, the Court held that the distinction as to lack of preliminary hearing was invalid, and the waiver immaterial. It therefore affirmed on the authority of *Hurtado*. While this may have been a valid argument prior to Powell v. Alabama, it now begs the question.

[25] Compare this reasoning with United States v. Motte, 251 F. Supp. 601 (S.D.N.Y. 1966) and People v. Jackson, 48 Misc. 2d 1026, 266 N.Y.S.2d 481 (Sup. Ct., 1965).

The claim "no constitutional right to preliminary hearing" is frequently based on decisions involving discovery, Dillard v. Bomar, 342 F.2d 789 (6th Cir. 1965), or denial of confrontation of witnesses, Goldsby v. United States, 160 U.S. 70, 73 (1895). *But see*, as to the latter, Pointer v. Texas, 380 U.S. 400 (1965). Neither

reasoning is untenable, for it assumes as a premise the conclusion which it seeks to prove. One cannot argue a fortiori from *Hurtado,* in which the asserted right to an independent determination of probable cause was safeguarded by preliminary hearing, to prove that a right to preliminary hearing does not exist.[26]

It is apparent that the court erred in the principal case when it stated that *Hurtado* foreclosed the fundamental rights issue. Yet in spite of the weakness in the Washington court's arguments, there are reasons for approving its decision. Most of the argument presented to the court was grounded on the "incorporation" theory.[27] The trend of recent decisions involving "incorporation" has been to extend the full measure of federal restrictions to the states.[28] Yet the right arising from application of the "incorporation" theory to the principal case would be a right to grand jury indictment, not to a preliminary hearing on probable cause. In light of recent thought on the efficacy of the grand jury,[29] judicial promulgation of such a right would be anachronistic. Reliance on "incorporation" in attacks on the direct information procedure should be avoided. The incorporation argument's conclusion overreaches its merits.

The incorporation argument does not, however, exhaust the reach of the due process clause.[30] The activities of the Michigan one-man grand jury have twice run afoul of the due process clause's prohibitions.[31] It is desirable to consider whether the presence of a specific

these decisions, nor those above denying hearing after indictment, have any bearing on the right to an independent determination of probable cause.

[26] The Washington cases cited to support the holding of the principal case rest solely on the *Hurtado* due process rationale. See State v. Westphal, 62 Wn. 2d 301, 382 P.2d 269 (1963); *In re* Wilburn v. Cranor, 40 Wn. 2d 38, 240 P.2d 563 (1952); *In re* Payne v. Smith, 30 Wn. 2d 646, 192 P.2d 964 (1948).

[27] Brief for Respondent, pp. 12-20; Brief for American Civil Liberties Union as Amicus Curiae, pp. 4-14. Even the ACLU brief provides no rationale for the "incorporation" of a right to preliminary hearing, although its due process attack is directed at the *Hurtado* line of cases.

[28] Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963). Further examples of state-federal parity of conduct on constitutional requirements are: Miranda v. Arizona, 384 U.S. 436 (1966) and Mapp v. Ohio, 367 U.S. 643 (1961).

[29] See Calkins, *Abolition of the Grand Jury Indictment in Illinois,* 1966 U. ILL. L.F. 423.

[30] See Adamson v. California, 332 U.S. at 124 (Justices Murphy and Rutledge, dissenting). *Cf.* Rudman, *"Incorporation" under the Fourteenth Amendment,* 3 LAW IN TRANSITION Q. 141 (1966), commenting on the restrictiveness of incorporation theory. Rutledge and Murphy add a natural law test to the examination of procedure, in addition to the provisions of the Bill of Rights. The anti-incorporationist justices have consistently maintained that due process is to be defined purely from considerations of essential fairness. The difficulties inherent in this approach are amply demonstrated by the state confession cases between Brown v. Mississippi, 297 U.S. 278 (1936) and Escobedo v. Illinois, 378 U.S. 478 (1964).

[31] *In re* Murchison, 349 U.S. 133 (1955); *In re* Oliver, 333 U.S. 257 (1948).

guarantee in the Bill of Rights is, to speak metaphorically, proof that the right protected is fundamental, or evidence that the area protected by the guarantee contains a fundamental right not expressly specified in the guarantee. Such an approach does not necessarily reintroduce the properly abandoned doctrine of *Betts v. Brady*.[32] That case, by conditioning a right to counsel on substantial prejudice to the defendant's interests, forced an ad hoc determination of the due process issue, and was subsequently denounced as enforcing a "watered-down" version of the Bill of Rights.[33] *Gideon v. Wainwright*,[34] by incorporation, avoided another alternative. By considering assistance of counsel as evidence of a fundamental right, the Court might have created a right to an advocate who was not a member of the bar. Such recognition would be based on general due process notions,[35] rather than incorporation. A more pointed example of the use of generalized due process by the Court may be found in adoption of the exclusionary rule in *Mapp v. Ohio*.[36] Generalized due process co-exists with incorporative due process within the scope of the fourteenth amendment.

Yet the criterion by which one rejects a procedure as violative of generalized due process is vague. Denial of preliminary hearing does not "shock the conscience,"[37] even in an intellectual sense. Arguably,

[32] 316 U.S. 455 (1942). See Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 274-75 (1960) (dissent).

[33] See Ohio *ex rel.* Eaton v. Price, *supra* note 32, at 275.

[34] 372 U.S. 335 (1963).

[35] See note 30 *supra* and note 36 *infra*. By use of the term "generalized due process," argument about the philosophic basis of what the Court has done may be avoided. Whatever that basis, it is clear that the decisions rest on a rationale far removed from incorporation.

[36] 367 U.S. 643 (1961). The fundamental nature of the right was not in issue in *Mapp*. Ker v. California, 374 U.S. 23, 30-32 (1963); Mapp v. Ohio, 367 U.S. at 650; Wolf v. Colorado, 338 U.S. 25,33 (1949). The exclusionary rule was announced in Weeks v. United States to cure "prejudicial error." 232 U.S. 383, 398 (1914). *Wolf* considered it a matter of state policy. In *Mapp*, four justices adverted to a constitutional basis in the fifth amendment, but established the rule because of the inadequacy of alternatives, 367 U.S. at 650-54, 655-57, which is a generalized due process rationale, and on grounds of state-federal symmetry. *Id.*, at 657-59. See also *Mapp, supra* at 669-71, (Mr. Justice Douglas, concurring); *Wolf, supra* at 41-47 (Mr. Justice Murphy, dissenting). Justice Black, concurring, found a constitutional basis in the overlap of the fourth and fifth amendments. *Mapp, supra* at 661-66.

In Linkletter v. Walker, 381 U.S. 618 (1955), the Court rested its refusal to give the doctrine of *Mapp* retrospective effect on the ground that the rule had been promulgated to curb police misconduct. *Id.*, at 636-37. That reason is inconsistent with the fundamental right test of incorporative due process. *Mapp* cannot be explained by incorporation, even though the Court in *Mapp* examined the overlap reasoning of Boyd v. United States, 116 U.S. 616 (1886). That reasoning could have no force in *Mapp*, which predates the incorporation of the privilege against self-incrimination by three years. See *Mapp, supra* at 685-86 (dissent) and see Malloy v. Hogan, 378 U.S. 1 (1964).

[37] Rochin v. California, 342 U.S. 165, 172 (1952). Although the decision reached in *Mapp*, appears to lessen the burden to be satisfied in invoking generalized due

denial of any review of the probable cause issue would be an improper merger of prosecutorial and judicial functions.[38] But while acceptable constitutional principles allow destruction of the direct information procedure, they do not compel its destruction.

Whatever force is given constitutional objections to the direct information, to make the prosecutor a judge without review of who shall be tried for felony without preliminary hearing or indictment is to vest in him an arbitrary discretion. This is unsound policy.[39] Certain collateral matters suggest that the defendant's interests involved are substantial. For example, the same personal interests which a right to indictment protects are safeguarded in civil cases by the tort of slander per se,[40] whereby action will lie for injury to reputation resulting from accusation of an infamous crime. As the prosecutor is immune from this tort, arguably his discretion should be balanced by some procedural check.[41] Requiring independent determination of probable cause would furnish a procedural safeguard benefitting the accused without involving the restraint on vigorous prosecution which could occur if tort liability were feared.

The grand jury has been considered the guardian of the average, as well as the political, defendant.[42] Even its critics urge that it should

---

process, a statement of the showing required seems even more difficult than under the *Powell* and *Palko* criteria. See note 20 *supra.*

[38] See notes 48 and 49 *infra.*

[39] The proper ambit of the prosecutor's discretion would appear to be that set by California. See Klein, *District Attorney's Discretion Not to Prosecute,* 32 Los ANGELES B. BULL. 323 (1957). *Cf.* United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965), 18 VAND. L. REV. 2062.

[40] Parallelism between rights secured under the fifth amendment grand jury provision and the tort of slander per se based on an accusation of crime is instructive. The actionable accusation must be of an indictable crime, involving infamous punishment or moral turpitude. 1 HARPER AND JAMES, TORTS § 5.10 at 376 (1956). The crime must be chargeable by indictment or information and punishable by death or imprisonment other than in lieu of a fine. RESTATEMENT, TORTS § 571. The interest protected has, however, been related to "major social disgrace", rather than the accidents of criminal procedure or the vagaries of punishment. See PROSSER, TORTS § 107 at 773-74 (3d ed. 1964). Any of the above tests would be satisfied by the crime of manslaughter charged in the principal case.

[41] Prosecutors are generally immune from malicious prosecution actions on the ground that personal liability for official acts is contrary to the public interest served by free and vigorous action. See Creelman v. Svenning, 67 Wn. 2d 882, 410 P.2d 606 (1966); Anderson v. Manley, 181 Wash. 327, 43 P.2d 39 (1935); 1 HARPER AND JAMES, TORTS, § 113 at 855-56 (3d ed. 1964).

[42] See *Ex Parte Bain,* 121 U.S. 1, 12 (1887):

> [I]t remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of *Jones v. Robbins,* 8 Gray 329, "individual citizens from... a public accusation of crime, and from the trouble, expense, and anxiety of a public trial before probable cause is established by the presentment and indictment of such a [grand] jury...."

This position was reaffirmed in Smith v. United States, 360 U.S. 1, 9 (1959).

be replaced by preliminary hearing, rather than abolished,[43] although the preliminary hearing is sometimes a perfunctory safeguard.[44] Discarding such ancillary matters as the use of preliminary hearing for discovery, it is better to provide a defendant with some protection than none.

While the prevalence of the direct information in rural counties,[45] where justices of the peace may be without legal training,[46] may constitute an explanation of the court's action, it does not constitute a countervailing policy justification.

Because *Hurtado* does not foreclose the fundamental rights problem, and relieve the court of its duty to balance the interests involved, the actual basis of the court's reasoning in the principal case is not *Hurtado* or *Lem Woon,* but *Ocampo v. United States.*[47] That case states that the determination of probable cause is a quasi-judicial function, which therefore may be vested in the prosecutor. Recent decisions involving the exercise of accusatory or investigatory functions in the same case by the same person later called upon to make a judicial[48] or quasi-judicial[49] determination are irreconciliable with *Ocampo.* The term quasi-judicial as used in *Ocampo* is not an argument. It is a cloak for a conclusion as to the nature of procedural due process, and should be used only after evaluation of the interests involved. Apart from problems caused by *Ocampo* having arisen under

[43] See Calkins, *supra* note 29, vigorously arguing for adoption of information after preliminary hearing as superior to the grand jury in all cases other than investigation of political corruption and syndicated crime.

[44] See Note, *Preliminary Hearings on Indictable Offenses in Philadelphia,* 106 U. PA. L. REV. 589 (1958).

[45] See note 5 *supra.*

[46] *Ibid.*; WASH. REV. CODE § 3.34.060 (1965).

[47] 234 U.S. 91 (1914).

[48] It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.... A single "judge-grand jury" is even more a part of the accusatory process than the ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. *While he would not likely have all the zeal of a prosecutor,* it can certainly not be said that he would have none of that zeal. *In re* Murchison, 349 U.S. 133, 137 (1955), reversing contempt conviction tried by citing judge. [Emphasis added]

The Court reserved the question of the constitutionality of the one man grand jury. It is submitted that if an accused is entitled to a determination of probable cause prior to standing trial, that determination cannot be made by the prosecutor, unless the logic of *Murchison* is rejected as wholly inapplicable to a preliminary proceeding.

[49] American Cyanamid Company v. F.T.C., 363 F.2d 757, 763-67 (6th Cir. 1966), (Comm'r disqualified as trier of fact by prior service as Counsel to Senate committee investigating same transactions); Trans World Airlines v. C.A.B., 254 F.2d 90 (D.C. Cir. 1958) (Board member disqualified by prior participation as attorney presenting government's case).

federal statute rather than the Constitution,[50] by its involvement of a misdemeanor rather than an infamous crime,[51] and by its age and circumstances,[52] it is unconvincing for court and counsel in the principal case to have devoted the greater part of their effort to issues not actually relevant to the interests involved. The court's reliance on *Ocampo,* which fails to examine those interests from the standpoint of due process, results in a similar defect in the principal case. *Ocampo* is neither authoritative nor convincing. Since neither *Ocampo* nor *Hurtado* and *Lem Woon* present any analysis of the constitutional issues actually involved in disposition of the principal case, the court has in effect rendered a per curiam opinion on the due process issues.

Further attempts to challenge the direct information should concentrate on generalized notions of due process,[53] or an extension of the arguments for criminal discovery.[54] To sustain a procedure so clearly open to misuse as the optional direct information for inadequate proof of abuse[55] is a perversion of the state freedom to experiment recognized in *Hurtado.*

---

[50] The Court has rejected the cases arising under the Philippine Bill of Rights, 32 Stat. 691 (1902), as constitutional precedent. Green v. United States, 355 U.S. 184, 194-97 (1957). See Hoag v. New Jersey, 356 U.S. 464, 478 n.3 (1958) (Mr. Justice Douglas, dissenting).

Nor did the Court in *Ocampo* make any pretense of construing the Constitution, as indicated by this language:

> Section 5 of the Act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the Fifth Amendment of the Constitution of the United States. And in this respect, the Constitution does not, of its own force, apply to the islands.

234 U.S. at 98. The Court then cited the Insular Cases: Hawaii v. Mankichi, 190 U.S. 197 (1903), Dorr v. United States, 195 U.S. 138 (1904), and Dowdell v. United States, 221 U.S. 325 (1911).

[51] The charge was criminal libel—a misdemeanor. Acts of the Philippine Commission—24 Oct. 1901, No. 277.

[52] Considered apart from its nature as constitutional precedent, the case is fraught with defects. The greater part of the opinion is devoted to another issue—equal protection, and the due process problems are inadequately discussed. The argument turned on use of the label "quasi-judicial" rather than any attempt to examine policy. On the merits, Ocampo had libelled a member of the Philippine Commission. He was pardoned prior to execution of the sentence, and became a minor national hero as the result of the case. HAYDEN, THE PHILIPPINES 607 (1942).

[53] See notes 30 and 36, *supra.*

[54] An attack on the discovery arguments is found in Dillard v. Bomar, 342 F.2d 789 (6th Cir. 1965). For an overall canvass of the interests involved at preliminary hearing, see Note, 51 IOWA L. REV. 164 (1965). The issue of discovery was rejected by the court in the principal case as not compelling.

[55] See 68 Wash. Dec. 2d at 652, 414 P.2d at 787. Such proof could probably concern either actual abuse (due process), or consist of a statistical analysis of the prevailing prosecutorial practice (equal protection). As to the latter, *cf.* Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966), 42 WASH. L. REV. 280.