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Criminal Procedure—Waiver of Indictment Precluded When Offense Charged Under Lindberg Act

In *Smith v. United States*¹ the petitioner and his companions had escaped from a Florida jail and had seized an automobile, forcing its owner to accompany them to Alabama where he was released unharmed. Petitioner waived indictment and was charged by information that he did “knowingly transport in interstate commerce . . . a person . . . who had been unlawfully seized, kidnapped, abducted and carried away . . . .”² The information did not allege whether the victim had been released harmed or unharmed. The accused was convicted and sentenced to imprisonment pursuant to the Lindberg Act.³ This act provides that punishment shall be: (1) by death if the kidnapped person has *not been liberated unharmed* and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed. On appeal the Fifth Circuit Court of Appeals affirmed.⁴ After granting certiorari the United States Supreme Court ruled that indictment could not be waived, and the case was reversed and remanded with instructions to dismiss the information.⁵ In a six-to-three decision the Court held that indictment was required because the statutory offense is sufficiently broad to justify a capital verdict and hence the trial must proceed on this basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was liberated unharmed. The majority stated that although the imposition of the death penalty will depend upon the proof introduced at trial, that circumstance does not alter the fact that the offense is one which *may* be punished by death.

In all capital offenses indictment is mandatory under the fifth amendment to the Constitution of the United States which provides that “no person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a grand jury . . . .” This policy has been incorporated into Federal Rule of Criminal Procedure 7(a) which states: “An offense which *may* be punished by death *shall be* prosecuted by indictment.” (Emphasis added.) In the principal case the majority based their decision on the premise that kidnapping under the statute is a capital offense whether or not there is an allegation that “the kidnapped person has not been liberated unharmed.”⁶

Prior to the principal case the Third Circuit Court of Appeals had held that kidnapping was not a capital offense when the indictment failed to allege that the victim was not liberated unharmed.⁷ However,

the decisions of the Second Circuit were in conflict with this view, and
the Supreme Court in the principal case cited with apparent approval
the dictum in United States v. Parrino,8 to the effect that the allegation
that the victim was not released unharmed goes only to the punishment
and is not part of the offense and that a defendant has no right to be
informed beforehand of the punishment the Government seeks. When
viewed in the light of this dictum the present position of the court
appears to be that an allegation in the indictment that the victim was
"not released unharmed" is not necessary to allow either the introd-
uction of evidence of harm or the jury's recommendation of the death
penalty. Such a rule would seem to place the defendant in danger of
being prejudicially surprised at the trial.9 The Court in the principal
case states that the defendant's procedural safeguards against such sur-
prise are discovery and a bill of particulars.10

This ruling may present serious problems to the defendant in the
conduct of his defense. If evidence of harm were admitted under an
indictment which did not allege harm, then it would appear that the
heretofore well-defined requirements of definiteness, exactitude and
certainty in an indictment11 are not satisfied. In a similar situation,
for example, it has been held that where the degree of larceny, and
consequently the severity of punishment, depends upon the value of the
property stolen, then the value of such property must be alleged and
proved.12 Certainly there is doubt that such an indictment as would
be permitted by the principal decision provides the defendant with suf-
ficient information to enable him to prepare his defense.13 He will not
be able to ascertain from it whether the prosecution will seek to estab-
lish the fact that he did not liberate the victim unharmed, and thus he
will not know the full extent of his jeopardy until the trial. Certainly
the attorney who must conduct the defense is in danger of being sur-
prised. Even if defendant is aware that he has harmed the victim it
is often difficult to persuade a criminal defendant to be frank with his
counsel.

Where can a defendant finding himself in such a position look for
protection from surprise? The court has said that this protection will
be discovery,14 but it is doubtful that discovery will provide the de-
fendant with the information he seeks. It is clear from the legislative

8 180 F.2d 613, 615 (2d Cir. 1950).
9 360 U.S. at 12 (separate opinion).
10 Id. at 10.
11 "If the indictment leaves the defendant in fair doubt as to the offense charged,
it fails to meet the test that an indictment should 'leave no doubt in the minds of
the accused and the court of the exact offense intended to be charged.'" Bratton
v. United States, 73 F.2d 795, 797 (10th Cir. 1934).
12 Cartwright v. United States, 146 F.2d 133 (5th Cir. 1944).
13 360 U.S. at 16-17 (separate opinion).
14 Id. at 10.
history of the Federal Rules that the grand jury minutes cannot be reached by a defendant under Rule 16. Rule 16 is of no help in reaching the statements of government witnesses, except in the comparatively rare case where such statements have been seized or obtained by process. The rule itself provides that the motion for discovery may be made "at any time after the filing of the indictment or information"; thus the defendant has no right to discovery prior to indictment. The use of this rule is made even less effective if discovery is denied by the trial court because there can be no interlocutory appeal from such denial.

The other provision for discovery is Federal Rule 17(c) which provides for discovery before trial through subpoena. The written statements of witnesses are considered as "papers and documents" within the language of this rule and thus are seemingly available to the defendant. However, the Court of Appeals of the District of Columbia is the only court which has permitted defendants to reach the statements of witnesses under this rule. The majority of courts have denied defendants this opportunity because such statements are not evidentiary until the witness has testified in court, and there is always the possibility that the witness will not be called at the trial.

A more liberal construction of Federal Rules 16 and 17(c) would be prevented by a recent statute, the language of which specifies:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. (Emphasis added.)

This statute make no distinction between capital and noncapital offenses. Therefore, if defendant must rely on discovery or inspection for his protection he will not know that he may be on trial for his life.

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16 Fed. R. Crim. P. 16: "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit defendant to inspect . . . books, papers . . . obtained from or belonging to defendant or obtained from others by seizure or by process . . ."
17 Cogen v. United States, 278 U.S. 221 (1929).
20 United States v. Echeles, 222 F.2d 144, 152 (7th Cir. 1955); United States v. Kiamie, 18 F.R.D. 421, 424 (S.D.N.Y. 1955); United States v. Brown, 17 F.R.D. 286, 287-88 (N.D. Ill. 1955); United States v. Bryson, 16 F.R.D. 431, 437 (N.D. Cal. 1954). The foregoing cases were all concerned with non-capital offenses. However, the same rationale would apply in either case; there is no more advance certainty that a given witness will be called in a capital case than in a non-capital case.
until the Government witness has testified that the victim was "not liberated unharmed." In a case decided recently by the Second Circuit Court of Appeals the statute was construed to prohibit a defendant from reaching the statements of witnesses until those witnesses had testified. Fourteen days after the principal case was decided this construction was affirmed by a divided United States Supreme Court.

The opportunity of inspection during the trial would be of little value to the defendant. Cross-examination, impeachment and rebuttal depend on careful investigation and preparation, and continuances during the trial are usually too short to allow this. Kidnapping cases may present complex issues that require extensive investigation and research before trial, and the defendant who is not aware of all the problems he will face until after the testimony of prosecution witnesses will be seriously prejudiced.

The last safeguard recommended by the court in the principal case was the use of a bill of particulars. There is no doubt that a bill may be obtained in this situation. However, since a bill of particulars is required only to set out with certainty the offense charged, it will not aid the defendant here, because under the Court's view of the nature and elements of kidnapping the specific information the defendant seeks is not an element of the offense. United States v. Parrino, cited in the principal case, stated that the matter of harm goes only to the punishment and does not affect the nature of the crime. Therefore, it does not appear that the Government would be required, in a bill of particulars or otherwise, to make known the punishment it intends to seek or the requirements for such punishment that it intends to prove. Although it is true that the evidence must conform to the bill, it would be inconsistent to say that evidence of harm not alleged in the bill is inadmissible for this reason, since the courts have held that such evidence may be introduced when harm is not alleged in the indictment.

The holding in the principal case presents a problem to the defendant when the prosecution has no intention of alleging or proving that the victim was harmed, as would appear to be the situation in the principal case. By the majority opinion, this defendant would be subject to the

24 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 330 (1947).
25 360 U.S. at 10.
26 "A bill should only be required where the charges of an indictment are so general that they do not advise defendant of the specific acts of which he is accused." United States v. Rosenwasser Bros., 255 Fed. 233, 234 (E.D.N.Y. 1919).
27 "The fundamental purpose of a bill of particulars is to apprise the defendant or the crime charged with sufficient particularity to enable him to properly prepare a defense to such charge." United States v. Macleod Bureau, 6 F.R.D. 590, 592 (D. Mass. 1947). (Emphasis added.)
28 180 F.2d 613, 615 (2d Cir. 1950).
29 Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945).
same confinement and delay that would be entailed had the prosecution sought the death penalty. The purpose of Federal Rule of Criminal Procedure 7(a), which provides for waiver of indictment in non-capital cases, was to avoid keeping just such a defendant languishing in jail getting no credit toward his sentence, while he awaits grand jury action.\textsuperscript{30}

Also the Government's position in a case where the victim has been released unharmed has been weakened by the principal decision. It would seem that the Government must now grant the defendant all the safeguards to which a defendant in a capital case is entitled even though a capital penalty is not sought and cannot be obtained. This is contrary to the congressional intent expressed in the Federal Rules which provide such safeguards only when a defendant is on trial for his life. These rules require the Government, in a capital case, to furnish to the defendant a list of veniremen and witnesses to be produced on the trial. Since this list must be given three days prior to trial, the additional burden of deciding and making known in advance what witnesses will be called at the trial is placed on the Government.\textsuperscript{31} Defendant will also be entitled to twenty peremptory challenges as against ten granted a defendant in a non-capital case.\textsuperscript{32}

North Carolina law requires a precise and comprehensive indictment in all cases.\textsuperscript{33} The problem raised in the Smith case does not arise in North Carolina because our kidnapping statute\textsuperscript{34} does not have the aggravation provision found in the federal statute. A similar situation is presented in North Carolina by the burglary statute\textsuperscript{35} which provides for different degrees of burglary and a graduated scale of punishment, depending upon the degree alleged and proved. If the state seeks the death penalty it must allege in the indictment that the dwelling was in the actual occupation of a person at the time of the crime. Without such averment the indictment is sufficient only for burglary in the second degree regardless of the proof at trial.\textsuperscript{36}

It is submitted that, although the decision in the principal case was beneficial to the defendant at bar, it has weakened the procedural safeguards protecting defendants generally.\textsuperscript{37} Discovery and bills of particulars are at this time, and will continue to be, inadequate safeguards so long as harm, when it exists, is held not to be an element of the offense of kidnapping under the Lindberg Act. Defendant's ability to prepare his defense will be greatly impaired if he must wait until the Government has rested its case before he can know the full degree of

\textsuperscript{30} 360 U.S. at 14-15 (separate opinion).
\textsuperscript{32} FED. R. CRIM. P. 24(b).
\textsuperscript{33} State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Albarty, 238 N.C. 130, 76 S.E.2d 381 (1953).
\textsuperscript{34} N.C. GEN. STAT. § 14-39 (1953).
\textsuperscript{35} N.C. GEN. STAT. § 14-51 (1953).
\textsuperscript{36} State v. Fleming, 107 N.C. 905, 12 S.E. 131 (1890).
\textsuperscript{37} 360 U.S. at 12 (separate opinion).
jeopardy to which his actions have exposed him. Perhaps the cause of justice would have been better served by an adoption of the approach of the Fifth Circuit Court of Appeals to the same case. 8

That court held: (1) since the victim was released unharmed the offense could not be punishable by death and the defendant could waive indictment, (2) that prosecution by information will be deemed a waiver of the Government's right to ask for the death penalty or for the jury to recommend it, and (3) that, whether waiver is allowed or whether the prosecution is to be by indictment, no evidence of harm can be introduced unless such harm is previously alleged so that the defendant will be made completely aware of the gravity of the charge he faces.

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Eminent Domain—Interest As an Element of Just Compensation

North Carolina recognizes the right of every property owner to receive just compensation for property taken from him under the power of eminent domain. 1 When land is taken under this power, the owner is entitled to receive an amount equal to the value of the land on the date of the taking. 2 If payment is made later than the date of the taking, then, when made it must include some additional sum as compensation for the delay, 3 because the condemnee has had neither the legal right to possession or use of his property nor the use of the money owed him for the deprivation during this interval. 4 Failure to compensate for the resulting loss would be unconstitutional. 5 Interest on the principal sum from the date of the taking is used as a measuring stick for computing the condemnee's damages resulting from delay in payment. 6 This right

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1 DeBruhl v. Highway Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Johnston v. Rankin, 70 N.C. 550 (1874); see generally Comment, 35 N.C.L. Rev. 296 (1957).
6 "The concept of just compensation is comprehensive and includes all elements . . . . The owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added." Jacobs v. United States, 290 U.S. 13 (1933).