

NOTES

The Rules of Evidence as a Factor in Probable Cause In Grand Jury Proceedings and Preliminary Examinations

INTRODUCTION

Usually a defendant may not be tried for a serious criminal offense until a determination of "probable cause" has been made in a preliminary examination or in a grand jury proceeding.¹ Although there is substantial accord with the proposition that the probable cause standard does not require the degree of certainty that "proof beyond a reasonable doubt" requires, short of this, agreement is something less than total. One attempt at definition appears in the following passage, in which the court noted that the term "probable cause"

is used in connection with many branches of the law such as arrest, attachment, the criminal law, false imprisonment, libel and slander, malicious prosecution, negligence, etc. It has been said to be a term difficult to define, but signifying about the same in law as in common parlance . . . and . . . it is thus defined: "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged."²

1. In the majority of American states, a serious offense may be prosecuted either by information or by indictment. If the prosecution is by indictment, a determination of probable cause made by a grand jury is, of course, prerequisite to a trial. If the prosecution is by information, a determination of probable cause made by an examining magistrate in a preliminary examination (or, "preliminary hearing") is prerequisite to trial, unless the defendant waives it or falls within certain limited statutory exceptions. Even if the prosecution is by indictment, the grand jury proceeding may follow a preliminary examination in which probable cause is found by the examining magistrate (or commissioner, as he is called in the federal system). In such a case, a further determination of probable cause is required to be made by a grand jury, unless, of course, it is waived by the defendant. See generally, ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 49-100, 135-216 (1947); Dession, *From Indictment to Information—Implications of the Shift*, 42 *YALE L.J.* 163 (1932). The concern of this note is with probable cause as that term refers to grand jury proceedings and to preliminary examinations used in conjunction with informations. Those cases in which the preliminary examination is used together with the grand jury and the indictment method of prosecution should be segregated, for the defendant's case is taken from the preliminary examination to the grand jury and not directly to trial. Hence, different considerations are involved as to the purpose of probable cause at the preliminary examination and the way that concept should function in relation to the jury trial rules of evidence.

2. *State v. Howland*, 153 Kan. 352, 359, 110 P.2d 801, 806 (1941).

Whatever value such a definition may have as indicating an attitude or as giving one a sense of the meaning of probable cause, its inadequacy as a legal standard is apparent.

Nevertheless, certain insights into the concept are available if one seeks to determine what extent the evidence upon which the grand jury or examining magistrate is expected to decide probable cause must conform to the rules of evidence normally applicable in criminal jury trials. Thus, if "probable cause" is thought of as imposing a minimum standard, functioning to screen out "weak" cases before they are submitted to trial, it is clear that the standard imposed will be higher if the evidence must conform to jury trial rules of evidence than it will be if no such conformity is required. If all the evidence the prosecutor has is inadmissible hearsay, whether he can prove probable cause might depend upon the applicability of the hearsay rule to the grand jury or the preliminary examination.

The purpose of this note is not to define the meaning of probable cause in its entirety (even assuming this were possible) but rather to analyze the role of one factor in that meaning: the criminal jury trial rules of evidence. Attention will be given first to the grand jury and then to the preliminary examination.

I. GRAND JURY PROCEEDINGS

One function of a grand jury in an indictment proceeding³ is to determine whether there is probable cause: that is, to decide whether there is sufficient evidence to justify holding a trial. A grand jury is a panel of citizens selected from the community. Its proceedings are *ex parte*; the defendant has no right to appear or to cross-examine witnesses, and only prosecution evidence is presented.⁴

3. The distinction between indictments and presentments is elusive. Both are "presented" to the trial court. Both are accusatory. A presentment is a report, drafted by the grand jury, of an investigation undertaken by it. An indictment is a formal charge, drafted by the prosecutor as a result of investigations undertaken by his office and by the police, which is proffered to the grand jury. When hearing evidence in support of an indictment, the grand jury's function is similar to that of a trial jury. When making a presentment, the grand jury functions as a prosecutor. A presentment must be drafted into a bill of indictment by the prosecutor and resubmitted to the grand jury in an indictment proceeding for a determination of probable cause. See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 157 (1947); Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 *COLUM. L. REV.* 1103 (1955). For a debate on the desirability of grand jury presentments see Oliver, *The Grand Jury: An Effort to Get a Dragon Out of His Cave*, 1962 *WASH. U.L.Q.* 166 and Weinstein & Shaw, *Grand Jury Reports—A Safeguard of Democracy*, 1962 *WASH. U.L.Q.* 191. None of the discussion in this note should be considered necessarily applicable to presentments.

4. For a general discussion, see *United States v. Smyth*, 104 *F. Supp.* 283 (1952); ORFIELD, *op. cit. supra* note 3, at 135-93; McClintock, *Indictment by a*

A. Federal Grand Jury Proceedings

The Constitution of the United States requires a grand jury proceeding when the defendant is accused of an infamous crime.⁵ Both the Constitution and the Federal Rules of Criminal Procedure are silent concerning the kind of evidence the grand jury may receive and upon which it may return an indictment.⁶ Nevertheless, federal grand juries are often instructed that they shall act upon only "legal" evidence or "competent" evidence.⁷ Whatever inferences one might be tempted to draw from such language, it is clear from the cases that violations of these grand jury instructions have no effect upon the validity of indictments.

The controversy in the cases has not been over the meaning of the terms "legal" and "competent" utilized in the instructions, but rather, whether the evidence should be required to conform to the rules of evidence applied in criminal jury trials. In that context, the word "competent" is used, as it is used here, to mean that evidence which would be admissible in a criminal jury trial.

The federal cases,⁸ following the 1910 Supreme Court decision in

Grand Jury, 26 MINN. L. REV. 153 (1942); Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932).

5. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." U.S. CONST. amend. V.

6. "But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." *Costello v. United States*, 350 U.S. 359, 362 (1956).

7. The charge to a grand jury in 1872 by Chief Justice Field is frequently repeated with approval: "In your investigations you will receive *only legal evidence*, to the exclusion of mere reports, suspicions and hearsay evidence . . ." Charge to Grand Jury, 30 Fed. Cas. 992, 993 (No. 18,225) (C.C.D. Cal. 1872). (Emphasis added.) Compare the following, displaying a shift in language in response to the rule announced in *Holt v. United States*, note 9 *infra*. "But there must be *some competent testimony* before you, otherwise there is no probable cause." Charge to Grand Jury, 16 F.R.D. 93, 94 (S.D. Cal. 1954). (Emphasis added.)

8. See, e.g., *Carrado v. United States*, 210 F.2d 712 (D.C. Cir. 1953) (semble); *United States v. Holmes*, 168 F.2d 888 (3d Cir. 1948); *Gates v. United States*, 122 F.2d 571 (10th Cir. 1941); *Tinkoff v. United States*, 86 F.2d 868 (7th Cir. 1937); *Czarlinsky v. United States*, 54 F.2d 889 (10th Cir. 1931); *Olmstead v. United States*, 19 F.2d 842 (9th Cir. 1927), *aff'd* without consideration of the point, 277 U.S. 438 (1928); *Murdick v. United States*, 15 F.2d 965 (8th Cir. 1926); *Arnstein v. United States*, 296 Fed. 946 (D.C. Cir. 1924); *Livezey v. United States*, 279 Fed. 496 (5th Cir. 1922); *Anderson v. United States*, 273 Fed. 20 (8th Cir. 1921); *McKinney v. United States*, 199 Fed. 25 (8th Cir. 1912); *Hillman v. United States*, 192 Fed. 264 (9th Cir. 1911). See also, *Chadwick v. United States*, 141 Fed. 225 (6th Cir. 1905); *McGregor v. United States*, 134 Fed. 187 (4th Cir. 1904).

Holt v. United States,⁹ unanimously hold that an indictment is not invalid because the grand jury heard (and probably considered) incompetent evidence, if it heard, in addition, *some competent evidence*. This rule is entirely consistent with one invalidating indictments when *all* the evidence before the grand jury was incompetent. Dicta in several cases adverted to the *possibility* of such a rule,¹⁰ but it was not until 1927 that the issue was squarely presented for decision.

In *Nanfito v. United States*,¹¹ and the following year in *Brady v. United States*,¹² the 8th Circuit adopted the rule that an indictment is invalid when all the evidence before the grand jury was incompetent. In *Nanfito*, the court held that the trial court erred in refusing to permit the defendant to prove that the testimony of his wife was the only evidence before the grand jury. Although the holding is thus confined to a situation in which all the evidence was incompetent, the court's language indicates that an indictment is invalid if any incompetent evidence was admitted,¹³ a position contrary to the *Holt* rule. The language in *Nanfito* was arguably confined to its holding by *Brady*. In that case, although the court held that an indictment is invalid when there was no evidence at all before the grand jury on an element of the offense which was the "gist" of the entire offense, it cited *Nanfito* and earlier 8th Circuit dicta for the proposition that "it is the settled law of this circuit, we think, that an indictment will be

9. 218 U.S. 245 (1910). Mr. Justice Holmes, speaking for a unanimous court, disposed of appellant's contention on this point in the following manner:

Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review . . . it is enough to say that there is no reason for reviewing it here. All that the affidavit [supporting the plea in abatement and motion to quash] disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of criminal practice would be enhanced if indictments could be upset on such a ground. *Id.* at 247-48.

10. *Olmstead v. United States*, 19 F.2d 842 (9th Cir. 1927), *aff'd* without consideration of the point, 277 U.S. 438 (1928); *Murdick v. United States*, 15 F.2d 965 (8th Cir. 1926); *Cooper v. United States*, 247 Fed. 45 (4th Cir. 1917).

11. 20 F.2d 376 (8th Cir. 1927).

12. 24 F.2d 405 (8th Cir. 1928).

13. It has become accepted as a general rule that investigations before the grand jury should be made in accordance with the well-established rules of evidence . . . and ample justification exists for such a rule, in order that the time of the trial courts may not be consumed in disposing of matters incapable of proof by competent evidence; and further that persons may not be indicted upon mere suspicion A grand jury, in the course of its inquisitorial duties, should be permitted to accuse and indict all persons who have violated the laws when sufficient evidence is presented to them by competent witnesses. The competency of the witnesses and the competency of the evidence must be determined by the established rules of evidence. *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927).

quashed, where there was either no evidence whatever, or no competent evidence of the offense charged, presented to the grand jury."¹⁴

After 1928, dicta in the 3d, 5th and 10th Circuits referred to this rule as the law.¹⁵ Thus far, no case had held that an indictment is *valid* when all the evidence before the grand jury was incompetent.¹⁶ This was the background against which the 2d Circuit decided the case of *United States v. Costello*¹⁷ in 1955.

Frank Costello was indicted for willfully attempting to evade payment of federal income taxes. A pre-trial motion to dismiss the indictment was denied. At the trial, the government offered evidence designed to show increases in the defendant's net worth as proof that he received more income during the years in question than he had reported. Defense counsel questioned each of the 144 government witnesses to determine which ones had testified before the grand jury; only the three investigating officers had. At the close of the government's case, another motion for dismissal of the indictment was made on the ground that the only evidence before the grand jury was hearsay, since the three officers had no firsthand knowledge of the transactions upon which their computations were based. This motion was denied and defendant was convicted.

The conviction was upheld on appeal, Judge Learned Hand saying:

It is indeed well settled that the admission of incompetent evidence at the inquest is not a ground for dismissing the indictment; but at times the courts have assumed that it is otherwise, if all the evidence is incompetent [citing the *Nanfito* and *Brady* cases]. . . . If "incompetent" is to cover all evidence, however rationally persuasive it may be, that would be excluded at a trial with great deference we cannot agree. Legal rules presuppose that the occasions to which they apply, shall be decided under the ordinary postulates of reasoning; and the exclusory rules are an exception, for they apply to evidence that is relevant rationally, but that courts will not accept, not because it does not prove the issue, but it is thought unjust to the opposite party to use it against him, or because it is within some privilege to suppress the truth. We should be the first to agree that, if it appeared that no evidence had been offered that *rationaly established the facts*, the indictment ought to be quashed; because then the grand jury would have in substance abdicated.¹⁸

14. *Brady v. United States*, 24 F.2d 405, 407-08 (8th Cir. 1928).

15. *United States v. Holmes*, 168 F.2d 888 (3d Cir. 1948); *United States ex rel. Potts v. Rabb*, 141 F.2d 45 (3d Cir. 1944); *Gates v. United States*, 122 F.2d 571 (10th Cir. 1941); *Frischia v. United States*, 63 F.2d 977 (5th Cir. 1933).

16. But see *United States v. Beadon*, 49 F.2d 164 (2d Cir. 1931) (dictum) and cases cited therein.

17. 221 F.2d 668 (2d Cir. 1955).

18. *United States v. Costello*, 221 F.2d 668, 677 (2d Cir. 1955). (Emphasis added.)

Judge Frank "reluctantly" concurred with Judge Hand and expressed hope that the Supreme Court would consider the question.¹⁹ The Supreme Court granted certiorari.²⁰

Petitioner argued that 1) an indictment based solely on hearsay evidence violates the fifth amendment requirement of a grand jury hearing and 2) even if the first argument is rejected, a rule should be adopted by the Supreme Court under its supervisory power over lower federal courts. Both arguments were rejected and in 1956 the conviction was again upheld.²¹

In answering petitioner's first argument, Mr. Justice Black, speaking for the Court, noted that the rationale upon which *Holt* was decided applies equally well when all the evidence is incompetent. He then summarized the reasons for his holding:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, *if valid on its face*, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.²²

While Mr. Justice Burton agreed with the holding, he sought to limit the broad language quoted above by affirming the view which Judge Hand had expressed in the 2d Circuit opinion:

I assume that this Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it *no substantial or rationally persuasive evidence* upon which to base its indictment, that indictment

19. *Id.* at 679-80.

20. 350 U.S. 819. Certiorari was limited to the question "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?" *Ibid.*

21. *Costello v. United States*, 350 U.S. 359 (1956), rehearing denied 351 U.S. 904 (1956).

22. *Id.* at 363. (Emphasis added.) In rejecting petitioner's second argument, the Court noted that the rule contended for would

run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial. *Id.* at 364.

should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen.²³

The extent of the *Costello* case is unclear. The holding is simply that hearsay evidence alone will support an indictment. The majority opinion goes further, however, and indicates that the only grounds for quashing are 1) an indictment invalid on its face, 2) an illegally constituted grand jury and 3) a prejudiced or biased grand jury. If this language is taken literally, it would seem to mean that an indictment is not subject to challenge even if the grand jury had before it no rationally persuasive evidence or, indeed, no evidence at all.²⁴ It is on this point that Mr. Justice Burton disagreed.

An indictment based on no evidence whatsoever is difficult to imagine. A responsible grand jury (and a responsible district attorney) will require at least some evidence for an indictment. Further, the *Costello* decision facilitates finding at least some evidence, such as hearsay, to use at the proceeding. Indeed, it has frequently been said that an indictment can be based on the knowledge of the grand jurors themselves.²⁵ However, if those statements were to be taken at face value, they would eliminate the necessity for any discussion of the applicability of the rules of evidence to the grand jury proceeding. Apparently, the Supreme Court in *Costello* did not regard those statements as representing current law, for its entire opinion was devoted to discussing the standards which the evidence must meet. It seems to have assumed, as Mr. Justice Burton believed, that some evidence (whether competent or incompetent) is required to be presented.

Prior to 1956 only the *Brady* case actually turned on a total lack of

23. *Id.* at 364. (Emphasis added.) Cf. Judge Hand's statement at text accompanying note 18 *supra*.

24. Such was apparently the interpretation in *United States v. Tolub*, 187 F. Supp. 705 (S.D.N.Y. 1960), where the court said: "In the federal courts, an overwhelming presumption has been established that an indictment returned by the Grand Jury is based on competent evidence." *Id.* at 708.

25. See, e.g., the dictum in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959): "Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves." *Id.* at 400. The Supreme Court decision in *Costello* was cited as authority for that statement. Upon examination of the *Costello* decision, however, it is made abundantly clear that the Court was speaking of the powers of the grand jury as they existed at one time in England and, consequently, is no authority for the proposition that grand juries may still return indictments solely on the basis of their own knowledge acquired outside the proceeding. See *Costello v. United States*, 350 U.S. 359, 362 (1956).

evidence,²⁶ and it held that the indictment can be challenged. Other cases have adverted to the possibility of such a rule.²⁷

In *United States v. James*,²⁸ decided in 1961, a grand jury returned an indictment, but it was dismissed. A second indictment was returned by the same grand jury, but failed to specify the amount of money involved in the embezzlement charged. The accused attacked this indictment on the ground it was impossible to ascertain whether a felony or misdemeanor was charged. A third indictment returned by the same grand jury indicated the value of the embezzled property. The second indictment was then voluntarily dismissed. Defendant attacked the third indictment on the ground no evidence whatsoever was heard by the grand jury *at the time* it was returned. The 5th Circuit, reversing the district court,²⁹ applied the *Costello* rule that a legally returned indictment, valid on its face, is presumed to be founded on competent evidence and held that defendant had not rebutted this presumption.³⁰

The court reasoned further that the grand jury did not have to hear evidence *at the time* the third indictment was returned, for it had heard evidence earlier, and it could use what it had previously heard. Implicit in this reasoning is the conclusion that if the defendant could have shown that no evidence was ever heard by the grand jury, the indictment would have been quashed—if, for example, a *new* grand jury had returned the third indictment on the basis of the prosecutor's statements that no evidence was necessary because a previous grand jury had heard the case twice before. The effect of hearing no evidence at any time before returning an indictment still remains an open question.

Indictments that are shown to be based on no evidence whatsoever should be invalidated. To hold otherwise would apparently violate the fifth amendment on the theory that an indictment based on no evidence is not an indictment at all.³¹ Another argument for quashing is the implication that the grand jury must have been strongly biased against the accused to return an indictment without hearing any

26. *Brady v. United States*, 24 F.2d 405 (8th Cir. 1928).

27. *Duarte v. United States*, 171 F.2d 971 (5th Cir. 1949) *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941); *United States v. Foster*, 80 F. Supp. 479 (S.D.N.Y. 1948); *United States v. Lewis*, 3 F. Supp. 279 (E.D. Pa. 1933); *United States v. Kilpatrick*, 16 Fed. 765 (W.D.N.C. 1883); *United States v. Farrington*, 5 Fed. 343 (N.D.N.Y. 1881).

28. 290 F.2d 866 (5th Cir. 1961).

29. *United States v. James*, 187 F. Supp. 439 (W.D. La. 1960).

30. Compare this interpretation of *Costello* to the one expressed in *Tolub*, note 24 *supra*.

31. See Mr. Justice Burton's concurring opinion in *Costello* in text accompanying note 23 *supra*.

evidence whatsoever. If this were the case, the indictment would not come under the *Costello* rule, which requires it to be returned by an *unbiased* grand jury.³²

Since a total lack of evidence is unlikely in light of the *Costello* holding approving the use of hearsay, the real issue may well be whether an indictment can be challenged on the basis of the lack of any *rationaly persuasive evidence* before the grand jury. The majority opinion in *Costello* did not distinguish between kinds of incompetent evidence. But in his concurring opinion, Mr. Justice Burton indicated that the absence of any "substantial or rationally persuasive evidence" should be grounds for quashing. Judge Learned Hand had similarly required that some rationally persuasive evidence be present.³³

One federal case indicates that the only evidentiary grounds for dismissing an indictment is a showing that no rationally persuasive evidence was presented to the grand jury, citing Mr. Justice Burton's concurring opinion.³⁴ But the majority opinion in *Costello* seems to indicate that indictments are not open to challenge on this ground.³⁵

A final point is that apparently the *Costello* rule permits the probable cause decision to stand whether it is based on evidence which is inadmissible because it is unreliable (*e.g.*, hearsay) or because it is privileged (*e.g.*, illegally seized evidence). Prior to the *Costello* case, when part of the evidence presented to the grand jury was privileged the indictment was upheld,³⁶ but when all the evidence was privileged it was quashed.³⁷ The cases in which defendant is forced to testify before the grand jury³⁸ are not applicable to this discussion, because

32. "An indictment returned by a legally constituted and *unbiased grand jury*, . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). (Emphasis added.)

33. See Judge Hand's statement in text accompanying note 18 *supra*.

34. *United States v. Geller*, 154 F. Supp. 727 (S.D.N.Y. 1957).

35. "Petitioner urges . . . [the court to] establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule." *Costello v. United States*, 350 U.S. 359, 363-64 (1956).

36. *Anderson v. United States*, 273 Fed. 20 (8th Cir. 1921); *Hillman v. United States*, 192 Fed. 264 (9th Cir. 1911); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (W.D.N.Y. 1943); *United States v. Gouled*, 253 Fed. 242 (S.D.N.Y. 1918).

37. *Giles v. United States*, 284 Fed 208 (1st Cir. 1922); *United States v. Smith*, 23 F. Supp. 528 (E.D. Mo. 1938); *United States v. Yuch Kee*, 281 Fed. 228 (D.C. Minn. 1922); *United States v. Bush*, 269 Fed. 455 (W.D.N.Y. 1920).

38. Several state decisions have set aside the indictment when defendant is required by the grand jury to testify against himself. See, *e.g.*, *Taylor v. Commonwealth*, 274 Ky. 51, 118 S.W.2d 140 (Ct. App. 1938); *State v. Harrell*, 228 La. 434, 82 So. 2d 701 (1955); *State v. Gardner*, 88 Minn. 130, 92 N.W. 529 (1902); *State v. Froiseth*, 16 Minn. 296 (1871); *State v. Naughton*, 221 Mo. 398, 120 S.W.

a challenge on those grounds questions the fundamental power of the grand jury to force a defendant to appear before it whereas the other questions the type of evidence used by the grand jury in making its decision.

In one recent case³⁹ (after *Costello*) defendant sought to dismiss the indictment on the ground that it was based solely on evidence obtained as a result of an illegal search and seizure. However, he did not prove this allegation. Although it found the search illegal, the court upheld the indictment because it refused to speculate upon the nature and quality of the evidence presented. The result might have been different if the defendant had proved that all the evidence before the grand jury was obtained by the illegal search. With no case in point, the only conclusion permissible from a reading of the language of the *Costello* opinion is that whether the evidence is incompetent because it is unreliable or privileged is immaterial.

B. State Grand Jury Proceedings

Sixteen states have statutes purporting to govern the evidence to be received by grand juries,⁴⁰ and New York has, only recently, repealed such a statute.⁴¹ The North Dakota provision is typical: "Grand Jurors can receive none but legal evidence, and the best evi-

53 (1909). For federal decisions discussing the point see *United States v. Cleary*, 164 F. Supp. 328 (S.D.N.Y. 1958) (holding the indictment invalid because accused was forced to testify at the grand jury proceedings), *rev'd*, 265 F.2d 459 (2d Cir. 1959) on the grounds the testimony was voluntary; *United States v. Lawn*, 115 F. Supp. 674 (S.D.N.Y. 1953) (conviction upheld on a later indictment in 355 U.S. 339 (1958)); *United States v. Swift*, 186 Fed. 1002 (N.D. Ill. 1911); *United States v. Farrington*, 5 Fed. 343 (N.D.N.Y. 1881); *United States v. Garnes*, 156 F. Supp. 467 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530 (2d Cir. 1958), decided after the *Costello* case, allowed an indictment to stand when defendant was compelled to appear before the grand jury. One reason given by the court for so holding was that there was other evidence, apart from defendant's testimony, on which probable cause could be found. The court seemed to indicate that if all the evidence consisted of defendant's testimony, the indictment would be quashed. However, it cited *Costello* as saying that if the indictment is valid on its face, that is all that is required.

39. *United States v. Block*, 202 F. Supp. 705 (S.D.N.Y. 1962).

40. ALA. CODE tit. 30 § 86 (1958); ARIZ. R. CRIM. P. 103 (1956); ARK. STAT. ANN. § 43-918 (1947); CAL. PEN. CODE § 939.6; IDAHO CODE § 19-1105 (1948); IOWA CODE ANN. § 771.17 (1950); KY. CRIM. CODE PRAC. § 107 (1960); LA. REV. STAT. ANN. § 15-213 (1951); MINN. STAT. ANN. § 628.59 (1947); MONT. REV. CODE ANN. § 94.6318 (1947); NEV. REV. STAT. § 172.260 (1950); N.M. STAT. ANN. § 41-5-22 (1953); N.D. CENTURY CODE § 29-10-24 (1960); OKLA. STAT. ANN. tit. 22, § 333-34 (1937); ORE. REV. STAT. § 132.320 (1959); UTAH CODE ANN. § 77-19-3 (1953).

41. N.Y. CODE CRIM. P. § 256 (Dennis, Supp. 1959), repealed, N.Y. Sess. Laws 1960, ch. 551.

dence in degree, to the exclusion of hearsay or secondary evidence."⁴² Although such language seems to demand that the trial rules of evidence be used by the grand jury, it is interpreted as being "directory," not mandatory. Thus, a grand jury's failure to follow such a statute affords no basis for dismissing the indictment.⁴³

[The statute] is directory to the grand jury only, and its failure to observe the statute does not give the accused the right to set aside or quash an indictment on account of such failure. . . . [A]ny irregularity in the finding and return of an indictment does not deprive the accused of any substantial right.⁴⁴

Thus, these statutory "mandates," like instructions to federal grand juries,⁴⁵ are not enforced. A reason often given is that since the grand jury is composed of persons who are unfamiliar with the law of evidence, its operation would be hindered if required to follow the technical rules of evidence used at trial.⁴⁶ Since interpretation prevents these statutes from having any effect, states having them need not be considered separately from those not having them.

It is settled in the majority of states that the reception of some incompetent evidence will not invalidate an indictment, provided some competent evidence was present.⁴⁷ The reasons given are vari-

42. N.D. CENTURY CODE § 29-10-24 (1960).

43. Of those 16 states which have such statutes in all 11 in which the issue was considered, the statute was held to be "directory only." See, e.g., *Sparrenberger v. State*, 53 Ala. 481 (1875); *Pfeiffer v. State*, 35 Ariz. 321, 278 Pac. 63 (1929); *McDonald v. State*, 155 Ark. 142, 244 S.W. 20 (1922); *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097 (1910); *State v. Hiatt*, 231 Iowa 643, 1 N.W.2d 736 (1942); *Birchan v. Commonwealth*, 238 S.W.2d 1008 (Ky. 1951); *State v. Simpson*, 216 La. 212, 43 So. 2d 585 (1949); *State v. Ernster*, 147 Minn. 811, 179 N.W. 640 (1920); *Nevada v. Logan*, 1 Nev. 509 (1865); *State v. Chance*, 29 N.M. 34, 221 Pac. 183 (1923); *Robinson v. Territory*, 16 Okla. 241, 85 Pac. 451 (1905), *rev'd on other grounds*, 148 Fed. 830 (8th Cir. 1906); *State v. McDonald*, 231 Ore. —, 361 P.2d 1001 (1961).

44. *McDonald v. State*, *supra* note 43, at 148-49, 244 S.W. at 22.

45. See charges set out in note 7 *supra*.

46. *State v. McDonald*, 231 Ore. —, 361 P.2d 1001, 1005-06 (1961).

47. *Sparrenberger v. State*, 53 Ala. 481 (1875); *United States v. Beaver*, 8 Alaska 83 (1929); *Pfeiffer v. State*, 35 Ariz. 321, 278 Pac. 63 (1929); *McDonald v. State*, 155 Ark. 142, 244 S.W. 20 (1922); *People v. Freudenberg*, 121 Cal. App. 2d 564, 263 P.2d 875 (1953); *Price v. Cobb*, 11 S.E.2d 822 (Ga. Ct. App. 1940); *King v. State*, 236 Ind. 268, 139 N.E.2d 547 (1957); *State v. Tucker*, 20 Iowa 508 (1866); *Birchan v. Commonwealth*, 238 S.W.2d 1008 (Ky. 1951); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937); *Commonwealth v. Lammi*, 310 Mass. 159, 37 N.E.2d 250 (1941); *People v. Lay*, 193 Mich. 476, 159 N.W. 299 (1916); *State v. Ernster*, 147 Minn. 811, 179 N.W. 640 (1920); *State v. Shreve*, 137 Mo. 1, 38 S.W. 548 (1897); *Nevada v. Logan*, 1 Nev. 509 (1865); *State v. Chance*, 29 N.M. 34, 221 Pac. 183 (1923); *State v. Choate*, 288 N.C. 491, 46 S.E.2d 476 (1948); *Wickline v. Alvis*, 103 Ohio App. 1, 144 N.E.2d 207 (1957); *State v. McDonald*, 231 Ore. —,

ous. One frequently used is that the statute prescribing the grounds for quashing an indictment⁴⁸ is conclusive. If it fails to provide for quashing, because incompetent evidence was received, this ground cannot be urged.⁴⁹ Other courts will not inquire into the competency of the evidence because the proceedings of the grand jury are secret and should not be invaded by an examination of evidence and witnesses.⁵⁰ A final reason given is that the grand jury is a judicial body whose finding is conclusive upon the court. The court should not and cannot hold a separate trial to review all the evidence presented to the grand jury when some competent evidence was before it.⁵¹ It is feared that to allow such an inquiry would be to substitute, to an extent, the opinion of the court for that of the grand jury and would ultimately lead to the destruction of the grand jury system.

New York, until 1960 at least, was a one state minority in holding that an indictment could be quashed if incompetent evidence were presented to the grand jury. This rule was based on a "legal evidence" statute similar to the North Dakota provision.⁵² It was repealed in 1960,⁵³ but no case has yet been decided concerning a grand jury proceeding held after the repeal became effective.

Several trial court opinions have formulated an elaborate set of rules for enforcing the repealed New York statute. If incompetent evidence was received by the grand jury, the indictment was dismissed if there was not sufficient competent evidence before it to support the finding of probable cause. Even if there was enough competent evidence, the indictment was dismissed if the incompetent evidence improperly influenced the grand jurors in their decisions.⁵⁴

361 P.2d 1001 (1961); *Commonwealth v. Emmel*, 194 Pa. Super. 441, 168 A.2d 609 (1961); *State v. Boyd*, 20 S.C.L. 288 (S.C. Ct. App. 1834); *State v. Clark*, 64 W. Va. 625, 63 S.E. 402 (1908).

48. *E.g.*, ARIZ. R. CRIM. P. 169 (1956).

49. *E.g.*, *United States v. Beaver*, 8 Alaska 83 (1929); *Pfeiffer v. State*, 35 Ariz. 321, 278 Pac. 63 (1929); *McDonald v. State*, 155 Ark. 142, 244 S.W. 20 (1922); *People v. Freudenberg*, 121 Cal. App. 2d 564, 263 P.2d 875 (1953); *Terry v. State*, 15 Tex. App. 66 (1883). See *State v. Ernster*, 147 Minn. 81, 179 N.W. 640 (1920).

50. *E.g.*, *State v. Fox*, 122 Ark. 197, 182 S.W. 906 (1916); *State v. Fasset*, 16 Conn. 457 (1844); *Morrison v. State*, 41 Tex. 516 (1874).

51. *State v. Hiatt*, 231 Iowa 643, 1 N.W.2d 736 (1942); *State v. Kasherman*, 177 Minn. 200, 224 N.W. 838 (1929); *State v. Pierson*, 337 Mo. 475, 85 S.W.2d 48 (1935); *State v. Chance*, 29 N.M. 34, 221 Pac. 183 (1923); *State v. McDonald*, 231 Ore. —, 361 P.2d 1001 (1961).

52. See text accompanying note 42 *supra*.

53. See note 41 *supra*.

54. *People v. Acritelli*, 57 Misc. 574, 110 N.Y. Supp. 430 (N.Y. County Ct. 1908). See, *e.g.*, *People v. Rodriguez*, 28 Misc. 2d 310, 215 N.Y.S.2d 22 (Orleans County Ct. 1961); *People v. Budzinski*, 159 Misc. 566, 289 N.Y. Supp. 656 (Oneida County Ct. 1936).

New York, unlike other states, held its statute governing evidence receivable by the grand jury to be mandatory.⁵⁵ When the "legal evidence" statute was violated the accused had a constitutional right to dismissal of the indictment.⁵⁶ The fact that reception of incompetent evidence was not a statutory ground for dismissal made no difference since the statute regulated only those cases not involving constitutional rights.⁵⁷ On other occasions it had been reasoned that at common law the grand jury could receive only competent evidence, and this rule was not changed by the statute.⁵⁸

The majority rule, refusing to quash an indictment because incompetent evidence was heard by the grand jury, is predicated on the requirement that some competent evidence was also presented.⁵⁹ Many cases have held that if *all* the evidence before the grand jury was incompetent, or if no evidence was presented, the indictment is invalid.⁶⁰ A minority of courts indicate that even if all the evidence considered by the grand jury was incompetent, the indictment cannot be challenged.⁶¹ The effect of the *Costello* case upon the state courts is not yet ascertainable. However, a recent Illinois case,⁶² relying on *Cos-*

55. *People v. Nicosia*, 166 Misc. 597, 4 N.Y.S.2d 35 (Kings County Ct. 1938).

56. *People v. Sexton*, 187 N.Y. 495, 80 N.E. 396 (1907).

57. *People v. Gaydica*, 122 Misc. 31, 203 N.Y. Supp. 243 (Kings County Ct. 1923).

58. *People v. Budzinski*, 159 Misc. 566, 289 N.Y. Supp. 656 (Oneida County Ct. 1936).

59. See *supra* note 47, and accompanying text.

60. *Walker v. State*, 17 Ala. 555, 86 So. 257 (1920); *Greenberg v. Superior Court*, 19 Cal. 2d 319, 121 P.2d 713 (1942); *People v. Byars*, 10 Cal. Rptr. 677 (Dist. Ct. App. 1961); *People v. Soto*, 144 Cal. App. 2d 294, 301 P.2d 45 (1956); *Dong Haw v. Superior Court*, 81 Cal. App. 2d 153, 183 P.2d 724 (1947); *People v. Schuber*, 71 Cal. App. 2d 773, 163 P.2d 498 (1945); *Price v. Cobb*, 63 Ga. 694, 11 S.E.2d 822 (1940); *State v. Pierson*, 337 Mo. 475, 85 S.W.2d 48 (1935) (complete lack of evidence leads to quashing); *Nevada v. Logan*, 1 Nev. 509 (1865); *State v. Choate*, 228 N.C. 491, 46 S.E.2d 476 (1948) (dictum); *Spivey v. State*, 69 Okla. Crim. 397, 104 P.2d 263 (1940); *Commonwealth v. Emmel*, 194 Pa. Super. 441, 168 A.2d 609 (1961) (dictum); *Commonwealth v. Halleron*, 163 Pa. Super. 583, 63 A.2d 140 (1949); *Commonwealth v. Brownmiller*, 137 Pa. Super. 261, 9 A.2d 155 (1939); *State v. Lawler*, 221 Wis. 423, 267 N.W. 65 (1936).

61. *McDonald v. State*, 155 Ark. 142, 244 S.W. 20 (1922); *State v. Fasset*, 16 Conn. 457 (1844); *People v. Jones*, 19 Ill. 2d 37, 166 N.E.2d 1 (1960); *King v. State*, 236 Ind. 268, 139 N.E.2d 547 (1957); *Birchan v. Commonwealth*, 238 S.W.2d 1008 (Ky. 1951); *Blowe v. State*, 130 Miss. 112, 93 So. 577 (1922); *State v. Levy*, 200 N.C. 586, 158 S.E. 94 (1931) (incompetent, as opposed to disqualified evidence, can be the sole basis of an indictment); *Lee v. State*, 66 Tex. Crim. 567, 148 S.W. 567 (1912); *United States v. Cutler*, 5 Utah 608, 19 Pac. 145 (1888); *Wadley v. Commonwealth*, 98 Va. 803, 35 S.E. 452 (1900); *Noll v. Dailey*, 72 W. Va. 520, 79 S.E. 668 (1913).

62. *People v. Jones*, *supra* note 61.

tello, overruled previous cases⁶³ and held that an indictment cannot be quashed because all the evidence presented to the grand jury was incompetent.

The typical view by state courts has been that while some competent evidence is required for probable cause, it need not be much: "It is generally conceded that if there is any legal evidence submitted to the grand jury, *even though slight*, the indictment will be sustained, notwithstanding there may have been illegal and incompetent evidence submitted and considered."⁶⁴

Such language indicates that the courts are not relying solely on competent evidence to show probable cause. The incompetent evidence must also be serving as a basis for finding probable cause, because so little competent evidence is required. The difference between the state and federal views is that most states require *some* competent evidence,⁶⁵ though it is usually only a small amount.⁶⁶

II. PRELIMINARY EXAMINATIONS

In a preliminary examination the determination of probable cause is made by a single judicial official (an examining magistrate) not by a panel of citizens. The suspect is entitled to be present and to cross-examine the state's witnesses. He has no such rights in grand jury proceedings. The preliminary examination not only performs

63. *People v. Gould*, 345 Ill. 288, 178 N.E. 133 (1931); *People v. Bladek*, 259 Ill. 69, 102 N.E. 243 (1913); *People v. Meisenhelter*, 317 Ill. App. 511, 47 N.E.2d 108 (1943).

64. *State v. Chance*, 29 N.M. 34, 36, 221 Pac. 183 (1923). (Emphasis added.) See *Clark v. State*, 240 Ala. 65, 197 So. 23 (1940).

65. California apparently requires a substantial amount of evidence. See *People v. Prewitt*, 52 Cal. 2d 330, 341 P.2d 1 (1959); *People v. Rissman*, 143 Cal. App. 2d 488, 299 P.2d 944 (1956); *People v. Olf*, 195 Cal. App. 2d. 97, 15 Cal. Rptr. 390 (1961).

66. The holdings are the same whether the evidence was incompetent because unreliable or because privileged. See *Aaron v. State*, 271 Ala. 70, 122 So. 2d 360 (1960); *United States v. Beaver*, 8 Alaska 83 (1929) (wife testified against husband); *People v. Bladek*, 259 Ill. 69, 102 N.E. 243 (1913) (wife testified); *King v. State*, 236 Ind. 268, 139 N.E.2d 547 (1957) (illegal search and seizure); *State v. Tucker*, 20 Iowa 508 (1866); *State v. Ernster*, 147 Minn. 81, 179 N.W. 640 (1920); *State v. Marshall*, 140 Minn. 363, 168 N.W. 174 (1918) (spouse testified); *Blowe v. State*, 130 Miss. 112, 93 So. 577 (1922); *State v. Coats*, 130 N.C. 701, 41 S.E. 706 (1902); *Wickline v. Alvis*, 103 Ohio App. 1, 144 N.E.2d 207 (1957) (wife testified). See also Annot., 24 A.L.R. 1429 (1923). *But see State v. Levy*, 200 N.C. 586, 158 S.E. 94 (1931) wherein an indictment was allowed to stand when all evidence heard by the grand jury was incompetent because unreliable. Prior cases, quashing an indictment when a wife testified against her defendant husband, were distinguished because in those cases, the wife was *disqualified* from testifying. Thus a different result was reached for privileged and unreliable evidence in this case.

the probable cause function, but also preserves the testimony of witnesses and gives the defense an opportunity to learn something of the state's case. The ultimate result of a preliminary examination is usually an information, while the grand jury system yields an indictment.⁶⁷

Language in the *Costello* case indicates that the rule that indictments can be based solely on incompetent evidence is also applicable to informations: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."⁶⁸ Although this quote was cited with approval in a federal circuit court case,⁶⁹ it was cited for the purpose of concluding by analogy that a complaint (upon which the arrest warrant is issued) may rest solely on incompetent evidence. This case was reversed by the Supreme Court⁷⁰ without discussing whether a complaint can rest solely on incompetent evidence. Whether the *Costello* rule for indictments will be extended to informations remains an open question.

Language in several state cases indicates that at the preliminary examination the magistrate is not limited by *technical* rules of evidence.⁷¹ It is unclear whether these cases stand for more than simply that the examining magistrate need not actually exclude evidence at the examination itself. Such a position is entirely consistent with requiring some competent evidence for probable cause.

In California, the admissibility of evidence at the preliminary examination is governed by the same rules governing admissibility at trial.⁷² It has frequently been held there that an information may be quashed if all the evidence at the preliminary examination was incompetent.⁷³

67. See generally, 1 ALEXANDER, THE LAW OF ARREST 662-82 (1949); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 49-100, 194-265 (1947).

68. *Costello v. United States*, 350 U.S. 359, 363 (1956). (Emphasis added.)

69. *Giordenello v. United States*, 241 F.2d 575, 579 (5th Cir. 1957).

70. *Giordenello v. United States*, 357 U.S. 480 (1958).

71. *Ex parte Hollingsworth*, 49 Idaho 455, 289 Pac. 607 (1930); *Harmer v. State*, 121 Neb. 731, 238 N.W. 356 (1931); *State v. Harris*, 44 Okla. Crim. App. 89, 279 Pac. 925 (1929); *McCurdy v. State*, 39 Okla. Crim. App. 310, 264 Pac. 925 (1928); ORFIELD, *op. cit. supra* note 67, at 88.

72. *Ex parte Plummer*, 79 Cal. App. 2d 651, 180 P.2d 771 (1947) (holding that proper objections must be made to the offer of evidence).

73. *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39 (1958); *People v. Valenti*, 49 Cal. 2d 199, 316 P.2d 633 (1957); *Hernandez v. Superior Court*, 143 Cal. App. 20, 299 P.2d 678 (1956); *Badillo v. Superior Court*, 46 Cal. 2d 269, 294 P.2d 23 (1956); *Rogers v. Superior Court*, 46 Cal. 2d 3, 291 P.2d 929 (1955); *People v. McRae*, 79 Cal. App. 79, 181 P.2d 965 (1947); *Ex parte Martinez*, 36 Cal. App. 2d 687, 98 P.2d 528 (1940).

The proof which will authorize a magistrate in holding an accused person for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. . . . *The constitutional guarantee of due process of law requires adherence to the adopted and recognized rules of evidence.* There cannot be one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations. . . . It is true that a preliminary examination is less formal than a trial, and that less evidence is required to hold an accused person for trial than is exacted to support a conviction. But . . . "It cannot be held that the essential principles of procedure and of evidence may be departed from by committing magistrates in the conduct of such examinations." *The rule which requires less evidence at a preliminary examination, or even slight evidence, merely goes to the quantum, sufficiency or weight of evidence and not to its competency, relevancy or character.*⁷⁴

Even excluding from consideration the questionable reference to due process (if federal due process was meant) it is clear that California adheres to an extreme view. California clearly considers the preliminary examination as a trial for purposes of applying rules of evidence. However, the cases which indicate that only competent evidence may be *considered* by the magistrate do not seem to authorize quashing the information simply because inadmissible evidence was admitted.

In Michigan, it has been held that the hearsay rule applies to the preliminary examination and such evidence cannot be considered.⁷⁵ However, the court seemed to say that the hearsay rule is applicable because not to apply it would violate the defendant's statutory right to confrontation. By inference, the hearsay rule also applies to the preliminary examination in Wisconsin.⁷⁶ Courts in Idaho have refused to review the competency of evidence at the preliminary examination on the grounds that such a review was precluded by statute.⁷⁷

A number of cases in Michigan indicate that the *corpus delicti* rule, requiring the *corpus delicti* of the offense to be corroborated

74. *People v. Schuber*, 71 Cal. App. 2d 773, 775-76, 163 P.2d 498, 499-500 (1945). (Emphasis added.)

75. "On the preliminary examination, however, the defendants were, under the statute, entitled to have the witnesses examined in their presence. . . . In view of the nature and purpose of the proceeding, the fact that the crime charged had been committed could not be established by hearsay testimony." *People v. Asta*, 337 Mich. 590, 612, 60 N.W.2d 472, 483 (1953).

76. *State ex rel. Wojtycki v. Hanley*, 248 Wis. 108, 20 N.W.2d 719 (1945). In this case, defendant made a statement which the court evidently characterized as an admission. This gives rise to a slight inference that the hearsay rule, with its exceptions, applies to the preliminary examination, or else there would be no need to characterize the statement as in the nature of an admission.

77. *State v. Arregui*, 44 Idaho 43, 254 Pac. 788 (1927); *State v. Foell*, 37 Idaho 722, 217 Pac. 608 (1923).

before a confession can be considered, applies at the preliminary examination.⁷⁸ But cases in Wisconsin have failed to apply the rule.⁷⁹ There are divergent holdings on whether illegally seized evidence may be used at the preliminary examination.⁸⁰ Finally, irrelevant evidence has been held inadmissible at the preliminary,⁸¹ but the best evidence rule has not been applied.⁸²

Given this sketchy backdrop of cases, one is hard-pressed to conclude what rules of evidence are applied at the preliminary examination. However, despite discussion outside the cases that may lead to a contrary conclusion,⁸³ the following statement seems best to summarize the cases examined: "An information will not be quashed

78. See *People v. Asta*, 337 Mich. 590, 60 N.W.2d 472 (1953); *People v. Lee*, 307 Mich. 743, 12 N.W.2d 418 (1943); *People v. Campbell*, 301 Mich. 670, 4 N.W.2d 51 (1942); *People v. June*, 294 Mich. 681, 293 N.W. 906 (1940); *People v. White*, 266 Mich. 29, 267 N.W. 777 (1936); *Peterson v. Oceana Circuit Judge*, 243 Mich. 215, 219 N.W. 934 (1928); *People v. Lee*, 231 Mich. 607, 204 N.W. 742 (1925). Of course, the California cases, applying trial rules of evidence, enforce the *corpus delicti* rule. See *Hernandez v. Superior Court*, 143 Cal. App.2d 20, 299 P.2d 678 (1956).

79. *State v. Goodchild*, 272 Wis. 181, 74 N.W.2d 624 (1956); *Lundstrum v. State*, 140 Wis. 141, 121 N.W. 883 (1909).

In *United States v. Bloomgart*, 24 Fed. Cas. 1180 (No. 14612) (S.D.N.Y. 1868), the defendant claimed the *corpus delicti* rule should apply to the hearing before the commissioner for commitment just as at trial. The court relied on the famous case of Aaron Burr (*United States v. Burr*, 25 Fed. Cas. 25 (No. 14692a) (C.C.D. Va. 1807)) and refused to apply the *corpus delicti* rule. In *Curreri v. Vice*, 77 F.2d 130 (9th Cir. 1935), the uncorroborated testimony of an accomplice was held sufficient at a preliminary hearing, though it is doubtful if this evidence was considered incompetent.

80. In *State v. Baltas*, 183 Wis. 545, 198 N.W. 282 (1924) a motion to suppress illegally seized evidence (and a motion to dismiss) were granted at the preliminary examination; in *State v. Smalling*, 240 La. 887, 125 So. 2d 399 (1960) informations grounded in whole or in part on evidence secured in violation of a constitutional right were said to be a nullity. However, the latter case involved a defendant testifying against himself.

Note the case of *United States v. Quaritius*, 267 Fed. 227 (E.D.N.Y. 1920), where the government applied for leave to file an information, but it appeared all the evidence was obtained by an illegal search and seizure. The court refused leave to file an information.

But in *United States v. Vatune*, 292 Fed. 497 (N.D. Cal. 1923) it was said there was no reason to quash an information based on illegal search and seizure evidence, though this statement was not necessary to dispose of the case.

81. *State v. Faull*, 178 Wis. 66, 189 N.W. 274 (1922).

82. *State ex rel. Brill v. Spieker*, 271 Wis. 237, 72 N.W.2d 906 (1955).

83. "The finding of the Illinois Crime Survey is that the 'rules of evidence are dispensed with to such an extent that proceedings are marked by hearsay and other incompetent forms of testimony.'" ORFIELD, *op. cit. supra* note 67, at 88. See also Baker & De Long, *The Prosecuting Attorney: The Process of Prosecution*, 26 J. CRIM. L., C. & P.S. 3, 185 (1935).

because of the admission of incompetent evidence where there is sufficient competent evidence to establish the commission of the offense by the defendant."⁸⁴ The judicial technique used here differs from that employed in the *Holt* case. An information is not upheld simply on the basis that there was some competent evidence before the examining magistrate; rather the court examines the competent evidence in detail and determines whether an inference of probable cause *from that evidence alone* was erroneous as a matter of law. This method yields a much fuller review of the facts than does the more mechanical *Holt* rule.

III. SUMMARY AND CONCLUSIONS

A rather confused picture has been presented.⁸⁵ In the federal system, the *Costello* case indicates that the rules of evidence have no place in the concept of probable cause. Whether this includes the rules of relevancy and materiality depends upon the acceptance of Judge Hand's and Mr. Justice Burton's opinions requiring "rationally persuasive evidence" as a prerequisite to probable cause. The applicability of *Costello* to federal preliminary examinations is speculative. In the states, most courts follow the *Holt* rule and refuse to quash an indictment when some competent evidence was before the grand jury. The state courts are split over the validity of an indictment returned on the basis of no competent evidence. With respect to preliminary examinations, most courts refuse to quash an information simply because some incompetent evidence was admitted. Most courts will, however, exclude incompetent evidence on appeal and examine the probable cause finding on the basis of the competent evidence only.

This summary, if it has done nothing else, should demonstrate that the meaning of probable cause is different in one jurisdiction than it is in another, and that within a given jurisdiction probable cause as found by a grand jury may differ from probable cause as found by an examining magistrate. It is clear, for example, that the *Costello* case would never have gone to trial if the determination of probable cause had been made in a California preliminary examination rather than in a federal grand jury proceeding.⁸⁶ A closer look at the concept

84. *People v. Rice*, 206 Mich. 644, 648-49, 173 N.W. 495, 496 (1919).

85. See generally *United States v. Walker*, 246 F.2d 519 (7th Cir. 1957); Annot., 100 L. Ed. 404 (1955); Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LA. L. REV. 655 (1957); Williams, *Two Criminal Cases and Individual Rights*, 3 CRIM. L. REV. 83 (1956); Comment, 43 CALIF. L. REV. 859 (1955); Note, 24 FORDHAM L. REV. 453 (1955); Note, 69 HARV. L. REV. 383 (1955); Note, 62 HARV. L. REV. 111 (1948); Note, 27 J.B.A. KAN. 78 (1958); Note, 37 MINN. L. REV. 586, 598 (1953); Note, 107 U. PA. L. REV. 1040 (1959); Note, 104 U. PA. L. REV. 429 (1956); Note, 65 YALE L.J. 390 (1956).

86. See note 73 *supra* and accompanying text.

itself is necessary in order to furnish a basis for criticism and suggestion.

What is the purpose of the probable cause requirement? Is it to insure that persons who are clearly innocent do not have to undergo the burdens of a long, public trial? Or is it to insure that these same burdens will not be imposed upon a defendant when the likelihood of his conviction is small? There is a difference. In the first, we are concerned with the probability of the defendant's guilt; in the second, we are concerned with the probability that he will be convicted at the trial. In the *Costello* case there is no doubt that the testimony of the three government investigators before the grand jury was sufficient to establish probable cause if that term is understood as indicating probability of the defendant's guilt. But since all the testimony would be inadmissible at trial, the probability of conviction on the basis of the evidence the grand jury had before it was virtually nil. A hypothetical case will provide further illustration. Suppose that all the evidence against a defendant was acquired as a result of an illegal search and seizure. On the authority of *Mapp. v. Ohio*⁸⁷ that evidence will be inadmissible at trial, even if it gives rise to a strong inference of guilt. If probable cause is regarded as meaning probability of guilt, it can rest upon the illegally seized evidence *even though conviction in the subsequent jury trial may be a legal impossibility*.

It is submitted that the distinction between probability of guilt and probability of conviction led Judge Frank to write his concurring opinion in the *Costello* case when it was before the 2d Circuit. In the majority opinion, Judge Hand had made it plain he considered probable cause to mean probability of guilt not probability of conviction:

[Exclusionary rules] apply to evidence that is relevant rationally, but that courts will not accept, *not because it does not prove the issue*, but it is thought unjust to the opposite party to use it against him, or because it is within some privilege to suppress the truth. We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed.⁸⁸

It seems clear Judge Hand thought the "issue" before the grand jury was the probability of defendant's guilt. Hence, the only evidentiary requirement is that the evidence be "relevant rationally." Judge Frank's opinion, however, proceeds upon a different concept of probable cause: "I have very serious misgivings about concurring in a

87. 367 U.S. 643 (1961).

88. *United States v. Costello*, 221 F.2d 668, 677 (2d Cir. 1955). (Emphasis added.)

conclusion that a grand jury may indict solely on the basis of evidence that would not support a verdict after trial.”⁸⁹ The “issue” before the grand jury for Judge Frank was the probability of conviction, not the probability of guilt.

One might well inquire into the propriety of permitting a determination of probable cause to stand when the evidence indicates there is no likelihood of conviction at trial. The position may be justified on any of three grounds: 1) it may be assumed that the prosecutor had some competent evidence in his possession which he did not disclose at the grand jury proceeding or preliminary examination, possibly because of the inconvenience of doing so (as apparently was the situation in *Costello*); or 2) it may be assumed that the prosecutor will turn up the necessary competent evidence before the trial; or 3) it may be assumed that society is not concerned with protecting guilty but unconvictable persons from the burdens of trial.

If the first assumption is utilized, one might properly inquire whether it is too much a burden upon the prosecutor for him to produce at least some of the admissible evidence in his possession. At least this would insure that he in fact has some such evidence and would prevent trials in cases in which all the material evidence is likely to be inadmissible, as in cases in which the offense is possession and an illegal search and seizure has been made. If the argument is made that responsible officials would never prosecute a case based entirely upon incompetent evidence, it seems a sufficient answer to say that all prosecutors are not responsible to the same degree, and that this argument would lead equally well to the conclusion that the grand jury and preliminary examination ought to be abolished entirely.

If the second assumption is utilized, it seems a sufficient answer to note that normally a prosecutor need not present a case to the grand jury until he feels prepared to do so and that with regard to preliminary examinations, continuances are available.

If the third assumption is utilized, one must be forced to recognize the proposition that a criminal trial has two functions: first the traditional one of determining whether or not the defendant violated a certain criminal law; and, second, an additional one of exposing to

89. *Id.* at 679. Judge Frank footnoted this statement by citations to *Brady* and *Nanfito*, among other cases. It is clear that the 8th Circuit in *Nanfito* thought of probable cause as probability of conviction. It said the rule that probable cause may not rest entirely upon incompetent evidence is necessary so that “the time of the trial courts may not be consumed in disposing of matters incapable of proof by competent evidence.” *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927). The language quoted in the text accompanying note 74 *supra* indicates that the court was tacitly assuming that probable cause refers to probability of conviction, while the definition of probable cause quoted in the text accompanying note 2 *supra* clearly refers to probability of guilt.

adverse publicity in a trial those persons who have violated such a law even though there is no chance of conviction. An affirmation of this proposition would certainly be unexpected in light of the reactions engendered by the use of such techniques in congressional investigations.

Another approach to the problem of the applicability of the rules of evidence to grand jury proceedings and preliminary examinations is to consider these proceedings under the more general heading of "proceedings other than jury trials." Thus, one might look at the discussion concerning the applicability of the jury trial rules of evidence to jury waived law trials,⁹⁰ administrative hearings,⁹¹ habeas corpus hearings,⁹² military courts-martial,⁹³ legislative hearings⁹⁴ and others.⁹⁵ The conclusions reached by such an analysis are by no means uniform or consistent. Nevertheless, an attempt at generalization has been made. Professor Davis, in his treatise on administrative law summarizes the entire problem in terms of a trend:

The direction of movement on evidence problems throughout the legal system . . . is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon "the kind of evidence on which responsible persons are accustomed to rely in serious affairs. . . ."

The guides are not the complexities of the jury-trial rules but are the broad standards of relevance, materiality, and the kind of evidence on which responsible persons are accustomed to rely in serious affairs.⁹⁶

If this "trend" is accepted as dispositive of the issue here, then probable cause can rest upon any evidence which is relevant, material and "the kind of evidence on which responsible persons are accustomed to rely in serious affairs." It is no accident that these are the standards which Judge Hand formulated in *Costello*,⁹⁷ for, indeed, Pro-

90. See 2 DAVIS, ADMINISTRATIVE LAW §§ 14.01-04 (1958); MCCORMICK, EVIDENCE 137 (1954); 1 WIGMORE, EVIDENCE § 4b (3d ed. 1940); Note, 46 ILL. L. REV. 915 (1952); Note, 29 IND. L.J. 446 (1954).

91. 2 DAVIS, *op. cit. supra* note 90, §§ 14.01-17; 1 WIGMORE, *op. cit. supra* note 90, at 32-33.

92. 1 WIGMORE, *op. cit. supra* note 90, § 4, at 19; Comment, 59 MICH. L. REV. 1218 (1960).

93. 1 WIGMORE, *op. cit. supra* note 90, § 4d, at 99; U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 137 (1951).

94. 1 WIGMORE, *op. cit. supra* note 90, § 4j, at 142.

95. Disbarment proceedings: 1 WIGMORE, *op. cit. supra* note 90, § 4a, at 25; Comment, 58 MICH. L. REV. 1218 (1960). Commercial arbitrations: Phillips, *A Practical Method for the Determination of Business Fact*, 82 U. PA. L. REV. 230 (1934); Note, 61 HARV. L. REV. 1022 (1948).

96. 2 DAVIS, *op. cit. supra* note 90, at 250-51.

97. See text accompanying note 18 *supra*.

fessor Davis supports his conclusion with a quotation from Judge Hand's opinion in that case, characterizing it as "symptomatic of the trend of thought among enlightened judges."⁹⁸

It is submitted that the issue under discussion cannot be decided by the "trend" of which Professor Davis speaks unless one assumes that probable cause relates to probability of guilt, not to probability of conviction. If the former is taken as the purpose of the probable cause requirement, then, as Judge Hand concluded, there is no need to impose restrictions upon the evidence other than those of relevancy and materiality.

If probable cause is regarded as indicating probability of conviction, then there is a need to apply the trial rules of evidence to the preliminary examination and the grand jury proceeding. If probable cause is conceptualized in that way, the grand jury proceeding and the preliminary examination do not function as independent proceedings (as does an administrative hearing, for example) but rather as *proceedings ancillary to the criminal jury trial*. It is not the purpose of these proceedings to make a final determination, but rather to predict the determination which will be made at the trial. If the rules of evidence regulate the proof on the basis of which conviction at the trial must rest, and if the purpose of the grand jury proceeding and preliminary examination is to predict the probability of such a conviction, then a prediction which does not take into account those rules of evidence is not a prediction at all, but an independent determination of probable guilt. Probability of conviction cannot be assessed without regard to the rules of evidence which will apply at the trial.

This conclusion does not mean, however, that a reversal need follow from an erroneous admission of incompetent evidence. It simply means that the reviewing court must be satisfied that its standard of probability of conviction has been met. Thus, courts may differ concerning the amount of competent evidence which should be required or, said differently, concerning the strength of the inference of probability of conviction which they will require the competent evidence to sustain.⁹⁹ This conclusion does mean, on the other hand, that if no competent evidence were presented, there would be absolutely no probability of conviction and a dismissal of the indictment or information should be automatic.

Whether one regards the exclusionary rules applied at criminal jury trials to be wise rules with regard to other types of proceedings, or even with regard to the trials at which they now apply is immaterial; so long as a conviction must conform to those rules, a determination of probability of conviction must also conform. If the

98. 2 DAVIS, *op. cit. supra* note 90, at 251.

99. See last sentence of quotation set out in text accompanying note 74 *supra*.

rules applicable at trial in a given jurisdiction are relaxed, a corresponding relaxation should be made for the grand jury proceeding and preliminary examination in that jurisdiction. And if the rules are made more strict at trial (which seems unlikely), a corresponding change should be made for those two proceedings.

In his opinion in *Costello* Judge Hand indicated that there is no reason to require some evidence to be competent unless it is all required to be competent:

The resulting situation: that is, that hearsay will serve, only when supplemented by some modicum of first-hand evidence, has nothing to commend it. The reason why evidence, incompetent for any reason, will ordinarily upset the judgment is that, except in rare cases, it is impossible to know how far it may have determined the judgment; yet it is obviously just as impossible at an inquest as at a trial to know that it was not the hearsay alone that convinced the jurors. We make no effort, and can make none, to ascertain what part it may have played in the result; all we can do, if hearsay alone is not to be enough, is to insist that there must be some first-hand evidence, no matter how feeble and untrustworthy the jury may have thought it. We can see no justification for such an amorphous compromise; and it is particularly unsatisfactory in a unilateral investigation like an inquest.¹⁰⁰

Judge Hand's position is correct assuming that probability of guilt is the determination to be made. If probability of conviction is accepted, however, then such a determination is impossible when there was no competent evidence present. A court might decide (as many apparently have) that some competent evidence "no matter how feeble and untrustworthy the jury may have thought it" is sufficient to support the probable cause determination. But that is a separate issue. A rule that only a slight amount of competent evidence is necessary to support probable cause is consistent with a view of probable cause as indicating probability of conviction. It simply means that the probability may be slight. But to affirm a probable cause determination based on no competent evidence is to depart from the probability of conviction position and to affirm the probability of guilt theory with all its consequences.

100. *United States v. Costello*, 221 F.2d 668, 678 (2d Cir. 1955).