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Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e)

COMMENT

SECRECY IN GRAND JURY PROCEEDINGS: A PROPOSAL FOR A NEW FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)

I. INTRODUCTION

While the past decade has witnessed an overall expansion of a criminal defendant's procedural rights, this general trend has not extended into the area of grand jury investigations. Presently, such investigations are conducted in almost absolute secrecy; rarely are the minutes of the proceedings made available to the defendant after indictment. Although the policy has not changed over the years, there is rapidly accumulating evidence which indicates that the traditional reasons for this secrecy are no longer viable. In addition, recent decisions have raised possible constitutional objections to the rule of grand jury secrecy. Moreover, the experience of those jurisdictions which have liberalized the rule of secrecy apparently has been successful. It is, therefore, proposed that Federal Rule of Criminal Procedure 6(e) be amended to provide for access to grand jury minutes after the defendant has been indicted.

II. HISTORY AND DEVELOPMENT OF GRAND JURY SECRECY AS APPLIED TO CRIMINAL DEFENDANTS

A. *Original Purpose for Grand Jury Secrecy*

The rule of secrecy in grand jury proceedings has its origins in the English common law.[1] While most commentators believe the Assize of Clarendon of 1166 to be the beginning of the grand jury system,[2] it seems "[t]he modern grand jury stems directly from the 'grande inquest' of twenty-three men which sheriffs began to appoint during the time of Edward III in the fourteenth century."[3] Whatever the origin of the grand jury, it is clear that the rule of secrecy did not attach to its proceedings until the famous Earl of Shaftesbury Trial in 1681,[4] although the concept of secrecy had some basis in grand jury proceedings prior to that time. Historically, the grand jury was both an investigatory and accusatory body; the concept of secrecy developed in the latter function. Moreover, it has been noted that: "The chief reason for retaining the grand jury as an accuser historically was to protect defendants from unjustified prosecutions at the hands of an overzealous prosecutor . . . ."[5] An-

1. See Note, A Reexamination of the Rule of Secrecy of Grand Jury Minutes in the Federal Courts, 34 N.Y.U.L. Rev. 606, 617 (1959).

2. See Note, Impeaching the Prosecution Witness: Access to Grand Jury Testimony, 28 U. Pitt. L. Rev. 338, 339 (1966).

3. Watts, Grand Jury: Sleeping Watchdog or Expensive Antique?, 37 N.C.L. Rev. 290, 293 (1959).

4. See Comment, Defense Access to Grand Jury Testimony: A Right In Search of a Standard, 1968 Duke L.J. 556, 558.

5. Watts, supra note 3, at 292.

other prime consideration was the need to protect the grand jury from the abuses of the Crown.[6]

From this history, it may be seen that the motivation for establishing and maintaining grand jury secrecy in England was the desire to protect the rights of defendants and the existence of the grand jury itself. It seems that the policy of secrecy resulted from an intense fear of oppression which was brought to this country and expressed in the fifth amendment guarantee that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[7]

B. *Grand Jury Secrecy as an Aid to the Prosecution*

Today, there is a widespread use of grand jury minutes by the prosecution in preparing its case; on the other hand, the defendant is rarely given access to them. While this procedure is normally justified on the ground that grand jury proceedings traditionally have been secret, as has been seen, the common law doctrine of grand jury secrecy was not designed as an aid to the prosecution.[8] During the nineteenth century, prosecutors began a campaign to allow use of grand jury minutes in the preparation of their cases. By the end of that century, a series of decisions had allowed such use.[9]

In *Bressler v. People*,[10] the state sought to use a witness' grand jury testimony to impeach him. In permitting this use, the court said:

> When the indictment is returned, and the defendant arrested and placed upon trial, neither the statutory nor common law reasons for secrecy can apply. There can be no reason, then, why evidence given before a grand jury should not be made known and proved, if the ends of justice require it. A contrary course would tend to defeat instead of to promote justice, and be directly in opposition to the tendency of the age, which is to enlarge, rather than to contract, the sources of the evidence.[11]

This new use of grand jury minutes thereafter became deeply ingrained in the law, and was zealously guarded by the prosecution. In *United States v. Garsson*,[12] the court denied the defendant's request for inspection of grand jury minutes. Judge Learned Hand implied that granting the motion would handicap the prosecution, as presumably the minutes were already at its disposal.

> [Inspection] is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the

6. See Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 456 (1965).

7. U.S. Const. amend V.

8. Calkins, supra note 6, at 458.

9. Id. at 463-64. "[A]s recent[ly] as one century ago the state as well as the defendant was barred from invading the secrecy of the grand jury. In a series of nineteenth century cases, prosecutors set forth the very reasons now urged on behalf of defendants as grounds for lifting the bar of secrecy once the grand jury has been discharged and the accused is in custody." Id. (footnotes omitted). See also Bressler v. People, 117 Ill. 422, 8 N.E. 62 (1886); State v. Bovino, 89 N.J.L. 586, 99 A. 313 (Ct. Err. & App. 1916).

10. 117 Ill. 422, 8 N.E. 62 (1886).

11. Id. at 437, 8 N.E. at 67.

12. 291 F. 646 (S.D.N.Y. 1923).

accused has every advantage. While the prosecution is held rigidly to the charge, [the defendant] need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crimes.[13]

Judge Learned Hand's statement clearly describes the then dominant theory justifying non-disclosure, that is, if the defendant cannot be compelled to disclose his defense, fairness requires that the prosecution should not be compelled to disclose its case. Access to grand jury minutes would, in the Hand view, give the defendant an unfair advantage over the state. The shift in the theory behind grand jury secrecy is apparent.

Later courts attempted to find other bases to justify the rule of secrecy. *United States v. Amazon Industrial Chemical Corp.*[14] gave five often-quoted reasons for maintaining secrecy. The court said:

The reasons which lie behind the requirement of secrecy may be summarized as follows: (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[15]

Are these reasons for maintaining grand jury secrecy still viable?

C. *Development of Exceptions to the Policy of Grand Jury Secrecy*

1. Development and Interpretation of Rule 6(e)

In *Metzler v. United States*,[16] in answering defendant's request for access to grand jury minutes after indictment, the Ninth Circuit said: "After the

13. Id. at 649. See also United States v. Cotter, 60 F.2d 689, 692 (2d Cir.), cert. denied, 287 U.S. 666 (1932); United States v. Geller, 154 F. Supp. 727, 729 (S.D.N.Y. 1957); United States v. Brookman, 1 F.2d 528, 536 (D. Minn. 1924), aff'd, 8 F.2d 803 (8th Cir. 1925).

14. 55 F.2d 254 (D. Md. 1931).

15. Id. at 261. See also United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954); Schmidt v. United States, 115 F.2d 394, 396-97 (6th Cir. 1940); Goodman v. United States, 108 F.2d 516, 519 (9th Cir. 1939).

16. 64 F.2d 203 (9th Cir. 1933).

indictment has been found and made public and the defendants apprehended, the policy of the law does not require the same secrecy as before. . . . Where the ends of justice can be furthered thereby and when the reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised."[17] Since *Metzler*, this argument has been widely accepted.[18]

However, in 1943, the Supreme Court proposed some limitations. In *United States v. Johnson*,[19] the Court said:

> To allow the intrusion, implied by the lower court's attitude, into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes.[20]

In 1946, Congress reacted by passing Rule 6(e) of the Federal Rules of Criminal Procedure, which presently provides:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment execpt when necessary for the issuance and execution of a warrant or summons.[21]

It should be noted that the grand jury's deliberations and votes are absolutely exempted from the rule and are never subject to disclosure. Rather, the purpose of the rule is to provide discretionary disclosures of witness' testimony upon a showing of need by the defendant. On the other hand, the government

17. Id. at 206 (citations omitted). See also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940); United States v. Alper, 156 F.2d 222, 226 (2d Cir. 1946); In re Bullock, 103 F. Supp. 639, 641 (D.D.C. 1952).

18. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The Supreme Court, citing Metzler, said: "Grand jury testimony is ordinarily confidential. . . . But, after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." Id. at 233-34 (citation omitted). See also United States v. Rose, 215 F.2d 617, 629 (3d Cir. 1954).

19. 319 U.S. 503 (1943).

20. Id. at 513. See also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1958); Berry v. United States, 295 F.2d 192, 194 (8th Cir. 1961), cert. denied, 368 U.S. 955 (1962).

21. Fed. R. Crim. P. 6(e). The rule was amended to include the "operator of a recording device, or any typist who transcribes recorded testimony" in 1966. 18 U.S.C.A. Rule 6(e) (1969).

has the right of access to the minutes under all circumstances "for use in the performance of [its] duties."[22]

In *United States v. Remington*,[23] the defendant had been convicted of perjury for his testimony before the grand jury. During the trial, he requested access to those portions of the grand jury transcript containing his own testimony. The Court of Appeals for the Second Circuit held the denial of access to be wrongful, although it found that defendant was not entitled to access to the testimony of other witnesses.[24] *United States v. Rose*[25] involved another charge of perjury arising out of grand jury testimony. As in *Remington*, the court allowed disclosure, as "[s]ince all the defendant desires is a transcript of his *own* testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings."[26]

In *United States v. Brennan*,[27] in rejecting defendant's application for inspection, the court said of Rule 6(e), "[a] strong and positive showing is required of persons seeking to break the seal of secrecy surrounding Grand Jury proceedings."[28] *United States v. Sugarman*[29] went even further in denying defendant's motion. In refering to the judge's discretionary power to allow disclosure, the court said, "[i]ts use can be justified only where by a properly verified pleading there is a clear and positive showing of gross and prejudicial irregularity influencing the grand jury in returning the indictment."[30]

Pre-trial requests for access to grand jury minutes also have been made by the defendant for purposes of pre-trial preparation,[31] preparation against a charge of perjury,[32] and preparation for a motion to dismiss the indictment.[33]

22. Fed. R. Crim. P. 6(e).

23. 191 F.2d 246 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952).

24. Id. at 250-51. The court based this decision in large part on the use to which the testimony would be put. As the defendant's own testimony would not be used merely to attack the credibility of other witnesses, but was instrumental in preparing his defense to the perjury charge arising out of it, the court granted access.

25. 215 F.2d 617 (3d Cir. 1954).

26. Id. at 630. It is interesting to note that the court relied on both Metzler and Socony as authority for the proposition that, under the facts, disclosure would not defeat the ends of justice.

27. 134 F. Supp. 42 (D. Minn. 1955), aff'd, 240 F.2d 253 (8th Cir.), cert. denied, 353 U.S. 931 (1957).

28. Id. at 52.

29. 139 F. Supp. 878 (D.R.I. 1956).

30. Id. at 881.

31. State ex rel. Clagett v. James, 327 S.W.2d 278 (Mo. 1959); see statutes cited note 97 infra.

32. United States v. Rose, 215 F.2d 617 (3d Cir. 1954).

33. Costello v. United States, 350 U.S. 359 (1956); United States v. Farrington, 5 F. 343 (N.D.N.Y. 1881); Fed. R. Crim. P. 6(e).

In addition, motions are often made during trial for impeachment purposes,[34] or after the government has first used the grand jury minutes.[35] In these cases, most courts have rejected the request, relying on the traditional reasons for secrecy put forth in *Amazon Industrial*, the policy of *Brennan*, or administrative need.[36] Nevertheless, the holdings of *Metzler* and *Socony-Vacuum* suggest that disclosure should be allowed where the defendant is in custody and where disclosure would not defeat the ends of justice. In addition, the rule of secrecy has been set aside where the defendant requests an *in camera* inspection of the minutes by the court.[37]

Although Rule 6(e) purported to regulate the disclosure of grand jury testimony, as of 1957 uniformity of interpretation was lacking. In that year, the policy of grand jury secrecy was drawn into question by the Supreme Court's decision in *Jencks v. United States*.[38]

2. Trend Towards Greater Disclosure in All Federal Criminal Cases

Jencks dealt with a request by the defendant for access to certain reports made by F.B.I. investigators. Although it does not deal with grand jury minutes, the case is important for its discussion of the general discovery policy in federal criminal cases; it called into question the traditional practice of allowing the trial court to determine access in its discretion. In allowing the defendants to examine evidence which later became the basis of a government witness' trial testimony, the court said:

> [P]etitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.[39]

Of the requirement that the defendant show cause as a precondition to disclosure, the Court stated:

> Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict . . . the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly

34. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959); United States v. Johns-Manville Corp., 1963 Trade Cas. 78, 834 (E.D. Pa. 1963).

35. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 231-37 (1940). See generally Calkins, supra note 6.

36. United States v. Geller, 154 F. Supp. 727, 729 (S.D.N.Y. 1957). See also Holt v. United States, 218 U.S. 245, 248 (1910); United States v. Sugarman, 139 F. Supp. 878 (D.R.I. 1956).

37. United States v. Holovachka, 314 F.2d 345 (7th Cir.), cert. denied, 374 U.S. 809 (1963); United States v. Geller, 154 F. Supp. 727 (S.D.N.Y. 1957).

38. 353 U.S. 657 (1957).

39. Id. at 668-69. Thus, the court clearly implied that the defendant, not the trial judge, is in the best position to determine the relevance of the material in question to the establishment of an effective defense. Id.

incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected.[40]

Once again, however, Congress acted to restrict the possibility of broadened federal discovery by forbidding discovery of the statement or report of a prospective witness until after he has testified; thereafter, discovery is limited to statements which relate to his testimony.[41]

3. *Jencks* and Grand Jury Secrecy

The impact of the new federal policy towards disclosure which motivated the *Jencks* decision was not immediately evident in the field of grand jury secrecy. In *United States v. Procter & Gamble Co.*,[42] the Supreme Court held that "[t]his 'indispensable secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."[43] This particularized need doctrine has prevailed in the field of grand jury secrecy for the last ten years. It was reaffirmed in *Pittsburgh Plate Glass Co. v. United States*,[44] where the Supreme Court discussed factors bearing on grand jury secrecy. The Court rejected the argument that the rationale of *Jencks* applies to grand jury secrecy; it felt such a conclusion "runs counter to 'a long-established policy' of secrecy . . . older than our Nation itself."[45] The Court re-affirmed the traditional rule that disclosure of grand jury minutes is solely within the discretion of the trial judge.[46]

Justice Brennan's dissenting opinion, concurred in by Chief Justice Warren, and Justices Black and Douglas, attacked the traditional rule of secrecy. The dissent noted that:

> Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice.[47]

The dissenters furthered argued that "[t]he interest of the United States in a criminal prosecution, it must be emphasized, 'is not that it shall win a case, but that justice shall be done.' "[48]

Influenced by the dissent in *Pittsburgh Plate Glass*, the Second Circuit in

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40. Id. at 667-68 (footnote omitted).
41. 18 U.S.C. § 3500 (1964). This legislation is commonly known as the Jencks Act.
42. 356 U.S. 677 (1958).
43. Id. at 682 (citation omitted), citing United States v. Johnson, 319 U.S. 503 (1943).
44. 360 U.S. 395 (1959).
45. Id. at 399 (citation omitted).
46. Id. at 400. Since the defendant had not met his burden of proof under the particularized need test, the Court found there was no error in the trial court's refusal to grant access to the grand jury minutes.
47. Id. at 403 (dissenting opinion).
48. Id. at 407 (dissenting opinion).

United States v. Zborowski,[49] held that where a witness' testimony is the only direct evidence, upon defendant's request, the court should examine the witness' grand jury testimony for possible inconsistencies, provided there is no supervening need for secrecy.[50] As the burden would be upon the prosecution to show facts requiring secrecy, rather than upon the defendant to show a need for disclosure, *Zborowski* moved away from the particularized need doctrine of *Procter & Gamble* and toward the more liberal position of *Jencks*. The court declared that "[t]he prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried."[51] This statement clearly implies incorporation of the rationale of *Jencks* into the Second Circuit's policy regarding grand jury secrecy. As such, it appears inconsistent with the Supreme Court's holding in *Pittsburgh Plate Glass*. While the report of the Senate Judiciary Committee on the Jencks Act made it clear that *Jencks* had no application to the traditional rule of grand jury secrecy,[52] most legal writers look more favorably upon the more liberal position of the Second Circuit. For example, it has been said that:

> [I]t seems obvious that *Jencks* paved the way for the abandonment of the notion that effective law enforcement would collapse if the contents of grand jury minutes were made accessible to the accused. Certainly, if the written or oral reports of government agents or informers made before trial were open to the defendant's inspection, the sworn testimony of witnesses before the grand jury should stand at least on the same footing, if not in a preferred position.[53]

In summarizing the reactions of most courts to attacks on the traditional rule of secrecy, it has been said: "[T]he judges who are convinced that departures from the policy of secrecy are unwise or undesirable, cite *Pittsburgh* for its defense of nondisclosure while those who believe that the policy goes too far point to *Jencks* and to Mr. Justice Brennan's dissent in *Pittsburgh*."[54]

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49. 271 F.2d 661 (2d Cir. 1959).

50. Id. at 666.

51. Id. at 668.

52. S. Rep. No. 981, 85th Cong., 1st Sess. 10 (1957). See also Note, supra 1, at 610.

53. Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668, 671 (1962). Accord, Calkins, supra note 6, Seltzer, Pre-trial Discovery of Grand Jury Testimony in Criminal Cases, 66 Dick. L. Rev. 379 (1962). See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Proc. Before Trial (Tent. Draft, 1969).

54. Sherry, supra note 53, at 676. While the statement was made with reference to the reactions of state courts, the analysis seems equally appropriate to the situation in the federal courts. See, e.g., United States v. Zborowski, 271 F.2d 661 (2d Cir. 1959), where Judge Lumbard cited Jencks and the dissenting opinion of Mr. Justice Brennan in Pittsburgh Plate Glass. But see Berry v. United States, 295 F.2d 192 (8th Cir. 1961), cert. denied, 368 U.S. 955 (1962); De Binder v. United States, 292 F.2d 737 (D.C. Cir. 1961).

4. Recent Developments

In the 1966 decision in *Dennis v. United States*,[55] the Supreme Court recognized "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[56] Although the Court continued to follow the particularized need doctrine first established in *Procter & Gamble*, it found that "[t]rial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony."[57] Quite probably prompted by the liberal tone of *Dennis*, the Second Circuit, in *United States v. Youngblood*,[58] though refusing to grant access to grand jury minutes for failure to show a particularized need, totally abrogated the requirement for future cases within the jurisdiction. The court said:

> [W]e direct that at trials commencing after our judgment here is entered, the district courts of this circuit at the request of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material . . . .[59]

The Second Circuit found that the particularized need doctrine expounded by the Supreme Court merely suggested "a minimum standard to which the courts must adhere, and do[es] not limit the court's power to order disclosure in additional situations where a showing of particularized need has not been made."[60]

In *Cargill v. United States*,[61] the Tenth Circuit also broadly construed *Dennis*, although it did not go as far as did *Youngblood*. In analyzing the particularized need doctrine, the court stated:

> [*Dennis*] retains the requirement that "particularized need" be shown . . . but holds *in effect* that such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility. Thus the Court as far as cross-examination is concerned has removed most, if not all, of the substance from the particularized need requirement . . . .[62]

Recently, the Supreme Court, in *Alderman v. United States*,[63] concluded that "surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial

55. 384 U.S. 855 (1966).
56. Id. at 870.
57. Id. at 874.
58. 379 F.2d 365 (2d Cir. 1967).
59. Id. at 370.
60. Id. at 369.
61. 381 F.2d 849 (10th Cir. 1967), cert. denied, 389 U.S. 1041 (1968).
62. Id. at 851-52.
63. 394 U.S. 165 (1969).

judge.[64] The petitioners were permitted to examine all evidence obtained against them by illegal eavesdropping to determine whether any of it formed a basis upon which they were convicted, without a prior determination by the trial judge. While the application of this decision to grand jury testimony is questionable in light of the Court's statement that, "[i]n both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where *in camera* procedures have been found acceptable to some extent,"[65] the decision clearly indicates the continued judicial sentiment favoring broader criminal disclosure.

United States v. Hughes[66] arose out of alleged price fixing activities. The defendants moved under Federal Rule of Criminal Procedure 16(b)[67] to have grand jury testimony of their employees made available to them for the purpose of preparing a defense of double jeopardy. The court stated that "Rule 16(b) permits the court to allow the defendant to inspect and copy 'books, papers, documents, tangible objects, buildings or places . . . .' Grand jury transcripts are 'documents.' "[68] Further, the court held that "discovery to ascertain the existence of double jeopardy fits well within the Rule 16(b) requirement of materiality to the preparation of the defense."[69]

Therefore, although the general rule of grand jury secrecy still exists, exceptions are gradually undercutting it as the trend towards liberalization of discovery rules continues. This trend has resulted in conflicting interpretations of Rule 6(e). In some jurisdictions, the Rule has been strictly interpreted; in others, defendants are entitled to grand jury minutes as a matter of right.

III. A New Federal Rule of Criminal Procedure 6(e) Proposed and Defended

A. *Proposed Amendment*

Because the original rationale of grand jury secrecy is no longer persuasive, because reform in this area has not kept pace with the general liberalization of discovery in criminal proceedings, and because of the lack of uniformity among the courts, a new federal rule governing access to grand jury minutes is needed. It is suggested that the existing rule should be amended to read:

64. Id. at 182.

65. Id. at 182-83 n.14.

66. 413 F.2d 1244 (5th Cir. 1969).

67. Fed. R. Crim. P. 16(b) provides:

"Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph, books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable." Reports, memoranda, other internal government documents, and statements made by government witnesses or prospective witnesses are not included within this rule and, except for the results of physical or mental examinations or scientific tests, no disclosure of these is allowed other than as proscribed by the Jencks Act. Id.

68. 413 F.2d at 1255.

69. Id. at 1257.

Disclosure of matters occurring before the grand jury other than its deliberations, and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. *After the indictment has been found and the defendant is in custody or has been granted bail, the defendant or his attorney is entitled, as a matter of right, to examine and copy the minutes of the grand jury proceedings upon which the defendant was indicted, including the testimony of witnesses appearing before the grand jury, but excluding the deliberations and the vote of any grand juror.* Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

B. *Evaluation of the Rule*

1. Are There Colorable Constitutional Objections to Nondisclosure?

While the *Jencks* decision was based on the Supreme Court's supervisory power over the lower federal courts and, as such, did not define constitutional limitations, it may well represent the beginning of a new rule of fairness with regard to discovery.[70] If this is true, *Jencks* and the cases following it suggest that a defendant may be denied due process of law if an unfair trial results from his inability to gain access to evidence potentially important to his defense.

In *Brady v. Maryland*,[71] the Supreme Court, speaking through Mr. Justice Douglas, said: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[72]

Since that decision, there has been uncertainty as to whether the doctrine should be broadly applicable. Although *Brady* did not deal with grand jury testimony, it is possible to argue that the prohibition against withholding evidence of potential benefit to the defendant should also apply to grand jury testimony.[73] *United States ex rel. Butler v. Maroney*,[74] and *Barbee v. Warden*,[75] support an extension of the *Brady* doctrine as to non-grand jury evidence. On the other hand, *United States ex rel. Bund v. La Vallee*[76] found that

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70. See Note, supra note 1, at 608.

71. 373 U.S. 83 (1963).

72. Id. at 87.

73. See Comment, supra note 4, at 586.

74. 319 F.2d 622 (3d Cir. 1963). In Butler, the court permitted the defendant to examine a statement made by him to the police shortly after his arrest.

75. 331 F.2d 842 (4th Cir. 1964). In Barbee, the court held the prosecution's failure to disclose exculpatory information to the defendant to be a violation of due process.

76. 344 F.2d 313 (2d Cir. 1965). The court held that a state court's refusal to grant

due process does not require disclosure of grand jury minutes. However, that decision relied on *Pittsburgh Plate Glass* and its affirmation of the traditional reasons for secrecy, later discredited by *Dennis*.[77] In fact, correlating the rationale of *Dennis* with that of *Brady* suggests a substantial argument supporting the due process claim. *Dennis* and the cases following it[78] hold that the defendant, rather than the trial judge, is best equipped to determine the usefulness of grand jury minutes; moreover, they note that the prosecution's responsibility is to do justice. To fulfill this responsibility, the prosecution should be under a duty to disclose all information which might possibly be favorable to a defendant; failure to do so might result in an unfair trial and a violation of due process.[79] The suppression of such evidence is considered to be inconsistent with *Brady*.[80] Thus, when viewed in light of the *Brady* rationale, *Dennis* may indicate that denying access to grand jury testimony is violative of procedural due process if the defendant is harmed thereby. If this is so, the prohibition should apply whether or not the grand jury witness later testifies at trial, as it is unlikely that the prosecution would call a witness whose testimony might prove detrimental.

It is also possible to argue that non-disclosure of grand jury testimony might lead to a violation of the defendant's sixth amendment right to confrontation.[81] As the Supreme Court noted in *Pointer v. Texas*,[82] the right of confrontation is not satisfied unless the accused has an opportunity for effective cross-examination. "Thus, to ensure the defendant the full potential of his opportunity for cross-examination, it is at least arguable that the sixth amendment should compell [sic] disclosure of relevant portions of a grand jury transcript."[83]

Therefore, it seems apparent that constitutional objections will be raised against non-disclosure in the future. The proposed amendment would overcome those objections.

2. Can the Proposal Withstand the Traditional Objections to Disclosure?

The traditional arguments for grand jury secrecy summarized in *Amazon Industrial*[84] do not provide an adequate objection to the proposed amendment.

access to grand jury testimony could not be a basis for federal habeas corpus relief where no exculpatory evidence had been suppressed.

77. See 43 N.Y.U.L. Rev. 194, 196 (1968).

78. Cargill v. United States, 381 F.2d 849 (10th Cir. 1967), cert. denied, 389 U.S. 1041 (1968); United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967). See Leon v. United States, 384 U.S. 882 (1966), vacating 347 F.2d 486 (D.C. Cir. 1965); United States v. Venn, 41 F.R.D. 540 (S.D. Fla. 1966).

79. Comment, supra note 4, at 583.

80. Id.

81. U.S. Const. amend. VI. In relevant part, it provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."

82. 380 U.S. 400 (1965). See also Comment, supra note 4, at 582.

83. Comment, supra note 4, at 582 (footnote omitted).

84. 55 F.2d at 261. The traditional reasons are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand

Two traditional arguments, prevention of escape before indictment and protection of the innocent accused, clearly are not valid objections to the proposed amendment, as it would not allow disclosure until after indictment, when the accused is in custody or has been granted bail. Likewise, the freedom of the grand jurors in their deliberations would not be impaired and there would be no greater risk of importuning them, as the deliberations and votes of the grand jurors would not be available for disclosure under the proposed amendment.

Preventing subornation of perjury or tampering with witnesses who testify before the grand jury and later appear at trial presents a different and more difficult problem. If the witness' grand jury testimony was truthful, the defendant could only attempt to suborn perjury between the time he receives the grand jury transcript and the trial. If he is successful in his attempt, the prosecution would be able to detect any inconsistencies between trial and grand jury testimony, as it would also have a grand jury transcript. If the witness' grand jury testimony was false, the requirement of secrecy to prevent perjury obviously would be unnecessary. Further, it has been said:

> "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law . . . to allow the accused to produce any witnesses at all."[85]

Moreover, it has been argued that absolute secrecy actually invites grand jury perjury, for if a witness knew that his testimony would never be disclosed, he might in fact be more inclined to perjure himself than if he knew any falsity would later be made public.[86]

The last traditional ground for secrecy rests upon the theory that a witness will speak more freely if he can be assured that his testimony will remain confidential. "However, since witnesses often recognize that they will be called to testify in subsequent criminal trials and since they should be aware of their liability to discovery in later civil cases, it is doubtful that the grand jury's gain outweighs the need of criminal defendants for adequate pre-trial preparation."[87] Thus, the traditional reasons for maintaining secrecy do not outweigh the advantages of the proposed rule.

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jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." Id.

85. Calkins, supra note 6, at 469 (footnote omitted).

86. Note, supra note 1, at 612.

87. Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1056 (1961) (footnotes omitted).

3. Would Disclosure of Grand Jury Testimony by the Prosecution Require Reciprocal Discovery by the Defendant?

The adoption of a system of reciprocal discovery in criminal cases would involve a basic shift from a purely adversary proceeding to one in which the ultimate end of criminal administration is justice.[88] The American Bar Association, in its *Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial*, suggests in section 2.1 (a) (iii) that the prosecuting attorney disclose "those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial."[89] In its comment to this section, the Advisory Committee on Pre-trial Proceedings further recognized that "[t]here is substantial and current authority for the proposition that generally the secrecy of grand jury proceedings should be reduced, and certainly as respects an accused whose indictment results from those proceedings.[90] At the same time, the Advisory Committee suggests instances in which the defendant be required to cooperate, such as by appearing in a line-up, speaking for identification, being fingerprinted, and posing for photographs.[91] In addition, the Advisory Committee suggests that a defendant may be asked to produce certain medical and scientific reports which he intends to use at trial.[92] The official comment suggests that this type of evidence should be viewed in the same light as that furnished by the prosecution.[93] Of course, these requirements of reciprocal disclosure are subject to constitutional limitations.[94]

New York State also has considered the liberalization of criminal discovery and has proposed three drafts of a *Proposed New York Criminal Procedure Law*.[95] New York has been more hesitant to allow discovery of grand jury minutes, as such evidence apparently would be exempt property, which includes records of statements made to parties, their attorneys, or their agents by witnesses or prospective witnesses.[96]

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88. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Proc. Before Trial § 1.1 (Tent. Draft, 1969). The Advisory Committee on Pre-trial Proceedings enumerates among other objectives to be obtained: expediency, thorough preparation, sufficient information for the purpose of a plea, and a reduction of interruptions and complications caused by collateral issues. Fuller discovery is one of the means by which these objectives may be fulfilled.

89. Id. § 2.1(a)(iii).

90. Id., Comment at 64.

91. Id. § 3.1.

92. Id. § 3.2.

93. Id., Comment at 97-98.

94. Id. § 3.1.

95. State of N.Y. Temp. Comm'n on the Revision of the Penal Law and Crim. Code, Proposed N.Y. Crim. Proc., Law art. 125 (1967). See also id. art. 125 (1968); id. art. 240 (1969). Although the provisions are identical, the later proposals do not include Staff Comments. The Commission notes that the trend is toward liberalization in this area.

96. State of N.Y. Temp. Comm'n on the Revision of the Penal Law and Crim. Code, Proposed N.Y. Crim. Proc. Law § 125.10(3) (1967). Perhaps the Commission's failure

Contrary to the American Bar Association proposal, the New York proposal allows discovery by the parties pursuant to a motion. The American Bar Association suggests, however, that discovery is something to which the parties are obligated. As such, there may be instances where disclosure by the prosecution requires reciprocal disclosure by the defendant. Subject to constitutional objections, this seems to be the most equitable solution. The proposed amendment would be in keeping with this trend.

4. Current Practices Supporting Disclosure

Current practice both in England and in some of the more progressive states[97] supports the proposed amendment. Since the adoption of the Indictable Offenses Act in 1848, the defendant in England has had access to testimony of all witnesses against him.[98] Further, the grand jury was abolished altogether in England in 1933;[99] the Crown's entire case is disclosed at a preliminary hearing at which the accused is present. He may choose to reveal his defense at this time or he may refuse to do so until trial. These hearings are normally open to the public, but the court will bar all but interested parties upon request by the accused. At trial, the prosecution is not restricted to the evidence presented at the hearing; rather, it is presumed the prosecution will gather new evidence during the interval between hearing and trial. However, the prosecutor is always under a duty to inform the accused of any new evidence which he intends to produce at trial. If the Crown fails to do this, the accused may, upon motion, stay the trial proceedings until such a time as he has had an opportunity to examine the evidence. Thus, complete disclosure is the trademark of English criminal justice.[100]

State criminal procedures vary; while the vast majority of states have emphatically denied pre-trial disclosure for the purpose of trial preparation,[101] a small number of states[102] have begun to liberalize their rules concerning grand jury secrecy and allow a criminal defendant an absolute right to inspect the minutes. For example, in Iowa a defendant or his attorney is entitled to minutes of grand jury testimony within two days of a formal demand.[103] In Kentucky, any person indicted by the grand jury has the right to procure a copy of the stenographic record of the testimony.[104] California's procedure

to allow discovery of grand jury testimony, if, in fact, that is intended, is in part due to its patterning the proposal on Fed. R. Crim. P. 16. Id. art. 125, Comment.

97. See Cal. Penal Code § 938.1 (West Supp. 1968); Iowa Code Ann. § 772.4 (1950); Minn. Stat. Ann. § 628.04 (1947).

98. Seltzer, supra note 53, at 395.

99. Id. at 379.

100. P. Devlin, Criminal Prosecution in England 112-17 (1958).

101. Note, Inspection of Grand Jury Minutes by Criminal Defendants, 1961 Wash. U.L.Q. 382, 394.

102. See statutes cited note 97 supra.

103. Iowa Code Ann. § 772.4 (1950), which provides: "The clerk of the court must, within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy." See also Note, supra note 101, at 386.

104. Ky. R. Crim. P. 5.16(2), which provides: "The [grand jury] stenographer and

is similar.[105] The experience of those states with liberalized procedure indicates that disclosure of grand jury testimony does not, in fact, have the much feared devastating effect on the administration of criminal justice. Professor Sherry has noted:

> Contrary to the forebodings of those who are fearful that disclosure of the proceedings of the grand jury after the return of the indictment threatens its usefulness and who maintain that secrecy is indispensable, California's experience convincingly demonstrates that the fact that the minutes of a grand jury proceeding will ultimately be made available to the accused has had no discernible effect whatever on the effectiveness or the utility of the grand jury in the types of cases in which its peculiar advantages may best be employed.[106]

IV. Conclusion

Since the traditional reasons for grand jury secrecy first advanced in *Amazon Industrial* are no longer viable objections to the proposed amendment, the rule of secrecy must be evaluated in light of the present policy underlying criminal discovery. This policy has greatly favored broader discovery rights for criminal defendants. Moreover, recent decisions have raised colorable constitutional objections to the continuation of the rule. Thus, the only possible rationale for objection to the proposed amendment is its possible impact upon the ability of the prosecution to continue the orderly adminstration of criminal justice. Such fears seem to be unfounded, however. Cognizant of the workability of liberalized rules in those jurisdictions which have adopted them and lack of adverse criticisms emanating from those jurisdictions, it is fair to say that an amendment of Federal Rule 6(e) in the manner proposed would be a salutary one.

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any typist who transcribes the stenographer's notes or recordings shall be sworn by the foreman not to disclose any testimony or the names of any witnesses except to the attorney for the Commonwealth or when testifying in court, and except that any person indicted by the grand jury shall have a right to procure a transcript of any stenographic notes or recordings relating to his indictment or any part thereof by paying the prescribed fee therefor." For the required fees, see Ky. Rev. Stat. Ann. § 28.460 (Supp. 1968). See also Seltzer, supra note 53, at 384.

105. Cal. Penal Code § 938.1 (West Supp. 1968), which in relevant part provides: "If an indictment has been found or accusation presented against a defendant, such stenographic reporter shall certify and file with the county clerk an original transcription of his shorthand notes and a copy thereof and as many additional copies as there are defendants . . . . The county clerk shall deliver the original of the transcript so filed with him to the district attorney immediately upon his receipt thereof, shall retain one copy for use only by judges in proceedings relating to the indictment or accusation, and shall deliver a copy of such transcript upon each such defendant or his attorney. If the copy of the testimony is not served as provided in this section the court shall on motion of the defendant continue the trial to such time as may be necessary to secure to the defendant receipt of a copy of such testimony 10 days before such trial." See also Seltzer, supra note 53, at 384.

106. Sherry, supra note 53, at 681. See also Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228, 243-50 (1964).