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THE RIGHTS OF A WITNESS BEFORE THE GRAND JURY

The grand jury system has been the subject of recent discussion, particularly in regard to the potential for prosecutorial abuse.¹ This comment will examine the rights of witnesses who appear before the grand jury and concentrate on the applicability of the sixth amendment right to counsel, the search and seizure provision of the fourth amendment, and the provision for due process and the privilege against self-incrimination contained in the fifth amendment. A focus upon this aspect of the grand jury will provide a perspective of the potential for misuse of this legal institution.

Across the country grand juries differ in the means of their establishment, in their size, and in the instances in which an indictment by the grand jury is required.² Grand juries may be of two types: an indicting grand jury which generally operates with impetus from the prosecutor to determine whether a crime has been committed and whether there is probable cause for an accused to stand trial, or an investigative grand jury which is convened with the authority to investigate wrongdoing but which has no particular person or criminal charge in mind and concludes with a "presentment" rather than an indictment.³ The focus of this comment will be on the indicting grand jury.

An understanding of the modern grand jury necessitates a look at the origins of this institution. The grand jury originated at the Assize of Clarendon in 1166, in which Henry II provided that "twelve knights or twelve good and lawful men [shall] disclose under oath the names of those in the community believed guilty of criminal offenses."⁴ Initially people in England feared the grand jury⁵ because it was thought to be merely a tool of the state. The concept of the grand jury as a protective barrier between the state and the individual arose from a grand jury's refusal to indict Lord Shaftesbury on charges of treason as urged by

1. Note, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & C. 157 (1974); Note, *The Grand Jury: Powers, Procedures, and Problems*, 9 COLUM. J. L. & SOC. PROB. 681 (1973); Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965).

2. See Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119 (1964) (compilation of state statutes relating to the grand jury).

3. For Missouri law concerning the grand jury see §§ 540.010-.330, RSMo 1969, and in particular § 540.020, RSMo 1969 for the powers and duties of the grand jury.

4. R. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941*, at 1 (1963).

5. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. R. 701, 108-10 (1972). This author suggests that Henry II devised the grand jury as a means of diverting court revenues from the judges to the crown.

Charles II.⁶ When the grand jury system began to operate in the American colonies⁷ it was thought of as a body which functioned with some independence from the prosecution. There were thus two facets to the grand jury. First, it was to investigate and determine whether cause existed to bring an accused person to trial. Second, while performing the first function, the grand jury was to stand between the individual and the state to protect against "a mistaken, unjust, or over zealous prosecution, to prevent the anxiety and risk, the expense [and] the loss of reputation . . . which would result to an innocent person from an ill-founded charge."⁸

In a consideration of the indicting grand jury it must be understood that this body is not adjudicative but is an investigative body whose purpose is to uncover and pursue all leads.⁹ This emphasis upon the investigative function has led to the uniform denial of the right of a grand jury witness to observe the proceedings,¹⁰ to know the specific charges under investigation,¹¹ to cross-examine witnesses,¹² to testify or present evidence in his favor,¹³ to raise the issue of a lack of grand jury jurisdiction,¹⁴ or to set any limits on the investigation a grand jury may conduct.¹⁵ As there is no adjudication at the grand jury level which could prejudice a witness, there is thought to be no need for these rights, the exercise of which might interfere with, disrupt, or delay the investigatory function of the grand jury.

In view of this investigative purpose, the indicting grand jury has been provided with broad investigative powers.¹⁶ It may consider and act

6. R. YOUNGER, *supra* note 4, at 2.

7. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." *U.S. Const.* amend V. The Missouri Constitution provides for a grand jury at Mo. CONST. art. I, § 16.

8. *Cobbs v. Robinson*, 528 F.2d 1331, 1338 (2d Cir. 1975), *cert. denied*, 424 U.S. 947 (1976). *See Hale v. Henkel*, 201 U.S. 43 (1906). It is thought that the grand jury was to operate as a "shield" between the state and the accused. *United States v. Mandujano*, 425 U.S. 564, 571 (1976); *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972).

9. *United States v. Doulin*, 538 F.2d 466 (2d. Cir.), *cert. denied*, 429 U.S. 895 (1976).

10. *United States ex. rel. McCann v. Thompson*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944).

11. *Hale v. Henkel*, 201 U.S. 43, 65 (1906).

12. *United States v. Schuly*, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955); *Boehm v. United States*, 123 F.2d 791, 806 (8th Cir. 1941), *cert. denied*, 315 U.S. 800 (1942).

13. *United States v. Bladgett*, 30 F. Cas. 1157, 1158 (S.D. Ga. 1867) (No. 18, 312).

14. *Blair v. United States*, 250 U.S. 273, 282-83 (1919).

15. *United States v. Calandra*, 414 U.S. 338, 345 (1974).

16. *United States v. Dionisio*, 410 U.S. 1, 13 (1972), *citing Branzburg v. Hayes*, 408 U.S. 665, 668 (1972).

upon tips, rumors, evidence offered by the prosecution, and the jurors' own personal knowledge.¹⁷ It has even been said that the purpose of the grand jury is not complete "until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed."¹⁸

One of these investigative powers is the power to subpoena witnesses who can be compelled to testify or produce documents. The Supreme Court of the United States has stated that the authority of the grand jury to subpoena a witness is "not only historic, but essential to its task."¹⁹ In accord with this, the subpoena power of the grand jury has frequently been enforced with the courts' power of contempt.²⁰ In the event testimony may be self-incriminating and fall within a constitutional protection, a witness may be granted immunity and compelled to testify upon matters otherwise privileged.²¹ This power to compel testimony is premised in the belief that it is the absolute duty of a witness before the grand jury to answer all questions, "subject only to a valid Fifth Amendment claim or other limited privileges."²² Courts have held to the principle that the public has a right to any person's evidence;²³ this provides the basis for much of the investigative power of the grand jury. A witness summoned before the grand jury can raise very few objections,²⁴ a feature of the grand jury system that appeals to prosecutors.

Because of its investigative rather than adjudicative purpose, the indicting grand jury is not bound by those procedural and evidentiary rules governing the conduct of criminal trials.²⁵ An indictment cannot

17. *Id.* at 15.

18. *Id.* at 13.

19. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

20. *Id.*; *Costello v. United States*, 350 U.S. 359 (1956); *Blair v. United States*, 250 U.S. 273 (1919); *Hale v. Henkel*, 201 U.S. 43 (1906). See §§ 540.190-.210 RSMo (1969) (court enforcement of a witness' duty to testify).

21. *Kastigar v. United States*, 406 U.S. 441 (1972).

22. *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

23. *United States v. Dionisio*, 410 U.S. 1, 9 (1972); citing *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972). This principle was "considered an 'indubitable certainty' that '[could not] be denied' by 1742." *Kastigar v. United States*, 406 U.S. 441, 443 (1972). In *United States v. Calandra*, 414 U.S. 338, 353 (1974), the Court stated:

Ordinarily, of course, a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony. He may invoke his Fifth Amendment privilege against compulsory self-incrimination, but he may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs.

24. *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Blair v. United States*, 250 U.S. 273 (1919).

25. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

be challenged as based upon inadequate evidence;²⁶ evidence inadmissible at trial may be considered by the grand jury.²⁷ For example, hearsay evidence may not only be considered by the grand jury, it may be the primary basis of an indictment.²⁸ Evidence that would normally be excluded at trial as having been obtained from an illegal search and seizure also may be brought before the grand jury,²⁹ as can "information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination."³⁰ The Supreme Court summarized the ability of the grand jury to consider all evidence brought before it when it stated:

Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. The general rule . . . is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government acquire[d] incriminating evidence in violation of the law, even if the tainted evidence was presented to the grand jury.³¹

Although the grand jury can *consider* incompetent evidence, the question arises as to the extent to which an indictment based upon such evidence may justify the subsequent arrest or search of an individual. As to a search of the individual, it has been stated that the indicted person should be able to raise the illegality of the source of knowledge (the incompetent evidence) and "suppress the evidence and its fruits if they were sought to be used against him at trial."³² It appears that an indictment may be the basis for an arrest warrant since the grand jury's determination that probable cause existed for the indictment also establishes that element for the lawful arrest of the person so charged, not-

26. *Id.* at 345, *citing* Costello v. United States, 350 U.S. 359, 362 (1956) and Holt v. United States, 218 U.S. 245 (1910).

27. Although in many jurisdictions the grand jury may consider evidence that would be incompetent at trial, some jurisdictions do not allow this practice. See N.Y. CODE CRIM. PROC. § 249 (McKinney 1958), which states that the grand jury can receive none but legal evidence. See also *In re* Investigation into Alleged Commission of Criminal Abortions in the County of Kings, 286 App. Div. 270, 143 N.Y.S.2d 501 (1955); *People v. Sexton*, 187 N.Y. 495, 80 N.E. 396 (1907).

It has been held that if the prosecutor becomes aware of perjured testimony which came before the grand jury, due process requires that he so notify the grand jury and the court to correct any injustice. *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974).

28. *United States v. Doe*, 455 F.2d 1270, 1274 (1st Cir. 1972), *citing* Costello v. United States, 350 U.S. 359 (1956).

29. *United States v. Calandra*, 414 U.S. 338 (1974); *Kastigar v. United States*, 406 U.S. 441 (1972).

30. *United States v. Calandra*, 414 U.S. 338, 343 (1974), *citing* *Lawn v. United States*, 355 U.S. 339 (1958).

31. *Gelbard v. United States*, 408 U.S. 41, 60 (1972), *citing* *United States v. Blue*, 384 U.S. 251 (1966); *Lawn v. United States*, 355 U.S. 359 (1956).

32. *United States v. Blue*, 384 U.S. 251, 255 (1966).

withstanding the presentation of incompetent evidence before the grand jury.³³

The grand jury has the power to compel the production of and to consider evidence that would be inadmissible in a criminal trial. For these reasons, the prosecutor may believe that his chances are more favorable to obtain a grand jury indictment than to pass muster at a preliminary hearing³⁴ where evidentiary rules apply and the accused is allowed the assistance of counsel.³⁵ Presently the grand jury depends upon the prosecutor to select and secure the attendance of witnesses, to question the witnesses, to instruct jury members as to laws alleged to have been violated,³⁶ to perform much of the investigative work,³⁷ and to draw up the indictment.

Perhaps the most significant impact of the relationship between the prosecution and the grand jury is the way it has altered the historical two-fold purpose of the grand jury. Although the grand jury still fulfills the investigative function, it is difficult to characterize the grand jury as standing between the individual and the prosecutor on whom the grand jury is so dependent. The problem lies in the fact that even though the historical purpose of the grand jury was to guard the individual's liberty, at present the grand jury "must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to

33. *Giordenello v. United States*, 357 U.S. 480, 487 (1958); *Ex parte United States*, 287 U.S. 241, 249 (1932); See C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 151 (1969). For the authorization of the issuance of an arrest warrant upon the basis of an indictment see FED. R. CRIM. P. 9; MO. R. CRIM. P. 24.19.

34. See Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. R. 807 (1972). In Missouri a preliminary hearing is necessary if the prosecution is based upon an information, unless such hearing is waived by the accused or the information was in substitution of the indictment. MO. R. CRIM. P. 23.02.

35. See *Coleman v. Alabama*, 399 U.S. 1 (1970); Dash, *supra* note 34, at 814-15, suggested the following hypothetical statement by a prosecutor to a witness before the grand jury:

Yes, indeed, if you have a preliminary hearing, it is a critical stage of the prosecution and you are entitled to counsel. You will be able to cross-examine witnesses against you, present any testimony you wish to give, challenge whether probable cause has been established and obtain some discovery of the case against you—but, of course, that is if I permit you to have a preliminary hearing. If I choose to go directly to the grand jury, on the other hand, all these precious rights I just outlined for you are not available since you are not exposed to a critical stage of the prosecution but only to the grand jury which indicts you.

36. Note, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & C. 157, 160 (1974).

37. Note, *American Grand Jury: Investigatory and Indictment Powers*, 22 CLEV. ST. L. REV. 136, 154 (1973). For the ability of a prosecuting attorney to act before the grand jury in Missouri, see §§ 540.130-140, RSMo 1969.

when he is acting oppressively.”³⁸ In light of the powers available to the grand jury, the significant relationship between the grand jury and the prosecution, and the lack of objections available to a witness appearing before the grand jury, it is not surprising that the grand jury process has been described as “a full fledged deposition procedure for the prosecution.”³⁹

A comparison of the rights and constitutional provisions which normally apply to witnesses at trial with the limited rights available to a witness before the grand jury makes it clear that the grand jury has not fulfilled one of its historical functions—that of standing between the individual and the prosecuting state.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

One of the more significant rights denied witnesses appearing before the grand jury is the right to counsel. The sixth amendment to the Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”⁴⁰ It has been held that because a grand jury proceeding is not adversary or adjudicatory in nature,⁴¹ it is not a criminal proceeding and the sixth amendment does not apply to a grand jury witness.⁴² This longstanding principle might have been compatible with a grand jury independent of the prosecution. However, the denial of counsel is not consistent with the goal of protecting the individual from ill-founded indictments, given the nature of the relationship between the prosecution and the grand jury.

In *Coleman v. Alabama*⁴³ the Supreme Court ruled that the sixth amendment’s right to counsel necessitated the presence of counsel to represent the defendant at a preliminary hearing.⁴⁴ The court reasoned that the preliminary hearing was a critical stage of the criminal process.

38. Antell, *supra* note 1, at 154.

39. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1191 (1960). A similar idea was expressed by the statement that the grand jury is being reduced to “simply another investigative device of law enforcement officials.” *United States v. Mara*, 410 U.S. 19, 47 (1972) (Marshall, J., dissenting).

40. *See also* MO. CONST. art. I, § 18(a).

41. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

42. *Id.*; *In re Groban's Petition*, 352 U.S. 330 (1957). In *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955), the court said: “Such a body is not charged with the duty of deciding innocence or guilt and, for this reason, its proceedings have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues.”

43. 399 U.S. 1 (1970).

44. *Id.* at 11. The purpose of the preliminary hearing in Alabama was to determine whether a crime had been committed and whether there was probable cause to bring the accused to trial. This is the same as the grand jury’s function.

The assistance of counsel was needed to "expose fatal weaknesses in the State's case, . . . fashion a vital impeachment tool for use in cross-examination of State's witnesses at the trial, . . . preserve testimony favorable to the accused, . . . discover the case the State has against his client and make possible the preparation of a proper defense. . . ." ⁴⁵ Additionally, counsel was thought essential to protect the accused against an improper or ill-founded prosecution. ⁴⁶

The "critical stage" standard ⁴⁷ would seem equally applicable to the grand jury because that body has the power to charge an accused with an offense for which he will have to stand trial. Considering the powers available to the grand jury, that proceeding could be thought of as even more critical a stage than the preliminary hearing. ⁴⁸ Presently the grand jury has the potential to be used as a deposition procedure for the prosecution "without the embarrassing presence of the defendant or his counsel." ⁴⁹ Although an indicted individual may be allowed some discovery of the grand jury proceedings, this discovery often is limited to the evidence or testimony of witnesses before the grand jury that the state will introduce or call a trial. ⁵⁰ Using the grand jury subpoena power, the prosecution is able to gain otherwise difficult to obtain or unavailable information helpful to the state's case but which would not be used at trial. In this event, information strengthening the state's case might not be discoverable by the defendant. The *Coleman* rationale would appear to be applicable to such a situation because the interests of the indicted individual, which were recognized as significant in the context of a preliminary hearing, would be prejudiced due to his inability to discover the information.

45. *Id.* at 9.

46. *Id.*

47. "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'" *Id.* at 9, *citing* *United States v. Wade*, 388 U.S. 218, 227 (1967).

48. If the current mode of constitutional analysis subscribed to by this Court in recent cases requires that counsel be present at preliminary hearings, how can this be reconciled with the fact that the Constitution itself does not permit the assistance of counsel at the decidedly more "critical" grand jury inquiry?

Id. at 25 (Burger, C. J., dissenting). It must be pointed out that the constitution does not deny the assistance of counsel at grand jury hearings. *See* *Dash*, *supra* note 34, at 813.

49. Goldstein, *supra* note 39, at 1191.

50. Missouri allows a defendant to discover: "Those portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as witnesses at a hearing or trial. . . ." Mo. R. CRIM. P. 25.32(3). *But see* *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). The general policy of strict secrecy surrounding

It could be argued that a preliminary hearing is more critical because the investigation has already focused upon a certain person. However, an indicting grand jury is also generally concerned with the activities of a particular individual and, in this sense, has begun to focus upon that person. As both procedures operate to determine whether there is probable cause for an individual to stand trial, the *Coleman* standard of substantial prejudice, satisfied when applied to a preliminary hearing, would seem to be equally satisfied when applied to the indicting grand jury.

Testimony before the grand jury may be used at a subsequent trial as an admission or to impeach. It also may be used for leads to other evidence.⁵¹ For these reasons a witness may be significantly prejudiced by the absence of counsel to advise him of his rights at the grand jury proceedings. Even though a witness may rely on the fifth amendment to avoid answering incriminating questions, he often lacks the training and skill necessary to assert his constitutional privilege against self-incrimination. As the witness "may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege,"⁵² he may risk contempt by claiming the privilege prematurely or he might waive his privilege by invoking it too late. The witness appearing without counsel also runs the risk of alienating the grand jury by improperly and too frequently asserting his privilege, or falling victim to a skilled prosecutor by responding with incriminating information or waiving his privilege.⁵³ The presence of counsel would enable the witness to take

grand jury investigations accounts for the limited availability of discovery. For a discussion of secrecy surrounding grand jury proceedings and its effects, see Note, *Grand Jury: Bulwark of Prosecutorial Immunity?*, 3 LOY. CHI. L.J. 305 (1972), in which the author suggests that secrecy is thought necessary to prevent the escape of those whose indictment is contemplated, to ensure freedom to the grand jury in its deliberations and prevent persons subject to indictment or their friends from influencing the grand jurors, to prevent subornation of perjury or tampering with grand jury witnesses, to encourage disclosures by persons with information concerning the commission of crimes, and to protect the innocent accused who is exonerated.

51. See *Jones v. United States*, 342 F.2d 863, 868 (D.C. Cir. 1964); *United States v. H.J.K. Theatres*, 236 F.2d 502 (2d Cir. 1956); *United States v. Kloch*, 210 F.2d 215 (2d Cir.), cert. denied, 347 U.S. 960 (1954). See also Mesbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189, 202 (1966); Note, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97.

52. *United States v. Mandujano*, 425 U.S. 564, 604 (1976) (Brennan, J., dissenting), citing *Maness v. Meyers*, 419 U.S. 449 (1975).

53. See *Jones v. United States*, 342 F.2d 863, 868 (D.C. Cir. 1964). See also Mesbesher, *supra* note 51, at 190, where the author reflects upon the coercive atmosphere by stating:

A potential defendant who is brought before the grand jury without an attorney at his side is almost helpless. He is faced with a barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective. This torrent of interrogation is, of

full advantage of his constitutional privileges⁵⁴ and would avoid the delay and antagonization of jurors which might result from the witness leaving the chambers to talk with his attorney prior to answering each question.⁵⁵

The presence of the witness' counsel is also necessary to offset potential abuse of the grand jury by the prosecution. As the grand jury is composed of laymen, the prosecutor is placed in the position of explaining legal principles while conducting much of the proceeding. This combination of factors gives the prosecutor considerable influence over the grand jury, with a potential result of unjustified indictment.⁵⁶ Additionally, it has been suggested that the secrecy which surrounds grand jury proceedings facilitates prosecutorial abuse of grand jury powers.⁵⁷ The presence of the witness' counsel might help control excesses and mitigate undue influence.

II. THE FOURTH AMENDMENT, THE SUBPOENA POWER, AND THE EXCLUSIONARY RULE

A. *The Subpoena Power*⁵⁸

As mentioned earlier, the subpoena power is one of the most important powers available to the grand jury.⁵⁹ It is through the subpoena

course, directed by a skilled prosecutor capable of utilizing the grand jury as a tool to obtain incriminating evidence from the mouth of a nervous witness.

54. "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

55. For cases sanctioning the right of a witness to consult his attorney outside the grand jury chambers during questioning, see *In re Tierney*, 465 F.2d 806 (5th Cir. 1972); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969); *United States v. De Sapio*, 299 F. Supp. 436 (S.D.N.Y. 1969), *aff'd*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

56. See Note, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & C. at 160.

57. "Although the grand jury is exalted as a curb upon the arbitrary use of power, ironically, it encourages abuses by allowing the prosecuting authority to carry on its work with complete anonymity and with effects greatly magnified by the accompanying judicial rites." Antell, *supra* note 1, at 156. A recent study "disclosed that prosecutors often disclose to the grand jury the prior criminal records of the accused, or introduce as part of their probable cause case illegally obtained confessions which would not be admissible at trial." Dash, *supra* note 34, at 816, *citing*, Schmentz, *The Indicting Grand Jury: A Field Summary of Evidentiary Practices*, March, 1972 (unpublished manuscript in Georgetown University Law Center, Washington D.C.).

58. The subpoena power is discussed with the fourth amendment because the propriety of a subpoena is tested under fourth amendment analysis.

59. See note 19 and accompanying text *supra*.

that reluctant witnesses can be compelled to appear and bring papers or documents before the grand jury. The subpoena can not be enforced by the grand jury; it is enforced by the court in whose jurisdiction the grand jury is located.⁶⁰ Thus, if a witness believes that a subpoena violates his constitutional rights, he may bring a motion to quash before the court in order to challenge the subpoena.⁶¹

The United States Supreme Court has stated that the "grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes or the common law."⁶² In accordance with this statement it has been held that the grand jury cannot subpoena or compel testimony regarding such privileged communications as those between husband and wife,⁶³ attorney and client,⁶⁴ doctor and patient,⁶⁵ or priest and penitent.⁶⁶ The manner in which subpoenaed information was discovered also may provide grounds for a motion to quash. By federal statute no evidence may come before any grand jury which was discovered directly or indirectly as a result of the illegal interception of an oral or wire communication.⁶⁷

60. *United States v. Dionisio*, 410 U.S. 1, 12 (1972); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

61. See *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971). Another means to challenge the authority of the grand jury to compel an answer is for the witness to refuse to respond. In this instance the witness would be subject to a contempt citation, but only after a court determined that the requested information was not privileged or protected. *Blau v. United States*, 340 U.S. 332 (1951). Missouri provides for such judicial determination in §§ 540.190-210, RSMo 1969.

62. *United States v. Calandra*, 414 U.S. 338, 346 (1974). The Court suggested that the grand jury may not force a witness to answer questions in violation of the fifth amendment privilege or compel a person to produce books and papers that would incriminate him. The grand jury is also without power to invade a legitimate privacy interest protected by the fourth amendment. See text accompanying notes 63-66 *infra*.

Missouri has by statute, § 540.160, RSMo 1969, provided that after an indictment a person who has been or is expected to be a witness for the indicted individual may not be subpoenaed.

63. *Blau v. United States*, 340 U.S. 332 (1951).

64. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *In re Goldman*, 331 F. Supp. 509 (W.D. Pa. 1971).

65. *In re Investigation into Alleged Commission of Criminal Abortions in the County of Kings*, 286 App. Div. 270, 143 N.Y.S.2d 501 (1955).

66. *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971).

67. 18 U.S.C. § 2515 (1968) provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . or other authority of the United States, a State, or a political subdivision thereof. . . .

The anticipated use of subpoenaed information or testimony also may be challenged as improper and provide grounds to quash a subpoena. There are broad statements to the effect that it is an abuse to use the subpoena power as a mere discovery device.⁶⁸ It has been held that a subpoena may be challenged where information is sought "to obtain evidence for use in [an ongoing] criminal prosecution,"⁶⁹ or for the primary or exclusive purpose of preparing a pending indictment for trial.⁷⁰ Likewise, a subpoena or a subsequent indictment may be quashed if a prosecutor calls before the grand jury an already indicted defendant and questions him concerning the subject matter of that crime for which he stands formally charged.⁷¹ A motion to quash also might be based on the ground that the subpoena is unreasonably broad or sweeping,⁷² that it seeks irrelevant material,⁷³ or that it appears to have been issued in bad faith or with intent to harass.⁷⁴

As a practical matter it is difficult to establish the grounds to support a motion to quash a subpoena. One of the major problems is that the witness has a right to know only the names of the persons investigated, not the charges.⁷⁵ More significantly, the purpose or scope of a grand jury proceeding is often "at the outset . . . only hazily perceived and tentatively defined,"⁷⁶ making it difficult to establish that use of the subpoena is abusive or unreasonable.

B. *Applicability of the Fourth Amendment*

The Fourth Amendment provides for "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

That the statute is applicable to state proceedings is shown in *Lee v. Florida*, 392 U.S. 378 (1968). See also *State v. Farha*, 218 Kan. 394, 544 P.2d 341 (1975); *People v. Sher*, 38 N.Y.2d 600, 345 N.E.2d 314 (1976).

68. *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972).

69. *Donaldson v. United States*, 400 U.S. 517 (1971).

70. *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972).

71. In *United States v. Doss*, 545 F.2d 548, 551 (6th Cir. 1977), the court stated:

When a person under our system of law has been indicted for a crime [or is the subject of an information], the government has no more right to call him before a grand jury and question him about that crime than it has to call an unwilling defendant to the stand during trial of the case.

72. *Hale v. Henkel*, 201 U.S. 43 (1906). See FED. R. CRIM. P. 17(c).

73. See *In re Grand Jury Investigation*, 425 F. Supp. 717 (S.D. Fla. 1977).

74. *United States v. Dionisio*, 410 U.S. 1, 10 (1972); *United States v. Mara*, 410 U.S. 19, 47 (1972); *Burse v. United States*, 466 F.2d 1059, 1080 (9th Cir. 1972), cited in *In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973).

75. *Hale v. Henkel*, 201 U.S. 43, 65 (1906).

76. *United States v. Doulin*, 538 F.2d 466, 469 (2d Cir. 1976), citing *Blair v. United States*, 210 U.S. 273 (1919).

searches and seizures." In *Hale v. Henkel*⁷⁷ the Supreme Court expressly applied a "test of reasonableness" and held that a subpoena was so broad and sweeping as to be unreasonable under the fourth amendment.⁷⁸ The 1906 decision concerned a subpoena duces tecum which required the production of all correspondence, contracts, understandings, reports, and accounts between the petitioner's company and six other companies, along with all letters received by petitioner's company from more than a dozen other companies. However, in *United States v. Dionisio*⁷⁹ the Court said that the fourth amendment did not apply to a subpoena directing a group of twenty persons to produce voice exemplars. The Seventh Circuit had ruled that the grand jury could not subpoena the exemplars absent a prior showing of the reasonableness of the seizure.⁸⁰ In reversing the lower court the Supreme Court stated that "a grand jury subpoena to testify is not that kind of a governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied,"⁸¹ that "it is not a 'seizure' in the Fourth Amendment sense."⁸² In contrast to the expectation of privacy surrounding an individual's personal papers, the Court stated that no person can have a justifiable expectation of immunity from a grand jury subpoena,⁸³ because it is the obligation of each citizen to appear before the grand jury and give his evidence.⁸⁴ Additionally, the Court reasoned that requiring a preliminary hearing to determine the reasonableness of a subpoena would saddle a grand jury with minitrials and severely handicap the grand jury's investigative function.⁸⁵

The dissenting justices indicated that even though judicial controls and motions to quash might to some degree control excesses of the grand jury, it was ill-advised to assert that a grand jury's use of the subpoena in this instance did not constitute a seizure. An independent grand jury could be "relied upon to prevent unwarranted interference with the lives of private persons and to ensure that the . . . subpoena powers . . . are exercised in only a reasonable fashion."⁸⁶ On the other hand, with the increased reliance of the grand jury upon the prosecutor, a holding that the fourth amendment was not applicable opened the door to potential abuse of the grand jury's powers and "the dangers of excessive and unreasonable interference with personal liberty . . . the Fourth Amendment

77. 201 U.S. 43 (1906).

78. *Id.* at 76.

79. 410 U.S. 1 (1972).

80. 442 F.2d 276 (7th Cir. 1971), *rev'd*, 410 U.S. 1 (1972).

81. 410 U.S. 1, 10 (1972).

82. *Id.* at 9.

83. *Id.* at 12 n.11.

84. *Id.* at 9-10.

85. *Id.* at 17.

86. *United States v. Mara*, 410 U.S. 19, 47 (1972) (dissent to both *Mara* and *Dionisio*).

was intended to prevent.”⁸⁷ The minority believed that *Dionisio* would allow the grand jury—with “guidance” from the prosecutor—to use subpoena power to obtain such voice exemplars in circumstances in which, according to *Davis v. Mississippi*,⁸⁸ law enforcement officials would be violating the fourth amendment if they were to compel the same exemplars.⁸⁹ In determining whether official action constitutes a seizure, the minority saw no ground to distinguish between acts by a grand jury and acts by the police. It would seem that the *Dionisio* decision focused upon only the investigative function of the grand jury and ignored both its historical function as a barrier between the individual and the state and its present day reliance on the prosecutor with the accompanying danger of abuse.⁹⁰

The Court found in *Dionisio* that a requirement of a preliminary showing of reasonableness for the issuance of a subpoena would cause extreme delay and disruption to the grand jury investigative process.⁹¹ It would seem, however, that when the issuance of a subpoena has been questioned by a motion to quash, the government should be required to make some minimal showing as to the propriety of the subpoena. Along these lines and subsequent to *Dionisio*, several jurisdictions have held that although the grand jury need not show probable cause to enforce a subpoena, the government should establish the grand jury’s jurisdiction in the matter, that the subject matter subpoenaed is relevant to the investigation, and that the material is not sought for a purpose unrelated to the investigation.⁹² Such a minimal requirement gives deference to the traditional investigative function of the grand jury yet recognizes the fact

87. *Id.*

88. 394 U.S. 721 (1969).

89. The majority distinguished *Davis* by stating that a grand jury subpoena involves no stigma and is under the control and supervision of a court. In contrast to a seizure effectuated by an arrest or an investigative stop, the compulsion exerted by a grand jury subpoena is merely that of a “civil obligation.” 410 U.S. 1, 10 (1972).

90. Justice Marshall’s dissent suggested that the decision could encourage prosecutorial exploitation of the grand jury process and bring the institution closer to becoming simply another investigative device of law enforcement officials. What law enforcement officers could not accomplish directly themselves they may now accomplish indirectly through the grand jury. *United States v. Mara*, 410 U.S. 19, 45 (1972). Justice Douglas in his dissent interpreted the decision as “allow[ing] the prosecutor to do under the cloak of the grand jury what he could not do on his own.” *Id.* at 31.

91. *Id.* at 17.

92. See *In re Grand Jury Investigation*, 425 F. Supp. 717, 718 (S.D. Fla. 1977); *United States v. Grand Jury Investigation*, 417 F. Supp. 389, 391 (E.D. Pa. 1976), *citing* *In the Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543, 548 (3d Cir.), *cert. denied*, 425 U.S. 992 (1976); *In re Grand Jury Proceedings*, 486 F.2d 85, 93–94 (3d Cir. 1973).

that the modern grand jury powers are susceptible to prosecutorial abuse.⁹³

C. The Exclusionary Rule

Following *Dionisio*, the Supreme Court further restricted the fourth amendment protection of a witness facing the grand jury by holding that the exclusionary rule was not applicable in grand jury proceedings. In *United States v. Calandra*,⁹⁴ the grand jury obtained a document that federal agents had illegally seized from Calandra's files. Calandra instituted a motion to suppress the illegally seized evidence which the grand jury was planning to use as the basis for its questioning of the subpoenaed witness. Refusing to apply the exclusionary rule, the Court held that a grand jury witness could not refuse to answer questions on the ground that they were based on illegally seized evidence. The Court reasoned that the purpose of the exclusionary rule was to deter illegal activities by law enforcement personnel and not to redress injury to an individual's privacy.⁹⁵ In addition, use of illegally obtained evidence by the grand jury as the basis for questioning an individual was thought to be only a "derivative use" of the evidence and did not constitute a "new Fourth Amendment wrong."⁹⁶ The questions originating from the tainted evidence "involved no independent government invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning."⁹⁷ The Court also stated that application of the exclusionary rule to grand jury proceedings would seriously interfere with its investigative functions which historically were not restricted by the rules of evidence and procedure applicable to criminal trials.⁹⁸ Finally, the majority suggested that the exclusionary rule was not constitutionally mandated but was a judicially created doctrine.⁹⁹ When the above mentioned factors were considered together, it was determined that the minimal deterrent effect would not

93. "It seems that such a minimal requirement is almost indispensable if citizens are to be afforded minimum protections against the possible arbitrary exercise of power by a prosecutor through the use of the grand jury machinery." *In re Grand Jury Investigation*, 425 F. Supp. 717, 718 (S.D. Fla. 1977), citing *In re Grand Jury Proceeding*, 486 F.2d 85, 94 (3d Cir. 1973).

94. 414 U.S. 338 (1974).

95. *Id.* at 347.

96. *Id.* at 354.

97. *Id.*

98. The Court said that application of the exclusionary rule would "delay and disrupt grand jury proceedings, . . . halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective, . . . [and] unduly interfere with the effective and expeditious discharge of the grand jury's duties." *Id.* at 349-50.

99. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

balance the harm which would result from applying the exclusionary rule to grand jury proceedings.¹⁰⁰

The Court in *Calandra* seems to have interpreted and applied the exclusionary rule in a much narrower fashion than earlier Supreme Court decisions would suggest. *Calandra* focused upon deterrence as the primary purpose for the exclusionary rule; other decisions have stressed that the rule is necessary "to maintain inviolate large areas of personal privacy."¹⁰¹ *Calandra* sanctioned mere derivative use of illegally obtained evidence by the grand jury. It had earlier been stated by the Court that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."¹⁰²

It appears that, upon being subpoenaed by the grand jury, a witness may challenge an order to compel the production of documents on the ground that the subpoena is too broad, as in *Hale v. Henkel*. Under *Dionisio* it is much more difficult for the witness to challenge a subpoena ordering the witness himself to appear and provide the grand jury with physical evidence such as a voice exemplar.¹⁰³ It is ironic that the grand jury could obtain the appearance of the person with fewer objections available to the witness than if only his papers had been subpoenaed. The grand jury also may use evidence illegally seized by law enforcement officials without its being subject to the exclusionary rule.¹⁰⁴ In view of the relationship of the grand jury and the prosecutor, the decisions in *Calandra* and *Dionisio*, while reaffirming the function of the grand jury as an investigative body, have had the practical effect of making the grand jury a more inviting tool for law enforcement officials¹⁰⁵ and increasing the potential for prosecutorial abuse.

100. See *West v. United States*, 359 F.2d 50, 56 (8th Cir. 1966).

101. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), citing *Feldman v. United States*, 322 U.S. 487, 489-90 (1944).

102. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The exclusionary rule has been referred to as "that command which this Court has held to be a clear, specific and constitutionally—even if judicially implied—deterrent safeguard." *Mapp v. Ohio*, 367 U.S. 643, 648 (1962). "[W]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered with the Fifth Amendment's law against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662 (Black, J. concurring). See also *Weeks v. United States*, 232 U.S. 383 (1914).

103. There is a question how far a grand jury could go in subpoenaing evidence without having to establish the reasonableness of the subpoena. Arguably *Dionisio* would apply to evidence such as handwriting or hair samples, and possibly blood samples. *United States v. Mara*, 410 U.S. 19 (1972), applied the same principles as in *Dionisio* in upholding a subpoena of handwriting samples.

104. See notes 27-32 and accompanying text *supra*.

105. *United States v. Mara*, 410 U.S. 19, 47 (1972) (Marshall, J. dissenting).

III. THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS

The Fifth Amendment provides that no person "shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."¹⁰⁶ Decisions have held that both the due process clause and the right against self-incrimination apply to grand jury proceedings. The due process clause is violated when a grand jury indictment rests upon information which the prosecutor knew was perjured.¹⁰⁷ An unreasonable delay in the seeking of an indictment may also breach due process standards. An indictment should be dismissed if pre-indictment delay results in substantial prejudice to the defendant's right to a fair trial and if the delay was employed by the government in an effort to gain a "tactical advantage" over the accused, but this test is rigorously applied in finding a violation of due process.¹⁰⁸

It is the fifth amendment privilege against self-incrimination that is most often associated with a witness appearing before the grand jury. This privilege provides one of the few exceptions to the broad investigative powers of the grand jury,¹⁰⁹ and is a bulwark against abuse of those powers.¹¹⁰ The fifth amendment protects a witness from being compelled to incriminate himself, and the scope of the privilege is "as broad as the mischief against which it seeks to guard."¹¹¹

When asserting his fifth amendment privilege before the grand jury, a witness without counsel must struggle with the technical rules which surround a claim of privilege.¹¹² The privilege is personal and therefore cannot be asserted to protect others.¹¹³ The privilege can only be as-

106. A similar provision is found at Mo. CONST. art. I, § 19.

107. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). See note 27 *supra*.

108. *United States v. Marion*, 404 U.S. 307, 324 (1971); *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977); *United States v. Swainson*, 548 F.2d 657 (6th Cir. 1977); *United States v. Croucher*, 532 F.2d 1042 (5th Cir. 1976); *United States v. Alderman*, 423 F. Supp. 847 (D. Md. 1976) (Summarization of federal jurisdictions). Jurisdictions appear to be split as to whether the test is single or dualpronged. Some courts have held that substantial prejudice to the defendant is sufficient to constitute a violation of due process; others have required both substantial prejudice and a finding that delay was intentionally employed by the government to support a finding of a violation of due process standards.

109. See *Murphy v. Waterfront Comm'r*, 378 U.S. 94 (1964).

110. *United States v. Mandujano*, 425 U.S. 564, 604 (1976) (Brennan, J. dissenting).

111. *Id.* at 574, citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

112. See notes 52-53 and accompanying text *supra*.

113. *Hale v. Henkel*, 201 U.S. 43, 69-70 (1960); *Rogers v. United States*, 340 U.S. 367, 371 (1951); *United States v. Murdock*, 284 U.S. 141 (1931).

serted to prevent the elicitation of incriminating information, not merely private or embarrassing information.¹¹⁴ Just as there are restrictions on asserting the privilege, there are also technical rules regarding waiver of the fifth amendment privilege. A witness can waive his privilege against self-incrimination by disclosing an incriminating fact. Once this has been done, disclosure of the details surrounding this fact are no longer privileged.¹¹⁵

Even if a witness successfully asserts his privilege and avoids waiver, the government may overcome the privilege by granting immunity to the witness. "Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected,"¹¹⁶ and once immunity has been granted the reason behind the privilege theoretically disappears.¹¹⁷ A question did exist whether the immunity granted should be "use" or "transactional" immunity,¹¹⁸ but a recent federal statute¹¹⁹ providing for the granting of only use immunity was upheld by the Supreme Court in *Kastigar v. United States*.¹²⁰

The importance of the fifth amendment privilege against self-incrimination was recognized by the Supreme Court in *Miranda v. Arizona*,¹²¹ and a rule was developed in that case for advising a person of his privilege prior to interrogation. The Court reasoned that "without the protections flowing from adequate warnings . . . all the safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities."¹²² Advising a witness of the availability of his privilege was thought necessary to warn the person that he was encountering an aspect of the criminal justice system where adverse consequences could result from his testimony.¹²³

114. *Mason v. United States*, 244 U.S. 362, 365-66 (1917). See note 23 *supra*.

115. See *Rogers v. United States*, 340 U.S. 367, 373-374 (1951). "[I]f the witness himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." *Powers v. United States*, 223 U.S. 303, 314 (1912).

116. *United States v. Mandujano*, 425 U.S. 564, 576 (1976).

117. "Immunity displaces the danger." *Ullman v. United States*, 350 U.S. 422, 439 (1956).

118. See Rief, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L.J. 829 (1972).

119. 18 U.S.C. § 6002 (1970).

120. 406 U.S. 441 (1972).

121. 384 U.S. 436 (1966). See also *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964), in which the Court stated: "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continual effectiveness on the citizens' abdication through unawareness of their constitutional rights."

122. *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).

123. This warning is needed in order to make him (the witness) aware not only of the privilege, but also of the consequences of forgoing it. . . . Moreover, this warning may serve to make the individual more

It has been argued that the same principles apply to a witness appearing before the grand jury, but the Supreme Court held in *United States v. Mandujano*¹²⁴ that the *Miranda* warnings need not be given to a putative defendant appearing as a witness before the grand jury.¹²⁵ The Court reasoned that grand jury proceedings were clearly distinguishable from the police interrogations before the Court in *Miranda*.¹²⁶ The Court recognized the broad investigative powers of the grand jury,¹²⁷ but stated that "in contrast to the police—it is not likely that [the grand jury] will abuse those powers."¹²⁸

The assertion that the grand jury is not likely to abuse its powers is subject to question, particularly in view of the relationship between the grand jury and the prosecution and the fact that the prosecutor often questions the witness. Although prior Supreme Court decisions had placed great importance upon the exercise of constitutional rights accorded a witness involved in the criminal process, the Court has balked at applying these constitutional standards in grand jury proceedings. These recent decisions have apparently been based upon the concept of a grand jury independent of the prosecutor—a grand jury that does not exist today. When a witness comes before a body whose interests are adverse to his own, where his statements may be subsequently used against him at trial, where he may be forced to respond to questions which are based upon illegally seized evidence, where he is without the guiding hand of counsel, and where skilled prosecutors whose primary interest is in obtaining criminal convictions are leading the interrogation, a witness is not appearing before an independent body of laymen who stand between the witness and the state. As broad powers exist in the grand jury, the temptation to the prosecutor to abuse those powers is significant. For these reasons the witness should at least be advised of his privilege against self-incrimination—one of the few rights that he does have before the grand jury.

acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

Id. at 469.

124. 425 U.S. 564 (1976).

125. It has been suggested that witnesses before the grand jury be classified as *de jure*, *de facto*, or potential defendants. See Note, *Self Incrimination by Federal Grand Jury Witnesses: Uniform Protection Advocated*, 67 YALE L.J. 1271 (1958); Note, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97. See also 425 U.S. at 579 (Brennan, J., concurring).

126. 425 U.S. at 578–79.

127. "Indispensable to the exercise of its power is the authority to compel the attendance and the testimony of witnesses." *Id.* at 571.

128. *Id.* at 580, citing *United States v. Mara*, 410 U.S. 19, 46 (1972) (Marshall, J., dissenting).

IV. CONCLUSION

Recent Supreme Court decisions have had the effect of increasing the imbalance in historical grand jury functions. Originally the grand jury was established to investigate activity and determine whether a crime had been committed and identify the person who probably committed the crime. At the same time, it was to stand as a barrier between the prosecution and the individual. Both functions were relatively compatible when the grand jury was an independent body with little reliance upon the prosecutor. As the grand jury has come to rely increasingly upon the prosecutor to conduct much of the actual investigation, gathering of evidence, and interrogation of witnesses, there has been a corresponding decrease in the independence of that body and its ability to stand between the individual and the prosecutor. It is against this background that one must consider the recent Supreme Court decisions relating to the rights of witnesses before the grand jury.

The Court's reassertion of the rule that a witness' counsel may not appear before the grand jury with his client is most significant in light of the relationship of the grand jury and the prosecution. Because the witness appears before the grand jury without a judge, counsel, or an impartial official to protect him, he must rely upon his own often inadequate skills to assert his privileges. In characterizing the results of such a situation, Judge Learned Hand said that "save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination there available."¹²⁹ The presence of the witness' counsel would not only ensure the witness of the full protection of his constitutional rights, but also might act to forestall abuse of grand jury powers by the prosecution.

Restriction of the applicability of the fourth amendment to grand jury proceedings has done much to increase the investigative power available to the grand jury, to increase the potential and temptation for prosecutorial abuse and simultaneously to lower the protection of individual liberties. By not requiring a showing of probable cause prior to a grand jury's subpoena of voice exemplars, the Court has given the grand jury power that even law enforcement officials do not have. The refusal to apply the exclusionary rule to grand jury proceedings creates the possibility that a court may find the victim of an illegal search and seizure in contempt for refusing "to participate in the exploitation of that conduct in violation of the explicit command of the Fourth Amendment. . . ."¹³⁰ Added to this is the fact that a person may be indicted solely on the basis of evidence which is inadmissible at trial. This possibility conflicts with

129. *United States v. Remington*, 208 F.2d 567, 573 (2d Cir.), *cert. denied*, 347 U.S. 913 (1954) (L. Hand, J., dissenting).

130. *United States v. Calandra*, 414 U.S. 338, 364 (1974) (Brennan, J., dissenting).

the traditional grand jury function of ensuring that one does not face trial on ill-founded charges.

Just as the fourth amendment has been narrowed in its application to grand jury proceedings, the fifth amendment's privilege against self-incrimination has been directly and indirectly restricted. Sanctioning "use" rather than "transactional" immunity has taken away the absolute fifth amendment privilege and replaced it with a less than equivalent substitute. The protection against self-incrimination has been indirectly limited by the refusal to allow counsel to appear with the witness. This forces the layman witness to assert the privilege on his own, possibly resulting in a failure to take full advantage of the protection accorded him under the fifth amendment.

The source of much criticism of the grand jury lies in the restriction of constitutional rights and privileges of witnesses in the face of expanded prosecutorial influence in the grand jury process. *Kastigar*, *Dionisio*, *Calandra*, and *Mandujano* signify an increase in the investigative powers of the grand jury through a restriction of the rights of individuals called before that body. In association with the increased prosecutorial power in the grand jury proceedings, the recent Supreme Court decisions have effectively transformed the grand jury—historically the safeguard of the layman witness—into a powerful tool against the witness in the hands of the professional prosecutor.

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