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THE FLORIDA GRAND JURY: ABOLITION OR REFORM?

I. INTRODUCTION

The grand jury is one of the oldest institutions in our legal system. It has been a part of Anglo-American criminal justice for over 800 years. It exists in some form in every state as well as in the federal system. But the grand jury's long history and widespread acceptance cannot, in and of themselves, serve as the sole rationale for its continued existence.

The first part of this note will examine the grand jury both in Florida and generally. The note will then present the arguments for and against maintaining the grand jury as presently established by the Florida Constitution. This author concludes that the justifications for maintaining the grand jury in Florida are outweighed by the arguments against it. The grand jury no longer serves the vital functions for which it was designed. Indeed, instead of protecting the people, it is often used to diminish individual rights. The grand jury has outlived its usefulness, and it should be abolished.

If the Florida grand jury system is not abolished, then certain procedural safeguards must be provided to protect the rights of persons who come into contact with the grand jury. This note considers two major areas of grand jury reform: first, the right of a witness to have counsel present with him in the grand jury room; second, the relative merits of use immunity and transactional immunity as applied to a witness compelled to give grand jury testimony.

Finally, in light of the foregoing discussion, various proposals will be made for revising the grand jury provisions of the Florida Constitution.

II. HISTORY OF THE GRAND JURY

The grand jury originated in England at the Assize of Clarendon in 1166.¹ Its main purpose was to investigate crimes and hand down indictments, but it also acted as an important buffer between the people and the Crown. Since that time, the grand jury system has been hailed by proponents as an essential guardian of justice and liberty.² This was undoubtedly the feeling of the Framers of the United States Constitution. They thought so highly of the grand jury institution

1. Note, *Should the Grand Jury Indictment Procedure Be Abolished in Illinois?*, 2 JOHN MARSHALL J. OF PRAC. AND PROC. 348 (1969). For an excellent history of the development of the grand jury, see R. YOUNGER, *THE PEOPLE'S PANEL* (1963).

2. See Wickersham, *The Grand Jury*, 38 N.Y. ST. B.J. 426 (1966); Wickersham, *The Grand Jury: Weapon Against Crime and Corruption*, 51 A.B.A.J. 1157 (1965); Comment, 8 MIAMI L.Q. 584 (1954).

that they included it as a basic guarantee in the Bill of Rights.³ The grand jury guarantee of the federal constitution is one of the few protections in the Bill of Rights that has not, by incorporation into the fourteenth amendment, been applied to the states.⁴ Nevertheless, most states have adopted a grand jury system either by constitution or statute.⁵

The grand jury system has existed in Florida by constitutional provision since 1838. In the 1838 constitution⁶ and the 1861 constitution,⁷ the grand jury provision stated: "[N]o person shall be put to answer any criminal charge but by presentment, indictment or impeachment." The 1865 constitution provided that all criminal charges had to be prosecuted by presentment, indictment, or impeachment except where the legislature provided otherwise.⁸ But where the criminal charge involved the "life of the accused," a grand jury presentment or indictment was required.⁹ The 1868 constitution further changed the grand jury provision, providing that all "capital or otherwise infamous crimes" were to be prosecuted by indictment or presentment.¹⁰ Only for petit larceny could the legislature exercise its discretion as to the type of charging instrument.¹¹

The grand jury provision in the 1885 constitution was very similar to the 1868 version. It provided that prosecutions for capital crimes or other felonies must be upon grand jury indictment or presentment unless provided otherwise in the constitution.¹² Members of the bar clamored for an amendment that would allow all non-capital felonies to be prosecuted under an indictment or information.¹³ Finally, the constitution was amended in 1933 to provide that all non-capital felonies may be prosecuted by indictment or information.¹⁴ The re-

3. U.S. CONST. amend. V provides in relevant part:

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

4. *Peters v. Kiff*, 407 U.S. 493, 496 (1972); *Hurtado v. California*, 110 U.S. 516 (1884).

5. See Appendix I, containing a breakdown of the state grand jury provisions.

6. FLA. CONST. art. I, § 16 (1838).

7. FLA. CONST. art. I, § 16 (1861).

8. FLA. CONST. art. I, § 16 (1865).

9. *Id.*

10. FLA. CONST. art. I, § 8 (1868).

11. *Id.*

12. FLA. CONST. art. I, § 10 (1885, as originally adopted).

13. See Henderson, *Discussion Of Criminal Prosecution On Information Instead of by Indictment*, 5 FLA. B.J. 287 (1931). The author discusses the efforts of the Florida Bar to have the 1885 Constitution grand jury provision amended.

14. Act of June 7, 1933, H.J.R. No. 152, 1933 FLA. LAWS '895.

quirement that an indictment be returned for capital crimes remained.¹⁵

The 1968 revision of the constitution contained a grand jury provision very similar to the 1885 provision, as amended. It too requires an indictment only for capital crimes; all other felonies may be prosecuted by indictment or information.¹⁶ It is this author's conclusion that the Florida grand jury system is unnecessary and should probably be abolished. If this is done, Florida's 1978 constitution should provide that all criminal prosecutions be initiated by information filed by the state's attorney.

III. ABOLITION OF THE GRAND JURY

Despite the long history and widespread acceptance of the grand jury indictment process, it has nevertheless been the subject of extensive criticism.¹⁷ As early as the nineteenth century, legal philosopher Jeremy Bentham was labeling the grand jury " 'an engine of corruption,' a body composed of 'a miscellaneous company of men' untrained in the law, and a system which had outlived its usefulness for over a century."¹⁸ Indeed, the grand jury indictment process was abolished by statute in England in 1933.¹⁹

In reviewing the modern criticisms of the grand jury system, it is helpful to look at the various arguments made in support of the grand jury. One of the major arguments for maintaining the grand jury is that it protects against abuses by an overzealous prosecutor.²⁰ The notion is that an unscrupulous prosecutor, moved by improper motives, might charge a crime without having a proper basis. The grand jury, it is argued, serves as a check on this potential abuse. Critics are quick

15. FLA. CONST. art. I, § 10 (1885, as amended 1933).

16. FLA. CONST. art. I, § 15(a).

17. See, e.g., Bickner, *The Grand Jury . . . A Layman's Assessment . . .*, 48 CAL. ST. B.J. 660 (1973); Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L.F. 423; Duff & Harrison, *The Grand Jury In Illinois: To Slaughter A Sacred Cow*, 1973 U. ILL. L.F. 635; Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & C. 157 (1974).

18. Calkins, *supra* note 17, at 423, quoting J. BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES* 26 (1821); 2 *THE WORKS OF JEREMY BENTHAM* 171 (Bowring ed. 1843) (footnotes omitted).

19. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1. In 1913, a committee chaired by Viscount St. Aldwyn recommended the abolition of the grand jury. It noted that the grand jury "had outlived the circumstances amongst which it sprang and developed, that it is little more than a historically interesting survival, . . . and further, that it uselessly puts the country to considerable expense and numerous persons to great inconvenience." Royal Commission on Delay in the King's Bench Division, quoted in Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L.C. & P.S. 3, 14 (1938-39).

20. See Duff & Harrison and Johnston, *supra* note 17.

to dispute this claim. They assert that in reality, the grand jury provides no such protective function, but is merely a "rubber stamp" of approval for prosecutors' desires.²¹ One author has stated that the grand jury lost its protective function because of its total dependence on the prosecutor.²² She points out that the grand jury from the outset is in closest contact with the prosecutor. The grand jury depends on the prosecutor to present it with cases to consider, to present evidence, to call witnesses, and to draft indictments.²³ More importantly, the grand jury must depend on the prosecutor's legal research and interpretation of statutes and case law. The grand jury is almost always composed of laypersons, and there is rarely any chance for the grand jury to hire its own independent counsel.²⁴ Professor Bickner has concluded:

As a result, in contradiction to its much-publicized autonomy, the grand jury is organizationally structured to be totally dependent on the district attorney—not only in fulfilling its criminal functions, but even in fulfilling the investigative role. In many instances, a 'grand jury investigation' is essentially a 'district attorney investigation.'²⁵

21. Meshbesh, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1966).

22. Bickner, *supra* note 17, at 666.

23. Consider, for example, the following Florida statutory provisions:

Whenever required by the grand jury, the state attorney shall attend them for the purpose of examining witnesses in their presence, or of giving legal advice in any matter before them; and he shall prepare bills of indictment.

FLA. STAT. § 27.03 (1975).

The state attorney or an assistant state attorney shall attend sessions of the grand jury to examine witnesses and give legal advice about any matter cognizable by the grand jury. The state attorney may designate one or more assistant state attorneys to accompany and assist him in the performance of his duties, or he may designate one or more assistant state attorneys to attend sessions, examine witnesses, and give legal advice to the grand jury. The state attorney or an assistant state attorney shall draft indictments.

FLA. STAT. § 905.19 (1975).

A State Attorney designated by the Governor with the approval of the Supreme Court shall attend sessions of the grand jury and serve as its legal advisor. The State Attorney, the State Attorney and one or more of his assistant state attorneys, or one or more assistant state attorneys shall examine witnesses, present evidence, and draft indictments, presentments, and reports upon the direction of the state-wide grand jury. The State Attorney may designate one or more assistant state attorneys to accompany and assist him in the performance of his duties, or he may designate one or more assistant state attorneys to attend sessions of the state-wide grand jury and perform such duties.

FLA. STAT. § 905.36 (1975).

24. Even if the grand jury desired to hire its own private counsel, that counsel would not be allowed to sit in on the proceedings. FLA. STAT. § 905.17 (1975).

25. Bickner, *supra* note 17, at 666. See Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154 (1965).

As a general rule, prosecutors are ethical and proceed within the bounds of the law, with or without a grand jury. But the prosecutor's traditional dominance of the grand jury²⁶ makes it unlikely that the grand jury would provide much protection against unethical behavior. Grand juries almost always indict when cases are presented to them, especially if the prosecutor indicates that an indictment should be returned.²⁷ As one commentator, speaking of the prosecutor's dominance over the grand jury, noted:

Almost without exception the grand jurors know only the facts of the case that the state's attorney chooses to present, and almost invariably grand jurors follow the wishes of the prosecutor as to who shall be indicted and who shall not be indicted. In fact, it is now quite safe to say that the reliability of the grand jury runs just about parallel with the reliability of the state's attorney. This is not . . . an attempt to indicate anything but a sincere effort on the part of either, but if the state's attorney is to so much govern the grand jury, why not let him exercise his discretion quickly by means of an information.²⁸

It has been suggested that prosecutorial abuses can be controlled better by means other than the grand jury. One author proposed three alternatives: (1) giving the courts discretionary power to supervise the activities of prosecutors; (2) extending a governor's suspension powers to include abuse of prosecutorial discretion; (3) depending upon an informed citizenry to oust an abusive prosecutor from office.²⁹

A second major argument made by grand jury proponents is that the grand jury, because of the secrecy of its proceedings, protects the accused's reputation and good name. The secrecy that surrounds the grand jury proceedings is a double-edged sword, however; although the general public cannot hear the testimony, neither can the accused. The complaining witness can testify in secrecy without fear of being cross-examined by the accused; the accused has no right to appear and

26. See Gelber, *The Grand Jury Looks at Itself*, 45 FLA. B.J. 576 (1971). In this study, the author submitted several questions to citizens who had served on grand juries. One question asked: "Do you believe the state attorney, as counsel for the grand jury, exercises too much influence over grand jury action?" Forty-three percent of those questioned responded affirmatively. *Id.* at 577.

27. One author has noted:

In a survey conducted by Dean Morse he found that in 6,453 cases where the prosecutor expressed his opinion to the grand jury as to what disposition should be made of the case, the grand jury disagreed with the prosecutor in only 5.39% of the cases, and in the cases of disagreement the grand jury tended not to indict.

Note, *supra* note 1, at 358.

28. Canfield, *Have We Outgrown the Grand Jury?* 40 ILL. B.J. 206, 209 (1951).

29. Calkins, *supra* note 17, at 432.

give his version of the story.³⁰ In addition, if the accused is called to testify before the grand jury, he has no constitutional right to have his counsel in the grand jury room to advise him during questioning.³¹ A further indication of the lack of protection provided for the accused is the fact that the normal rules of evidence do not apply in grand jury proceedings. Therefore, an indictment may be based on hearsay or other evidence that would not be admissible at trial.³²

A third argument advanced by grand jury advocates is that grand jury secrecy gives the state a double advantage.³³ First, proponents assert that witnesses will be more willing to testify if they know that their testimony will not be disclosed and they will be safe from harassment. Second, secrecy guards against the accused fleeing the jurisdiction to avoid prosecution.

The secrecy argument can be attacked on several grounds. First, the accused usually knows the identity of the complaining witness. Moreover, even if the identity of the complaining witness is protected by the grand jury, it is very likely that he will be required to testify at trial. One writer explains that "any hesitancy that a witness might have in divulging harmful evidence before the grand jury would be based upon the fear that eventually he must give that same evidence in open court."³⁴ A third criticism is that secrecy does not deter the accused from suborning witnesses. Although the accused cannot hear the witness testify before the grand jury, many states, including Florida, allow the accused to discover witness lists prior to trial.³⁵ If he wants to threaten or bribe witnesses, the accused can simply refer to the witness list; the grand jury is an ineffective protection here. Still another argument against the grand jury secrecy is that the element of surprise has no place in any trial, especially in a criminal prosecution.³⁶ It should also be noted that the purported benefits of secrecy

30. *Id.*; see FLA. STAT. § 905.17 (1975), which provides that only the witness, the state attorney and his assistants, the court reporter, and an interpreter may be present in the grand jury room.

31. *In re Groban*, 352 U.S. 330 (1957).

32. *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974) (evidence seized in violation of fourth amendment admissible); *Costello v. United States*, 350 U.S. 359 (1956) (hearsay evidence admissible). *But see In re Grand Jury Investigation*, 287 So. 2d 43 (Fla. 1973) (communications intercepted by an illegal wiretap are not admissible before a grand jury).

33. See Calkins, *supra* note 17, at 433-35.

34. *Id.* at 434 (footnote omitted).

35. See FLA. R. CRIM. P. 3.220(a)(1)(i), which requires the prosecutor, after the filing of an indictment or information, to divulge the names and addresses of all persons having relevant information about the offense. Note that this discovery grant is not limited to those witnesses whom the state will call at trial.

36. See Calkins, *supra* note 17, at 434-35. Justice Traynor has written:

It is time to ask whether the element of surprise they set such store by is not

will not be lost if the grand jury is abolished. The same secrecy protections are guaranteed when the prosecutor files an information. The complaining witness can testify in secrecy, and with reasonably confidential matters, the accused will not know of the pending investigation. Thus it appears that the information process preserves secrecy values as well as the grand jury does.

A final argument in favor of the grand jury is that it acts as a buffer between the prosecutor and the public when the crime under investigation is unpopular or notorious. In such an instance, the prosecutor can take the case to the grand jury and let them bear the responsibility of refusing to indict.³⁷ Considering the domination that the prosecutor has over the grand jury, it seems clear that he could subtly persuade the grand jury to act as he wishes and then pin any public opprobrium on its members.

The fact that the state attorney—an elected official—can use the grand jury to sidestep public pressure is a questionable justification for retaining the grand jury. Although the present process may remove some pressure from the state attorney, it may also mislead the public as to who is making the accusation.

It appears that the prosecutor's ability to hide behind the grand jury is subject to two abuses. First, when there is insufficient evidence, the prosecutor can persuade the grand jury to indict and thus free himself from the responsibility of bringing the charges. One commentator noted:

[T]he grand jury may well be, in given circumstances, the skirt behind which an over-zealous or malicious or even corrupt prosecutor may hide to destroy the accused in the white-hot light of public accusation, without merit, and without fear of retribution in the form of a suit for malicious prosecution.³⁸

The second type of abuse is just the opposite. If the prosecutor does not really want to pursue a case, he can present the case to a grand

one of the most overrated elements in the judicial process. It is one thing to acknowledge its usefulness in testing credibility, but quite another to glorify it as the keystone of the adversary system. If it were indeed the keystone, the arch would in truth be fallen. The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise. The more open the process for eliciting it, the less need there is of surprise.

Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 249 (1964).

37. A collateral argument is that the grand jury serves a vital investigatory function. In Florida, however, the state attorney has subpoena power and can adequately perform the investigatory duties. See FLA. STAT. § 27.04 (1975).

38. Kranitz, *The Grand Jury, Past—Present—No Future*, 24 MO. L. REV. 318, 328 (1959). See Calkins, *supra* note 17, at 436.

jury in such a way as to guarantee that they will not return an indictment. Once again, the prosecutor can point to the grand jury as the responsible party. Admittedly both of these premises are based on the notion that the prosecutor can manipulate the grand jury to follow his own desires, but it is a notion which has been given broad support by legal scholars.³⁹

The current Florida Constitution provides that all capital crimes must be prosecuted by indictment.⁴⁰ All other felonies may be prosecuted either by indictment or information.⁴¹ One of the leading Florida cases dealing with grand jury indictments is *State v. Hernandez*.⁴² In *Hernandez*, the trial court quashed two informations charging drug law violations. The lower court reasoned that "organic due process" precluded prosecution of a crime without an indictment or a preliminary hearing. The Supreme Court of Florida disagreed, holding instead that there was no constitutional requirement to indict except for capital

39. See notes 25-28 and accompanying text *supra*.

This type of abuse is illustrated by a recent incident in Lake City, Florida:

[I]n July of 1976 the city's mayor, James Ward, abruptly resigned one night after completing about a year on the job. He said he had been getting telephone calls from drug pushers, gamblers and men who wanted to set up houses of prostitution in Lake City—and that he was afraid for his family's safety.

Ward's announcement was a political bombshell for his home town.

Politicians angrily denied that there was any kind of "organized" crime in the Lake City area. A local grand jury was hastily called into session. It met for two days, then issued a presentment critical of Ward and the local newspaper, which had published his remarks along with a story saying many Lake City residents believed the resigning mayor.

The Jury returned its presentment to Circuit Judge Samuel S. Smith, whose office in the Columbia County Courthouse was located a few doors down from the grand jury room. Smith read the presentment, signed it, and released it to the public.

With that, the talk of gambling and prostitution around Lake City died down. The community went about its business.

Tallahassee Democrat, December 18, 1977, § B, at 1, col. 4. A federal investigation followed. Judge Smith was indicted and convicted of possession of marijuana.

Meantime, FBI agents were combing through hundreds of court cases from the Third Judicial Circuit, looking for signs of wrongdoing in the past.

They found them.

When the FBI's work was done, it concluded that the area's judicial system had been riddled with corruption.

Id. § B, at 5, col. 1.

40. FLA. CONST. art. I, § 15(a) provides:

No person shall be tried for a capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by court martial.

41. *Id.*

42. 217 So. 2d 109 (Fla. 1968). This case construed the 1885 Constitution's grand jury provision, which was very similar to the current grand jury section. See text accompanying notes 14-16 *supra*.

crimes. The court cited *Hurtado v. California*⁴³ with approval, noting that the grand jury requirements of the federal system do not apply to the states.⁴⁴ Likewise, the Florida Supreme Court in *Horner v. State*⁴⁵ refused to hold violative of the federal constitution the provision of the 1885 constitution that dealt with grand jury indictments.

In *Hall v. State*,⁴⁶ the Supreme Court of Florida addressed the rationale behind the constitutional guarantee of indictment only for capital offenses:

The undoubted benefits arising from the continued presence and functioning in each judicial circuit of some trained and responsible prosecuting officer representing the state, vested with the very grave but necessary authority of initiating prosecutions by way of information, is no doubt the primary reason for the adoption of [the 1885 constitution's grand jury provision]. One of these benefits has been the reduction of the expense and the avoidance of the delay incurred in the frequent summoning of grand juries where prompt prosecutions for the commission of felonies is essential to the efficient administration of justice.⁴⁷

Thus, early on, the Florida Supreme Court recognized that prosecuting cases by information saved time and money.

Another line of cases in Florida has held that a prosecutor may file an information, even though the grand jury failed or refused to indict.⁴⁸ Recall that one of the arguments advanced for maintaining the grand jury is that it protects the accused from being charged with a crime for which there is no basis.⁴⁹ But, if the prosecutor can charge by information even when the grand jury refuses to indict, the protective role of the grand jury is undermined. In Florida, therefore, if there is any merit to the argument that the grand jury protects the accused, it would only apply in capital cases. Only in capital cases would the prosecutors be unable to prosecute by information if the grand jury refused to indict.⁵⁰

No state has completely abolished the grand jury indictment process;⁵¹ however, many states have receded from the federal requirement

43. 110 U.S. 516 (1884). See text accompanying note 4 *supra*.

44. 217 So. 2d at 109.

45. 168 So. 2d 137 (Fla. 1964).

46. 187 So. 392 (Fla. 1939).

47. *Id.* at 399.

48. State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972); State *ex rel.* Latour v. Stone, 185 So. 729 (Fla. 1939).

49. See note 20 and accompanying text *supra*.

50. FLA. CONST. art. I, § 15(a).

51. See Appendix.

of indictments for all felonies. At this writing, twenty-four states allow all crimes, including felonies, to be prosecuted by either indictment or information.⁵² Six other states allow all but major felonies (usually capital or life imprisonment crimes) to be prosecuted by either indictment or information.⁵³ The remaining states require felonies to be prosecuted by indictment,⁵⁴ although several of these provide that the accused may waive his right to indictment.⁵⁵

It appears that there may be a trend among the states toward the use of the information for initiating criminal prosecutions. In a 1966 article, the author noted that twenty-four states required indictments for felony prosecutions, while twenty-two allowed prosecution of all crimes to be initiated by either indictment or information.⁵⁶ A recent review of the various state provisions indicates that now only twenty states require indictments for all felonies, and twenty-four states allow all crimes to be prosecuted by either indictment or information.⁵⁷

In conclusion, it appears that there is no legitimate reason for perpetuating the grand jury indictment process in Florida. The asserted rationale for maintaining the grand jury simply do not, in reality, exist. The grand jury does not protect the individual from the overzealous prosecutor, because the grand jury is dominated by and dependent upon the state attorney. Instead of acting in its historic role as a buffer between the individual and the state, the grand jury all too often acts as a shield for the prosecutor, allowing him to camouflage his

52. ARIZ. CONST. art. II, § 30; ARK. CONST. art. II, § 8, as amended by amend. 21 § 1; CAL. CONST. art. I, § 14; COLO. REV. STAT. ANN. § 16-5-10 (1973); IDAHO CONST. art. I, § 8; ILL. ANN. STAT. ch. 38, §§ 111-112 (Smith-Hurd Supp. 1977); IND. CODE ANN. § 35-3.1-1-1 (Burns 1975); IOWA CODE ANN. § 769.1 (West Supp. 1977); MASS. GEN. LAWS ANN. ch. 263, § 4 (West Supp. 1977); ME. CONST. art. I, § 17; MICH. COMP. LAWS ANN. § 767.1 (1968); MONT. CONST. art. II, § 20; NEB. REV. STAT. § 29-1601 (1975); NEV. CONST. art. I, § 8; N.M. CONST. art. II, § 14; N.D. RULE CRIM. P. 7(a); OKLA. CONST. art. 2, § 17; S.C. CONST. art. I, § 11; S.D. CONST. art. VI, § 10; UTAH CONST. art. I, § 13; VT. R. CRIM. P. 7(a); WASH. CONST. art. I, § 25; WISC. STAT. ANN. § 967.05(3) (West 1971); WYO. STAT. ANN. § 7-118 (1959).

53. CONN. CONST. art. I, § 8; FLA. CONST. art. I, § 15(a); LA. CONST. art. I, § 15; MD. CODE ANN. § 23-592; MINN. R. CRIM. P. 17.01 (1977); R.I. CONST. amend. 40, § 1.

54. ALA. CONST. art. I, § 8, and amend. 37; ALAS. CONST. art. I, § 8; DEL. CONST. art. I, § 8; GA. CODE ANN. § 27-704; HAWAII CONST. art. I, § 8; KAN. STAT. ANN. § 22-23-03 (1974); KY. CONST. Bill of Rights, § 12; ME. CONST. art. I, § 7; MISS. CONST. art. III, § 27; N.H. REV. STAT. ANN. § 601:1 (1974); N.J. CONST. art. I, § 8; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 22; OHIO CONST. art. I, § 10; ORE. CONST. art. VII (amended), § 5; PA. CONST. art. I, § 10; TENN. CONST. art. I, § 14; TEX. CONST. art. I, § 10; VA. CODE ANN. § 19.2-217 (1975); W. VA. CODE ANN. § 62-2-1 (1977).

55. See, e.g., ALAS. CONST. art. I, § 8; N.H. REV. STAT. ANN. § 601:1 (1974); N.C. CONST. art. I, § 22; VA. CODE ANN. § 19.2-217 (1975).

56. Calkins, *supra* note 17, at 424 n.6.

57. See notes 34-35 *supra*. For an examination of the various state provisions, see Appendix I.

own role in certain prosecutions. Finally, it should be reiterated that whatever the merits of closed grand jury proceedings, secrecy of accusatory proceedings can just as easily be guaranteed through the information process.

The Florida grand jury system is unnecessary and should be abolished. As a substitute provision, the Florida Constitution should provide that all criminal prosecutions are to be initiated by information filed by the state attorney. Admittedly, such a proposal would be a novel step; the fact that no other state has completely abolished the grand jury indicates that the grand jury idea dies hard. Nevertheless, it seems that grand jury abolition is a step which would not impair the criminal justice process in Florida.

IV. PROTECTION OF RIGHTS UPON RETENTION OF THE GRAND JURY SYSTEM

The grand jury system is no longer of much value and should be abolished. If Florida retains the grand jury system, however, certain procedural safeguards should be provided to protect the rights of those who are called to testify before a grand jury. While many reforms could be suggested, this note will deal with two major reform proposals that have recently received much attention.

A grand jury reform package was approved by the American Bar Association at its annual convention in August, 1977.⁵⁸ Two of the twenty-seven parts of the ABA proposal were especially controversial. The first dealt with a witness' right to have counsel present with him in the grand jury room when he testifies.⁵⁹ The second proposed transactional immunity for those witnesses who are compelled to testify before the grand jury.⁶⁰ This part of the note will examine and evaluate only the counsel and immunity questions—two of the most significant and controversial grand jury reform subjects. But that is not to suggest that these proposals should be considered to the exclusion of other grand jury reforms. Many other meritorious grand jury reform proposals exist and are currently being debated.⁶¹

A. A Witness' Right to Counsel Before a Grand Jury

1. Under the Federal Constitution. The United States Supreme

58. *ABA Annual Meeting*, 46 U.S.L.W. 2089 (August 23, 1977).

59. See *Report to the ABA House of Delegates, Section of Criminal Justice, Recommendation Number 1*, approved August 9, 1977.

60. See *id.*, Recommendation Number 17.

61. See generally *Report to the ABA House of Delegates, Section of Criminal Justice*, approved August 9, 1977.

Court has never recognized a witness' federal constitutional right to have counsel present inside the grand jury room. In fact, it has indicated that a grand jury witness has no such right.⁶² Theoretically, however, at least two constitutional avenues could lead to a right to counsel before grand juries.

The first approach concerns the right to counsel guaranteed by the sixth amendment of the United States Constitution. As will be developed below, the Supreme Court has historically interpreted the sixth amendment right to counsel as attaching at any level of the criminal proceeding that is a "critical stage."⁶³ Arguably, a grand jury proceeding, especially when the witness is the putative or "target" defendant, is a "critical stage." The Supreme Court has rejected this argument, however, and recently held that the sixth amendment right to counsel only attaches "at or after the time that adversary judicial proceedings have been initiated . . ."⁶⁴

The alternative approach to a right to counsel before a grand jury under the federal constitution involves the fifth amendment right against self-incrimination. In *Miranda v. Arizona*,⁶⁵ the Supreme Court determined that under the fifth amendment, an accused has a right to have counsel present whenever he is subjected to a "custodial interrogation." The *Miranda* rationale was that for an accused to intelligently assert his self-incrimination privilege, he needed the assistance of counsel. Logically, this rationale could be extended to include witnesses testifying before grand juries, especially when they are "target" defendants.

This section of the note will examine these two federal constitutional arguments. It will then look at the limited extent to which the federal courts have allowed a grand jury witness to consult with counsel.

Since the adoption of the fifth amendment, its grand jury guarantee has been construed to mean that no federal felony can be charged without an indictment.⁶⁶ But the fifth amendment right to grand jury indictment is one of the guarantees in the Bill of Rights that has not been incorporated and made binding upon the states.⁶⁷ The states are therefore free to prosecute felonies without a grand jury indictment.

62. *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *Anonymous v. Baker*, 360 U.S. 287 (1959); see *In re Groban*, 352 U.S. 330 (1957).

63. See notes 69-75 and accompanying text *infra*.

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

65. 384 U.S. 436 (1966).

66. *Harvin v. United States*, 445 F. 2d 675 (D.C. Cir. 1971); see FED. R. CRIM. P. 7(a).

67. *Peters v. Kiff*, 407 U.S. 493, 496 (1972); *Hurtado v. California*, 110 U.S. 516 (1884).

The sixth amendment right to counsel provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." Unlike the right to grand jury indictment, the sixth amendment right to counsel has been incorporated by the fourteenth amendment and is binding on the states.⁶⁸ For many years, the United States Supreme Court has debated the appropriate scope of the sixth amendment right to counsel. *Powell v. Alabama*⁶⁹ was one of its earliest and broadest statements on the subject. There the Court said that a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him."⁷⁰ Then, during the 1960's and the years of the Warren Court, the Supreme Court began to view the sixth amendment right to counsel question in terms of "critical stages." If a certain level of the criminal process was found to be a "critical stage," then the constitutional right to counsel attached. Thus, the Supreme Court found that arraignment,⁷¹ plea and sentencing proceedings,⁷² trial,⁷³ lineups,⁷⁴ and preliminary hearings⁷⁵ were all "critical stages" that required the presence of counsel. At the same time, the Court in *Escobedo v. Illinois*⁷⁶ and *Miranda v. Arizona*,⁷⁷ basing its holdings on the fifth amendment right against self-incrimination, determined that an accused subjected to a "custodial interrogation" had a constitutional right to have counsel present. The assumption was that the accused could not adequately assert and protect his right against self-incrimination unless counsel was present to assist him.

In the wake of these developments, many commentators argued that the channel was clear for recognition of a sixth amendment right to counsel inside the grand jury room.⁷⁸ They were immediately forced to explain two other Supreme Court cases which inferred that a

68. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

69. 287 U.S. 45 (1932).

70. *Id.* at 69. Advocating a right to counsel before grand juries, Professor Steele made this comment about the *Powell* Court's statement: "If the Court had followed its own rhetoric and actually extended the right to counsel to 'every step in the proceedings against him' this article would not be necessary." Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 Mo. L. REV. 193, 195 (1971).

71. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

72. *White v. Maryland*, 373 U.S. 59 (1963).

73. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

74. *United States v. Wade*, 388 U.S. 218 (1967).

75. *Coleman v. Alabama*, 399 U.S. 1 (1970).

76. 378 U.S. 478 (1964).

77. 384 U.S. 436 (1966).

78. See, e.g., Boudin, *The Federal Grand Jury*, 61 GEO. L. J. 1, 17 (1972); Mesh-besher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189, 193-99 (1966); Steele, *supra* note 70, at 203; Note, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97, 124-25.

witness had no right to counsel inside the grand jury room—*Anonymous v. Baker* and *In re Groban*.⁷⁹ Neither case dealt with the question precisely, however.⁸⁰ In *Groban*, a witness suspected of arson was called to testify before the Fire Marshall as provided by Ohio law. He refused to answer without counsel present and was jailed. Holding five-to-four that *Groban* had no right to counsel, the Court said in dicta:

A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigative bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination.⁸¹

Similarly, *Baker* involved attorneys who were called as witnesses before a special judicial investigatory body inquiring into unethical legal practices. Citing *Groban* as controlling, the Court in another five-to-four decision refused to allow counsel to accompany the witnesses before the investigatory body.⁸²

Besides not dealing specifically with the question of counsel before a grand jury, it appeared to the commentators that *Groban* and *Baker* were outdated. *Groban* and *Baker* both reasoned that the witness could rely on his fifth amendment privilege against self-incrimination. The commentators asserted that *Miranda* had recognized the fragility of the fifth amendment and the often real need for counsel to be present to help a witness preserve his rights.⁸³ Indeed, such a proposition was recently approved by the Supreme Court:

The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective

79. *Anonymous v. Baker*, 360 U.S. 287 (1959); *In re Groban*, 352 U.S. 330 (1957).

80. As Justice Brennan stated in his concurring opinion in *United States v. Mandujano*, 425 U.S. 564, 603 (1976), "neither *Groban* nor any other case in this Court has squarely presented the question" of whether "there is any constitutional right of a witness to be represented by counsel when testifying before a grand jury." (footnote omitted).

81. 352 U.S. at 333 (footnotes omitted).

82. 360 U.S. at 295.

83. See, e.g., GRAND JURY DEFENSE OFFICE OF THE NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES 147 (1976) [hereinafter cited as FEDERAL GRAND JURIES].

opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege.⁸⁴

Secondly, the commentators argued that grand jury proceedings had become a "critical stage."⁸⁵ They reckoned that the grand jury was no longer the independent and impartial body that it had been in England. Rather, they asserted, the modern grand jury had become just another tool of the prosecutor. The grand jury was likened to a "rubber stamp" which gave formal approval to the charges sought by the prosecutor.⁸⁶ It is not surprising that the critics viewed the grand jury as a "critical stage," for a grand jury appearance by a witness can be very damning. The grand jury witness, it was argued, needs the legal expertise of counsel to recognize his rights and privileges.⁸⁷

The sixth amendment argument that the grand jury proceeding was a "critical stage" met a quick and certain demise at the hands of the Supreme Court. In *Kirby v. Illinois*,⁸⁸ a case involving a pre-indictment lineup, the Court read the words "criminal prosecution" in the sixth amendment literally. The Court concluded that there was no sixth amendment right to counsel until "at or after the time that adversary judicial proceedings have been initiated."⁸⁹ Although

84. *Maness v. Meyers*, 419 U.S. 449, 466 (1975) (footnote omitted).

85. See, e.g., Steele, *supra* note 70; Meshbesher, *supra* note 78.

86. [The grand jury's] decision to indict or not is usually a rubber stamp of what the prosecutor has already determined

It has been suggested that the grand jury has outlived any usefulness it might have had and should be abandoned completely, leaving the sole determination of a criminal charge up to the prosecutor who can act more efficiently and with more judicial restraint. Whatever its merits, attorneys are faced with the fact that the grand jury system is operating today and it appears that few, if any, present practitioners will see its disappearance.

Meshbesher, *supra* note 78, at 189 (footnotes omitted). See text accompanying notes 30-50 *supra*.

87. See generally FEDERAL GRAND JURIES, *supra* note 83, at 145-46.

88. 406 U.S. 682 (1972).

89. *Id.* at 688. *Kirby's* narrow holding was that prior to the initiation of "adversary judicial proceedings," a person subjected to a pre-indictment lineup for identification purposes had no right to appointed counsel under the sixth amendment. There was no indication from the Court that *Kirby's* counsel would have been denied access to the lineup if he had been privately retained. Arguably, then, a person who can afford counsel is not to be denied it simply because the proceeding in which he is involved does not reach the *Kirby* threshold. For example, a person called to testify before a legislative hearing may be accompanied by his private counsel, even though the hearing is not an "adversary judicial proceeding." It should be noted that a procedure allowing witnesses before a grand jury to be accompanied by counsel only if they could afford it would likely be challenged on equal protection grounds. The inquiry then would be whether the right to counsel before a grand jury was so fundamental that to base it on the ability to pay would be a denial of equal protection.

Consider also the recent case of *Brewer v. Williams*, 97 S. Ct. 1232 (1977), which held that the defendant's right to counsel attached after arraignment—a procedure under

there is still some debate as to what constitutes an "adversary judicial proceeding," it seems fairly certain that a grand jury proceeding does not fall within the classification.

The *Miranda* fifth amendment argument that counsel is presumed necessary to protect against involuntary self-incrimination is especially relevant when the person being called to testify before the grand jury is a "target" or "putative" defendant. A "target" defendant is "a person who is not an ordinary witness but rather is a prime suspect of the crime being investigated."⁹⁰ Since the "target" defendant is likely to be indicted by the grand jury, it would seem logical that his rights should be closely protected. Numerous issues arise, including the "target" defendant's right to counsel before the grand jury,⁹¹ and whether he is entitled to *Miranda* warnings before he testifies.

The answers to these questions came from the Supreme Court in 1976 in *United States v. Mandujano*.⁹² The case held that the fifth amendment did not require the suppression of statements made before a grand jury by a "target" defendant who had not been given *Miranda* warnings. However, a plurality of the Court also dealt with the right to counsel before a grand jury. It said:

[Mandujano] was also informed that if he desired he could have

Iowa law which is very similar to Florida's "first appearance." Arguably, then, the sixth amendment right to counsel in Florida attaches at first appearance. Therefore, at any interrogation following first appearance—including questioning before a grand jury—the defendant would have a right to have counsel present. Note that in the cases denying grand jury counsel, the witness had not yet been placed under arrest.

90. Note, *Juries and Jurors: The Right to Counsel in the Oklahoma Grand Jury*, 29 OKLA. L. REV. 967, 972 (1976) (footnote omitted).

91. In defining what it meant by the words "critical stage," the *Escobedo* Court said that it could be when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. . . ." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

92. 425 U.S. 564 (1976), *rev'g* 496 F.2d 1050 (5th Cir. 1974). The Court's *Mandujano* holding has been further strengthened by two recent cases, *United States v. Wong*, 97 S. Ct. 1823 (1977), and *United States v. Washington*, 97 S. Ct. 1814 (1977). In *Wong*, the defendant, a Chinese immigrant with a limited knowledge of English, was convicted of perjury for false statements made before a grand jury. She argued that she had not understood the prosecutor's warning that she had the right to remain silent. The Court rejected her argument, holding that the defendant was not entitled to have false statements suppressed on the ground that the self-incrimination warnings had not been effective. The fifth amendment, said the Court, does not condone perjury.

In *Washington*, unlike *Mandujano* and *Wong*, the defendant was convicted of the substantive crime about which he voluntarily testified before a grand jury. He was given a series of warnings, including notice of his right to remain silent, but he was not informed that he was a potential defendant. The Court held that the defendant's grand jury testimony was admissible at trial. The Court reserved judgment on whether the warnings given were constitutionally required, holding that in this situation, the warnings actually given dissipated any element of compulsion.

the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play. *Kirby v. Illinois*, 406 U.S. 682 (1972). A witness 'before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel' *In re Groban, supra* at 333. Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room. Fed. Rule Crim. Proc. 6(d).⁹³

Thus, the plurality was unwilling to provide for counsel before a grand jury, even when the witness was a "target" defendant.

Justice Brennan disagreed with the plurality on the issue of counsel before the grand jury. He felt that "the privilege against compulsory self-incrimination is inextricably involved in this case since a putative defendant is called and interrogated before a grand jury."⁹⁴ He discredited the plurality's reliance on *Groban*, saying that *Miranda* and *Escobedo*, which recognize the "'coextensive[ness]' . . . of the right to counsel and the privilege against compulsory self-incrimination, . . . have led many to question the continuing vitality of such older dicta."⁹⁵ Justice Brennan also dissented from the "implication in the plurality opinion" that the right to have counsel outside the grand jury room was not a constitutional right, and therefore could only be enjoyed by those able to afford a lawyer.⁹⁶ Justices Stewart and

93. *Id.* at 581 (footnote omitted) (Burger, White, Powell, and Rehnquist, JJ.). The fifth amendment argument for providing counsel at grand juries is based on the *Miranda* assumption that a witness cannot protect his right against self-incrimination without the assistance of counsel. This fifth amendment approach needs to be viewed in light of the developing law on grants of immunity.

In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that a "use and derivative use" immunity standard is coextensive with the fifth amendment. Under the *Miranda* rationale, counsel is needed to protect his client's fifth amendment rights. If, however, the witness were granted immunity, his fifth amendment rights would no longer need protection. In other words, since the immunity grant is coextensive with the fifth amendment, it supplants the witness' fifth amendment rights. Theoretically, at least, the witness no longer has self-incrimination problems. Therefore, once immunity is granted, the rationale for supplying counsel to protect fifth amendment rights would disappear. At least one state has adopted such an approach by statute. See note 123 and accompanying text *infra*.

94. 425 U.S. at 602-03. (Brennan and Marshall, JJ., concurring).

95. *Id.* at 603 (footnotes and citations omitted).

96. *Id.* at 608. A key distinction should be noted between a grand jury witness' right to retain counsel to represent him before a grand jury and that witness' right to counsel before a grand jury. The former would only allow grand jury counsel for those who could afford to hire an attorney. The latter would allow counsel for all those called to testify before a grand jury, even if they were indigent; it could, in effect, be similar to the sixth amendment right to counsel.

Blackmun concurred in the result only, finding it unnecessary to address those issues dealt with by the plurality.

In conclusion, the cases provide very little support under the federal constitution for allowing counsel to be present with the witness in the grand jury room.⁹⁷ A plurality of the Court has rejected the notion that the grand jury proceeding is a critical stage requiring counsel under the sixth amendment. And in *Mandujano*, the Court refused to recognize a right to counsel, even though the witness was a target defendant and the likelihood of self-incrimination was very real.

Although there is virtually no support for allowing counsel to go into the grand jury room with the witness, the majority of the federal and state courts allow the witness to leave the grand jury room and consult with his attorney after each question.⁹⁸ Representative of this position is the view of the Second Circuit Court of Appeals announced in *United States v. Capaldo*.⁹⁹ After holding that Capaldo could not have his attorney in the grand jury room with him, the court said:

Capaldo was told, however, that he had a right to counsel and that he would be permitted to consult with counsel immediately outside the grand jury room whenever he desired. . . . We think that the rule under which appellant was free to leave the grand jury room at any time to consult with counsel is a reasonable and workable accommodation of the traditional investigatory role of the grand jury, preserved in the Fifth Amendment, and the self-incrimination and right to counsel provisions of the Fifth and Sixth Amendments.¹⁰⁰

There appear to be no federal cases that refuse to allow the witness to leave the room to consult with his attorney. But one court has allowed limitations on the frequency of consultation. In *In re*

Note that in both *Groban* and *Baker*, the witnesses already had privately retained counsel. Their only argument was that this counsel should have been allowed to accompany them before the investigatory body. See *United States v. Mandujano*, 425 U.S. 564, 608 (1976) (Brennan, J., concurring).

97. *But see* *Chandler v. Garrison*, 286 F. Supp. 191 (E.D. La. 1968) (special circumstances entitled defendant to counsel before grand jury), *aff'd*, 412 F.2d 857 (5th Cir. 1969); *Sheridan v. Garrison*, 273 F. Supp. 673 (E.D. La. 1967) (criminal proceedings had been commenced so defendant had the right to counsel before the grand jury), *rev'd on other grounds*, 415 F.2d 699 (5th Cir. 1969).

98. FEDERAL GRAND JURIES, *supra* note 83, at 144.

99. 402 F.2d 821 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969).

100. *Id.* at 824; *accord*, *United States v. Duncan*, 456 F.2d 1401 (9th Cir. 1972); *United States v. George*, 444 F.2d 310 (6th Cir. 1971); *United States v. Weinberg*, 439 F.2d 743 (9th Cir. 1971); *United States v. Corallo*, 413 F.2d 1306 (2d Cir. 1969); *United States v. De Sapio*, 299 F. Supp. 436 (S.D.N.Y. 1969); *Steele*, *supra* note 68, at 203 and cases cited therein. See also *United States v. Mandujano*, 425 U.S. 564, 584 (1976) (Brennan, J., concurring).

Tierney,¹⁰¹ the Fifth Circuit approved of a grand jury procedure whereby the foreman allowed the witness to leave the room "usually after two and at no time more than three questions had been propounded."¹⁰² It appears that most courts have not limited the number of times that a witness can leave the grand jury room to consult with counsel.¹⁰³

Thus our federal courts have developed a strange rule concerning the right to counsel before grand juries. It is clear that the courts have not recognized a constitutional right to have counsel present inside the grand jury room. It is equally settled that the witness may walk out of the grand jury room and consult his attorney waiting outside. The attorney can discover everything that the grand jury asks his client. The only limitation is that the information has to come to him secondhand. This cat-and-mouse routine has led one commentator to note that relegating the lawyer to the hallway "is excessively mechanistic, if not altogether absurd."¹⁰⁴

2. *Under Florida Law.* The grand jury is not widely used in Florida since the Florida Constitution provides that only capital crimes need to be charged by grand jury indictments.¹⁰⁵ All other felonies and all misdemeanors may be charged by information. Section 905.17, Florida Statutes, identifies those persons who may be present during the grand jury session.¹⁰⁶ The witness' attorney is not specifically authorized to attend the session; therefore, the statutory construction doctrine of *expressio unius est exclusio alterius* would preclude his presence.¹⁰⁷

101. 465 F.2d 806 (5th Cir. 1972).

102. *Id.* at 810.

103. See FEDERAL GRAND JURIES, *supra* note 83, at 149. See also cases cited at note 100 *supra*.

104. Steele, *supra* note 70, at 203.

105. FLA. CONST. art. I, § 15(a).

106. FLA. STAT. § 905.17 (1975) provides:

(1) No person shall be present at the sessions of the grand jury except the witness under examination, the state attorney and his assistant state attorneys, designated assistants as provided for in s. 27.18, the court reporter or stenographer, and the interpreter. The stenographic records, notes, and transcriptions made by the court reporter or stenographer shall be filed with the clerk who shall keep them in a sealed container not subject to public inspection. The notes, records, and transcriptions shall be released by the clerk only on request by a grand jury for use by the grand jury or on order of the court pursuant to Sec. 905.27.

(2) No person shall be present while the grand jurors are deliberating or voting.

(3) An intentional violation of the provisions of this section shall constitute indirect criminal contempt of court.

107. It is, of course, a general principal of statutory construction that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*.

Probably because the grand jury is used infrequently in the Florida criminal process, there is little case law dealing with a witness' right to counsel before a State grand jury. No cases were found dealing with the issue under the right to counsel provision in the Florida Constitution.¹⁰⁸ The most recent Florida case dealing with the right to counsel before a grand jury is a 1968 case, *Martin v. State*.¹⁰⁹ In *Martin*, the witness had been called before the grand jury and given transactional immunity. Nevertheless, he refused to testify and was jailed. On appeal, Martin contended that he should have been allowed to step outside the grand jury room and consult with his counsel. Disagreeing with this contention, the court said:

[Martin] says: "We do not mean to imply that he has the right to have his counsel present in the Grand Jury room; nevertheless, the accepted practice is to permit the witness to consult with his attorney who may be present outside the Grand Jury room." He argues that the witness must be afforded an opportunity to "step outside the grand jury room for such consultations" whenever he chooses.

There is respected authority for the proposition that such is not yet the practice in Florida. See *State ex rel. Lowe v. Nelson*, Fla. App. 1967, 202 So. 2d 232.

It takes but little imagination to realize that when such procedure does become the "accepted practice" grand jury investigations will be impeded and hindered to the point that they will be reduced to a mockery and an object of ridicule.¹¹⁰

Thus at least one Florida court has declined to follow the majority rule, let alone expand it to allow counsel in the grand jury room.

The court in *Martin* relied on a First District Court of Appeal case, *State ex rel. Lowe v. Nelson*.¹¹¹ In that case, the court held that a witness called before a grand jury was entitled to the warnings or protections of *Miranda*. *Lowe* in turn relied on *Gordon v. Gerstein*,¹¹² a 1966 Florida Supreme Court case. *Gordon* involved a witness, subpoenaed to testify before the state attorney under section 27.04, Florida Statutes,¹¹³ who refused to testify when he was not allowed to have

Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.

Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (citation omitted).

108. FLA. CONST. art. I, § 16.

109. 208 So. 2d 630 (Fla. 4th Dist. Ct. App.), cert. denied, 214 So. 2d 623 (Fla. 1968).

110. *Id.* at 632-33.

111. 202 So. 2d 232 (Fla. 1st Dist. Ct. App. 1967).

112. 189 So. 2d 873 (Fla. 1966).

113. FLA. STAT. § 27.04 (1975) provides:

his counsel present. The *Gordon* court recognized that this was not the same as a grand jury, but reasoned by analogy to the grand jury. It declined to follow Mr. Justice Black's dissent in *Anonymous v. Baker*,¹¹⁴ and opted instead for the view that counsel need not be furnished for a witness before a grand jury.¹¹⁵

The lack of Florida case law on the issue of grand jury counsel is probably attributable to two reasons. First, Florida grand juries probably do not call many "target" defendants to testify because of Florida's broad transactional immunity statute; state attorneys want to avoid the possibility of inadvertent grants of immunity.¹¹⁶ Most of the witnesses before the grand jury are police and others unconcerned with having counsel present. Second, it is likely that notwithstanding the *Martin* case, Florida grand juries as a matter of practice allow witnesses to leave and consult an attorney at their request.¹¹⁷ If

The state attorney shall have summoned all witnesses required on behalf of the state; and he is allowed the process of his court to summon witnesses from throughout the state to appear before him in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated, and he is empowered to administer oaths to all witnesses summoned to testify by the process of his court or who may voluntarily appear before him to testify as to any violation or violations of the criminal law.

114. 360 U.S. 287 (1959).

115. Justice Thomas stated for the court:

What a spectacle would evolve if all the witnesses before all the grand juries and all the prosecutors in the State could plant their feet and defy inquisition into criminal violations unless each had an attorney at his elbow. That would indeed be a leap from the sublime protection under the Constitution to the ridiculous obstruction of justice. We don't view the administration of justice as a means only of coddling prisoners and securing to lawbreakers escape from paying for their misdeeds but rather as a system to winnow the guilty and innocent to make freedom as well as guilt more sure.

189 So. 2d at 875. Admittedly, the *Gordon* decision was delivered before *Miranda*. Sixteen days after *Miranda*, the court denied a petition for rehearing. *Id.* at 876. See also note 96 *supra*.

116. Interview with State Attorney Harry Morrison, January 6, 1978. Mr. Morrison indicated that the state rarely, if ever, called a putative defendant to testify before the grand jury unless that person agreed to waive his immunity.

117. Consider, for example, the excerpt of the Hillsborough County Grand Jury proceedings contained in *Tsavaris v. Scruggs*, No. 48,637 (Fla. Mar. 17, 1977). State Attorney Salcines, in advising the witness Tsavaris of his rights before the grand jury, stated:

Mr. Salcines: This is Dr. Louis Tsavaris, who has been subpoenaed to appear before you [H]is attorney, Mr. Larry Byrd, . . . is standing right outside the door.

Doctor, should you, at any time, wish to consult with your attorney you may do that.

. . . .

Q. And [do you understand] that you have a right to be represented by an attorney, and to have him present outside of the Grand Jury Room to confer

witnesses were denied this right as in *Martin*, it seems certain that some would have appealed.

Perhaps *Martin* is distinguishable from most right to counsel before grand jury cases because in that case, the witness had already been granted immunity. At least one authority has pointed out many reasons why a witness needs to be able to consult with counsel, even after immunity is granted.¹¹⁸

3. *Various State Options and the ABA Proposal.* Of the fifty states, forty follow the majority rule and refuse to allow a witness before a grand jury to have counsel present with him.¹¹⁹ The ten states that allow the witness to have counsel with him in the grand jury room are Arizona, Illinois, Kansas, Michigan, Minnesota, Oklahoma, South Dakota, Utah, Virginia, and Washington.¹²⁰ They provide for this right by statute or by a rule of criminal procedure. No state provides for counsel before a grand jury by constitutional provision.

There is a great deal of variance among the ten state provisions which allow a grand jury witness to be accompanied by counsel. Virginia, for example, allows the witness to have counsel present in a special session of the grand jury, but not a regular one.¹²¹ Oklahoma,¹²² Michigan,¹²³ Utah,¹²⁴ and South Dakota¹²⁵ provide that any witness called to testify before a grand jury may have an attorney accompany him. Arizona¹²⁶ and Illinois,¹²⁷ on the other hand, allow counsel to be

with before you answer any questions put to you . . . ?

. . . .

Q. Any question that is asked that you wish to consult with your attorney, the interrogation would stop immediately, and we will give you a reasonable time to consult with your attorney. Do you understand that, Doctor?

118. See note 83 *supra*.

119. *Report to the ABA House of Delegates, Section of Criminal Justice, Recommendation Number 1*, approved August 9, 1977, at 6. Actually, the report listed nine states that permitted counsel. The Utah provision brings the total to ten. UTAH CODE ANN. § 77-19-3 (Supp. 1974).

120. *Report, supra* note 119.

121. VA. CODE § 19.2-209 (1975). In Virginia, special grand juries may only "investigate and make report thereon concerning any condition which tends to promote criminal activity in the community or which indicates misfeasance of governmental authority by government agencies or the officials thereof." *Id.* § 19.2-191(2). Regular grand juries can do likewise and may also consider bills of indictment prepared by the state attorney. *Id.* § 19.2-191.

122. OKLA. STAT. tit. 22, § 340 (Supp. 1976). Oklahoma allows only "one (1) attorney representing [the] witness." *Id.*

123. MICH. COMP. LAWS ANN. § 767.3 (1975).

124. UTAH CODE ANN. § 77-19-3 (Supp. 1974). The Utah statute limits the evidence receivable by the grand jury to "none but legal evidence." *Id.*

125. S.D. COMPILED LAWS ANN. § 23-30-7 (Supp. 1976).

126. ARIZ. R. CRIM. P. 12.6 (1970).

127. ILL. ANN. STAT. ch. 38, § 112-4(b) (Smith-Hurd) (Supp. 1977).

present only if the witness is under investigation by the grand jury—*i.e.*, a target defendant. Washington's statute¹²⁸ allows counsel to accompany a witness before a grand jury if the witness has not been granted immunity. The Minnesota statute¹²⁹ allows a witness to have counsel present only after he has waived his immunity from self-incrimination. Kansas¹³⁰ provides the broadest protection for the witness. It clearly states that all witnesses before a grand jury have a right to counsel and must be so informed. It also states that if a witness is indigent, counsel must be provided by the state. In each state that allows a witness to have counsel before the grand jury, the role of the attorney is restricted.¹³¹

At its annual meeting this past August, the American Bar Association House of Delegates adopted twenty-five out of twenty-seven proposals for grand jury reform.¹³² One of the proposals adopted dealt with a witness' right to counsel before a grand jury. The proposal suggests that a witness appearing before a grand jury "shall have the right to be accompanied by counsel in his or her appearance before the grand jury."¹³³ Like the state provisions listed above, the ABA proposal contemplates the attorney's role before the grand jury as that of passive advisor to the witness. He may not address the grand jurors or ask questions, and he may be removed from the room for "conduct inconsistent with this principle."¹³⁴ Dubbing the resolution "The Lawyers Relief Act," Attorney General Griffin Bell opposed the change.¹³⁵ Nevertheless, the proposal passed 186-93.¹³⁶

4. Conclusions.

128. WASH. REV. CODE ANN. § 10.27.120 (Supp. 1976).

129. MINN. R. CRIM. P. 18.04 (1964).

130. KAN. STAT. ANN. § 22-3009 (1974).

131. A common restriction is the limitation of the attorney's role to merely giving advice to his client; he is not allowed to ask questions or to cross-examine. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 112-4(b).

132. ABA Annual Meeting, 46 U.S.L.W. 2089 (August 23, 1977); *Report to the ABA House of Delegates, Section of Criminal Justice*, Recommendation Number 1, approved August 9, 1977.

133. *Report to the ABA House of Delegates, Section of Criminal Justice*, Recommendation Number 1, approved August 9, 1977.

It is interesting to note that the ABA Criminal Justice Section report on its grand jury proposal does not mention providing counsel for indigent witnesses before the grand jury. Under the *Kirby* rationale, counsel for indigent witnesses before a grand jury would not appear to be mandated by the sixth amendment. However, counsel for indigents would probably be mandated by the equal protection clause. *See* note 89 *supra*.

134. *Report to the ABA House of Delegates, Section of Criminal Justice*, Recommendation Number 1, approved August 9, 1977.

135. 45 U.S.L.W. 2089 (August 23, 1977).

136. *Id.* at 2090.

No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure.¹³⁷

Despite powerful statements like the one above, the vast majority of courts have refused to allow a witness before a grand jury to be represented by counsel in the grand jury room. As with other cases that have upheld the sanctity of the grand jury,¹³⁸ it appears that the courts' reluctance to extend the right of counsel to grand juries is largely based on the historical secrecy of the institution. Professor Steele has written:

We have reached a phase where we grant a suspect right to counsel if he is placed in a line-up or interrogated by a police department, but we deny a suspect counsel if he is paraded before, or interrogated by, a grand jury. The justification for that apparent incongruity is historical precedent. And yet, most of the grand jury's historical function has withered from disuse. Given the cadre of trained police available today, there is practically no need for investigation by a grand jury.¹³⁹

One argument often raised by proponents of the majority rule is that the presence of an attorney for the witness would turn the grand jury into an adversary proceeding and cause delay. Concerning delay, it is hard to imagine a more dilatory procedure than the present method of allowing the witness to leave the room after each question to consult with his attorney. A carefully drawn provision allowing the attorney to take the role of a passive advisor would almost certainly speed up the grand jury process. Of course, if the attorney were allowed into the grand jury room, he could hear every question asked of the witness. But under the present majority rule, he still can hear every question since the witness is allowed to leave the room to consult him. If the witness' lawyer is not allowed to do anything but advise, it is difficult to see how the proceeding could be viewed as adversarial. If the attorney overstepped these reasonable restrictions, he could be barred from the room. One commentator has noted that: "Presence

137. *Powell v. United States*, 226 F.2d 269, 274 (D.C. Cir. 1955) (footnote omitted).

138. *See, e.g., United States v. Calandra*, 414 U.S. 538 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Costello v. United States*, 350 U.S. 359 (1956).

139. Steele, *supra* note 70, at 214. *See generally* note 86 *supra*.

of a lawyer at a hearing does not necessarily turn it into a contentious or adversary proceeding, anymore than presence of a physician at an execution turns it into a medical treatment."¹⁴⁰

B. Use and Transactional Immunity

1. *Immunity and the Federal Constitution.* One obvious problem with the privilege against self-incrimination is that it hampers the detection of crime. A witness could assert the privilege, remain silent, and thus thwart the investigative process. Not surprisingly, England and the United States began to develop ways to avoid this impact of the privilege. The primary method chosen was the grant of immunity. The idea behind the immunity statutes was simple: a reluctant witness would be compelled to testify, and, in return, the state would grant him some degree of immunity from prosecution for the crime about which he testified.

Immunity statutes generally fall into one of three categories. Under a "use" immunity statute, only the subsequent use of the witness' compelled testimony is prohibited.¹⁴¹ "Use and derivative use" immunity statutes prohibit the subsequent use of the witness' compelled testimony as well as any evidentiary "fruits" that were derived from that testimony.¹⁴² "Transactional" immunity statutes prohibit the prosecution of the witness for any crime about which he was compelled to testify.¹⁴³ Use immunity is the narrowest protection for the witness, for

140. Steele, *supra* note 70, at 204.

141. An example of a use immunity statute is ch. 11, 12 Stat. 333 (1862):

[T]he testimony of a witness examined and testifying before either House of Congress . . . shall not be used as evidence in any criminal proceeding against such witness in any court of justice: *Provided, however,* [t]hat no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect such witness from any criminal proceeding as aforesaid

This act was passed in an attempt to uncover corruption then existing in the Congress. Interestingly, the original immunity law passed for the same purpose in 1857 was a broader transactional immunity statute. It was narrowed to the use immunity statute above in 1862 by members of Congress who were "[r]eccoiling from the immunity 'baths' that enabled corrupt rascals to escape from criminal liability . . ." L. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 174-75* (1974).

142. The current federal immunity statute, 18 U.S.C. § 6002 (1970), is representative: Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply . . . but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in a criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

143. An example of a transactional immunity statute is ch. 83, 27 Stat. 443 (1893), which provides in relevant part:

it only prohibits the use of his actual testimony in a subsequent prosecution. Transactional immunity is the broadest. The current federal immunity statute is the use and derivative use type.¹⁴⁴ Presently, Florida's immunity statute grants the broader transactional immunity.¹⁴⁵

For over eighty years, the United States Supreme Court has struggled with which form of immunity (if any) meets the constitutional requirements of the fifth amendment. In 1892, the Court in *Counselman v. Hitchcock*¹⁴⁶ unanimously struck down a federal statute which compelled testimony before the ICC in exchange for use immunity only.¹⁴⁷ The Court said that the statute in question was not co-extensive with the protections of the fifth amendment. Using very broad language, the Court concluded:

We are clearly of [the] opinion that no statute which leaves the party or witness subject to prosecution after he answers the crinating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. *In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.*¹⁴⁸

The Court's language clearly indicated that the only type of immunity that it would consider consonant with the fifth amendment was transactional immunity.

[N]o person shall be excused from attending and testifying . . . for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify

144. 18 U.S.C. § 6002 (1970).

145. FLA. STAT. § 914.04 (1975) provides in relevant part:

No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying . . . upon the ground or for the reason that the testimony or evidence . . . required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

146. 142 U.S. 547 (1892).

147. The statute, ch. 13, 15 Stat. 37 (1868), provided in part:

[N]o answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness . . . shall be given in evidence, or in any manner used against such party or witness

148. 142 U.S. at 585-86 (emphasis added).

A few days after the *Counselman* decision, Congress replaced the invalidated law with one granting transactional immunity.¹⁴⁹ This statute was challenged four years later in *Brown v. Walker*.¹⁵⁰ In a five-to-four decision, the Court upheld the new immunity statute. The Court read the *Counselman* language as saying that complete transactional immunity would be a substitute for the fifth amendment protection. The fifth amendment's purpose, said the Court, was to protect a witness compelled to give testimony from future criminal prosecution as a result of his statements.¹⁵¹ The statute in question served this purpose.

The *Brown* dissenters took an absolutist position, which is exemplified by the first paragraph of Justice Shiras' dissent:

It is too obvious to require argument that, when the people of the United States, in the Fifth Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress.¹⁵²

The dissenters were of the opinion that no immunity grant could substitute for the protections of the fifth amendment. They also argued that the fifth amendment was supposed to protect one against public infamy in addition to self-incrimination. Since *Brown*, the absolutist argument has been raised periodically, but it has never commanded a majority of the Court.¹⁵³

The Supreme Court reaffirmed *Brown* in *Ullman v. United States*.¹⁵⁴ Ullman was subpoenaed to testify about Communist Party activities. When he refused to testify, he was granted transactional immunity under the Immunity Act of 1954.¹⁵⁵ Ullman argued that his testimony would cause him to suffer great losses such as his job, labor union membership, and passport eligibility, and would cause him "general public opprobrium."¹⁵⁶ The Court rejected his argument:

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testi-

149. Ch. 83, 27 Stat. 443 (1893). See note 143 *supra*.

150. 161 U.S. 591 (1896).

151. *Id.* at 605-06.

152. *Id.* at 610.

153. See, e.g., *Ullman v. United States*, 350 U.S. 422 (1956) (Douglas & Black, J.J., *dissenting*).

154. 350 U.S. 422 (1956).

155. Ch. 769, § 1, 68 Stat. 745 (1954), *repealed* by 18 U.S.C. § 6002 (1970).

156. 350 U.S. at 430.

mony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.¹⁵⁷

Justice Frankfurter, for the *Ullman* Court, concluded:

[T]he Court's holding in *Brown v. Walker* has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court, in opinions written, among others, by Holmes and Brandeis, JJ. . . . The 1893 statute has become part of our constitutional fabric and has been included "in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government."¹⁵⁸

The Court's language in *Ullman* was clear; transactional immunity was still the relevant constitutional standard.

Although transactional immunity was the accepted constitutional standard, there still existed the problem of inter-jurisdictional immunity. The petitioners in *Brown*, *Ullman*, and other cases argued that although the sovereign asking the questions had granted them full immunity, they might still be subject to prosecution on the basis of their statements in another jurisdiction which had not granted them immunity. This argument was especially valid after the Court, in *United States v. Murdock*,¹⁵⁹ initiated the "two-sovereignties" rule. This rule stated that a person could not refuse to testify on the grounds that his testimony would subject him to prosecution by another sovereign. In *Ullman*, the Court held that Congress could grant federal and state immunity since the immunity statute in question dealt with national security.¹⁶⁰ But in most other situations, witnesses were caught in this inter-jurisdictional dilemma.

In *Murphy v. Waterfront Commission of New York Harbor*,¹⁶¹ the Court sought to solve this pressing problem. The petitioners had been subpoenaed to testify about a work stoppage at the New Jersey piers. New Jersey and New York granted them full immunity. Nevertheless, they still refused to answer, asserting that they might subject themselves to federal prosecution. The Court concluded, after lengthy review, that there had been no historical basis for the "two sovereignties" rule. It rejected *Murdock* and held "that the constitutional privilege against self-incrimination protects a state witness against incrimination under

157. 350 U.S. at 431, quoting *Hale v. Hinkle*, 201 U.S. 43, 67 (1906).

158. *Id.* at 437-38 (citations omitted).

159. 284 U.S. 141 (1931).

160. 350 U.S. at 436.

161. 378 U.S. 52 (1964).

federal as well as state law and a federal witness against incrimination under state as well as federal law."¹⁶² However, the Court went on to state that the proper standard for inter-jurisdictional immunity was use and derivative use immunity, not transactional immunity. It concluded that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the *compelled testimony and its fruits* cannot be used in any manner by federal officials in connection with a criminal prosecution against him."¹⁶³

At least one commentator, speaking of the *Murphy* decision, has said that although it was an exception to the rule in *Brown* and *Counselman*, it was "meant to be an extension of the Fifth Amendment."¹⁶⁴ Nevertheless, *Murphy* marked the first time that the Supreme Court had accepted something less than transactional immunity.¹⁶⁵

Only one year later, the Court in *Albertson v. Subversive Activities Control Board*¹⁶⁶ invalidated a statute which granted the witness only use immunity for his testimony. Citing *Counselman*, the Court held that the offered immunity must be absolute for the entire transaction. Apparently convinced that the inter-jurisdictional immunity cases were of a completely different genre, the Court did not even mention *Murphy* in its opinion. Therefore, it seems clear that even after *Murphy*, the Court felt that complete transactional immunity was still the proper constitutional standard. This standard stood unquestioned until 1970.

In 1970, the Nixon Administration proposed substantial legislation in the crime control area. The result was the Organized Crime Control Act of 1970, Title II of which is the current federal immunity statute.¹⁶⁷ In the seventy-eight years between the *Counselman* decision and the enactment of the present federal immunity statute, Congress had enacted some seventy immunity provisions.¹⁶⁸ With a few exceptions, none of these provided for anything less than transactional immunity. Title II of the 1970 Act replaced virtually all of these with use and derivative use immunity.¹⁶⁹

162. *Id.* at 77-78.

163. *Id.* at 79 (emphasis added).

164. LEVY, *supra* note 141, at 177.

165. See generally Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A.L. REV. 350 (1973) [hereinafter cited as *Scope of Testimonial Immunity*].

166. 382 U.S. 70 (1965).

167. 18 U.S.C. § 6002 (1970). See note 142 *supra*.

168. Note, *Scope of Testimonial Immunity*, *supra* note 165, at 364.

169. See note 142 *supra*. Prior to the 1970 Act, most of the federal investigatory bodies had their own similar, but separate, immunity provisions. The 1970 Act repealed all of the separate provisions and consolidated them into 18 U.S.C. § 6002 (1970).

The current federal immunity statute was challenged and upheld in *Kastigar v. United States*.¹⁷⁰ Speaking for the Court, Mr. Justice Powell said that use and derivative use immunity was consonant with the guarantees of the fifth amendment privilege. He continued:

Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted.¹⁷¹

The Court next attempted to distinguish the prior case law.¹⁷² The Court pointed out that the immunity statutes that were struck down in *Counselman* and *Albertson* were only use immunity statutes, and that this was the first time the Court had considered a use and derivative use statute. The Court dismissed the broad language of *Counselman*, saying that it was "unnecessary to the Court's decision, and cannot be considered binding authority."¹⁷³

The majority latched onto the *Murphy* case, citing it as a precedent approving use and derivative use statutes. The Court realized that here, unlike *Murphy*, the jurisdiction seeking to compel the testimony had granted only use and derivative use immunity. It concluded, however, that if this kind of immunity could supplant the fifth amendment for purposes of the noncompelling jurisdiction, then nothing in the fifth amendment causes the compelling jurisdiction to be held to any higher standard.

[B]oth the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or federal jurisdiction, the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege. . . . This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution re-

170. 406 U.S. 441 (1972). See also *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472 (1972), upholding a New Jersey statute similar to 18 U.S.C. § 6002 (1970).

171. 406 U.S. at 453.

172. Justice Powell's treatment of the strong precedents in favor of transactional immunity has led one commentator to write that "[h]is prestidigitary [sic] manipulation of the precedents left them twisted like pretzels." L. LEVY, *supra* note 141, at 184.

173. 406 U.S. at 455.

quires even against the jurisdiction compelling testimony by granting immunity.¹⁷⁴

Finally, the Court addressed the petitioners' argument that the statute could not be enforced in practice; it would be impossible, petitioners said, to prove how certain leads were obtained. The Court disagreed, holding that the use of investigatory leads obtained from compelled testimony was banned by the statute. The Court also reaffirmed the *Murphy* enforcement standard:

Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.¹⁷⁵

In summary, the Supreme Court has moved from its broad language in *Counselman* and *Brown* favoring transactional immunity to the use and derivative use standard developed in *Kastigar*. The new standard offers substantially less protection to the witness who is compelled to testify against his wishes. Despite a few rumblings from an occasional dissenter, there appears to be no doubt that immunity statutes in some form are constitutional. But it seems clear from the Court's distinction in *Kastigar* that a grant of immunity offering a witness less protection than a use and derivative use statute would not meet the requirements of the fifth amendment.

2. *Immunity Under Florida Law.* Florida's current immunity statute provides for transactional immunity.¹⁷⁶ The statute, in some form or another, dates back to 1905.¹⁷⁷ Like most state constitutions, the Florida Constitution does not specifically include a provision concerning immunity for compelled testimony;¹⁷⁸ it merely guarantees a

174. 406 U.S. at 458-59 (footnotes omitted).

175. 406 U.S. at 460, quoting *Murphy v. Waterfront Comm'n*, 378 U.S. at 79 n.18. The dissents of Justices Douglas and Marshall in *Kastigar* also express the fear that investigative leads will be obtained from compelled testimony. Justice Brennan did not participate in *Kastigar*, but his dissent in *Picirillo v. New York*, 400 U.S. 548 (1971) indicates that he held views similar to the *Kastigar* dissenters. See *United States v. McDaniel*, 449 F. 2d 832 (8th Cir. 1971).

176. FLA. STAT. § 914.04 (1975), *supra* note 145.

177. Act of June 1, 1905, ch. 5400, § 1, 1905 FLA. LAWS 78.

178. Only two state constitutions contain immunity guarantees for those who are compelled to testify. The Arizona constitution guarantees transactional immunity for those witnesses who are compelled to testify about "bribery or illegal rebating":

Bribery or illegal rebating; witnesses; self-incrimination no defense.

Section 19. Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with bribery or

right against self-incrimination similar to that contained in the fifth amendment of the United States Constitution.¹⁷⁹

The leading case construing Florida's immunity statute is *State ex rel. Hough v. Popper*.¹⁸⁰ In *Hough*, certain witnesses were compelled to testify against a man named Connell. Subsequently, they were indicted along with Connell as co-conspirators. Examining the Florida statute, the court concluded that it grants both transactional and use immunity. The statute provides for complete immunity from prosecution for any other crime which relates to the criminal transaction about which the witness was compelled to testify. Additionally, if in the course of his testimony, a witness makes a statement unrelated to the transaction, but which nevertheless links him to a crime, then he is granted use immunity for that statement.¹⁸¹ The *Hough* case was

illegal rebating, shall not be excused from giving testimony or producing evidence, when legally called upon to do so, on the ground that it may tend to incriminate him under the laws of the State; but no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may so testify or produce evidence.

Ariz. Const. art. II, § 19.

The Oklahoma constitutional provision is even broader; it guarantees complete transactional immunity to all witnesses who are compelled to testify after they have refused to testify on the grounds of self-incrimination.

Witnesses not excused from testifying—Immunity from prosecution.

Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with an offense against the laws of the State, shall not be excused from giving testimony or producing evidence, when legally called upon so to do, on the ground that it may tend to incriminate him under the laws of the State; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence.

OKLA. CONST. art. II, § 27. The Oklahoma provision is substantially the same as the Florida immunity statute. See FLA. STAT. § 914.04 (1975), *supra* note 145.

179. Compare FLA. CONST. art. I, § 9 with U.S. CONST. amend. V.

180. 287 So. 2d 282 (Fla. 1973). See *State v. Toogood*, 349 So. 2d 1203 (Fla. 2d Dist. Ct. App. 1977).

181. The court offered an example of how the dual immunity provisions might operate:

Thus, if a person testifies under subpoena before a grand jury concerning an armed robbery in which he was a participant, and states in the course of his testimony that he drove his black Cadillac as the "getaway car," and it later is discovered that this car was driven by the witness in another, unconnected robbery, the statute provides the witness with complete immunity from prosecution for the robbery concerning which he testified, but only with use immunity as to the second, unconnected robbery. For this separate offense, the witness may be prosecuted; the statute, however, forbids the use of his compelled testimony in this prosecution even to establish the fact (innocent in and of itself) of ownership of the vehicle. It is the function of the use immunity in such a situation to provide the immunity necessary to safeguard the constitutional privilege against self-incrimination as to separate facts of an independent criminal transaction. The testimony given as to such incidental facts may not be used against the witness, but he may be prose-

remanded to the lower court to resolve two issues: 1) whether the testimony of the petitioners related to the criminal transaction for which they were indicted, thus entitling them to transactional immunity; and 2) if it did not and the petitioners were only entitled to use immunity, whether the state could prove that it obtained its information from independent sources.¹⁸²

Florida has liberally construed its immunity statute to protect a witness from forfeitures other than criminal penalties. In *Lurie v. Florida State Board of Dentistry*,¹⁸³ the Court held that where a witness was granted immunity under the immunity statute, the grant would also render the witness immune from administrative license revocation proceedings. In *Gilliam v. State*,¹⁸⁴ petitioners argued that while they had transactional immunity in Florida, they would have only use and derivative use immunity if they were indicted for similar crimes in another jurisdiction. The court held that they must nevertheless testify, and recognized that under *Kastigar* and *Zicarelli*, the federal constitution only requires use and derivative use immunity. The *Gilliam* court did not mention the self-incrimination protection under the Florida Constitution.¹⁸⁵

Although transactional immunity has long been the accepted rule in the state, several recent developments in Florida law indicate that the transactional immunity doctrine in Florida is not as secure as it might appear. In spring of 1977, the Florida Supreme Court handed down its decision in *Tsavaris v. Scruggs*.¹⁸⁶ Tsavaris, a psychiatrist, was indicted for the murder of a former patient. The question was

cuted for this independent criminal transaction if it can be proved without the use of the compelled testimony. This is where the State's contended "independent source" of proof comes in. Such proof, however, must be of the separate, independent transaction. As initially stated, there is a complete immunity as to the transaction for which petitioners were subpoenaed to testify.

287 So. 2d at 284.

182. See *State v. Hough*, 332 So. 2d 98 (Fla. 3d Dist. Ct. App. 1976) (holding that the state could not prove that it obtained its information from independent sources). Although the court uses the term "use immunity," *id.* at 101, it appears to mean "use and derivative use immunity."

183. 288 So. 2d 223 (Fla. 1973). The *Lurie* court overruled *Headley v. Baron*, 228 So. 2d 281 (Fla. 1969), which had refused to extend the immunity statute to administrative proceedings. *Headley*, in turn, had overruled *Fla. Bd. of Architecture v. Seymour*, 62 So. 2d 1 (Fla. 1952), which had taken the same position as *Lurie*.

184. 267 So. 2d 658 (Fla. 2d Dist. Ct. App. 1972).

185. FLA. CONST., art. I, § 9.

186. No. 48,637 (Fla. Mar. 17, 1977). Judge Hatchett authored the three-man plurality opinion. Justice Sundberg concurred in the result only, being of the opinion that the sole issue before the court was the applicability of the Florida transactional immunity statute. Dissenting Justices England, Adkins, and Roberts would have granted transactional immunity in this case. They rejected what they viewed as the adoption by the plurality of the federal fifth amendment case law.

whether Tsavaris could claim immunity from prosecution for murder because his secretary, under subpoena, had turned over to the police his personal appointment book and the medical records of the victim. A plurality of the court held that even if the records were protected by the fifth amendment, the immunity statute would not apply.¹⁸⁷ The court's remarks about the Florida immunity statute are enlightening:

Immunity statutes are designed to insulate the witness against the incriminating effect of testimony the State compels him to give. As a federal constitutional matter, it is only necessary that the witness be given use immunity. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972); *Kastigar v. United States*, 406 U.S. 441 (1972). Under Section 914.04, Florida Statutes (1975), the prosecutor, by requiring a subpoenaed witness to testify over objection on self-incrimination grounds, confers transactional immunity as to other offenses. *State ex rel. Hough v. Popper*, 287 So. 2d 282, reh. den. 287 So. 2d 321 (Fla. 1974). *Whether, in such circumstances, this broader grant of immunity is required by Art. I, § 9, Florida Constitution is an open question.*¹⁸⁸

The court must have meant "use and derivative use" instead of "use" when referring to the federal constitutional standard; even *Kastigar* implied that a pure use immunity statute would not meet constitutional requirements.¹⁸⁹ More importantly, the court declined to recognize transactional immunity as being required by the Florida Constitution's self-incrimination clause, specifically reserving that issue as an "open question." This implies that if faced with the proper case, the Florida Supreme Court might follow the United States Supreme Court and adopt use and derivative use as the standard mandated by the Florida Constitution.

This statement by the Florida Supreme Court is especially important when viewed in the context of the other recent developments in Florida immunity law. During the 1977 legislative session, a move

187. The issue of whether the papers would be suppressed under the fifth amendment was reserved for the trial court. The ultimate question of whether the fifth amendment applies to these papers will be an interesting one indeed. Florida cases have generally given a broad interpretation to the fifth amendment insofar as it concerns the compelled production of personal documents. A good example can be found in *State v. Dawson*, 290 So. 2d 79, 82-83 (Fla. 1st Dist. Ct. App. 1974): "We think there is no difference whatever in compelling a man to be a witness against himself and in seizing his records to be used against him. They are both constitutionally protected rights."

The *Tsavaris* majority indicated that it felt the recent United States Supreme Court decision in *Fisher v. United States*, 425 U.S. 391 (1976), severely undercut the *Dawson* rationale. No. 48, 637, slip op. at n.8. See also *Andresen v. Maryland*, 427 U.S. 463 (1976).

188. No. 48,637, slip op. at 7 n.6. (emphasis added).

189. See text accompanying notes 170-75 *supra*.

was made to replace the current transactional immunity statute with a use and derivative use statute cast in the federal mode. Although no legislation was enacted, bills filed in both houses gained substantial support.¹⁹⁰ Apparently, a significant number of state legislators were inclined to have Florida follow the federal lead and adopt a use and derivative use immunity standard. This issue will undoubtedly recur in future legislative sessions.

3. *Conclusions.* For many years, immunity statutes have been used as a constitutionally approved method to obtain information regarding criminal conduct. Originally, the courts required that one who was compelled to testify be given the broadest immunity possible—complete transactional immunity. Though the Supreme Court's broad language in *Counselman* technically may have been dictum, the Court's intent seemed clear: the only immunity coextensive with the fifth amendment was transactional immunity.¹⁹¹ This same theme was repeated many times until the Court in *Kastigar* narrowed the constitutional standard to use and derivative use immunity. Note that the Court in *Kastigar* did not hold that transactional immunity was unconstitutional; it merely concluded that the United States Constitution required only use and derivative use immunity.

One of the major criticisms leveled at the use and derivative use standard is that it is difficult (if indeed possible) to enforce. Under the standard set forth in *Murphy* and *Kastigar*, the government has the burden of proving that its information was derived from "independent sources" and not from compelled testimony. Critics argue that even without intentional abuses by the government, "human fallibility" will allow compelled testimony to become intermingled and used along with other legitimate government leads.¹⁹² In addition,

190. The use and derivative use immunity bill originated in the Senate and was sponsored by Senator Dunn. Fla. S. 19 (1977). A similar bill in the House was sponsored by Representative Haben. Fla. H.R. 1114 (1977). Both bills received overwhelming support in their respective houses. The House passed its bill by a vote of 115 to 2 and sent it to the Senate where it was amended and passed by a vote of 39 to 1. FLA. H.R. JOUR. 216 (1977); FLA. S. JOUR. 216 (1977). The House refused to concur in the Senate amendments and the bill died upon adjournment sine die. FLA. H.R. JOUR. 373 (1977). Interestingly, the Senate amendment in which the House refused to concur provided that a witness could have counsel present in the grand jury room when he testified. FLA. S. JOUR. 217 (1977).

191. Indeed, if the Court in *Counselman* had felt that use and derivative use was the appropriate standard, it could have limited its decision by saying that the statute in question failed because it did not protect a witness against the use of the fruits of his testimony. The Court *chose* to cast its opinion in the broad language of transactional immunity. Note, *Scope of Testimonial Immunity*, *supra* note 165, at 361.

192. Consider Justice Brennan's dissent in *Piccirillo v. New York*, 400 U.S. 548, 568 (1971):

[A]ll the relevant evidence will obviously be in the hands of the government—the

it has been suggested that when the government learns of a certain witness' involvement in a crime, its burden of establishing the case on its own has been substantially lessened; if nothing more, the compelled testimony aids the government in deciding whether it can establish a case against the witness.¹⁹³

Another area discussed by commentators concerns the effect that *Harris v. New York*¹⁹⁴ will have on use and derivative use immunity. In *Harris*, the Court held that statements obtained in violation of the *Miranda* rule could nevertheless be used to impeach the defendant if he took the stand. Although the *Kastigar* Court stated that the statute "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom,"¹⁹⁵ one wonders whether under *Harris*, *Kastigar* might be extended to allow compelled statements before a grand jury to be used for the limited purpose of impeachment.¹⁹⁶

Finally, there exists a genuine question whether use and derivative use immunity will be a better tool for fighting crime than transactional immunity. The argument is often made that immunity statutes are especially necessary for the detection and investigation of organized crime.¹⁹⁷ At least one author has taken issue with this view.

Although the Administration's ostensible social justification for use immunity was that it was essential to the fight against organized crime, use immunity, or any other form of immunity, is largely valueless in such cases. The Mafia's *omertà* code, which can be

government whose investigation included compelling the individual involved to incriminate himself. Moreover, this argument does not depend on assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained.

193. See Note, *Scope of Testimonial Immunity*, *supra* note 165, at 374.

194. 401 U.S. 222 (1971).

195. 406 U.S. at 460.

196. See Note, *Scope of Testimonial Immunity*, *supra* note 165, at 380. Neither transactional nor use and derivative use immunity protects from subsequent prosecution for perjury a witness who lies to a grand jury. It would seem that since the fifth amendment is not a license to commit perjury, then there would be no difference between the two types of immunity for purposes of impeachment. See discussion *supra* note 92.

197. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 80 (1967):

Above all else, the testimony of witnesses is indispensable in the prosecution of organized crime. The existing legal tools available to develop such testimony need to be strengthened, and alternatives need to be sanctioned . . . Immunity grant and similar legislation must be broadened.

roughly translated as "death to informers," makes a few months in jail for contempt of court a comparative slap on the wrist.¹⁹⁸

This supports the view of some commentators that, unlike transactional immunity statutes, use and derivative use statutes will actually hamper the criminal investigatory process. Their view is that if witnesses who have something to hide realize that their compelled testimony may in some way be used against them, then they may view contempt sanctions as the lesser of the two evils and remain silent in spite of the immunity grant.¹⁹⁹

V. CONCLUSIONS & PROPOSALS

The grand jury indictment system has, by historical accident, survived until the present day, even though its original protective functions no longer exist in fact. Quite the opposite from its original protective purpose, the grand jury has become one of the prosecutor's tools—a tool which often works to the detriment of individual rights. In addition to its abuse potential, the grand jury serves little practical purpose since any independence it may have, in theory, is squelched by the state attorney's dominance of the proceeding.

In Florida, grand jury indictments are required only for capital crimes. Although other crimes may be prosecuted by indictment, it should be noted that if a grand jury fails to indict on a non-capital crime, the state attorney may still initiate a criminal prosecution by filing an information. Thus, with the narrow exception of capital crimes,²⁰⁰ the Florida prosecuting attorney already has the final determination concerning which cases will be brought to trial. At best, the Florida grand jury system is an unnecessary, but harmless, pre-trial procedure. At worst, it is a wasteful, expensive, and dilatory ritual creating an illusion of protection of individual rights. Since 1934, Florida state attorneys have routinely charged serious crimes by means of information rather than indictment. The step to prosecuting all crimes by information would not be a difficult one. The grand jury requirement in the Florida Constitution should be abolished.

198. Harris, *Annals of Law: Taking the Fifth—Part II*, THE NEW YORKER, April 12, 1976, at 99–100.

199. Note, *Scope of Testimonial Immunity*, *supra* note 165, at 383. See Harris, *Annals of Law: Taking the Fifth—Part I*, THE NEW YORKER, April 5, 1976, at 44. See also Harris, *Annals of Law: Taking the Fifth—Part III*, THE NEW YORKER, April 19, 1976, at 42.

200. Currently, the only capital crimes in Florida are first-degree murder and sexual battery of a child under 11 by a person 18 or older. See FLA. STAT. §§ 782.04, 794.011(2). The death sentence for rape is of questionable constitutionality following the United States Supreme Court ruling in *Coker v. Georgia*, 97 S. Ct. 2861 (1977).

Article I, section 15(a) of the Florida Constitution could be amended so as to do away with grand jury indictments altogether,²⁰¹ or to allow all crimes to be prosecuted by either indictment or information.²⁰² The first option would presumably require that all crimes be prosecuted by information—a step that no state has yet taken. The second would put Florida in the same position as some twenty-four other states, but would make little change in Florida grand jury law. The only difference would be that capital crimes could be prosecuted by indictment or information. It should be noted that under this approach, the prosecutor could still hide behind the grand jury on unpopular issues. The first option—requiring all crimes to be prosecuted by information—makes better sense and should be adopted.

If the grand jury indictment system is retained in any form in the Florida Constitution, then additional provisions should be included in the constitution to protect those who come into contact with the grand jury. First, a witness called to testify before a grand jury should be permitted to have counsel present with him in the grand jury room.²⁰³ This would allow a witness to avoid the incriminating inuendo of having to leave the room after each question to consult with counsel in the hall. Allowing counsel to be present as a “passive advisor” along the lines of the ABA proposal would not unduly disrupt the proceedings. On the contrary, having counsel present would expedite the grand jury proceedings; the proceedings would not have to be halted while the witness left the room to consult with counsel. Since the witness can divulge all of the questions to his counsel anyway, the attorney’s presence would not violate the grand jury’s secrecy. The

201. A proposal might read: “All crimes *shall* be prosecuted by information under oath by the prosecuting officer of the court”

202. An example might be: “All crimes may be prosecuted either by indictment or by information”

203. Such a provision might be patterned after the Kansas statutory provision, which reads:

(1) Any person called to testify before a grand jury must be informed that he has a right to be advised by counsel and that he may not be required to make any statement which will incriminate him. Upon a request by such person for counsel, no further examination of the witness shall take place until counsel is present. In the event that counsel of the witness’ choice is not available, he shall be required to obtain other counsel within three (3) days in order that the work of the grand jury may proceed. If such person is indigent and unable to obtain the services of counsel, the court shall appoint counsel to assist him

(2) Counsel for any witness may be present while the witness is testifying and may interpose objections on behalf of the witness. He shall not be permitted to examine or cross-examine his client or any other witness before the grand jury. KAN. STAT. ANN. § 22-3009 (1974).

Any provision adopted should provide that a witness before a grand jury has a right to *have* counsel and not merely to *retain* counsel. The latter language would allow only those who could afford an attorney to have counsel present.

state attorney would merely be denied the psychological advantage of having the witness separated from his counsel.

The constitution should also include a provision guaranteeing transactional immunity to a witness who is compelled to testify over the assertion of his privilege against self-incrimination.²⁰⁴ This would have the effect of elevating to the level of constitutional right an individual protection which Florida has recognized by statute for many years. Such a move is necessitated by the restrictive approach that the United States Supreme Court has recently taken toward immunity and the fifth amendment. Making transactional immunity a right under the state constitution would guarantee that Florida will not follow the federal lead and deviate from its established policy of broad immunity for those who are forced to testify against their will. In addition, it should be reiterated that some authorities believe that transactional immunity is actually a better crime-fighting tool than use and derivative use immunity.

In closing, it must be emphasized that the need to guarantee these safeguards, namely, counsel in grand jury proceedings and transactional immunity, by constitutional provision is especially acute. Neither has been recognized under the United States Constitution; if they are to exist at all, they must come from the states.²⁰⁵

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204. The transactional immunity provision could be patterned after the current Florida immunity statute, *supra* note 145, or after the provision in the Oklahoma Constitution, *supra* note 178.

205. See generally Brennan, *State Constitutions And The Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). In his article, Mr. Justice Brennan recognizes that the protection of individual rights is becoming increasingly the province of state constitutional law.

APPENDIX I

VARIOUS STATE PROVISIONS DEALING WITH THE
INITIATION OF CRIMINAL PROCEEDINGS

Alabama—All felonies must be prosecuted by grand jury indictment. Misdemeanors may, if authorized by the legislature, be prosecuted by information. Indictment may be dispensed with if the defendant chooses to plead guilty. ALA. CONST. art. I, § 8 and amend. 37.

Alaska—Grand jury indictments are required for all “capital or infamous” crimes. The indictment may be waived by the accused. ALAS. CONST. art. I, § 8.

Arizona—All crimes may be prosecuted by information or indictment; provided that if a felony is prosecuted by information, there must have been a preliminary examination before a magistrate. ARIZ. CONST. art. II, § 30.

Arkansas—All crimes may be prosecuted by indictment or information. ARK. CONST. art. II, § 8.

California—Felonies may be prosecuted by either indictment or information. If prosecuted by information, it must be after an examination and commitment by a magistrate. CAL. CONST. art. I, § 14.

Colorado—The constitution provides that all felonies must be prosecuted by indictment, unless otherwise provided by law. Colorado has provided by statute that all crimes may be prosecuted by indictment or information. COLO. REV. STAT. ANN. § 16-5-10 (1973).

Connecticut—All crimes punishable by death or life imprisonment must be prosecuted by grand jury indictment. CONN. CONST. art. I, § 8.

Delaware—All “indictable offenses” must be prosecuted by indictment. DEL. CONST. art. I, § 8.

Florida—All capital crimes must be charged by indictment; all other crimes may be prosecuted by indictment or information. FLA. CONST. art. I, § 15(a).

Georgia—All felonies must be prosecuted by indictment. However, for noncapital crimes, the accused may be prosecuted by information, provided he waives in writing his right to grand jury indictment. All other crimes may be prosecuted by information. GA. CODE ANN. § 27-704 (1976).

Hawaii—Indictment by grand jury is required for the prosecution of all “capital or otherwise infamous” crimes. HAWAII CONST. art. I, § 8.

Idaho—Felonies may be prosecuted by indictment or information; provided that if by information, the accused must have first been examined by a magistrate. IDAHO CONST. art. I, § 8.

Illinois—All prosecutions of felonies may be by indictment or information; provided that if by information, the accused must have either had or waived his right to a preliminary hearing. ILL. ANN. STAT. ch. 38, §§ 111-2 (Smith-Hurd Supp. 1977).

Indiana—All crimes may be prosecuted by indictment or information. IND. CODE ANN. § 35-3.1-1-1 (Burns 1975).

Iowa—The constitution says that all crimes where punishment exceeds \$100 fine or 30 days imprisonment must be charged by indictment. However, in apparent conflict is a 1977 statutory provision allowing all crimes to be prosecuted by either indictment or information. IOWA CODE ANN. § 769.1 (Supp. 1977).

Kansas—All crimes greater than misdemeanors must be prosecuted by indictment. KAN. STAT. ANN. § 22-2303 (1974).

Kentucky—All “indictable offenses” must be prosecuted by indictment. KY. CONST. Bill of Rights, § 12.

Louisiana—Felonies may be prosecuted by indictment or information, but capital and life felonies must be prosecuted by indictment. LA. CONST. art. I, § 15.

Maine—All capital or infamous crimes must be prosecuted by indictment. ME. CONST. art. I, § 7.

Maryland—There is no constitutional provision. A statute provides that in all felony prosecutions, the accused has 10 days to request a preliminary hearing. If he does not,

or if he waives it, or if a magistrate determines that probable cause exists, then the prosecutor may charge the crime by information. MD. CODE ANN. § 23-592 (1973).

Massachusetts—All crimes may be prosecuted either by indictment or complaint. MASS. GEN. LAWS ANN. ch. 263, § 4 (Supp. 1977).

Michigan—All crimes may be prosecuted by either indictment or information. MICH. COMP. LAWS ANN. § 767.1 (1968).

Minnesota—Any crime punishable by life imprisonment must be prosecuted by a grand jury indictment. MINN. R. CRIM. P. 17.01.

Mississippi—All "indictable offenses" must be prosecuted by indictment; provided that in cases not punishable by death or penitentiary imprisonment, the legislature may dispense with the grand jury. As of this writing, no action has been taken to dispense with the grand jury. MISS. CONST. art. III, § 27.

Missouri—All crimes may be prosecuted by either indictment or information. MO. CONST. art. I, § 17.

Montana—All lower court crimes may be prosecuted by complaint. All district court crimes may be prosecuted by indictment or by information; provided that if by information, the accused must have been examined and committed by a magistrate, or leave of court must have been given. MONT. CONST. art. II, § 20.

Nebraska—The constitution requires indictments for felonies, but allows the legislature to permit informations. The legislature has provided that all crimes may be prosecuted by either information or indictment. NEB. REV. STAT. § 29-1601 (1975).

New Hampshire—All capital crimes with punishments of more than one year in prison must be prosecuted by indictment. The accused may waive indictment except for capital crimes. N.H. REV. STAT. ANN. § 601:1 (1974).

New Jersey—All crimes must be prosecuted by grand jury indictment. N.J. CONST. art. I, § 8.

New Mexico—All crimes may be prosecuted by indictment or information; provided that if by information, the accused shall have had or waived a preliminary examination before a magistrate. N.M. CONST. art. II, § 14.

New York—All capital or otherwise infamous crimes must be prosecuted by indictment. However, for all such crimes except capital or life imprisonment crimes, the accused may waive the indictment. N.Y. CONST. art. I, § 6.

Nevada—All capital or infamous crimes may be prosecuted by indictment or information. NEV. CONST. art. I, § 8.

North Carolina—All crimes greater than misdemeanors must be initiated by indictment. However, a person represented by counsel in a noncapital case may waive his right to indictment. N.C. CONST. art. I, § 22.

North Dakota—The constitution provides for all felonies to be tried by indictment unless otherwise provided by law. Criminal Rule 7(a) provides that all crimes may now be prosecuted by indictment or information. N.D. R. CRIM. P. 7(a).

Ohio—All capital or otherwise infamous crimes must be initiated by grand jury indictment. OHIO CONST. art. I, § 10.

Oregon—All felonies must be prosecuted by indictment unless the accused waives indictment, has a preliminary hearing, or waives his right to a preliminary hearing. ORE. CONST. art. VII (amended), § 5.

Oklahoma—All crimes may be prosecuted by indictment or information. However, if a felony is prosecuted by information, the accused must have had or waived a preliminary examination before a magistrate. OKLA. CONST. art. II, § 17.

Pennsylvania—All "indictable offenses" must be prosecuted by indictment. PA. CONST. art. I, § 10.

Rhode Island—All capital and life felonies must be tried by indictment, and all other felonies may be prosecuted by indictment or information. R.I. CONST. amend. 40, § 1.

South Carolina—All crimes having penalties of more than \$200 or imprisonment for 30 days must be prosecuted by indictment. The General Assembly may provide for

waiver of indictment. It has not done so as of this writing. S.C. CONST. art. IV, § 10.

South Dakota—All criminal offenses must be prosecuted by indictment or information. The grand jury may be abolished by law. It has not been abolished as of this writing. S.D. CONST. art. VI, § 10.

Tennessee—No person shall answer to any criminal charge other than by presentment, indictment, or impeachment. TENN. CONST. art. I, § 14.

Texas—All criminal offenses must be tried by indictment except in cases where the punishment is by fine or imprisonment in other than the penitentiary. TEXAS CONST. art. I, § 10.

Utah—Offenses formerly required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination is waived. All crimes may be prosecuted by indictment. UTAH CONST. art. I, § 13.

Vermont—All crimes may be prosecuted by information or indictment at the option of the prosecutor. Leave of court is not required for an information. VT. R. CRIM. P. 7(a).

Virginia—All felonies must be prosecuted by indictment unless the accused waives the indictment in writing. VA. CODE ANN. § 19.2-217 (1975).

Washington—Offenses formerly required to be prosecuted by indictment may be prosecuted by information or indictment. WASH. CONST. art. I, § 25.

West Virginia—Felonies must be prosecuted by indictment. W. VA. CODE ANN. § 62-2-1 (1977).

Wisconsin—Felonies may be prosecuted either by indictment or information. WISC. STAT. ANN. § 967.05(3) (1971).

Wyoming—The constitution provides for all felonies to be prosecuted by indictment unless otherwise provided by law. The legislature has provided that all crimes may be prosecuted by indictment or information. WYO. STAT. ANN. § 7-118 (1959).