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THE DOCTRINE OF WAIVER AS APPLIED TO GRAND JURY SUBPOENAS

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I. INTRODUCTION

Although grand juries historically have had broad powers to subpoena witnesses and to compel testimony, federal courts have the authority to protect witnesses served with grand jury subpoenas.[1] This authority derives from the grand jury's dependence upon the court to issue the actual subpoena. As the United States Supreme Court has noted, it is "the court's process which summons the witness"[2] to provide testimony and to produce documents and not "the process of the grand jury, nor of the [D]istrict [A]ttorney."[3] Consequently, courts of law have inherent power "to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice."[4]

Federal courts have exercised their supervisory power over grand jury proceedings in a number of ways. For example, courts have granted relief from grand jury subpoenas that (1) were utilized by the federal prosecutor to obtain documents not ultimately shown to the grand jury,[5] (2) required a witness to be interviewed by prosecuting attorneys in their office, without the protection of the grand jury's secrecy and independence,[6] (3) required the giving of hand-

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1 *See, e.g.*, United States v. Gurule, 437 F.2d 239 (10th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); FED. R. CRIM. P. 17(c).

2 Brown v. United States, 359 U.S. 41, 49, reh'g denied, 359 U.S. 976 (1959), *overruled on other grounds*, Harris v. United States, 382 U.S. 162 (1965).

3 *In re* National Window Glass Workers, 287 F. 219, 225 (N.D. Ohio 1922).

4 *Id.*; *See In re* Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973).

5 *In re* Nwamu, 421 F. Supp. 1361 (S.D.N.Y. 1976).

6 Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); *see also* United States v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *In re* Grand Jury Proceedings, 486 F.2d at 91.

writing exemplars outside of the grand jury room,[7] (4) required the production of documents to be used *solely* in a civil proceeding,[8] or (5) have been employed to gather evidence for use at trial after an indictment has already been returned.[9] In addition to the foregoing nonconstitutional grounds for granting relief from complying with a grand jury subpoena, courts have at times also granted relief from such subpoenas on the basis of the first,[10] fourth,[11] and fifth amendments[12] to the United States Constitution.

Despite the fact that federal courts have authority to grant relief from grand jury subpoenas on a variety of grounds, they generally have shown a reluctance to exercise that power.[13] There are several reasons for this reluctance. First, because grand juries do not adjudicate rights but only investigate and determine who should be tried, many courts believe that fewer procedural safeguards are necessary at the grand jury stage.[14] Second, judges fear that intrusion by the courts at the grand jury stage will cause a series of mini-hearings that will serve to delay criminal investigations.[15] Finally, because a person served with a grand jury subpoena can disobey the subpoena and raise certain challenges to it at the contempt hearing, legitimate arguments can be raised at that time.[16]

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7 United States v. O'Kane, 439 F. Supp. 211 (S.D. Fla. 1977).

8 *In re* April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956).

9 *In re* National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922); *see also* United States v. Woods, 544 F.2d 242 (6th Cir.), *cert. denied*, 430 U.S. 969 (1976); United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972).

10 *See, e.g.*, Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (holding that when governmental activity collides with first amendment rights, the government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon first amendment rights is no greater than is essential to vindicate its subordinating interest).

11 *See, e.g.*, *In re* Corrado Brothers, Inc., 367 F. Supp. 1126 (D. Del. 1973) (stating that a grand jury subpoena may not be so broad and sweeping that it violates the fourth amendment).

12 *See, e.g.*, *In re* Grand Jury Empanelled March 19, 1980, 680 F.2d 327 (3d Cir. 1982), *aff'd in part, rev'd in part*, 104 S.Ct. 1237 (1984); *In re* Grand Jury Subpoena, 646 F.2d 963 (5th Cir. 1981) (holding that the fifth amendment applies to sole proprietor's business records).

13 *See, e.g.*, *In re* Radio Corp. of America, 13 F.R.D. 167 (S.D.N.Y. 1952) (upholding subpoena for voluminous documents covering span of 18 years); *In re* Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948) (upholding a grand jury subpoena covering a time period of 20 years and calling for 50 tons of records).

14 United States v. Calandra, 414 U.S. 338, 349 (1974). Of course, people's rights are often affected by indictments alone as certain employers dismiss employees who are merely accused of committing crimes. For this reason, it can be argued that greater safeguards are necessary at the grand jury stage than are presently provided.

15 *See, e.g.*, *Calandra*, 414 U.S. at 350; United States v. Dionisio, 410 U.S. 1 (1973); *In re* Braughton, 520 F.2d 765 (9th Cir. 1975).

16 *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, No. 83-2385 (7th Cir. 1984); *In re* Archuleta, 432 F. Supp. 583, 592 (S.D.N.Y. 1977).

Recently, a new rationale has been advanced by the Court of Appeals for the Second Circuit for refusing to protect the rights of certain witnesses subpoenaed to appear before a grand jury. In *In re Fula*,[17] the Second Circuit, relying upon the doctrine of waiver, held that when witnesses subpoenaed to appear before a grand jury move to quash the subpoena, they must raise all defenses in their motion that reasonably could have been included in the motion, or their defenses are waived at a subsequent contempt hearing.[18]

This Article will analyze the doctrine of waiver as enunciated by the court in *In re Fula*. It will argue that *Fula* improperly relied upon precedent. The Article will further argue that, for policy reasons, *Fula* was wrongly decided and, hence, the *Fula* decision should not be followed by the other federal circuits and should be overturned by the Supreme Court.

II. *IN RE FULA*

On October 20, 1981, an attempted robbery of a Brinks armored truck occurred in Nanuet, New York. During the attempt, one guard and two police officers were killed.[19] Several pieces of evidence linked the events to Yassmyn Fula, a legal assistant with the National Task Force for Cointelpro Litigation.[20] For example, Nathaniel Burns, a former member of the Black Panther Party and one of the suspected robbers, stayed at Fula's apartment following the robbery attempt. On October 23, 1981, Burns was captured and his companion killed in a shoot-out with police; at the time, Burns and his companion were driving a car registered to Fula.[21] A bullet extracted from the companion's body had been fired from the gun of one of the police officers killed during the attempted robbery.[22] Finally, a third suspect in the Brinks incident, Anthony LaBorde, worked with Fula at one of her jobs.[23]

Fula was served with two subpoenas ordering her to appear before a federal grand jury in New York that was investigating both the Brinks robbery and the question of "whether [the robbery in-

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17 *Fula*, 672 F.2d 279 (2d Cir. 1982).

18 *Id.* at 284.

19 *Id.* at 281.

20 Fula described this task force "as a collection 'of lawyers, paralegals, and law students who are attempting to expose the racism and hypocrisy of the policies of the United States Government and, in particular, its law enforcement intelligence operations directed aganst Black organizations.' " *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

volved] a larger pattern of criminal activities . . . ."[24] One subpoena required Fula, before testifying, to produce physical evidence, including handwriting and hair samples.[25] Fula eventually appeared before the grand jury, but refused to comply with the subpoena requiring the production of physical evidence.[26]

The government moved to compel Fula to produce the subpoenaed evidence. Fula filed a cross-motion to quash the subpoena on various grounds, arguing that the subpoena violated her first, fourth, fifth, sixth, eighth, ninth, and thirteenth amendment rights.[27] The district court denied Fula's motion to quash and ordered her to appear before the grand jury and to produce the evidence requested.[28]

Fula subsequently appeared before the grand jury and repeated her refusal to comply with the subpoena.[29] She was returned to the district court. At the government's request, the judge cleared the courtroom except for Fula, her attorney, and government counsel.[30] The judge then asked Fula if she would comply with the subpoena, and she said she would not.[31] Pursuant to 28 U.S.C. § 1826(a),[32] the judge found Fula in civil contempt and ordered that she be confined either until she complied with the subpoena or until the grand jury's term expired.[33] Fula then appealed.[34]

Before the Second Circuit, Fula asserted that (1) she had just

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24 *Id.* (quoting *In re* Fula, No. M-11-188, slip op. at 4 (S.D.N.Y. Dec. 2, 1981)).

25 *Id.*

26 *Id.*

27 Fula also moved to suppress certain documents seized from her apartment pursuant to a search warrant and she sought access to statements she made to government agents. These claims were not raised on appeal.

28 *Fula*, 672 F.2d at 281.

29 *Id.* at 282.

30 *Id.*

31 *Id.*

32 Section 1826(a) provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
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> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. § 1826(a) (1982).

33 *Fula*, 672 F.2d at 282.

34 *Id.*

cause to defy the subpoena because the grand jury lacked the authority to investigate her under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68,[35] (2) she was denied due process because the contempt proceeding was conducted in a closed courtroom,[36] and (3) at the contempt hearing, the district court improperly denied her the opportunity to raise defenses.[37]

The court of appeals properly dismissed Fula's first contention as being without merit because a grand jury witness lacks the standing "to take exception to the jurisdiction of the grand jury or the court over the particular subject matter that is under investigation."[38] The court agreed with Fula's second assertion that due process required her contempt hearing to be conducted in public. For this reason, the court vacated her contempt citation and remanded the case to the district court to conduct a public contempt hearing, "excluding the public only to the extent necessary to protect the secrecy of the grand jury process."[39]

The court rejected Fula's final argument that the district court improperly barred her from raising defenses to the subpoena at her contempt proceeding, reasoning that:

> Fula chose to attack the subpoena in this case affirmatively by motion to quash. In doing so, she had from November 4, 1981 until November 30, 1981, when Judge Goettel ordered her to comply with the subpoena, to raise her grounds for defying the grand jury. Indeed, Fula filed with the court a lengthy legal memorandum and a panoply of affidavits during that time. *We see no reason why Fula should have a second opportunity to raise defenses which could reasonably have been included in her motion to quash. To the extent she chose not to pursue these defenses, they are waived. See In re Liberatore*, 574 F.2d 78, 82 (2d Cir. 1978).
>
> This is not to say, however, that Fula will be barred on remand from demonstrating "just cause" to defy Judge Goettel's order that she comply with the subpoena. *She may proffer any defenses which, for reasons she will have to show, could not have been raised in her motion to quash.*[40]

Because the Second Circuit relied solely upon *In re Liberatore*[41] for its holding in *Fula*, a closer examination of that case will be instructive.

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35 Racketeer Influenced and Corrupt Organizations Act (RICO), § 901(a), 18 U.S.C. §§ 1961-68 (1982).

36 *Fula*, 672 F.2d at 283.

37 *Id.*

38 *Id.* (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).

39 *Id.*

40 *Id.* at 284 (emphasis added).

41 *Liberatore*, 574 F.2d 78 (2d Cir. 1978).

III. *IN RE LIBERATORE*

Thomas Liberatore was serving two consecutive one-year sentences at the Connecticut Correctional Institution for six violations of state law.[42] While Liberatore was incarcerated, federal prosecutors in the District of Connecticut obtained a writ of *habeas corpus ad testificandum* to have Liberatore appear before a federal grand jury in Connecticut and provide handwriting samples and certain fingerprints.[43] Liberatore refused to do so on fifth amendment grounds.[44] The prosecutors asked the district court to issue an order requiring Liberatore to provide the handwriting samples and fingerprints.[45]

At a subsequent contempt hearing, Liberatore advanced a different justification for his refusal to provide the materials requested, namely, that there was no need for him to provide the materials because both his handwriting and fingerprint samples were already available to federal prosecutors. The government demonstrated its need for the materials, however, and the court ordered Liberatore to provide the handwriting samples and fingerprints.[46] Liberatore refused to comply with the court order and, as a result, was found in civil contempt.[47] First orally and then by written order, the court directed Liberatore to be held in federal custody until the expiration of the grand jury's term, or until Liberatore supplied the handwriting samples and the fingerprints requested by the grand jury.[48] The written court order was silent on whether Liberatore's pre-existing state sentence should be suspended during his period of federal confinement.[49]

At no time during the contempt hearing or before the order adjudging him in contempt was issued did Liberatore raise the objection that he had not been given "adequate notice of or an opportunity to defend against the charge of civil contempt."[50] Moreover, at no time did Liberatore file a motion to quash the subpoena. Approximately one month after the order was entered, however, Liberatore filed a memorandum with the court raising for the first time the claim that "he had not been given sufficient notice of the con-

42 *Id.* at 80.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 80-81.
47 *Id.* at 81.
48 *Id.*
49 *Id.*
50 *Id.*

tempt charge or ample opportunity to prepare a defense."[51] In his memorandum, Liberatore also argued that the district judge "ought not direct that the service of his state sentence be interrupted"[52] while he was confined for civil contempt of the federal court. The district court rejected Liberatore's arguments, and Liberatore appealed.[53]

Liberatore argued before the Court of Appeals for the Second Circuit that he did not receive sufficient notice of the government's application to find him in contempt. The court rejected this argument stating, "inasmuch as the point was not properly preserved before the district court, we need not, and do not, reach the merits of Liberatore's argument that he did not receive adequate notice of the application for contempt to allow him to prepare a defense to it."[54] Thus, because Liberatore's only argument at the contempt hearing before the district court was that the government failed to establish its need to have Liberatore produce the requested materials, the Second Circuit, on appeal would not hear Liberatore's belated claim that he was given insufficient time to prepare for the hearing. As the court said:

> [i]n no manner whatever did Liberatore contend, or even intimate, [at the contempt hearing] that the notice he had received was inadequate to comply with the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure . . . . Having failed to preserve the point before the district court, Liberatore has waived the issue . . . , and we therefore do not consider it on appeal.[55]

The Second Circuit's reasoning in *Liberatore* is based on the understanding that the function of an appellate court is to review decisions of the lower courts for possible errors. Obviously, if a matter was not presented to the lower court,[56] the appellate court should decline to hear it. If the alleged procedural deficiency had been properly presented to the district court, the district judge "could easily have rectified [the matter] had he been alerted to it at the time it supposedly developed."[57]

Thus, *In re Liberatore* stands for the rather obvious proposition that if a matter has not been properly raised in the district court, it may not be raised for the first time on appeal. It does not, in any

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51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 82.

56 Liberatore did present the adequate notice argument to the district court, but not until long after the contempt hearing.

57 *Liberatore*, 574 F.2d at 82.

manner whatsoever, support the proposition articulated by the *Fula* court that if individuals file a motion to quash a grand jury subpoena in the district court they must raise all defenses that reasonably could have been included in the motion to quash or such defenses will be considered waived at the subsequent contempt hearing in the district court.[58]

IV. Policy Considerations

Because the Second Circuit in *In re Fula* improperly relied upon *In re Liberatore* in applying the doctrine of waiver to grand jury subpoenas, and because the court gave no other reason for its decision, it is important to examine the policy reasons for applying the doctrine of waiver in these circumstances. The United States Supreme Court has defined a waiver as "an intentional relinquishment or abandonment of a known right or privilege."[59] When viewed in this traditional manner, it is obvious that neither Yassmyn Fula nor most witnesses who file motions to quash grand jury subpoenas intend, by filing such a motion, to abandon any known rights at a subsequent contempt hearing. For this reason, the traditional view of the doctrine of waiver does not justify its application to grand jury subpoenas based upon the filing of a motion to quash such a subpoena.

The doctrine of waiver, however, can be viewed in another manner. By filing a motion to quash a grand jury subpoena, the individual forfeits, by operation of law, the right to raise additional challenges to the subpoena at a contempt hearing, without regard to the state of mind or intention of the witness.[60] If this is the meaning behind the court's finding—that a waiver of such rights occurred when Fula filed a motion to quash the subpoena—it begs an important question. For the issue still arises: why *should* the filing of such a motion require, as a matter of law, the relinquishment of rights not raised in the motion to quash the grand jury subpoena? The question is all the more important when the forfeited rights are of a constitutional nature. In short, because nothing in the traditional doctrine of waiver itself, or in the actions of most witnesses who file motions to quash grand jury subpoenas, justifies the requirement of a forfeiture of rights not preserved in the motion to quash, another justification for the doctrine of waiver must be found.

The only sound argument to support the result in *Fula* is that it

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58 *See supra* note 18 and accompanying text.

59 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

60 For an excellent discussion of the doctrine of waiver as it relates to the forfeiture of constitutional rights, see Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214-61 (1977).

eliminates piecemeal litigation. According to this view, because the courts are crowded, there is no reason to permit a witness subpoenaed by a grand jury to raise certain issues in a motion to quash the subpoena and then raise other arguments at a subsequent contempt hearing. Indeed, in the civil context, a litigant who files a motion to dismiss on certain grounds must raise all such grounds in his motion to dismiss or they are forever waived.[61] The holding in *Fula* accomplishes similar results in grand jury proceedings.

There are several problems with this approach. First, it is doubtful that a substantial contribution to judicial economy will be realized. Little evidence exists that significant judicial time is consumed on motions to quash grand jury subpoenas. Moreover, litigants faced with the holding in *Fula* may file, in an abundance of caution, sweeping motions to quash that raise many issues, thus consuming even more judicial time than if the requirements of *Fula* did not exist.[62]

Even more troublesome, however, is that the holding in *Fula* may discourage counsel from filing a potentially meritorious motion to quash a grand jury subpoena for fear of waiving significant rights if the motion to quash is not granted. This is particularly true because the denial of a motion to quash a grand jury subpoena generally is not appealable.[63] Counsel for persons served with a grand jury subpoena that they believe is being used solely to gather evidence for civil litigation to which the government is a party, for example, may be reluctant to challenge the subpoena on those grounds alone, if by doing so, their clients may be deemed to have waived constitutional rights at a subsequent contempt hearing.[64] Moreover, because it may be considerably more difficult to prevail on the constitutional issues without a fully developed record at the motion to quash hearing than it would be at a contempt hearing where a more fully developed record exists,[65] counsel likewise may be reluctant to raise those issues in a motion to quash.

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61 *See* FED. R. CIV. P. 12(h).

62 *See, e.g., Archuleta*, 432 F. Supp. at 586.

63 *See, e.g.*, United States v. Ryan, 402 U.S. 530 (1971); Cobbledick v. United States, 309 U.S. 323 (1940).

64 Another example arises when a person served with a burdensome grand jury subpoena challenges the breadth of the subpoena and in the alternative asks for costs of compliance. Courts can condition compliance upon the payment of costs. *See, e.g., In re* Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum (Second National Bank of North Miami), 555 F.2d 1306 (5th Cir. 1977); *In re* Grand Jury Subpoena Duces Tecum (S. Motor Carriers Rate Conference, Inc.), 405 F. Supp. 1192, 1198 (N.D. Ga. 1975). If *Fula* applies in these circumstances, even its limited goal of avoiding piecemeal litigation will not be realized.

65 *Archuleta*, 432 F. Supp. at 593-94.

The *Fula* decision contains no rationale to compensate adequately for its objectionable results. Indeed, no reason exists to require a person to litigate important constitutional rights as a condition to raising nonconstitutional challenges to a grand jury subpoena.[66] Similarly, no convincing reason exists for the law to discourage the filing of potentially meritorious motions to quash grand jury subpoenas. Because the holding in *Fula* creates these results, it should not be followed by other federal circuits and should be overruled by the Supreme Court.

V. CONCLUSION

The recent decision by the Court of Appeals for the Second Circuit in *In re Fula* requires that witnesses subpoenaed before a grand jury who file a motion to quash the subpoena must raise all defenses in their motion that reasonably could have been included, or such defenses are waived for a subsequent contempt hearing. The *Fula* holding, however, is not supported by the sole case upon which the Second Circuit relied. Moreover, *Fula* leads to the undesirable results of requiring a person to litigate important constitutional rights as a condition to raising nonconstitutional challenges to a grand jury subpoena and of discouraging the filing of potentially meritorious motions to quash grand jury subpoenas. Thus, *In re Fula* should not be followed by other federal circuits, and it should be overruled by the Supreme Court.

66 This is the important distinction between the holding in *Fula* and the waiver required by FED. R. CIV. P. 12(h). The rights required to be relinquished by *Fula* often are important constitutional rights, while those in FED. R. CIV. P. 12(h) are of a less significant nature. Moreover, there is no reason to believe that the kind of matters which Rule 12(h) requires to be forfeited by motion cannot be as effectively raised in a responsive pleading. It is not likely, however, that a person who raises constitutional issues in a motion to quash will be as successful at a contempt hearing where a more complete record exists.