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Fifth Amendment--Substantial Exculpatory Evidence, Prosecutorial Misconduct and Grand Jury Proceedings: A Broadening of Prosecutorial Discretion

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FIFTH AMENDMENT—SUBSTANTIAL EXCULPATORY EVIDENCE, PROSECUTORIAL MISCONDUCT AND GRAND JURY PROCEEDINGS: A BROADENING OF PROSECUTORIAL DISCRETION

United States v. Williams, 112 S. Ct. 1735 (1992)

I. INTRODUCTION

In *United States v. Williams*,[1] the United States Supreme Court held that courts may not dismiss indictments when the prosecution fails to present substantial exculpatory evidence to the grand jury.[2]

In doing so, the Court emphasized the historical independence of the grand jury and reasoned that judicial intervention would hinder the grand jury's effectiveness as an investigative body.[3] The Court also held that certiorari could be granted even though the question presented was neither pressed nor passed upon below.[4] According to the Court, review was justified because the United States had also been a litigant in an earlier case which the lower courts used as precedent in *Williams*.[5]

This Note examines the Court's decision and concludes that the Court placed too much emphasis on the historical independence of the grand jury. Such emphasis ignored recent changes in the grand jury system and the role the grand jury plays in protecting citizens from wrongful prosecution. This Note also suggests that the "substantial exculpatory evidence" rule, set forth in *United States v. Page*[6] and argued for in Justice Stevens' dissent, better balances the interests promoted by the investigatory and protective functions of the grand jury. Finally, this Note concludes that the Court's expanded powers of review may unduly favor the government. The ultimate

1 112 S. Ct. 1735 (1992).
2 *Id.* at 1741-46.
3 *Id.* at 1742.
4 *Id.* at 1740-41.
5 *Id.*
6 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987).

effect of this expansion will depend upon whether the Court grants review of similar cases in the future, and how it rules in each of these future cases. Even if the rule does not result in actual bias, however, it does display an undesirable appearance of unfairness.

II. BACKGROUND

A. THE BROAD POWERS OF THE GRAND JURY

Historically, the grand jury has enjoyed broad investigatory powers and freedom from procedural rules.[7] The Supreme Court recognizes the grand jury's independence and has consistently limited judicial interference with grand jury activities.[8]

In *Hale v. Henkel*,[9] the Court determined that a grand jury could conduct an investigation into the commission of a crime without a formal charge.[10] The historical independence of the grand jury indicated to the Court that the grand jury possesses the power to act on its own volition.[11] Furthermore, the Court noted, the large majority of state courts support such broad investigatory powers.[12] However, by holding that the grand jury may not undertake an investigative action "far too sweeping in its terms to be regarded as reasonable," the *Hale* Court did place loose limits on the grand jury's investigative power.[13]

After *Hale*, the Court held in a series of cases that certain evidentiary and procedural rules do not apply in the grand jury context. In *Costello v. United States*,[14] the Court acknowledged the

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7 For information regarding the historical independence of the grand jury, *see* Hale v. Henkel, 201 U.S. 43 (1906); GEORGE J. EDWARDS, JR., THE GRAND JURY, 28-32 (1906); 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.2 (1984).

8 *Hale*, 201 U.S. at 60; Costello v. United States, 350 U.S. 359 (1956); United States v. Calandra, 414 U.S. 339 (1974); United States v. Mechanik, 475 U.S. 66 (1986); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

9 201 U.S. 43 (1906).

10 *Id.* at 59-60. In *Hale*, the grand jury issued Hale a subpoena duces tecum. *Id.* at 66, 70. Despite being offered immunity from criminal charges, Hale refused to answer questions or produce documents on the grounds that there was no specific charge against any particular person before the grand jury and that, by answering, he would tend to incriminate himself. *Id.* at 59. The Court first held that the investigation was valid, even absent a formal charge, due to the grand jury's broad investigatory powers. The grand jury possesses the power to begin investigations based upon its own knowledge or the testimony of a witness. *Id.* at 65. Second, the Court ruled that Fifth Amendment protections do not apply to grand jury proceedings. *Id.* at 70. However, the Court invalidated the subpoena duces tecum because its terms were "far too sweeping to be regarded as reasonable." *Id.* at 76.

11 *Id.* at 60.

12 *Id.* at 62.

13 *Id.* at 76.

14 350 U.S. 359 (1956).

validity of an indictment based solely on hearsay. In upholding the indictment, the Court reasoned that allowing indictments to be challenged on the basis of incompetent or inadequate evidence would greatly delay the justice system.[15] Also, such a rule would run counter to the entire history of the grand jury as an independent body.[16] The Court held that a grand jury indictment, if facially valid, provides a sufficient base for a trial on the merits and satisfies the Fifth Amendment's requirement of a grand jury indictment.[17] Furthermore, the Court commented that courts should not impose nonconstitutional requirements on the grand jury, such as one regarding hearsay, which would invalidate its indictments.[18]

In *United States v. Calandra*,[19] the Court reaffirmed the broad discretion allowed in grand jury proceedings by ruling that the Fourth Amendment's exclusionary rule does not apply to grand jury proceedings.[20] The Court held that a defendant may not refuse to answer a grand jury's questions on the ground that they are based on unlawfully obtained evidence.[21] Although the protections provided by the Fourth Amendment's exclusionary rule clearly existed in a trial on the merits, the Court held that extending Fourth Amendment protections to grand jury proceedings would hinder the historically independent function of the grand jury.[22] Also, such an extension would improperly transform the grand jury into a trial on

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15 *Id.* at 363. In *Costello*, the grand jury indicted the defendant for wilfully attempting to evade payment of income taxes. The indictment was based on the testimony of three government agents who had no firsthand knowledge of the financial transactions they discussed. Instead, the agents summarized and explained information provided by 144 witnesses who later testified at trial. *Id.* at 359-60.

16 *Id.* at 364.

17 *Id.* at 363. The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V.

18 *Costello*, 350 U.S. at 364.

19 414 U.S. 339 (1974).

20 *Id.* at 349.

21 *Id.* In *Calandra*, federal agents obtained a warrant to search the respondent's place of business for gambling records and wagering paraphernalia. *Id.* at 340. Although no such records or items were found, the agents did uncover records of what were possibly extortionary payments. *Id.* at 340-41. The district court determined that no probable cause existed to justify the warrant and that the search exceeded the scope of the warrant. *Id.* at 342.

22 *Id.* The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. Under this rule, the Court has held that evidence obtained in a manner which violates the fourth amendment cannot be used against the victim of an unreasonable search and seizure in a criminal proceeding. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

the merits and delay dispensation of justice.[23]

Even when there has been a procedural error in a grand jury investigation, the Court has been reluctant to dismiss a grand jury indictment. In *United States v. Mechanik*,[24] the Court refused to dismiss an indictment solely because testimony before the grand jury had violated Rule 6(d) of the Federal Rules of Criminal Procedure.[25] Because of its investigative role, the grand jury has traditionally been given "wide latitude" in its proceedings, and barring severe violations a grand jury's indictment will not be dismissed.[26] Furthermore, Federal Rule of Criminal Procedure 52(a) states that errors which do not affect substantial rights shall be disregarded.[27] In that case, the subsequent conviction of the defendants rendered any error before the grand jury harmless. Furthermore, the Court reasoned, reversal of convictions entails substantial costs, delays justice and, because of the passage of time, may render retrial difficult.[28]

B. DISMISSAL OF INDICTMENTS FOR PROSECUTORIAL MISCONDUCT

Once a defendant has been indicted by the grand jury, the courts have only limited ability to dismiss the indictment for prosecutorial misconduct. In *Bank of Nova Scotia v. United States*,[29] the Court applied the harmless-error rule set forth in Federal Rule of Criminal Procedure 52(a)[30] to hold that courts may not dismiss indictments for prosecutorial misconduct in grand jury proceedings unless such misconduct prejudiced the defendants.[31] In that case, eight defendants had been indicted on twenty-seven counts of conspiracy, mail fraud, tax fraud and obstruction of justice.[32] On remand for determination of whether prosecutorial misconduct occurred, the District Court for the District of Colorado dismissed all twenty-seven counts because prosecutorial misconduct had pre-

23 *Calandra*, 414 U.S. at 350. *See also* United States v. Dionisio, 410 U.S. 1, 17 (1973).

24 475 U.S. 66 (1986).

25 *Id.* at 73. Federal Rule Of Criminal Procedure 6(d) states that only certain persons, including "the witness under examination" may be present during grand jury proceedings. FED. R. CRIM. P. 6(d). The violation in this case consisted of testimony given in tandem before the grand jury by two government witnesses. *Mechanik*, 475 U.S. at 73.

26 *Mechanik*, 475 U.S. at 74 (O'Connor, J., concurring) (quoting *Calandra*, 414 U.S. at 343).

27 *Id.* at 75. Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial right, shall be disregarded." FED. R. CRIM. P. 52(a).

28 *Mechanik*, 475 U.S. at 72.

29 487 U.S. 250 (1988).

30 *See supra* note 27 for text of FED. R. CRIM. P. 52(a).

31 *Nova Scotia*, 487 U.S. at 254.

32 *Id.* at 252.

vented the grand jury from conducting an accurate investigation.[33] The Court of Appeals for the Tenth Circuit reversed, holding that the government's misconduct before the grand jury did not warrant dismissal because "the accumulation of misconduct" did not "significantly infringe" on the grand jury's ability to exercise independent judgment.[34]

The Supreme Court affirmed.[35] The Court noted that, because Congress has empowered the Court to prescribe rules of pleading, practice and procedure, Rule 52(a) is as binding as statutes enacted by Congress.[36] Therefore, federal courts lack the discretion to ig-

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[33] *Id.* at 253; United States v. Kilpatrick, 594 F. Supp. 1324, 1353 (1984), *rev'd* 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom.* Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

The district court's findings of fact concerning prosecutorial misconduct can be grouped into ten basic areas. The court first found that the prosecution improperly appointed three Internal Revenue Service agents as "grand jury agents" when it had no power to do so and allowed these agents to testify in tandem before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). *Kilpatrick*, 594 F. Supp. at 1328-30. Second, the court found that the government violated Federal Rule of Criminal Procedure 6(e) by delegating its authority before the grand jury to the Internal Revenue Service agents. *Id.* at 1331. Third, the court determined that the government was using the grand jury's powers to obtain information for use in later civil litigation. *Id.* at 1332. Fourth, the court held that, through publishing the names of the individuals and entities which were being investigated, the government violated the "time-honored tradition of grand jury secrecy." *Id.* at 1334. Fifth, the court determined that the government improperly imposed obligations of secrecy on two grand jury witnesses for strategic purposes, in violation of Federal Rule of Criminal Procedure 6(e). *Id.* at 1335-36. Sixth, the government made only informal offers of immunity to some witnesses. The court found that the informal nature of these offers placed witnesses in fear that immunity might be withdrawn unless their testimony pleased the government. *Id.* at 1336-38. Seventh, the court found that the government prejudiced the jury against some defendants by calling them to testify, even though it knew these defendants would invoke their fifth amendment privilege against self-incrimination. *Id.* at 1338. Eighth, the court found that the government "summarized" evidence which actually had never been presented to the grand jury. *Id.* at 1339-40. Ninth, the court determined that government prosecutors had interrogated witnesses "without notice to or leave of defense counsel." *Id.* at 1342. Finally, the court found that the prosecution grossly mistreated the defense's tax expert during a recess, within the hearing of some of the grand jurors. *Id.* at 1343.

[34] United States v. Kilpatrick, 821 F.2d 1456, 1474 (1987), *aff'd sub nom.* Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

[35] *Nova Scotia*, 487 U.S. at 263-64.

[36] *Id.* at 255. This power was granted under 18 U.S.C. § 687 (1946 ed.) (codified at 18 U.S.C. § 3771 at the time *Nova Scotia* was decided), which invested the Court with authority to "prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict . . . . [A]ll laws in conflict therewith shall be of no further force and effect."

18 U.S.C. § 3771 was repealed by Act Nov. 19, 1988, P.L. 100-702, Title IV, § 404(a), 102 Stat. 4651, effective Dec. 1, 1988, as provided by § 407 of such Act, which appears as 28 U.S.C. § 2071 note. Similar provisions now appear in 28 U.S.C. § 2071(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business . . . " and 28 U.S.C. § 2074, which allows the Supreme Court to fix the extent that rules of

nore or circumvent the Rule "simply 'in order to chastise what the court[s] view as prosecutorial overreaching.' "[37] The Court also adopted Justice O'Connor's test for dismissal of an indictment, set forth in her concurrence in *Mechanik*: dismissal is appropriate only if the violation substantially influenced the grand jury's decision to indict or if "grave doubt" exists that the decision to indict was free from any substantial influence by such violations.[38]

The circuit courts have also addressed the issue of whether indictments may be dismissed for prosecutorial misconduct, particularly in the form of failure to present exculpatory evidence to the grand jury. Prior to the Supreme Court's decision in *Nova Scotia*, both the Eleventh and Sixth Circuits stated simply that the prosecution has no duty to present exculpatory evidence to a grand jury.[39] The Sixth Circuit noted that the grand jury plays an investigative, non-adversarial role, and that exculpatory evidence therefore need not be presented.[40]

After *Nova Scotia*, the Ninth Circuit took a more moderate stance, stating that no affirmative duty exists for the prosecutor to present exculpatory evidence to the grand jury.[41] Under *Nova Sco-*

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procedure and evidence promulgated by the Court under 28 U.S.C. § 2072 (1992 Supp.) apply to pending proceedings. 28 U.S.C. §§ 2071(a), 2074 (1992 Supp.).

37 *Nova Scotia*, 487 U.S. at 255 (quoting United States v. Hasting, 461 U.S. 499, 507 (1983)). In *Hasting*, the defendants were tried and convicted of kidnapping, transporting women across state lines for immoral purposes, and conspiracy to commit these offenses. The prosecution commented during summation that the defendants had never challenged the charges. The defense argued that these statements violated the defendant's fifth amendment rights under Griffin v. California, 380 U.S. 609 (1965) (characterization by prosecutor of testimony as uncontradicted is error if only the nontestifying defendant can dispute the testimony). The Seventh Circuit declined to follow the harmless-error rule and reversed the convictions. *Hasting*, 461 U.S. at 503. Citing the harmless-error doctrine, the Court reversed and remanded the case. *Id.* at 504.

38 *Nova Scotia*, 487 U.S. at 256 (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)).

39 United States v. Hawkins, 765 F.2d 1482, 1488 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986) (citing United States v. Ruyle, 524 F.2d 1133, 1136, (6th Cir. 1975) (defendant may not challenge superceding indictment on grounds that the second grand jury may have heard less evidence than the first grand jury), *cert. denied*, 425 U.S. 934 (1976)); United States v. Hyder, 732 F.2d 841, 844-45 (11th Cir. 1984) (government not obligated to present exculpatory evidence to the grand jury); United States v. Adamo, 742 F.2d 927 (6th Cir. 1984) (following *Ruyle*, 524 F.2d at 1136, for the proposition that a federal prosecutor is not obligated to present exculpatory evidence to the grand jury), *cert. denied sub nom.* Freeman v. United States, 469 U.S. 1193 (1985); United States v. Morano, 697 F.2d 923, 927 (11th Cir. 1983) ("An indictment valid on its face cannot be challenged merely because the grand jury acted on inadequate or incompetent evidence.").

40 *Adamo*, 742 F.2d at 937.

41 United States v. Larrazolo, 869 F.2d 1354 (9th Cir. 1989). In support of its position, the Ninth Circuit cited United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir. 1983) (citing United States v. Tham, 665 F.2d 855, 863 (9th Cir. 1982) (prosecution has

tia, a court may dismiss a grand jury indictment for prosecutorial misconduct which substantially influences the grand jury's decision to indict or raises "grave doubt" that the indictment was free from such influence.[42] The Ninth Circuit determined that this rule did not preclude dismissal if prejudice existed.[43] In this case, however, the prosecution's failure to present possibly exculpatory evidence to the grand jury did not result in prejudice.[44] Similarly, the First and Eighth Circuits have held that the prosecution normally has no duty to disclose exculpatory evidence to a grand jury.[45]

Alternatively, the Second, Seventh and Tenth Circuits have held that prosecutors do have a duty to present substantially exculpatory evidence to the grand jury. The Second Circuit stated that the prosecution should provide the grand jury with "any substantial evidence negating guilt" which might reasonably lead the grand jury to not indict.[46] The Seventh Circuit requires prosecutors to present

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no duty to present to the grand jury matters concerning witness credibility or exculpatory evidence), *cert. denied*, 456 U.S. 944 (1981)), *cert. denied*, 461 U.S. 932 (1983); United States v. Trass, 644 F.2d 791, 796 (9th Cir. 1981) (facially valid indictment sufficient for trial on the merits); United States v. Kennedy, 564 F.2d 1329, 1337-38 (9th Cir. 1977) (indictment should be dismissed only for flagrant error relating to material matter), *cert. denied sub nom.* Meyers v. United States, 435 U.S. 944 (1978); United States v. Cederquist, 641 F.2d 1347, 1353 n.3 (9th Cir. 1981) (failure by prosecution to present evidence favorable to defendant to the grand jury is not basis for dismissal of the indictment).

42 *Larrazolo*, 869 F.2d at 1358 (quoting *Nova Scotia*, 487 U.S. at 256 (quoting *Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring))) (internal quotations omitted).

43 *Id.* at 1358.

44 *Id.* at 1360. In *Larrazolo*, the defendants were indicted for conspiring to distribute and to possess marijuana with intent to distribute. The defendants argued, inter alia, that the prosecution's failure to present exculpatory evidence to the grand jury constituted error. *Id.* at 1359. Specifically, the defendants claimed that their statements in their arrest reports and the arrest report of their father (not a defendant on appeal) were exculpatory and should have been presented to the grand jury. *Id.* Because the defendants failed to show that actual prejudice resulted from the withholding of the potentially exculpatory evidence, the Court upheld the indictment. *Id.* at 1360.

45 United States v. Vincent, 901 F.2d 97 (8th Cir. 1990) (government normally not under duty to disclose exculpatory evidence to the grand jury; validity of grand jury indictment may not be challenged for being based on inadequate or incompetent evidence) (citing United States v. Calandra, 414 U.S. 338, 345 (1974), United States v. Bucci, 839 F.2d 825, 831 (1st Cir. 1988), *cert. denied*, 488 U.S. 844 (1988)); United States v. Rivera-Santiago, 872 F.2d 1073, 1087 (1st Cir. 1989) (prosecution normally has no duty to disclose exculpatory evidence to a grand jury; a facially valid indictment is sufficient to call for a trial on the merits) (citing Costello v. United States, 350 U.S. 359, 363 (1956), *Bucci*, 839 F.2d at 831, United States v. Wilson, 798 F.2d 509, 517 (1st Cir. 1986)).

Interestingly, in both *Rivera-Santiago* and *Bucci* the First Circuit also cited United States v. Page, 808 F.2d 723, 727-28 (10th Cir. 1987)—the precedent used by the Tenth Circuit in *Williams*—as general support for the proposition that the prosecution *normally* has no duty to present exculpatory evidence to the grand jury. *Rivera-Santiago*, 872 F.2d at 1087; *Bucci*, 839 F.2d at 831.

46 United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (prosecution should

to the grand jury evidence which clearly negates guilt.[47] Similarly, in *United States v. Page*,[48] the Tenth Circuit ruled that, while the prosecution need not "ferret out and present every bit of potentially exculpatory evidence," it must reveal substantial exculpatory evidence to the grand jury.[49]

III. Facts and Procedural History

John H. Williams, a Tulsa, Oklahoma businessman, obtained loans and loan renewals from four Tulsa banks between September 1984 and November 1985.[50] For each loan or loan renewal, Williams provided the banks with a list of "current assets" and a "statement of projected income and expense."[51]

When organized in accordance with Generally Accepted Ac-

present substantial evidence negating guilt to the grand jury when such evidence might reasonably lead the grand jury to not indict). *See also* United States v. Bari, 750 F.2d 1169, 1176 (2d Cir. 1984) (if prosecution knows of substantial evidence which negates guilt it should inform grand jury, but dismissal is only justified when prosecution knowingly or recklessly misleads grand jury regarding an essential fact), *cert. denied sub nom.* Benfield v. United States, 472 U.S. 1019 (1985).

The Second Circuit created this rule in addition to other law, adopted from other circuits, that limited the prosecution's discretion in presenting evidence to the grand jury. First, the prosecution may not obtain an indictment on the basis of material evidence which the prosecution knows to be perjurious. United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974). Second, the prosecution may not lead the grand jury to believe that hearsay evidence is actually eyewitness testimony. United States v. Estepa, 471 F.2d 1132, 1136-37 (2d Cir. 1972).

47 United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983) (prosecution must present evidence which clearly negates target's guilt to the grand jury, but need not present all possibly exculpatory evidence), *cert. denied*, 465 U.S. 1068 (1984).

The Seventh Circuit noted in Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986) that case law regarding the prosecution's duty to reveal substantially exculpatory evidence to the grand jury only began to develop in 1975, and as of 1986 (when *Kompare* was decided) the law was unclear. *Id.* at 890 n.8. The Seventh Circuit first mentioned the duty in *Flomenhoft*. *Id.*

48 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987).

49 *Id.* at 728. In *Page*, a former assistant district attorney was convicted of engaging in racketeering activities affecting interstate commerce and of obstructing, affecting and delaying interstate commerce through extortion. *Id.* at 725-26. Following conviction, the defendant claimed that the prosecution failed to present the grand jury with exculpatory evidence regarding payments taken to fix cases. *Id.* at 727. The defendant asserted that this evidence—in the form of tax returns, canceled checks and a client's testimony—went to show that he had not taken illegal payments. *Id.* at 728. Such prosecutorial misconduct, the defendant argued, warranted dismissal of the indictment. *Id.*

In order to decide this issue, the Tenth Circuit adopted the rule that when "*substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury." *Id.* Applying this rule, the court found that withholding the evidence from the grand jury resulted in no error because the evidence was not clearly exculpatory. *Id.*

50 United States v. Williams, 112 S. Ct. 1735, 1737 (1992).

51 *Id.*

counting Principles (GAAP), a list of current assets records the fair market value of assets which will be realized in cash within one year.[52] Williams' statements, however, listed several investments at cost, not fair market value.[53] Included in his current assets were "notes receivable" for investments, totalling between $5 million and $6 million, in several new venture capital corporations with negative net values.[54] The negative net worth of these corporations made it likely that the costs of these investments would exceed their fair market value. In Williams' defense, each statement did contain a disclaimer in a legend on its front page which stated that the venture corporation investments were listed at cost, not fair market value.[55]

Williams' other financial statement, a "Statement of Projected Income and Expense," included interest income payable on the above notes receivable.[56]

The government claimed that Williams used these statements to intentionally mislead the banks by improperly giving these investments the appearance of assets which were readily realizable in liquid form.[57] The government asserted that these items should not have been listed as current assets because the poor financial position of these corporations precluded their recovery within one year.[58] The government also alleged that Williams misled the banks by listing interest payments from the venture corporations in his statement of projected income and expense.[59] Because the venture companies maintained such weak financial positions and generated no profits, the government claimed, any interest income could only be generated using funds invested directly into the corporations, such as the investments made by Williams.[60] Thus, the government asserted, disclosure of these payments as interest income was likely to have misled the banks into believing the interest constituted a source of independent income.[61]

On May 4, 1988, after a six-month investigation, a federal grand jury returned a seven count indictment charging Williams

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52 United States v. Williams, 899 F.2d 898, 899 (10th Cir. 1990); BLACK'S LAW DICTIONARY 382 (6th ed. 1990).

53 Brief of Respondent at 10, United States v. Williams, 112 S. Ct. 1735 (No. 90-1972) (1992).

54 *Williams*, 899 F.2d at 899.

55 Brief of Respondent, *supra* note 53, at 10.

56 *Williams*, 899 F.2d at 899.

57 United States v. Williams, 112 S. Ct. 1735, 1737 (1992).

58 *Id.* at 1737; Brief for the United States at 2, *Williams* (No. 90-1972) (1992).

59 *Williams*, 899 F.2d at 899.

60 *Id.*

61 *Id.*

with defrauding a bank in violation of 18 U.S.C. § 1014.[62]

After arraignment, Williams filed a motion with the district court pursuant to the ruling in *Brady v. Maryland*[63] for disclosure of all exculpatory portions of the grand jury transcript.[64] The district court granted the motion, and the government indicated it would comply by supplying Williams with any exculpatory evidence.[65]

After examining the provided materials, Williams filed a motion to dismiss, claiming that the government had failed to fulfill its duties required under *United States v. Page*[66] to present "substantially exculpatory evidence" to the grand jury.[67] Williams argued that his statements of current assets and projected income and expense were of a substantial exculpatory nature because they showed that he lacked intent to defraud the banks. Specifically, Williams claimed these records showed that he had consistently accounted for his interest income and notes receivable in the same manner he presented them to the Tulsa banks. The consistent use of these accounting methods, he claimed, showed a decided lack of intent on his part to defraud the banks because it "indicate[d] a lawful basis for the information provided to the banks."[68] Furthermore, Williams continued, the legends located at the bottom of the first page of each current asset statement clearly stated that the venture corporation investments were valued at cost, not fair market value. These additional statements, Williams argued, also negated intent.[69]

In addition to these records, Williams claimed that the government possessed but had failed to produce a five-volume deposition, given by Williams in a contemporaneous bankruptcy proceeding, in which he offered legitimate explanations for his methods of ac-

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62 The statute states in relevant part:

> [w]hoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . [upon any] loan, or any extension of the same . . . shall be fined not more that $1,000,000 or imprisoned not more than 30 years or both.

18 U.S.C. § 1014 (1988 ed., Supp. II).

63 373 U.S. 83 (1963).

64 *Williams*, 899 F.2d at 899. In *Brady*, the defendant, who was tried and convicted for first degree felony murder, appealed on the grounds that the prosecution had withheld during trial a confession by an accomplice in which the accomplice confessed to committing the murder. *Brady*, 373 U.S. at 84. The Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

65 *Williams*, 899 F.2d at 899.

66 808 F.2d 723 (1987), *cert. denied*, 482 U.S. 918 (1987).

67 *Id.* at 728 (emphasis omitted). *See supra* note 49 for a discussion of *Page*.

68 *Williams*, 899 F.2d at 900.

69 Brief of Respondent, *supra* note 53, at 10.

counting.[70] According to Williams, these explanations also negated the requisite intent required under the statute.[71]

The district court initially denied Williams' motion.[72] Upon reconsideration, however, the court dismissed the indictment without prejudice.[73] The withheld information, the court concluded, constituted substantial exculpatory evidence, raised "reasonable doubt about the defendant's intent to defraud" and rendered the grand jury's indictment "gravely suspect."[74]

The government appealed the district court's finding that it withheld substantial exculpatory evidence from the grand jury.[75] The government contended it had presented the grand jury with all relevant evidence concerning Williams' financial statements, and asserted that the deposition testimony's "self-serving" nature prevented it from being substantially exculpatory.[76] In the alternative, the government argued that the remedy of dismissal was inappropriate.[77] Williams cross-appealed, claiming that the indictment should have been dismissed with prejudice.[78]

The Court of Appeals for the Tenth Circuit affirmed the lower court's decision in its entirety.[79] The Tenth Circuit explained that the district court had defined the withheld information as substantially exculpatory, and that absent clear error this finding of fact could not be reversed.[80] In this case, the circuit court noted that, although the facts could be interpreted differently, the district court's decision was not clearly erroneous. The court held further

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70 *Williams*, 899 F.2d at 900.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 901. In its brief to the Tenth Circuit, the government urged the court " 'to review the grand jury transcripts . . . and satisfy itself of the accuracy of the government's position.' " *Id.* at 903 (quoting Government's Response, April 5, 1989, at 9). However, the grand jury transcript was not designated as part of the record. The Tenth Circuit provided these comments:

> [i]f we had the benefit of reviewing the grand jury transcript, our review of the deposition's exculpatory evidence may have lead [sic] to a different conclusion. Nevertheless, we conclude that the explanations regarding the classification of the notes as well as their valuation in the financial statements are consistent with the possible theory that defendant simply did not intend to mislead the banks. *Id.* at 903.

77 *Id.* at 900.

78 *Id.*

79 *Id.* at 904.

80 *Id.* at 900 (citing Lone Star Steel Co. v. United Mine Workers, 851 F.2d 1239 (10th Cir. 1988)). The court noted that, although this rule is set forth in Federal Rule of Civil Procedure 52(a), it is also applied to certain issues in criminal proceedings. *Id.* (citing United States v. Ortiz, 804 F.2d 1161 (10th Cir. 1986)).

that the prosecution substantially influenced the grand jury by withholding the substantial exculpatory evidence, or at least " 'cast grave doubt that the decision to indict was free from such substantial influence.' "[81] Since withholding this evidence might have infringed on the grand jury's ability to exercise independent judgment, the district court had properly granted dismissal under the rule set forth in *Bank of Nova Scotia v. United States*.[82]

Finally, the Tenth Circuit denied Williams' request for dismissal with prejudice. The court reasoned that dismissal without prejudice was entirely proper in this case because it left the government free to reintroduce its case to a grand jury, with the exculpatory evidence included, for determination of probable cause.[83]

The United States Supreme Court granted certiorari to address the issue of whether a district court may dismiss an otherwise valid indictment due to government failure to disclose substantial exculpatory evidence in its possession to the grand jury.[84]

IV. THE SUPRME COURT OPINIONS

In a 5-4 decision, the Supreme Court reversed the Court of Appeals for the Tenth Circuit. The Court held that the indictments could not be dismissed for the prosecution's failure to present substantial exculpatory evidence to the grand jury, because to do so would infringe on the traditional independence of the grand jury institution.[85] The Court also expanded its broad rule for granting review by determining that certiorari had not been improvidently granted, even though the question presented had been neither pressed nor passed upon below.[86]

A. THE MAJORITY OPINION

1. The Granting of Certiorari

Justice Scalia delivered the opinion of the Court.[87] By granting

81 United States v. Williams, 899 F.2d 898, 903 (10th Cir. 1990) (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988)).

82 *Id.* In *Nova Scotia*, 487 U.S. 250 (1988), the Supreme Court set forth the following standard for dismissing an indictment for nonconstitutional error: "[t]he prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless." *Nova Scotia*, 487 U.S. at 263.

83 *Williams*, 899 F.2d at 904 (citing Record, vol. 6, at 5).

84 United States v. Williams, 112 S. Ct. 1735, 1737 (1992).

85 *Id.* at 1740-41, 1745.

86 *Id.* at 1738.

87 *Id.* at 1737. Justice Scalia was joined by Chief Justice Rehnquist and Justices

certiorari in this case, the Court increased its discretionary power of review.[88] The government had sought and been granted certiorari on the question of "[w]hether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury."[89] The Court's traditional rule for granting certiorari precludes review only when " 'the question presented was not pressed or passed upon below.' "[90] Although the question in this case had not been presented in the lower courts, the Court nonetheless stated that a grant of certiorari was entirely in accord with its traditional practice for granting review. The Court noted that it would be "improvident" to dismiss the writ of certiorari after briefing, argument and full consideration by the court.[91] Review of an issue not pressed or passed upon below was justified if the following conditions were satisfied: first, the issue must have been addressed in a recent case; second, that recent case must have been used as precedent in the instant case; and third, the party contesting the issue in the instant case must have been a litigant in that precedential case.[92]

Under this rule, according to the Court, a grant of certiorari in the instant case was entirely proper. In *United States v. Page*,[93] the Tenth Circuit had ruled against the government's position and had set forth the rule that the prosecution in a criminal case has the duty to present substantial exculpatory evidence to the grand jury.[94] In ruling upon *Williams*, the Tenth Circuit had applied the *Page* rule without objection from the government. The Court reasoned, however, that it would be "unreasonable" to require a litigant to object to such directly applicable and recent precedent in order to be

White, Kennedy and Souter. Justice Thomas also joined, but only regarding the grant of certiorari.

88 The Court has declared that "[t]his Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." Duignan v. United States, 274 U.S. 195, 200 (1927). *See also* United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977) (no review of questions not raised below except in exceptional circumstances); United States v. Ortiz, 422 U.S. 891, 898 (1975) (declining to address issue raised for first time in petition for certiorari).

89 *Id.* at 1739.

90 *Id.* at 1738 (quoting the dissent at 1747-48).

91 *Id.*

92 *Id.* 1740-41. The Court's precise language is as follows:

> It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent. *Id.* (footnotes omitted).

93 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987).

94 *Id.* at 728.

granted certiorari upon that issue.[95] It was sufficient that in this case the government had merely complied with the *Page* rule without acknowledging its correctness.[96] Because the government had not conceded the propriety of the *Page* rule, it was within the Court's discretion to grant review, even though the issue had been neither pressed nor passed upon in the courts below.[97]

The Court conceded that the government would naturally benefit from this rule permitting the Court to grant certiorari more often than other parties, it being the most frequent litigant in the federal courts. However, since such a benefit inevitably occurs with most desirable rules of procedure or jurisdiction, the Court concluded that this expanded rule does not amount to favoritism for the government on the part of the Court.[98]

2. *Court Supervision and Control of the Grand Jury*

Emphasizing the historical independence of the grand jury from the courts, the Court concluded that the district court should not have dismissed the indictment against Williams. The Court thus declined to follow the rule suggested in *Bank of Nova Scotia v. United States*[99] that an indictment may be dismissed where errors before the grand jury prejudiced the defendants.[100] Instead, the Court stated that, barring violation of a specific Federal Rule of Criminal Procedure, courts lack sufficient supervisory power over the grand jury to dismiss indictments.[101] Thus, failure by the prosecution to present substantial exculpatory evidence in its possession to the grand jury does not warrant dismissal.

The Court provided further support for its holding that courts may not dismiss indictments when the prosecution fails to present

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95 United States v. Williams, 112 S. Ct. 1735, 1740 (1992).

96 *Id.* The majority stated that the government had merely "acknowledged 'that it has certain responsibilities under . . . *Page*.' " *Id.* (quoting Brief for the United States in Response to Appellee's Brief at 9, United States v. Williams, 899 F.2d 898 (10th Cir. 1990) (Nos. 88-2827, 88-2843) (emphasis omitted)). The dissent, however, described the government as having "expressly acknowledged the responsibilities described in *Page*." *Id.* at 1747-48 (Stevens, J., dissenting).

97 *Id.* at 1740-41.

98 *Id.* at 1741.

99 487 U.S. 250 (1987).

100 *Id.* at 254.

101 *United States v. Williams*, 112 S. Ct. 1735, 1741-42 (1992). The Court emphasized that this broad discretion is only " 'bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's function.' " *Id.* at 1741 (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)). These rules, however, are only intended as "means of enforcing . . . legally compelled standards," not as a "means of *prescribing* those standards of prosecutorial conduct in the first instance . . . ." *Id.* at 1742.

substantial exculpatory evidence in its possession by noting that the entire theory behind the grand jury is that it should serve as a "buffer or referee between the government and the people."[102] Furthermore, the grand jury has not been "textually assigned" to any branch of government, and aside from the calling together of the grand jurors and the administering of their oaths of office, judges have never been directly involved in the functioning of the grand jury.[103]

The Court found additional support for the independence of the grand jury in language taken from earlier decisions which stated that the Fifth Amendment's constitutional guaranty "presupposes" an investigative body which acts independently of the prosecution and judge.[104] As a result, the grand jury should remain free to conduct its investigations unhindered by external supervision so long as the grand jury does not infringe upon the rights of witnesses called before it.[105] To infringe on this freedom by imposing increased supervision would impinge on the grand jury's role as an independent accusatory body. The Court thus rejected Williams' argument that the *Page* rule was justified as "a sort of Fifth Amendment 'common law', a necessary means of assuring the constitutional right to the judgment 'of an independent and informed grand jury.' "[106]

The majority countered the dissent's argument for preservation of the grand jury's dual roles of accuser and protector by commenting that, if a balance between the accusatory and protective roles of the grand jury were truly a concern, then logically the method by which this should be accomplished would be to entitle a person targeted by a grand jury investigation to provide a defense before the grand jury.[107] To deny this option while requiring the prosecutor to provide the grand jury with defense material, however, would be "quite absurd."[108] It also would be illogical to dismiss the indictment in this instance because the grand jury is not obligated to hear any more evidence than that which convinces it that an indictment is proper.[109] Had the prosecution offered to present the exculpatory

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102 *Id.* at 1742.

103 *Id.* (citing United States v. Calandra, 414 U.S. 338, 343 (1974); FED. R. CRIM. P. 6(a) (giving the courts the power to call the grand jury and the administer the grand jurors' oaths of office)).

104 *Id.* at 1743 (citing United States v. Dionisio, 410 U.S. 1 (1973); Stirone v. United States, 361 U.S. 212 (1960)).

105 *Id.*

106 *Id.* at 1744 (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962); citing Brief for Respondent, *supra* note 53, at 27).

107 *Id.* at 1745.

108 *Id.*

109 *Id.*

evidence to the grand jury and the grand jury had refused to hear it because it was convinced an indictment was justified, dismissal would not be possible.[110] "We reject," stated the Court, "the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor."[111]

Finally, the majority rejected Williams' argument that a rule which requires presentation of such evidence would promote judicial economy by removing unjustified prosecutions from the federal docket.[112] Williams' argument followed the Tenth Circuit's reasoning set forth in *Page*: if a fully informed grand jury cannot find probable cause to indict, then there is little chance that the prosecution could have proved guilt beyond a reasonable doubt before a petit jury.[113] The Court questioned whether such an approach would in fact save valuable judicial time: such a savings, it suggested, would depend upon the actual ratio of unjustified prosecutions eliminated to grand jury indictments challenged. Nevertheless, such policy making was not the role of the Court, and was more properly left for the legislative branch. "[I]f there is an advantage to the proposal,' the Court concluded, "Congress is free to prescribe it."[114]

B. THE DISSENTING OPINION

1. The Granting of Certiorari

The dissent, written by Justice Stevens, fully agreed with the majority concerning the traditional rule for granting certiorari.[115] Following this rule, the dissent argued that certiorari had been improvidently granted because, in this case, the question presented had never been presented or passed upon below.[116]

The dissent's disagreement hinged on the rule, set forth in *United States v. Page*,[117] that the prosecution in a criminal case must present substantially exculpatory evidence to the grand jury.[118] Because the government never objected to the Tenth Circuit's application of the *Page* rule, the question of this standard's appropriateness had been neither passed upon nor presented below. Therefore, ac-

110 *Id.*
111 *Id.*
112 *Id.* at 1746.
113 *Id.* (citing United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987)).
114 *Id.*
115 *Id.* at 1748 (Stevens, J., dissenting). Justices Blackmun and O'Connor joined the dissent. Justice Thomas also joined concerning the courts' supervisory power over the grand jury, but not regarding the grant of certiorari.
116 *Id.* at 1746-49 (Stevens, J., dissenting).
117 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987).
118 *Id.* at 728.

cording to Justice Stevens, certiorari had been improvidently granted.[119] The dissent decried the Court's new rule for granting certiorari and argued that it improperly extended the Court's power to grant certiorari in a manner which would result in favoritism for the government over ordinary litigants.[120]

Justice Stevens argued further that, even though the case had already been fully briefed and argued, dismissal of the writ as improvidently granted would have been entirely appropriate: a vote of four justices is sufficient to grant a petition for certiorari, but this does not preclude subsequent dismissal by a 5-4 vote.[121]

2. *Court Supervision and Control of the Grand Jury*

The dissent interpreted the grand jury's traditional role differently than the majority and asserted that the prosecution must be required to present substantial exculpatory evidence to the grand jury. Otherwise, the prosecution would be able to mislead a grand jury into believing that probable cause to indict exists by withholding evidence which clearly negates guilt.[122] The dissent agreed with the Court, however, that the government should not be required to place all exculpatory evidence before the grand jury, because such a requirement would be inconsistent with the grand jury's purpose and would place excessive burdens on the prosecution.[123]

First, the dissent observed that, despite its independent role, the grand jury remains an appendage of the court which requires the court's aid to carry out its functions.[124] Second, the dissent emphasized that the grand jury has the dual duties of acting as both an investigative body and a protective one against improper and oppressive governmental action.[125] Third, the dissent followed the Court's reasoning in *Berger v. United States*[126] and argued that, be-

119 *United States v. Williams*, 112 S. Ct. 1735, 1747-48 (1992) (Stevens, J., dissenting).

120 *Id.* at 1748 (Stevens, J., dissenting).

121 *Id.* at 1749 n.7 (Stevens, J., dissenting). The dissent cited NAACP v. Overstreet, 384 U.S. 118 (1966), dismissed over the dissent of four justices after briefing and argument, as an example.

122 *Id.* at 1754 (Stevens, J., dissenting).

123 *Id.* (Stevens, J., dissenting).

124 *Id.* at 1752 (Stevens, J., dissenting) (citing Brown v. United States, 359 U.S. 41 (1959)).

125 *Id.* at 1753 (Stevens, J., dissenting) (citing United States v. Calandra, 414 U.S. 339, 343 (1974)). In *Calandra*, the Court explained that the traditionally wide latitude given to the grand jury reflected its special role in fair and effective law enforcement. *Calandra*, 414 U.S. at 343. In contrast, the Court in *Williams* dismissed this qualification of the grand jury's broad powers and cited *Calandra* to support its position of noninterference with the grand jury's function. *United States v. Williams*, 112 S. Ct. 1735, 1743-46 (1992) (citing *Calandra*, 414 U.S. at 343).

126 295 U.S. 78 (1935).

cause prosecutors represent the government, their responsibilities include both the obligation to refrain from improper methods for obtaining a conviction and the duty to use all legitimate means available to secure a just one.[127]

In the eyes of the dissent, the issue was one of fundamental fairness of grand jury proceedings.[128] The mere fact that no statute proscribes a certain action, such as the withholding of substantial exculpatory evidence by the prosecution, does not mean that the court lacks authority to supervise the grand jury when its proceedings threaten to preclude the grand jury's fulfillment of its dual roles.[129] In order to protect the integrity of grand jury proceedings, the courts must be allowed to penalize unrestrained prosecutorial misconduct by dismissing indictments thereby obtained.[130]

Finally, the dissent noted that statements in the U.S. Department of Justice's United States Attorneys' Manual supported a rule requiring presentation of substantial exculpatory evidence to the grand jury: "[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such person."[131]

V. ANALYSIS

In *Williams*, the Supreme Court reaffirmed the grand jury's independence from court supervision by rejecting a rule requiring the prosecution to present substantial exculpatory evidence to the grand jury. In doing so, the Court emphasized the grand jury's historical independence and role as an accusatory body unfettered by court-imposed restraints. As a secondary matter, the Court expanded its powers of review by allowing for review of questions not pressed or passed upon below. This Note predicts that this decision may lead to increased aggressiveness by prosecutors in obtaining

127 *Williams*, 112 S. Ct. at 1750 (Stevens, J., dissenting) (citing *Berger*, 295 U.S. at 88). The dissent quoted the following passage from *Berger*:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger*, 295 U.S. at 88.

128 *Williams*, 112 S. Ct. at 1746 (Stevens, J., dissenting).

129 *Id.* at 1753 (Stevens, J., dissenting).

130 *Id.* at 1752 (Stevens, J., dissenting).

131 *Id.* at 1754 (Stevens, J., dissenting) (quoting U.S. Dept. of Justice, UNITED STATES ATTORNEYS' MANUAL, Title 9, ch. 11, ¶ 9-11.233 (1988).

indictments, since prosecutorial misconduct in the form of failure to present substantial exculpatory evidence will not lead to dismissal of indictments. This Note also suggests that the Court's ruling over emphasizes the grand jury's independence at the expense of another historical function of the grand jury: protection of citizens from unfair prosecution.

Regarding the expanded power of review set forth in this case, this Note predicts that such a rule may result in a greater number of appeals to the Supreme Court in decisions unfavorable to the government. This expanded rule potentially favors the government in court proceedings by providing it with a much greater chance for review of some unfavorable decisions than other parties enjoy. The ultimate effect of this potential favoritism, however, will depend upon whether the Court grants certiorari in these cases, and if so, whether the Court affirms or reverses these decisions.

A. JUDICIAL SUPERVISION OF THE GRAND JURY

1. The Court and Dissent's Differing Definitions of the Grand Jury's Role

The conclusions reached by the Court and the dissent depend upon the different definitions each gave to the grand jury's function. Because their conclusions center on these mutually exclusive definitions of the grand jury's role, the two positions seem irreconcilable.

The Court defines the grand jury as a purely accusatory body, which for that reason must remain as independent as possible from court interference and supervision.[132] This reasoning follows the Court's decision in *Costello v. United States*,[133] in which the Court emphasized the grand jury's historical independence in upholding a facially valid indictment based on hearsay.[134] By definition, an independent grand jury must have minimal judicial supervision and interference. Aside from court supervision as provided by Rule 6 of the Federal Rules of Criminal Procedure and by statute, the courts cannot interfere with grand jury proceedings to dismiss an indictment.[135]

The dissent's definition of the grand jury's role necessarily

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[132] *Williams*, 112 S. Ct. at 1742 (citing Stirone v. United States, 361 U.S. 212, 218 (1960); Hale v. Henkel, 201 U.S. 43, 61 (1906); GEORGE J. EDWARDS, JR., THE GRAND JURY, 28-32 (1906)). *See supra* text accompanying notes 7-28.

[133] 350 U.S. 359 (1956).

[134] *Id.* at 363.

[135] *Williams*, 112 S. Ct. at 1742 (citing United States v. Calandra, 414 U.S. 339, 343 (1974); FED. R. CRIM. P. 6(a)). Federal Rule of Criminal Procedure 6(a) reads as follows:

> (a) Summoning of Grand Juries.
>
> (1) Generally. The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of

leads it to a different conclusion. According to the dissent, the grand jury fulfills the dual purposes of acting as both an accuser of crimes and a protector of citizens from unjust prosecution.[136] Although court supervision must be limited to protect the former, to promote the latter it must also extend to the dismissal of indictments wrongfully obtained.[137] Even if not explicitly prohibited by the Federal Rules of Criminal Procedure or by statute, extreme acts of prosecutorial misconduct which promote unjust prosecution of citizens must be disciplined by the courts.[138]

2. *The Dissent's Rule is More Balanced*

The majority's decision properly defends the independence of the grand jury. It also aptly notes that great care must be taken not to transform grand jury proceedings from a process for determining probable cause to indict into a process for determining guilt.[139] However, because it ignores the traditional protective function of the grand jury, the Court views any requirement that substantial exculpatory evidence be presented to the grand jury not as a protection against prosecutorial misconduct, but as an erosion of the grand jury's independent, accusatory function.[140] Because prosecutors would be able to withhold much substantial exculpatory information with impunity, the Court's decision may result in a less informed grand jury which makes less accurate decisions.

In contrast, the dissent proposes a balancing approach: in order to prevent abuses which harm the grand jury's function, the court must counterbalance the independence of the grand jury with supervision. Thus, the dissent suggests a more case-by-case analysis than the "hands off" approach adopted by the majority. While such a case-by-case method lacks the appealing simplicity of the majority's approach, the dissent's pragmatic balancing test probably

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not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.

136 *Id.* at 1753 (Stevens, J., dissenting). *See supra* text accompanying notes 122-27.

137 *Id.* (Stevens, J., dissenting) (citing *Calandra*, 414 U.S. at 343; Wood v. Georgia, 370 U.S. 375 (1962) (grand jury must be both independent and informed)).

138 *Id.* (Stevens, J., dissenting).

139 *Id.* at 1744.

140 *Id.* at 1742.

would improve the grand jury's functioning as both accuser and protector.

The Court argues in response that if presentation of exculpatory evidence to the grand jury were desirable, then logically the best way to do this would be to let the party under investigation testify. The Court properly notes, however, that such a rule would infringe on the petit jury's function.[141] Therefore, the Court concludes, requiring presentation of substantial exculpatory evidence to the grand jury is undesirable.[142]

Yet instead of transforming the grand jury process into a mini-trial on the merits, a requirement that the prosecution present substantial exculpatory evidence to the grand jury might balance the grand jury's accusatory and protective roles. First, better informed grand juries would result in more knowledgeable indictments. To protect the grand jury's traditional independence, however, the grand jury would retain its traditional freedom to refuse to hear the evidence, and any indictment issued following such a refusal would still be valid.[143] This approach would better inform the grand jury while still respecting its independence and discretion in issuing indictments.

In contrast, a rule which permits the prosecutor to withhold information directly relevant to this determination harms this process by making the grand jury's decision potentially skewed in favor of the prosecution.[144] By allowing for increasingly biased indictments, this rule would undermine the protective role of the grand jury.[145]

3. Possible Changes in the Grand Jury's Role

The modern grand jury arguably operates in a much different setting than its historical counterpart. Critics contend that the modern grand jury lacks independence and no longer fulfills its protective role.[146] These critics also suggest that the modern grand jury relies on more informed prosecutors in determining probable

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141 *Id.* at 1745.

142 *Id.* at 1746.

143 This approach quells the fears expressed by the Court that any rule requiring the prosecution to present substantial exculpatory evidence to the grand jury would erode the historical independence of the grand jury. *See id.* at 1745.

144 *Id.* at 1754 (Stevens, J., dissenting).

145 *Id.* at 1753 (Stevens, J., dissenting) (citing *Calandra*, 414 U.S. at 343; Wood v. Georgia, 370 U.S. 375 (1962)).

146 United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting). In *Mara*, the Court ruled that requiring a witness to provide a sample of his handwriting to the grand jury did not violate the fourth amendment. *Id.* at 22. Justice Douglas decried the prosecution's use of the grand jury to circumvent constitutional restrictions on its powers. *Id.* at 29.

cause, with the result that prosecutors can obtain indictments almost at will.[147] Some lower federal courts also express concern that the grand jury is used as a "pawn" or "mere tool" of the prosecution.[148] Allowing courts to dismiss indictments for prosecutorial failure to present substantial exculpatory evidence to the grand jury might result in a better informed grand jury which does not merely act as the pawn of the executive branch. Such a rule would promote the grand jury's historical independence, as well as its traditional protective role.

B. THE GRANT OF CERTIORARI

The Court's traditional rule for granting certiorari precludes review only if the question was neither pressed nor passed upon below.[149] In *Williams*, the issue presented to the Court satisfied neither of these requirements. The grant of certiorari in this case therefore may be seen as an expansion of the Court's power of review. The Court's reasoning seems to suggest that an issue not directly pressed or passed upon in the lower courts was implicitly pressed or passed upon in the current case if the following conditions are met:

a. The question was pressed or passed upon in a recent case.

b. That recent decision was used as direct precedent by the lower courts in the current case.

c. The litigant raising the issue on appeal in the current case was also a litigant in the recent case used as precedent by the lower courts.

d. That litigant did not acknowledge the propriety of this rule from the recent decision, even though it may have complied with this rule as direct precedent.

In other words, because the rule is so recent and directly applicable in the instant case, the correctness of that rule is implicitly and inherently an issue in this case, and it therefore may be reviewed by the Supreme Court.[150]

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147 *Id. See also In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir. 1973). *Schofield* involved a witness who refused to supply writing samples to the grand jury and refused to allow the government to take her fingerprints and photograph. *Id.* at 87. In requiring the government to make a preliminary showing of reasonableness before the witness could be held in contempt, the court commented that it was a "fundamental proposition" that the grand jury acts as an investigative and prosecutorial arm of the executive branch. *Id.* at 90, 94.

148 United States v. Weingartner, 485 F. Supp. 1167 (D.N.J.), *appeal dismissed*, 642 F.2d 445 (3d Cir. 1981).

149 *United States v. Williams*, 112 S. Ct. 1735, 1738 (1992).

150 As the dissent states, "[that] the issue was raised in a different case is an adequate substitute for raising it in *this* case." *Id.* at 1746 (Stevens, J., dissenting).

1. The Supreme Court Should Not Have Created This Expanded Rule

The Supreme Court's traditionally broad powers of review should be sufficient for granting review of important issues. The Court had already declined to grant certiorari in *United States v. Page*.[151] Therefore, the Court should not in a later case review the rule from that decision, unless the rule is directly challenged. The government had a clear right to present such a challenge in *Williams*, but it did not. Because it declined to oppose the *Page* rule, this rule from an earlier decision should not have been reviewable in this case.

Furthermore, resting the propriety of review in part upon the distinction between a party that complies with a rule without acknowledging its correctness[152] (review granted) and one which accepts a rule as correct and recognizes its obligations under that rule[153] (review not granted) seems to be a weak semantic difference on which to base this decision. Contrary to the Court's suggestion, it is perhaps not "unreasonable" in an adversarial system to require litigants to object to clearly applicable precedent in order to gain review on that issue.[154]

2. The Court's Expanded Rule Unduly Favors the Government

The Court's rule for granting certiorari will disproportionately favor the government, the court system's most frequent litigant. Furthermore, such favorability does not hinge merely on the greater number of cases in which the government is a party. Rather, such an advantage depends on the likelihood that two recent cases involving the same issue and litigant exist, and that one of the cases is used a precedent by the other. The probability of this occurring when the government is the party is therefore significantly greater than the probability that any other litigant might benefit from the rule.

This prejudice is easily illustrated. First, assume that there is a current case, such as *United States v. Williams*, before a circuit court. Also assume that in that circuit a certain procedural rule was recently promulgated. Normally, both parties would have an equal chance to benefit from the rule in any given case.

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151 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987).

152 *Williams*, 112 S. Ct. at 1740 (citing Brief for the United States in Response to Appellee's Brief at 9, United States v. Williams, 899 F.2d 898 (10th Cir. 1990) (Nos. 88-2827, 88-2843) (language used by the Court to characterize the government's actions)).

153 *Id.* at 1747 n.1 (Stevens, J., dissenting) (language used by the dissent to characterize the government's actions).

154 *Id.* at 1740.

The situation changes, however, if a party may only employ that rule if it was also a litigant in the earlier, precedential case. The likelihood that a party can benefit from that rule then depends on the number of recent cases in which that party has been a litigant. The United States is a much larger entity than all other litigants in the United States courts, and therefore a much greater likelihood exists that it was a litigant in the earlier, precedential case. It follows that, in a case such as *United States v. Williams*, the government will be much more likely to benefit from that rule than the other, smaller litigant.

A simple economic model demonstrates the government's disproportionate advantage.

ASSUMPTIONS:

1. Two parties, *A* and *B*, are involved in a law suit.
2. A case pool of ten precedential cases exists. Party *A* was a party in five of these cases, and party *B* was a party in one.
3. Two precedential rules, rules #1 and #2, apply to the current case, *A v. B*. Both rules were decided in one of the cases in the case pool.
4. Rule #1 is a precedent from an earlier case which may be used by any litigant, regardless of whether that litigant was a party in the earlier, precedential case.
5. Rule #2 is a precedent from an earlier case which may be used only by a litigant which was also a party in that earlier, precedential case.

RESULTS:

1. *Both parties have an equal, 100% chance of employing rule #1.* The rule comes from a case in the case pool, and neither party has to have been a party in the precedential case in order to employ that rule in the current case, *A v. B*.
2. *Party A is favored in the use of rule #2.* There is a 50% chance that *A* was a litigant in the precedential case which promulgated rule #2, since *A* was a party in five of the ten cases.

   However, there is only a 10% chance that *B* can use rule #2, since *B* was only a party in one of the ten cases.

Because of its favorability to the government, the rule in *Williams* for granting review could have a significant, asymmetric impact on the granting of certiorari. The government will have more opportunity to appeal to the Court for review. Other litigants, however, will be much less able to benefit from this rule. Therefore, the dissent is correct in asserting that this rule treats the government as a favored litigant.[155]

The ultimate impact of this new rule, however, depends upon

155 *Id.* at 1754 (Stevens, J., dissenting).

its usage by the Supreme Court. If the Court denies certiorari in cases in which the government has this advantage, then the impact will be small. Conversely, if it grants certiorari, its impact may be significant, if the Court reverses previous lower court decisions as it did in *Page*.

Yet even if the ultimate effect of the Court's new rule is negligible, the rule fails to maintain even an appearance of fairness. Two basic tenets of the criminal justice system are that fair procedures will be provided and that the appearance of fairness will be maintained in the application of these procedures.[156] The Supreme Court has expressed these values as well in such statements as "justice must satisfy the appearance of justice"[157] and "our system of law has always endeavored to prevent even the probability of unfairness."[158] In a broad yet very important sense, these statements emphasize the importance of fairness—and the appearance of fairness—in the criminal justice system.[159] Arguably, the rule in *Williams* fails to maintain even the appearance of fairness by creating the possibility of dissymmetry in grants of certiorari.

VI. Conclusion

In *Williams*, the Court reinforced the independent nature and broad discretion of the grand jury. Citing the historical independence of the grand jury and its role as an investigative and accusatory body, the Court held that federal courts may not dismiss indictments when the prosecution fails to present substantial exculpatory evidence in its possession to the grand jury. In reaching this conclusion, however, the Court ignored the grand jury's historical role in protecting accused parties from wrongful indictment. The added discretion given to the prosecution may lead to more poorly informed grand juries that, because they are less informed, are less accurate in determining probable cause.

The Court also expanded its rule for granting certiorari to allow for review of questions not pressed or passed upon below. The Court held that certiorari is proper, even if the question on appeal

156 LaFave & Israel, *supra* note 7, § 1.6(g).

157 Offutt v. United States, 348 U.S. 11, 14 (1954) (judge who is personally embroiled with counsel throughout trial should not sit in contempt hearing against counsel, regardless of ability to remain objective).

158 *In re* Murchison, 349 U.S. 133, 136 (1955) (judge sitting as state's "judge-grand jury" may not preside over contempt hearing for witnesses who refused to testify before him).

159 If confined only to the facts in *Offutt* and *Murchison*, however, these statements stand for the narrower principal that no person should act as judge in a case in which that person has a vested interest. *See Offutt*, 348 U.S. at 14; *Murchison*, 349 U.S. at 136.

was not pressed or passed upon below, if the question was pressed or passed upon in a precedential case in which the current appellant was also a litigant. The appellant, however, must never have acknowledged the propriety of this precedential rule. This expanded rule may unduly favor the government and create dissymmetry of review. Even if the expanded rule ultimately has little impact, however, this appearance of unfairness is an unwelcome addition to the criminal justice process.

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