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Failure to Record Proceedings: Another Gap in the Glory of the Grand Jury

Anne Callaghan Conway

novel suggestion.[92] Under the proposed standard such legislation would become indispensable. In no manner do airplanes, including those carrying cargo or passengers on transoceanic flights, come within the scope of the purpose of admiralty jurisdiction. The medium of travel is wholly different and modern aircraft are not transient or inherently hazardous in the same way as are maritime vessels. The special problems of aviation accident litigation would be better controlled by other uniform law, leaving admiralty jurisdiction to maritime matters.

CONCLUSION

The advantages that accrue from the classification of a tort as maritime should provide the impetus for the development of a definite jurisdictional standard. Unfortunately, however, no such guidelines exist today; indeed, there may be more problems now than ever before. The proposed changes offer a new direction to the courts. The acceptance of such changes would provide the federal courts with the consistent and relevant guidelines now lacking.

DAVID R. TYRRELL

92. The Court in *Executive Jet* noted that if aviation tort cases "should be governed by uniform substantive and procedural laws . . . Congress is free to enact legislation applicable to all such accidents." 409 U.S. at 273-74. *See generally* Bell, *Admiralty Jurisdiction in the Wake of* Executive Jet, 15 ARIZ. L. REV. 67 (1973); Moore & Pelaez, *Admiralty Jurisdiction: The Sky's the Limit,* 33 J. AIR L. & COMM. 3 (1967); Comment, *supra* note 4.

FAILURE TO RECORD PROCEEDINGS: ANOTHER GAP IN THE GLORY OF THE GRAND JURY

Although firmly entrenched as an American and common law institution,[1] the grand jury has recently become the subject of broad controversy.[2] Criticism is based largely on the charge that the grand jury no longer serves the func-

1. *See* United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952). "The grand jury breathes the spirit of a community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy. Here the people speak through their chosen representatives. This feature has been largely disregarded by the critics. But it is the essence of the rule of the people. The grand jurors may commit serious errors. But the voters are not deprived of suffrage because of occassional mischances." *Id.* at 291 (footnotes omitted).

2. The prominent position the grand jury is playing in American politics has drawn much attention. In the wake of Watergate citizen concern flows with the actions of public officials. In Florida, for example, grand juries were credited with influencing many of the key races in the 1974 election. *See* Cox, *Grand Juries Had a Lot To Do with Cabinet Races,* Gainesville (Fla.) Sun, Nov. 3, 1974, §B at 3, col. 1.

tions it was originally instituted to perform:[3] protecting the accused from oppression by the prosecution[4] and determining whether probable cause to return an indictment existed.[5] Critics of the grand jury point out that these two purposes are inherently contradictory,[6] and that in practice the grand jury, instead of protecting the defendant from oppression, is little more than the "prosecutor's alter ego."[7]

One of the major sources of controvery surrounding grand juries has been the requirement that grand jury proceedings be secret.[8] There are two types of grand jury secrecy:[9] the secrecy required while the grand jury is in session[10] and nondisclosure of records of the proceedings after they have ended.[11] Because some secrecy reasonably may be necessary to prevent interference with the proceedings, the most cogent criticism of grand jury secrecy has focused on nondisclosure of the records of the proceedings.

The justification for nondisclosure of records of grand jury proceedings has historically been based on the need to protect both the efficiency of the grand jury and the rights of individuals called before it.[12] This justification for non-

3. Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony,* 60 F.R.D. 237 (1973) (*originally printed* in 48 WASH. L. REV. 423 (1973)). "The arguments most often made against the grand jury are that the jury is a needless expense; that it may be slow to act in areas where it meets infrequently; and that it seldom provides protection against unjust prosecution, since the prosecutor generally has great influence with the jury and may simply use the jury to insulate himself from responsibility. Proponents of the grand jury argue that it retains the power to serve as a check on capricious accusation, especially when dealing with political, racial or religious minorities; that the indicting processes allow the prosecution to subpoena witnesses and get their testimony on record; and that the grand jury can express the judgment of the community in certain cases of political importance." *Id.* at 237-38 (footnotes omitted).

4. *See, e.g.,* Wood v. Georgia, 370 U.S. 375, 390 (1962).

5. "The grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged." Beavers v. Henkel, 194 U.S. 73, 84 (1903).

6. *See, e.g.,* Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy,* 48 VA. L. REV. 668 (1962).

7. *See* Knudsen, *supra* note 3, at 242. *See also* Alexander & Portman, *Grand Jury Indictment Versus Prosecution by Information — An Equal Protection-Due Process Issue,* 25 HASTINGS L.J. 997 (1974); Commentary, *The Preliminary Hearing Versus the Grand Jury Indictment: "Wasteful Nonsense of Criminal Jurisprudence" Revisited,* 26 U. FLA. L. REV. 825 (1974).

8. *See* United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952). The rule of secrecy was imposed "for two purposes: first, to save grand jurors from embarrassment, pressure, threats, and reprisals from having their part in an indictment known; second, to aid the government in prosecution." *Id.* at 304 (footnotes omitted).

9. *See* United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952); *In re* Attorney General of United States, 291 N.Y.S. 5, 7 (Kings County Ct. 1936). *See also* Calkins, *The Fading Myth of Grand Jury Secrecy,* 1 JOHN MARSHALL J. 18, 19 (1967).

10. *See* Comment, *Secrecy in Grand Jury Proceedings,* 38 FORD. L. REV. 307 (1969).

11. In United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940), the Supreme Court recognized that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

12. In United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931), the traditional reasons for nondisclosure were expressed. These reasons are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to

disclosure has been limited, however, by numerous state and federal statutes and rules of court controlling discovery of grand jury testimony.[13] By delineating the situations where disclosure may be made, these provisions implicitly nullify the argument that total nondisclosure is desirable, or even permissible.[14] The irony is that the question whether to disclose transcripts of grand jury proceedings is often academic because the prosecution is cloaked with authority to decide whether the proceedings will be recorded at all.[15] It is clearly an empty gesture to grant an accused the right to inspect grand jury testimony when no transcript of that testimony exists.

This commentary dissuses the reasons for requiring grand jury proceedings to be recorded, including allowing an accused to exercise statutorily conferred rights of discovery to test the sufficiency of an indictment, and to afford the court a more effective means of supervising the actions of both the grand jury and the prosecutor. Following this discussion is an analysis of the recording practices of both federal and Florida courts and a summary of the practices employed by other states.

THE NEED TO RECORD GRAND JURY PROCEEDINGS

Discovery

Although there has been a recent trend toward liberal discovery,[16] the nature of criminal prosecutions has prevented criminal defendants from enjoying the access to discovery granted to civil litigants.[17] Nevertheless, significant progress has been made in liberalizing criminal discovery,[18] beginning with *Jencks v. United States.*[19] In *Jencks,* the defendant moved to examine FBI reports written by undercover agents who were testifying against him at trial. The Government opposed the motion on the ground that no preliminary

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the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." *See also* United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (*quoting* United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954).

13. See text accompanying notes 20-42 *infra.*

14. *See generally* ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft 1970).

15. *See* Knudsen, *supra* note 3, at 254.

16. Only federal discovery will be discussed at this point. State discovery procedures vary greatly and are discussed in connection with the state's policies of recording. See text accompanying notes 109-165 *infra.*

17. The trend toward liberalism is most pronounced in civil cases. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Comment, *supra* note 10. In civil cases there is no requirement that either side make a showing of particularized need. Knudsen, *supra* note 3, at 244.

18. *See* Sherry, *supra* note 6, at 675.

19. 353 U.S. 657 (1957).

foundation of inconsistency between the reports and the agents' testimony had been laid.[20] In holding for the defendant the Court stated that only the defense is adequately equipped to determine the usefulness of documents to be used in defendant's behalf, and thus for production purposes all it need show is that the evidence is "relevant, competent and outside any exclusionary rule."[21] *Jencks,* therefore, resulted in greater access to information by shifting to the Government the burden of showing an overwhelming public interest calling for nondisclosure.[22]

To ensure that courts following *Jencks* did not allow a defendant unlimited access to confidential government files, Congress enacted the Jencks Act.[23] This Act codified the *Jencks* holding and at the same time limited it to its facts, thus allowing production of relevant documents without showing a particularized need only after a government witness has testified on direct examination.[24] Since the Act as originally passed contained no reference to grand jury proceedings, the Supreme Court in *Pittsburgh Plate Glass Co. v. United States*[25] held that neither *Jencks* nor the Jencks Act encompassed grand jury proceedings.[26] This interpretation, however, was later repudiated by the Supreme Court in *Dennis v. United States,*[27] where the Court held that denial of a defendant's request to inspect the grand jury testimony of government witnesses testifying at trial was reversible error.[28] In *Dennis* the Court recognized that recent developments[29] making grand jury testimony available to defendants were "entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[30]

Dennis created confusion about whether the defense's entitlement to grand jury testimony is dependent upon a showing of need. Although *Dennis* indicated, as did *Jencks,* that a showing of need was not necessary, numerous courts still require a defendant to demonstrate a particularized need to gain access to grand jury records.[31] Other courts, however, have followed the view that a

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20. *Id.* at 666.

21. *Id* at 667 (*quoting* Gordon v. United States, 344 U.S. 414, 420 (1952)).

22. *Id.* It would seem that the Government is more capable of bearing this burden, since it has the documents before it.

23. 18 U.S.C. §3500 (1970).

24. *See* 1957 U.S. CODE CONG. & AD. NEWS 1861, 1861-62.

25. 360 U.S. 395 (1959).

26. *Id.* at 398.

27. 384 U.S. 855 (1966). The trial court had denied a motion for inspection on the basis that no particularized need had been shown.

28. *Id.*

29. The Court cited the new liberal discovery rules as the "recent developments." *Id.* at 870-71. See notes 36-39 *infra* and accompanying text.

30. 384 U.S. at 870.

31. In Walsh v. United States, 371 F.2d 436 (1st Cir. 1967), *cert. denied,* 387 U.S. 947 (1966), the court claimed that relief was granted in *Dennis* on the ground that a showing of particularized need was shown. The court recognized that the 1966 amendment to the Federal Rules of Criminal Procedure was intended to liberalize discovery, but even so "these rules give no automatic right to a defendant." *Id.* at 437. *See also* United States v. Hensley, 374 F.2d 341 (6th Cir. 1967), *cert. denied,* 388 U.S. 923 (1966).

defendant's access to grand jury records should not be dependent upon a showing of need.[32] This view is supported by the Jencks Act Amendment, passed as part of the Organized Crime Control Act of 1970,[33] which defines "statement" as: "[A] statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."[34] This amendment clearly brings grand jury testimony within the Jencks Act.[35]

In addition to the Jencks Act, two federal rules of criminal procedure allow discovery of grand jury testimony in some instances. Rule 6 allows disclosure of grand jury testimony prior to or during a judicial proceeding and becomes operative upon court order or where grounds exist for a defense motion to dismiss because of occurrences before the grand jury.[36] A second rule, rule 16, applies when the defendant is seeking access to his own testimony.[37] In its present form this rule is discretionary and applicable only to those statements of defendant that the court deems relevant.[38] As might be expected, varying interpretations by the courts have led to inconsistent application of the rule. A restrictive application places the burden on the defendant to show cause for the court to grant the motion, while a more liberal approach requires the Government to bear the burden.[39] A compromise position gives the defendant an absolute right to grand jury testimony subject to the government's right to a protective order where public policy necessitates nondisclosure as, for example, in cases involving national security.[40] The present rule, however, should be significantly changed by the proposed amendments to the Federal Rules of Criminal Procedure.[41] These amendments, scheduled to become effective in August 1975, provide for mandatory disclosure of any recorded testimony that the defendant gives before a grand jury if the testimony relates to the offense charged.[42]

A defendant entitled to inspect grand jury testimony by reason of either the Jencks Act or the Federal Rules of Criminal Procedure may find that this right is of little use if the prosecution has neglected or refused to record the

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32. Leading the cases that have recognized *Dennis* as doing away with the requirement of showing a particularized need is United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967). "[W]e are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial. Nevertheless, despite this rule, the Government, upon a showing that disclosure of particular material would jeopardize national security or should be denied for other proper reasons, may seek a protective order from the trial court in order to prevent disclosure to the defendant of that particular portion of the grand jury material . . . ." *Id.* at 370.

33. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. 1, §102, 84 Stat. 922. For legislative history, see 1970 U.S. CODE CONG. & AD. NEWS 4007, 4017.

34. 18 U.S.C. §3500(e)(3) (1970).

35. *Id.* As a result, the effect of Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), and United States v. Proctor & Gamble Co., 356 U.S. 677 (1958), is overridden.

36. FED. R. CRIM. P. 6.

37. FED. R. CRIM. P. 16.

38. *See* Knudsen, *supra* note 3, at 253.

39. *See, e.g.*, United States v. Heckman, 479 F.2d 726 (3d Cir. 1973).

40. *See* Comment, *supra* note 10.

41. *See* Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276 (1966).

42. *See* Comment on Proposed Federal Rules of Criminal Procedure. FED. R. CRIM. P. 16.

proceedings. Since an accused can exercise his discovery rights only where the grand jury proceedings have been recorded, it is inherently contradictory to allow circumvention of this right through failure or refusal to record the grand jury proceedings.

Supervision of Indictments and Grand Jury Procedures

Apart from enhancing discovery procedures, recorded grand jury proceedings may also be used to test the sufficiency of an indictment.[43] This is a critical function because a valid indictment is a prerequisite to a court's jurisdiction to proceed against a defendant.[44] Even though an accused may not challenge an indictment that is valid on its face,[45] he may use the grand jury transcript to discover whether the indictment was procured through governmental misconduct.[46]

Although the United States Supreme Court has held that an indictment based entirely on hearsay is not constitutionally invalid,[47] a number of courts have adopted a "Best Evidence Rule" to be applied to grand jury indictments.[48] This rule discredits an indictment based upon hearsay evidence when nonhearsay evidence was available. Before this rule will be applied, it must be determined not only that the grand jury was incorrectly led to believe it was hearing direct testimony, but also that the grand jury would probably not have indicted the defendant had it heard the eyewitness' testimony.[49] Consistent with this view, the Second Circuit Court of Appeals in *United States v. Estepa* dismissed an indictment upon the prosecutor's violation of the Best Evidence Rule.[50] The court reasoned that it is important to avoid undue reliance upon hearsay because "an indictment constitutes a finding of probable cause and

43. *See* United States v. Calandra, 414 U.S. 388 (1974); Costello v. United States, 350 U.S. 359 (1956); notes 52-54 *infra* and accompanying text.

44. *Cf.* Note, *Indictment Sufficiency,* 70 COLUM. L. REV. 876 (1970), which discusses the sufficiency of the indictment itself.

45. Costello v. United States, 350 U.S. 359 (1956).

46. United States v. Cleary, 265 F.2d 459 (2d Cir. 1959). After reviewing an indictment dismissed by a district court because of the self-incrimination privilege, the Second Circuit reversed on the ground that any impairment of the privilege was not due to government misconduct. *See also* United States v. Pepe, 367 F. Supp. 1365 (D. Conn. 1973).

47. Costello v. United States, 350 U.S. 359 (1956).

48. *See, e.g.,* United States v. Ramirez, 482 F.2d 807 (2d Cir. 1973), *cert. denied,* 414 U.S. 1070 (1973); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

49. Indictments were dismissed following warnings to prosecutors for using hearsay testimony when eyewitnesses were available, and when the grand jury was misled as to the nature of the evidence before it. *See* United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); United States v. Leibowitz, 420 F.2d 39 (2d Cir. 1969); United States v. Russo, 413 F.2d 432 (2d Cir. 1969); United States v. Carella, 411 F.2d 729 (2d Cir. 1969).

50. 471 F.2d 1132 (2d Cir. 1972). The court may have dismissed the indictment to punish the prosecutor rather than protect a right of the accused. In dismissing the indictment the court stated: "We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants." *Id.* at 1137.

avoids the need for a preliminary hearing."[51] Other courts entirely reject utilization of the Best Evidence Rule as an instrument to insure the defendant's rights. These courts view the rule merely as a guide in determining whether the "independence and integrity of the grand jury have been impaired."[52] Regardless of which view a court follows, recordation is essential, for each necessarily presupposes recorded minutes.

Recorded grand jury testimony readily facilitates court supervision of procedures used by both the prosecutor and the grand jury.[53] Because the prosecution is often obligated to advise the grand jurors on points of law as well as on procedural matters, a transcript of the entire proceeding enables the court to ensure that techniques employed by the prosecutor comply with constitutional principles. The court may also utilize a transcript to weigh arguments made in support of motions to suppress grand jury testimony or dismiss indictments.[54] Similarly, an appellate court may use the transcript in deciding to reverse a lower court's dismissal of an indictment.[55]

Recorded grand jury testimony can be used to enhance discovery procedures, test the sufficiency of indictment, and insure greater efficiency in court supervision of prosecutors and grand juries. Perhaps the best argument for the routine recording of grand jury proceedings is that it is often not certain until

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51. 471 F.2d at 1136. *See* FED. R. CRIM. P. 5(c). *See also* Sciortino v. Zampano. 385 F.2d 132 (2d Cir. 1967), *cert. denied,* 390 U.S. 906 (1968). "We have not gone so far as to apply to grand juries the proposal in the American Law Institute's Model Code of Pre-Arraignment Procedure §§330.4(4) and 340.5 (Tent. Draft No. 5, 1972), that hearsay may be received at a preliminary hearing or by a grand jury only 'if the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained.' See also ABA Standards Relating to the Prosecution Function and the Defense Function §3.6 (Approved Draft 1971), although . . . we do not believe Costello v. United States [citation omitted] would prevent this exercise of our supervisory powers should we deem it wise." 471 F.2d at 1135.

The District of Columbia Superior Court, finding that a defendant was wrongfully deprived of a preliminary hearing, ordered the Government to provide the defendant with a transcript of the grand jury testimony. "The grand jury transcripts will give defense counsel the incidental discovery he would have gained had a preliminary hearing been held and will avoid the needless consumption of time and energy necessary to conduct a preliminary hearing. Probable cause has already been established by the return of a valid indictment." United States v. Strickland, 14 BNA CRIM. L. REP. 2324 (D.C. Super. Ct. Dec. 20, 1973).

52. United States v. Newcomb, 488 F.2d 190, 192 (5th Cir. 1974). "Were we to hold that grand jury minutes must be turned over so that defense counsel could satisfy his mere suspicion that the indictment was based on insufficient evidence, grand jury proceedings would effectively be open at the whim of the defense." *Id.* at 193.

53. A hearing held to determine prosecutorial practices may threaten grand jury secrecy by requiring additional testimony from witnesses and members of the grand jury. This threat is minimized when the court makes an *in camera* inspection of recorded minutes.

54. United States v. Pepe, 367 F. Supp. 1365, 1370 (D. Conn. 1973). "While not every impairment of constitutional right stems from governmental misconduct, the flagrant abuse here fully justifies the sanction of dismissal of the indictment."

55. See United States v. Cleary, 265 F.2d 459 (2d Cir. 1959). *See also* United States v. Mingoia, 424 F.2d 710, 713-14 n.4 (2d Cir. 1970); United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).

after the proceedings whether the defendant, the government, or the court will be hampered by the absence of such records. Accordingly, some courts, cognizant of the numerous advantages of recordation, have begun to require grand juries to record their proceedings. These courts, however, represent only a small minority.

FEDERAL PRACTICES OF RECORDING GRAND JURY PROCEEDINGS

Frequently, whether grand jury proceedings are recorded depends upon the person with whom the decision to record lies. When there is no specific federal constitutional or statutory provision requiring grand juries to record their proceedings,[56] the decision rests with the government. This practice has recently been challenged as more defendants utilize their right to discover grand jury testimony.[57] Based upon the rationale that, because secrecy is essential, grand jury testimony must be treated differently from other types of discoverable evidence,[58] the majority of courts support the contention that minutes need not be kept.[59]

Some courts, reasoning that *Dennis* does not require it, have refused to

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56. *See* Knudsen, *supra* note 3, at 253-54. *But see* ABA COMMITTEE ON RULES, REPORT, *reprinted in* 38 F.R.D. 95, 106-06 (1965). "A. Rule 6 (The Grand Jury). After careful study, described below, the Section of Criminal Law and this Committee recommend that: (1) Rule 6(e) of the Federal Rules of Criminal Procedure be amended to provide that a reporter transcribe the minutes of all proceedings of grand jury which are accusatorial in nature; that the cost of such transcript be borne by the government of the United States and the proceedings in transcribed form be filed in a sealed envelope with the appropriate United States District Court for further necessary action; (2) Similar action be taken either by changes in the rules of court or by necessary legislation in the several states which follow the common law practice described herein; (3) After an indictment has been returned against a defendant, or after his arrest, that a copy of the grand jury minutes or transcript be furnished to him as a matter of right, upon his request, prior to his arraignment or as soon thereafter as is practicable; except in cases where the government reveals that national security or public interest is involved, in which event grand jury proceedings shall not be disclosed without an order of the court." *Id.* at 106.

57. The earliest case in which the court recognized that recordation of grand jury proceedings was the "better practice" and then proceeded to indicate that steps would be taken to insure the implementation of this policy was United States v. Gramolini, 301 F. Supp. 39, 42 (D.R.I. 1969). See text accompanying notes 68-73 *infra*.

58. The distinction made is supported by traditional secrecy arguments; that is, it is necessary in order to (a) prevent escape by the accused, (b) insure candor among grand jurors, (c) prevent perjury and witness tampering, (d) encourage free disclosures by persons having knowledge of crimes, and (e) protect innocent accused. *See* United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). *See also* Knudsen, *supra* note 3, at 257 n.109.

59. United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), *cert. denied,* 405 U.S. 924 (1971); United States v. Cramer, 447 F.2d 210 (2d Cir. 1971), *cert. denied,* 404 U.S. 1024 (1971); United States v. Aloisio, 440 F.2d 705 (7th Cir. 1971), *cert. denied,* 404 U.S. 824 (1971); McCaffrey v. United States, 372 F.2d 482 (10th Cir. 1967), *cert denied,* 387 U.S. 945 (1966); United States v. Dallago, 312 F. Supp. 249 (E.D.N.Y. 1970). *See also* 8 J. MOORE, FEDERAL PRACTICE, *The Grand Jury* §6.02 n.24 (1973); 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, *Indictment and Information* §103 (1969).

command recording of minutes.[60] These courts believe that *Dennis*[61] merely mandates disclosure of grand jury testimony under proper circumstances where recorded testimony exists and that, because neither party has access to a transcript, the *Dennis* Court's condemnation of the government's "exclusive access to a storehouse of relevant fact"[62] does not apply. Such reasoning, however, ignores the fact that the prosecutor not only is present during grand jury proceedings but often is in control.[63] The effect is that the prosecutor is allowed to make the choice that neither side may benefit from recordation because the benefit to the defendant may outweigh that to the prosecution.[64]

Although a few courts are establishing court rules concerning recording,[65] the majority view their role as a supervisory one and therefore refuse to intervene in the absence of flagrant abuse by the prosecutor.[66] The Seventh Circuit Court of Appeals, recognizing that the preservation of grant jury minutes is a wise practice, has simply refused to bind the district courts to such a requirement.[67] Similarly, the Second Circuit has indicated that any change resulting in mandatory recording should come from the Advisory Committee of Criminal Rules or from the Circuit Council rather than from its own order.[68]

Mandatory recording, however, is being required by a minority of courts that recognize recordation as the better practice.[69] The earliest case to espouse

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60. *See, e.g.*, United States v. Howard, 433 F.2d 1, 2 (5th Cir. 1970), *cert. denied*, 401 U.S. 918 (1970).

61. 384 U.S. at 873.

62. *Id.* (footnotes omitted).

63. *See, e.g.*, Alexander & Portman, *supra* note 7; Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 363 (1931).

64. *Cf.* Williams v. Florida, 399 U.S. 78, 82 (1970). "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."

65. The local criminal rule requiring recording in the Northern District of California was recently repealed " 'because of noncompliance.' The court felt that it was not in 'a good position to enforce the rule' since the funds for compensation of court reporters before the grand jury come 'from the Department of Justice.' " Knudsen, *supra* note 3, at 266 n.145.

66. *See* United States v. Arradondo, 483 F.2d 980 (8th Cir. 1973), *cert. denied*, 94 S. Ct. 1428 (1974); United States v. Cooper, 464 F.2d 648 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1972); United States v. Cramer, 447 F.2d 210 (2d Cir. 1971); United States v. Barson, 434 F.2d 127 (5th Cir. 1970).

67. In United States v. Aloisio, 440 F.2d 705, 706 (7th Cir. 1971), the court stated it would rely on "the individual district courts to exercise their local rule-making powers in this area pending any amendment to Rule 6(e) of the Federal Rules of Criminal Procedure." As an example the court cited the rule promulgated by the United States District Court for the Northern District of Illinois: "Local Rule 1.04(c) *Official Reporter To Attend Sessions of the Grand Jury*. An Official Reporter of this Court shall attend and record all testimony of witnesses appearing before every Grand Jury. Such record shall be filed with the Clerk of the Court and transcribed and released to the Court upon order or to the United States Attorney upon request and payment of the appropriate fees to the Official Reporter." *Id.* n.2.

68. United States v. Cramer, 477 F.2d 210 (2d Cir. 1971). The court stated: "[T]his would be the worst possible case in which to announce, on a retroactive basis, a *per se* rule of exclusion of the testimony of a witness whose grand jury testimony was not recorded." *Id.* at 214. In this case the witness had prepared a detailed memorandum recording what transpired in conferences among federal agents, defendants and their attorneys.

69. The United States District Court for the Northern District of Ohio promulgated a

this view was *United States v. Gramolini*,[70] where the defendant moved for dismissal on the grounds that his grand jury testimony had not been recorded. Although the court had indicated that a failure to keep minutes may be fatal to the prosecution's case, it denied the motion for dismissal,[71] holding that the defendant had only demonstrated "the appearance of prejudice" resulting from the absence of a transcript.[72] The court was reluctant to invalidate all other indictments pending before it[73] and chose instead to rule that from that date forward indictments would be dismissed upon a failure to record.[74] In approving mandatory keeping of grand jury minutes and acknowledging that such a practice promotes greater fairness, the court explicitly rejected the notion that recordation interferes with the proper functioning of the grand jury.[75]

A series of recent cases arising in the Ninth Circuit further illustrates the trend toward required recording.[76] The stated judicial policy of that circuit is that recordation should be routine and that nonrecordation permissible only in exceptional circumstances.[77] After a number of cases in which the district courts had denied recording to defendants who demanded it,[78] the appellate

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set of local criminal rules, one of which required the recording of grand jury testimony. Although the rules were subsequently repealed, Judge Battisti, in his capacity as Chief Judge, entered an order requiring the recording of all grand jury testimony in the Northern District of Ohio. The Sixth Circuit in upholding Judge Battisti's order recognized that recording, although not constitutionally required, was the better practice. United States v. Battisti, 485 F.2d 961 (6th Cir. 1973).

70. 301 F. Supp. 39, 42 (D.R.I. 1969).

71. *Id.*

72. In this case minutes would have materially aided the defendant in proving bias, since the case was presented exclusively by hearsay. *Id.* at 42-43.

73. The court denied the motion for dismissal on the ground that granting it would "injure the administration of criminal justice by rendering every presently pending indictment dismissable." *Id.*

74. *Id.* at 43.

75. After citing several sources indicating that the keeping of minutes is the better practice, the judge further supported this view by discussing his own experience, including 18 years as a prosecutor. "Against this background, I unequivocally reject the notion that recordation of grand jury proceedings interferes with the proper functioning of the grand jury. In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might, in its absence be used, but that cannot qualify as a reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the grand jury is closeted a rapport — a dependency relationship — which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses." 301 F. Supp. at 41, 42.

76. *See* United States v. Savage, 482 F.2d 1371 (9th Cir. 1973), *cert. denied*, 94 S. Ct. 1446 (1974); United States v. King, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 414 U.S. 846 (1973); United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973), *cert. denied*, 414 U.S. 839, 414 U.S. 856 (1973); United States v. Price, 474 F.2d 1223 (9th Cir. 1973); United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

77. *See* United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

78. *See* United States v. Price, 474 F.2d 1223 (9th Cir. 1973). The court blamed the recurrence of denied motions on the district courts' hesitancy to exercise discretion. "The frequency of instances in which denial of preindictment motions has been brought to our

court held that even where discovery procedure is permissive rather than mandatory, a court cannot arbitrarily deny permission to record.[79] Unless the government shows that it has a legitimate and compelling interest requiring nonrecordation,[80] such a denial by the court may constitute an abuse of discretion.[81] The effect of this policy, however, has been considerably weakened[82] by the court's refusal to dismiss indictments unless the defendants could present a clear indication of prejudice.[83] Nevertheless, in *United States v. Brice*[84] defendants' sentences were vacated, and on remand the court permitted them a "further opportunity to expand the record by offering additional evidence bearing on the issue."[85] The court blamed its unwillingness to invoke a rule requiring dismissal of an indictment on the absence of a "clear indication of prejudice, although we can give no assurances that such a rule may not be applied under similar circumstances in the future."[86]

The strongest argument for dismissing an indictment came in the Ninth Circuit Court of Appeals case of *United States v. King*.[87] The defendants in that case, after their original indictments were returned, made a timely motion before a United States magistrate for the transcription of any future grand jury proceedings that involved them. The magistrate, ignoring the dictates of the Ninth Circuit,[88] denied the motion but warned the United States attorney that a failure to record, if shown to be prejudicial, might result in dismissal.[89] Despite this warning the Government obtained an indictment without recording the proceedings. After being denied discovery of grand jury testimony on the ground that there was no transcript of the proceedings, the defense unsuccessfully moved for a dismissal of the indictments.[90] Upon appeal, the Ninth Circuit described the government's actions as "impudent" and "arrogant"[91] and noted that dismissing the indictment would be the "only complete remedy," but refused to use such a "drastic remedy" in this particular case.[92] To support

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attention suggests that the district court's misapprehension of the principle is not uncommon." *Id.* at 1225 n.3.

79. United States v. Thoresen, 428 F.2d 654, 666 (9th Cir. 1970).

80. United States v Price, 474 F.2d 1223 (9th Cir. 1973). "The Government cannot meet its burden by resort to the secrecy rubric. Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means." *Id.* at 1225.

81. *See, e.g.*, United States v. Savage, 482 F.2d 1371 (9th Cir. 1973); United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

82. In United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970), the court refused to dismiss the indictment because it was unaware of any precedent for such a course of action.

83. *Id.* at 666.

84. 474 F.2d 1223 (9th Cir. 1973).

85. *Id.* at 1226.

86. *Id.*

87. 478 F.2d 494 (9th Cir. 1973).

88. See note 76 *supra*.

89. 478 F.2d at 507.

90. *Id.*

91. The court's assessment of the government's behavior was based on "a growing awareness that grand jury secrecy is not an end in itself, and the reasons underlying this tradition are undergoing judicial scrutiny." *Id.*

92. Even after stating that the Government will not heed the warnings given by the

its hesitancy to dismiss an indictment absent a showing of prejudice or need, the court delineated the two steps necessary before defendants can utilize their right to inspect grand jury testimony under *Dennis v. United States*:[93] First, the proceedings must be recorded, and second, the defendants must show a particularized need for the transcript. Only after showing such a need will the defendant be granted the right to inspect the record. It is the denial of the right to inspect, rather than the failure to record, that results in prejudice.[94] Although the court repeated its warning that the Government is "courting disaster when it fails to record grand jury proceedings, and the judges should exercise their discretion to require such recording,"[95] it reserved "the matter of the remedy for a more appropriate case."[96]

The court's refusal to dismiss indictments absent a clear demonstration of prejudice results in confusing the remedy with the right.[97] The only way a defendant can be assured that his testimony will be recorded is if the prosecutor views dismissal as a real threat.[98] Application of the two-step test enunciated by the Ninth Circuit would seem to mean that a failure to record, unless accompanied by a showing of particularized need, would be considered harmless error. It is argued, however, that the right to recordation is a separate right flowing from the rules and statutes conferring a right to inspect under proper circumstances and therefore should have a remedy without a showing of prejudice.[99] The requirement of demonstrating prejudice should attach only after the proceedings have been recorded and a defendant is seeking to have the benefit of the right to inspect grand jury testimony.[100] As it now stands, before an indictment will be dismissed a defendant must show a clear indication of prejudice.[101] In other words, there must be more than mere speculation to overcome the presumption of regularity of grand jury pro-

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court in prior cases until an indictment is actually dismissed, the court refused to dismiss. The court's refusal was based upon a lack of prejudice. *Id.* at 507, 508; *see* United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

93. 384 U.S. 855 (1966). See notes 28-31 *supra*. Courts following *Dennis* have split as to whether a showing of particularized need is required.

94. The court ignored United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967), which held that the defense was entitled to grand jury testimony without a showing of particularized need; see note 32 *supra*.

95. United States v. King, 478 F.2d 494 (9th Cir. 1973).

96. *Id.* at 508. The court does not describe a "more appropirate case."

97. This also ignores the dictates of *Jencks* and *Dennis*, which do away with the requirement of demonstrating need. See notes 31-32 *supra* and accompanying text.

98. See note 50 *supra*. The courts themselves recognize that only dismissal of an indictment will insure compliance by the Government.

99. The appropriate sanction for lack of a showing of prejudice to the defendant is a refusal to allow him access to the transcript. Since the right to record can only be safeguarded by sanctions for nonrecording, it seems illogical to say that the right cannot be exercised without a showing that an accused would be prejudiced by the denial of his right.

100. The right to record must come first because, if there is no recorded testimony, it would be futile for a defendant to show a need for a nonexistent demand.

101. *See* United States v. Heckman, 479 F.2d 726 (3d Cir. 1973); United States v. King, 478 F.2d 494 (9th Cir. 1973); United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973); United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

ceedings.[102] This reasoning is faulty because if the initial step of recording is not taken the only remedy remaining, where a defendant does show a particularized need, is dismissal of the indictment. Such a "drastic remedy" would be unnecessary if the proceedings were recorded to begin with. Even though it may be necessary to dismiss an indictment in order to show the prosecutor that the court intends to enforce its policy, the prosecutor will soon record the grand jury proceedings to protect indictments from dismissal.[103]

An additional anomaly results from a further requirement that a defendant demand recordation prior to the grand jury proceedings.[104] In *United States v. Price* the court held that a failure to record *after notice* to the prosecution that the defendant wants the proceedings to be recorded may jeopardize a prosecution.[105] Likewise, in *United States v. Savage*[106] and *United States v. Antonick*[107] the Ninth Circuit flatly refused to dismiss an indictment where the demand for recording was made subsequent to the grand jury proceedings. This gives the right to recordation of grand jury testimony only to those defendants who expect to be indicted and who have the foresight to make the demand. Thus, the advantage of recorded testimony will never be given to an accused who is unaware of the proceedings or to one who had not yet employed counsel, since he will not be sufficiently versed in the law to know of this prerequisite.

Although some federal courts have recently begun to see recordation as the better practice, implementation of this policy is hampered by the imposition of unreasonable requirements. For the most part these requirements of showing prior request, need, or prejudice are established as protection against the inconvenience to the Government that may result from the application of the "drastic remedy" of dismissing an indictment. Nonetheless, to require an accused first to demand recordation when he may not even be aware of the proceedings and then to show need or prejudice, when he is not certain of the contents of the transcript, is ridiculous. The potential efficacy of a recordation policy is greatly diminished by these requirements and by the courts' reluctance to enforce the policy. Because of their supervisory relationship to grand juries it is appropriate for courts to take it upon themselves to provide a remedy that ensures that grand jury proceedings are recorded.

The problems relating to failure to record grand jury testimony, which

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102. *See, e.g.*, United States v. Messitte, 324 F. Supp. 334, 337 (S.D.N.Y. 1971); United States v. Gramolini, 301 F. Supp. 39, 41 (D.R.I. 1969).

103. An analogous rationale was used by the Second Circuit in United States v. Estepa, 471 F.2d at 1137, where an indictment was dismissed to insure compliance with the "Best Evidence Rule." See notes 48-50 *supra* and accompanying text.

104. In United States v. Antonick, 481 F.2d 935, 939 (9th Cir. 1973), *cert. denied*, 414 U.S. 1010 (1973), the defendant's first request for recording was filed 9 days after the indictment was handed down. *See also* United States v. Price, 474 F.2d 1223 (9th Cir. 1973).

105. 474 F.2d 1223 (9th Cir. 1973).

106. 482 F.2d 1371, 1373 (9th Cir. 1973): "We held in United States v. Price . . . that upon a proper motion, failure to record grand jury proceedings absent a showing of compelling government interest to be served by nonrecordation is an abuse of discretion by the district court. In the instant case, however, no request for recordation was made."

107. 481 F.2d 935 (9th Cir. 1973).

have occupied the attention of federal courts, have been avoided in the states that have promulgated statutes establishing requirements for recording. Other states, however, have recently been faced with the question of the right of an accused to have grand jury testimony recorded.

STATE PRACTICES OF RECORDING GRAND JURY PROCEEDINGS

Florida

Florida has neither a court rule nor a statutory provision expressly requiring recordation of grand jury proceedings. There is, however, one section of the Florida Grand Jury Statute that indicates a court reporter or stenographer may be present during a session of the grand jury.[108] Recently, in *State v. McArthur,* the question arose whether this section required, or merely permitted, recording.[109] Noting that the question was one of first impression in Florida, the appellate court in *McArthur* ruled that grand jury proceedings need not be recorded as a matter of law.[110] The *McArthur* trial court had dismissed an indictment for first degree murder on the ground that:

> [T]he State deliberately and intentionally failed to comply with the provisions of F.S. 905.17 requiring the presence of a court reporter or stenographer at sessions of the grand jury when testimony is being taken and requiring that the stenographic records, notes and transcriptions shall be filed with the clerk and kept by him to be released on order of the Court for the purpose of ascertaining whether the Grand Jury testimony is consistent wth his subsequent testimony before the Court and for the purpose of furthering justice.[111]

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108. FLA. STAT. §905.17 (1973). Until enactment of the Criminal Procedure Act of 1939 Florida had no statutory law regarding the presence of a court reporter or stenographer in the grand jury room during the examination of witnesses. Fla. Laws 1939, ch. 19554. The passage of the 1939 law made it unlawful to have any court reporter or stenographer present before the grand jury while it was in session. As originally introduced in the legislature in 1939, §§96, 105, and 106 recognized the propriety of the presence of a court reporter or stenographer during sessions of the grand jury. During the progress of the bill, however, §93 was added making it unlawful to have a court reporter or stenographer present before the grand jury. Fla. Laws 1939, ch. 19554, §§96, 105, 106, at 1324-26. In 1951 Fla. Stat. §905.14 was repealed and FLA. STAT. §905.17 was amended specifically to provide for the presence of a court reporter. Fla. Laws 1951, ch. 26584, §2, at 237-38. Since that time the statute has remained essentially the same. *See* Brief for Appellee at 8, State v. McArthur, 296 So. 2d 97 (4th D.C.A. Fla. 1974). The revisors' comment on the 1970 amendment, ch. 70-339, §54, states: "The proposed section makes changes in style and arrangement only." The 1974 legislature, however, had before it a house bill that would have required a court reporter to be present at all grand jury sessions and to take minutes verbatim. *See* 296 So. 2d at 100 n.4.

109. 296 So. 2d 97 (4th D.C.A. Fla. 1974).

110. *Id.* at 98. See also State v. Rucker, 301 So. 2d 501 (2d D.C.A. Fla. 1974), where the court relying on *McArthur* revised per curiam the trial court's dismissal of an indictment for lack of recording.

111. Brief for Appellee at 1-2, State v. McArthur, 296 So. 2d 97 (4th D.C.A. Fla. 1974).

The circuit court believed that failure to provide a court reporter in this particular proceeding deprived the defendant of substantial rights, which necessitated a dismissal of the indictment.[112] The Fourth District Court of Appeal, relying on federal cases viewing recordation as permissive rather than mandatory, disagreed with the circuit court and reversed its decision.[113] Utilizing the two-pronged test devised by federal courts, the court required the defendant to show that he had "a viable need for grand jury testimony" or that he was a victim of bad faith or arbitrary prosecutorial behavior.[114] Since no showing of need or bad faith had been made the court saw no reason to dismiss the indictment on the basis that the proceedings were not recorded.[115] The court also considered demand for recordation a necessary preliminary step to the dismissal of an indictment.[116] In this instance the Florida court found that "the subject indictment was proper, and should not have been quashed when no constitutional rights were abrogated, no Florida law was contravened, and no request for recordation was made by [the defendant]."[117]

The rationale employed by the court in *State v. McArthur*[118] is inconsistent with Florida's liberal discovery procedures. By statute,[119] case law,[120] and court rules[121] the defendant is permitted access to grand jury testimony if necessary for impeachment purposes, for determining whether a witness is guilty of perjury, or for furthering justice.[122] Additionally, when the accused has testified before the grand jury, Florida Rules of Criminal Procedure require the prosecutor, upon demand by the defendant, to disclose to defense counsel that portion of recorded grand jury minutes containing the testimony of the accused.[123]

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112. *Id.*

113. 296 So. 2d at 98. The defendant relied upon an interpretation of the grand jury statute as evidenced by the title to the 1951 Act evincing a purpose of providing for the presence of a court reporter. The title of ch. 26584 reads: "An Act Amending Section 905.17, Florida Statutes of 1941, to Provide for the Presence of Any Court Reporter or Stenographer Before the Grand Jury While They Are in Session and to Repeal Section 905.14, Florida Statutes of 1941." Fla. Laws 1951, ch. 26584, §2, at 237.

114. 296 So. 2d at 99. See text accompanying notes 97-98 *supra.*

115. 296 So. 2d at 99. *See* United States v. King, 478 F.2d 494, 507 (9th Cir. 1973).

116. *Id.* at 100; see text accompanying notes 102-105 *supra.*

117. 296 So. 2d at 100.

118. *Id.*

119. FLA. STAT. §905.17 (1973).

120. *See, e.g.,* State v. Gillespie, 227 So. 2d 550 (2d D.C.A. Fla. 1969); State v. Drayton, 226 So. 2d 469 (2d D.C.A. Fla. 1969). *See also* Minton v. State, 113 So. 2d 361 (Fla. 1959); Gordon v. State, 104 So. 2d 524 (Fla. 1958).

121. See note 123 *infra.*

122. *See* FLA. STAT. §§905.27(1)(a)-(c) (1973).

123. FLA. R. CRIM. P. 3.220 reads: "3.220 DISCOVERY (a) Prosecutor's Obligation (1) After filing of an indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect . . . (v) those portions of recorded grand jury minutes that contain testimony of the accused." The Committee note appended to this rule indicates that the rule was worded so as to avoid any inference that it made recording of grand jury testimony mandatory. FLA. R. CRIM. P. 3.220 is drawn from rule 2.1 of the ABA Federal Standards.

In *Trafficante v. State*[124] the Florida supreme court held that "an accused on trial is entitled to the issuance of a subpoena duces tecum to reach testimony of a State's witness given before a grand jury when it is shown that such testimony is or may be material to the issues in the trial."[125] Subsequent cases[126] also recognized the right of the accused, in appropriate circumstances, to have the grand jury testimony produced either for the defendant's use or for *in camera* inspection by the court.[127] Although courts seem willing to allow access to grand jury testimony, the defendant's right of access is worthless if the testimony before the grand jury has not been recorded. The prosecutor is therefore given the ability not only to manipulate the grand jury but to circumvent the discovery provisions as well. Discovery in the grand jury context becomes a right without substance.

As a result of judicial and legislative reluctance to make recording mandatory in Florida, no set policy is followed in the various circuits. Of the state attorneys responding to a questionnaire,[128] three stated they always record grand jury testimony,[129] one never does,[130] and twelve sometimes do.[131] Although in three circuits grand jury testimony is always recorded, the testimony will not be transcribed except for one of the following reasons: the witness is accused of perjury, the defendant has been granted access for discovery purposes, the state requests it for impeachement, or the case is unusually complicated. Within these three circuits exists the entire spectrum of requests for discovery. In the Thirteenth Circuit defense motions for discovery are rarely made or granted.[132] The Eleventh Circuit, however, frequently entertains such

124. 92 So. 2d 811 (Fla. 1957).

125. *Id.* at 815 (*quoting* State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936)).

126. Although there are no Florida cases holding that the failure to have a court reporter present is grounds for dismissal of an indictment, violations of other provisions of FLA. STAT. §905 have been held to be valid grounds for dismissal. *See* State *ex rel.* Losey v. Willard, 54 So. 2d 183 (Fla. 1951) (holding that the presence in the grand jury room of persons other than those specifically authorized by the statute rendered an indictment subject to be quashed on a timely motion); Cotton v. State, 85 Fla. 197, 95 So. 668 (1923) (the fact that one of the grand jurors returning the indictment was ineligible to serve made the indictment subject to dismissal); State v. Gartenmayer, 239 So. 2d 116 (3d D.C.A. Fla. 1970); State v. Papy, 239 So. 2d 604 (3d D.C.A. Fla. 1970) (the presence of unauthorized persons in the grand jury room justified dismissal of an information based on a grand jury indictment).

127. *See* Minton v. State, 113 So. 2d 361 (Fla. 1959); Gordon v. State, 104 So. 2d 524 (Fla. 1958); State v. Gillespie, 227 So. 2d 550 (2d D.C.A. Fla. 1969); State v. Drayton, 226 So. 2d 469 (2d D.C.A. Fla. 1969). In Williams v. State, 271 So. 2d 810 (3d D.C.A. Fla. 1973), the court denied defendant's request for production of grand jury minutes because the record failed to show the defendant had requested production prior to trial.

128. *See* Appendix *infra*. Responses to questionnaires are on file in the office of the *University of Florida Law Review*.

129. The three circuits where grand jury proceedings are always recorded are the 11th, 13th, and 17th.

130. The 20th Circuit is the only circuit answering that it never recorded grand jury proceedings.

131. The 1st, 2d, 3d, 4th, 5th, 7th, 8th, 9th, 10th, 12th, 18th, and 19th Circuits replied that they do not always record.

132. Interview with Robert H. Bonanno, Assistant State Attorney, 13th Judicial Circuit of Florida, in Tampa, Florida, Sept. 12, 1974.

motions, but whether they are granted depends largely upon the judge handling the case.[133] The response of the Seventeenth Circuit was that a defense motion for discovery of grand jury testimony is made in every case, although motions for defendant's testimony are granted only where provided for under Florida Rules of Criminal Procedure.

The state attorney in the Twentieth Circuit stated that inasmuch as recording is not mandatory a court reporter is never present at the grand jury proceedings. He also stated, however, that this was not the policy of the circuit but rather his own policy. Even though the proceedings are not recorded, defense motions for discovery of grand jury testimony are often made. These motions are routinely denied because the defense is not entitled to the testimony and it is not recorded.

The majority of Florida circuits view recording as a matter of prosecutorial discretion. The most frequent reasons given for recording were that either the state attorney's office believes a witness may be lying or the case is unusually complicated. Another response often given was that the proceedings were recorded when a public official was involved. The Second Circuit also records all "sex oriented cases." While in most circuits defendants rarely seek discovery of grand jury testimony, the circuits are split as to whether the defense motion, when made, will be granted. Grand jury secrecy was cited a number of times as a justification of denial of defense motions.[134]

The obvious conclusion to be drawn from the Florida practice of recording grand jury proceedings is that gross inconsistencies exist among the circuits. Even more obvious is the conclusion that some sort of uniformity is needed. Since a defendant's right to discovery, granted to him by statute, court rule, and case law can easily be circumvented by the refusal of the prosecutor to record the proceedings, some assurance is needed that the decision whether to record is based upon principles of procedural fairness.

Whether to require the recording of grand jury testimony has also arisen in other states. That various states address the problem differently further points to the need for some sort of uniformity.

Other States

Generally, the states can be classified into three groups according to their practice of recording grand jury testimony. The first class consists of those

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133. Interview with N. Joseph Durant, Jr., Chief Assistant State Attorney and Legal Advisor to the Grand Jury, 11th Judicial Circuit of Florida, in Miami, Florida, Sept. 11, 1974.

134. "We feel that the principle of grand jury secrecy is fundamental and that this principle should not be eroded by either legislation or judicial decisions. We believe that the policy considerations for secrecy substantially outweigh the complaints of defendants who have come under scrutiny of the grand jury." Letter from Aaron K. Bowden, Assistant State Attorney, 4th Judicial Circuit of Florida, to Anne C. Conway, Oct. 14, 1974, on file in the office of the *University of Florida Law Review.*

The 9th Circuit blamed the granting of defense motions for discovery on the fact that "[m]ost judges do not fully appreciate the necessity for Grand Jury Secrecy. They seem unduly curious themselves to find out what went on." See Response of 9th Circuit, *supra* note 128.

states that prohibit recordation of grand jury testimony.[135] Although only one state statute expressly forbids the recording of grand jury testimony,[136] judicial interpretations in two other states have, in the interest of protecting grand jury secrecy,[137] refused to allow minutes to be kept.[138]

The second class, which constitutes the largest grouping, allows but does not require the keeping of minutes or the recordation of the proceedings.[139] Three states allow either the grand jury,[140] the judge,[141] or the prosecuting attorney[142] the option of requesting recording. As is the case in Florida,[143] inconsistencies exist in many of these states between their liberal discovery procedures and their recording practices.[144]

States in the third group require recording.[145] These states can be further

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135. *See* IDAHO CODE §19-112 (1947); TENN. CODE §40-1611 (1956); PA. R. CRIM. P. 208.

136. PA. R. CRIM. P. 208 provides: "The transcription or reproduction by any person of the testimony of witnesses given before the grand jury is prohibited."

137. The Connecticut court refuses to allow a defendant to "jeopardize [grand jury] secrecy" by recording, whether in writing or otherwise, what transpires. This is especially true if recording is desired merely for the purpose of making the grand jury investigation a more effective tool for discovery. *See* State v. Vennard, 159 Conn. 385, 270 A.2d 847 (1970), *cert. denied,* 400 U.S. 1011 (1970). In Parton v. State, 455 S.W.2d 645 (Crim. App. Tenn. 1970), the Tennessee supreme court found no authority for a grand jury to keep minutes of the testimony of witnesses before them.

138. IDAHO STAT. §19-1112 (1947) enumerates persons allowed to be present at grand jury proceedings; a court reporter or stenographer is not listed. Case law, however, indicates that any action taken by the grand jury will not be disturbed because the prosecutor, for his own purposes, allowed a stenographer to be present in the grand jury room, unless the accused can show that the presence of the stenographer has in some way been detrimental to him. *See* Gasper v. District Court, 74 Idaho 388, 264 P.2d 679 (1953); State v. Barber, 13 Idaho 65, 88 P. 418 (1907).

139. *See* ARK. STAT. ANN. §§43-905-06 (1954); KAN. STAT. ANN. §§22-3010, 3012 (1970); ME. REV. STAT. ANN. tit. 15 §1256 (1964); MD. CTS. & JUD. PRO. CODE ANN. §2-503 (1974); MASS. ANN. LAWS ch. 221, §86 (Supp. 1967); MICH. COMP. LAWS ANN. §767.16 (1948); MO. ANN. STAT. §540.100 (Vernon 1949); MONT. REV. CODE ANN. §95-1409 (1947); NEV. REV. STAT. §29-1407 (1943); N.H. REV. STAT. ANN. §600:5 (1955); OHIO REV. CODE ANN. §§2939.09-11 (1953); TEX. CODE CRIM. PRO. art. 20.09 (Vernon 1966); WYO. STAT. ANN. Grand Jury Section §§7-92-117.

140. *See* ARK. STAT. ANN. §54-905 (1964); KAN. STAT. ANN. §22-3004 (1970); ME. REV. STAT. ANN. tit. 15, §1256 (1965); MICH. COMP. LAWS ANN. §767.16 (1948); MO. ANN. STAT. §540.100 (Vernon 1949); N.H. REV. STAT. ANN. §600:5 (1955); OHIO REV. CODE ANN. §2939.09 (1953); DEL. SUPER. CT. CRIM. R. 6.

141. *See e.g.,* MICH. COMP. LAWS ANN. §767.16 (1948); MONT. REV. CODE ANN. §95-1409 (1947). *See also* Toth v. Silbert, 184 F. Supp. 163 (N.D. Ohio 1960). "The responsibility for any relaxing of the rule of secrecy and of suprevision of an 'inquiry should reside in the court.' " *Id.* at 167.

142. CONN. GEN. STAT. ANN. §54-45 (1958); LA. CODE CIV. PRO. §434; MASS. ANN. LAWS ch. 221, §86 (1932) (Supp. 1967); OHIO REV. CODE ANN. §2939.11 (1953).

143. See text accompanying notes 118-123 *supra.*

144. For example, KY. R. CRIM. P. 5.16(2) requires that "any person indicted by the grand jury shall have a right to procure a transcript of any stenographic notes or recordings relating to his indictment or any part thereof . . . ." The courts, however, have held that this rule does not require that testimony of witnesses be taken and transcribed. *See* Amburgey v. Commonwealth, 415 S.W.2d 103 (Ky. 1967); White v. Commonwealth, 394 S.W.2d 770 (Ky. 1965). *See also* People v. Embry, 12 Ill. App. 3d 332, 297 N.E.2d 604 (1973).

145. *See* ARIZ. REV. STAT. ANN. §21-411A (Supp. 1974-1975); ILL. ANN. STAT. ch. 38,

divided according to their discovery procedures. Most of the states in this category allow the defendant only limited access to the testimony even though they require preservation of the minutes.[146] The purposes for which disclosure is allowed include impeaching witnesses,[147] proving perjury charges,[148] complying with the discovery rules of procedure,[149] and furthering justice.[150] Other states, however, place the burden upon the prosecutor to show a compelling need for nondisclosure.[151]

Certain other states within this third group have unique policies. In Iowa when an indictment is held to be insufficient, an order is made to resubmit the case to the grand jury. Under those circumstances it is unnecessary to summon the witnesses again before the grand jury, since state law permits the grand jury minutes to be used on resubmission. The defective indictment and the minutes of the testimony are returned to the grand jury, which can then return a proper indictment without eliciting additional testimony.[152] Minnesota also has an unusual policy in that recording is always required, but a copy of the testimony is only furnished to the defendant in case of a presentment and not an indictment.[153]

The most liberal state, as far as access to recorded grand jury testimony is concerned, is California. California law not only requires that the grand jury appoint a competent stenographer and furnish the defendant with a transcript,[154] but it also requires a continuance until the defendant receives a copy.[155] One California case required that all grand jury testimony be given

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§§112-16 (Smith-Hurd 1970); IND. ANN. STAT. §9-810 (Burns 1956); MINN. STAT. ANN. §628.57 (1971); NEV. REV. STAT. §172.215 (1973); N.M. STAT. ANN. §41-5-8 (1953); N.Y. CRIM. PRO. LAW §190.20(3) (McKinney 1971); N.D. CENT. CODE §29-10.1-16 (1974); S.D. COMPILED LAWS ANN. §230290 3 §23-29-13 (1967); UTAH CODE ANN. §77-18-7 (1953); WASH. REV. CODE ANN. §10.27.070(4) (Supp. 1973); WIS. STAT. ANN. §255.12 (1971); ARIZ. R. CRIM. P. 12.8; COLO. R. CRIM. P. 16; VT. R. CRIM. P. 6(d).

146. *See, e.g.*, OKLA. STAT. ANN. tit. 22, §328 (1936); ORE. REV. STAT. §132.220 (1973); S.D. COMPILED LAWS ANN. §23-30-14 (Supp. 1974); UTAH CODE ANN. §77-19-10 (1953); WASH. REV. CODE §10.27.090(5) (Supp. 1973); WIS. STAT. ANN. §255.21 (1971); VT. R. CRIM. P. 6(d), 16(a)(2)(B).

147. *See* State v. Harries, 118 Utah 260, 221 P.2d 605 (1950).

148. ORE. REV. STAT. §132.220 (1973); S.D. COMPILED LAWS ANN. §23-30-14 (Supp. 1974).

149. *See* VT. R. CRIM. P. 16(a)(2).

150. *See* WASH. REV. CODE ANN. §10.27.090(5) (Supp. 1973).

151. *See* ARIZ. REV. STAT. ANN. §12-411A (Supp. 1974); N.D. CENT. CODE §29-10.16 (1974); COLO. R. CRIM. P. 16(c)(2).

152. IOWA CODE ANN. §772.5 (1946).

153. MINN. STAT. ANN. §628.04 (1971). *See* State v. Falcone, 292 Minn. 365, 195 N.W.2d 572 (1972); State *ex rel.* Robertson v. Steele, 117 Minn. 384 (1912).

154. CAL. PENAL CODE §938 (West 1970).

155. CAL. PENAL CODE §938.1 (West 1970). That courts are reluctant to dismiss indictments is further evidenced by a case interpreting the California statute that arose in a federal district court in the Southern District of New York. The defendant was a fugitive from California and was arrested in New York. After the Governor of California issued a warrant for her extradition the defendant sought a writ of habeas corpus urging that the affidavit of the California district attorney failed to show probable cause. The requisition for the warrant was supported by an indictment returned by the grand jury of Marion County, California, and the defense argued that because the statute had not been complied with the indictment was invalid. Without the indictment there would be no probable cause for the

to the defendant, not just that which was used as a basis for the return of the indictment.[156] The possible impact of the California law has been diminished, however, by judicial interpretations. An appellate court in *People v. Carella*,[157] for example, stated that the "object of these provisions is to enable the defendant to know the testimony upon which the charge against him is founded, and to make his defense. . . . Noncompliance therewith does not affect the validity of the indictment or the jurisdiction of the court to proceed thereunder."[158] Under the circumstances of the case, the court found the failure to comply with the statute was harmless.[159]

Nevada is the only state that imposes the extreme sanction of dismissal of indictment for failure to record.[160] In *Bonnenfant v. State*[161] the Nevada supreme court stated that the primary purpose of the statute requiring recording is to enable an accused to test probable cause[162] and that the statute benefited the accused by according him new protection against ill-founded charges.[163] In this case a prior indictment was dismissed because no transcript was made of the proceedings.[164]

As was seen most clearly in Florida, it makes little sense to liberalize dis-

affidavit. The California statute directs that the transcript cannot be exhibited to anyone other than the district attorney until the defendant is in custody. The defendant was denied a transcript because she was not "in custody" in California. She was therefore unable to test the sufficiency of the warrant. Davis v. Behagen, 321 F. Supp. 1216 (S.D.N.Y. 1970), *aff'd*, 436 F.2d 596 (2d Cir. 1971).

156. People v. Pipes, 179 Cal. App. 2d 547, 3 Cal. Rptr. 814 (Dist. Ct. App. 1960). "It is not for the grand jury, its foreman, or any member thereof, or the court to determine what testimony taken in the course of an investigation of a criminal cause was considered in returning an indictment respecting such cause, and direct that such testimony alone should be reported and transcribed." *Id.* at 554, 3 Cal. Rptr. at 818. The court belived, however, that unless the error was prejudicial a reversal would not be justified. *Id.* at 556-57, 3 Cal. Rptr. at 819.

157. 191 Cal. App. 2d 115, 12 Cal. Rptr. 446 (4th Dist. Ct. App. 1961).

158. *Id.* at 125, 12 Cal. Rptr. at 451.

159. "Unless noncompliance with the statute prejudiced the defendants they are not entitled to urge a reversal of the judgment on account thereof . . . . There is no showing that the failure to obtain the names of all the witnesses appearing before the grand jury or a transcript of their testimony until after the trial had commenced prejudiced the defense in this case in any way." *Id.* at 126, 12 Cal. Rptr. at 452. The court based its reasoning on its belief that "[t]he law is the protector but not the puppet of the accused." *Id.*

160. *See* NEV. REV. STAT. §172.215 (1973). The stenographer is required to file with the county clerk an original transcript, which is then delivered to the district attorney, and enough copies for the judge and each defendant. NEV. REV. STAT. §172.225 (1973).

161. 86 Nev. 393, 469 P.2d 401 (1970).

162. *Id.* at 395, 469 P.2d at 402. Prior to enactment of the statute directing that a copy of the transcript be given to the accused, probable cause could only be tested by compelling the witness who had given evidence before the grand jury to testify in support of the challenge. *Id.*

163. *Id.* The protection is based upon the fact that only in rare circumstances could the accused get a witness to testify in support of his challenge of probable cause. *See Ex parte* Colton, 72 Nev. 83, 295, 383 (1956); *Ex parte* Stearns, 68 Nev. 155, 227 P.2d 971 (1951); Eureka County Bank Habeas Corpus Cases, 35 Nev. 80, 126 P. 655 (1912).

164. 36 Nev. at 395, 469 P.2d at 402. The defendant argued against resubmission of the case to the same grand jury on the grounds of irreparable prejudice. The court, however, said that because the evidence may be reviewed by the use of the transcript to determine

covery procedures yet at the same time to regard recording, the means to implement the policy, as permissive rather than mandatory. While the divergent views of the various states demonstrate that it is not essential to link the recordation of grand jury proceedings to the traditional concepts of grand jury secrecy, they also demonstrate that there is some need for uniformity in policy to insure potential defendants of their rights to due process of law. Perhaps the federal solution, which considers a denial of a request for recordation to be an abuse of judicial discretion, would be sufficient if supported by effective means of enforcement. In any event, it would seem that in recognition that recordation is the "better practice," the courts on all levels should take it upon themselves to insure the institution of such sound policy.

CONCLUSION

Most courts addressing the question have held that an accused has no constitutional right to recorded grand jury testimony.[165] This view ignores the fact that regularity and procedural fairness are indispensable elements of due process.[166] As Justice Douglas commented in *Joint Anti-Fascist Refugee Committee v. McGrath:* "[I]t is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."[167] Grand juries, by their very nature, make strict procedural safeguards essential. The accused is not afforded the right to have counsel present at the proceedings to advise him or to oversee the methods employed by the prosecution in presenting its case. The accused himself may be subjected to questioning by an accusatorial body that in many cases is being manipulated by his adversary.[168] Because no one is present to protect his interests, it is the duty of the court to do so. This can only be accomplished effectively through the use of a recorded transcript. Otherwise, as long as the grand jury is potentially, if not actually, subject to manipulation by the prosecutor, the due process requirement of fundamental fairness is avoided. Additionally, the failure of the courts to impose a mandatory requirement of recording grand jury testimony gives a prosecutor an opportunity to circumvent the rights of discovery given to a defendant by statute, court rule, and case law. The illogic of allowing an adversary this advantage is apparent.

ANNE CALLAGHAN CONWAY

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legal sufficiency, a court need not worry whether the indictment was returned by a prejudiced grand jury. *Id.* at 396, 469 P.2d at 403.

165. *See* United States v. Battisti, 486 F.2d 961 (6th Cir. 1973); United States v. King, 478 F.2d 494 (9th Cir. 1973); United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

166. *See* Hurtado v. California, 110 U.S. 516 (1884). "Due Process clause requires that the state adopt a procedure which will insure that no person is required to stand trial at the whim or caprice of the prosecuting attorney." Alexander & Portman, *supra* note 7, at 1001-02.

167. 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

168. See text accompanying note 7 *supra.*

APPENDIX

QUESTIONNAIRE

1. It is the policy of this circuit to:
   A. Never have a court reporter present at grand jury proceedings.
      The reason for this policy is:
      a. It is a policy matter, since recording is not mandatory
      b. It is too expensive to record
      c. Other:

   B. Always record the grand jury testimony.
      Since a court reporter is always present, when are the proceedings transcribed?
      a. Only when the witness is accused of perjury
      b. When the defendant has been granted access for discovery purposes
      c. Other:

   C. Sometimes have a court reporter present.
      The proceedings are recorded for one or more of the following reasons:
      a. The defendant has requested that the proceedings be recorded
      b. The state attorney's office believes a witness may be lying
      c. The case is unusually complicated
      d. The state will be benefited at trial if it has a transcript of the grand jury proceedings
      e. Other

2. How often do cases arise where the defense makes a motion for discovery of grand jury testimony?

3. Are these motions usually granted? If not, on what grounds are they denied?

4. Comments: