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THE "PUTATIVE DEFENDANT" IN A FEDERAL GRAND JURY INVESTIGATION

EDWARD F. MAREK*

I. INTRODUCTION

FREQUENTLY, PERSONS WILL BE CALLED TO TESTIFY before a federal grand jury when the government has reason to believe that they are involved in a criminal activity currently under grand jury investigation. They may also be asked to produce documents or other evidence for the grand jury to consider. There is no constitutional prohibition against subpoenaing such a putative defendant; indeed, the Supreme Court has encouraged it.¹ The grand jury proceeding is a critical stage for the putative defendant regardless of whether he is summoned to appear. The prospect of indictment is ever-present and an appearance can serve to strengthen the government's position. It can likewise be a critical stage for a person under subpoena who is not initially suspected of complicity in the criminal activity, but who may later subject himself, during testimony or thereafter, to charges of perjury, contempt, or an offense which is a part of the overall investigation.

Effective representation of a putative defendant or a person under subpoena requires an understanding of the environment in which a federal grand jury operates as well as the substantive and procedural law involved. In dealing with this subject the assumption is often erroneously made that the grand jury is the forum. It is not, rather the prosecutor is the forum because of the enormous influence he exerts over the conduct and scope of the investigation. The grand jury in and of itself has no independent means which permits it to function in a meaningful manner without the close guidance of the attorney representing the government. Major decisions are made by the prosecutor, such as determining which witnesses (or documents) to subpoena and/or immunize, defining the "law" against which the grand jury is to measure the evidence received in its determination of probable cause, and most importantly, deciding whether an indictment is to be returned and which persons and offenses are to be included.

¹ "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete.... It is entirely appropriate—indeed imperative—to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime." United States v. Mandujano, 425 U.S. 564, 573 (1976). However, an appearance of a putative defendant may be avoided on other than constitutional grounds. See notes 24-29 infra and accompanying text.

*B.S., Ohio Univ.; J.D., Case Western Reserve Univ.; Federal Public Defender, Northern District of Ohio; Adjunct Faculty, Cleveland-Marshall College of Law, Cleveland State University.
Although a federal grand jury has wide-ranging investigative authority, aside from its report writing function it must focus on a suspected violation of a federal criminal statute and may not be utilized for any other purpose. For example, it cannot properly be used as a discovery tool to aid a prosecutor in trial preparation of a previously returned indictment, nor as an investigative aid to a federal agency where no federal offense is shown to have been committed. When the legitimacy of an investigation is questioned, the government will be required to demonstrate that the focus of the investigation is on a suspected violation of federal law.

Although the prosecutor determines the course and outcome of the investigation, the grand jury is nevertheless an arm of the judiciary. Albeit tenuous at times, a grand jury is subject to the authority of the court in the jurisdiction in which it is impaneled. Neither the grand jury nor the prosecutor can effectively function without judicial assistance and authority. The imposition of sanctions to enforce a subpoena or to compel a recalcitrant witness to testify, for instance, must come from a court. Further, a court may check any abuse of the grand jury process. It can refuse to impose contempt sanctions, dismiss an indictment or even end the life of a grand jury.

Against this background, this article will examine substantive and procedural considerations arising in connection with the representation of a putative defendant or a subpoenaed witness who may become ex-


4 A grand jury was improperly used to assist the Federal Bureau of Investigation in discovering the location of a fugitive where no related federal offense, such as harboring, had been shown. In re Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975).

5 Based on its supervisory power, the Third Circuit has required a showing, via affidavit, of the nature of the investigation and the federal statutes believed to have been violated. In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1019 (1975). The First Circuit, however, requires a request for such an affidavit. In re Lopreato, 511 F.2d 1150 (1st Cir. 1975). In Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), the court required the government to demonstrate the relevance between the questions propounded to a witness and the offenses under investigation for which the witness was immunized.

Other circuits have declined to require affidavits. See In re Liberatore, 574 F.2d 78 (2d Cir. 1978); In re Grand Jury Investigation, 565 F.2d 318 (5th Cir. 1977); In re Hergenroeder, 555 F.2d 686 (9th Cir. 1977).


posed to criminal charges or contempt in the course of a grand jury investigation. Subtle as well as obvious applications of the fifth amendment privilege against self-incrimination will be addressed. In addition, certain problem areas will be explored such as whether a “target” of a grand jury investigation who is under subpoena can legally avoid an appearance, or whether illegally obtained evidence can be used to obtain an indictment, or whether and under what circumstances exculpatory evidence must be presented. In discussing these subjects, decisional authority will be cited to support conclusions and extensive reference will be made to a set of internal guidelines promulgated by the United States Department of Justice to regulate the conduct of federal prosecutors before federal grand juries.9

Traditionally, resort to judicial remedy for correction of impropriety occurring in connection with a grand jury proceeding has taken place after indictment. However, a major thrust of this article will be on a pre-emptive invocation of judicial relief prior to indictment via the federal courts’ supervisory power over federal grand juries.

II. FIFTH AMENDMENT PROBLEMS

Just as the fifth amendment does not prohibit subpoenaing a putative defendant to appear before a grand jury (nor require that he be warned of his status as such),10 it likewise does not prevent the government from asking incriminating questions. What it does prohibit is compelling the witness to give incriminating answers or produce documents or tangible items where the act of production can be incriminating.11 However, the fifth amendment will not protect a witness who refuses to give handwriting or voice exemplars or display himself in a line-up. These “human characteristics” are said to be non-testimonial and therefore outside of the protection of the privilege against self-incrimination.12

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10 United States v. Washington, 431 U.S. 181 (1977). Although the Supreme Court in Washington held that a warning of target status was not required under due process considerations, the Second Circuit has required such a warning under its supervisory authority. United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976). The Department of Justice, through its grand jury guidelines, also requires that a target be warned of his status as such. U.S. DEP’T OF JUSTICE, GRAND JURY PRACTICE § 9-11.250 (1977) [hereinafter cited as GRAND JURY GUIDELINES]. The Third Circuit has suggested that it will require a target warning under its supervisory authority where a prosecutor deviates from an established policy or practice to give such a warning. United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977).


13 United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973). However, the purpose for which these characteristics are sought may
Although easily stated, the applicability of the privilege against self-incrimination in a grand jury setting can be difficult to recognize. The problem often becomes one of gaining access to sufficient information about the nature of the grand jury's investigation and the extent of incriminatory information possessed by the grand jury and the government concerning a particular witness. Where the prosecutor has declared that a witness is a "target," or this status has otherwise been determined, and the questions propounded relate to the criminal activity under investigation, the privilege, absent immunity, clearly supports a refusal to testify. However, at other times the secretive rubric of the grand jury and the prosecutor's reverence to that secrecy prevent a clear understanding of the potential exposure of the witness. Traditional discovery vehicles are unavailable and a prosecutor, at least initially, need only make a limited formal disclosure of the scope of the grand jury investigation.

The fifth amendment recognition problem is further compounded by the twin prohibitions against the presence of counsel inside the grand jury room and against the assertion of the privilege against self-incrimination prior to questioning. Fortunately, the courts have taken a liberal approach in allowing the privilege. Accordingly, given the limitations on access to information and the danger that partial answers can result in forced full disclosure of the remaining subject matter, any judgment as to the applicability of the privilege should err on the side of caution by a refusal to testify. In the event of a challenge, the prosecutor must disclose sufficient information concerning the investigation; the witness can then require a court to make a determination on the applicability of the fifth amendment privilege.

Often, investigative agents involved in the overall investigation are utilized to serve grand jury subpoenas. This offers the government an opportunity to obtain an advance interview of a potential witness concerning his contemplated grand jury testimony. The resulting interview constitutionally limit their availability. See In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973).

14 See note 5 supra and accompanying text.

15 United States v. Harmon, 339 F.2d 354 (6th Cir. 1964), cert. denied, 380 U.S. 944 (1965). Although Harmon dealt with an assertion of a fifth amendment privilege during trial, the court's refusal to permit the claim in advance of the question is clearly applicable to a grand jury setting. The court stated that "the danger to be apprehended must be real and appreciable, and not a danger of imaginary and unsubstantial contingency." Id. at 359.

16 "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure . . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

17 Id. at 486.
reports can be material to a disputed fifth amendment claim. They not only provide insight into the nature of the investigation, but may also define the potential exposure of the witness in the criminal activity under investigation through the manner of questioning and the presence of Miranda type warnings. It would be difficult for a prosecutor to argue the non-incriminating nature of requested grand jury testimony when self-incrimination warnings were previously given to the witness by law enforcement officers.

The existence of a previous interview concerning contemplated grand jury testimony in and of itself can also be a source of criminal exposure for the witness, thus providing the basis for a fifth amendment self-incrimination claim when the witness goes before the grand jury. Section 1001 of title 18 of the United States Code generally prohibits the making of oral (or written) false statements concerning a matter within the jurisdiction of an agency of the government. Although the Supreme Court has not addressed the issue of whether section 1001 reaches false oral statements made to a federal investigative agent during the course of a criminal investigation, some lower courts have concluded that it does. The issue is sufficiently unresolved to pose potential criminal liability upon a person who has given previous statements to a federal


agent which may be inconsistent with subsequent grand jury testimony. Where a question exists as to the accuracy of the previous statements, it appears that, like exposure to any other offense, the fifth amendment provides grounds for a later refusal to testify. This situation is similar to one in which a witness has given prior grand jury testimony suspected by a prosecutor to be perjurious. Any subsequent testimony on the same subject matter would be incriminating, thus providing a fifth amendment basis for a refusal to testify a second time.21

Given the importance of prior statements made by a prospective witness to an investigative agent, persuasive grounds exist to support disclosure of the interview reports. In a related area, the courts have required disclosure of a witness' previous grand jury testimony prior to a second appearance on the same subject, particularly where a substantial period of time has elapsed between appearances.22 This has been done as a matter of fairness to avoid unintentional inconsistent testimony. Similarly, access to an interview report can avoid inadvertent inconsistent testimony. In fact, the case for production of an agent's interview report is even more compelling. Unlike previous grand jury testimony, no verbatim transcript is made.23 Rather, the interview report generally consists of the agent's recollection of the substance of statements made by the prospective witness, reconstructed from notes which are usually later destroyed.

III. AVOIDING AN APPEARANCE OF A PUTATIVE DEFENDANT

The problems attendant grand jury appearance and/or testimony of a putative defendant warrant avoiding an appearance if possible. Even

21 The court in United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977), clearly recognized the potential for incrimination in subsequent testimony where the prosecutor had reason to believe that prior testimony was not truthful.

22 In In re Grand Jury Investigation of Brantiff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975), the court ordered production of the transcript of prior grand jury testimony before a witness' third appearance because of the danger of prosecution for perjury under 18 U.S.C. § 1623(c) (1976) which permits conviction on two inconsistent statements given under oath. See also Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). The Ninth Circuit held that "fundamental fairness inherent in due process" required production of previously recorded grand jury testimony prior to a subsequent appearance. Id. at 1080.

23 The lack of a verbatim transcript of allegedly false oral statements made to an FBI agent was one of the grounds which prompted the court to dismiss the section 1001 charge in United States v. Ehrlichman, 379 F. Supp. 291 (D.D.C. 1974), aff'd, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977).
when a fifth amendment self-incrimination privilege is clearly applicable to requested testimony or documents, an appearance nevertheless can involve many problems in actually asserting the privilege, exposure to investigative agents as well as potential adverse public exposure. Although an appearance cannot constitutionally be avoided regardless of the existence of valid grounds for a subsequent refusal to testify or otherwise produce evidence, a putative defendant may avoid appearing through utilization of the Department of Justice's grand jury guidelines. In the absence of compelling considerations to the contrary, a federal prosecutor is prohibited from calling a "target" witness upon receipt of written notice from the witness and counsel stating an intent to assert a fifth amendment self-incrimination privilege. Written notice to the prosecutor in charge of the investigation, citing Department of Justice guidelines, either before or after service of a grand jury subpoena, should suffice to avoid the appearance of a putative defendant. Notice prior to service of a subpoena is desirable in order to avoid exposing the putative defendant to questioning by an investigative agent also acting as a process server.

If a prosecutor, upon receipt of notice, insists on an appearance by the putative defendant, the issue becomes whether relief may be obtained through judicial enforcement of the guidelines. To date, when presented with this issue in the context of a request for such a drastic remedy as dismissal of an indictment or the exclusion of evidence, the courts have refused to give the Justice Department guidelines "force of law" to remedy contrary prosecutorial action. The issue, however, is by no

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24 Even where sensitive first amendment claims are raised, an initial appearance cannot constitutionally be avoided. See Branzburg v. Hayes, 408 U.S. 665 (1972).

25 GRAND JURY GUIDELINES, supra note 10, at § 9-11.254. "Target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime. . . ." Id. § 9-11.250.

In Escobedo v. Illinois, 378 U.S. 478 (1964), "target" was defined where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." Id. at 490. Moreover, the subjective intent of an individual prosecutor is not determinative; the test is whether a person "could" be subject to indictment as measured by objective standards. United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977).

Such factors as the importance of the desired testimony, the inability to obtain the information from other sources and the applicability of the claimed privilege may nevertheless compel an appearance. However, both the prosecutor and the grand jury must make the decision to subpoena a target. See GRAND JURY GUIDELINES, supra note 10, at §§ 9-11.251, 254.

26 United States v. Shulman, 466 F. Supp. 293 (S.D.N.Y. 1979). In Shulman, the court refused to dismiss an indictment because of failure by the government to give the defendant, then a target, notice of his target status and an opportunity to appear before the grand jury. Such notice together with an opportunity to testify or produce witnesses are required by the guidelines. GRAND JURY GUIDELINES, supra note 10, at § 9-11.253. See also Appeal of Angiulo, 579 F.2d 104 (1st
A motion to quash a subpoena issued to a putative defendant, after notification to the prosecutor (pursuant to the guidelines) of an intent to refuse to testify on fifth amendment grounds, does not present a court with such apparently drastic remedies as dismissal of an indictment or suppression of testimony already given by the witness. The court is thus in a better position to give effect to the guidelines by invoking its supervisory power. In a hearing on the motion to quash, the prosecutor would of necessity be required to show either the non-target status of the witness or a compelling reason for insisting on an appearance and

Cir. 1978). The First Circuit avoided confronting the issue of the appropriate remedy for the government's "wrongful" subpoena of a target contrary to the guidelines. The basis for the court's decision lay in the lack of a factual predicate demonstrating that the appellant was a "target" at the time he was subpoenaed to testify.

In another context the Supreme Court has refused to adopt a per se exclusionary rule for failure of an Internal Revenue Service agent to follow internal IRS guidelines regulating the surreptitious use of recording equipment during a conversation with a suspected tax violator. United States v. Caceres, 440 U.S. 741 (1979). The Court, however, left the door open for a judicial remedy as to an agency violation of its internal rules. Factors such as demonstrable prejudice to the defendant, the willfulness or recklessness of the violation and whether the guideline in question implicated constitutional or federal laws were cited by the Court as relevant considerations. Id. at 752-53. Accordingly, each guideline must be viewed individually and in the context of a given violation. For instance, in United States v. Heffner, 420 F.2d 809 (4th Cir. 1969), the court enforced an IRS regulation requiring that Miranda type warnings be given to a taxpayer under suspicion even though the questioning was not "custodial" for Miranda purposes. It is important to note that the guideline involved in Heffner implicated constitutional rights, whereas the consensual monitoring in Caceres was clearly constitutionally proper under United States v. White, 401 U.S. 745 (1971).

Although decided without regard to the guidelines, the Third Circuit in United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977), clearly signaled its willingness to enforce compliance with established practice: "Certainly the uniform practice of warning target witnesses before grand juries . . . has much to commend it, and we endorse that practice. Thus in the future, United States Attorneys in the Third Circuit should not be surprised if, pursuant to our supervisory powers over the manner of conducting grand jury proceedings, we were to follow United States v. Jacobs . . ." Id. at 1056. The Second Circuit in United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), required target warnings under its supervisory power. Jacobs was decided prior to promulgation of the guidelines. Significantly, with respect to judicial enforcement of agency regulations, the court in Jacobs stated:

We did not specifically refer to the analogy of an agency being required to adhere to its own regulations . . . because we recognized that the Attorney General in his prosecutorial function may be, strictly speaking, less restricted than the Secretary of State. However, the analogy is persuasive when the Attorney General actually promulgates Guidelines for supervision by the United States Attorney in specific circumstances . . . and inconsistent treatment results therefrom.

Id. at 774 (citations omitted).
questioning in the face of a stated intention to refuse to testify. It is difficult to imagine any legitimate purpose for insisting on the appearance of a person who has announced an intention to exercise a valid fifth amendment refusal to testify. Even a grant of immunity can be conferred in the absence of an actual initial appearance.

Moreover, instances of grand jury abuse are not unknown. They have been improperly used as a discovery device after indictment or, incredibly, to question an actual defendant concerning the very offenses contained in a previously returned, but still secret, indictment. A motion to quash a subpoena issued to a “target” after notice of an intention to refuse to testify will flush out any intended abuse of the grand jury. The grand jury is an arm of the court and its conduct (as well as that of the prosecutors) is subject to the exercise of a federal court’s inherent supervisory authority.

IV. USE OF ILLEGALLY OBTAINED EVIDENCE

The Supreme Court has refused to extend the exclusionary rule to bar the use of illegally obtained evidence before grand juries. Thus, a witness before a grand jury who was the object of an unlawful search and seizure, once immunized, cannot refuse to answer questions derived from the unlawfully obtained evidence. Nor, it seems, may an immunized witness refuse to answer questions resulting from a coerced confession taken from him at an earlier time. Not only may such illegally

28 See United States v. Doss, 563 F.2d 265 (6th Cir. 1977) (en banc). Doss had counsel before the grand jury, was given Miranda warnings and was advised he was a target. However, he was not told of the already returned but secret indictment charging him with counterfeiting and narcotics offenses. Although declining to answer some questions on fifth amendment grounds, Doss did answer questions about counterfeit money and narcotics. These answers formed the basis for a subsequent perjury indictment. The court dismissed the indictments finding an abuse of the grand jury process in violation of the fifth and sixth amendments. See also United States v. Star, 470 F.2d 1214 (9th Cir. 1972); United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972); and notes 3 & 4 supra.


In United States v. Serubo, 604 F.2d 807 (3d Cir. 1979), the court dismissed an indictment under its supervisory power because of misconduct of a prosecutor during the grand jury investigation, stating that such a remedy “may be . . . appropriate . . . to correct flagrant or persistent abuse, despite the absence of prejudice to the defendant . . . .” Id. at 817. For a general discussion of a federal court’s supervisory power see United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976); Marek, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 CLEV. ST. L. REV. 35, 39-43 and nn. 24-40 (1978).


31 In re Weir, 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974). The Weir court cited Calandra in foreclosing an attack on questions based on an
obtained evidence be used to question the "aggrieved" witness, but it may also be presented to a grand jury in support of an indictment against him. Although the Supreme Court has observed that prosecutors have little incentive to use such evidence to obtain an indictment against a person who is the object of illegal police conduct, it has refused to erect a constitutionally based barrier. However, in recognition of the Court's observation, the Department of Justice's grand jury guidelines prohibit federal prosecutors from presenting "against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation."

It is doubtful that this guideline would prevent the use of illegally obtained evidence in questioning an immunized witness; arguably, the evidence would not have been used against an aggrieved party. Moreover, "standing" principles, the language of the guidelines and the frequent need for a prior judicial determination of the legality of police conduct limit the situations in which the use of illegally obtained evidence to support an indictment can be prevented. Both the guidelines and traditional standing notions permit the use of illegally obtained evidence against other persons whose constitutional rights have not been violated. Furthermore, the Supreme Court has clearly expressed a reluctance to permit "disruptive" hearings concerning the legality and the origin of evidence in a grand jury investigation. As a result, it is doubtful that a judicial determination of the legality of evidence can be obtained prior to or in connection with its contemplated presentation to a grand jury.

However, where the questioned evidence has been the subject of a separate proceeding in either federal or state court, a judicial determination concerning its origin may have already been made. The constitu-

alleged tortured confession, refusing to "elevate the fifth amendment over the fourth amendment." Id. at 881. Both the Supreme Court in Calandra and the Ninth Circuit in Weir refused to extend the exclusionary rule to grand juries due to uncertainty as to whether doing so would enhance the deterrence of unlawful police conduct. This position, however, overlooks the incentive to law enforcement officers to disregard the rights of "lesser" conspirators to reach "higher-ups."

The Supreme Court stated that it considered use of illegally obtained evidence to obtain an indictment against the aggrieved party remote because "a prosecutor would be unlikely to request an indictment where a conviction could not be obtained." United States v. Calandra, 414 U.S. 338, 351 (1974).

GRAND JURY GUIDELINES, supra note 10, at § 9-11.331.

Id.; United States v. Calandra, 414 U.S. at 348.

See United States v. Calandra, 414 U.S. 338 (1974). Similarly, the legality of a court authorized wiretap cannot be fully litigated at the grand jury stage. See In re Special February 1977 Grand Jury, 570 F.2d 674 (7th Cir. 1978); In re Vigorito, 499 F.2d 1351 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); In re Lochiatto, 497 F.2d 803 (1st Cir. 1974).
tional violation, in that case, would be "clear" and the need for a further judicial determination in connection with the later use of the evidence before a grand jury would be obviated. Likewise, a motion for return of unlawfully seized property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, is available immediately after a search and can force a judicial determination of the legality of the seizure separate and apart from a grand jury proceeding. In addition, where the constitutional violation is flagrant, it may be uncontested by the government and a judicial determination will not be necessary.

Should a constitutional violation exist under these circumstances, a written request may be made to the prosecutor asking him to refrain from presenting the illegally obtained evidence to a grand jury in support of an indictment against a putative defendant who was the subject of the violation. If the evidence constitutes the entire case, such as possession of contraband, the Supreme Court's observation that a prosecutor has little incentive to use it to obtain an indictment is persuasive; the evidence would not be usable at trial (harassment cannot be overlooked. However, where the evidence constitutes only an aspect of the entire body of evidence or was "derived" from the original illegally obtained evidence, an incentive to present it to a grand jury in support of an indictment may nevertheless be present.

The written notice should not only refer to the applicable Department of Justice guideline and contain a detailed description of the evidence (including derivative) in question, but it should also include a request for a reply by the prosecutor prior to the return of an indictment. In the event the prosecutor either fails to reply within a reasonable period of time, or submits a negative reply, application can logically be made to the court to enjoin the prosecutor from presenting the illegally obtained evidence to the grand jury. It is unlikely that a court will inquire into the legality of the police conduct in the first instance as such an inquiry will require the kind of "mini-trial" the Supreme Court has discouraged. However, where a prior judicial determination exists or the police conduct is flagrant, the court is in a position to prevent presentation of the evidence under its supervisory power.


37 See In re Weir, 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974) (defense affidavit alleging a tortured confession occurring in another country was not rebutted by the government).

38 See note 32 supra.

39 See note 36 supra and accompanying text.

40 See notes 27, 29 supra.
At this pre-indictment stage, a court is not presented with the prospect of the more extreme remedy of dismissal of a facially sound indictment and thus may be more open to grant the relief requested. In addition, the prosecutor will be in the vulnerable position of justifying an apparent intent to use illegally obtained evidence before the grand jury contrary to Department of Justice guidelines. Not only would such action violate the grand jury guidelines, but it would also be contrary to the Department of Justice’s Principles of Federal Prosecution which generally admonish an attorney for the government to commence a prosecution only where there is probable cause “that the person’s conduct constitutes a federal offense and ... the admissible evidence will probably be sufficient to obtain and sustain a conviction. ...”

V. PRESENTATION OF EXCULPATORY EVIDENCE

If a grand jury is to perform its intended function of providing a shield against unfounded and unprovable accusations, it must have access to all facts which are critical to a determination of whether there exists probable cause to indict. Simply stated, probable cause is a reasonable belief by the jurors that a statutorily definable offense has been committed by the target. Accordingly, all evidence which can substantially affect that belief must be made available to the grand jury so that it can independently exercise its broad discretion. However, a grand jury is not an adversary proceeding; the prosecutor is essentially its sole source of information despite also being a partisan in an adversary system of justice.

Perhaps in recognition of these seemingly contradictory considerations, an attempt has been made by various components of the criminal justice system to impose an obligation on prosecutors to present exonerating as well as incriminating evidence to a grand jury. However, there is wide disagreement over a definition of the type of evidence which must be presented. Without recognizing a legal obligation to do so, the Department of Justice, through its grand jury guidelines, requires that “when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject ... the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.”

41 U.S. Department of Justice, Principles of Federal Prosecution B(2), reprinted in 27 Crim. L. Rep. (BNA) 3277 (Aug. 6, 1980) (emphasis added). Although, the Principles contain a general “disclaimer” that they create no right or benefit enforceable “at law” by a defendant, Part A(5)—action by a prosecutor contrary to, and with full knowledge of, their requirements—certainly is relevant to a judicial exercise of supervisory authority. The Principles require that each prosecuting attorney for the government be made aware of the provisions. Id. pt. A(2).

42 GRAND JURY GUIDELINES, supra note 10, § 9-11.334 (emphasis added).
obligation in this regard, the courts have imposed a duty on prosecutors to present "exculpatory evidence" to a grand jury. This obligation is generally based upon constitutional grounds as well as on the judiciary's supervisory power. Finally, ethical considerations demand that an attorney representing the government present what is described as evidence which "tend[s] to negate guilt."

As can be seen, attempts to state the requirement only begin the inquiry. The problems arise not only in its definition, but in its application as well. What type of evidence, "directly negates guilt," "tends" to do so or is "exculpatory"? What remedies exist for a failure or refusal of a prosecutor to present such evidence to a grand jury prior to indictment? And, what avenues, if any, are available to force its presentation prior to indictment once the judgment to do so is made?

A definition of the type of evidence that is sufficiently exculpatory to require its presentation to a grand jury can be as illusive here as it is in a trial context under Brady v. Maryland. The Department of Justice confines the scope to "substantial evidence which directly negates . . . guilt," and then only that evidence which the prosecutor is "personally aware of." This standard renders the guideline all but meaningless. If the prosecutor is aware of substantial evidence which directly negates guilt, the case should not even be presented to a grand jury. Moreover, the language of the guideline attempts to isolate evidence known to the prosecutor from evidence known to other persons in the government, particularly investigative agencies, by requiring that the prosecutor be "personally aware of" the critical information. This standard is self-serving and much too rigid to be given judicial approval.

At the other extreme, evidence which merely impeaches the credibility of a government witness in some collateral way or is inconsistent with other substantial, incriminating evidence would not require presen-


"The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.6(b) (1978). Moreover, an attorney for the government is subject to judicial discipline for unethical conduct before a grand jury. United States v. Gopman, 531 F.2d 262 (5th Cir. 1976).

373 U.S. 83 (1963). The Court stated in Brady: "The suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment irrespective of the good or bad faith of the prosecution." Id. at 87 (emphasis added).

GRAND JURY GUIDELINES, supra note 10, at § 9-11.334.

See note 41 supra and accompanying text. A federal prosecutor is directly admonished not to commence a prosecution unless there is sufficient evidence to obtain and sustain a conviction. U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, B(1), reprinted in 27 CRIM. L. REP. (BNA) 3277, 3278 (Aug. 6, 1980).
tation under any test. For example, a lengthy criminal record of a key government witness or the failure of a single witness to identify a putative defendant where scientific evidence or several other witnesses confirm an identification, are not the kinds of evidence which can reasonably be said to have an effect on a finding of probable cause.

As in Brady situations, the answer must finally depend upon the nature of the alleged exculpatory evidence as weighed in connection with all of the other evidence known to the government and grand jury. Fortunately, case law is available to provide guidance. Of course, perjured testimony cannot knowingly be allowed to be given by a government witness to a grand jury. Where the sole witness material to the element of fraudulent intent in a false income tax return investigation gave inconsistent testimony that suggested a negligent rather than a willful omission of a material fact in the tax return under investigation, the failure of the prosecutor to bring this testimony to the attention of the grand jury was fatal to the resulting indictment.48 Likewise, a prosecutor’s failure to advise the grand jury that a key voice identification witness had previously stated that he was “unsure” of his later identification testimony before the grand jury, required dismissal of the indictment.50 It has also been suggested by one court that psychiatric evidence which showed a severe mental illness of a government grand jury witness was sufficiently exculpatory to require its presentation.51

48 "Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel—and, if the perjury may be material, also the grand jury—in order that appropriate action may be taken." United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974). See also United States v. Gallo, 394 F. Supp. 310, 315 (D. Conn. 1975).

49 United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977). The court examined the case law interpreting the fraudulent intent element of the statute under consideration by the grand jury and, finding willfulness critical to a violation, relied on both its supervisory power and fifth amendment due process grounds to dismiss the indictment.

It has been suggested that exculpatory evidence should include that which "casts serious doubt on the credibility of testimony which the jurors are asked to rely upon in finding an indictment." 8 Moore’s Federal Practice, ¶ 6.03[2] (2d ed. 1978).

50 United States v. Provenzano, 440 F. Supp. 561 (S.D.N.Y. 1977). In Provenzano the witness advised the prosecutor before his grand jury testimony that he was unsure of his voice identification after which the prosecutor suggested that the witness’s “statement [identification] to the grand jury would be proper.” Id. at 568. The witness's uncertainty was also relieved by the prosecutor’s false assurance that an FBI examination of a tape recording of the voice established that it was the voice of the target.

51 United States v. Samango, 450 F. Supp. 1097 (D. Hawaii 1978), aff’d, 607 F.2d 877 (9th Cir. 1979). In dismissing the indictment because of several instances of prosecutorial misconduct which created a “biased” grand jury in violation of the fifth amendment, the court observed that psychiatric evidence concerning a key witness was relevant to the grand jury’s assessment of the witness’s credibility.
The courts have also gone beyond requiring presentation of critical impeachment evidence. Disclosure of other types of information as well has been considered necessary to allow a grand jury to independently exercise its indicting function. Thus, the failure of a prosecutor to disclose a "vindictive" motive in seeking a superseding indictment that contained additional charges in retaliation for the defendant's exercise of a legal right was fatal to the new indictment. Similarly, an indictment was dismissed because of a prosecutor's failure to fully familiarize a second-indicting grand jury with the contents of 1160 pages of testimony taken before a prior grand jury which contained some exculpatory material.³³

Judicial involvement in the issue of presentation of exculpatory evidence to a grand jury has heretofore taken place in a post-indictment context with relief in the form of dismissal of the indictment in the appropriate case. The cases have undoubtedly developed at the post-indictment stage because the exculpatory information was either unknown to anyone outside the government prior to indictment and subsequently became known through normal discovery, or was produced as Brady material prior to trial. In these cases, the government has found itself in the contradictory position of Justifying its failure to present the evidence to a grand jury prior to indictment, while at the same time recognizing its exculpatory nature for purposes of pretrial production under Brady. Notwithstanding the Department of Justice position that a prosecutor must be "personally aware of" the exculpatory evidence before it need be presented to the grand jury, the government cannot take refuge in the fact that an individual prosecutor was personally unaware of evidence known to other government employees involved in the case. Separate components of the "prosecution" have been viewed as one for purposes of disclosure of exculpatory evidence, at least in the Brady sense.⁵⁷

⁵² In United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975), aff'd, 505 F.2d 1224 (9th Cir.) cert. denied, 434 U.S. 827 (1977), the government sought and obtained a superseding indictment containing additional charges after the defendant sought a change of venue. As a result, the court dismissed the superseding indictment under its supervisory power and also found violations of the fifth amendment's twin guarantees of due process and an "independent grand jury."

⁵³ United States v. Carcaise, 442 F. Supp. 1209 (M.D. Fla. 1978). The indictment was dismissed in spite of the fact that the prosecutor advised the grand jury generally of the existence of the exculpatory portions of the transcripts and left them with the grand jury for examination.

⁵⁴ See notes 46-53 supra. See also Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).


⁵⁶ See note 45 supra and accompanying text.

In the event of a dismissal of an indictment because of failure to present exculpatory evidence to the grand jury, the prospect of a superseding indictment is, of course, present. Where reindictment is likely, steps can be taken to assure that the case is properly presented the second time. In addition to presenting the exculpatory evidence itself, the court can direct the prosecutor to disclose the need for the superseding indictment. The court can also direct the prosecutor to refrain from making any characterizations before the grand jury which may minimize the value of the exculpatory evidence. In an appropriate case, such as where the exculpatory evidence impeaches the credibility of a key government witness in some significant manner, the court can direct the prosecutor to present the "live" testimony of the witness rather than simply a transcript of previous grand jury testimony. The jurors will then have the opportunity to observe the demeanor of the witness in light of the newly presented exculpatory evidence. Since all proceedings before a grand jury are recorded, including colloquy between the prosecutor and jurors, these precautions are easily verifiable through judicial examination of the transcript of the grand jury proceedings.

Despite this growing authority, there still remains judicial resistance to dismissal of a facially sound indictment because of matters occurring (or not occurring) before a grand jury. To sidestep this reluctance as well as to assure that all relevant information is available to the grand jury, procedures are available to force a prosecutor to present exculpatory evidence to a grand jury prior to its vote on an indictment. However, first defense counsel is presented with the tactical decision whether to make exculpatory evidence known to the prosecutor. Of course, the problem is not present where the evidence is already known to the government; nor is it of concern when the evidence is of such a nature that it will likely be "discovered" by the government prior to

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59 Inappropriate characterization of evidence before a grand jury have been found to be prejudicial. See United States v. Serubo, 604 F.2d 807 (3d Cir. 1979).


61 See Fed. R. Crim. P. 6(e).

62 See United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978), and cases cited therein.
trial. But otherwise, non-disclosure and the effectiveness of using the information at trial must be weighed against its probable impact on the grand jury.

Once it is decided to disclose exculpatory evidence or where it already is, or will be, known to the government, a written notice to the prosecutor requesting its presentation to the grand jury can be made. This can be done in connection with either an "original indictment" or prior to an imminent attempt to obtain a superseding indictment, which may be sought for a variety of reasons apart from being occasioned by dismissal of the original indictment. Many times extensive discovery has been completed prior to a superseding indictment and, as a result, counsel may be in possession of extensive exculpatory evidence. The notice should request presentation pursuant to the Department of Justice guidelines accompanied by a detailed documentation of the evidence in question. This will serve the purpose of making the prosecutor "personally aware" of the exculpatory evidence, as required by the guideline, and provide grounds for a later request for judicial relief in the event of a refusal or failure to present the evidence. In this regard, the notice should request a reply as to whether the prosecutor will accede to the request prior to a grand jury vote.

In the event of inaction or a refusal to present the evidence, the court can be requested to compel presentation. The difficult issue of judicial enforcement of internal executive guidelines is not directly involved, rather the appeal is to the court's supervisory authority over the grand jury. It does not seek to invoke the "extreme" remedy of dismissal of an already returned indictment. The court is merely presented with an intentional refusal by the prosecutor, after notice, to follow the Depart-

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63 In this regard, consideration should be given to the prospect of reciprocal discovery and the other provisions allowing for government discovery under the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 12.1, 12.2, 15 and 15(b).

64 Where the evidence may likely cause the grand jury to return a no-bill, Department of Justice guidelines normally prohibit a second attempt to obtain an indictment. GRAND JURY GUIDELINES, supra note 10, at § 9-11.220.

65 As stated, the prospect of judicial enforcement of internal guidelines has not been foreclosed. See note 27 supra. A refusal to present exculpatory evidence upon request in disregard of the Department of Justice guidelines would be a clear intentional violation, which the Supreme Court noted was absent in United States v. Caceres, 440 U.S. 741 (1979). Further, the presentation of exculpatory evidence to a grand jury implicates due process considerations. United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975), aff'd, 505 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

66 Here also, the U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, reprinted in 27 CRIM. L. REP. (BNA) 3277 (Aug. 6, 1980) become relevant. Inaction or refusal to present exculpatory evidence undercuts the spirit and letter of the requirement that a prosecution go forward only if the evidence would probably be sufficient to obtain and sustain a conviction.
VI. PROCEDURAL CONSIDERATIONS

For the most part, there is limited acceptable appellate review of lower court orders made in connection with a grand jury proceeding. The reluctance of appellate courts arises not only from a general disdain for review of interlocutory orders, but more particularly from a desire not to disrupt grand jury investigations through piecemeal appeals.

An order requiring a person under subpoena to appear before a grand jury or to testify is not a "final decision" and, therefore, not appealable. A subsequent refusal by the witness to obey the order generally will result in a civil contempt proceeding which in turn, will determine "just cause" for the witness' refusal to testify.

Except in a narrow class of cases, appellate review is only available from the civil contempt judgment. This "obey or contempt" dilemma is compounded by the general unavailability of bail pending review. Unlike criminal contempt, which is punitive, civil contempt is coercive in nature. Its purpose is to compel the witness to obey the court order through incarceration; accordingly, bail may be viewed as inconsistent with this objective.

An in camera examination can be utilized to meet any government claim that in order to demonstrate the "non-exculpatory" nature of the evidence in question, disclosure of other evidence in its possession would be necessary. An in camera examination was employed in United States v. Provenzano, 440 F. Supp. at 561.


Where a "third-party" document holder could not be counted on to risk contempt to assert a privilege claimed by the "owner" of the documents, appeal from a lower court order to produce the documents was allowed without a contempt finding because the document owner was "powerless to avert the mischief of the order." Perlman v. United States, 247 U.S. 7, 13 (1918). The Perlman exception was also applied in Gravel v. United States, 408 U.S. 606 (1972) and In re Grand Jury Impaneled January 21, 1975, 531 F.2d 373 (3d Cir. 1976). See also In re Grand Jury Proceedings (Cianfrani), 563 F.2d 577 (3d Cir. 1977).


However, where it can be demonstrated that the appeal is not frivolous and taken for delay, bail may be available, particularly if the government so stipulates. In the event of an affirmation by the appellate court, the witness can thereafter "purge" the contempt by obeying the court order. See In re Grand Jury Proceedings (Shiffman), 576 F.2d 703 (6th Cir.), cert. denied, 434 U.S. 830 (1978).
Appellate courts have signaled a willingness to review some issues arising at the grand jury stage. Although sparingly granted, a writ of mandamus is available to obtain review particularly where prosecutorial bad faith or a significant abuse of the grand jury process can be shown. For example, the denial of a motion to quash a grand jury subpoena could be found reviewable via mandamus when the subpoena is issued to a "target" contrary to Department of Justice guidelines and an improper prosecutorial motive is shown. Whether either the intentional use of illegally obtained evidence to obtain an indictment or a refusal by a prosecutor to present clearly exculpatory evidence to a grand jury is sufficient abuse of the grand jury process to warrant review through mandamus depends upon the degree of abuse or bad faith demonstrated. The general effect on the administration of justice and the grand jury system, and the prospect of ultimate review after conviction are both relevant considerations.

Given the limited prospects under acceptable conditions for appellate review of unfavorable lower court orders, judicial intervention in a grand jury proceeding to protect the interests of a putative defendant or witness is preferably obtained in the first instance, i.e., at the district court level. A hearing to determine "just cause" in connection with a government request for civil contempt sanctions permits the recalcitrant witness to present grounds for his refusal to testify. Although civil contempt is summary in nature, the witness has a right to notice of the hearing and a reasonable opportunity to prepare a defense.

It is settled in this circuit that the appropriate way to challenge alleged errors or abuses of discretion on the part of district judges in dealing with grand jury investigations is through a petition for a writ of mandamus. The grand jury process on occasion gives rise to questions of exceptional importance despite the early stage at which they occur. "[If in fact a prosecutorial conflict of interest constituting abuse of the grand jury process were shown in the record below, this court could properly consider the case under the all writs statute, 28 U.S.C. Section 1651, as a petition for writ of mandamus." In re Grand Jury Subpoenas (General Motors Corp. v. United States), 584 F.2d 1366, 1371 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979), Judge Edwards cited prosecutorial bad faith as a factor in determining whether mandamus should be granted. Id. at 1371. The full court declined to consider the issue of jurisdiction via mandamus because it was not properly raised below. Id. at 1368 n.2.

Although abuse was not found, in In re April 1977 Grand Jury Subpoenas (General Motors Corp. v. United States), 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979), Judge Edwards cited prosecutorial bad faith as a factor in determining whether mandamus should be granted. Id. at 1371. The full court declined to consider the issue of jurisdiction via mandamus because it was not properly raised below. Id. at 1368 n.2.

Undoubtedly, had the abuse of grand jury process in United States v. Doss, 563 F.2d 265 (6th Cir. 1977) (en banc), been presented to an appellate court via mandamus prior to indictment, a writ would have issued. The facts of Doss are set forth at note 28 supra.


See In re Brummitt, 608 F.2d 640 (5th Cir. 1979); In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976).
In addition to contempt proceedings, a lower court's supervisory authority over a grand jury investigation may be invoked through a pre-emptive motion to either prevent a threatened abuse or to require some affirmative action by a prosecutor. Previous notice to the prosecutor to follow or to refrain from violating his own guidelines will provide a basis for judicial intervention. The focus of this procedure is on fairness and the appearance of fairness. These considerations are inherent in such issues as subpoenaing a target who has previously given notice of an intention to assert a fifth amendment refusal to testify, using illegally obtained evidence to obtain an indictment, or simply a refusal to present evidence which negates guilt. The return of an indictment, with all of its adverse consequences, and the very independence of the grand jury hang in the balance.

At a time of heightened criticism of the grand jury as an institution and the executive's dominance over it, substantial arguments exist to support pre-emptive invocation of a federal court's supervisory power. The court is merely being asked to do that which the Department of Justice itself has recognized—"insure that justice is done."

VII. CONCLUSION

With the current emphasis on organized crime, political corruption and economic and white collar offenses, the grand jury has become more dominant as an instrument of investigation. The time has long since past when legal representation first commenced upon the return of an indictment. Increasingly, representation must be furnished during the investigative stage. An understanding of the issues confronting a putative defendant in a grand jury investigation or a witness with possible exposure in imperative. This article has attempted to raise some of these issues and suggest some answers. The "law" regarding federal grand jury investigations and the "rights" of persons affected thereby is in its infancy. An aware defense bar can make a significant contribution to its further development.

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80 The Department of Justice has admonished federal prosecutors that: In his dealings with the grand jury, the prosecutor must always conduct himself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape or innocence suffer. He must recognize that the grand jury is an independent body whose functions include not only the investigation of crime and the initiation of criminal prosecution, but also the protection of the citizenry from unfounded criminal charges... In discharging these responsibilities, he must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

GRAND JURY GUIDELINES, supra note 10, at § 9-11.051 (emphasis added).

81 Id.