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The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury

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THE GRAND JURY AND EXCULPATORY EVIDENCE: SHOULD THE PROSECUTOR BE REQUIRED TO DISCLOSE EXCULPATORY EVIDENCE TO THE GRAND JURY?

I. INTRODUCTION

In 1992, the United States Supreme Court ruled in *United States v. Williams*[1] that the federal courts do not have the supervisory power to require prosecutors to present exculpatory evidence to the grand jury.[2] Prior to this decision, several federal circuit courts[3] and district courts[4] recognized a duty on the part of the prosecutor to

[1]United States v. Williams, 504 U.S. 36 (1992).

[2]*Id*. at 54.

[3]*See*, *e.g*., United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (holding that in the "interest of justice," a prosecutor should present "any substantial evidence negating guilt . . . where it might be reasonably expected to lead the jury not to indict"); United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984) (recognizing that prosecutors "must present evidence which clearly negates the target's guilt"); United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987) (holding that the Government must reveal "substantial exculpatory evidence" if it is "discovered in the course of an investigation").

introduce exculpatory evidence, but now according to *Williams*, this duty no longer exists in the federal grand jury system.[5] However, states are not bound by the federal court decision of *Williams*. In many jurisdictions, statutes require a prosecutor to present exculpatory evidence to the grand jury.[6] In addition, some state courts have held that prosecutors must present evidence if the evidence negates a defendant's guilt, if the evidence is substantially exculpatory, or if the evidence is clearly exculpatory.[7]

This Note argues that the *Williams* decision is flawed because it diminishes crucial rights of defendants and because it prevents the grand jury from fulfilling its protective function. In Section II, this Note examines the historical background and purpose of the grand jury in England and America. Section III discusses the *Williams* decision and the rationale behind both the majority and dissenting opinions. It also discusses the flaws and injustice of the decision. Section IV focuses on the jurisdictions that require prosecutors to present exculpatory to the grand jury. Section V proposes a statute for prosecutors in Ohio and explains the reasons for the statute as well as the effects of such a statute. Finally, this Note concludes that jurisdictions that currently require prosecutors to introduce exculpatory evidence to state grand juries provide justice because they offer necessary protections, and because they allow juries to make unbiased, independent decisions.

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[4]*See, e.g.,* United States v. Phillips Petroleum Co., 435 F. Supp. 610, 619-21 (N.D. Okla. 1977) (holding that suppression of exculpatory evidence violates due process and abuses the grand jury proceeding); United States v. Mandel, 415 F. Supp. 1033, 1042 (D. Md. 1976) (stating that a prosecutor should disclose evidence to the grand jury when "the evidence clearly would have negated guilt" or when failure to disclose such evidence "undermined the authority of the grand jury to act"); United States v. Gressett, 773 F. Supp. 270, 276 (D. Kan. 1991) (stating that a prosecutor must "reveal known, substantially exculpatory evidence to the grand jury"); United States v. Dyer, 750 F. Supp. 1278, 1300 (E.D. Va. 1990) (stating that "a failure to present evidence that directly negates a target's guilt constitutes grand jury abuse").

[5]*Williams*, 504 U.S. at 54.

[6]*See, e.g.*, CONN. GEN. STAT. § 54-47 f(f) (1997) (requiring the prosecutor to make a timely disclosure to the defense of all evidence or information known to the prosecutor that might negate the accused's guilt); NEV. REV. STAT. ANN. § 172.145(2) (Michie 1992) (stating that "if the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury"); OKLA. STAT. ANN. tit. 22, § 335 (West 2000) (stating that "the grand jurors, upon request of the accused, shall, and on their own motion may, hear the evidence for the accused"); OR. REV. STAT. § 132.320(4) (1999); COLO. R. PROF. COND. 3.8(d) (West 1994).

[7]*See, e.g.,* Johnson v. Superior Ct. of Cal., County of San Joaquin, 113 Cal. Rptr. 740 (Cal. Ct. App. 1974); Johnson v. Superior Ct. of San Joaquin County, 539 P.2d 792 (Cal. 1975); State v. Hogan, 676 A.2d 533, 543 (N.J. 1996); Trebus v. Davis, 944 P.2d 1235 (Ariz. 1997); Herrell v. Sargeant, 944 P.2d 1241 (Ariz. 1997); People v. Ramjit, 612 N.Y.S.2d 600 (N.Y. A.D.2d 1994).

II. HISTORICAL BACKGROUND

A. Origins in England

The origins of the grand jury can be traced back to the Assize of Clarendon issued in 1166.[8] Prior to the issuance of the Assize, a subject could be charged by the victim of a crime before one of the baronial courts.[9] The verdict at trial was based on either the ability of the accused to find eleven people who would swear to his innocence or his ability to survive a trial by battle or ordeal.[10] With the issuance of the Assize in 1166, Henry II changed the way in which trials were conducted. The Assize required that "an inquiry . . . be made in each community by twelve of its 'good and lawful men.'"[11] These jurors were put under oath and questioned by traveling justices of the peace or the sheriff.[12] It was the duty of the jurors to accuse anyone they suspected, and those who were accused were then tried by ordeal.[13] Thus, the Assize enabled the King to create a citizens' police force, thereby allowing him to maintain central control over criminal prosecution and generating more charges than the previous criminal justice system.[14]

Over the next few centuries the grand jury continued to assist the government in apprehending criminals,[15] but by the seventeenth century the grand jury found itself in conflict with the government. In the late seventeenth century, with the bitter religious struggle between the Anglican church and the Protestant church emerging in England, the Crown began to pressure grand juries to indict notorious supporters of the Protestant cause.[16] Grand juries refused to succumb to that pressure in several cases, including two that attracted much attention. In the cases of Stephen Colledge and the Earl of Shaftesbury, both accused of high treason, the grand jury refused to indict[17] and thus maintained some independence from the Crown. Although the

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[8]*See*, *e.g.*, LEROY D. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER 8 (1975); GEORGE J. EDWARDS, JR., THE GRAND JURY 7 (1906); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 347 (1985); BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE 46 (1991).

[9]CLARK, *supra* note 8, at 8.

[10]*Id.*

[11]LAFAVE & ISRAEL, *supra* note 8, at 347.

[12]*Id.*

[13]*Id.* Unlike petit jurors, grand jurors did not have the job of guilt or innocence but only had the job of deciding whether an individual should be brought to trial. RICHARD YOUNGER, THE PEOPLE'S PANEL 1 (1963).

[14]CLARK, *supra* note 8, at 9. S*ee also* LAFAVE & ISRAEL, *supra* note 8, at 347-48 (stating that the "Assize clearly was designed not to provide protection for those suspected of crime, but rather to lend assistance to government officials in the apprehension of criminals").

[15]LAFAVE & ISRAEL, *supra* note 8, at 348.

[16]*Id.*

[17]*Id. See also* CLARK, *supra* note 8, at 10. Clark notes that the Crown attempted to hold grand jury proceedings against Shaftesbury in public in order to disgrace him in the eyes of his countrymen. CLARK, *supra* note 8, at 10. The grand jurors were opposed, claiming that if the

Crown later received an indictment against Colledge, the Shaftesbury and Colledge cases led the grand jury to be commemorated as a "bulwark against the oppression and despotism of the Crown."[18] During the same period, grand juries became important in battling governmental corruption because they issued presentments on the basis of their inquiries into the misconduct of minor officials in matters of local administration.[19] Thus, grand juries came to be viewed with increasing respect. John Somers, Lord Chancellor of England, in his tract, *The Security of Englishmen's Lives*, claimed that "[g]rand juries are our only security, in as much as our lives cannot be drawn into jeopardy by all the malicious crafts of the devil, unless such a number of our honest countrymen shall be satisfied in the truth of the accusations."[20] By the end of the seventeenth century, grand juries had become crucial in protecting the rights and privileges of English citizens.

B. Coming to America

In addition to many other institutions of English law, the grand jury became an important part of the criminal process when the colonists settled in America in the seventeenth century. The first formal grand jury proceeding was held in Massachusetts in 1635, and by 1683 some form of the grand jury existed in every colony.[21] Grand juries returned indictments for criminal offenses, and quite often presentments, which were different from indictments because the grand jurors initiated the investigation and were able to offer any evidence they personally possessed.[22] Although the grand jury played an important role in enforcing criminal law, it soon developed into an agent of the colonial government beyond enforcing criminal law.[23] The English grand jury had occasionally used the presentment to criticize action or inaction on the part of government officials.[24] The American grand juries extensively used that authority, and their presentment "reports" became the primary means for citizens to complain on a wide range of matters.[25] As discontent with England's colonial policies grew, these reports were most frequently aimed at the Crown's officials in America.[26] At the same time, colonial grand juries came into conflict with royal officials regarding appropriate cases for criminal prosecution.[27] For example, the prosecution of John Peter Zenger for seditious libel

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grand jury sessions were not secret, suspects would be alerted and would attempt to escape. *Id.* The grand jurors also claimed the right to render their decisions in private. *Id.* Although the chief justice of the grand jury required the proceeding to be heard publicly, the grand jury was subsequently praised by commentators for its efforts to create a tradition of secrecy. *Id.*

[18]LAFAVE & ISRAEL, *supra* note 8, at 348.

[19]*Id.*

[20]YOUNGER, *supra* note 13, at 2.

[21]CLARK, *supra* note 8, at 13.

[22]*Id.*

[23]LAFAVE & ISRAEL, *supra* note 8, at 348.

[24]*Id.* at 348-49.

[25]*Id.* at 349.

[26]*Id.*

was brought by a prosecutor's information rather than an indictment because colonial grand juries twice refused to issue the requested indictments.[28] Conversely, grand juries issued criminal presentments against many royal officials, including British soldiers, on which the Crown refused to prosecute.[29]

After the colonists won independence from the British in the American Revolution, the right to an indictment before a grand jury was included within the Fifth Amendment of the United States Constitution.[30] By this time the grand jury had come to serve two major functions, and it still serves those functions today. On the one hand, the grand jury is comparable to a "shield" in that it operates as a "screening agency," standing between the government and the individual.[31] In determining whether to issue an indictment, the grand jury examines the prosecutor's evidence and "screens" his or her decision to charge.[32] If the grand jury refuses to indict when the evidence is insufficient or when the prosecution seems unfair, the grand jury is said to, "function as a shield, standing between the accuser and the accused, protecting the individual citizen against oppressive and unfounded government prosecution."[33] In addition to its screening function, the grand jury also serves an investigative function by assisting the government in examining situations that are still at the inquiry stage.[34] Using its investigative powers, the grand jury is able to uncover evidence that was not previously available to the prosecution and to assist the government in obtaining convictions that the government would not have secured on its own.[35] Thus, in its investigative capacity, the grand jury is similar to a "sword" because it enables the government to prosecute criminals.[36]

Several court cases have emphasized the screening function of the grand jury and acknowledged that the purpose of the grand jury is to protect the innocent. One

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[27]*Id.*

[28]LAFAVE & ISRAEL, *supra* note 8, at 348.

[29]*Id.*

[30]U.S. CONST. amend. V. The Fifth Amendment states in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." *Id.* An "infamous crime" is one that can lead to imprisonment in a penitentiary. *See Ex parte* Wilson, 114 U.S. 417 (1885). The Supreme Court has held that the right to trial by grand jury is not made applicable to the states by the Fourteenth Amendment. *See* Hurtado v. California, 110 U.S. 516 (1884).

[31]LAFAVE & ISRAEL, *supra* note 8, at 346.

[32]*Id.*

[33]*Id.* *See also* United States v. Cox, 342 F.2d 167, 186 (5th Cir. 1988) (stating that the grand jury is a "shield" of justice because "it is the protection of the innocent against unjust prosecution"). In addition to being called a "shield" protecting against unfair prosecution, the grand jury has also been called a "buffer" protecting against unjust prosecution. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 695 (1996).

[34]LAFAVE & ISRAEL, *supra* note 8, at 346.

[35]*Id.*

[36]*Id.* *See also* United States v. Cox, 342 F.2d 167, 186 (5th Cir. 1988) (stating that the grand jury is a "sword of justice because "it is the terror of criminals").

significant case asserting the protective function of the grand jury is *Wood v. Georgia*, in which the U.S. Supreme Court stated that the main purpose of the grand jury is to protect innocent people against "hasty, malicious, and oppressive persecution."[37] In recent years, however, the role of the grand jury as protector of the accused has been questioned;[38] commentators and courts have come to view the grand jury indictment as a "rubber stamp" for the prosecutor's charging decisions.[39] At the same time the protective function of the grand jury has been challenged, courts have emphasized the accusatory function of the grand jury, holding that the purpose of the grand jury is to determine whether probable cause exists to charge a person with a crime. A key case emphasizing the accusatory role of the grand jury is *United States v. Williams*, in which the U.S. Supreme Court held that the defendant should not be permitted to introduce exculpatory as well as inculpatory evidence because doing so would change the grand jury's role, "transforming it from an accusatory to an adjudicatory body."[40]

C. The Role of the Grand Jury Today

Today, in most jurisdictions, the grand jury panel is chosen from the same constituency as the petit jury is chosen.[41] In most jurisdictions, prospective grand jurors are chosen from a standard list (usually a voter registration list) that represents a cross-section of the community.[42] Because grand jurors sit for longer terms than

[37]Wood v. Georgia, 370 U.S. 375, 390 (1962). *See also* Branzburg v. Hayes 408 U.S. 665, 686-687 (1972) (stating that the grand jury has the function of "protecting citizens against unfounded criminal prosecutions"); United States v. Dionisio, 410 U.S. 1 (stating that the historic role of the grand jury has been as a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor"); United States v. DiGrazia, 213 F. Supp. 232, 235 (N.D. Ill. 1963) (stating that the grand jury exists for the "express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons").

[38]SALTZBURG & CAPRA, *supra* note 33, at 705.

[39]*Id.* *See also* Hawkins v. Superior Court, 586 P.2d 916 (Cal. 1978) (expressing a skeptical view of the modern grand jury); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263 (1995) (arguing that "according to the cliches the grand jury is a 'rubber stamp,'" perfectly willing to reinforce the prosecutor's decision to indict).

[40]United States v. Williams, 504 U.S. 36, 50 (1992). *See also* United States v. Calandra, 414 U.S. 338, 343 (1974) ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.").

[41]LAFAVE & ISRAEL, *supra* note 8, at 358.

[42]*Id.* Lafave and Israel also note that a minority of jurisdictions use a "key-man" or "discretionary" system. *Id.* In some jurisdictions, the "key-man" provides a list of nominees, and the grand jurors are chosen from that list. *Id.* In other jurisdictions, the jury commissioners or judge "exercise discretion" in choosing people from that list. *Id.* It is important to note that under the Fourteenth Amendment, racial or ethnic discrimination in the selection of grand jurors will violate the equal protection clause, and perhaps notions of fairness under the Due Process Clause as well. SALTZBURG & CAPRA, *supra* note 33, at 696. *See also* United States v. Short, 671 F.2d 178 (6th Cir. 1982), *cert denied*, 457 U.S. 1119 (1982); Rose v. Mitchell 443 U.S. 545 (1979); Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970).

petit jurors, the grand jury system allows for more leniency in excusing people who claim that jury service will lead to severe hardship.[43] Consequently, in many jurisdictions, the grand jury may have a heavier grouping than the petit jury of dependent spouses, retirees, and people whose employers will continue to pay them during jury service.[44] The size of the grand jury also differs from the size of the petit jury. The federal system requires sixteen to twenty-three grand jurors, and twelve votes are needed for an indictment.[45] Although many state grand juries impanel the same number of jurors as the federal system does, other jurisdictions set different numerical requirements for their grand juries.[46]

The jurors in both the state and federal systems have the duty of determining whether there is "probable cause" to believe that the accused has committed a crime.[47] If the grand jury finds that there are adequate grounds for the charge against the accused, it votes to return an indictment against the accused–it "true bills" the charge.[48] On the other hand, if the grand jury decides that there are not adequate grounds for the charge, it votes not to return an indictment–it "no bills'" the charge.[49] The high percentage of cases resulting in true bills is a situation that is to be expected in light of the fact that the grand jury hears only one side of the case and the fact that "no counter to the prosecutor appears before the grand jury."[50] Thus, the main function of the grand jury today is probably not to refuse an indictment, but to compel the prosecution to gather and provide evidence in a clear, cohesive manner before a charge is brought.[51]

III. THE *WILLIAMS* DECISION

A. Background to the Case

The case of *United States v. Williams* is significant because it defined the duty of the prosecutor in regard to presenting exculpatory evidence before the grand jury and because it further defined the grand jury's accusatory role.[52] In *Williams*, a federal grand jury indicted John Williams on seven counts of making false statements for the purpose of influencing a financial institution in violation of 18 U.S.C. § 1014.[53]

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[43]LAFAVE & ISRAEL, *supra* note 8, at 358.

[44]*Id.*

[45]*Id.* at 359.

[46]SALTZBURG & CAPRA, *supra* note 33, at 696.

[47]*Id.*

[48]*Id.* at 697.

[49]*Id.*

[50]*Id.* at 706.

[51]SALTZBURG & CAPRA, *supra* note 33, at 706.

[52]United States v. Williams, 504 U.S. 36 (1992).

[53]*Id.* at 38. It was alleged that over the course of one year Williams gave four Oklahoma banks "materially false" information that overstated the value of his assets and interest income in order to influence the banks' actions on his requests. *Id.*

After the arraignment, the district court allowed Williams to examine all exculpatory portions of the grand jury transcripts in accordance with *Brady v. Maryland*.[54] Williams then requested that the district court dismiss the indictment on the grounds that the government had failed to fulfill its obligation under the Tenth Circuit's prior decision in *United States v. Page*, 808 F.2d 723, 728 (10th Cir. 1987) to present "substantial exculpatory evidence" to the grand jury.[55] Williams argued that the evidence the government had not presented to the grand jury, such as his general ledgers, his tax returns, and his testimony in contemporaneous Chapter 11 bankruptcy proceedings, revealed that for tax purposes and other purposes he had maintained proper accounting practices.[56] Therefore, he claimed that he had no intent to mislead the banks and that the information the government had not revealed directly negated an essential element of the charge.[57]

Although the district court initially denied Williams' motion for dismissal, the court reconsidered and ordered the indictment be dismissed without prejudice.[58] The court found that the evidence the government withheld was "relevant to an essential element of the crime charged"[59] and created a "reasonable doubt about [respondent's] guilt;"[60] therefore, the grand jury's decision to indict was "gravely suspect."[61] Upon the government's appeal, the court of appeals held that the government's behavior "substantially influenced" or at the very least raised serious doubts as to whether the decision to indict was free from influence.[62] The U.S. Supreme Court granted certiorari to decide the issue of whether a district court may dismiss an otherwise valid indictment if the government fails to reveal substantially exculpatory evidence.[63]

B. The Majority Opinion

In the majority opinion, Justice Scalia wrote that the supervisory power of the federal courts could not be used to dismiss an indictment because the prosecutor failed to present exculpatory evidence to the grand jury. According to Scalia, the supervisory power of the federal courts can be used to dismiss an indictment because of misconduct before the grand jury in situations where the misconduct violates rules drafted by the Supreme Court and Congress in order to maintain the integrity of the

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[54]*Id.* at 38. Under *Brady v. Maryland*, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963).

[55]*Williams*, 504 U.S. at 39.

[56]*Id.*

[57]*Id.*

[58]*Id.*

[59]*Id.*

[60]*Williams*, 504 U.S. at 39.

[61]*Id.*

[62]*Id.* at 39-40.

[63]*Id.* at 37-38.

grand jury.[64] The Court could not require the prosecutor to reveal substantially exculpatory evidence to the grand jury because if the prosecutor chose to refrain from revealing such evidence, no law or rule would be violated.[65] Furthermore, Scalia reasoned that the grand jury is an institution separate from the courts and that the courts do not preside over the functioning of the grand jury.[66] He wrote: "[T]he whole theory of . . . [the grand jury's] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."[67] Scalia maintained that the grand jury's independence from the judicial branch is revealed through the "scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised."[68] Therefore, because the courts do not have supervisory authority over the grand jury, the Court decided that the Tenth Circuit exceeded its authority when it required the prosecutor to disclose substantially exculpatory evidence to the grand jury.[69]

The Court also focused on an historical argument, claiming that requiring the prosecutor to present exculpatory evidence to the grand jury would change the grand jury's traditional role.[70] Scalia reasoned that requiring the prosecutor to present exculpatory evidence at trial would "alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."[71] Scalia also stated that the grand jury "sits not to determine guilt or innocence, but to assess whether there is

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[64] *Id*. at 46. The doctrine of the federal court's supervisory power was first articulated in *McNabb v. United States*. *See* Mcnabb v. United States 318 U.S. 332 (1943). In *McNabb*, the Supreme Court acknowledged that the administration of justice imposes a duty on courts to maintain certain standards of procedure and evidence. *McNabb*, 318 U.S. at 341. Recent commentators and scholars have written about the duty of the federal courts to use their supervisory power in governing grand jury proceedings. *See* Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311 (1993) (arguing that the Supreme Court has properly restricted the federal courts from invading the autonomy of the grand jury); Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1490-94, 1522 (1984) (arguing that federal courts should not have the authority to regulate grand jury proceedings).

[65] *Williams*, 504 U.S. at 46-47.

[66] *Id.* at 47.

[67] *Id*.

[68] *Id.* at 48. In order to buttress his claim that the grand jury has broad investigative powers, Scalia wrote: "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *Id.* In order to provide further support to his claim that the grand jury operates independently of the courts system, Scalia wrote that the grand jury requires no authorization from "its constituting court" to initiate an investigation; the prosecutor does not require leave of the court to request a jury indictment; and in its daily operations, the grand jury operates without the interference of a presiding judge. *Williams*, 504 U.S. at 48.

[69] *Id*. at 47.

[70] *Id*. at 51.

[71] *Id*.

adequate basis for bringing a criminal charge."[72] Determining whether to bring charges has always been the function of the grand jury, and Scalia thought that in order to make an assessment of whether a criminal charge should be brought, it is sufficient to hear the prosecutor's side.[73] Scalia supported his conclusion with an eighteenth century explanation of the reason why only the prosecution's side should be considered. He wrote, "[a]s Blackstone described the prevailing practice in 18th-century England, the grand jury was 'only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined.'"[74] Therefore, according to Scalia, to impose upon the prosecutor a legal obligation to present exculpatory evidence would be "incompatible" with the system of determining probable cause.[75]

C. The Dissent's Contention

Justice Stevens, writing for the dissent, focused on the idea that a prosecutor's failure to present substantially exculpatory evidence is a form of prosecutorial misconduct. The dissent quoted Justice Sutherland's famous statement in explaining the ethical duties of the prosecutor: "[W]hile he (the prosecutor) may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[76] The dissent also maintained that the prosecutor's duty to protect the fairness of the judicial proceedings is especially important when he presents evidence before the grand jury.[77] Unlike the majority, the dissent was unwilling to accept numerous forms of prosecutorial misconduct "no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury–simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings."[78] The dissent believed that prosecutorial misconduct in grand jury proceedings is "inconsistent" with the "administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods."[79]

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[72] *Id*.

[73] *Williams*, 504 U.S. at 51.

[74] *Id.* The majority also supported its argument that the prosecution should not be required to present exculpatory evidence at the grand jury proceeding with early American authority. *See*, *e.g*., Respublica v. Shaffer, 1 U.S. 236 (1788); FRANCIS WHARTON, CRIMINAL PLEADING AND PRACTICE § 360 at 248-49 (8th ed. 1880).

[75] *Williams*, 504 U.S. at 52.

[76] *Id.* at 62.

[77] *Id.* The dissent described the duty of the prosecutor in the following manner: "The ex parte character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that . . . the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 63.

[78] *Id*. at 68-69.

[79] *Williams*, 504 U.S. at 69.

As to the scope of the prosecutor's duty to disclose exculpatory evidence, the dissent maintained that requiring the prosecutor to present all evidence that could be used at trial to create reasonable doubt as to the defendant's guilt would be inconsistent with the function of the grand jury proceeding and would impose heavy burdens on the investigation.[80] However, the dissent reasoned that the prosecutor may not "mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary."[81] The dissent endorsed the position expressed in Department of Justice's United States Attorneys' Manual, Title 9, ch. 7, par. 9-11.233,88: "When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."[82] Thus, the dissent ultimately concluded that an indictment may be dismissed if the prosecution fails to present exculpatory evidence to the grand jury.[83]

D. Flaws in the Williams Decision

In light of the fact that the rights afforded to alleged criminals and defendants are slowly being chipped away by our court system,[84] the decision in *Williams* becomes problematic because the decision disregards the screening function of the grand jury. A recent case that represents the manner in which the rights of alleged criminals are being whittled away is *Illinois v. Wardlow*.[85] In *Wardlow*, the respondent fled upon seeing a caravan of police vehicles gather in an area of Chicago known for heavy narcotics trafficking.[86] When the officers caught up with the respondent, one of the officers conducted a protective pat-down search for weapons because in his experience there were usually weapons involved in narcotics transactions.[87] Finding a handgun, the officer arrested Wardlow.[88] The U.S. Supreme Court held that the officer's actions did not violate the Fourth Amendment because the respondent's

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[80]*Williams*, 504 U.S. at 69.

[81]*Id.*

[82]*Id*. at 69-70. Along with the United States Department of Justice, the American Bar Association has set a standard for the disclosure of exculpatory evidence in grand jury proceedings. *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.6(b) ("[N]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.").

[83]*Williams*, 504 U.S. at 70.

[84]*See* Minnesota v. Dickerson, 508 U.S. 366 (1993) (holding that police may seize nonthreatening contraband without a warrant when the contraband is detected through a sense of touch during a protective patdown search and the protective patdown search stays within the bounds marked by *Terry v. Ohio*, 392 U.S. 1 (1968)); Michigan v. Long, 463 U.S. 1032 (1983) (holding that a protective search of the passenger compartment of a vehicle is reasonable under the principles of *Terry v. Ohio*, 392 U.S. 1 (1968)).

[85]Illinois v. Wardlow, 528 U.S. 119 (2000).

[86]*Id*. at 121.

[87]*Id*. at 122.

[88]*Id.*

unprovoked flight from the officers in an area of heavy narcotics trafficking supported a reasonable suspicion that the respondent was involved in criminal activity and justified the stop.[89]

Wardlow provides an example of the increasing power of the police because they now have the authority to stop someone who flees from them in area of heavy drug activity. Because the rights of defendants are being eroded before defendants ever reach a court,[90] it is important to ensure that defendants are provided with full protections, beginning with the decision to indict them. By holding that the prosecutor does not have a duty to introduce substantially exculpatory evidence, the *Williams* decision has ignored the grand jury's protective role and sets up a situation in which defendants are offered few protections as they enter the early phase of our criminal justice system.

The *Williams* case is also problematic in light of the fact that it further diminishes defendants' rights at a time when defendants have few rights once they come before a grand jury. In *Costello v. United States*, a key case involving the diminution of defendants' rights before the grand jury, the U.S. Supreme Court granted certiorari to determine the question whether a conviction could be sustained when only hearsay evidence was presented to the grand jury that indicted the defendant.[91] The Court upheld the conviction on the grounds that in the whole history of the grand jury "laymen [have] conducted their inquiries unfettered by technical rules"[92] and that "defendants are not entitled . . . to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."[93] In *United States v. Calandra*, a second important case diminishing defendants' rights before grand jury proceedings, the grand jury subpoenaed the defendant in order to ask him questions based on information obtained from illegally seized documents.[94] The Court held that the defendant had no right to refrain from answering the grand jury's questions because the exclusionary rule does not apply to grand jury proceedings.[95] When examined in conjunction with *Costello* and *Calandra, Williams* is problematic because it further diminishes the protections that should be provided to a defendant who must come before a grand jury. Although it is true that one function of the grand jury is to

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[89]*Id.* at 125. The standard for the stop in this case is governed by *Terry v. Ohio*, 392 U.S. 1 (1968). According to *Terry*, a police officer who has a reasonable, articulable suspicion that criminal activity is afoot may conduct a brief, investigatory stop. *Id.* at 30. It is important to note that an individual's presence in a "high crime area," standing alone is not enough to support a reasonable suspicion of criminal activity, but a location's characteristics do play a role in determining whether the circumstances are sufficiently suspicious to justify further investigation. Adams v. Williams, 407 U.S. 143-44, 147-48 (1972). Nervous, evasive behavior is another factor in determining reasonable suspicion. *See* United States v. Brigoni-Ponce, 422 U.S. 873, 885 (1975). In the present case headlong flight was found to be the consummate act of evasion. *Wardlow*, at 124-25.

[90]*See supra* text accompanying note 84.

[91]Costello v. United States, 350 U.S. 359, 363 (1956).

[92]*Id.* at 364.

[93]*Id.*

[94]Calandra v. United States, 414 U.S. 338, 341 (1974).

[95]*Id.* at 354.

determine probable cause as to whether the defendant committed a crime, the rights of the defendant in a grand jury proceeding should not be so minimal that the criminal justice system ceases to operate in a just and fair manner.

Another reason that the *Williams* decision is flawed is that the decision has the potential to further enhance the power of the prosecutor and to allow for the abuse of that power. Usually, the prosecuting attorney has complete control of what occurs in the grand jury room because he or she calls the witnesses, interprets the evidence, states and applies the law, and advises the grand jury on whether a crime has been committed.[96] The grand jury is independent from the prosecutor only because it is not formally attached to the prosecutor's office.[97] Although jurors are free to vote as they please, statistical and survey data show that jurors almost always agree to the recommendations of the prosecuting attorney.[98] In recent years for which figures are available, federal grand jurors returned 17,419 indictments and 68 "no true bills" (refusals to indict).[99] Because the grand jury is dominated by the prosecutor as the data illustrates, there needs to be some kind of check on the authority of the prosecutor. *Williams* does not provide a check on the power of the prosecutor because it gives him or her the authority to decide what information he or she will reveal. Furthermore, there is no check for prosecutorial abuse under *Williams* because the courts do not have the power to supervise grand jury proceedings. Thus, the *Williams* decision further increases the domination of the prosecutor over the grand jury, and it does not allow recourse for prosecutorial abuse.

In addition to increasing the power of the prosecutor, *Williams* diminished the independence of the grand jury. One of the responsibilities of the grand jury is to determine probable cause, yet the grand jury often cannot make an informed and impartial decision about probable cause because the prosecutor has no duty to present exculpatory evidence and crucial evidence is unavailable. As Patrick Mastrian noted, "[S]uppression [of exculpatory evidence] causes the grand jury to operate merely as an extension of government rather than a barrier standing solidly between the government and the individual."[100] Implicit in this argument is the idea that suppression of exculpatory evidence causes the grand jury to function as a dependent body rather than as an autonomous entity able to make rational, informed decisions on its own.

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[96]SALTZBURG & CAPRA, *supra* note 33, at 706.

[97]*Id.*

[98]*Id.*

[99]Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1050 n.16 (1984) (citing Statistical Report of the U.S. Attorney's Office for the Fiscal Year 1984). The prosecutorial influence revealed by such statistics has led commentators to echo the sentiment expressed by United States District Judge William J. Campbell, a former prosecutor, who wrote: "Today the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury." William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

[100]Patrick F. Mastrian, III, Note, *Indianhead Poker in the Grand Jury Room: Prosecutorial Suppression of Exculpatory Evidence*, 28 VAL. U. L. REV. 1377, 1413 (1994).

Lastly, the *Williams* decision is problematic because it does not take into account the devastating personal and professional consequences a grand jury indictment can have for an individual that cannot be remedied by a subsequent dismissal or acquittal at trial. As several commentators and scholars have noted, individuals face serious consequences when they are indicted by a grand jury but later face a dismissal or acquittal at trial even if the charges are dismissed or the person is acquitted.[101] In addition, the Third Circuit Court of Appeals addressed this issue in *United States v. Serubo*:[102]

> [I]n practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary toprotect against even the appearance of unfairness, are correspondingly heightened.[103]

Because every aspect of a person's life is on the line when he or she is indicted, it is crucial that the justice system protect against inequity and prevent unjust indictments. Thus, it is imperative that the prosecutor reveal substantially exculpatory evidence so that the grand jury has the opportunity to make unbiased, impartial decisions.

IV. JURISDICTIONS IMPOSING A PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY EVIDENCE

A. Introduction

Although *Williams* does not require the prosecutor to present exculpatory evidence to the grand jury,[104] several state courts and state statutes do not follow

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[101]Monroe H. Freedman has written:

> Merely to be charged with a crime is a punishing experience. The defendant's reputation is immediately damaged, usually irreparably, despite an ultimate failure to convict. Anguish and anxiety become a daily presence for the defendant . . . The financial burdens can be enormous, and may well include loss of employment because of absenteeism due to pretrial detention or time required away from work during hearings and the trial, or because of the mere fact of having been named as a criminal defendant.

MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 84 (1975). *See also In re* Fried, 161 F.2d 453, 458 (2d Cir. 1947), *cert. denied*, 331 U.S. 858 (1947) ("wrongful indictment is no laughing matter. . . . The blot on a man's [reputation], resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty."); Roger T. Brice, Comment, *Grand Jury Proceedings*: *The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 762 (1972) ("Whatever the final outcome of [a defendant's case] may be, indictment can cause the accused loss of employment, lessening of community respect, and an expensive, time-consuming legal battle.").

[102]United States v. Serubo, 604 F.2d 807 (3d Cir. 1979).

[103]*Id.* at 817.

[104]United States v. Williams, 504 U.S. 36 (1992).

Williams. Because these state courts and state statutes are not bound by the federal decision in *Williams,* they are able to require prosecutors to disclose exculpatory evidence to the grand jury. The results of these cases and statutes are fairer than *Williams* because they allow grand juries to make independent, unbiased decisions while at the same time allowing grand juries to fulfill their protective functions.

B. California

The Court of Appeals of California was the first court to compel prosecutors to present exculpatory evidence to the grand jury.[105] In *Johnson v. Superior Court of California,* Johnson was arrested for conspiracy to sell narcotics and for the sale and transportation of such drugs.[106] At the preliminary hearing, Johnson explained that he was involved in an agreement with the prosecutor and that his participation in the narcotics deal was only in furtherance of that agreement.[107] The magistrate eventually dismissed the charges against Johnson due to the insufficiency of the evidence, but the district attorney brought the same charges before the grand jury.[108] However, in bringing the charges, the prosecutor suppressed the results of the preliminary hearing and Johnson's exculpatory testimony.[109] The court in *Johnson* recognized that the traditional role of the grand jury is to stand as a barrier between arbitrary prosecution and victimized citizens.[110] Emphasizing the protective function of the grand jury, the court reasoned that the grand jury "can perform its central function as the independent adjudicator of probable cause only if the prosecutor's duty extends beyond avoidance of suppression and includes an affirmative obligation to produce evidence in his possession or control which tends to negate guilt."[111] The

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[105]Johnson v. Superior Ct. of Cal., County of San Joaquin, 113 Cal. Rptr. 740 (Cal. Ct. App. 1974).

[106]*Id.* at 742.

[107]*Id*. at 742-43.

[108]*Id.* at 743.

[109]*Id*. The district attorney did not reveal the exculpatory testimony of Johnson; instead the district attorney "improperly" produced testimony of a police witness who said that Johnson, upon the advice of his attorney, refused to make any statement regarding the transaction. *Johnson*, 113 Cal. Rptr. at 743. The grand jury indicted Johnson, and the indictment was filed on September 12, 1973. *Id.* On October 15, Johnson, through his attorney, moved in the superior court to set aside the indictment partly on the ground that the district attorney had withheld his exculpatory testimony from the grand jury and partly on the ground that the indictment was not substantiated by evidence to show proper cause. *Id.* The court ruled that the district attorney's partial presentation of evidence was not a proper ground for a motion to set aside an indictment and refused to consider that ground. *Id.* The court rejected Johnson's claim of insufficiency of the evidence to support the indictment. *Id.* After rejection of the motion to "set aside" the indictment, Johnson then moved to "quash the indictment, again claiming that the district attorney had withheld evidence. *Johnson*, 113 Cal. Rptr. at 743. On December 4, 1973, the court denied this second motion. *Id.* On December 19, Johnson filed his petition in the Court of Appeals of California. *Id.*

[110]*Id.* at 747. The court asserted: "vital attribute of 'the law of the land' is the grand jury's historic role as a barrier between arbitrary prosecutors and citizens who might suffer the anxiety and obloquy of public trial for serious crime." *Id.*

[111]*Johnson*, 113 Cal. Rptr. at 749.

court maintained that by suppressing part of the evidence, the prosecution "imparted an unconscious bias to the grand jury's judgment"[112] and "depriv[ed] . . . [the grand jury] of its vital autonomy."[113]

After the appellate court heard Johnson's case, the California Supreme Court considered his case.[114] Just as the appellate court emphasized the protective function of the grand jury, the state supreme court also emphasized the protective duty of the grand jury when it asserted, "The grand jury's 'historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor' . . . is as well-established in California as it is in the federal system."[115] While focusing on the protective function of the grand jury, the court decided the case on statutory grounds. The court held that when a prosecutor seeking an indictment is aware of evidence "reasonably tending to negate guilt,"[116] he has an obligation under section 939.7 of the California Penal Code to reveal to the grand jury the nature and existence of the evidence so that the grand jury may exercise its power under the statute to order the evidence produced.[117] Section 939.7 imposes a duty upon the grand jurors to weigh all the evidence submitted to them and states that if they believe that other evidence within their reach "will explain away the charge," they should ask for such evidence to be produced.[118] The court reasoned that because the statute requires the grand jury to order the production of exculpatory evidence and because the grand jury is only aware of such evidence when the prosecutor presents it, the grand jury will not know what evidence to call for unless the prosecutor has a duty to produce it.[119] Therefore, when a prosecuting attorney is aware of evidence reasonably tending to negate guilt, he has an obligation under section 939.7 to inform the grand jury of its nature and existence so that the grand jury may order the evidence produced.[120]

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[112] *Id.* at 750.

[113] *Id.*

[114] Johnson v. Superior Ct. of San Joaquin County, 539 P.2d 792 (Cal. 1975).

[115] *Id.* at 795.

[116] The language of California's Model Penal Code states that the prosecutor must present evidence that "will explain away the charge." CAL. PENAL CODE § 939.7 (West 1985). The court did not provide any specific reasoning as to how, based on the language of California's Penal Code, it determined that evidence "reasonably tending to negate guilt" would be the standard for the kind of evidence it would require prosecutors to present to the grand jury. The court only stated, "We hold . . . that when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence . . ." *Johnson*, 539 P.2d at 796.

[117] *Id.* The California Model Penal states:

> The Grand Jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and where it has reason to believe that other evidence exists within its reach which will explain away the charge, it shall order the evidence to be produced and for that purpose may require the district attorney to issue process for the witness.

CAL. PENAL CODE § 939.7 (West 1985).

[118] CAL. PENAL CODE § 939.7 (West 1985).

[119] *Johnson*, 539 P.2d at 796.

[120] *Id.*

Johnson's case merits examination because it emphasized both the need for the grand jury to maintain its autonomy as well as the need for the grand jury to fulfill its protective function. Both the appellate court and the state supreme court focused on how the suppression of exculpatory evidence prevents grand juries from making independent, impartial decisions. Thus, both courts recognized that the grand jury must be made aware of relevant, substantive information about the defendant lest the grand jury becomes an arm of the government, merely approving the prosecution's requests. In addition, both the appellate court and the state supreme court emphasized the protective function of the grand jury by requiring the grand jury to review evidence that might negate the guilt of a defendant. In requiring the grand jury to review evidence negating a defendant's guilt, the courts took a step in attempting to ensure that defendants do not become the victims of unfounded charges. Therefore, the courts recognized the importance of protecting defendants, and the courts understood that the grand jury could only protect defendants from unfounded charges if the prosecutor provided it with relevant information, including exculpatory evidence.

C. Other Jurisdictions

In addition to the broad rule in California where a prosecutor is required to produce "evidence that reasonably tends to negate guilt,"[121] other states require exculpatory evidence to be presented to a grand jury only if the exculpatory value of the evidence is substantial. Under a New Mexico statute, the prosecuting attorney is required to "present evidence that directly negates the guilt of the target where he is aware of such evidence."[122] Under a Utah statute, when the State's attorney or the special prosecutor is personally aware of "substantial and competent evidence negating the guilt of a subject or target that might reasonably be expected to lead the grand jury not to indict," he or she is required to disclose the evidence to the grand jury.[123] The Supreme Court of Connecticut requires the prosecutor to present to the grand jury "any substantial evidence that would negate the accused's guilt."[124] The District of Columbia Court of Appeals places a duty on the prosecutor to reveal substantial evidence negating guilt that might reasonably be expected not to lead the grand jury to indict.[125] The Supreme Court of Hawaii requires the prosecutor to disclose evidence that is "clearly exculpatory."[126] The Supreme Court of Minnesota compels the prosecutor to present evidence that would materially affect grand jury proceedings.[127] Finally, the Supreme Court of North Dakota requires the prosecutor to present "evidence which would preclude issuing an indictment."[128] Although

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[121] *Id.*

[122] N.M. STAT. ANN. § 31-6-11(b) (Michie 1996).

[123] UTAH CODE ANN. § 77-10a-13 (West 1985).

[124] State v. Couture, 482 A.2d 300, 315 (Conn. 1984), *cert. denied*, 469 U.S. 1192 (1985).

[125] Miles v. United States, 483 A.2d 649, 655 (D.C. 1984).

[126] State v. Hall, 660 P.2d 33, 34 (Haw. 1983).

[127] State v. Moore, 438 N.W.2d 101, 105 (Minn. 1989).

[128] State v. Skjonsby, 319 N.W.2d 764, 783 (N.D. 1982).

these requirements differ in degree as to the kind of evidence the prosecutor is required to disclose and although the prosecutor inevitably has some latitude in deciding if the exculpatory evidence meets the necessary tests for disclosure, these requirements all offer the accused extra protection in the indictment process because they allow the grand jury to view crucial evidence and to make an impartial, unbiased decision.

D. New Jersey, Arizona, and New York

In addition to the cases and the statutes that require a prosecutor to reveal exculpatory evidence, a 1996 New Jersey Supreme Court decision is worthy of special examination because it directly addressed *Williams* and set out clear requirements for prosecutors to produce exculpatory evidence.[129] In *State v. Hogan*, the defendant was convicted of armed robbery, robbery, armed burglary, burglary, and possession of a lawful weapon for an unlawful purpose.[130] The appellate division reversed the defendant's convictions on the grounds that the trial court should have dismissed the indictment because the prosecutor did not present evidence to the grand jury that the State's main witness had recanted her complaint against the defendant.[131] The state supreme court granted the State's petition for certiorari and reversed the decision of the appellate court, holding that recantation of accusations against a defendant was not clearly exculpatory.[132] In addition to ruling that recantation testimony is not exculpatory, the court held that a prosecutor must present evidence to a grand jury if the evidence directly negates the guilt of the defendant and if the evidence is "clearly exculpatory."[133]

In discussing the prosecutorial duty to present exculpatory evidence to the grand jury, the court in *Hogan* first emphasized the protective role of the grand jury. Although the court acknowledged that the grand jury must determine whether the State has made out a prima facie case that a crime has been committed and that the accused has committed the crime,[134] the court also recognized that the "purposes of the grand jury extend beyond bringing the guilty to trial."[135] The court noted that the responsibility of the grand jury is to "protect the innocent from unfounded prosecution"[136] and that the grand jury serves the function of determining "whether a

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[129]State v. Hogan, 676 A.2d 533 (N.J. 1996).

[130]*Id.* at 535.

[131]*Id.*

[132]*Id.* at 544. In holding that the recantation testimony of the victim was not "clearly exculpatory," the court wrote: "[R]ecantation testimony is generally considered exceedingly unreliable." *Id.* Furthermore, the court reasoned: "Partly because recantations are often induced by duress or coercion . . . the sincerity of a recantation is to be viewed with extreme suspicion." *Hogan*, 676 A.2d at 544. Moreover, the victim in this specific case explained under oath the intimidation and threats that had frightened her into making a recantation. *Id.*

[133]*Id.* at 543.

[134]*Id.* at 538.

[135]*Id.*

[136]*Hogan*, 676 A.2d at 538. The court also noted that the duty of the grand jury to protect the innocent had it its roots in English history and that this duty has continued constitutional

charge is founded upon reason or [whether a charge] was dictated by an intimidating power or by malice and personal ill will."[137] Therefore, the court reasoned that the grand jury has the same responsibility in clearing those who may be innocent as it does in bringing those persons to trial who may be guilty.[138]

After discussing the protective function of the grand jury, the court next examined *Williams* and explained why *Williams* was not dispositive in *Hogan*. First, the court noted the Supreme Court's argument that requiring the prosecutor to present exculpatory evidence would alter the grand jury's traditional role from being an "accusative" body to an "adjudicative" body.[139] The court also noted that a fundamental basis for the decision was the Supreme Court's conclusion that the federal courts do not possess the power to determine standards of prosecutorial conduct before the grand jury.[140] Unlike the Supreme Court, which does not have supervisory power over grand juries, the court in *Hogan* reasoned that its precedents make clear that it "may invoke its supervisory power to remedy perceived injustices in grand jury proceedings."[141] Furthermore, the court noted that it has often granted greater protections to defendants than have the federal courts.[142] Finally, the court acknowledged the criticism directed at *Williams* for failing to protect the grand jury's historical role of "filter[ing] out unfounded criminal allegations and shield[ing] an individual from a malicious prosecutor."[143]

The court in *Hogan* recognized that the primary function of the grand jury is to act as an accusatory body, yet it still maintained that there should be a prosecutorial duty to present exculpatory evidence. The court asserted that the Supreme Court accurately identified the grand jury as an accusatory rather than an adjudicative body.[144] Furthermore, the court acknowledged that "[t]he grand jury's role is not to weigh evidence presented by each party, but rather to investigate potential defendants and decide whether a criminal proceeding should be commenced."[145] Nevertheless, the court did not want the State to have an unfair advantage over the defendant by allowing the State to distort the evidence. The court wrote: "[I]n establishing its prima facie case against the accused, the State may not deceive the

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significance. *Id.* The court wrote that the grand jury "safeguard[s] citizens against arbitrary, oppressive, and unwarranted criminal accusation." *Id.*

[137]*Id*. at 538-39.

[138]*Id.* at 539.

[139]*Hogan*, 676 A.2d at 539.

[140]*Id*.

[141]*Id*. at 540. The court listed precedent-setting cases in the area of supervisory power. *See, e.g*., State v. Del Fino, 495 A.2d 60 (N.J. 1985); State v. Murphy, 538 A.2d 1235 (N.J. 1988).

[142]*Hogan,* 676 A.2d at 540. The court referred to cases in which defendants were granted more rights in the state courts than in the federal courts. *See*, *e.g.*, State v. Reed, 627 A.2d 630 (N.J. 1993); State v. Sanchez, 609 A.2d 400 (1992); State v. Mollica, 554 A.2d 1315 (N.J.1989).

[143]*Hogan*, 676 A.2d at 540, *citing* Mastrian, *supra* note 100, at 1379.

[144]*Hogan*, 676 A.2d at 542.

[145]*Id.*, *citing Calandra*, 414 U.S. at 343-44.

grand jury or present its evidence in a way that is tantamount to telling the grand jury a 'half-truth.'"[146] Therefore, in order for the grand jury to perform its vital protective function, the court held that the grand jury must have access to evidence that "directly negates the guilt of the accused."[147] According to the court, evidence that "directly negates the guilt of the accused" refers to evidence that clearly refutes an element of the crime,[148] and the prosecutor is required to disclose such evidence to the grand jury.[149]

In addition to requiring that the evidence directly negate the guilt of the defendant, the *Hogan* court also required that the evidence be "clearly exculpatory."[150] The court maintained that the requirement of "clearly exculpatory" necessitates "an evaluation of the quality and reliability of the evidence."[151] According to the court, the "exculpatory value of the evidence should be analyzed in the context of the nature and source of the evidence, and the strength of the State's case."[152] The prosecutor, however, is not required to create a case for the accused

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[146]*Hogan*, 676 A.2d at 542. The court also wrote: "Although the grand jury is not the final adjudicator of guilt and innocence, the presence of the right to indictment in the State Constitution indicates that the grand jury was intended to be more than a rubber stamp of the prosecutor's office. . . . Our State Constitution envisions a grand jury that protects persons who are victims of personal animus, partisanship, or inappropriate zeal on the part of the prosecutor." *Id.* at 542-43 (citations omitted).

[147]*Id.* at 543.

[148]*Id.* The court provided examples of evidence that directly negates the guilt of the defendant. *Id.* For instance, the State has no duty "to inform the grand jury of evidence that indicates that the accused did not have a motive for committing the crime for which the State seeks an indictment." *Hogan*, 676 A.2d at 543. Likewise, the State is not required to "impeach the credibility of the State's witnesses appearing before the grand jury by informing the grand jury of the witnesses' criminal records." *Id.*

[149]*Id.*

[150]*Id.*

[151]*Id.*

[152]*Hogan*, 676 A.2d at 543. The court provided examples about how the State should go about making its decision to produce exculpatory evidence to the grand jury. *Id.* For instance, if the exculpatory evidence in question is eyewitness testimony and if there is potential bias on the part of the eyewitness, the prosecutor may not be obligated to disclose the witness's testimony to the grand jury. *Id.* Likewise, the exculpatory testimony of the witness is not "clearly exculpatory" if it is contradicted by the testimony of several other witnesses. *Id.* In addition, an accused's statement denying participation in a crime, although directly negating guilt, would not be sufficiently credible to be clearly exculpatory. *Id.* On the other hand, the credible testimony of a reliable, unbiased alibi witness illustrating that the accused could not have committed the crime in question would be clearly exculpatory. *Hogan*, 676 A.2d at 544. Likewise, physical evidence of unquestioned reliability illustrating that the defendant did not commit the crime would be clearly exculpatory, and the grand jury must be informed of such evidence. *Id.* In these instances, the court reasons that "a failure to present exculpatory evidence to the grand jury may raise questions about the prosecuting attorney's good faith and could deprive the grand jury of the opportunity to screen out unwarranted prosecutions." *Id.* at 544.

"or search for evidence that would exculpate the accused."[153] Only if the prosecuting attorney has actual knowledge of clearly exculpatory evidence that directly negates guilt must the evidence be disclosed to the grand jury.[154] Finally, the *Hogan* court noted that courts should dismiss indictments on the grounds that exculpatory evidence is not revealed only after they give due consideration to the prosecutor's own evaluation of whether the evidence is "clearly exculpatory."[155] Thus, the disclosure requirement in *Hogan* is narrow, and the duty of disclosure is limited to exceptional cases.[156]

The result in *Hogan* is fairer than *Williams* because it recognized both the accusatory and protective functions of the grand jury, whereas *Williams* only recognized the grand jury's accusatory functions. Although the *Hogan* court acknowledged the fact that grand juries are primarily accusatory bodies, it was also concerned with the injustice that could occur when the prosecuting attorneys are not required to reveal exculpatory information. The *Williams* court, on the other hand, only acknowledged the accusatory function of the grand jury and did not recognize the injustice that might result when exculpatory evidence is not disclosed by the prosecution. As a result of the differing emphases, the decisions have vastly different implications for the defendant as well as for the grand jury. *Williams* affords defendants little or no protections against unfounded charges because it does not require that exculpatory evidence is heard by the grand jury. *Hogan*, however, provides defendants with more of a chance for justice because it affords defendants protections by requiring the prosecution to present evidence that "directly negates guilt" and that is "clearly exculpatory."[157] In addition, under *Williams*, the grand jury's role as an independent decision maker is compromised because the grand jury does not have all the relevant evidence available. *Hogan*, in contrast, enables the grand jury to remain an independent, impartial decision maker because certain key information about the defendant's guilt is required to be presented to the grand jury; thus, the grand jury has the opportunity to judge the crucial facts of a case.

In addition to *Hogan*, two 1997 Arizona Supreme Court decisions are relevant because they established procedural rights for defendants who are the subjects of grand jury investigations and because they set out rules for prosecutors in presenting exculpatory evidence to the grand jury.[158] In the first of these decisions, *Trebus v. Davis*, the defendant's stepdaughter told the police that she had been sexually

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[153] *Id.*

[154] *Id.*

[155] *Hogan*, 676 A.2d at 544. The court understood that determining the exculpatory value of evidence at the grand jury stage of proceedings could be difficult. *Id.* (citations omitted). Therefore, the court wrote: "[C]ourts should act with substantial caution before concluding that a prosecutor's decision in . . . [choosing not to disclose exculpatory evidence] . . . was erroneous." *Id.*

[156] *Id.* at 542-43.

[157] *Id.* at 543. The court wrote: "We emphasize that only in the exceptional case will a prosecutor's failure to present exculpatory evidence to a grand jury will constitute grounds for challenging an indictment." *Hogan*, 676 A.2d at 544.

[158] Trebus v. Davis, 944 P.2d 1235 (Ariz. 1997); Herrell v. Sergeant, 944 P.2d 1241 (Ariz. 1997).

molested by the defendant.[159] After the police interviewed the defendant, his lawyer wrote to the county attorney, requesting an opportunity to disclose exculpatory to the grand jury.[160] The defendant sought to introduce evidence concerning his stepdaughter's veracity and credibility as well as evidence highlighting inconsistencies in her various allegations.[161] The court determined that issues such as witness credibility and factual inconsistencies are ordinarily reserved for trial.[162] The court further found that the letter from Trebus's lawyer was vague, did not refer to any specific exculpatory evidence, and did not explain whether Trebus wanted to testify before the grand jury.[163] The court did not believe that the letter was sufficient to require the county attorney to inform the grand jury that Trebus wanted to present evidence or testify.[164] The court maintained that the grand jury can make a reasoned decision to hear a defendant or his or her evidence only if the defendant's request (to provide the evidence) explains in some detail at least the subject and outline of the proposed evidence and if the prosecutor explains that information to the grand jury.[165] The state supreme court found that Trebus's request did not explain what evidence, other than credibility issues, he wished to present to the grand jury, and the court was unclear whether Trebus would testify before the grand jury if given the chance. Therefore, the court denied the motion to remand the case to the grand jury for a new determination of probable cause.[166]

Although the Arizona Supreme Court denied the defendant's motion, it did explain that the defendant has the right, under statute and rules, to request the grand jury to consider exculpatory evidence.[167] The court noted that the defendant's right to request the grand jury to hear evidence is implicit in the Arizona Revised Statute, which states in relevant part:

> The grand jurors are under no duty to hear evidence at the request of the person under investigation, *but may do so* . . . The grand jurors shall weigh all the evidence received by them and when they have reasonable

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[159] *Trebus*, 944 P.2d at 1236.

[160] *Id.*

[161] *Id.* at 1239.

[162] *Id.* In discussing that issues such as witness credibility and factually are usually reserved for trial, the court wrote that the grand jury's main function is to determine "whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it." *Id.* (citation omitted). The court also wrote: "Simply put, the grand jury is not the place to try a case. Thus the county attorney was not required to present the proffered evidence. . ." *Trebus*, 944 P.2d at 1236.

[163] *Id.* No evidence was described in the letter, nor was any offer to testify made. *Id.* Furthermore, at oral argument, Trebus's lawyer was unable to tell the court what evidence other than credibility issues, Trebus wanted the grand jury to consider; and his lawyer was unsure whether Trebus would testify before the grand jury if given the chance. *Id.*

[164] *Id.*

[165] *Trebus*, 944 P.2d at 1240.

[166] *Id.*

[167] *Id.* at 1237, 1239-40.

> ground to believe that other evidence, which is available, will explain away the contemplated charge, they *may require* the evidence to be produced.[168]

The court also noted that the defendant's right to request that his or her evidence be heard is even more clearly apparent in Rule 12.6 of the Arizona Rules of Criminal Procedure, which states in relevant part: "A person under investigation by the grand jury may be compelled to appear or may be permitted to appear before the grand jury upon the person's written request . . ."[169] Thus, the court acknowledged that the defendant has specific rights to present evidence to the grand jury on behalf of himself or herself.

The court also noted that it is the prosecutor's duty to inform the grand jury that the defendant has exculpatory evidence available or that the defendant has requested to appear before the grand jury.[170] In acknowledging this duty, the court emphasized the idea that the prosecutor, "as an officer of the court as well as a lawyer for the state," has an obligation to make an unbiased presentation to the grand jury.[171] The court wrote: "The interests of the prosecutor and the state are not limited to indictment but include serving the interests of justice; thus, the prosecutor's obligation to make a fair and impartial presentation to the jury has long been recognized."[172] The court noted that in making this fair and unbiased presentation to the grand jury, the prosecutor is required to present exculpatory evidence provided by the defendant as well as exculpatory evidence provided by the police.[173] Thus, in discussing the prosecutor's duty before the grand jury, the court focused on how the prosecutor's role is to maintain a sense of justice and fairness rather than to serve as an "adversary" to the person being investigated.[174]

In examining the prosecutor's role before the grand jury, the court also focused on the idea that the prosecutor must give the grand jury the opportunity to act independently.[175] The court noted that "by failing to inform the grand jury of the defendant's willingness to come forward, a prosecutor may effectively control the outcome of a given proceeding, thereby usurping the grand jury's role and depriving a defendant of the due process right to an independent grand jury."[176] Although the

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[168]*Id.* at 1237 (citing ARIZ. REV. STAT. ANN. §§ 21-412 (West 1990).

[169]*Id.* (citing Ariz. R. Crim. P. 12.6).

[170]*Trebus*, 944 P.2d at 1237-39.

[171]*Id.* at 1238.

[172]*Id.*, *citing* Crimmins v. Superior Court, 688 P.2d 882, 884 (Ariz. 1983) and State v. Emery, 642 P.2d 838, 851 (Ariz. 1982).

[173]*Trebus*, 944 P.2d at 1239. The court wrote, "We . . . see nothing odd in requiring the prosecutor to tell the grand jury about possible exculpatory evidence. After all, if the exculpatory evidence had been provided by the police, the laws requires that it be presented to the grand jury. Why should the rule be different when the prosecutor receives such information from the defendant?" *Id.* at 1238-39 (citation omitted).

[174]*Id.* at 1238.

[175]*Id.*

[176]*Id.* (citation omitted).

court realized that there are other ways in which the defense can communicate information to the grand jury (such as notifying the presiding judge), the court reasoned that the "only pragmatic, realistic conduit is the county attorney–the grand jury's assistant and advisor."[177] Therefore, the court maintained that because the prosecutor serves as the advisor to the grand jury, he or she has the obligation "to assist the grand jury in its investigations;"[178] and part of the prosecutor's role in assisting the grand jury includes informing the grand jury when the defendant wishes to appear or when the defendant has exculpatory evidence that he or she wishes to disclose.[179]

Finally, in explaining the duty of the prosecutor to inform the grand jury of the defendant's willingness to come forward or the defendant's willingness to present exculpatory evidence, the court maintained that the proposed submission must be "clearly exculpatory in nature."[180] The court defined "clearly exculpatory evidence" to be "evidence of such weight that it might deter the grand jury from finding the existence of probable cause."[181] Thus, like the New Jersey Supreme Court, which set out narrow rules for prosecutors by requiring disclosure if the evidence directly negates the guilt of the defendant and if the evidence is clearly exculpatory in nature,[182] the Arizona Supreme Court here set out a narrow rule for disclosure for prosecutors by requiring disclosure if the evidence is "clearly exculpatory in nature."[183]

The second Arizona Supreme Court decision, *Herrell v. Sargeant,* filed the same day as *Trebus*, also focused on the defendant's right to present exculpatory evidence to the grand jury.[184] In *Herrell*, the defendant's daughter was a frequent runaway who socialized with gangs.[185] One evening after his daughter returned from a probation-required counseling session, the defendant believed that she had run away again.[186] He was unsuccessful in his search of his neighborhood in his car, and when he returned home, he saw his wife running toward a car at the end of his driveway, calling out his daughter's name.[187] Because he believed his daughter to be in the car, the defendant followed the car; he then forced the car to stop by pulling in front of the car, getting out, and approaching the car with a pistol.[188] The car drove away and

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[177] *Trebus*, 944 P.2d at 1238 (citation omitted).

[178] *Id.*

[179] *Id.* at 1234.

[180] *Id.* at 1239.

[181] *Id.*

[182] *See supra* notes 131-56.

[183] *Trebus*, 944 P.2d at 1238.

[184] *Herrell*, 944 P.2d 1241.

[185] *Id.* at 1242.

[186] *Id.*

[187] *Id.*

[188] *Id.*

the defendant ultimately discovered that the car did not contain his daughter, but his neighbor's family instead.[189]

The defendant and his neighbor reported the incident to the police, and the defendant was indicted for aggravated assault on the basis of the testimony police officer who investigated the incident.[190] The officer who testified had only spoken with the victims but had not spoken with the defendant.[191] Consequently, the defendant moved to remand the case to the grand jury for a new determination of probable cause so that the county attorney could "advise the jurors of all the evidence in its possession/knowledge regarding the background" of the case and of "all the appropriate justification statutes."[192] On remand, the evidence presented to the grand jury was "essentially the same."[193] The grand jury reindicted the defendant, and a motion for a second remand was denied.[194]

On special action review, the supreme court directed the trial court to remand for a third probable cause determination.[195] In making its decision, the court focused on the idea that the prosecutor has a duty to make an unbiased presentation to the grand jury. The court wrote: "Given that the deputy county attorney presented the second grand jury with virtually the same information that had been given to the first jury, we do not understand how the trial judge could find the second presentation to be fair and impartial."[196] In addition, the court found that the evidence the defendant wished to present to the grand jury was "clearly exculpatory."[197] The court noted that the defendant wished to introduce evidence explaining that he was attempting to stop what appeared to be "surreptitious taking of his underage daughter, probably for the purpose of an illicit sexual encounter, or other type of unlawful assault."[198] The defendant also wished to introduce evidence that his daughter was being taken from her parents home against their will and possibly against her will.[199] Because the defendant's version of the facts was supported by documentary evidence available to

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[189] *Herrell*, 944 P.2d at 1243.

[190] *Id.*

[191] *Id.* The officer told the grand jury that the defendant explained to the other officers that he had been having trouble with his 13-year-old daughter, that she had been associating with gang members, that she was on probation, and that he thought she may have run away from some gang members the evening of the incident. *Id.* However, the grand jury was never given the opportunity to hear the testimony of the other officers. *Id.*

[192] *Herrell*, 944 P.2d at 1243.

[193] *Id.*

[194] *Id.* at 1243. The trial judge denied the defendant's motion for a second remand to the grand jury, stating, "The information which the Defendant suggests should have been presented is exculpatory, but not clearly exculpatory to an extent which would require its presentation to the Grand Jury." *Id.*

[195] *Id.* at 1245.

[196] *Herrell*, 944 P.2d at 1245.

[197] *Id.*

[198] *Id.*

[199] *Id.*

the county attorney, the court held that the grand jury should have been able to consider whether the defendant had reasons to use force in preventing what he thought was the commission of a serious crime against his daughter.[200] The court wrote: "Thus, we believe the evidence was very clearly exculpatory and the order denying remand was clearly erroneous."[201] Therefore, the court concluded that because the county attorney did not provide the grand jury with an accurate picture of the substantive facts in both the initial grand jury proceeding and on remand, the defendant "was denied his right to due process and fair and impartial presentation."[202] Accordingly, the court remanded the case for a determination of probable cause.[203]

Although *Trebus* and *Herrell* did not directly address *Williams*, they are relevant to a discussion of the duty of prosecutors to present exculpatory evidence to a grand jury because they set out clear requirements for prosecutors to present exculpatory evidence to the grand jury and because they focus on the role of the grand jury in the decisionmaking process. Both the *Trebus* and *Herrell* courts require prosecutors to present "clearly exculpatory evidence" to the grand jury,[204] and both courts set out clear definitions of "clearly exculpatory."[205] In addition, implicit in both the courts' holdings that the prosecutor has a duty to make a fair and impartial presentation to the grand jury is the idea that the grand jury should be able to function as an independent decsionmaker with access to all the key information. The courts recognized that suppression of exculpatory evidence fails to provide the grand jury with an accurate picture of substantive facts; and when the grand jury is deprived of the knowledge of substantive facts, it merely becomes an arm of the government, sitting to rubberstamp the decisions of the prosecutor. Thus, the *Trebus* and *Herrell* courts understood the importance of requiring the prosecutor to present exculpatory evidence to the grand jury so that the grand jury does not become an arm of the government but rather becomes a buffer standing between the individual and the government as it was intended to be.[206]

Trebus and *Herrell* also deserve special examination because they establish rights for defendants who are being investigated by the grand jury. Prior to these cases, Arizona courts recognized that the prosecutor had a duty to present exculpatory evidence to the grand jury when the evidence was provided by the police.[207] In these

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[200] *Id.*

[201] *Herrell*, 944 P.2d at 1245.

[202] *Id.*

[203] *Id.*

[204] *Trebus*, at 1239; *Herrell*, 944 P.2d at 1245.

[205] *Trebus,* 944 P.2d at 1239; *Herrell*, 944 P.2d at 1245. The *Trebus* court defines "clearly exculpatory evidence as evidence as "evidence of such weight that it might deter the grand jury from finding the existence of probable cause." *Trebus,* 944 P.2d at 1239. The *Herrell* court defines "clearly exculpatory evidence" as "evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *Herrell*, 944 P.2d at 1245.

[206] *See Williams*, 504 U.S. at 47 (stating that the whole theory of the grand jury's function is that serves as "a kind of buffer or referee between the Government and the people").

[207] *Trebus*, P.2d at 1238; *Herrell*, P.2d at 1244.

cases, however, the courts recognized that the prosecutor also has a duty to introduce exculpatory evidence presented by the defendant.[208] Therefore, the *Trebus* and *Herrell* courts took a step in the right direction because they realized that defendants deserve to have the opportunity to defend themselves. The *Trebus* and *Herrell* courts seemed to understand that often the only kind of evidence the defendant is able produce to defend himself or herself is evidence that he or she will provide, and both courts took this important fact into consideration in deciding their cases. Thus, these courts must be commended for their regard for the rights of defendants in an era when the rights of defendants are slowly being whittled away by other courts.[209]

Lastly, a 1994 New York Supreme Court decision warrants special examination because it sets out clear requirements for the disclosure of exculpatory evidence and because it establishes rights for defendants just as *Trebus* and *Herrell* do.[210] In *People v. Ramjit*, the defendant was indicted for rape in the first degree and sodomy in the first degree.[211] Prior to trial, the defendant moved to dismiss the indictment, and the state supreme court granted his motion on the basis that the prosecution had failed to inform the grand jury of the existence of allegedly exculpatory evidence in their possession.[212] The record demonstrated that before the case was presented to the grand jury, counsel for the defendant gave the prosecutor names of witnesses whose testimony he claimed would show that he had not committed the crime.[213] After conducting two separate investigations, the prosecutor determined that the defense counsel's information regarding the exculpatory nature of the proposed testimony could not be confirmed and that she would not present the evidence to the grand jury.[214] However, the prosecutor told the defendant's counsel that the defendant and his witnesses would be given the opportunity to testify before the grand jury.[215] The defendant's counsel rejected the prosecutor's offer and indicated that he would call the witnesses at trial.[216]

The state supreme court concluded that the court erred in dismissing the indictment, and the court focused on the fact that the prosecutor has a great deal of discretion in presenting evidence to the grand jury.[217] In explaining the duty of the

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[208] *Trebus*, P.2d at 1238-39; *Herrell*, P.2d at 1244.

[209] *See* Illinois v. Wardlow, No. 98-1036, 2000 WL 16315 (U.S. 2000). This case is a good example of how the courts have begun chipping away at the rights of defendants because the Supreme Court held that the police have the right to stop a person who flees from them in a high crime area. *Id.*

[210] *Ramjit*, 612 N.Y.S.2d 600.

[211] *Id.* at 601. The defendant's sons "were charged in the same indictment with intimidating and harassing the victim, whom they alleged telephoned and threatened to kill after their father had been arrested." *Id.*

[212] *Id.* Another second basis for dismissal of the indictment was the fact that the charges against the defendant and his sons were impermissibly joined in the same indictment. *Id.*

[213] *Ramjit*, 612 N.Y.S.2d at 601.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

prosecutor to disclose exculpatory evidence, the court wrote: "[T]he people maintain broad discretion in presenting their case to the Grand Jury and need not seek [out] evidence favorable to the defendant or present all their evidence tending to exculpate the accused."[218] (citations omitted) Thus, the court seemed to grant the prosecution a certain degree of power by emphasizing the idea that he or she has a great deal of latitude in bringing evidence before the grand jury. The court also focused on the fact that the defendant does have the right to offer exculpatory testimony on his or her behalf at the grand jury proceeding.[219] As the court noted, "[I]n the ordinary case, it is the defendant who, through the exercise of his own right to testify and have others called to testify on his behalf before the Grand Jury, brings exculpatory evidence [before] the grand jury."[220] (citations omitted)

In addition, the court discussed the requirements for the disclosure of exculpatory evidence. The court explained that the prosecution is required to present exculpatory evidence if the evidence either "implicated a complete legal defense [or] was of such quality as to create the potential to eliminate a 'needless or unfounded prosecution.'"[221](citations omitted) The court found that here the evidence did not meet the requirements for disclosure because the evidence related primarily to the victim's credibility and therefore should be raised during the petit jury proceedings rather than during the grand jury proceedings.[222] The court also concluded that the prosecution was not required to accept defense counsel's information concerning the allegedly exculpatory evidence "at face value" and to present it to the grand jury without inquiring into its truthfulness.[223] Finally, the court found that the prosecution exercised their broad discretion in a permissible manner by declining to present the defense's evidence to the grand jury because the prosecution conducted their own investigation and concluded that defense counsel's information could not be confirmed.[224]

Ramjit is relevant to an examination of the prosecutorial duty to disclose exculpatory evidence to the grand jury because it granted prosecutors a certain amount of power, and this power has the potential for abuse. As the court explained, the prosecutor is not required to accept defense counsel's representations of exculpatory evidence at face value, nor is the prosecutor required to present

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[218]*Ramjit*, 612 N.Y.S.2d at 601.

[219]*Id.*

[220]*Id.*

[221]*Id.* at 602.

[222]*Id.* The court also noted that the defendant failed to exercise his right to "bring exculpatory evidence to the grand jury's attention by [his] own testimony or that of others testifying on [his] behalf." *Ramjit*, 612 N.Y.S.2d at 601.

[223]*Id.*

[224]*Id.* The court also noted that the supreme court erred in finding that the charges against the defendant were improperly joined with those of his two sons. *Id.* The court found that the record established that the crimes committed by the defendant and his sons were "so closely connected and related with regard to the time and circumstances of their commission as to constititute a single criminal transaction. *Id.*

"evidence tending to exculpate the accused."[225] Because prosecutors have broad discretion–and also a certain degree of power–in deciding whether to present exculpatory evidence to the grand jury, the New York courts must hold prosecutors to high standards and carefully examine prosecutorial behavior in cases concerning the disclosure of exculpatory evidence to the grand jury so that prosecutors do not have the opportunity to abuse their powers.

Ramjit is also deserves special examination because like *Trebus and Herrell*,[226] it established rights for defendants who are the subjects of grand jury investigations. The *Ramjit* court acknowledged the idea that defendants should be given opportunities to bring their own exculpatory evidence directly before the grand jury or to request the prosecutor to disclose specific exculpatory evidence.[227] The *Ramjit* court created more fairness within New York grand jury proceedings because it recognized that defendants should be given the chance to defend themselves and should be given the chance to offer exculpatory evidence to the grand jury. Thus, this court should be commended for recognizing the rights of defendants in a time when many courts seem to be chipping away at the rights of defendants.[228]

In sum, many jurisdictions require prosecutors not to follow *Williams* but instead require prosecutors to disclose exculpatory evidence to the grand jury. These decisions create an element of fairness within the grand jury proceedings because they allow grand juries to make independent, unbiased decisions and because they allow grand juries to fulfill their screening function. Finally, many of these decisions create a certain degree of fairness within the grand jury proceedings because they establish greater rights for defendants by allowing defendants to bring their own exculpatory evidence before the grand jury.

V. PROPOSED STATUTE

A. Introduction

In the State of Ohio, the grand jury plays an important role in the system of criminal law. Just as the right to indictment by a grand jury is guaranteed by the United States Constitution, the right to indictment by a grand jury is guaranteed by the Ohio Constitution.[229] Although Ohio has a guarantee for indictment by a grand jury in its Constitution, Ohio does not have a statute regulating the kind of evidence that a prosecutor is required to present to a grand jury. This portion of the paper proposes a statute that imposes a duty on prosecutors in Ohio, requiring them to

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[225] *Ramjit*, 612 N.Y.S.2d at 601.

[226] *Trebus*, 944 P.2d 1235; *Herrell*, 944 P.2d 1241.

[227] *Ramjit*, 612 N.Y.S.2d at 601.

[228] *See supra* note 209 and accompanying text.

[229] OHIO. CONST. art. I, § 10. The wording of the Ohio Constitution is similar to the wording of the United States Constitution: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury."

introduce exculpatory evidence to the grand jury.[230] This part also explains the reasons for and effects of such a statute. Finally, this part examines the an Ohio case in which the defendants might have received greater protections had a prosecutorial duty to disclose exculpatory evidence existed.

B. The Language of the Proposed Statute

If the prosecuting attorney has personal knowledge of evidence favorable to the accused where such evidence will materially affect the grand jury decision to indict on the charge, the prosecuting attorney must present such evidence to the grand jury. If the prosecuting attorney gains personal knowledge of such evidence either before the grand jury proceedings begin or during any stage of the grand jury proceedings, he or she is required to present the evidence to the grand jury. Failure by the prosecuting attorney to disclose such evidence will cause the indictment to be held invalid and to be dismissed without prejudice.

C. Discussion of the Proposed Statute

The standard for disclosure in the proposed statute is broader than the disclosure standard in *Hogan*,[231] *Trebus*,[232] *Herrell*,[233] and *Ramjit*;[234] and the standard is based, in part, on principles of disclosure articulated in *Brady v. Maryland*.[235] Because the standard is broader than the standard in *Hogan, Trebus, Herrell,* and *Ramjit* the prosecution will be required to disclose more evidence that is favorable to the defendant, thereby decreasing the chances that the defendant will be indicted when he or she is really innocent. In addition to being rather broad, the standard for disclosure is based on *Brady v. Maryland*, which held that the "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."[236] However, the proposed statute differs from the *Brady* standard in several respects. First, the statute requires the prosecution to disclose evidence favorable to the defendant even if the defendant does not request such evidence; and second, the statute does not impose a faith requirement upon the prosecution. The statute requires the prosecution to disclose exculpatory evidence to the grand jury whether or not the defendant requests such evidence to be disclosed because many times the defendant is unaware that relevant evidence exists, and thus he or she will be unable to make a request for key evidence that the grand jury should have in order to make its decision. The statute also does not impose any kind of faith requirement upon the prosecution because implicit in the statute is the notion that the prosecutor will make a good faith effort to disclose exculpatory evidence

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[230] *See also* Mastrian, *supra* note 143 (proposing a rule placing a duty on prosecutors in the federal system to disclose exculpatory evidence to grand juries).

[231] *See Hogan*, 676 A.2d at 543.

[232] *See Trebus*, 944 P.2d at 1239.

[233] *See Herrell*, 944 P.2d at 1245.

[234] *See Ramjit*, 612 N.Y.S.2d at 601.

[235] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[236] *Id.*

when it becomes known to him or her and because a prosecutor cannot be expected to present exculpatory evidence to the grand jury if such evidence exists, but he or she is unaware of the evidence.

Despite the differences between the proposed statute and the *Brady* standard, the reasons for creating the statute comport with the reasons for having the *Brady* standard. In *Brady*, the Supreme Court's ruling was both an effort to prevent the conviction of innocent people and ensure the fairness of criminal trials.[237] The Court wrote:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'[238]

This analysis of criminal trials by the Supreme Court relates to the issue of the grand jury and the production of exculpatory evidence in the sense that a duty imposed on the prosecutor will prevent innocent people from being indicted and will ensure fairer grand jury proceedings.

Because the proposed statute focuses on the protective functions of the grand jury, it will promote more fairness and justice within the grand jury proceedings in Ohio. Although the statute acknowledges the importance of the protective function of the grand jury, it still recognizes the accusatory role of the grand jury. Because the statute imposes a duty on the prosecutor to present exculpatory evidence only if the evidence is favorable to the accused and if the evidence materially affects the grand jury decision, the statute does not call for a trial on the merits in which all the evidence will be heard. Thus, one of the main functions of the grand jury will still be to determine probable cause, and the statute will not transform the grand jury into an adjudicatory body. In effect, the petit jury will still be the body that determines the guilt or innocence of the defendant. In addition, the statute establishes fairness by enabling the grand jury to have access to more of the relevant information about the guilt of the defendant, thereby allowing the grand jury to make independent, unbiased decisions. Furthermore, with more relevant information available, the grand jury will be able to fulfill its "higher function" of acting as buffer between the government and the accused in order to ensure that the accused are not the victims of malicious, oppressive prosecution.[239] Moreover, unlike the federal system, this statute recognizes that there must be some kind of remedy for the situation in which the prosecutor is aware that exculpatory evidence exists yet fails to disclose such evidence to the grand jury; thus, the remedy is that the indictment against the accused person will be automatically dismissed if the prosecutor fails to present exculpatory evidence to the grand jury. Finally, this statute offers greater protections

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[237] *Id.*

[238] *Id.*

[239] *See* Elizabeth G. Mckendree, Note, *United States v. Williams: Antonin's Costello–How the Grand Jury Lost the Aid of the Courts as a Check on Prosecutorial Misconduct*, 37 HOW. L.J. 49, 81 (1993) (stating that the grand jury's "higher function" is to "stand between the accuser and the accused").

to defendants by requiring that evidence in their favor be heard by the grand jury when the evidence materially affects the decision to indict; and in light of the disturbing fact that defendants' rights are slowly being eviscerated, this statute provides some relief.

D. The Effect of the Statute on Case Law

One Ohio case in particular in which the proposed statute would have afforded the defendants greater protections had the statute been adopted is *State v. Tankersley*.[240] In *Tankersley*, the prosecutor presented testimony regarding an incident in which two off-duty Cleveland police officers allegedly assaulted a man and broke a window in the door of his home.[241] After listening to the testimony of several witnesses to the incident, the grand jury returned an indictment for criminal damaging and assault.[242] At a pretrial hearing, the prosecutor informed the court of unsuccessful plea negotiations with the officers.[243] She told the court that she had notified the officers that unless both pleaded to the charges and resigned from the police force, they would be reindicted on more serious charges.[244] Because one of the officers refused to plead guilty to the charges, the prosecutor moved to dismiss the indictment;[245] she also moved to proceed to present these cases to the grand jury for reindictment.[246] The trial court granted the prosecutor's motions, and the prosecutor was given the chance to present the case to a second grand jury.[247] The second grand jury then returned more serious charges of felonious assault and vandalism against both officers.[248]

The testimony at the second indictment differed from the testimony at the first indictment, and the officers argued that it was "fundamentally unfair for the State to present different evidence to the second grand jury than was presented to the first grand jury."[249] During the first grand jury proceeding, the prosecutor presented the testimony of nine witnesses.[250] At the second proceeding, only testimony from two

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[240]State v. Tankersley, No. CR-331314, 1998 WL 196137 (Ohio Ct. App. Apr. 23, 1998).

[241]*Id.* at *2.

[242]*Id.*

[243]*Id.*

[244]*Id.* at *3.

[245]*Tankersley*, 1998 WL196137, at *3.

[246]*Id.*

[247]*Id.*

[248]*Id.* In the interim, the defendants appealed the dismissal of the first indictment, and they argued that the prosecution failed to demonstrate "good cause" for dismissing the indictment as required by Revised Code 2941.33; they also argued that the prosecution improperly made each officer's acceptance of the plea agreement contingent on the other officer's acceptance of the agreement. *Id.* at *3-4. Upon the motion of the prosecution, the Eighth Appellate District Court of Appeals dismissed the officers' appeals "for lack of a final appealable order." *Tankersley*, 1998 WL196137, at *4.

[249]*Id.* at *3, *7-8.

[250]*Id.* at *8.

of the witnesses was presented.[251] In addition, during the first grand jury hearing, the prosecutor presented statements from one of the witnesses indicating that she had lied about viewing the incident in question.[252] In the second grand jury proceeding, however, her testimony was not presented.[253] The court reasoned that "one could argue that the evidence at the second grand jury hearing was fairer to . . . [the defendants] . . . in that admittedly perjured testimony was not presented."[254] The court also maintained that "even if the evidence [of the perjured testimony] is viewed as exculpatory, it has been held that the prosecution has no duty to disclose exculpatory evidence to a grand jury."[255]

The defendants in this case would have received greater protections had the proposed statute been in existence at the time the case was decided. Although the defendants in this case were police officers, it is important to note that they were acting in their capacity as civilians at the time they were alleged to have committed the crimes.[256] Thus, the proposed statute, which is intended to benefit all defendants, would be applicable in protecting the rights that these defendants hold as civilians. By reasoning that the evidence presented at the second trial was fairer to the defendants because admittedly perjured testimony was not presented, the court ignored the fact that the grand jury should be given the opportunity hear relevant, substantive information. Without relevant information available, the grand jury would not have had the chance to make an unbiased decision independent from the influence of the government. Furthermore, the testimony of the witness admitting that she had lied about witnessing the event in question is both favorable to the accused and would have materially affected the decision to indict. Thus, the testimony in this case is exactly the kind of exculpatory evidence that the proposed statute would require the prosecutor to disclose so that the defendants are not indicted for a crime of which they are innocent. Finally, by maintaining that the prosecutor has no duty to disclose exculpatory evidence to the grand jury, the court focused too narrowly on the accusatory function of the grand jury and ignored the fact that the grand jury has a screening function that it must also perform.

VI. CONCLUSION

The decision in *Williams* is problematic because it deprives defendants of a crucial right: evidence that is favorable to them is not required to be heard at the grand jury. In addition, the decision ignores the function of the grand jury as a protective body that makes independent decisions and stands between the government and the accused. If fairness is to be recognized in our criminal justice system, we need to follow the lead of those jurisdictions that impose a duty on the prosecutor to present exculpatory evidence. Those jurisdictions imposing a

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[251] *Id.*

[252] *Id.*

[253] *Tankersley*, 1998 WL196137, at *8.

[254] *Id.*

[255] *Id.* at *8 (citing *U.S. v. Williams*, 504 U.S. 36, 37 (1992).

[256] At the time of the crime when they allegedly assaulted the victim and broke a window in his home, the defendants were off duty. *Id.* at *2.

prosecutorial duty recognize that the grand jury is an accusatory body, yet they also acknowledge the screening and protective functions of the grand jury. Because Ohio presently does not impose a duty upon prosecutors to disclose exculpatory evidence, this situation must be rectified with a proposed statute. Based partly on the standard articulated in *Brady v. Maryland*,[257] the standard for disclosure in the proposed statute will require the prosecution to disclose evidence if the evidence is favorable to the accused and if the evidence will materially affect the grand jury decision to indict. Such a statute in Ohio will not turn the grand jury proceedings into trials on the merits because there is no requirement that all the evidence be heard. Instead, the statute will grant defendants some rights in order to ensure the existence of a criminal system based on justice; and the statute will enable the grand jury to fulfill its role of protecting the innocent.

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[257]*See Brady*, 373 U.S. at 87.

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