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THE ROLE OF THE PROSECUTOR INSIDE THE GRAND JURY ROOM: WHERE IS THE FOUL LINE?

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I. INTRODUCTION

The historic role of the English grand jury, as it eventually evolved, was to act as an independent bulwark to protect English subjects from unfounded accusations by the crown.[1] The English colonists in America established the grand jury with the same powers as its English model.[2] The framers of the United States Constitution made the grand jury a part of the fifth amendment.[3] The purpose of the constitutional provision was to protect the citizens "against unfounded accusation, whether it comes from [the] government, or [is] prompted by partisan passion or private enmity."[4]

During the past decade, the grand jury has been criticized as no longer being an independent body, but simply a rubber stamp of the prosecutor.[5] Despite the criticism, the grand jury as an institution is not likely to be abolished because it occupies a strong constitutional

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1 *In re* Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971).

2 The famous case of newspaper publisher John Peter Zenger is a prime example. Two grand juries refused to indict Zenger on charges brought by the governor of New York for criticizing the governor's policies. He was later prosecuted on an information and acquitted. M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 11 (1977).

3 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

4 *Ex parte* Bain, 121 U.S. 1, 11 (1887).

5 *See* United States v. Provenzano, 440 F. Supp. 561, 564 (S.D.N.Y. 1977); 8 MOORE'S FEDERAL PRACTICE § 6.02[1], 6-22 (rev. 2d ed. 1985); M. FRANKEL & G. NAFTALIS, *supra* note 2, ch. 2. The Supreme Court also has expressed some doubt concerning the independence of the grand jury: "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ." United States v. Dionisio, 410 U.S. 1, 17 (1973).

position.[6]

Another historic function of the grand jury is its power to summon witnesses.[7] This power remains intact today. Although often criticized as being too broad,[8] the subpoena power of the grand jury is protected and valued by the courts: "The inquisitorial power of the grand jury is the most valuable function which it possesses today and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution."[9] Courts have consistently refused to limit the broad, sweeping investigatory powers of the grand jury.[10]

The grand jury remains one of the most effective methods in a criminal investigation for compelling the appearance of witnesses and the production of documents. The author is of the opinion that without the investigatory power of the grand jury, successful investigations of official corruption, large scale financial fraud, or organized crime would be dramatically reduced.

The importance of the investigative role of the grand jury, however, must not be permitted to overshadow its role as an independent accusatory body. A balance must be maintained between the two roles. The key to the balance lies with the integrity and the professionalism of the prosecutor.[11]

The prosecutor's role is crucial to the operation of the modern

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6 England has abolished the grand jury. Administration of Justice Act of 1933, 23 & 24 Geo. 5, c. 36; McCormick on Evidence, ch. 12, § 113, at 276 (3d ed. 1984).

7 "[A]s early as 1612, in the Countess of Shrewsbury's case, Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.' " Blair v. United States, 250 U.S. 273, 279 (1919).

8 *See Dionisio*, 410 U.S. 1 (1973) (Brennan, Douglas & Marshall, JJ., dissenting); United States v. Mara, 410 U.S. 19, 22, 23, 31 (1973) (Brennan, Douglas & Marshall, JJ., dissenting).

9 *In re* Grand Jury Proceedings, 4 F. Supp. 253, 284 (E.D. Pa. 1933).

10 A grand jury needs no probable cause to initiate an investigation. The investigation may be triggered by tips, rumors, or evidence given by the prosecutors. Branzburg v. Hayes, 408 U.S. 665, 701 (1972). A grand jury investigation cannot be enjoined. *In re* Grand Jury Proceedings (U.S. Steel), 525 F.2d 151, 157 (3d Cir. 1975). The grand jury's right to inquire into possible offenses is unrestrained by technical or evidentiary rules. United States v. Calandra, 414 U.S. 338, 343 (1974).

A witness cannot quash a grand jury subpoena on the grounds that the witness will assert the fifth amendment. The witness must appear and assert the privilege as to each question asked. United States v. Pilnick, 267 F. Supp. 791, 798 (S.D.N.Y. 1967). A witness may not refuse to answer questions on the grounds of relevance. *In re* Fula, 672 F.2d 279, 283 (2d Cir. 1982). Although a grand jury subpoena *duces tecum* may be quashed by the court for being unreasonable or oppressive, courts are very liberal in upholding the demands of subpoena *duces tecum*. *See, e.g., In re* Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948).

11 Prosecutors have an ethical obligation to preserve the status of the grand jury as an independent legal body. United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983);

grand jury. The prosecutor decides what subjects the grand jury investigates, and what witnesses and documents to subpoena. He questions the witnesses. He advises the grand jury on the relevance of the evidence, drafts the charges, advises the grand jury on the law, and requests the grand jury to return an indictment.[12] The grand jury cannot return an indictment without the signature of the prosecutor.[13] This power can easily be misused.[14]

The vast discretion vested in the prosecutor and the proceedings inside the grand jury have received little judicial attention.[15]

American Bar Ass'n, Standards for Criminal Justice, Standard 3-3.5 at 3.48 (2d ed. 1980).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he 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.

Berger v. United States, 295 U.S. 78, 88 (1935).

12 United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); 8 MOORE'S FEDERAL PRACTICE § 6.02[1] (rev. 2d ed. 1985); 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d §101 (1982); Note, *The Grand Jury As An Investigative Body*, 74 HARV. L. REV. 590, 596 (1961).

13 Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *In re* Grand Jury Jan. 1969, 315 F. Supp. 662, 673 (D. Md. 1970).

14 "Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations." FED. R. CRIM. P. 6(e)(1) advisory committee notes (1979 amend.).

15 Prior to 1979, the prosecutor's activity inside the grand jury room was largely a mystery to anyone except those persons in the prosecutor's office. The Federal Rules of Criminal Procedure did not require grand jury proceedings to be transcribed, although several district courts passed local rules to require recording. Northern District of Illinois, Local Rule 1.04(c); Northern District of Ohio, Local Rule 3(c). In United States v. Gramolini, 301 F. Supp. 39, 42 (D.R.I. 1969), the court held that indictments would be dismissed if proceedings were not recorded. Although the practice of nonrecording was upheld by a vast majority of courts, *see* WRIGHT, *supra* note 12, at § 103.1, the practice was strongly condemned.

In 1979 Rule 6(e) of the Federal Rules of Criminal Procedure was amended to require all proceedings before the grand jury to be recorded.

> All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

FED. R. CRIM. P. 6(e)(1).

The advisory committee noted that one of the benefits derived from recording was

This Article will explore the role of the prosecutor inside the grand jury room, and attempt to establish some parameters for his activity. The Article will attempt to define the gray area between proper and improper prosecutorial conduct.

This Article also will examine the restrictions on the use of hearsay evidence; the limitations on the use of transcripts from prior grand juries; the limitations on the prosecutor's examination of recalcitrant witnesses; the prosecutor's duty to present exculpatory evidence; the extent to which the prosecutor may make an opening statement or a final argument; whether or not the prosecutor is required to advise the grand jury on the relevant law; and the manner in which allegations of prosecutorial misconduct or other improprieties should be raised.

Although the grand jury is a body independent of the courts and the executive branch, the courts have an inherent supervisory authority over the grand jury's operation.[16] The court has authority to review the proceedings of a grand jury that it has empaneled and instructed[17] in order to prevent the grand jury's independence from being subverted.[18] The court also has the power to supervise the use of subpoenas and to oversee the general operation of the grand jury.[19] This supervisory authority is exercised carefully lest the court disturb the prerogatives of the executive branch and the

"restraining prosecutorial abuses before the grand jury." FED. R. CRIM. P. 6(e)(1) advisory committee notes (1979 amend.).

16 United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976). The Supreme Court urged lower courts to use supervisory power when there is a threat "to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

17 United States v. O'Shea, 447 F. Supp. 330, 332 (S.D. Fla. 1978).

18 United States v. Al Mudarris, 695 F.2d 1182 (9th Cir.), *cert. denied*, 103 S. Ct. 2097 (1983); *Chanen*, 549 F.2d 1306 (9th Cir. 1977).

Supervisory authority has been exercised to insure uniformity in warnings given to putative defendants testifying before the grand jury, *Jacobs*, 547 F.2d 772 (2d Cir. 1976); to insure uniformity of procedures for taking guilty pleas, Burton v. United States, 483 F.2d 1182 (9th Cir. 1973); and, to reverse a conviction that resulted from an indictment returned by a grand jury from which women were intentionally excluded, *Ballard*, 329 U.S. 187 (1946). *See* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

19 *In re* Seiffert, 446 F. Supp. 1153, 1155 (N.D.N.Y. 1978). The courts have the power to establish procedures to insure uniformity in hearing allegations regarding grand jury investigations. For example, the District Court of the Eastern District of Pennsylvania has established a procedure whereby each grand jury investigation is assigned a number by the clerk of the court. All subpoenas issued during that investigation are given the same number. Any challenges to a subpoena or any irregularity alleged in the investigation are assigned to be heard by a judge chosen by lot. All litigation from the numbered investigation will be assigned to the same judge so that the judge will have familiarity with the investigation and will maintain close supervision. *See* Local Criminal Rule 4, E.D. Pa.

grand jury[20] and upset the doctrine of separation of powers.[21]

II. Opening Statement

At the beginning of every grand jury investigation, it is necessary for prosecutors to outline the purpose of the investigation, the violations of the law that are suspected of having been committed, what witnesses will be called, and what direction the investigation will take. As the investigation progresses, it may be necessary for prosecutors to brief the grand jury on new areas that will be pursued. The prosecutors must explain the relevance of each witness and what they hope the questioning will reveal.[22]

Although there are no cases directly discussing whether prosecutors can make a statement to the grand jury at the beginning of an investigation or prior to the appearance of a witness, it is implicit from their role as directors of the investigation that they keep the grand jury informed. They must caution the grand jurors that the jurors alone must determine if probable cause exists, and that they alone should make such a determination from the evidence they hear, and not from the prosecutors' statements.[23] The prosecutors should not voice their personal opinion as to the guilt or innocence of the prospective defendants.[24]

III. The Questioning of Witnesses

Quite often in complicated fraud, political corruption or organized crime cases, the only witnesses to the crime are persons who committed it or persons who have a personal, political or business relationship with the major figures in the scheme. These individuals are reluctant to testify, even when granted immunity from prosecution.[25] Evasive answers often cause the government attorney to become frustrated. Numerous cases involving prosecutorial

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20 United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979).

21 *Chanen*, 549 F.2d 1306 (9th Cir. 1977).

22 8 Moore's Federal Practice § 6.04[1], 6-78 (rev. 2d ed. 1985).

23 United States v. Rintelen, 235 F. 787, 791 (S.D.N.Y. 1916). *See* United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957) (court approved summary argument at close of evidence).

24 U.S. v. McKenzie, 678 F.2d 629, 633 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

25 Title 18 of the United States Code, Section 6001-004, permits the government attorney to seek a court order to force a witness to testify over the witness' assertion of the fifth amendment. 18 U.S.C. § 6001-004 (1982). The witness' testimony, and any leads resulting therefrom, cannot be used against him. *See* Kastigar v. United States, 406 U.S. 441 (1972). If the witness refuses to testify, he may be held in civil contempt and incarcerated until he complies or the grand jury expires. He may not be incarcerated longer than 18 months. 28 U.S.C. § 1826(a) (1982).

misconduct have resulted when the prosecutor badgered, insulted or threatened witnesses in an attempt to force them to testify truthfully and in a straightforward manner. In earlier cases, although often strongly criticizing a prosecutor's conduct for mistreating a witness, courts have refused to intercede if there was sufficient evidence to sustain a guilty finding.[26] As the grand jury was increasingly used to conduct lengthy investigations involving more complex evidence and more reluctant witnesses, however, the prosecutor's conduct came under closer scrutiny.

Courts have defined two criteria for determining the effect of prosecutorial misconduct. Some courts have held that in order to dismiss an indictment the court must find an actual prejudice to the defendant.[27] Other courts have applied the cumulative error rule, finding that the court's supervisory powers may be invoked without a showing of actual prejudice, where the prosecutor's unethical conduct has become a common practice within the district or the circuit. For example, the Third Circuit Court of Appeals said that "[federal] courts have an institutional interest, independent of their concern for the rights of the particular defendant in preserving and protecting the appearance and the reality of fair practice before the grand jury, an interest which could justify the imposition of a prophylactic rule in a proper case."[28] The cumulative error rule is invoked when: "The cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury."[29] Under either standard, if the overall conduct of the prosecutor is sufficiently egregious, courts will find prejudice from the fact that the independence of the grand jury was destroyed.[30]

The prosecutor may ask "hard" questions of a witness with the intent of obtaining information. When the prosecutor deviates from that goal, and uses his questions as a method of voicing his own opinion or making an argument to the grand jury, he strays into the area where courts are likely to find prosecutorial misconduct. In

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26 United States v. Riccobene, 451 F.2d 586, 587 (3d Cir. 1971); United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967).

27 United States v. Adamo, 742 F.2d 927, 941 (6th Cir. 1984); *McKenzie*, 678 F.2d at 631 (5th Cir. 1982). *See also* United States v. Morrison, 449 U.S. 361 (1981), where federal agents visited defendant after her indictment without informing her lawyer and told defendant that her lawyer was incompetent and that she would fare better with another lawyer. The defendant continued to retain the lawyer. The Supreme Court found that although the agents' activity was egregious it did not prejudice the defendant.

28 United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979).

29 *Samango*, 607 F.2d at 884 (9th Cir. 1979).

30 *Id.*

United States v. Serubo,[31] the prosecutor, frustrated by the lack of knowledge of the witnesses, continually used rhetorical questions to link the targets[32] of the investigation to organized crime and to impugn the integrity of the witnesses. The witnesses did not supply information in response to his questions. The court found that such conduct was egregious enough to invoke the supervisory power of the court to grant relief.[33]

The prosecutor is not prohibited from offending the witness. In the words of Judge Learned Hand: "I agree that, when faced with a patently unwilling witness, the grand jury was free to press . . . [the] cross examination hard and sharp; truth is more important than the sensibilities of the witness."[34]

The prosecutor cannot degrade the witness, and the questions should relate directly to a fact in question. In *United States v. DiGrazia*,[35] the court dismissed an indictment when the prosecutor asked a woman target if her son, another target, was legitimate, and chided her for asserting the fifth amendment. The court held that the examination was conducted merely to discredit the witness before the grand jury.[36]

A particularly troublesome situation which has given rise to numerous findings of prosecutorial misconduct is the examination of a witness who originally agreed to cooperate but later declines to do so. The prosecutor's frustration with the witness frequently appears in his remarks and questioning, which some courts often have found prejudicial. In *United States v. Samango*,[37] before questioning the defendant, the prosecutor, who had agreed not to prosecute the defendant, made a long and heated statement to the grand jury about his dissatisfaction with the defendant's prospective testimony. The prosecutor made references to the defendant's acquaintance with a person whom the prosecutor described to the grand jury as being capable of murder. He frequently insinuated that the defendant was lying, and bickered over the defendant's failure to cooperate in a

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31 604 F.2d 807 (3d Cir. 1979).

32 A "target" is a person who, in the judgment of the prosecutor, is a putative defendant. United States Attorneys' Manual, tit. 9, ch. 11.250.

33 Because the indictment was returned by a second grand jury rather than the one before which the initial questioning took place, the court, instead of dismissing the indictment remanded the case to enable the lower court to determine if the conduct continued into the second grand jury. *Serubo*, 604 F.2d at 818.

34 United States v. Remington, 208 F.2d 567, 571-72 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 343 U.S. 907 (1954). After making this statement, however, Judge Hand found that the prosecutor had gone beyond the bounds of fairness.

35 213 F. Supp. 232, 234-35 (N.D. Ill. 1963).

36 *Id.* at 235.

37 607 F.2d 877 (9th Cir. 1979).

satisfactory manner. The Ninth Circuit found that the questioning was calculated to serve no other purpose than to prejudice the defendant in the eyes of the grand jury.[38]

When faced with hostile witnesses, the prosecutor should not attempt to establish probable cause simply by discrediting them or entering into long heated arguments with them during questioning. In *United States v. Sears, Roebuck and Company*,[39] the prosecutor questioned employees and attorneys of the defendant company in a manner which implied that the company had totally failed to respond to a subpoena. He badgered lawyer witnesses who requested time to secure counsel. He made a long statement to the grand jury on the credibility of a witness. He constantly demanded yes or no answers to complex questions that were not susceptible of one word answers, and told a witness that he sounded "like an Abbott and Costello movie."[40] The court branded the prosecutor's efforts as "blind zeal" that resulted in basic unfairness of the grand jury proceeding and dismissed the indictment.[41]

A majority of the Ninth Circuit found the prosecutor's conduct "deplorable," but reinstated the indictment because the defendant could show no prejudice which would amount to a violation of the constitutional requirement of indictment by an independent grand jury.[42] Judge Norris, dissenting in part, felt that the lower court should have the opportunity to consider exercising its supervisory power to dismiss the indictment.[43] Upon remand, the district court dismissed the indictment pursuant to its supervisory power.[44]

Similarly, in *United States v. Lawson*,[45] the court dismissed the indictment where the prosecutor, although possessing records that corroborated the witness' testimony, embarked on a searing examination designed to discredit the witness so that it would appear that he was covering up for the defendant.

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38 *Id.* at 883.

39 518 F. Supp. 179 (C.D. Cal. 1981), *rev'd*, 719 F.2d 1386 (9th Cir. 1983).

40 *Id.* at 187.

41 *Id.* at 190.

42 *Sears, Roebuck and Co.*, 719 F.2d 1386, 1392 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1441 (1984). The court held that the constitutional requirement arose not from the fifth amendment's due process clause, but from the grand jury clause.

> Although the constitutional concept of "fundamental fairness" has sometimes been analyzed as an aspect of due process, *see, e.g.*, United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974), it accords both with prevailing precedent and with the language of the Constitution to treat the right to unbiased treatment by a grand jury as one grounded in the grand jury clause of the Fifth Amendment.

Id. at 1391 n.7.

43 *Id.* at 1394.

44 *Sears, Roebuck and Co.*, 579 F. Supp. 1055, 1056 (C.D. Cal. 1984).

45 502 F. Supp. 158 (D. Md. 1980).

Implicit in the foregoing cases is a conception by the courts that prosecutors in the past have taken advantage of their powerful position with the grand jury. The courts intend to insure that such practices do not reoccur.

IV. The Nature of Grand Jury Evidence

In *Costello v. United States*,[46] the Supreme Court held that an indictment cannot be attacked on the ground that evidence presented before the grand jury was incompetent or inadequate. The Court would not permit a series of hearings or mini-trials to determine if the jury correctly found probable cause. The Court approved an indictment based solely upon hearsay testimony.

Despite the holding in *Costello*, lower courts have dismissed indictments when they found that the grand jury was misled as to the nature and the quality of the evidence presented by the prosecutor. The courts have decided the cases on due process grounds or pursuant to their supervisory authority. Courts also have dismissed indictments on due process grounds when it became known that the indictment was based upon perjured material testimony.[47]

The use of hearsay evidence, however, has presented problems. Indictments have been dismissed when based solely upon the unsworn statements of the prosecutor.[48] The Second Circuit, in the first of several cases on the issue, dismissed an indictment where the witness testifying had no firsthand knowledge of the events he related, but testified as if he were an on-the-scene witness.[49] The court objected to the prosecutor's misleading the grand jury to believe that it was receiving firsthand testimony.[50]

In a later case, the same court issued the following warning to prosecutors:

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46 350 U.S. 359 (1956).

47 *Basurto*, 497 F.2d 781 (9th Cir. 1974); United States v. Goldman, 451 F. Supp. 518 (S.D.N.Y. 1978). *But see Adamo*, 742 F.2d at 941 (6th Cir. 1984) (conviction upheld where perjury was not fault of prosecutor and perjured testimony was not used at trial). The court in *Adamo* held that if the prosecutor discovers perjury prior to trial, he must determine if a petit jury would convict without perjured testimony. If in doubt, he must resubmit the remaining evidence to the grand jury. If the remaining evidence would not convict, he must dismiss the indictment.

48 *See* United States v. Hodge, 496 F.2d 87 (5th Cir. 1974).

49 United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

50 The court stated:

> We have been willing to allow ample . . . latitude in the needless use of hearsay, subject to only two provisos—that the prosecutor does not deceive grand jurors as to the "shoddy merchandise they are getting so they can seek something better if they wish," . . . or that the case does not involve a "high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted."

Id. at 1137 (quoting United States v. Payton, 363 F.2d 996, 1000 (2d Cir. 1966)

> Although there is no prohibition on the use of hearsay evidence before a grand jury . . . [the] extensive reliance on hearsay testimony is disfavored. More particularly, the government prosecutor, in presenting hearsay evidence to the grand jury, must not deceive the jurors as to the quality of the evidence they hear. . . . Heavy reliance on secondary evidence is disfavored precisely because it is not first-rate proof. It should not be used without cogent reason . . . and never be passed off to the grand jurors as quality proof when it is not.[51]

But determining what is an excessive or misleading use of hearsay testimony is a difficult task because each case depends upon the individual factual circumstances. As a practical matter, the prosecutor may use hearsay in many instances that are not misleading or prejudicial. For example, a hearsay witness may report facts that are not subject to dispute, or a witness who made an out of court statement may not have his credibility seriously drawn into question. It is a common practice for one law enforcement agent to relate the findings of one or more other law enforcement agents when the appearance of all agents would be time consuming and unnecessary.[52]

If the prosecutor's case depends upon eyewitness testimony of certain key witnesses, the witnesses should be presented so that the grand jury may judge their credibility. In *United States v. Provenzano*,[53] the court dismissed an indictment that was based solely upon the incriminating testimony of one witness. The grand jury did not hear or see the witness, but was given a transcript of his testimony from a prior grand jury. The circumstance was aggravated because the witness had partially recanted his incriminatory testimony in a private letter to the prosecutor.[54] The court felt that the grand jury was misled and should have been given the opportunity to see the "shoddy merchandise they were getting."[55]

(Friendly, J., dissenting)) and (quoting United States v. Leibowitz, 420 F.2d 39, 42 (2d. Cir. (1969)).

Other courts have applied a version of the *Estepa* rule:

> [A]n indictment based on hearsay is invalid where (1) non-hearsay evidence is readily available; (2) the grand jury is misled into believing it was hearing direct testimony rather than hearsay; and (3) there is high probability that had the grand jury heard the eyewitness it would not have indicted.

United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979) (quoting United States v. Cruz, 478 F.2d 408, 410 (5th Cir.), *cert. denied*, 414 U.S 910 (1973)).

51 United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983); *see* Note, *The Prosecutor's Unnecessary Use of Hearsay Evidence Before The Grand Jury*, 61 WASH. U.L.Q. 191 (1983).

52 *See* United States v. Bednar, 728 F.2d 1043, 1049 (8th Cir. 1984); United States v. Rossbach, 701 F.2d 713, 716 (8th Cir. 1983) (indictment not subject to dismissal where clear that federal agent was relating results of his investigation).

53 440 F. Supp. 561 (S.D.N.Y. 1977).

54 The prosecutor made this known to the defense attorney prior to trial.

55 *Provenzano*, 440 F. Supp. at 565.

As a general rule, evidence of a defendant's bad reputation in the community or of his implication in other crimes is unnecessary to the grand jury. Presentation of such information through hearsay testimony of law enforcement agents or by hearsay statements by the prosecutor himself has resulted in the dismissal of the indictment and harsh criticism by the court.[56]

The prosecutor has traditionally used hearsay evidence by presenting transcripts of prior grand jury testimony. The practice is common, often dictated by the expiration of a grand jury's term before an indictment can be returned, or by a grand jury that is occupied with other matters. The practice has been approved by numerous courts.[57] The Supreme Court has formalized the procedure for release of information from one grand jury to another.[58] The practice has some danger. The selective use of incomplete or inaccurate summaries may void an indictment.[59] Courts also have condemned the prosecutor's use of transcripts where the transcript conceals infirmities in the prosecutor's evidence or prevents the grand jury from seeing and hearing an important witness.[60]

There is no hard or fast rule concerning the use of summaries

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[56] *See Hogan*, 712 F.2d at 761. The court said:

> [T]he impartiality and independent nature of the grand jury was seriously impaired by the AUSA's argument that Hogan [the defendant] was a real hoodlum who should be indicted as a matter of equity. . . . Added to this inflammatory rhetoric were numerous speculative references to other crimes of which Hogan was "suspected." None of these other crimes . . . was under investigation. . . . In fact, there is no indication that Hogan has ever been charged with these offenses by any state or federal body. These government accusations and others appear to have been made, not to support additional charges, but in order to depict appellants as bad persons and thereby obtain an indictment for independent crimes. This tactic is "fundamentally unfair."
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> . . . .
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> . . . [T]he incidents related are flagrant and unconscionable.

Id. at 761-62.

[57] *See, e.g.*, United States v. Barone, 584 F.2d 118 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. Brown, 574 F.2d 1274 (5th Cir.), *cert. denied*, 439 U.S. 1046 (1978); *Chanen*, 549 F.2d 1306 (9th Cir. 1977); United States v. Gaskill, 491 F.2d 981 (8th Cir. 1974); United States v. Linton, 502 F. Supp. 861 (D. Nev. 1980).

[58] FED. R. CRIM. P. 6(e)(3)(C)(iii).

[59] United States v. Mahoney, 508 F. Supp. 263 (E.D. Pa. 1981). The extensive use of summaries has been condemned as a technique. *See, e.g.*, United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977); *In re* May 1972 San Antonio Grand Jury, 366 F. Supp. 522 (W.D. Tex. 1973); *In re* Grand Jury Investigation of Banana Industry, 214 F. Supp. 856 (D. Md. 1963).

[60] *Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977). "The use of summaries allows the government to present evidence which 'appears smooth, well integrated and consistent in all respects. . . . [G]rand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events.' " *Mahoney*, 508 F. Supp. at 266 (quoting United States v. Arcuri, 282 F. Supp. 347, 349 (E.D.N.Y. 1968)).

of prior grand jury transcripts. As a rule, any key witnesses should be brought before the new grand jury, especially if there is some credibility problem that could be solved by their appearance and by giving the grand jury the opportunity to ask questions. If the transcripts are lengthy, they should be summarized by a witness.[61] This practice is preferred to presenting the grand jury with volumes of transcripts and expecting all twenty-three members to study them in the short span of a grand jury session.

The problems with transcripts of prior grand jury proceedings are illustrated in *United States v. Gallo*,[62] where the prosecutor presented the grand jury with a superceding[63] indictment to correct certain legal problems in the prior indictment. The grand jury was not the same one that returned the first indictment. The evidence presented consisted only of transcripts of the testimony of the witnesses before the first grand jury. The prosecutor did not tell the grand jury that the testimony of a key witness included in the transcript contained some contradictory statements as to crucial events. The grand jury which returned the first indictment had been aware of the problems and had seen and heard the witness. The prosecutor did not give the second grand jury any guidance as to use of the transcript. The court faulted the prosecutor for not informing the grand jury that the witness was available and could be called to testify if the grand jury wished to hear him. The court held that, at a minimum, the prosecutor should have given the grand jury some direction as to how to use the transcripts.[64]

The Ninth Circuit dismissed an indictment under similar factual circumstances,[65] but reversed the dismissal of an indictment in another case where the transcripts were read aloud and the grand jury was made aware of the prior inconsistent statements of the witnesses.[66]

The prosecutor must take a common sense approach to the presentation of grand jury evidence. He must insure that there is credible evidence on each element of the offense. If a certain element depends upon a key witness, he should present that witness, especially if the witness has credibility problems. The prosecutor also should advise the grand jury that they have the right to call

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61 *See Linton*, 502 F. Supp. 861 (D. Nev. 1980).

62 394 F. Supp. 310 (D. Conn. 1975).

63 The procedure whereby the prosecutor submits a revised indictment to the grand jury, making substantive changes in the original charges, or adding new charges.

64 *Gallo*, 394 F. Supp. at 315.

65 *Samango*, 607 F.2d at 881.

66 *Chanen*, 549 F.2d at 1311.

witnesses not heard, or to recall witnesses, and he should give the jurors the opportunity to do so. Presenting witnesses to the grand jury, making the jurors aware of their past convictions and all promises and rewards granted to them by the prosecutor in return for their testimony, will reduce the likelihood of misconduct charges.

There should be a practical approach to the presentation of hearsay. Hearsay is relied upon by government and business leaders every day to conduct sensitive and important transactions. The weight given to the hearsay varies with the nature of the source of the information and the transaction for which it is used. The prosecutor should determine the necessity of the use of hearsay in the same manner. To be admissible, hearsay should meet the following standard: would a reasonable person rely upon the hearsay in conducting the major affairs of his or her own life?

V. Prosecutor's Duty to Present Exculpatory Evidence

The prosecutor is not required to search for or submit to the grand jury evidence favorable to the defendant or negating guilt.[67] He is not required to call to the grand jury's attention "every conceivable discrepancy" in the government's proof.[68] Nor is he required to present evidence which would merely raise issues of credibility or evidence that would not cause a grand jury to refrain from indicting.[69] If, however, the prosecutor is aware of any substantial evidence negating guilt, and the presentation of the evidence might reasonably be expected to cause the grand jury not to indict the defendant, the prosecutor must present that evidence.[70]

Thus, the prosecutor has a great deal of discretion. Courts have ruled, however, that to require the prosecutor to present all evidence that negates culpability or bears upon the credibility of witnesses would turn the grand jury into a mini-trial and away from its function of determining probable cause.[71]

Although the prosecutor need not search for every available bit of evidence favorable to the potential defendant, what if the poten-

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67 United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979).

68 United States v. Litman, 547 F. Supp. 645, 649 (W.D. Pa. 1982), *aff'd*, 661 F.2d 17 (3d Cir. 1981).

69 United States v. Lasky, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 804 (E.D. Pa. 1980).

70 *Ciambrone*, 601 F.2d at 623; United States v. Boffa, 89 F.R.D. 523, 530 (D. Del. 1981).

71 *Ciambrone*, 601 F.2d at 622; *Litman*, 547 F. Supp. at 649.

tial defendant specifically submits the names of several witnesses who he contends will give evidence favorable to him? Some courts have found that potential defendants or other parties have no right to testify before a grand jury.[72] Recently, the Department of Justice revised its policy to require that a potential defendant be notified of his right to appear before the grand jury.[73] In the future, it is likely that a potential defendant's reasonable and specific request that certain witnesses be allowed to testify on his behalf will be granted.

If the prosecutor does accede to the defendant's request, he need not present the exculpatory material in the manner requested by the defendant. All that is required is that the prosecutor make the evidence known to the grand jury.[74] In any event, the grand jury should be told that it has the power to call any of the witnesses that are alleged to have exculpatory evidence.[75]

VI. Summary Argument

The grand jury investigation may last months, and often more than a year. During the course of the investigation the grand jury may hear numerous witnesses and view hundreds of documents. At the close of the investigation, if the prosecutor decides to seek an indictment, there is a need to summarize the vast amount of evidence so that the jury will understand the relevance of the witnesses and the documents. Although there is very little case law on the subject, sound logic dictates that the prosecutor be permitted to summarize the evidence. In *United States v. United States District Court*,[76] the Fourth Circuit approved the prosecutor's summarizing the evidence. The court quoted with approval an opinion written by Judge August Hand:

> If in a complicated case he [the prosecutor] were not allowed to show the grand jurors the bearing of the evidence upon the alleged violation of the statute, they would certainly be confused as to the entire situation. Even a trained judge is often unable to understand the bearing of relevant testimony without the aid of counsel. Asking the grand jury to find an indictment is but putting in words what every act

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[72] *See* United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977); United States v. Gardner, 516 F.2d 334, 339 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); United States v. Fitch, 472 F.2d 548, 549 (9th Cir.), *cert. denied*, 412 U.S. 954 (1973); Gollaher v. United States, 419 F.2d 520, 523 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); Directory Services, Inc. v. United States, 353 F.2d 299, 301 (8th Cir. 1965).

[73] United States Attorneys' Manual tit. 9, ch. 11.263.

[74] In United States v. Sun Myung Moon, 532 F. Supp. 1360, 1368 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1210 (2d Cir. 1983) (prosecutor called seven witnesses suggested by defendant and presented affidavits of nine others), *cert. denied*, 104 S. Ct. 2344 (1984).

[75] *See Gallo*, 394 F. Supp. at 315.

[76] 238 F.2d 713, 721 (4th Cir. 1956).

> of the government, and its representatives, means and is well known to mean. What reasonable objection can be urged against allowing the man who has prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken, perhaps, over weeks or months, and reading from the minutes and giving them a list of the names of the persons charged with the crime? Any objection is really, if not ostensibly, based on the supposition that grand juries are devoid of all independence and prosecuting officers are either tyrannical or dishonest.[77]

The prosecutor must not deviate from a factual presentation. He must refrain from giving his personal opinion as to whether there is probable cause to indict.[78]

VII. Advice as to the Law

Another area that has received little judicial attention is the instruction of the grand jury on the applicable law. If the jurors must decide whether or not there is probable cause that the defendant violated a federal statute, how much instruction must the grand jury receive on the nature of the crime involved?

Since the purpose of the grand jury is to determine if probable cause exists, courts are hesitant to place upon the grand jury the same requirements for instruction as that of a petit jury. For example, one court has held that an incorrect instruction on the law will not void an indictment by the grand jury.[79]

In a recent case,[80] the Ninth Circuit refused to dismiss an indictment because the grand jury was not instructed on the applicable law. The court said: "[The] indictment is normally prepared by the prosecutor, who is presumably acquainted with the 'applicable law.' . . . We are not persuaded that the Constitution imposes the additional requirement that grand jurors receive legal instructions."[81]

Courts will not presume that the grand jury received inadequate instruction.[82] A mere speculation of irregularity will not suffice to cause the court to examine the grand jury transcript.[83] In *United States v. Hart*,[84] the court found that the indictment returned by the grand jury which listed the elements of the crime indicated

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77 *United States District Court*, 238 F.2d at 721 (quoting *Rintelen*, 235 F. at 791).

78 *McKenzie*, 678 F.2d 629, 632 (5th Cir. 1982).

79 *See* United States v. Felice, 481 F. Supp. 79, 82 (N.D. Ohio 1978), *aff'd*, 609 F.2d 276 (6th Cir. 1979).

80 United States v. Kenny, 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

81 *Id.* at 1347.

82 United States v. Hart, 513 F. Supp. 657, 658 (E.D. Pa. 1981).

83 *Id.*

84 *Id.* at 659.

that the grand jury was aware of the legal requirements of the statute.

There should be a basic requirement that the grand jury receive some direction as to what law is alleged to have been violated, without requiring that the grand jury receive instructions as complete as those given a petit jury. The modern federal grand jury deals with complicated violations such as income tax evasion,[85] mail[86] and wire fraud,[87] and violations of the Racketeer Influenced Corrupt Organizations Act (RICO),[88] the Hobbs Act,[89] the Extortionate Credit Transactions Act,[90] and the antitrust laws.[91] Unlike common law crimes such as murder, robbery, rape, or arson which are easily comprehended by laymen, these federal crimes are created by statute and contain terms that must be defined before they can be applied intelligently. Without at least a basic explanation of the terms, even a lawyer in some instances would have difficulty applying some of the statutes.[92] Courts have approved both the prosecutor's

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85 26 U.S.C. § 7201 (1982).

86 18 U.S.C. § 1341 (1982).

87 18 U.S.C. § 1343 (1982).

88 18 U.S.C. § 1962 (1982).

89 18 U.S.C. § 1951 (1982).

90 18 U.S.C. §§ 891-94 (1982).

91 15 U.S.C. § 1, et seq. (1982).

92 For example, consider reading any of the following statutes to the grand jury without any explanation:

18 U.S.C. § 1341 (mail fraud):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (wire fraud):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 892 (loan sharking):

> (a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

giving the grand jury the elements of the offense [93] and reading the statute involved.[94]

The courts have not completely faced the problem. A simple solution would be for the courts in each judicial district to approve a unified procedure for advising the grand jury on the law to be followed in all cases. That procedure could take the form of reading the statute involved if it were not a complex violation, or reading the necessary elements of the crime from any approved treatise on instructions. This procedure would assure that the grand jury receives an adequate instruction so that it can carry out its function of determining probable cause, and would reduce claims that the grand jury was misled by the prosecutor.

VIII. Raising the Issue of Grand Jury Abuse

Following the indictment, if the attorney for the defendant suspects that prosecutorial misconduct has occurred during the investigation, he must sufficiently raise the issue in order to be permitted to examine the transcripts to prove his claim. Courts consistently have refused to release the transcripts of the grand jury on a mere allegation, requiring instead that the defendant show particularized need for the release of the transcripts.[95]

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18 U.S.C. § 891 further defines the terms:

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

[93] *See* United States v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *In re* Terranova, 495 F. Supp. 837, 839 (E.D. Wis. 1980).

[94] *See* United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976); United States v. Slepicoff, 524 F.2d 1244, 1247 (5th Cir. 1975).

[95] *See* United States v. Lame, 716 F.2d 515, 518 (8th Cir. 1983); United States v.

The Seventh Circuit has adopted a procedure whereby a defendant who can make definite allegations of improper conduct may request that the judge examine the grand jury transcripts *in camera* and report if there is any such evidence. If there is evidence, the government is required to acquiesce in the release of the transcripts or suffer a dismissal.[96]

Although no other circuits have adopted this procedure, several courts have examined the transcripts *in camera*, even though they refused to release the transcript to the defendant.[97] The specificity of the allegation necessary to prove particularized need to obtain release of a transcript, or to cause the courts to examine the transcripts *in camera*, is within the discretion of the court[98] and depends upon the factual circumstances of each case.

A sufficient allegation might be raised by submitting affidavits of witnesses who appeared before the grand jury or submitting transcripts of witnesses produced pursuant to the Jencks Act[99] to

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Edelson, 581 F.2d 1290, 1291 (7th Cir.), *cert. denied*, 440 U.S. 908 (1978); United States v. Tocco, 581 F. Supp. 379, 383 (N.D. Ill. 1984); United States v. Pike Industries, Inc., 575 F. Supp. 885, 891 (D. Vt. 1983); United States v. Donohue, 574 F. Supp. 1263, 1266 (D. Md. 1983); *see* 8 MOORE'S FEDERAL PRACTICE § 6.05[3] at 6-114.

The defendant is placed in a dilemma—as stated by Justice Gordon in *United States v. Roethe*, "I appreciate the defendant's dilemma: he wants the grand jury minutes to prove his claim, but he cannot see the minutes until he demonstrates a right to see them." 418 F. Supp. 1118, 1119 (E.D. Wis. 1976).

96 *Edelson*, 581 F.2d at 1291; Pollard v. United States, 441 F.2d 566, 568 (7th Cir. 1971); United States v. Duff, 529 F. Supp. 148, 156 (N.D. Ill. 1981).

97 *See, e.g.*, United States v. Shane, 584 F. Supp. 364 (E.D. Pa. 1984); *Donohue*, 574 F. Supp. at 1268; *Litman*, 547 F. Supp. at 650; *Sun Myung Moon*, 532 F. Supp. 1360 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984); *Roethe*, 418 F. Supp. at 1119.

98 *See supra* note 95.

99 The Jencks Act provides:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(e) The term "statement", as used . . . [above] in relation to any witness called by the United States, means—

* * *

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(b) (1982).

It is the author's experience that some courts often order the government to produce the Jencks Act statements prior to the testimony of the witness, or even prior to trial. As a practical matter prosecutors usually comply without taking exception.

demonstrate improper questioning or arguments.[100] The government should respond "not simply on unsupported pleadings but on affidavits or other evidence tending to support a contrary finding."[101] A request pursuant to *Brady v. Maryland*[102] for favorable testimony given by grand jury witnesses might cause the prosecutor to produce transcripts of witnesses who testified favorably to the defendant while resisting an improper examination.[103]

Defendants may ask the court to examine the prosecutor's advice on the law when the statute charged as being violated is very complicated.[104] Defendants also should ask the court to determine if there was any prejudicial or misleading summarization of the transcripts of prior testimony[105] or the use of transcripts of prior testimony to hide witnesses with credibility problems.[106] Although the courts are reluctant to examine volumes of testimony based upon conclusory allegations, there is a definite trend for courts to examine grand jury testimony when some proof of impropriety can be demonstrated.[107]

IX. CONCLUSION

The grand jury is a powerful and useful institution of government. The grand jury's continued viability depends upon the

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100 *Shane*, 584 F. Supp. at 367.

101 *Id.*

102 373 U.S. 83 (1963).

103 The evidence of the misconduct in United States v. Serubo, 604 F.2d 807 (3d Cir. 1979), was discovered in this fashion. *See id.* at 814.

104 *See, e.g.*, United States v. Sun Myung Moon, 532 F. Supp. 1360 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984).

105 *See supra* note 59.

106 The court in United States v. Shane, 584 F. Supp. 364 (E.D. Pa. 1984), set forth a procedure for determining whether the use of summary transcripts was misleading. The court first must determine whether to review the summaries *in camera* or order the release of the summaries to the defendants. The decision to release the summaries to the defendant turns on the good faith of the prosecutor in using summaries. The court said:

> The prosecutor's burden is to demonstrate good faith in their use. This can be shown by the existence of a very lengthy record, portions of which are not relevant in the prosecutor's estimation to a finding of probable cause. It should be clear, however, that relevance alone as a justification cannot be sufficient to demonstrate good faith, for it leaves in the hands of the prosecutor an editorial decision of grave importance. Rather, relevance can be argued as one of several factors in a carefully thought-out decision not to transmit the full transcript to the grand jury. Further, that the prosecutor provided the grand jury with opportunities for hearing or viewing the entire record, or portions in their entirety, would show good faith.

Shane, 584 F. Supp. at 367 (quoting United States v. Mahoney, 495 F. Supp. 1270, 1276 (E.D. Pa. 1980)).

The court held that administrative convenience does not establish good faith and will warrant disclosure to the defendant. *Id.* at 367. Where the prosecutor can establish good faith the court need only conduct an *in camera* review. *Id.* at 368.

107 *See supra* note 97.

professional integrity of the prosecutor. He cannot abuse his close relationship with the grand jury. He must not mislead the grand jurors by the type of evidence that he presents or hide from them the infirmities of government witnesses. He must not avoid presenting key witnesses that the grand jury should see and hear because of economy of time. The prosecutor should conduct searching examinations and ask hard questions, yet must refrain from berating or badgering witnesses simply to discredit them in the eyes of the grand jury.

The continued viability of the grand jury depends upon the professionalism of the prosecutors who appear before it.[108] If the courts are of the opinion that the prosecutors are carrying out their duties in a straightforward and fair manner, the courts will be reluctant to exercise their supervisory power to impede the work of the grand jury. When the courts strongly suspect that the prosecutors are abusing their positions to obtain an indictment at all costs by resorting to underhanded tactics, or are sloppy in their approach to grand jury practice, the courts will examine closely the activities of the prosecutor.

108 The Department of Justice currently has a nationwide training program for prosecutors with heavy emphasis on grand jury practice. This training should be continued and intensified on the grand jury portion. All newly hired assistant U.S. Attorneys and attorneys in the litigating sections of the Department of Justice in Washington D.C. should be required to undergo this grand jury training in the first three months of their service.