A Mandatory Right to Counsel for the Material Witness

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A MANDATORY RIGHT TO COUNSEL FOR THE MATERIAL WITNESS

In a criminal case, authorities detain a material witness when they believe that the witness will not voluntarily appear at trial. A material witness is "a witness whose testimony is crucial to either the defense or prosecution. In most states, he may be required to furnish bond for his appearance, and, for lack of surety, he may be confined until he testifies." The same factors that lead the authorities to believe that a witness may not return for trial, such as indigence or lack of community ties, make it likely that a material witness will be unable to post bond set by the court or a magistrate. Unless there is a statutory maximum period of confinement or a provision requiring that the police deposite and release the material witness within a specific period of time, detained material witnesses who are unable to post bond may be held in custody until they testify at the defendant's trial. As a result, large numbers of material witnesses are detained annually.

Both federal and state statutes authorize the initial arrest and possible detention of material witnesses believed by the authorities to be unwilling to testify at trial. A few state statutes have

1. Black's Law Dictionary 1438 (5th ed. 1979). See Stein v. People, 346 U.S. 156, 184 (1953)(stressing that "[t]he duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."); Application of Cochran, 434 F. Supp. 1207, 1213 (1977) (defining a material witness as "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government... the deprivation of liberty, although temporary by definition, can be measured in weeks or even months."). See, e.g., 18 U.S.C.A. § 3144 (West 1985) (providing statutory authority on the federal level for the arrest and detention of the material witness).

2. Material witnesses are frequently detained because they are from out-of-state, or because they are indigent. Because they have no ties to the community, they are incarcerated to ensure their testimony at trial. St. Louis Globe Democrat, June 2-3, 1979, at E1, col. 3.

3. See infra notes 35-40 and accompanying text.

4. See infra notes 24-26, 29-30, 37 and accompanying text.

5. See infra notes 29-31 and accompanying text.

provided a mandatory right to counsel for the material witness.\(^7\)

The federal statute includes a discretionary right to counsel for the material witness.\(^6\)

The lack of a mandatory right to counsel creates problems for the material witness. First, because he or she has not been accused of any crime, the material witness is not entitled to the same constitutional protections as are criminal suspects despite the similarities between the criminal suspect and the material witness.\(^9\) Second, police sometimes misuse material witness statutes to incarcerate a suspect until they gather enough evidence to formally charge the material witness as a criminal defendant.\(^10\)

\(^7\) See infra note 39 and accompanying text.

\(^8\) See infra notes 27-28 and accompanying text.

\(^9\) U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." See also Carlson & Voelpel, Material Witness and Material Injustice, 58 Wash. U.L.Q. 1 (1980); Shelef & Shichor, Victimological Aspects of Bystander Involvement, 26 Crime & Delinqu. 193, 201 (1980) ("In some respects, the witness actually has fewer rights than does the accused. The accused may refuse to give evidence; this right is denied to the witness except when the evidence may be self-incriminating.").

\(^10\) See infra notes 82-85 and accompanying text.
Perhaps in response to some of these problems, both individual states, 11 and the federal government, 12 have attempted to reform material witness statutes, with mixed success. 13 Although there have been reforms in other areas affecting the material witness on the federal level, the provision of counsel for the material witness is still a matter of judicial discretion. 14 In fact, a federal legislative attempt to adopt a mandatory right to counsel for the material witness failed in 1984. 15

This Note argues that a uniform statute establishing a mandatory right to counsel should be adopted, at both the state and federal levels, to afford to the material witness protection that the Constitution fails to provide. Part I describes the general scope of the problem and concludes that neither the federal government, the individual states, nor the United States Constitution provides the material witness with a mandatory right to counsel. Part II argues that the material witness should have a statutorily mandated right to counsel. A mandatory right to counsel should be extended to the material witness both for the protection of the witness' rights and for the encouragement of witness participation in the criminal justice system. Part III briefly considers a potential counter-argument to the claim that the material witness should be given a statutory right to counsel, and concludes that the provision of counsel for the material witness need not threaten the constitutional rights of the defendant to confront his or her accuser. Finally, Part IV presents a model statute establishing such a mandatory right to counsel for the material witness and evaluates recent federal legislation that was considered by Congress in 1984.

I. THE FAILURE OF THE PRESENT SYSTEM TO PROVIDE THE MATERIAL WITNESS WITH A MANDATORY RIGHT TO COUNSEL

Material witness statutes date back several hundred years. In the course of their evolution, however, the material witness has never been guaranteed the right to counsel.

11. See infra notes 38-39 and accompanying text.
12. See infra notes 100-07 and accompanying text.
13. See infra notes 36-40, 91-95, 100-07 and accompanying text.
14. See infra notes 24-28 and accompanying text.
15. See infra notes 100-07 and accompanying text.
A. Origin of Material Witness Statutes

The origin of the power to arrest material witnesses is not clear.\textsuperscript{16} Originally, material witnesses who were likely to leave the jurisdiction were detained because of the difficulty of travel between states.\textsuperscript{17} Distance was a very substantial barrier to a witness' return, and a witness who left a jurisdiction was therefore unlikely to be available for trial.\textsuperscript{18} In early twentieth-century cases, detention of material witnesses was allowed only if the witness refused to appear or to provide recognizances.\textsuperscript{19} Courts deemed the inability to pay equivalent to a refusal to pay.\textsuperscript{20}

B. Federal Material Witness Statutes

The first federal statute providing for the arrest and detention of material witnesses was enacted in 1789,\textsuperscript{21} and it remained in effect until a general revision of the United States Criminal Code in 1948.\textsuperscript{22} Neither the first statute, nor Rule 46(b) of the Federal Rules of Criminal Procedure which replaced the statute, provided the material witness with a mandatory right to counsel.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{16} Although some courts have claimed that this power derived from the common law, see, e.g., \textit{In re Craig}, 20 Hawaii 447, 450 (1911), others have traced the existence of material witness statutes to a sixteenth-century English law. \textit{Id.}; \textit{Linsky v. County of Luzerne}, 101 Pa. Super. Ct. 42, 44 (1931)(citing 1 and 2 P. & M. c. 13 (1554)).
  \item \textsuperscript{17} Carlson & Voelpel, \textit{supra} note 9, at 3.
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} \textit{See, e.g., In re Craig}, 20 Hawaii 447, 451 (1911).
  \item \textsuperscript{20} \textit{See, e.g., Howard & Cook v. Grace}, 18 Minn. 398, 402 (1872).
  \item \textsuperscript{21} 28 U.S.C. § 659 (1925):
  
  Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, or to appear to testify therein; and for that purpose, may issue a warrant against such a person, under his hand, with or without seal, directed to the marshall or other officer authorized to execute process in behalf of the United States, to arrest and bring him such person. If the person so arrested neglects or refuses to give recognizance in the manner so required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison therein. And the said person shall remain in confinement for the purpose of giving his testimony, or until he gives the recognizance required by said judge.
  \item \textsuperscript{22} \textit{C.f. Bacon v. United States}, 449 F.2d 933, 938 (9th Cir. 1971).
  \item \textsuperscript{23} Until 1972, Rule 46 of the Federal Rules of Criminal Procedure stated:

  If it appears by affidavit that the testimony of a person is material in any crimi-
The Bail Reform Act of 1966 provided a more liberal provision concerning material witnesses. This Act and its amendments, along with Rule 46(b) of the Federal Rules of Criminal Procedure, provide current authority for the arrest of material witnesses and the bail setting procedures.

In 1970, Congress amended the Criminal Justice Administration Act and included material witnesses in the federal statute authorizing discretionary appointment of counsel. As a result,
indigent material witnesses who are unable to secure counsel may have counsel appointed by the court if the judge believes "it is in the interest of justice." On the federal level, therefore,

28. 18 U.S.C.A. § 3006A(g) (West 1985): "Discretionary appointments.—Any person . . . in custody as a material witness . . . may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation."


**CHAPTER 2. APPOINTMENT AND PAYMENT OF COUNSEL**

Section 1. Eligibility for Representation Under the Act

2.01 District Plans

A. Each district court, with the approval of the judicial council, is required to have a plan for furnishing representation for any person financially unable to obtain adequate representation:

   1. who is charged with a felony or misdemeanor (other than a petty offense as defined in Section 1 of Title 18 of the United States Code, unless the defendant, charged with a petty offense, faces the likelihood of loss of liberty, if convicted) or with juvenile delinquency (See 18 U.S.C. 5034 with regard to appointment of counsel; for appointment of guardian ad litem, see paragraph 3.14 below) or with a violation of probation or parole;

   2. who is under arrest, when such representation is required by law;

   3. who is in custody as a material witness, or seeking collateral relief, as provided in Subsection (g) of the Criminal Justice Act (See paragraph 2.15 below regarding material witness representation) . . .

2.15 Representation of a Material Witness.

While subsection (g) of the CJA provides for the discretionary appointment of counsel for a person in custody as a material witness "when the interests of justice so require," the Bail Reform Act of 1984 requires that counsel be appointed to provide representation at a detention hearing for a person who has been arrested as a material witness. See sections 3144 and 3142 (f) of title 18, United States Code, as amended by P.L. 98-473, 98 Stat. 1837, October 12, 1984. This requirement is incorporated into the CJA through the operation of subsection (a)(2) of the CJA which provides for the furnishing of representation to a person "who is under arrest when such representation is required by law" as well as subsection (a)(5) which provides for the representation of a person "for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel." The $500 limit set forth in subsection (d)(2) of the CJA applies to representation throughout the material witness proceedings.

Because this interpretation is not binding on the courts, Ms. Silverman says that the Criminal Justice Act Division would prefer statutory authority. However, this interpretation does provide advocates with further support for appointment of counsel for the material witness.
the material witness' right to counsel is purely discretionary, and
the decision as to whether or not counsel should be appointed
rests entirely with the judge in the underlying criminal case.

Currently, use of the federal statute results in the confinement
of large numbers of material witnesses annually. One estimate is
that there were nearly 200,000 witness/days spent in detention
in 1978 on the federal level alone. More recent data available
indicates that during the twelve-month period ending June 30,
1983, federal magistrates processed 5,085 material witnesses in
federal district courts. Currently, up to half of all federal of-
fenses in states bordering on Mexico may involve material
witnesses.

Both prosecutors and defense attorneys continue to find mate-
rial witness statutes useful for two reasons. The first involves the
defendant's constitutional right to a complete defense. In some
cases, witness detention is useful to preserve exculpatory testi-
mony. In illegal alien smuggling cases, for example, the defense
commonly requests detention of the allegedly smuggled aliens.

29. Carlson & Voelpel, supra note 9, at 35. The final statistic was obtained by divid-
ing the total compensation paid by the federal government to U.S. citizens held as mate-
rial witnesses by the statutorily determined amount that they are paid per day. Illegal
aliens, however, are forbidden by statute to receive compensation. 28 U.S.C. § 1821(e)
(1982). Therefore, given that the authors did not include illegal aliens held as material
witnesses in computing the totals, these figures may underestimate the total number of
material witnesses held in custody. For a discussion of the scope of detention of illegal
aliens, see infra note 33 and accompanying text.

Conference 201 (table 62) (1983). Analogous data is not available for fiscal

31. Telephone interview with Roger Wolf, Tuscon, Arizona attorney involved in the
drafting of an illegal alien release provision currently in use in Arizona (Sept. 8, 1984).
Interestingly, illegal aliens are no longer exclusively Mexican, or even Central American,
but also include Koreans, Iranians, Yugoslavians and other Eastern Europeans. Tele-
phone Interview with Robert A. Shivers, San Antonio, Texas attorney active in the rep-
resentation of illegal aliens (Sept. 8, 1984). Illegal aliens complicate the material witness
problem, but the topic of illegal alien material witnesses will not be discussed in depth in
this Note. Illegal aliens face all the problems of other material witnesses. They also face
additional hurdles of a bond required by the border patrol, and the constant threat of
being placed in deportation or being formally charged with a border violation under 8
alien material witness.

32. 3 W. LaFave & J. Israel, Criminal Procedure § 23.3(e), 17 (1984) (stating that
the defendant's sixth amendment right to compulsory process, and the fifth amendment
right not to be disadvantaged by financial status, have led all jurisdictions to adopt
"statutes or court rules authorizing defense use of the court's subpoena power to compel
the attendance of witnesses at trial.").

33. Authorities apply material witness statutes to illegal aliens to help convict smug-
glers of aliens. (Smuggled aliens are often referred to as polles, or chickens, and the
smugglers are referred to as coyotes—the chickens are used to catch the coyote.) In
The second reason for continued use of material witness detention statutes is the prosecution's need for corroborative testimony to ensure convictions in some cases. State and federal prosecutors seek detention of material witnesses more often than do defendants, hoping to compel testimony at trial that will lead to conviction of the accused.\(^4\)

C. State Material Witness Statutes

Estimates of material witness detention under state laws are not available.\(^5\) Because state material witness statutes vary greatly, the material witness receives widely disparate treatment from state to state,\(^6\) including but not limited to conditions of release and witness compensation.\(^7\) While some states have recently amended old material witness statutes,\(^8\) only eight state

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United States v. Mendez-Rodriquez, the Ninth Circuit held that deportation of aliens to their homelands before the defendant-smuggler's attorney has been able to interview them deprives defendants of their fifth and sixth amendment rights. 450 F.2d 1, 5 (9th Cir. 1970). Since that decision, federal courts have limited the applicability of the Mendez-Rodriquez rule. See, e.g., United States v. Tsutagawa, 500 F.2d 420, 422 (9th Cir. 1974). In addition, federal courts require that the defendant make an affirmative effort to request that the witnesses be detained. See Uribe v. United States, 529 F.2d 742, 743 (5th Cir. 1976); United States v. Romero, 469 F.2d 1078, 1079 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973). There has also been a movement toward the exercise of judicial discretion on the trial court level, in determining which illegal aliens need be held as material witnesses. See United States v. Hart, 546 F.2d 798 (9th Cir. 1976), cert. denied, 429 U.S. 1120 (1977).

34. Cf. 2 W. LaFave & J. Israel, Criminal Procedure § 12.4(f), 150 (1984) (noting that prospective witnesses in cases involving felonies or major crimes may be brought before a judge of counsel, most generally the prosecutor).

35. There is no centralized data concerning the numbers of material witnesses arrested on the state level.

36. Material witness’ rights are statutorily defined, on both the federal and state level. See supra note 6.

37. See, e.g., Ala. Code §§ 15-11-12 to -14, 14-6-3 (1975) (allowing confinement of prosecution witnesses, including minors and married women, for failure to enter $100 recognizance in any criminal case); N.D. Const. art. I., § 12; N.D. Cent. Code §§ 31-03-19 to -20, -24 (1976); N.D. R. Crim. P. 46(e); N.J. Stat. Ann. §§ 2A:162-2 to -4 (West 1971) (providing for comfortable lodging, separated from defendants or convicts, with as little restriction on movement as possible, but allowing only three dollars per diem in witness fees); N.Y. Crim. Proc. Law § 620.80 (McKinney 1984) (providing appointed counsel, but allowing witness fees of only three dollars a day. Practice Commentary, provided by Joseph W. Bellacosa, ridicules the stipend: “A material witness who cannot make bail and is thus held in custody is entitled to the magnificent compensation of $3 per diem. Perhaps the fine meals and exquisite lodging sometimes afforded in these situations is viewed as sufficient compensation for the enormous deprivation involved.”); Or. Rev. Stat. §§ 136.607-615 (1981) (allowing commitment of witnesses for inability, not refusal, to furnish bond; authorizing compensation of $7.50 per day).

38. Some states have reformed their material witness confinement procedures, requiring that a deposition be taken within a specific time period, or that material witnesses
statutes provide a mandatory right to counsel for material witnesses. Because the rights of the material witness are determined by statute, and state statutes vary widely with regard to treatment of the material witness, the greatest abuses of the material witness appear to occur on the state level.

D. The Fifth and Sixth Amendments Do Not Protect the Material Witness

Both the fifth and sixth amendments may appear to provide the material witness with a mandatory right to counsel, either through the application of the prophylactic Miranda warnings, designed to protect the fifth amendment right of the accused against compelled self-incrimination, or through the expansion of the sixth amendment right to counsel to guarantee representation for all individuals involved in trial proceedings "intimately related" to the criminal trial. Unfortunately, because they are limited in application to criminal proceedings, neither the fifth amendment nor the sixth amendment can be interpreted to grant the detained material witness a right to counsel.

1. The fifth amendment does not provide a mandatory right to counsel for the material witness—Police abuse of material witness statutes might justify an expansion of fifth amendment

39. COLO. CONST. art. II, § 17; CONN. GEN. STAT. § 54-63c (Supp. 1984); ILL. ANN. STAT. ch. 31, §§ 17-18.1 (Smith-Hurd 1969) (only witnesses detained by a coroner at an inquest have the right to counsel); KAN. STAT. § 22-2805 (1981); MONT. CODE ANN. § 46-11-601 (1985).

40. See infra notes 78-85 and accompanying text for discussion of abusive police practices on the state level relating to the material witness.

41. See supra note 9; Miranda v. Arizona, 384 U.S. 436 (1966) (expanding the fifth amendment right against self-incrimination to include pre-trial custodial questioning by the police).

42. See supra note 9; infra notes 54-71 and accompanying text.

43. See infra notes 75-76 and accompanying text.

44. See infra notes 49-53, 67-71 and accompanying text.
derived *Miranda* protections to encompass material witnesses. Because police sometimes arrest suspects as material witnesses and use their non-criminal status to engage in custodial interrogation without providing *Miranda* warnings,\(^46\) the material witness may be entitled to the constitutional protections owed to the criminal suspect in the same setting.\(^46\) The material witness held in custody faces the functional equivalent of arrest\(^47\) in terms of restraint on personal freedom.

However, the fifth amendment privilege against self-incrimination that provides the theoretical underpinning for the prophylactic *Miranda* rights does not extend to material witnesses. The Supreme Court applies a two-prong test to determine whether or not *Miranda* warnings are necessary; the test requires both custody and interrogation.\(^48\) This standard, as interpreted by both federal and state courts, does not extend fifth amendment protections against self-incrimination to the material witness. In *United States v. Anfield*, the Ninth Circuit Court of Appeals stated that the custody of a material witness "was not of the type requiring *Miranda* warnings."\(^49\) Similarly, in *State v. Dictado*,\(^50\) the Washington Supreme Court held that *Miranda* rights need not be extended to material witnesses, and that, furthermore, material witnesses do not have any right to remain silent.\(^51\)

\(^{45}\) See infra notes 82-85 and accompanying text.

\(^{46}\) Suspects questioned by police in a custodial setting have a generally recognized right to counsel. The Supreme Court derived this right from the fifth amendment right against self-incrimination in *Miranda v. Arizona*, 384 U.S. 436 (1966), and clarified this right in later cases. In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Supreme Court stated that *Miranda*-type warnings are required "where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.* at 495.

\(^{47}\) Just like defendants, the material witness faces pre-trial detention, possible loss of a job and certain loss of wages, mental anguish, and other disadvantages of incarceration.


\(^{49}\) 539 F.2d 674, 677 (9th Cir. 1976)(affirming the conviction of defendant on a perjury charge based on statements made by the defendant when he was a material witness in another trial and stating that defendant's incarceration as a material witness did not entitle him to *Miranda* warnings); United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974) (affirming defendant Glasco's perjury conviction based on testimony given while in custody as a material witness without benefit of *Miranda* warnings).

\(^{50}\) 102 Wash. 2d 277, 687 P.2d 172 (1984).

\(^{51}\) *Id.* at 293, 687 P.2d at 182.
Finally, although police interrogation of material witnesses would meet the two-prong *Miranda* test\(^52\) were the agent in custody a suspect instead of a material witness, the wording of the fifth amendment itself excludes material witnesses from its scope, referring explicitly to *criminal* cases.\(^53\) Because the material witness is not a criminal suspect, the fifth amendment does not protect the witness.

2. **The sixth amendment does not provide a mandatory right to counsel for the material witness**— An expansion of the sixth amendment right to counsel afforded to criminal defendants during adversarial proceedings would also aid the material witness.\(^54\) Unfortunately, the amendment’s express limitation to criminal cases\(^55\) excludes the material witness from its scope. Although one federal court has claimed that material witnesses have a constitutionally derived right to counsel,\(^56\) no other court has so interpreted the scope of the sixth amendment to apply to material witnesses. This expansive view does not withstand close constitutional analysis.

In *Gideon v. Wainwright*\(^57\) the Supreme Court applied the sixth amendment to the states through the fourteenth amendment, requiring appointment of counsel for indigents on trial for felony offenses.\(^58\) The Court observed that representation by counsel is essential to assure a fair trial—the objective of the

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52. *See supra* note 48 and accompanying text.
53. *See supra* note 9. *See also* Beckwith v. United States, 425 U.S. 341 (1976) (holding that civil IRS interview in a private home did not constitute custody for *Miranda* purposes); United States v. Woods, 720 F.2d 1022 (9th Cir. 1983) (holding that incriminating statements made by defendants at airport cocktail lounge were admissible as voluntary responses to permissible and limited questions prior to any physical detention or seizure); United States v. Bridwell, 583 F.2d 1135 (10th Cir. 1978) (holding that *Miranda* rights did not vest where defendant was questioned in his own office and was not under arrest and no other indicia of coercion were apparent). The reader should note, however, that the material witness is subject to far more overt forms of coercion, in that the material witness may actually be detained at a police station or in jail with criminal suspects and may be subject to intense periods of interrogation at the discretion of the arresting authorities. *See infra* notes 79-85 and accompanying text. These differences distinguish the rights of a material witness in his or her civil proceeding from cases that deny the fifth amendment right to counsel in other types of civil cases.
54. Sixth amendment protections include the right to a public trial, to be informed of the nature and cause of the accusation, to confront one’s accusers, to compulsory process for obtaining witnesses in one’s favor, and to be assisted by counsel at critical stages in one’s defense if the crime is certain to lead to a prison sentence. Scott v. Illinois, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 28 (1971).
55. *See supra* note 9 for wording of sixth amendment.
58. *Id.* at 344.
sixth amendment. Since Gideon v. Wainwright, the Supreme Court has further expanded the sixth amendment right to counsel, holding that any crime that results in post-conviction loss of liberty for the accused, whether a felony or a misdemeanor, gives rise to a sixth amendment right to counsel at a stage "critical" to the defendant's defense. As the Supreme Court stated in Mempa v. Rhay, "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The material witness meets neither the actual imprisonment standard, nor the critical stage test.

The actual imprisonment standard established by the Supreme Court in Scott v. Illinois for the application of the sixth amendment right to trial, excludes the material witness from the scope of the right. The Court required a showing of actual post-conviction imprisonment, not merely the threat of imprisonment, before the right to be provided with appointed counsel vests for misdemeanants. The Court also noted that the actual imprisonment standard provides clear guidance to states, but that any further expansion of the right to counsel would lead to confusion. Thus, the material witness does not meet this condition for the application of the sixth amendment right to counsel. A material witness is threatened with a loss of liberty prior to the trial rather than subsequent to the trial.

Even if the material witness fell within the parameters of Scott v. Illinois, the material witness' right to counsel would have to vest at a critical stage in a criminal proceeding.

59. Id. at 344.
62. Id. at 134. See also United States v. Ash, 413 U.S. 300 (1973); Coleman v. Alabama, 399 U.S. 1 (1970).
64. Id. at 374.
65. Id. at 373.
66. Although the material witness theoretically may challenge a later conviction that results from his or her detention as a material witness, courts may or may not recognize that claim. See supra notes 84-85 and accompanying text. Effective protection for the material witness depends on an explicit statement of rights.

Of course, no matter how significant the particular proceeding, the Sixth
Regardless of the interrelatedness of the criminal and civil proceedings, material witnesses are not, strictly speaking, "criminals," and are not protected by the sixth amendment. The material witness would meet the critical stages test if he or she were a criminal defendant. Like the fifth amendment, however, the sixth amendment is expressly limited in application to criminal prosecutions. The material witness is arrested pursuant to a criminal investigation, but the procedure itself is civil, and not criminal, in nature. Although the drafters of the House Judiciary Report for the 1970 Criminal Justice Act point out the *functional* similarities between the detention procedures for material witnesses and criminal suspects, the basic civil/criminal distinction is impossible to overcome. Absent a criminal prosecution, the sixth amendment right does not vest. Thus, the material witness is not protected by the sixth amendment.

3. The need for statutory protection—In order to fully protect the material witness, both the fifth and sixth amendment right to counsel would have to be expanded to include the material witness. Neither amendment alone would provide adequate protection for the material witness. The material witness needs to be represented by counsel both during custodial interrogation and at the bail hearing. Because the witness may face intense interrogation prior to the time he or she is brought before a magistrate, the witness needs a *Miranda*-like right to counsel. Because the bond-setting hearing may be crucial to the material witness' hope for pre-trial liberty, the witness needs a right to appointed counsel at the magisterial hearing. The text of both the fifth and sixth amendments precludes the judicial expansion of the amendments to provide this right to counsel for the material witness. Thus, the material witness needs a statutorily defined right to counsel that would apply in either situation.

Although the mechanics of state and federal adoption of a statutory right to counsel may appear cumbersome and unwieldy, the process of statutory amendment is still a compara-

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Amendment right does not apply if the proceeding is not part of the "criminal prosecution." The starting point for the criminal prosecution is the initiation of "adverse judicial proceedings." It is at that point that the individual becomes an "accused" person entitled to the application of the Sixth Amendment guarantee.

68. See Haynes v. Washington, 373 U.S. 503 (1963) (holding that a defendant has a right to contact counsel during the interrogation process).
69. See supra note 9 for wording of the sixth amendment.
70. See infra notes 75-76 and accompanying text.
71. See supra note 9.
72. See infra notes 79-82 and accompanying text.
73. See supra notes 53, 69 and accompanying text.
tive advantage over the present system. The material witness is already under the jurisdiction of statutes that govern the material witness' detention and rights while detained. Some statutes provide a right to counsel, and several even make the right to counsel mandatory. Amending existing statutes that do not provide a mandatory right to counsel for the material witness is therefore a logical step.

II. THE MATERIAL WITNESS SHOULD HAVE A MANDATORY RIGHT TO COUNSEL

The present system discourages the voluntary participation of the material witness by imposing many of the burdens of a criminal defendant upon the material witness without benefit of counsel. Statutory protections, both federal and state, prove to be inadequate to safeguard the material witness from both unjust and unnecessary detention. The material witness, therefore, needs a statutorily defined right to counsel.

A. Functional Similarities Between the Material Witness and the Criminal Suspect Justify a Mandatory Right to Counsel

The legislative history of the 1970 amendments to the Criminal Justice Act provides justification for a mandatory right to counsel for the material witness. The House Judiciary Committee report noted the interrelatedness of the criminal and civil procedure required for the custody of material witnesses, suggesting that because the two procedures are inherently linked, the indigent material witness should be allowed the same right to appointment of counsel as indigent defendants.

The hearing at which a magistrate decides whether or not to require a posting of bond for the release of the material witness

74. See infra notes 78-85 and accompanying text.
76. Id. at 3988. The House Judiciary Report states that "no right to appointed counsel has as yet been recognized under the sixth amendment. The distinction between civil and criminal matters, however, has become increasingly obscure where deprivation of personal liberty is involved." Id. at 3987. The report also notes that material witness proceedings are "intimately related to the criminal process." Id. at 3988.
should be viewed as adversarial.\textsuperscript{77} The outcome of the hearing determines whether the material witness will be deprived of his or her liberty. Therefore, the witness needs counsel to represent his or her interests just as the criminal defendant needs representation at a bail hearing.

\textit{B. Police Abuse of Material Witness Statutes Justifies A Mandatory Right to Counsel}

Police sometimes take advantage of outdated and lax material witness statutes to arrest criminal suspects as material witnesses.\textsuperscript{78} Police can place a suspect under arrest as a material witness and interrogate the suspect without the constraints of the \textit{Miranda} rights\textsuperscript{79} derived from the fifth amendment.\textsuperscript{80} Police may then hold the suspect in custody until they gather enough evidence to establish the probable cause necessary to charge the material witness for the crime under investigation.\textsuperscript{81}

While most use of material witness statutes by prosecutors is in good faith, there are documented cases in which the authorities have misused the statutes by arresting suspects as material witnesses,\textsuperscript{82} thus evading the constitutional protections afforded

\textsuperscript{77} See Coleman v. Alabama, 399 U.S. 1, 8, 10 (1970) (holding that the preliminary hearing is an adversarial stage of the proceedings requiring appointment of counsel when the purpose of the hearing is to determine whether or not there is sufficient evidence to warrant presenting the case to a grand jury, and if so, to set bail if the offense is bailable).

\textsuperscript{78} See infra notes 84-85 and accompanying text.


\textsuperscript{80} See supra note 9.

\textsuperscript{81} See infra notes 82-85 and accompanying text.

\textsuperscript{82} See, e.g., Glinton v. Denno, 200 F. Supp. 643 (S.D.N.Y. 1962) (convicting defendant based on incriminating statements made during 62 days of custodial interrogation as material witness without right to counsel during interrogation), aff'd, 309 F.2d 543 (2d Cir. 1962), cert. denied, 372 U.S. 938 (1963); Wilson v. State, 229 Ga. 395, 191 S.E.2d 783 (1972) (admitting confession of murder suspect obtained through suspect's detention as material witness and following eight days of intensive interrogation); State v. Giovanni, 375 So. 2d 1360 (La. 1979) (reversing and remanding district court's denial of defendant's motion to suppress oral inculpatory statements because defendant's arrest as a material witness was not valid, where no warrant was issued for his arrest as a witness, nor was there an attempt to procure a warrant, nor was there a prior judicial determination that defendant's testimony was essential and that there would be ground to fear his departure from the jurisdiction, and where there was insufficient attenuation between defendant's illegal arrest and his oral inculpatory statements); State v. McKendall, 584 P.2d 316 (Or. App. 1978) (reversing conviction based on confession derived from illegal arrest and interrogation of material witness without benefit of counsel); Wilkerson v. State, 657 S.W. 2d 784 (Tex. Crim. App. 1983) (overturning conviction because police had held defendant as a material witness without a legal basis, and custody as material
to criminal suspects.\textsuperscript{83} Some courts condone the police use of material witness statutes to arrest suspects and accept the confessions of material witnesses obtained under circumstances that would be unlawful if the witnesses had been detained as suspects.\textsuperscript{84} Other courts treat such actions as an impermissible violation of the rights of the accused.\textsuperscript{85} This lack of uniformity in the treatment of material witnesses provides further support for passage of national legislation that would clarify and protect the rights of the material witness. Material witness statutes should not be used to detain suspects. Creation of a statutory right to counsel for the material witness would curtail this abuse.

C. A Mandatory Right to Counsel Would Enhance Voluntary Cooperation by the Material Witness

Witness participation is essential to the success of the United States criminal justice system.\textsuperscript{86} Because of the poor treatment

\begin{quote}

\textsuperscript{83} In Dunaway v. New York, 442 U.S. 200, 219 (1979), the Supreme Court stated that arrest without probable cause violated the fourth amendment and that any confession subsequent to such an illegal arrest must be suppressed. The Court concluded that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the fourth amendment as necessarily to trigger the traditional safeguards against illegal arrest." \textit{Id.} at 216. In addition, the fifth and sixth amendment rights of criminal suspects may be compromised if suspects are instead held as material witnesses. See infra notes 41-71 and accompanying text for discussion of the fifth and sixth amendment rights of the accused.

\textsuperscript{84} See, e.g., State v. Edwards, 419 So. 2d 881 (La. 1982) (holding that illegal detention as material witness and failure to inform the material witness of \textit{Miranda} rights did not invalidate later conviction for murder and robbery about which defendant had made incriminating statements as a material witness); State v. Voltz, 626 S.W.2d 291 (Tenn. Crim. App. 1981) (holding that the conviction of a man who confessed to murder during interrogation in custody as a material witness was valid in spite of the fact that no principal had been arrested when the defendant was taken into custody); State v. Dictado, 102 Wash. 2d 277, 687 P.2d 172 (1984) (concluding that incriminating statements made by defendant while testifying at trial as a material witness could be used against him in his later trial and that defendant was entitled neither to sixth amendment right to counsel nor \textit{Miranda} warnings before testifying at trial as a material witness).

\textsuperscript{85} See, e.g., Rodriguez v. Sandstrom, 382 So. 2d 778 (Fla. 1980) (granting material witness' writ of habeas corpus because no charges were pending before the court against any person in the first degree murder investigation); People v. Allen, 109 Mich. App. 147, 311 N.W.2d 734 (1981) (reversing conviction of a material witness on the grounds that his conviction was prejudiced by his treatment as a material witness; he was not represented by counsel and not given \textit{Miranda} rights); Young v. State, 670 P.2d 591 (Okla. Crim. App. 1983) (invalidating defendant's confession because he was detained originally as a material witness and questioned for 12 hours).

\textsuperscript{86} See \textit{Victim and Witness Assistance}, 14 \textit{CRIM. JUST. NEWSLETTER}, June 6, 1983, at 3 ("The justice system cannot function without the assistance and cooperation of victims and witnesses."). See also Stein v. People, 346 U.S. 158, 184 (1953)(pointing out that
of witnesses that may actually lead to less voluntary cooperation with the police in the long run, the potential abuse of witness detention, and the possibility of error in the prediction of whether or not a material witness will flee before trial, the criminal justice system should use detention of material witnesses sparingly. As a means of attaining this end, it is therefore in the best interests of both the individual material witness and society in general to provide the material witness with a statutory right to counsel.

D. Discretionary Standards Fail to Protect the Material Witness

Although attempts have been made to adapt outmoded material witness statutes to comport with modern conceptions of due process, too little progress has been made in this area in recent years. On the federal level, the material witness’ right to counsel is left to the discretion of the judge in the underlying criminal case.

“interrogation of those who know something about the facts is the chief means to solution of crime”).

87. Witnessing a Crime Can Land You in Jail, Detroit Free Press, Feb. 12, 1979, at 3C, col. 1 (quoting Ronald Carlson, John Byrd Martin Professor of Law, University of Georgia School of Law: “[Material witness] laws aren’t used often, but they’re used just enough to remind the civic-minded public that this danger is out there and could be used if they come forward with what they know about a crime.”). Empirically, witnesses react to adverse treatment by the judicial system by becoming less cooperative with the authorities, resulting in the loss of a significant number of criminal convictions. See Norton, Witness Involvement in the Criminal Justice System and Intention to Cooperate in Future Prosecutions, 11 J. CRIM. JUST. 143 (1983). See also Shellef & Shichor, supra note 9, at 199:

Indifference to the very real problems of the witness can—and does—have unfortunate consequences for the court system itself leading to a general negative attitude toward the system and perhaps a decision by the witness to refuse to participate should a comparable situation arise. These considerations would be apt to spread to the witness’ family and friends—those who learned of his unhappy experience with the criminal process.

88. See supra notes 78-85 and accompanying text.

89. See Application of Cochran, 434 F. Supp. 1207, 1214 (D. Neb. 1977) (pointing out that “[t]he crucial issue when the state seeks to secure the presence of a material witness will usually be whether the witness is likely to appear at the trial in response to a subpoena alone. Certainty is impossible, because the witness’ intentions as to future acts are involved. Thus there is a serious risk of error, which can and should be guarded against.”).

90. The intervention of a lawyer to represent the detained person should alleviate unnecessary disregard for the material witness’ interests. Cf. Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in CRIMINAL JUSTICE IN OUR TIME 64 (A.E.D. Howard ed. 1965).

91. See supra notes 27-28 and accompanying text.
All district courts have complied with federal law requiring that they file plans providing requisite procedures for appointment of counsel. It is not clear, however, whether counsel is regularly being provided for material witnesses. The only available statistics with regard to appointment of counsel quantify the number of public defender attorneys appointed under the Criminal Justice Act to represent detained indigent material witnesses. The statistics indicate that the vast majority of appointments under the Act occur in only three district courts. Because there are large numbers of material witnesses in other districts, this is significant evidence that many material witnesses are going without counsel under federal law.

Despite Congress’ 1970 amendments to the Criminal Justice Administration Act, it is unclear whether or not material witnesses are represented. Regardless of the empirical data to date, representation is discretionary in nature, so that federal law does not provide the material witness with a guarantee of representation. Moreover, even in cases in which the authorities invoke material witness statutes in good faith, courts have noted that society should be wary of depriving a citizen of his or her liberty under circumstances in which the individual is neither accused of a crime nor provided with counsel.


94. Silverman interview, supra note 92. According to Advisory Attorney Silverman, the federal government does not keep complete records in the area of appointment of counsel in federal courts for material witnesses. A breakdown by district of Criminal Justice Act panel attorney appointments for material witnesses in custody for fiscal year 1983 indicates that there were a total of 1,817 such appointments in 1983. The majority of these appointments were made in border areas such as the Southern District of California (1,105), Arizona (426), the Southern District of Texas (59), and New Mexico (21). Therefore, the total number of lawyers appointed for indigent material witnesses may be skewed significantly by what is probably appointment of counsel for illegal aliens in border states. See supra notes 31, 33 and accompanying text. Although illegal alien material witnesses are a significant proportion of the total number of material witnesses, it is unclear why they receive almost all appointed counsel.

95. See Quince v. State, 94 R.I. 200, 205, 179 A.2d 485, 487 (1962) ("To the innocent, even a momentary deprivation of liberty is intolerable; 158 days is an outrage. Confinement of the plaintiff for so long a period among criminals and forcing him to wear prison garb added the grossest insult to injury."). See also State v. Reid, 114 Ariz. 16, 25, 559 P.2d 136, 145 (1976) (noting that the "[c]onfinement of a witness, even for a few days, not charged with a crime, is a harsh and oppressive measure which we believe is justified
Counsel for the Material Witness

III. SAFEGUARDING THE DEFENDANT'S RIGHT TO CONFRONTATION

One possible counterargument to the claim that the material witness should have a mandatory right to counsel is that such reform might violate the criminal defendant's sixth amendment right to confrontation. This right encompasses the right to cross-examine prosecution witnesses. Hypothetically, if the material witness' right to counsel precludes the defendant from confronting or cross-examining the witness, this use of such testimony would violate the constitutional rights of the accused. It could be argued, therefore, that giving the material witness a mandatory right to counsel would reduce the number of criminal convictions. If properly drafted, however, liberalization of material witness statutes will not threaten the defendant's constitutional rights.

Further, it should be noted that our criminal justice system does not eliminate or reduce criminal defendants' rights on the grounds that it would be easier to gain convictions if basic constitutional rights were not observed. In the same vein, even if appointment of counsel makes criminal convictions more difficult in some cases, that does not justify the abuse of any individual material witness' rights. Finally, it is clear that protecting the rights of the material witness will make it more likely, not less likely, that the witness will cooperate.

While release of a material witness and possible reliance upon the deposed testimony at trial could preclude the defendant from confrontation of his or her accuser, safeguards, such as videotaping of the material witness' deposition and the cross-examination of the material witness by defense counsel, can be taken to protect the defendant's constitutional rights. These

only in the most extreme circumstances"), cert. denied, 431 U.S. 921 (1977).
97. See Application of Cochran, 434 F. Supp. 1207, 1214 (D. Neb. 1977) (concluding that the material witness should be given the right to counsel in spite of the state's interest in securing testimony for criminal trials, because "that interest need not be threatened by procedural protections afforded to the material witness whose liberty is threatened. Whatever safeguards are necessary can be incorporated into the extensive criminal procedures necessarily attendant to the criminal prosecution. Moreover, emergency procedures can be devised to serve the legitimate state interest where flight of the witness is imminent.")
98. See supra note 87 and accompanying text for the impact of poor treatment of witnesses on the likelihood of their future cooperation.
99. Both the videotaping of the material witness' deposition and the cross-examination of the material witness by defense counsel at the deposition act as important safeguards of the defendant's sixth amendment confrontation right. See, e.g., M. Belli, Modern Trials §59.1 (2d ed. 1982)(videotape can convey demeanor evidence, witness'
safeguards could be added to any model statute mandating appointment of counsel for the material witness.

IV. PROPOSED AMENDMENT TO MATERIAL WITNESS STATUTES AND RECENT LEGISLATION

The material witness needs legislation devoted to the purpose of guaranteeing right to counsel for the witness. This section provides one example of such a statute, and also analyzes past and current legislative attempts on the federal level to provide a right to counsel for the material witness.

A. Proposed Amendment

STATEMENT OF PURPOSE AND POLICY

Finding that public policy requires a response to the denial of counsel to material witnesses;
that the judicial system cannot function without the cooperation of witnesses, of which material witnesses are a vital component;
that material witnesses are innocent people who have witnessed, not committed, a crime;
that the present system discourages the participa-
tion of material witnesses in the judicial system;
that in the present system, neither constitutional guarantees nor statutory provisions adequately protect material witnesses from abusive police interrogation and/or lengthy confinement;
and, that material witnesses and society in general will benefit from more equitable treatment of material witnesses,

This legislation amends and supplements other material witness statutes by providing for a statutory right to counsel for all material witnesses.

SECTION 1: DEFINITIONS

In this Act:
(a) "material witness" means a witness to a criminal act whom the police have designated as unlikely to voluntarily provide needed testimony at trial, and who is therefore arrested by police to compel appearance at trial.
(b) "custodial interrogation" means questioning during custody.
(c) "indigent" means financially unable to obtain counsel, as determined by a magistrate or by the court through appropriate inquiry.

SECTION 2: RIGHT TO COUNSEL

A material witness must be provided with counsel. Prior to custodial interrogation, arresting authorities must inform the material witness of a right to have counsel present during custodial interrogation. Police must inform an indigent material witness of a right to have counsel appointed by the court. United States Magistrates and District Judges may appoint counsel for material witnesses.
Comment

This provision establishes the statutory and mandatory right of material witnesses to be represented by counsel during custodial interrogation. It also provides for the appointment of counsel for indigent material witnesses in a manner similar to the provision of counsel for indigent defendants.

SECTION 3: COURT APPEARANCES

Unless the material witness has knowingly, intelligently and voluntarily waived the right to counsel, the material witness must be accompanied by counsel at any hearings affecting conditions of release.

Comment

Like a defendant held before trial, the material witness needs representation in court, at the bail hearing or any other hearing, to adequately protect his or her rights. Because the material witness is incarcerated without suspicion of guilt for any crime, but is not afforded the same constitutional protections as a criminal suspect, the need for representation by counsel is particularly acute.

SECTION 4: RELEASE OF MATERIAL WITNESSES

No material witness shall be detained because of an inability to post a bail bond if the testimony of the witness can be adequately secured by deposition under this section.

Comment

This section is provided to guarantee prompt release of the material witness. This section could operate in conjunction with a system for videotaping material witness testimony in order to protect the constitutional rights of the criminal defendant. A separate program should be established to deal with the unique
problems faced by illegal alien material witnesses in border states.

SECTION 5: ENFORCEMENT

Any violation of section 2 or section 3 of this legislation shall result in the suppression of that witness' testimony at the relevant criminal trial.

Comment

This provision provides an enforcement mechanism for the statute. The threat of suppression of testimony is introduced to encourage compliance with the rest of the statute.

B. 1984-85 Reform Attempts

Legislation introduced during the 1984 congressional session, as part of the Criminal Justice Act Revisions of 1984, would have eliminated the discretionary nature of the appointment of counsel and mandated representation of all indigent material witnesses. Time constraints forced Congress to condense the legislation, passing some amendments to the Criminal Justice Administration Act but omitting the material witness provision. This portion of the legislation has since been reintroduc-
duced as separate legislation in the 1985-86 legislative session.\textsuperscript{102} The House of Representatives has passed the bill.\textsuperscript{103} Thus, it may pass into law in 1986.\textsuperscript{104}

Even if this bill becomes law, however, its limited scope precludes increased effectiveness in dealing with the problems of material witnesses. The current legislation, like last year's proposed amendment to the Criminal Justice Act, constitutes a brief addendum to a statute providing counsel for indigent criminal defendants.\textsuperscript{105} Neither bill would focus any attention on the unique constitutional posture of detained material witnesses. There are two specific problems that neither bill recognized. First, the proposed statutes both fail to state explicitly that a detained material witness who is not indigent has a right to counsel.\textsuperscript{106} This is important because the material witness needs a statute that provides explicit recognition of the right to counsel as a general rule. Second, the bills fail to provide guidelines with regard to the permissibility of custodial interrogation before the court appoints counsel for the indigent material witness.\textsuperscript{107} Neither bill provides a clear statement of the material witness' rights. The legislative proposals thus fail to provide an adequate model for the states to follow.

**CONCLUSION**

In the present system, the material witness lacks basic protections granted to all criminal defendants. Because neither the United States Constitution nor the various state and federal statutes that authorize detention of the material witness provides adequate protection against unfair detention and police

\textsuperscript{102} H.R. 3004 § 2(a)(1)(g), S. 1581 § 2(a)(1)(g), 99th Cong., 1st Sess. (1985) (identical bills in the House and Senate).


\textsuperscript{104} The Senate bill was referred to the Judiciary Committee on August 1, 1985. There has been no further action. 1 CONG. INDEX (CCH), 99th Congress, Senate, 1985-86.

\textsuperscript{105} See H.R. REP. No. 764, 98th Cong., 2d Sess. 1 (1984)(documenting the need to upgrade Criminal Justice Act (CJA) attorney fees, and noting that this is "[t]he primary impetus for the revision of the CJA").

\textsuperscript{106} See id. Neither bill would deal with the general issue of guaranteeing counsel for material witnesses. See supra notes 41-71 and accompanying text for discussion of the constitutional status of provision of counsel for the material witness.

\textsuperscript{107} See supra notes 78-85 and accompanying text.
abuse, a uniform statute should be adopted to mandate provision of counsel for the material witness.

—Susan Kling