Michigan Law Review

Volume 63 | Issue 3

1965

Grand Jury Secrecy

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GRAND JURY SECRECY

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RECENT opinions of the Supreme Court of the United States have expressed an increasing concern with outmoded criminal practices of our courts, both state and federal.[1] Perhaps motivated by these decisions, a discernible trend toward a more realistic and liberalized procedure of criminal discovery is emerging in many jurisdictions. The past decade, for example, has seen a thorough reappraisal of the use of grand jury minutes and concomitant efforts of courts to place within proper perspective what was previously considered an inviolable doctrine of grand jury secrecy. But, with every such trend toward judicial "reform," there appear countering forces that seek to maintain the status quo or to force a retreat to legal concepts long antiquated and rejected. Such a force, opposing the more liberalized use of grand jury minutes by defendants, has been the "reform" legislation recently enacted by the Illinois Legislature.[2]

While an increasing number of jurisdictions have recognized the need for permitting a defendant greater access to grand jury minutes, the Illinois Legislature, by its newly enacted Code of Criminal Procedure, has virtually eliminated all opportunity for a defendant to gain access to such minutes. In so doing, the legislature has purported to withdraw control of grand jury proceedings from the courts and to place it in the state's attorney's office, an unprecedented innovation. In substance, the new provision provides that only "when the State uses, for the purposes of examining any witness, any part of a transcript of matters occurring before the Grand Jury" may that portion "be disclosed when the court . . . in the interests of justice so directs."[3]

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1. *E.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (pertaining to defendant's right to favorable evidence that is in the possession of the prosecution); Gideon v. Wainwright, 372 U.S. 335 (1963) (pertaining to defendant's right to counsel); Jencks v. United States, 353 U.S. 657 (1957) (pertaining to defendant's right to statements of government witnesses). See also Brennan, *Remarks on Discovery*, 33 F.R.D. 47, 56 (1963).

2. ILL. REV. STAT. ch. 38, § 112-6 (1963).

3. ILL. REV. STAT. ch. 38, § 112-6(b) (1963) provides in full:

"(b) Matters other than the deliberations and vote of any grand juror may be disclosed by the State's Attorney solely in the performance of his duties. When the State uses, for the purpose of examining any witness, any part of a transcript of matters occurring before the Grand Jury, that portion of the transcript may be disclosed when the court, preliminary to or in connection with

When a leading state such as Illinois enacts "reform" legislation, an impact on the legislatures of other jurisdictions may be anticipated. Accordingly, a need exists for an examination of this legislation in the light of the common-law background of grand jury secrecy and for a further analysis of it in the face of the growing trend toward more liberalized discovery of grand jury minutes in other jurisdictions. It is the contention of the author that such an empirical study will demonstrate that this legislation adopted by Illinois is contrary to all modern judicial thinking and is, in fact, a retrogressive step toward a period long outdated; that it facilitates serious abuses inherent in granting to the prosecution sole control over the use of grand jury minutes; and that, by the very limitations it creates, a serious question is raised as to its constitutionality.

I. Historical Background of Grand Jury Secrecy

A cursory analysis of the historical background of grand jury secrecy reveals two important considerations: recognition of grand jury secrecy was motivated by a grave need for protecting the grand jury from the abuses of the Crown; and, the common-law doctrine of grand jury secrecy was never envisioned as an instrument to be invoked or waived as the prosecution saw fit.

At its inception in England in 1166, the grand jury was not protected by principles of secrecy; its deliberations were open to the public, and it functioned solely in the interest of the Crown.[4] This was an age when little regard was given to the rights of private citizens. The Grand Assize, as the grand jury was called, was in-

a judicial proceeding, directs such in the interests of justice. The court may direct that a Bill of Indictment shall be kept secret until the defendant is in custody or has given bail and in either event the clerk shall seal the Bill of Indictment and no person shall disclose the finding of the Bill of Indictment except when necessary for the issuance and execution of a warrant. Any grand juror or officer of the court who shall disclose, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection shall be in contempt of court, subject to proceedings in accordance to law."

4. Some commentators contend that the Assize of Clarendon issued by Henry II in 1166 was not the precursor of the grand jury, but the petit jury. One commentator asserts that it was not until 1368, toward the end of the reign of Henry III, that the modern practice of returning a panel of twenty-four men called "the graunde inquest" to inquire for the county was established. Edwards, The Grand Jury 26 (1906). Other authorities note that similar accusing bodies may have been utilized by the Athenians before the Christian era, by the Saxons who settled in England in the fifth and seventh centuries, and by the Scandinavians in the eighth century. For a discussion of this historical background, see 1 Holdsworth, A History of English Law 312-27 (3d ed. 1922); Stephen, A History of the Criminal Law of England 184-86, 250-58 (1883).

voked to augment the power of the Crown by acting as a public prosecutor for the purpose of ferreting out certain crimes. In 1368, after a long period of diminishing importance of the Grand Assize as an accusatory body, there emerged a wholly distinct body called "*le graunde inquest*," which subsequently lodged all criminal charges whether or not private accusers came forward. Significantly, this body adopted the custom of hearing witnesses in private, thereby establishing some independence of action from the Crown.[5]

However, the true independence of the grand jury and the institution of grand jury secrecy as a legal concept received their first real impetus in 1681 as a result of the *Earl of Shaftesbury Trial*.[6] In that case, the King's counsel had insisted that the grand jury hear in open court testimonial evidence of certain treason charges that had been lodged by the Crown against the Earl of Shaftesbury. Following the hearing, the jurors demanded and were granted the right to interview the witnesses in private chambers. Although the Crown had expected full acquiescence, the indictment ultimately was returned by the jury with the word "ignoramus" written across it. The jurors gave only their consciences as the reason for declining to indict. The case was thereafter celebrated as a bulwark against the oppression and despotism of the Crown.[7]

This procedure of receiving testimony in private, outside the presence of the prosecution and defendant alike, was a common practice for a considerable period of time.[8] As fear of coercion from

5. See EDWARDS, *op. cit. supra* note 4, at 27. See also Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1103 (1955).

6. 8 How. St. Tr. 759, 771-74 (1681). For a discussion of this case, see EDWARDS, *op. cit. supra* note 4, at 29, and 8 WIGMORE, EVIDENCE § 2360 (3d ed. 1940).

7. A second case, Trial of Stephen College at Oxford for High Treason, 8 How. St. Tr. 549, 550 (1681) is also cited for the meritorious action of the grand jury in withstanding the strongest possible pressure from the Crown. The presiding judge compelled the grand jury to hear witnesses in court. The grand jury then demanded that they be permitted to examine the witnesses in private, which the court allowed. After considering the matter for several hours, they ignored the bill, refused to return an indictment, and informed the court that they had given their verdict according to their consciences and would stand by it. Edwards states:

> "It was in this period that the independence of the grand jury became established. No longer required to make known to the court the evidence upon which they acted, meeting in secret and sworn to keep their proceedings secret by oath which contained no reservation in favor of the government, selected from the gentlemen of the best figure in the country, and without regard to their knowledge of any particular offence, the three centuries that followed the return of twenty four knights [1368], witnessed its freedom of action from all restraint by the court. The independence which the institution had attained was soon to be put to the severest tests, but protected by the cloak of secrecy and free from the control of the court as to their findings, they successfully thwarted the unjust designs of the government." EDWARDS, *op. cit. supra* note 4, at 28.

8. *E.g.*, People v. Klaw, 53 Misc. 158, 104 N.Y. Supp. 482 (N.Y.C. Gen. Sess. 1907). If a

governmental influences subsided, however, a prosecutor for the Crown or state was permitted to be present during the taking of testimony in order that he might draw the form of the indictment desired by the jury. Gradually, in the late nineteenth and early twentieth centuries, there evolved greater freedom in the use of grand jury proceedings by the state, and, today, it is a commonly accepted right of the state.

In examining the evolution of grand jury secrecy, it is important to note that the common-law concept of secrecy that was imparted to American jurisprudence arose initially from a need to protect the grand jurors and private citizens from the oppression of the state. It was not intended to aid the prosecution in its discovery of facts or to protect the prosecution's case from disclosure.

At the present time, the reasons for the policy of grand jury secrecy are, for the most part, very different from those for which it was originally conceived. Therefore it is essential to ascertain and analyze these reasons in order to determine whether a need for secrecy continues. If valid reasons for a policy no longer exist, certainly any requirement to pursue that policy should terminate. Grand jury secrecy should be maintained to the full extent necessary to fulfill the ends of justice, and no further.[9]

Courts normally advance four reasons in justification of grand jury secrecy:

1. The grand jurors should be free from the apprehension that their opinions and votes may subsequently be disclosed by compulsion;
2. The complainants and witnesses summoned should be free from the apprehension that their testimony may be subsequently disclosed by compulsion so that the state may secure willing witnesses;
3. The guilty accused should not be provided with information that might enable him to flee from arrest, suborn false testimony, or tamper with witnesses or grand jurors;
4. The innocent accused, who is charged by complaint before the grand jury but exonerated by its refusal to indict,

grand juror disclosed to any person indicted for a felony the evidence that was given before the grand jury, he was thereby made an accessory to the crime; and, in the days of Blackstone, such juror was guilty of high misprision and liable to fine and imprisonment. See Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940); Goodman v. United States, 108 F.2d 516 (9th Cir. 1939). Even today, in Texas and Missouri, violation of grand jury secrecy is a misdemeanor. Mo. REV. STAT. § 3924 (1959). Addison v. State, 85 Tex. Crim. 181, 211 S.W. 225 (1919); Misso v. State, 61 Tex. Crim. 241, 135 S.W. 1173 (1911).

9. See 8 WIGMORE, EVIDENCE § 2360 (McNaughton rev. 1961).

> should be protected from the compulsory disclosure of the fact that he has been groundlessly accused.

Of paramount importance is the maintenance of secrecy concerning the deliberations and votes of the grand jurors themselves, both during and subsequent to a hearing.[10] The citizen who assumes this high and responsible duty must be assured that the law will not permit him to be subjected to the malice and consequent injury that might result from an accused neighbor's knowledge that he advocated and voted for the latter's indictment. Few, if any, courts have broken the seal of secrecy in this regard, and its permanence exists even after the indictment has been returned, the accused apprehended, and the grand jury discharged.[11]

The second reason for secrecy, to facilitate free and open disclosure by witnesses and complainants, is of particular importance to the state during the preparation of its case. Inasmuch as the state desires to insure that sufficient evidence is forthcoming from those appearing before the grand jury, witnesses and complainants are protected, at least temporarily, against compulsory disclosure of their testimony. Secrecy is the state's inducement for obtaining evidence.[12]

The third reason is also of importance to the state because an accused should not know of the charges until the state can apprehend him and place him in custody. Premature disclosure might facilitate his escape. Furthermore, courts have recognized that the grand jury's function of making a preliminary and ex parte investigation to ascertain probable cause could easily be impeded by an accused who, knowing of the proceedings and fearing indictment,

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10. See United States v. Farrington, 5 Fed. 343, 347 (N.D.N.Y. 1881); People v. Goldberg, 302 Ill. 559, 135 N.E. 84 (1922); Turk v. Martin, 232 Ky. 479, 23 S.W.2d 937 (1930); State v. Borg, 8 N.J. Misc. 349, 150 Atl. 189 (1930); State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233-34 (1940).

11. See Costello v. United States, 350 U.S. 359 (1956). Its establishment in the Constitution "as the sole method for preferring charges in serious criminal cases" indeed "shows the high place it [holds] as an instrument of justice." *Id.* at 362. See also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). A number of jurisdictions have provided by statute that the votes and deliberations of the grand jury may not be disclosed. See, *e.g.*, FED. R. CRIM. P. 6(e); ARIZ. R. CRIM. P. 106(b); FLA. STAT. § 905.25 (1963); KAN. GEN. STAT. ANN. § 62-924 (1949); MASS. GEN. LAWS ANN. ch. 277, § 13 (1959); NEB. REV. STAT. § 29-1415 (1956); OHIO REV. CODE ANN. § 2939.19 (Page 1954); WASH. REV. CODE § 10.28.100 (Supp. 1956); WIS. STAT. ANN. § 255.20 (1957); WYO. STAT. ANN. § 7-111 (1957).

12. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). See also 8 WIGMORE, *op. cit. supra* note 9, § 2362.

obtained witnesses through collusive means to testify falsely on his behalf.[13]

The fourth reason is of particular importance to the innocent accused, who, having been exonerated by the grand jury, must be protected from any possible condemnation or suspicion on the part of friends or the public generally. Such protection can be maintained only by permanent secrecy of the grand jury proceedings brought against him.

Once the accused has been indicted, apprehended, and the grand jury discharged, however, a question arises as to the need for continued secrecy. As noted above, courts do not challenge the need for permanent secrecy of the grand jury's votes, deliberations, and the fact that an innocent accused has been exonerated. But whether the policy reasons for secrecy continue to exist with respect to a witness' or complainant's testimony before the grand jury if subsequent proceedings are brought raises a highly perplexing problem. Thus, this area of secrecy must be further explored.

II. Permanent Secrecy of Grand Jury Testimony

Unquestionably, one of the most controversial issues discussed by judges and lawyers alike is the need for continued secrecy of a witness' testimony once the grand jury has been discharged and the accused apprehended. Generally urged as a reason for continued secrecy is the effect disclosure might have on future witnesses before the grand jury who might hesitate to testify freely if they knew that the evidence they give might soon thereafter be in the hands of the accused.[14] The possibility of reprisal, it is contended, is also a realistic reason for continued secrecy unless the clear demands of justice require disclosure.[15] Furthermore, the possibility that an accused who has knowledge of the evidence against him might tamper with the prosecution's witnesses or suborn false testimony for use at the trial is suggested as an additional reason for continued secrecy.

13. See Atwell v. United States, 162 Fed. 97 (4th Cir. 1908).

14. See Minton v. State, 113 So. 2d 361 (Fla. 1959).

15. The Supreme Court in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959) states:

> "Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness."

See also Minton v. State, *supra* note 14; United States v. General Motors Corp., 15 F.R.D. 486, 488 (D. Del. 1954).

Any analysis of these reasons, however, demonstrates that they are more theoretical than practical. First, the rule of secrecy concerning matters transpiring in the grand jury room is designed primarily as an aid and protection to the grand jury, not the witnesses appearing before it.[16] A witness is not a confidential informant;[17] he must consider his testimony subject to all the obligations of oath required in any judicial proceeding.[18] In revealing damaging evidence before the grand jury, the witness must expect that such evidence will be disclosed at trial. Therefore, any hesitancy that a witness might have in divulging harmful evidence before the grand jury ordinarily would be based upon a fear of the eventual necessity of giving that same evidence in open court rather than the fear that, having once given such harmful evidence, his grand jury testimony might be divulged. Disclosure of the prior testimony will not unduly discourage free statements by witnesses before the grand jury.[19]

Second, the disclosure of a witness' grand jury testimony cannot cause any fear of retaliation or embarrassment that is not already created by the testimony given in open court. Normally such disclosure will only affirm that the same damaging evidence was given before the grand jury. Indeed, Wigmore states:

> "If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce."[20]

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16. *E.g.*, United States v. Amazon Industrial Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931). The Advisory Note to FED. R. CRIM. P. 6(e) states:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

17. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 406-07 (1959) (dissenting opinion).

18. *E.g.*, State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); People v. Goldberg, 302 Ill. 559, 135 N.E. 84 (1922); State v. McPherson, 114 Iowa 492, 87 N.W. 421 (1901); State v. Benner, 64 Me. 267 (1874); State v. Morgan, 67 N.M. 287, 354 P. 2d 1002 (1960); Gordon v. Commonwealth, 92 Pa. 216 (1879).

19. The court in United States v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1955), recognized the application of this principle in both the criminal prosecution and the subsequent civil action arising from the same violation.

20. 8 WIGMORE, *op. cit. supra* note 9, § 2362, at 736. In Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 406 (1959), Mr. Justice Brennan stated in his dissenting opinion: "His [a key prosecution witness] testimony has been extremely damaging. Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced." See also State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960).

Third, a policy of continued secrecy concerning grand jury testimony will have little deterrent effect on the defendant who seeks to tamper with or suborn witnesses at his trial.[21] If an unscrupulous party wishes to tamper with a witness' testimony, he will do so regardless of whether the minutes are made available to him. Once he has knowledge of the names of the witnesses who will testify against him, which in most jurisdictions is provided prior to trial, it is irrelevant to him what was said before the grand jury.[22] And the prosecution, armed with the grand jury transcript, is fully equipped to detect such unlawful conduct.[23] Such a possibility should not stand as an obstruction to a defendant who seeks only to present his best defense and to impeach those testifying against him.[24] Certainly such a reason for maintaining secrecy is wholly inapplicable once the witness has testified adversely to the defendant, since it is then absolutely clear that the witness has not been suborned.[25]

The abuses inherent in refusing disclosure may be serious indeed.[26] A person, assured that his grand jury testimony will remain forever inviolate, could testify to one thing before the grand jury and to something entirely different before the petit jury. And, unless the subsequent testimony ran counter to that which the prosecution wished to obtain, there would be no way for the defend-

21. See State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959).

22. The court in Murphy v. State, 124 Wis. 635, 653, 102 N.W. 1087, 1093 (1905), stated: "[T]he danger of subornation . . . is quite effectually disregarded in modern criminal law, which approves the right and procedure by which the accused, in fairness, is informed before the trial of the witnesses the state relies upon to establish the case." The rules of all American jurisdictions concerning the disclosure of witnesses' names prior to trial are set forth and analyzed in 6 WIGMORE, *op. cit. supra* note 6, §§ 1850-55.

23. See United States v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1955).

24. In Commonwealth v. Mead, 78 Mass. (12 Gray) 167 (1858), the court stated:

> "[I]t is clear that the rights of the accused might be greatly affected and his peril much increased, if he can be shut out from showing the fact that an important witness against him is unworthy of credit, or that his testimony before the jury trial is to be taken with great caution and doubt because on a previous occasion, when called to testify on oath, he had given a different account of the same transaction from that which he has stated in his evidence at the trial."

See also Clanton v. State, 13 Tex. App. 139 (1882).

25. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 406 (1959) (dissenting opinion).

26. The Sixth Circuit in Schmidt v. United States, 115 F.2d 394, 397 (6th Cir. 1940), recognized the evils and abuses of strict secrecy:

> "It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their

ant to submit the contradiction to the jury.[27] It is the policy of the law that the truth be ascertained; the state has no interest in convicting an accused on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. No possible injury to the prosecution can arise from disclosure of a witness' grand jury testimony. Presumably, it will be the same as that given at the trial. However, if inconsistencies or conflicts arise, it is unquestionably in the interest of the state as well as of the defendant that such be disclosed and justice assured.[28]

It is significant to note that, when the prosecution seeks to use grand jury testimony to further its own case through impeachment of witnesses or refreshment of their recollection, no limitations of secrecy exist.[29] This has not always been true, for as recent as one century ago the state as well as the defendant was barred from invading the secrecy of the grand jury.[30] In a series of nineteenth century cases, prosecutors set forth the very reasons now urged on

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enemies. If malicious, ambitious or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of 'the citizen against the unfounded accusation, whether it comes from the government or be prompted by partisan passion, or private enmity' . . . which it was primarily designed to provide, may become an engine of oppression and a mockery of justice."

See also Herman Schwabe, Inc. v. United Shoe Mach. Corp., 194 F. Supp. 763 (D. Mass. 1958); United States v. Procter & Gamble Co., 19 F.R.D. 122, 126 (D.N.J. 1956); State v. Harries, 118 Utah 260, 221 P.2d 605 (1950).

27. See United States v. Worcester, 190 F. Supp. 548, 559 (D. Mass. 1960); State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960).

28. See Commonwealth v. Mead, 78 Mass. (12 Gray) 167 (1858); State v. Morgan, *supra* note 27. The court, in Gordon v. United States, 299 F.2d 117, 118 (D.C. Cir. 1962), stated: "Whatever invasion of the historic sanctity of grand jury proceedings such examination may cause, if any, seems to us outweighed by the additional certainty this procedure will lend to the process of verifying as credible the uncorroborated testimony of a sole witness for the government." See also Brady v. Maryland, 373 U.S. 83 (1963).

29. United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Cotter, 60 F.2d 689 (2d Cir. 1932). For purposes of impeachment, see Hickory v. United States, 151 U.S. 303, 308 (1894); Sneed v. United States, 298 Fed. 911, 914 (5th Cir. 1924); for purposes of refreshing recollection, see Hyde v. United States, 225 U.S. 347, 377 (1912); Putnam v. United States, 162 U.S. 687, 694 (1896); for purposes of refreshing a hostile witness, see Felder v. United States, 9 F.2d 872, 874 (2d Cir. 1925), *cert. denied*, 270 U.S. 648 (1926). *But see* Rosenthal v. United States, 248 Fed. 684, 686 (8th Cir. 1918); for purposes of reading into evidence a confession of defendant before the grand jury, see Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933).

30. People v. Klaw, 53 Misc. 158, 104 N.Y. Supp. 482 (1907).

behalf of defendants as grounds for lifting the bar of secrecy once the grand jury has been discharged and the accused is in custody.[31]

Recognizing that the rule of secrecy may be breached at any time by the state and that the witness himself may disclose all,[32] a growing number of courts have specifically held that the reasons for maintaining grand jury secrecy end when that body is discharged and the accused is apprehended.[33] In lifting the veil of secrecy, courts have argued that the rigid maintenance of the rule would constitute a bar only to the defendant, who has most at stake in learning the truth of the charges brought against him.[34] Many courts,[35] including the United States Supreme Court,[36] have at least recognized a discretionary power in the courts to permit disclosure of such testimony. And a large number of legislatures have, in fact,

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31. In Bressler v. People, 117 Ill. 422, 8 N.E. 62 (1886), the state sought to use the grand jury testimony of a witness to impeach him. The court, in permitting the state to do so, stated:

> "When the indictment is returned, and the defendant arrested and placed upon trial, *neither statutory nor common law reasons for secrecy can apply.* There can be no reason, then, why evidence given before a grand jury should not be made known, and proved, if the ends of justice require it. A contrary course would tend to defeat, instead of to promote justice, and be directly in opposition to the tendency of the age, which is to enlarge, rather than to contract, the source of evidence. . . ."

117 Ill. at 437, 8 N.E. at 67. (Emphasis added.)

See also State v. Bovino, 89 N.J.L. 586, 99 Atl. 313 (1916); State v. Mageske, 119 Ore. 312, 249 Pac. 364 (1926); State v. Krause, 260 Wis. 313, 50 N.W.2d 439 (1951).

32. See United States v. Amazon Industrial Chem. Corp., 55 F.2d 254, 262 (D. Md. 1931), where the court stated: "If . . . from such witnesses complete disclosure is possible of all testimony given to a grand jury, what is the basis for prohibition against vicarious disclosures in the absence of proof of actual injury."

33. *E.g.*, Beatrice Foods Co. v. United States, 312 F.2d 29, 39 (8th Cir. 1963); United States v. Zborowski, 271 F.2d 661 (2d Cir. 1959); Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933); State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); Turk v. Martin, 232 Ky. 479, 23 S.W.2d 937 (1930); State v. Faux, 9 Utah 2d 350, 345 P.2d 186, 187 (1959).

34. See Turk v. Martin, *supra* note 33; People v. Klaw, 53 Misc. 158, 104 N.Y. Supp. 482 (N.Y.C. Gen. Sess. 1907).

35. The only noticeable exception is Ohio, where the court has rigidly required absolute secrecy. State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910).

36. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940). FED. R. CRIM. P. 6(e) provides in part:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

See also UNIFORM RULES OF EVIDENCE 35, 44 (1953); MODEL CODE OF EVIDENCE RULE 229 (1942); ALI, CODE OF CRIMINAL PROCEDURE §§ 144-45 (1930).

enacted statutes that permit such disclosure for purposes of impeachment.[37]

In recognizing that a trial judge has inherent discretionary power to permit disclosure in the interests of justice, varying views have been presented by the courts as to when this power should be exercised. Normally, four considerations govern this determination: timeliness of the request, scope of the request, delay that the request will cause, and extent of the burden placed upon the judge. The importance of these considerations depends substantially on whether the request for disclosure is made prior to trial or during trial.

III. Pretrial Motions for Grand Jury Minutes

A. *Pretrial Preparation*

A very limited but perhaps growing number of jurisdictions, either by judicial fiat[38] or statute, have granted motions for pretrial disclosure of grand jury minutes to facilitate pretrial preparation.[39]

37. Numerous state statutes provide that a court may require disclosure of testimony of a witness examined before the grand jury in order to ascertain whether it is consistent with that given by the witness before the court or to resolve a charge of perjury. See Ala. Code tit. 14 § 272 (1959); Alaska Comp. Laws Ann. § 66-8-35 (1949); Ariz. R. Crim. P. 106(b), 107; Ark. Stat. Ann. § 43-930 (1947); Cal. Pen. Code § 938.1; Fla. Stat. § 905.27 (1963); Idaho Code Ann. § 19-1112 (1948); Ind. Ann. Stat. §§ 9-816, 9-817 (1956); Iowa Code § 771.24 (1962); Kan. Gen. Stat. Ann. §§ 62-923, 62-925 (1949); Ky. Crim. Code §§ 110, 113 (Baldwin 1953); Mich. Comp. Laws § 767.19 (1948); Minn. Stat. Ann. § 628.04 (1947); Mo. Rev. Stat. § 3922 (1959); Mont. Rev. Codes Ann. § 94-6325 (1949); Nev. Rev. Stat. § 172.330 (1959); N.M. Stat. Ann. § 41-5-30 (1953); N.Y. Code Crim. Proc. § 259; Ore. Rev. Stat. § 132.220 (1959); P.R. Laws Ann. tit. 34, § 554 (1956); S.D. Code § 34.1226 (1939); Tenn. Code Ann. § 40-1612 (1955); Utah Code Ann. § 77-19-10 (1953); Wis. Stat. Ann. § 255.21 (1957).

The court stated in State v. Thomas, 99 Mo. 235, 259, 12 S.W. 643, 650 (1889): "The evil sought to be remedied, by this legislation, was the immunity, which witnesses might enjoy under the old rule, from prosecution for perjury for swearing falsely before the grand jury, and from the discredit which would follow upon the deliverance, on trial, in open court, of evidence different from that delivered under oath before the grand jury. In other words, to remove, as far as was consistent with public policy, the temptation to false swearing before the grand jury." See also State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960). Most of these statutes were first enacted during a period when grand jury minutes were not regularly kept, and thus only the grand juror's testimony was available for purposes of impeachment. Courts construing these provisions have permitted grand jury minutes to be disclosed when kept, in lieu of a grand juror's testimony, because they are more reliable. See State v. Morgan, *supra*. *Contra*, State v. Krause, 260 Wis. 313, 50 N.W.2d 439 (1951). See also State v. McPherson, 114 Iowa 492, 87 N.W. 421 (1901).

38. *E.g.*, State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959); State v. Moffa, 64 N.J. Super. 69, 165 A.2d 219 (1960); State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959); see also People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

39. In an analogous situation, numerous courts in civil antitrust actions have permitted pretrial disclosure of grand jury minutes. See Allis-Chalmers Mfg. Co. v.

These jurisdictions have concluded that, because such evidence is often of grave importance to a defendant for purposes of impeaching prosecution witnesses, he should be entitled to the grand jury minutes at some time during the trial. And once the prosecution has indicated those witnesses who will testify for the state, which in most jurisdictions is prior to trial, there is no apparent reason for thereafter withholding their grand jury testimony. These jurisdictions have found through experience that the more restrictive practice of requiring counsel to wait until each witness has testified before requesting disclosure is both cumbersome and time-consuming, inasmuch as counsel must be given sufficient time after each request to examine the minutes and evaluate the testimony for purposes of impeachment.[40] Pretrial disclosure, on the other hand, affords a timely and unfettered opportunity to prepare fully cross-examination and impeachment and thus facilitates the orderly and efficient handling of witnesses.[41] Four states have provided by statute that, after the indictment is returned, a defendant upon demand must be provided with a copy of the grand jury minutes in advance of trial.[42]

City of Fort Pierce, 323 F.2d 233 (5th Cir. 1963); Atlantic City Elec. Co. v. A. B. Chance Co., 313 F.2d 431, 434 (2d Cir. 1963); Nairn v. Clary, 312 F.2d 748 (3d Cir. 1963); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 486, 491 (E.D. Pa. 1962); United States v. Procter & Gamble Co., 187 F. Supp. 55 (D.N.J. 1960); Herman Schwabe, Inc. v. United Shoe Mach. Co., 194 F. Supp. 763 (D. Mass. 1958); United States v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1955); *In re* Special 1952 Grand Jury, 22 F.R.D. 102, 104 (E.D. Pa. 1958). Compare Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958); In the Matter of the October 1959 Grand Jury, 184 F. Supp. 38 (E.D. Va. 1960); *In re* Bullock, 103 F. Supp. 639 (D.D.C. 1952); *In re* Grand Jury Proceedings, 4 F. Supp. 283 (E.D. Pa. 1933).

40. See State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959).

41. See State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959); State v. Moffa, 64 N.J. Super. 69, 165 A.2d 219 (1960).

42. See CAL. PEN. CODE § 938.1; IOWA CODE § 772.4 (1962); KY. CRIM. CODE § 110 (Baldwin 1953); MINN. STAT. ANN. § 628.04 (1947).

The experience of these states in permitting disclosure indicates that the dangers repeatedly urged are seriously overrated. California, for example, since 1897 has followed the procedure of providing a defendant in a criminal prosecution with a copy of the transcript of the grand jury testimony before trial. Such practice became compulsory in all cases with the passage of an amendment in 1927 which provided that transcripts be made of all grand jury testimony and supplied to defendant. The present California statute provides in part:

> "If an indictment has been found or accusation presented against a defendant, such stenographic reporter shall certify and file with the county clerk an original transcription of his shorthand notes and *a copy thereof* and as many *additional* copies as there are defendants. . . . The county clerk shall deliver the original of the transcript so filed with him to the district attorney immediately upon his receipt thereof, shall return one copy for use only by judges in proceedings relating to the indictment or accusation, and *shall deliver a copy of such transcript upon each such defendant or his attorney.*"

CAL. PEN. CODE § 938.1.

The vast majority of jurisdictions, however, have emphatically denied pretrial disclosure for purposes of trial preparation.[43] Judge Learned Hand eloquently set forth some of the reasons for this in *United States v. Garsson*:

> "I am no more disposed to grant it than I was in 1909. U.S. v. Violon (C.C. 173 Fed. 501). It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see."[44]

Thus, as partially outlined by Judge Hand, three reasons have been advanced by courts for withholding the disclosure of grand jury testimony until after a witness has testified: (1) disclosure would give the mute defendant an unfair advantage over the prosecution, which alone would be required to expose its entire case prior to trial; (2) disclosure would enable the defendant to procure perjured testimony in order to set up a false defense; and (3) disclosure would encourage the defendant to bribe or intimidate prosecution witnesses in order to induce reluctance to testify at trial.

But these arguments lose much of their force when exposed to a careful examination. First, only the most naive practitioner would suggest that the indigent and the ignorant, who comprise the great majority of the defendants tried in our courts today, could ever have

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Legal scholars discussing the California statute, as well as those of Kentucky, Iowa, and Minnesota, agree that such pretrial disclosure has had no adverse effect; the grand jury has remained a vital and active force in these states. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1184 n.116 (1960); Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 71 n.59 (1961); Seltzer *Pre-Trial Discovery of Grand Jury Testimony in Criminal Cases*, 66 DICK. L. REV. 379 (1962); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962); Note, 48 CALIF. L. REV. 160, 161-62 (1960).

43. *E.g.*, United States v. Procter & Gamble Co., 356 U.S. 677 (1958). *But see* United States v. Procter & Gamble Co., 187 F. Supp. 55 (D.N.J. 1960), where the district court upon remand found a "particularized need" and permitted partial pretrial discovery of the grand jury minutes); United States v. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960). *Contra*, United States v. Byoir, 147 F.2d 336 (5th Cir. 1945).

44. 291 Fed. 646, 649 (S.D.N.Y. 1923).

an advantage over the state, which has massive investigative machinery, criminal experts, laboratories, and other investigative mediums, all of which aid the prosecution in keeping abreast of the modern techniques for the detection and prevention of crime. All too frequently, little or no investigation is available to such a defendant, and state witnesses are reluctant to talk to defense counsel.[45] Moreover, the *right* of a defendant to remain silent would seem at times to be spurious: "We all know that the right to conduct prolonged questioning of suspects is vigorously championed by law enforcement authorities. . . . Success very frequently crowns the effort, if the proportion of guilty pleas and convictions resting on confessions affords a reliable guide."[46] It is rare indeed that the prosecution is surprised by the defense, but the element of surprise is always a grave danger to the defendant. Furthermore, talk of "disadvantage" to the state assumes that criminal trials are contests in which the state's sole aim is to win. Any suggestion that the state must have at least as good a chance to prevail as the defendant would seem to violate the traditional policy of favoring the defendant in order to avoid conviction of the innocent.[47]

Second, in response to the argument that discovery would lead to a perjured defense, the words of Mr. Justice Brennan are apropos: "[H]ow can we be so positive criminal discovery will produce perjured defenses when we have in this country virtually shut the door to all such discovery?"[48] In fact, pretrial discovery of grand jury

45. "It should with equal candor be conceded that a deficiency in our present handling of criminal matters is the lack of adequate facilities of factual investigation by defendants. State v. Johnson, 28 N.J. 133, 142 (1958)." State v. Moffa, 64 N.J. Super. 69, 71-72, 165 A.2d 219, 220 (1960).

46. Brennan, *Remarks on Discovery*, 33 F.R.D. 47, 64 (1963). See also STEWART, FEDERAL RULES OF CRIMINAL PROCEDURE 155 (1945). *But see* Escobedo v. Illinois, 378 U.S. 478 (1964).

In the Criminal Court of Cook County for the year 1963 there were 2,744 defendants brought to trial, and, of this number, 2,185 pleaded guilty. Annual Report of Criminal Court of Cook County, Fiscal Year, January 1, 1963—December 31, 1963.

47. Polstein, *How To "Settle" a Criminal Case*, Practical Lawyer, Jan. 1962, pp. 35, 43, states:

> "Even though the cards are not arranged by the prosecutor or judge, the fact remains that any criminal prosecution is inherently unfair to the defendant, semantic presumptions of innocence notwithstanding. The defendant is not being sued for some real or imagined civil debt. He is being accused of a crime against the community, an assault upon the *status quo*. The plaintiff is the People. The complaint doesn't contain vague allegations drawn by some lawyer trying to earn a fee, but is an indictment returned by a grand jury. Plaintiff's counsel is no unknown attorney, but the public prosecutor. 'Accused,' 'crime,' 'grand jury,' 'indictment,' 'district attorney,' 'People'—these are words that evoke emotional response. All of the majesty of the law, all the dignity of the prosecutor's office, all of the outrage of the community, is working to the prejudice of the defendant."

See also Note, 111 U. PA. L. REV. 1154 (1963).

48. See Brennan, *supra* note 46, at 62.

minutes would have exactly the opposite effect. It would reduce the likelihood that a witness' testimony at the trial was not perjured since both the state and the defendant would know the content of those proceedings. "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law . . . to allow the accused to produce any witnesses at all."[49] Furthermore, the guilty defendant, necessarily acquainted with the details of the crime that the state must prove, can fabricate a defense accordingly, regardless of whether he has obtained disclosure of the grand jury minutes.

Finally, the defendant who will resort to intimidation or other means to silence state witnesses will do so regardless of whether he knows the content of their grand jury testimony. As noted above, listing state witnesses prior to trial enables a defendant to gain access to their names and addresses, which is all such a defendant needs to know to perpetrate his wrong.

Unquestionably, the abolition of the grand jury system in England in 1933[50] and the growing use of the information rather than grand jury indictment in America demonstrate the fallacy of many of the arguments expressed by those opposing pretrial disclosure.[51] Under the present English system, a defendant obtains full discovery of the testimonial evidence that is in the hands of the prosecutor prior to trial, and the prosecution is limited at the trial to the evidence disclosed at the preliminary hearing.

Perhaps most jurisdictions are reluctant at this time to liberalize their rules of discovery to the extent of permitting pretrial inspection of grand jury minutes, but the experience of those that have demonstrates that no vitality is drained from the effort or success of the state in its prosecution of criminals.

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49. *Id.* at 63 (Remarks of Dean Wigmore).

50. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1. The abolition was effected on a plea of economy. On the merits, the reform in the procedure of the preliminary examination and the separation of the functions of the police and the justice of the peace had made the grand jury less essential. The argument for retention, that the grand jury might be a protection of accused persons against oppression, did not convince the English. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947). See also Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L., C. & P.S. 3, 20 (1938); Seltzer, *Pre-Trial Discovery of Grand Jury Testimony in Criminal Cases*, 66 DICK. L. REV. 379 (1962).

51. In Kansas and Wyoming, for example, the grand jury is seldom employed. In the former it is employed only by a petition signed by taxpayers and addressed to the court. KAN. GEN. STAT. ANN. § 62-901 (1949). In the latter it is employed only upon order of a district court. WYO. STAT. ANN. § 7-92 (1957).

B. *Defense Against a Charge of Perjury*

Most jurisdictions that have considered the question have held that a person indicted for making perjurious statements before a grand jury has a right to inspect the minutes of his own statements before trial.[52] Not only is this right fully recognized as essential to the preparation of the defendant's case,[53] but refusal to grant inspection has been held to deny him a fair trial.[54] Recognizing this, a number of states have enacted legislation permitting disclosure in such a case.[55]

It is clear that, inasmuch as the testimony sought is that of the defendant himself, no danger of intimidation or subornation of prosecution witnesses will result. The minutes requested here are not to be used for "the relatively negative purpose of impeaching a witness," but rather to afford the defendant an opportunity to prepare an affirmative defense.[56] Of critical importance to this defense is a showing of what had gone on before and after the critical questions and answers since this might shed light on how the defendant understood the questions and what he meant by his answers.[57] Moreover, the excising of words here and there by the prosecution can radically change the meaning of what transpired. A witness is not always able to remember in detail his testimony before the grand jury; consequently, a refusal to permit him to examine the minutes

52. *E.g.*, Parr v. United States, 265 F.2d 894, 902-03 (5th Cir. 1959); United States v. Alu, 246 F.2d 29, 30-31 (2d Cir. 1957); United States v. Rose, 215 F.2d 617 (3d Cir. 1954); United States v. Remington, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952); *In re* Bullock, 103 F. Supp. 639, 642 (D.D.C. 1952); United States v. White, 104 F. Supp. 120 (D.N.J. 1952); Minton v. State, 113 So. 2d 361 (Fla. 1959); People v. Calandrillo, 29 Misc. 2d 495, 215 N.Y.S.2d 364 (Suffolk County Ct. 1961). *But see* State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945), where the court held that a refusal to permit inspection is a proper exercise of discretion. See also United States v. Wortman, 26 F.R.D. 183 (D. Ill. 1960); United States v. Owen, 11 F.R.D. 371 (W.D. Mo. 1951); Commonwealth v. Ries, 337 Mass. 565, 150 N.E.2d 527 (1958); State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959).

53. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 403 (1959) (dissenting opinion).

54. See Gordon v. State, 104 So. 2d 524 (Fla. 1958).

55. See, *e.g.*, ALASKA CODE CRIM. PROC. 6; ARIZ. R. CRIM. P. 106(b); ARK. STAT. ANN. § 43-930 (1947); CAL. PEN. CODE § 924.2; IDAHO CODE ANN. § 19-1112 (1948); IND. ANN. STAT. § 9-817 (1956); IOWA CODE § 771.23 (1950); KAN. GEN. STAT. ANN. §§ 62-923, 62-925 (1949); KY. CRIM. CODE § 110 (Baldwin, 1953); LA. REV. STAT. § 15:471 (1950); MICH. COMP. LAWS § 767.19 (1948); MINN. STAT. ANN. § 628.65 (1947); MO. REV. STAT. § 3922 (1959); MONT. REV. CODES ANN. § 94-6325 (1949); NEV. REV. STAT. § 172.330 (1959); N.M. STAT. ANN. § 41-5-30 (1953); N.Y. CODE CRIM. PROC. § 259; OKLA. STAT. tit. 22 §§ 341, 342 (1961); ORE. REV. STAT. § 132.220 (1959); P.R. LAWS ANN. tit. 34, § 554 (1956); S.D. CODE § 34.1226 (1939); TENN. CODE ANN. § 40-1612 (1955); UTAH CODE ANN. § 77-19-9 (1953); WIS. STAT. ANN. § 255.20 (1957).

56. See United States v. Remington, 191 F.2d 246 (2d Cir. 1951).

57. See United States v. White, 104 F. Supp. 120 (D.N.J. 1952).

in order to fill in the gaps left by the prosecution could work to his prejudice.

Thus, in view of the fact that none of the frequently urged reasons for secrecy could have any application, basic rules of fairness dictate that a defendant indicted for perjury be given a full transcript of his testimony before the grand jury. This transcript is, after all, the very gravamen of such a criminal proceeding.

C. *Motion To Dismiss the Indictment*

One of the more difficult problems concerning requests for pretrial disclosure of grand jury minutes arises when the request is made in support of a motion to dismiss or quash the indictment.[58] Whether disclosure will be granted is normally determined, not by considerations of secrecy, but rather by two other considerations: whether the motion on its face raises a constitutional question requiring dismissal of the indictment if proved and whether the motion and supporting papers demonstrate that the motion was made in good faith. Addressing the first of these issues, courts have been faced repeatedly with the constitutional questions of whether indictments are valid when (1) based on insufficient, incompetent, or hearsay evidence, (2) based on no legal evidence whatever, (3) based on perjured testimony, (4) based on coerced confessions or illegally seized evidence, (5) returned by a prejudiced or biased grand jury, or (6) returned against an accused granted immunity by a constitutional or statutory provision. In order to determine whether disclosure will be granted, then, it is necessary to consider first whether the motion to dismiss in each of these categories raises a constitutional question. If such a question is raised, the second issue of a good faith showing becomes relevant.

1. *Insufficient, incompetent, or hearsay evidence.* In *Costello v. United States*,[59] the Supreme Court held that it does not violate the fifth amendment to retain the presumption of validity of an indictment, even though the defendant alleges it was returned on the basis of hearsay evidence.

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."[60]

58. See generally Note, 111 U. PA. L. REV. 1154 (1963).
59. 350 U.S. 359 (1956).
60. *Id.* at 363.

Consistent with this decision, with relatively few exceptions,[61] both state and federal courts have long held that a request for grand jury minutes will be denied when sought in order to prove that an indictment was based upon insufficient, incompetent, or hearsay evidence.[62] So strong is the presumption that the grand jury acted on sufficient evidence[63] that it is the rare case in which the matter will be considered further.[64]

The reasons dictating foreclosure of this question are not based upon considerations of secrecy, but rather upon the abuses a contrary policy would invite. As the Supreme Court in *Costello* observed, if indictments were held open to challenge on grounds that insufficient, incompetent, or hearsay evidence was received, "the resulting delay would be great indeed." Every defendant, prior to trial, could insist upon "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."[65] Thus, this constitutional question was resolved in *Costello* by the practical considerations that the Court held might give rise to serious abuse.

2. *No legal evidence.* Where, however, it is alleged that the grand jury had before it no legal evidence whatever, a more difficult constitutional question is posed. Most courts agree that the indictment under these circumstances must be quashed.[66] Although the

61. New York State is perhaps the only notable exception; although cognizant of the problems of extended pretrial litigation, its courts will quash indictments returned on the basis of incompetent or insufficient evidence. *E.g.*, People v. Howell, 3 N.Y.2d 672, 148 N.E.2d 867 (1958); People v. Bareika, 9 App. Div. 2d 1002, 195 N.Y.S.2d 97 (1959). See also Note, 111 U. PA. L. REV. 1154 (1963).

62. *Cf.* Costello v. United States, 350 U.S. 359 (1956); Kastel v. United States, 23 F.2d 156 (2d Cir. 1927); Simpson v. United States, 11 F.2d 591, 593 (4th Cir. 1926), *cert. denied*, 271 U.S. 674 (1926); United States v. Foster, 80 F. Supp. 479 (S.D.N.Y. 1948); State v. Shawley, 334 Mo. 352, 67 S.W.2d 74 (1933); State v. Selby, 126 N.E.2d 606 (C.P. Ohio 1955); State v. Reyes, 209 Ore. 595, 308 P.2d 182 (1957); State v. Broadhurst, 184 Ore. 178, 196 P.2d 407 (1948), *cert. denied*, 337 U.S. 906 (1949).

63. "There is a strong presumption of regularity accorded to the findings of a grand jury." Beatrice Foods Co. v. United States, 312 F.2d 29, 39 (8th Cir. 1963), *cert denied*, 373 U.S. 904 (1963).

64. The Eighth Circuit recognized the invalidity of indictments based solely on incompetent evidence, Nanfito v. United States, 20 F.2d 376 (8th Cir. 1927), or supported by insufficient evidence, Brady v. United States, 24 F.2d 405 (8th Cir. 1928). See also United States v. Perlman, 247 Fed. 158 (S.D.N.Y. 1917); United States v. Bolles, 209 Fed. 682, 684 (W.D. Mo. 1913); United States v. Farrington, 5 Fed. 343 (N.D.N.Y. 1881); United States v. Reed, 27 Fed. Cas. 727, 735 (No. 16134) (C.C.N.D.N.Y. 1852).

65. 350 U.S. at 363.

66. "[W]hen the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment." United States v. Farrington, 5 Fed. 343, 348 (N.D.N.Y. 1881). See also Cochran v. United States,

Supreme Court has not ruled expressly on this point, Mr. Justice Burton, in his concurring opinion in the *Costello* case, stated: "[I]t seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed."[67] And Judge Learned Hand, dealing with the same case at the court of appeals level, ruled that "if no evidence had been offered that rationally established the facts, the indictment ought to be quashed."[68]

Courts have not established clear guidelines with respect to what must be alleged in the motions and substantiated by attached affidavits in order for a defendant to receive a ruling requiring disclosure of grand jury minutes. It would seem, however, that a mere allegation that there was no legal evidence before the grand jury should be sufficient to require the judge to examine the minutes in camera. A cursory examination by the judge would certainly establish with minimum delay whether grounds existed for the defendant's motion. The judge could then either grant or deny disclosure accordingly.

3. *Perjured testimony.* When perjured testimony is the sole evidence upon which the indictment is returned, the indictment must be quashed. In *Coppedge v. United States,*[69] the Supreme Court considered this question, and, although it did not pass on it directly, it intimated that inspection of grand jury minutes in such a situation might be required.[70] Upon remand, the lower court permitted the defendant to examine the grand jury minutes in their entirety but ultimately dismissed the motion to quash after concluding that there was sufficient non-perjurious evidence to sustain the indictment.[71]

Unquestionably, if the defendant has established in his motion that the grand jury was exposed to perjurious testimony, the court should make at least an in camera inspection in order to determine whether other, independent competent evidence upon which an

310 F.2d 585, 590-91 (8th Cir. 1962); United States v. Lydecker, 275 Fed. 976 (W.D.N.Y. 1921); State *ex rel.* Clagett v. James, 327 S.W.2d 278 (Mo. 1959); Annot. 59 A.L.R. 567 (1929).

67. 350 U.S. at 364.

68. United States v. Costello, 221 F.2d 668, 677 (2d Cir. 1955), *aff'd,* 350 U.S. 359 (1956). Additionally, when it is alleged that there was no evidence to prove an element of the crime, inspection will be permitted. Brady v. United States, 24 F.2d 405 (8th Cir. 1928); People v. Barieka, 11 App. Div. 2d 567, 199 N.Y.S.2d 1007 (1959); People v. Stecker, 140 Misc. 684, 252 N.Y. Supp. 185 (N.Y.C. Gen. Sess. 1931).

69. 369 U.S. 438 (1962).

70. *Id.* at 458-59.

71. See Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962).

indictment could be sustained was offered. The burden placed upon the court is not great, and the requirement that a defendant establish, in the first instance, that perjury was committed assures that the motion is made in good faith.

4. *Coerced confessions, illegally seized evidence.* Similarly, when an indictment based entirely on the coerced confession of the defendant or on illegally seized evidence is returned, it must be dismissed as violative of the defendant's constitutional rights.[72]

The Supreme Court has held, however, that the mere suspicion that wrongfully seized evidence was presented to the grand jury is insufficient to warrant inspection of the minutes.[73] Such a rule, as a practical matter, would seem unduly restrictive. Certainly when the trial judge considers the motion to suppress the illegally seized evidence or the coerced confession, he could also make an in camera inspection of the grand jury minutes in order to determine whether the evidence ordered suppressed was the only evidence before the grand jury. If he so finds, the motion to dismiss and the motion to suppress could be granted without additional delay.

5. *Prejudiced or biased grand jury.* The Supreme Court has not directly ruled that the fourteenth amendment requires that an indictment be returned by an unprejudiced and unbiased grand jury. In *Beck v. Washington*,[74] the Court stated that "it may be true that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury."[75] After examining the grand jury minutes in that case, however, the Court concluded that there was no prejudice and therefore declined to determine the constitutional question. The dissenting Justices, Black, Douglas, and Chief Justice Warren, made it clear in their opinion that the Constitution will tolerate no lesser standard than freedom from prejudice.[76] And Justice Burton stated in another case, "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment."[77] In *Costello*, the full Court did state as dictum that "an indictment returned by a legally constituted[78] and *unbiased grand jury*, . . . if valid on its face, is

72. See Lawn v. United States, 355 U.S. 339 (1958). See also Holt v. United States, 218 U.S. 245 (1910).

73. See United States v. Lawn, 355 U.S. 339 (1958).

74. 369 U.S. 541 (1962).

75. *Id.* at 546.

76. *Id.* at 558, 579.

77. Costello v. United States, 350 U.S. 359, 364 (1956).

78. The selection of grand jurors under state law as well as federal is held to close

enough to call for trial of the charge on the merits."[79] From these statements, one might reasonably conclude that the constitutional standards enumerated by the dissent in the *Beck* case are the law of the land.[80]

A mere allegation that the jury was biased or prejudiced, without some factual support, will unquestionably fail as a basis for obtaining disclosure. However, when the defendant, through affidavits or otherwise, is able to establish good grounds for his motion to dismiss, as in the *Beck* case, disclosure should be permitted and further consideration given by the court. Denial of examination in the latter instance would give rise to serious abuse and would be a basic infringement upon a defendant's constitutional rights.

6. *Privilege against self-incrimination.* An accused who is called by the prosecution as a witness before the grand jury and who presents evidence tending to sustain an indictment against him is protected by his constitutional privilege against self-incrimination[81] and is immune from prosecution based upon his testimony.[82] Likewise, a defendant who is granted statutory immunity has a right to move that an indictment against him be quashed or dismissed.[83]

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scrutiny by the Supreme Court and must conform to minimum constitutional standards. Hill v. Texas, 316 U.S. 400, 406 (1942).

79. Costello v. United States, 350 U.S. 359, 363 (1956). (Emphasis added.)

80. Irregularities occurring during the grand jury hearing such as the presence of unauthorized persons or misconduct of the state's attorney have also been held as grounds for allowing inspection of minutes and dismissal of an indictment. *E.g.*, Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963); United States v. Amazon Industrial Chem. Corp., 55 F.2d 254, 261-62 (D. Md. 1931); Coblentz v. State, 164 Md. 558, 166 Atl. 45 (1933); Lobowitch v. Commonwealth, 235 Mass. 357, 126 N.E. 831 (1920). See also United States v. Remington, 191 F.2d 246, 252 (2d Cir. 1951); United States *ex rel.* McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944); State *ex rel.* Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947).

81. See Jones v. United States, 327 F.2d 867 (D.C. Cir. 1963); Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935); United States v. Lawn, 115 F. Supp. 674, 677 (S.D.N.Y. 1953); United States v. Miller, 80 F. Supp. 979 (E.D. Pa. 1948); United States v. Kimball, 117 Fed. 156 (S.D.N.Y. 1902); People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468 (1959). There is no waiver of this privilege by failure to invoke it, and, unless the accused is properly warned of the privilege and has knowingly waived it, he may move to quash the indictment. United States v. Lawn, *supra*. See also United States v. Cleary, 265 F.2d 459 (2d Cir. 1959); Mencheca v. State, 28 S.W. 203 (Tex. Crim. App. 1894); State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913); Malloy v. Hogan, 374 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

82. The federal constitution and the constitutions of all but two states include language relating specifically to self-incrimination. See 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961). *Cf.* United States v. Johns-Manville Corp., 1962 Trade Cas. ¶ 70,498 (N.D. Pa. 1962); United States v. Kimball, 117 Fed. 156, 165 (S.D.N.Y. 1902); United States v. Jones, 69 Fed. 973, 978 (D. Nev. 1895); People v. Macner, 171 Misc. 720, 13 N.Y.S.2d 451 (Oneida County Ct. 1939).

83. *E.g.*, United States v. Andolschek, 142 F.2d 503, 505-06 (2d Cir. 1944); Havenor v. State, 125 Wis. 444, 104 N.W. 116 (1905); Murphy v. State, 124 Wis. 635, 102 N.W.

Under such circumstances, courts have expressed little reluctance to set aside the veil of secrecy and to permit the defendant to inspect the grand jury minutes, as the minutes sought are those of the defendant's own testimony.[84] Furthermore, the purpose for which they are sought is narrow, being limited to the question of whether the defendant's constitutional and statutory rights have been violated.

The foregoing discussion suggests varying constitutional problems, some resolved and others unresolved. Unquestionably, when clear constitutional questions are raised by a motion to dismiss or quash, stronger reasons are presented for giving a defendant complete freedom to inspect the grand jury minutes. Certainly, no policy of grand jury secrecy should impede a determination of constitutional questions.

IV. Motion for Grand Jury Minutes During Trial

A. *For Purposes of Impeachment*

The real cudgel of an unrealistic policy of grand jury secrecy strikes a defendant hardest when he seeks inspection for purposes of impeaching a prosecution witness. Such a request is normally made after the witness sought to be impeached has testified and the reasons for secrecy are nonexistent.[85] Nearly all jurisdictions recognize that the trial court has discretionary power to permit disclosure for purposes of impeachment, but many courts have never exercised this power.

The Supreme Court in *Pittsburgh Plate Glass Co. v. United States*[86] held that, under rule 6(e) of the Federal Rules of Criminal Procedure,[87] the trial court has discretionary power to permit disclosure when a "particularized need" exists, such as to "impeach a witness, to refresh his recollection, to test his credibility and the

1087 (1905). See also Edwards v. United States, 312 U.S. 473 (1941); United States v. Onassis, 125 F. Supp. 190 (D.C.D.C. 1954).

84. See text accompanying notes 52-57 *supra*, for discussion of inspection of minutes in connection with perjury indictments.

85. The witness, having testified adversely, has lost his anonymity. Moreover, the possibility of intimidation in additon to that created when he gives the same damaging evidence in open trial can be at most slight. No general searching for evidence is involved here (as where general discovery is sought) because only the testimony of a particular witness is desired. Also, when the testimony is sought after the witness has testified, it can be effectively limited to the subject matter developed on direct examination, a limitation which is not possible with pretrial disclosure.

86. 360 U.S. 395 (1959).

87. Fed. R. Crim. P. 6(e).

like."[88] The majority stated (and the dissent agreed)[89] that to establish a "particularized need," a defendant is not required to show inconsistencies between the trial and the grand jury testimony before disclosure could be granted "for the defense will rarely be able to lay a foundation for obtaining grand jury testimony by showing it is inconsistent with trial testimony unless it can inspect the grand jury testimony . . . ."[90]

Three distinct views have been expressed by various courts with regard to disclosure for purposes of impeaching a witness. The dissent in *Pittsburgh Plate Glass* held that the trial judge, upon request and after a witness has testified, should hold an in camera inspection of the grand jury testimony and turn over that portion that covers the subject matter of the witness' testimony at the trial.[91] Patterning this rule after the *Jencks* rule,[92] which pertains to witnesses' statements, the dissent reasoned that only the defense is adequately equipped to determine the usefulness of such testimony for

88. 360 U.S. at 399. In this case the defendants claimed that they had a "right" to inspect the grand jury testimony of a key prosecution witness. The Government had offered to let the trial judge screen the testimony and to allow inspection of material portions, an offer that the defendants rejected. The Supreme Court affirmed the trial court's denial of disclosure, holding that no such *right* existed. *Cf.* United States v. Coduto, 284 F.2d 464 (7th Cir. 1961), *cert. denied*, 365 U.S. 881 (1961); Continental Baking Co. v. United States, 281 F.2d 137, 146 (6th Cir. 1960); United States v. Killian, 275 F.2d 561 (7th Cir. 1960).

89. The dissent of Mr. Justice Brennan, in which Mr. Chief Justice Warren and Justices Black and Douglas joined, concluded that, once the witness had testified, there were no valid considerations militating in favor of continued secrecy; simple justice required that the defendants be given a fair opportunity to refute the Government's case. 360 U.S. at 405.

90. *Id.* at 408. See United States v. Giampa, 290 F.2d 83 (2d Cir. 1961); United States v. Zborowski, 271 F.2d 661, 666 (2d Cir. 1959); Travis v. United States, 269 F.2d 928 (10th Cir. 1959) (dissenting opinion); *cf.* State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960). Many courts in the past required, and some still require, a defendant to meet this insurmountable burden. See, *e.g.*, Hance v. United States, 299 F.2d 389 (8th Cir. 1962); Brilliant v. United States, 297 F.2d 385 (8th Cir. 1962); Berry v. United States, 295 F.2d 192, 194-96 (8th Cir. 1961), *cert. denied*, 368 U.S. 955 (1962); Bary v. United States, 292 F.2d 53 (10th Cir. 1961); United States v. Magin, 280 F.2d 74 (7th Cir. 1960); Travis v. United States, 269 F.2d 928 (10th Cir. 1959); Herzog v. United States, 226 F.2d 561 (9th Cir. 1955), *aff'd en banc*, 235 F.2d 664, *cert. denied*, 352 U.S. 844 (1956).

91. In its brief in the *Pittsburgh Plate Glass* case, the Government suggested that the trial court had discretionary power to refuse even to inspect the minutes. Brief of Appellee, pp. 39-40. *Cf.* Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963); Herzog v. United States, *supra* note 90; Minton v. State, 113 So. 2d 361 (Fla. 1959). The strong dissent and silence of the majority indicates the Court has not prescribed this view.

92. Jencks v. United States, 353 U.S. 657 (1957). The *Jencks* rule provides that the Government, upon motion by the defendant after a government witness has testified, must produce for in camera inspection by the judge any documents in its possession that touch upon matters testified to by the witness. Defendant need not make a prior showing of inconsistency. The rule is now embodied in 18 U.S.C. § 3500 (1958).

purposes of impeachment and even the most able and experienced trial judge, who is hard pressed by the pressures of conducting a trial, would be unable to determine which parts of the grand jury testimony would be useful in impeaching a witness.[93] The experience under the *Jencks* rule has indicated that such a procedure has caused no undue delay, nor have the courts been unduly burdened. To a limited extent, this rule has been followed by the Circuit Court for the District of Columbia.[94]

A different view has been adopted by the Second Circuit. That court has held that upon request of the defendant, after a witness has testified, the trial judge must examine in camera the grand jury testimony of the witness for inconsistencies; if such inconsistencies exist, the testimony of the witness must be made available to defense counsel.[95] Under this rule, secrecy is maintained until inconsistencies are found to exist by the trial judge. The arguments urged against such a rule are (1) a trial judge is not as well equipped as trial counsel to determine the impeachment value of grand jury testimony;[96] (2) a serious burden is placed on the trial judge if an

93. 360 U.S. at 409. The dissent quoted at great length from Jencks v. United States, *supra* note 92:

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

See also People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881 (1961).

94. The court in De Binder v. United States, 292 F.2d 737 (D.C. Cir. 1961), held that when there is a single or key prosecution witness upon whose credibility the prosecution's case depends, the trial court should allow disclosure without a prior in camera inspection for inconsistencies. See Simmons v. United States, 308 F.2d 324 (D.C. Cir. 1962); Gordan v. United States, 299 F.2d 117 (D.C. Cir. 1962). See also Atwell v. United States, 162 Fed. 97 (4th Cir. 1908).

95. *E.g.*, United States v. Giampa, 290 F.2d 83 (2d Cir. 1961); United States v. Hernandez, 282 F.2d 71 (2d Cir. 1960); United States v. McKeever, 271 F.2d 669 (2d Cir. 1959); United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958); United States v. Alper, 156 F.2d 222 (2d Cir. 1946); *cf.* Simmons v. United States, 308 F.2d 324 (D.C. Cir. 1962). See also United States v. Coduto, 284 F.2d 464 (7th Cir.), *cert. denied*, 365 U.S. 881 (1961), where the Seventh Circuit indicated that it might adopt the rule of the Second Circuit. The Seventh Circuit, in a more recent decision, United States v. Micele, 327 F.2d 222 (7th Cir. 1964), held that, when the witnesses are key prosecution witnesses, an in camera inspection is required. The Court also noted that "possible" inconsistencies were suggested by a stricken answer and the fact that the witnesses in question were accomplices and felons, thereby establishing a "particularized need."

96. *Cf.* Berry v. United States, 295 F.2d 192 (8th Cir. 1961), *cert. denied*, 368 U.S. 955 (1962); Bary v. United States, 292 F.2d 53 (10th Cir. 1961); Minton v. State, 113 So. 2d 361 (Fla. 1959). As pointed out in these cases, this procedure makes the judge a fact finder for the defense, and he would be acting as "associate counsel" in a manner contrary to every concept of judicial functions. See also Herzog v. United States, 226 F.2d 561 (9th Cir. 1955), *aff'd en banc*, 235 F.2d 664, *cert. denied*, 352 U.S. 844 (1956); United States v. Alper, 156 F.2d 222 (2d Cir. 1946).

in camera investigation is requested after each prosecution witness has testified;[97] (3) such a procedure would cause repeated delays in the trial; and (4) every defendant would embark on a "fishing expedition" and request an in camera inspection for every state witness with the hope of finding inconsistencies.[98]

In actual practice, however, these objections to the Second Circuit rule have not been as formidable as they might first appear in a factual vacuum. If, upon an in camera examination, inconsistencies are not found to exist by the trial judge, the minutes are sealed and may be reviewed by the appellate court, thereby permitting a further examination for inconsistencies or impeaching material.[99] This additional judicial examination, apart from the exigencies of the trial, is certainly sufficient assurance that the rights of the defendant will be protected.[100] Also, in a criminal case such as rape or robbery where there might be only one or two key prosecution witnesses, the burden of requiring an in camera inspection is minimal. The assurance that these witnesses are credible and worthy of belief more than offsets this slight delay in trial time.[101] Furthermore, the experience gained from the protracted electrical industry antitrust litigation has demonstrated that even in a multi-witness trial the fear of burdening the court with in camera inspections of the grand jury testimony has not materialized.[102] In conducting the depositions of numerous witnesses in that litigation, the courts have read grand jury minutes just prior to or during the depositions themselves. When inconsistencies have been found, the courts have ordered the entire grand jury minutes disclosed to counsel. More recently in *United States v. Johns-Manville*

97. Herzog v. United States, *supra* note 96 ("not only is the latter course a 'fishing expedition,' but the judge is chumming the fish for the fisherman"); Jackson v. United States, 297 F.2d 195 (D.C. Cir. 1961).

98. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 409-10 (1959) (dissenting opinion).

99. United States v. Guido, 327 F.2d 222 (7th Cir. 1964); United States v. Santore, 290 F.2d 51, 67 (2d Cir. 1960); United States v. H.J.K. Theatre Corp., 236 F.2d 502 (2d Cir. 1956).

100. Parr v. United States, 265 F.2d 894 (5th Cir. 1959); People v. Dales, 309 N.Y. 97, 127 N.E.2d 829 (1955).

101. See Gordan v. United States, 299 F.2d 117 (D.C. Cir. 1962); De Binder v. United States, 292 F.2d 737 (D.C. Cir. 1961); United States v. Hernandez, 282 F.2d 71 (2d Cir. 1960); United States v. Alper, 156 F.2d 222 (2d Cir. 1946).

102. *Cf.* Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233 (5th Cir. 1963); Atlantic City Elec. Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963); Nairn v. Clary, 312 F.2d 748 (3d Cir. 1963). See also Herman Schwabe, Inc. v. United Shoe Mach. Corp., 194 F. Supp. 763 (D. Mass. 1958); United States v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1955).

Corp.,[103] a criminal antitrust trial, the Government was ordered to produce one day in advance the grand jury testimony of each prosecution witness for the court's in camera inspection. When inconsistencies existed, disclosure was allowed. Of assistance to the Second Circuit in discovering discrepancies in the grand jury testimony is its requirement that the Government be prepared to advise the trial judge regarding possible inconsistencies.[104] Finally, the fear of trial delays and abuse by defendants has not materialized, and the administration of criminal law in the Second Circuit has not been unduly obstructed.[105]

A third, more restrictive, view permits disclosure of grand jury minutes only if some showing of inconsistency has first been made.[106] Such a showing may be satisfied by establishing that the witness made extrajudicial statements that are inconsistent with his trial testimony or that other evidence demonstrates certain discrepancies in his testimony.[107] The principal advantage of this rule is that it eliminates all "fishing expeditions" and requires the defendant to make some showing that his request is made in good faith. This rule also eliminates the objection of repeated trial delays advanced against the Second Circuit rule. It is clear, however, that a showing of inconsistency between grand jury and trial testimony should not be required. Instead, any evidence that casts some doubt on the credibility of a prosecution witness or raises the "possibility" of inconsistency in his testimony should be sufficient to require the court to exercise its discretion and allow disclosure or, at least, to make an in camera inspection. A more limited rule would place on a defendant an insuperable burden—a burden that the Supreme Court has specifically found to be unreasonable.[108] But, even if

103. 1963 Trade Cas. ¶ 70967 (E.D. Pa. 1963).

104. *Cf.* United States v. McKeever, 271 F.2d 669 (2d Cir. 1959); United States v. Spangelet, 258 F.2d 338, 342 (2d Cir. 1958). See also United States v. Zborowski, 271 F.2d 661, 667-68 (2d Cir. 1959). Indeed, in United States v. Grunewald, 162 F. Supp. 621 (S.D.N.Y. 1958), the Government voluntarily gave the defense access to the grand jury testimony of Government witnesses.

105. New York state has adopted the same rule as the Second Circuit. See People v. Dales, 309 N.Y. 97, 127 N.E.2d 829 (1955); People v. Boniello, 303 N.Y. 619, 101 N.E.2d 488 (1951); People v. Schainuck, 286 N.Y. 161, 165-66, 36 N.E. 2d 94, 96 (1941). The rule of New York has been adopted by New Mexico. See State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960).

106. See People v. Harden, No. 1301, Cook County Ill. Crim. Ct., Dec. 13, 1963.

107. Harrell v. United States, 317 F.2d 580 (D.C. Cir. 1963); Minton v. State, 113 So. 2d 361 (Fla. 1959); People v. Harden, *supra* note 106.

108. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 401, 408 (1959). Secondary sources have uniformly denounced the requirement of establishing inconsistencies between the trial and grand jury testimony of a witness. See, *e.g.*, Note, 11 SYRACUSE L. REV. 225 (1960).

inconsistency between grand jury testimony and trial testimony need not be shown, many indigent prisoners, unable to afford an investigation for outside evidence, will be effectively barred under this third view unless their court-appointed counsel are able to establish the requisite discrepancies through cross-examination. It is for this reason that several courts have held that, if the state's case is based upon the testimony of one or two witnesses whose credibility is of utmost importance, a right sense of justice requires disclosure of the grand jury minutes of their testimony to assure rigorous cross-examination and as thorough an impeachment as the evidence permits.[109]

The rule of grand jury secrecy is presently proceeding through the same evolutionary path as the *Jencks* rule.[110] Although the Supreme Court has held that the *Jencks* rule does not apply to grand jury minutes,[111] the rationale and reasons for that rule certainly are apposite as a rule of fairness.[112] So overwhelming is the need to protect the rights of a defendant that the Supreme Court and Congress under the *Jencks* rule have required disclosure of all statements given to police by a prosecution witness in order to enable the defense to examine them thoroughly for possible impeaching evidence. The only determination to be made by the trial judge is whether the scope of the statements are within the subject matter of the witness' trial testimony. Significantly, the interests of the Government in the confidentiality of those reports, often FBI informant reports which could affect the national security, were not considered so overwhelming as to outweigh the personal interests of the defendant in obtaining disclosure.

The maintenance of secrecy over the use of grand jury minutes can hardly be said to be of greater importance than preserving the secrecy of confidential FBI reports. Yet, as to the latter, the veil of secrecy has been permanently removed. It is fair to conclude, therefore,

109. State v. Moffa, 64 N.J. Super. 69, 165 A.2d 219 (1960). See also State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960). Such a requirement is absolutely essential in cases of rape and other crimes where the thread between truth and perjury hangs thin. Gordon v. Commonwealth, 92 Pa. 216 (1879); People v. Harden, No. 1301, Cook County Ill. Crim. Ct., Dec. 13, 1963.

110. Jencks v. United States, 353 U.S. 657 (1957). See note 92 *supra*.

111. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398 (1959). *Contra*, United States v. Rosenberg, 245 F.2d 870 (3d Cir. 1957), which held the *Jencks* rule controlling as to grand jury testimony.

112. United States v. Consolidated Laundries Corp., 159 F. Supp. 860 (S.D.N.Y. 1958). See People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881 (1961). See also Comment, 27 FORDHAM L. REV. 244 (1958); Comment, 55 NW. U.L. REV. 482 (1960); Note, 73 HARV. L. REV. 185 (1959).

that the courts, and perhaps Congress also, will soon recognize the same need for disclosure of grand jury minutes, especially in view of the fact that the reasons for their secrecy have spent themselves when the grand jury has been discharged, the defendant has been apprehended, and the witness has testified.

B. *After the Government Has First Used the Grand Jury Minutes*

Another area that deserves comment relates to the right of a defendant to examine the grand jury minutes of a witness after they have first been used by the prosecution either to impeach the witness or to refresh his recollection. The Supreme Court in *United States v. Socony-Vacuum Oil Co.*[113] held that it is not an abuse of discretion for a trial judge to refuse disclosure of grand jury minutes when they have first been used to refresh the recollection of Government witnesses. The Court noted, however, that the prior grand jury testimony was either cumulative or dealt only with the minutiae of the conspiracy. The record, even without the testimony of the witnesses so refreshed, clearly established all the necessary facts for proof of the illegal conspiracy. "Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted."[114] Although the majority in *Pittsburgh Plate Glass Co. v. United States* did not discuss the question, four Justices stated in dissent: "Of course, when the Government uses grand jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony . . . ."[115] From these Supreme Court pronouncements it is clear that, at least when the testimony refreshed is of importance to the Government in establishing guilt, the defendant is *entitled* to examine the grand jury testimony covering that subject matter. Whether this privilege should be restricted to essential testimony is not clear; the existence of such a rule raises some important questions of fairness.

To adopt a procedure that permits the prosecution alone to have unlimited use of grand jury minutes for purposes of impeaching or refreshing the recollection of state witnesses is to abide by a rule that will lead to grave abuse. In this situation, no reason can be

113. 310 U.S. 150, 231-37 (1940).

114. *Id.* at 235. Furthermore, the witnesses so refreshed were either employed by one of the defendants or closely associated with them and were hostile, evasive, and reluctant to testify. *Id.* at 231.

115. 360 U.S. 395, 404 (1959).

advanced for maintaining continued secrecy, since the prosecution itself is initiating partial disclosure presumably to adduce testimony that is most damaging to the defendant. Such disclosure should constitute a waiver by the prosecution of any right to continued secrecy, for what can be left to protect except evidence that will contradict or place in proper perspective the damaging evidence already elicited. Judge Learned Hand, long an advocate of grand jury secrecy, stated in *United Sates v. Cotter*:

> "It is indeed true that the prosecution having used the former testimony, the defendants were entitled to put in such other parts as threw light upon it . . . . Nor is this right secured by the judge's going over the record for himself and selecting so much as he thinks relevant. The party must be allowed an inspection for himself; not of the whole minutes of course, but the whole evidence of the witness. This does not invade the secrecy of the grand jury; it is not an inspection of the minutes preparatory to trial and in invitum, which is in no circumstances permissible. . . . But when the prosecution chooses to open them, the time for secrecy has passed, fair dealing requires that the other side shall inspect them freely."[116]

Using this reasoning, numerous federal and state courts have held that once the prosecution has used the grand jury minutes for the purposes of refreshing the recollection of a witness the defense has a *right* to examine them.[117] Likewise, they have held that, when the minutes are used to impeach a defense witness, disclosure as a matter of right must be made to the defendant.[118] And, even when the state has refreshed the witness' recollection outside of the courtroom, a right sense of fairness requires that the defendant have an equal opportunity to discern any discrepancies that might exist in that prior testimony.[119] To perpetuate the rule of secrecy in such an

116. 60 F.2d 689, 692 (2d Cir. 1932), *cert. denied*, 287 U.S. 666 (1932). Compare United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923).

117. See *e.g.*, United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961); Continental Baking Co. v. United States, 281 F.2d 137, 146-47 (6th Cir. 1960); United States v. H.J.K. Theatre Corp., 236 F.2d 502 (2d Cir. 1956); United States v. Weinberg, 226 F.2d 161 (3d Cir. 1955); People v. Stevenson, 103 Cal. App. 82, 284 Pac. 487 (1930); People v. Kraus, 377 Ill. 539, 37 N.E.2d 182 (1941); State v. Archibald, 204 Iowa 406, 215 N.W. 258 (1927); Turk v. Martin, 232 Ky. 479, 23 S.W.2d 937 (1930); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957). *But see* Lennon v. United States, 20 F.2d 490 (8th Cir. 1927); State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910); State v. Magers, 36 Ore. 38, 58 Pac. 892 (1899); State v. Paschall, 182 Wash. 304, 47 P.2d 15 (1935).

118. See United States v. Stone, 282 F.2d 547 (2d Cir. 1960); People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931). See also Squaire v. State, 64 So. 2d 916 (Fla. 1953); People v. O'Neill, 107 Mich. 556, 65 N.W. 540 (1895).

119. State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957).

instance is to make the rule an end in itself, unsupported by reason, logic, or necessity. Secrecy then could become only an instrument of the prosecution, to be used or abused as it sees fit, rather than a policy for the protection of the grand jury.

C. *The Witness Seeks Disclosure*

Frequently a witness or the defendant may seek disclosure of his own grand jury testimony for purposes of refreshing his recollection. This is becoming increasingly true in antitrust criminal cases, where witnesses are employees or officers of the defendant corporation. Because of the frequent and prolonged delays between the grand jury hearing and the trial, such refreshment of recollection is often a grave necessity if the witness is to avoid entrapment due to inconsistencies, an inevitable result of the passage of time. Without such refreshment, a witness is often at the complete mercy of the prosecution, which can impeach his testimony directly or indirectly on matters most damaging to the defense while leaving sealed that testimony which, if brought to the attention of the witness, might clarify or nullify the adverse evidence elicited.

Reasons for nondisclosure were discussed in the majority opinion of *Pittsburgh Plate Glass*:

> "[B]ut testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness."[120]

These reasons are wholly inapplicable, however, when the witness voluntarily invites disclosure in order to fully refresh his own recollection. In *United States v. Standard Oil*, disclosure was permitted when a witness consented to it.[121] In an analogous situation, the court in *United States v. Schoeneman*[122] said: "The government could be prejudiced by a disclosure of other witnesses, but the court is unable to discern how the government could be adversely affected by a disclosure to defendant of his own testimony." To deny disclosure in such a case would not only be a great unfairness to the defense and to employee witnesses, but it would subvert the rule of secrecy beyond all reason and simply make it an outright instru-

120. 360 U.S. at 400.

121. No. 11584-C (S.D. Cal. 1955) (Pretrial Memorandum No. 1).

122. 203 F. Supp. 840, 842 (D.D.C. 1962). See also the perjury cases dealing with the same question, *supra* note 52.

ment of the prosecution.[123] "The blanket of secrecy is not so imprisoning as to defeat justice."[124]

V. Unconstitutionality of Section 112-6 of the Illinois Code of Criminal Procedure

Unquestionably, with each new decision on the subject of grand jury secrecy the pattern of a more liberalized use of grand jury minutes by defendants has become more securely implanted. State and federal appellate courts have recognized the need for disclosure at both the pretrial and trial stage; state legislatures in increasing numbers have focused on the problems herein raised and have passed important legislation liberalizing discovery. But obstructing the path of this judicial trend toward more liberal discovery and use of grand jury minutes stands section 112-6 of the new Illinois Code of Criminal Procedure; it provides:

> "(b) Matters other than the deliberations and vote of any grand juror may be disclosed by the State's Attorney solely in the performance of his duties. When the State uses, for the purpose of examining any witness, any part of a transcript of matters occurring before the Grand Jury, that portion of the transcript may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interest of justice. . . . Any grand juror or officer of the court who shall disclose, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection shall be in contempt of court, subject to proceedings in accordance to law."[125]

A careful examination of this statute forcefully demonstrates that it is not only out of step with even the most conservative judicial thinking on the subject but that it is a complete repudiation of over a century of case law. The statute effectively withdraws from the courts all discretionary power to permit disclosure even though the interests of justice might require disclosure. It can be categorically stated that no other jurisdiction in this country has ever before taken this well-established inherent power to control judicial proceedings from its courts. Prior to passage of section 112-6, Illinois decisions

123. There can be no valid distinction between an individual defendant seeking his own testimony and a corporate defendant seeking the testimony of its own employees or officers when those witnesses have freely consented to such disclosure.

124. United States v. Byoir, 58 F. Supp. 273 (N.D. Tex. 1945).

125. Ill. Rev. Stat. ch. 38, § 112-6 (1963).

had long recognized and applied this inherent power in permitting disclosure of grand jury testimony.[126]

The statute places complete control of grand jury minutes in the hands of the prosecution. Only if the state decides to use the grand jury minutes does the court have any discretion to permit disclosure to a defendant. In addition to violating a sense of fairness, this procedure places in the hands of the state an instrument fraught with potential abuses. As already noted, the prosecution could prevent the disclosure of grand jury testimony regardless of how convinced the court might be that such testimony would establish a ground for perjury or impeachment of a witness. Significantly, under prior Illinois case law, if the prosecution used the grand jury testimony of a witness at the trial, the defendant was entitled to examine it *as a matter of right.* Under the new statutory provision, disclosure is left to the discretion of the court.[127] Contrary to prior Illinois practice, under the new provision a grand juror may not testify as to testimony given before the grand jury, even when the "ends of justice require it," if such testimony has not been used by the state.[128] This changes a procedure recognized in Illinois as long ago as 1846.[129]

This statute, therefore, is not only a complete departure from all common-law concepts of grand jury secrecy, both within Illinois and elsewhere, but it also infringes upon the very philosophy underlying a court's inherent power to exercise discretionary control of the dis-

126. As early as 1846, the Illinois Supreme Court, in Granger v. Warrington, 8 Ill. 299 (1846), recognized this discretionary power of a trial judge to permit disclosure of grand jury testimony. In Bressler v. People, 117 Ill. 422, 8 N.E. 62 (1886), the Illinois Supreme Court stated:

> "There can be no reason, then, why evidence given before a grand jury should not be made known, and proved, if the ends of justice require it. A contrary course would tend to defeat, instead of to promote, justice, and be directly in opposition to the tendency of the age, which is to enlarge, rather than to contract, the sources of evidence."

Id. at 437, 8 N.E. at 67.

This power was repeatedly recognized by the Illinois Supreme Court, lower Illinois appellate courts, and Illinois trial courts until at least eighteen days before the new Illinois Code went into effect on Jan. 1, 1964, when Judge Brussell of the Criminal Court of Cook County granted disclosure in People v. Harden, No. 1301, Cook County Ill. Crim. Ct., Dec. 13, 1963. *E.g.,* People v. Kraus, 377 Ill. 539, 37 N.E.2d 182 (1941); People v. Goldberg, 302 Ill. 559, 135 N.E. 84 (1922); Hoge v. People, 117 Ill. 35, 6 N.E. 796 (1886); Looney v. People, 81 Ill. App. 370 (1898); Louis v. People, 81 Ill. App. 358 (1898).

127. See People v. Kraus, *supra* note 126; People v. Harden, No. 1301, Cook County Crim. Ct., Dec. 13, 1963.

128. *E.g.,* Bressler v. People, 117 Ill. 422, 8 N.E. 62 (1886); Hoge v. People, 117 Ill. 35, 6 N.E. 796 (1886); Granger v. Warrington, 8 Ill. 299 (1846).

129. See Granger v. Warrington, *supra* note 128.

closure of grand jury proceedings. The reasons for this retrogressive departure from the general trend of the law are not clear; nor can the impact of this legislation on other jurisdictions be easily measured. It is of significance that the drafting committee that prepared a "Tentative Final Draft of the Proposed Illinois Code of Criminal Procedure 1963" recommended, without dissent, a provision concerning grand jury secrecy substantially similar to rule 6(e) of the Federal Rules of Criminal Procedure. That draft provided:

> "(b) Matters other than the deliberations and vote of any grand juror may be disclosed by the State's Attorney solely in the performance of his duties. *Matters occurring before the Grand Jury may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice.* . . . Any person who shall disclose, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection shall be in contempt of court, subject to the proceedings in accordance to law."[130]

This draft quite clearly would have codified the common-law discretionary power of the courts to permit disclosure of grand jury minutes. However, both the Illinois House and Senate Judiciary Committees amended this provision to eliminate the discretionary judicial power. With little or no debate, the respective committees approved the amendments, and the provision that became section 112-6 was enacted into law by the Illinois Legislature.

In addition to the policy considerations, a statute of this type raises basic constitutional questions, both at the state and federal levels, that militate seriously against judicial approbation. Under the state constitution this limitation on disclosure of grand jury testimony seems to violate Illinois' quite typical provision vesting all judicial power in the courts.[131]

Under the United States Constitution this measure seems to

130. Tentative Final Draft of the Proposed Illinois Code of Criminal Procedure 1963, Art. 48-6 (1962). (Emphasis added.)

131. Section 112-6 is subject to a strong constitutional objection under article VI, section 1 of the Illinois Constitution of 1870 (as amended by a general election Nov. 6, 1962), which provides: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." The Illinois Supreme Court has consistently recognized that the constitutional grant of judicial power "is an exclusive and exhaustive grant vesting all such power in the courts." Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952). See also People *ex rel.* Navert v. Smith, 327 Ill. 11, 158 N.E. 418 (1937); People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); People v. Bruner, 343 Ill. 146, 175 N.E. 400 (1931). If the power is judicial in nature, "it necessarily follows that the legislature is expressly prohibited from exercising it," or from in

violate the due process clause. It is clear that section 112-6 does not permit disclosure of grand jury minutes unless and until the prosecution uses them. Yet, the due process clause clearly requires that the prosecution, upon request, must turn over favorable evidence to a defendant at the beginning of the trial. This includes statements of witnesses and co-defendants. In *Brady v. Maryland*[132] the Supreme Court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[133]

In harmony with the *Brady* decision the Illinois Supreme Court stated in *People v. Cole*:[134]

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any way attempting to limit or control it. People *ex rel.* Noren v. Dempsey, 10 Ill.2d 288, 139 N.E.2d 780 (1957); Agran v. Checker Taxi Co., *supra.*

Although article VI, section 1 does not define "judicial power," it has been defined by the Illinois Supreme Court as the power that adjudicates upon and protects the rights and interests of individual citizens. People v. Bruner, *supra.* And, among the basic judicial powers of a trial judge are the discretionary powers to control the proceedings before him, to ensure that a defendant is being fairly treated, and to act where the interests of justice dictate action. See People *ex rel.* Noren v. Dempsey, *supra.*

Moreover, it has long been recognized in the common law that the grand jury is an arm of the judiciary and the grand jurors are officers of the court rather than a part of the executive or legislative branches of government. See Brown v. United States, 359 U.S. 41, 49 (1959); Cobbledick v. United States, 309 U.S. 323 (1940); United States v. Smyth, 104 F. Supp. 279 (N.D. Cal. 1952). The United States Supreme Court, in Levine v. United States, 362 U.S. 610, 617 (1960), stated: "The grand jury is an arm of the court and its *in camera* proceedings constitute 'a judicial inquiry.'" And the Illinois supreme court indicated its concurrence with this position in People v. Polk, 21 Ill.2d 594, 174 N.E.2d 393 (1961).

It is thus a judicial function of the court to impanel the grand jury and to decide whether to make public the jury's records, which are, in effect, the court's records. The legislature can neither curtail nor abrogate this judicial power so long as the grand jury system is employed in the state. People *ex rel.* Noren v. Dempsey, *supra.* Article VI, section 8 of the Illinois Constitution of 1870 does, however, provide that the grand jury system may be abolished by law.

Furthermore, the legislature does not have the power to transfer this function of the courts to the state attorney's office. Grand jury proceedings are judicial in nature and are subject to direction by the courts, not the state attorney's office or the Department of Justice. Herman Schwabe, Inc. v. United Shoe Mach. Corp., 194 F. Supp. 763 (D. Mass. 1958). Thus, it manifestly appears that § 112-6 of the Illinois Criminal Code is an unconstitutional usurpation of the judicial power.

132. 373 U.S. 83 (1963). See also Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Wilde v. Wyoming, 362 U.S. 607 (1960); Mooney v. Holohan, 294 U.S. 103 (1935).

133. *Id.* at 87. In the *Brady* case, the evidence in question was the statement of an accomplice who admitted in an unsigned confession that he had committed the actual homicide. See also United States v. Burr, 25 Fed. Cas. 1, 35, 191 (No. 14692) (C.C. Ky. 1806); People v. Davis, 52 Mich. 569, 573-74, 18 N.W. 362, 363-64 (1884).

134. People v. Cole, 30 Ill. 2d 375 (1964).

> "Where it appears that there is evidence in the possession and control of the prosecution favorable to the defendant, a right sense of justice demands that it should be made available unless there are strong reasons otherwise."[135]

In the *Brady* case the state was ordered to make available to the defense, prior to trial, statements of an accomplice that were favorable to the defendant; and, in the *Cole* case, the state was ordered to make available statements made to the police by the principal prosecution witness that were favorable to the defendant and that had been suppressed by the state.

These cases clearly recognize a basic constitutional right of a defendant to have access to favorable evidence that is in the hands of the state. The Constitution does not discriminate between evidence obtained by the state from an extrajudicial statement of a witness and testimony given by that same witness before a grand jury.[136] The life or liberty of an accused is no less important when the source of the favorable evidence is the grand jury hearing. Therefore, a statute that would stand as an obstruction to such disclosure, as is the case with section 112-6, must fall before the constitutional requirements of due process.

It must be recognized that the state, through the grand jury process, is able to sift the incriminating evidence from that favorable to a defendant and to bring into focus at the trial only the former. Evidence favorable to the defense is often entirely lost because the defendant does not have the investigatory resources to search out such evidence. It is no answer that the *Brady* rule places an untenable burden on the state to do the defendant's investigating, for the sole function of the prosecution is to ensure that justice is done, not simply to win a tainted conviction.[137]

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135. *Ibid.* See also People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1958); People v. Davis, 52 Mich. 569, 573-74, 18 N.W. 362, 363-64 (1884).

136. Looney v. People, 81 Ill. App. 370 (1898).

137. The Court in Brady v. Maryland, 373 U.S. 83, 87-88 (1963), stated:

> "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done to its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though as in the present case, his action is not the 'result of guile'. . . ."

Conclusion

Unquestionably, the law purports less to be justice than to be a pursuit of it, and each liberalization of criminal discovery is another step toward the goal of ultimate criminal justice. The shedding of outworn and antiquated concepts of criminal law often takes decades to complete; yet, once in motion, the change can be swift and complete. The discarding of outmoded concepts of grand jury secrecy has found new and increased momentum in the past decade. For the first time, many courts are recognizing the need for pretrial discovery of grand jury minutes and the necessity for allowing their introduction at the trial for purposes of impeachment and refreshing recollection. The increased use of such testimony has been augmented by concern for the plight of the indigent defendant, who is wholly dependent upon the ability or inability of the criminal judicial process of the courts to protect his life and liberty.

Limitations on disclosure of grand jury minutes such as those contained in the new Illinois Criminal Code constitute an obstruction to the progress already made in other jurisdictions. Hopefully, such steps backward will be temporary in nature; for legislation of that type is completely out of step with the trend of modern judicial thinking and, therefore, should not be considered as a model for future legislative thought.