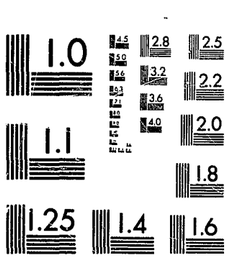

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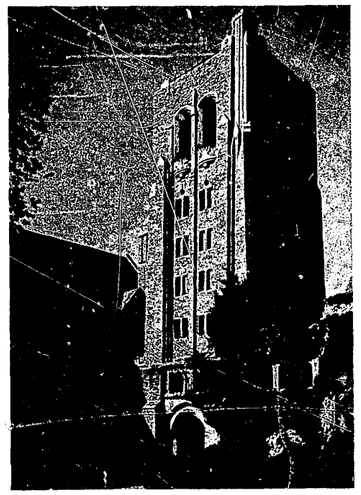

Techniques in the Investigation and Prosecution of Organized Crime

Grand Jury Examination of the Recalcitrant Witness: Contempt and Perjury

Second Edition

Cornell Institute on Organized Crime

Techniques in the Investigation
and Prosecution of Organized Crime

GRAND JURY EXAMINATION OF THE RECALCITRANT WITNESS: CONTEMPT AND PERJURY

Based on lectures by Kenneth Conboy delivered at the Cornell Institute on Organized Crime during the 1976 and 1978 Summer Seminar programs.

Second Edition

edited by:

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with
Austin Campriello

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Ithaca, N.Y.

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FOREWORD

In 1967, the Task Force on Organized Crime of the President's Crime Commission concluded that the effective investigation and prosecution of organized criminal activity required "the compulsory [production] . . . [of] . . . testimony or material."

> This is most readily accomplished by an investigative grand jury or an alternate mechanism through which the attendance of witnesses and production of books and records may be ordered.
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> * * *
>
> There is evidence to indicate that the availability of immunity can overcome the wall of silence that so often defeats the efforts of law enforcement to obtain live witnesses in organized crime cases. Since the activities of criminal groups involve such a broad scope of criminal violations, immunity provisions covering this breadth of illicit actions are necessary to secure the testimony of uncooperative or criminally involved witnesses. Once granted immunity from prosecution based upon their testimony, such witnesses must testify before the grand jury and at trial, or face jail for contempt of court. [Task Force Report: Organized Crime, the President's Commission Law Enforcement and Administration at 16 (1967)].

Those who have struggled with the evidence-gathering process in organized crime cases readily appreciate the value, indeed the necessity, of compulsory process, and recognize the concommitant duty to enforce the statutes that oblige witnesses to give truthful testimony. They are also acutely aware that essential constitutional protections and technical procedural requirements, when combined with the understandable fear that organized crime engenders in witnesses, and the codes of silence adopted by the underworld, make that task exceedingly difficult and time consuming. The interminable delays associated with the grand jury examination of witnesses who are determined

to withhold evidence caused one assistant district attorney to describe his entire occupation as "compelling recalcitrant witnesses to disgorge the truth."

This monograph has been specifically designed to facilitate the efforts of consciencious prosecutors to do just that.

G.R.B.

R.G.

A.C.

Ithaca, New York
February, 1977

FOREWORD TO THE SECOND EDITION

The demand for this mongraph, and hence the requirement of a second printing, provided the opportunity to update references and incorporate new legal developments in the area. One major source of new material was Kenneth Conboy's 1978 Seminar lecture, which has been integrated with the 1976 transcript from the 1st edition. The legal memoranda included in the mongraph have been cite checked and shepardized through the summer of 1978.

Thanks is owed to Institute staff members — Kathy Tajeu, who painstakingly typed these materials; Michael Smith, who tirelessly proofread this volume; and Kathryn Quirk, who carefully edited and updated the first edition.

R.G.

Ithaca, New York
May, 1977

CONTEMPT AND PERJURY

Contempt and Perjury

Kenneth Conboy[1]

Good morning, ladies and gentlemen. The subject of testimonial crimes is exceedingly complex, and the task of reviewing it adequately in just an hour is impossible. I have brought with me and will leave with the Institute a series of indictments which contain in them the cross-examinations that were the basis of the perjury and contempt prosecutions that many of you have read about in your précis on contempt and perjury. We really cannot intelligently discuss how one goes about laying the foundations for effective perjury and contempt prosecutions without a close study of those examinations. Because we have such a limited time this morning, I am not going to allude to those examinations extensively, but I do suggest that if any of you are interested you see Ron Goldstock or Bob Blakey and get one or more of those indictments and study them.[2] All, incidentally, resulted in convictions.

Now, I would first of all like to say, by way of introduction, that the organized crime prosecutor is always viewed, and I think this is part of the attraction of doing the work, as an

[1]A.B. 1961, Fordham; LL.B. 1964, Virginia. Mr. Conboy is the assistant district attorney in charge of the Rackets Bureau of the New York County District Attorney's Office. He has served as a staff member of the Mayor's Ad Hoc Committee on Civil Disorders and as a member of the Investigative Panel of the Strike Force against Organized Crime and is currently on the Committee on Penology of the Association of the Bar of the City of New York.

[2]See Appendices A-D.

amalgam of investigator and lawyer. This is an exceedingly challenging role. I think, though, that when we get to the question of the hostile witness in the grand jury, we are talking about the apex of a lawyer's, as opposed to an investigator's, skills. What we are really talking about here is effective cross examination. We are talking about it in the context of an exceedingly fluid legal environment. What I mean by that is that there has been a great amount of litigation in recent years in the perjury and contempt fields. Procedural, substantive and tactical considerations have become extraordinarily complex, and frankly, in many respects, hopelessly ambiguous. These considerations are doubly difficult to deal with because every single witness is a unique individual. Accordingly, one must adapt oneself to the uniqueness of that person in the context of the changing law, and beyond that, to the requirements of the principles of good cross examination.

The second point, by way of introduction, that I would like to make to you goes to the larger question of prosecutorial discretion. There is no field of public prosecution where prosecutorial discretion is more delicately exercised than in the areas of perjury and contempt. The decision to seek an indictment for contempt or perjury is one that is fraught with peril for any prosecutor who is sensitive to his obligation to fairness. After all, we are dealing in the end in these cases with language, the subtlety of language, the complexity of human motivation. You all know that it is infinitely easier for a

prosecutor to stand up in a public courtroom and say, "Ladies and gentlemen of the jury, convict this person of robbery in the first degree, because the People's witness saw him commit this crime." You are proving extrinsic facts, you are drawing inferences as to guilt from demonstrable facts that are extrinsic to the defendant's state of mind. That, in a sense, is not the case with testimonial crimes. And that has given rise to an extraordinary series of cases[3] that go to very sophisticated questions of prosecutorial conduct, criminal intent, and other aspects of what has been derisively characterized by defense lawyers in these cases as a cat and mouse contest where the prosecutorial cat has all the advantages in the grand jury chamber.

Now, before addressing the technical aspects of the subject, I want to recommend to you some broader reading about the problem of guilt and criminal intent. Though there are many good monographs in the field on criminal intent as a legal concept, I think that as a practical matter you cannot really appreciate the dimensions of your challenge without considering broader philosophical and psychological principles. I recommend to you the Principles of Psychology, a seminal book in the field by William James, an American psychologist, who treats exceedingly well the subject of guilt, and its telltale manifestations. I think that also if you read the novels of his brother, Henry

[3] See, e.g., United States v. Mandujano, 425 U.S. 564 (1976); United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976); People v. Tyler, 46 N.Y.2d 251 (1978); People v. Pomerantz, 46 N.Y.2d 240 (1978); People v. Schenkman, 46 N.Y.2d 232, (1978); People v. Blumenthal, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1st Dep't. 1976).

James, you will come to understand the necessity for an understanding of language, its depth, its texture, its nuance. You will appreciate the beauty of his lucid insights into the way people think, because that is really, at the bottom line, what you are seeking at the grand jury and in the court room in cross-examination. You are seeking to expose the truth, and not merely demonstrate it. Your questions, coherent, purposeful and logically integrated, must in the aggregate, light up the interior terrain of the witness like a flare. Tolstoy and Dostoevski, too, have wonderful insights into human beings, and teach us about the complexity of human perception and motivation.

I am a firm believer in the fact that every lawyer can be successful in this field if he is willing to work tirelessly to prepare himself for the challenge of dealing with a witness who is seeking to conceal from him and from the grand jury the factual information which it is his obligation to give, having been, in the typical case, immunized from any prosecution.

Now, I want to be more specific and turn to six legal issues that tend to recur in grand jury presentations. Then, I would like to talk to you about preparing for the witness, then the advice to be given to the witness to satisfy legal and equitable requirements, and finally the techniques of examination, which again, cannot really be intelligible to you unless you avail yourselves of the examinations which will be on file here and available to you.

There are basically six devices that witnesses and lawyers invoke to challenge or impede you in your right to ask these

"proper and legal interrogatories," to use a New York phrase.[4] The first and most complex relates to the whole question of immunity, that Peter Richards[5] has covered in detail. The device is simply to challenge the effectiveness of the procedure designed to protect the witness' constitutional rights. Clearly, a person cannot be compelled to testify against himself without being given some kind of immunity.[6] Now, the immunity given, the dimension of it, the quality of it, varies, of course, with each jurisdiction. I should tell you that if you want to see how complex, how absurdly complex, a legal issue can become in the unravelling case law of a state, look at the case law of New York State from roughly 1955 to 1975, 20 years of effort by the appellate courts to deal with the question of immunity: whether immunity and its dimensions were adequately conveyed to the witness before he testified; whether the statutory requirements were complied with; whether he got a transactional immunity broader than the prosecutor intended, because the questions were imprecise, and the answers were broader than the questions, but were nonetheless still responsive. These theoretical questions are particularly relevant to those of you who are practicing in a state which still has a statutory scheme whereby a witness must invoke his privilege to trigger the immunity process. The most troublesome area in the immunity field in New York has been the witness-target

[4]N.Y. Penal Law § 215.51 (McKinney 1975).

[5]Mr. Richards lectured on the subject of"Grand Jury and Immunity." A recording of that lecture is on file with the Institute.

[6]See e.g., Kastigar v. United States, 406 U.S. 441 (1972).

distinction.[7] When does a person move from the ambiguous and neutral status of witness and become a target? When the New York legislature passed a statute[8] that gives every witness who does not sign a waiver automatic transactional immunity, it rendered the witness-target distinction obsolete and meaningless. This has not prevented enterprising lawyers from resurrecting the distinction in the guise of a Miranda issue. Now, there is the basic rule that you are not obligated to give a witness his Miranda warnings when he is in the grand jury, even when he has become a "target," but there is a recent case in New York that does require the prosecutor to advise the witness of the definition of criminal contempt or perjury if his testimony is approaching those areas.[9]

Before leaving the subject of immunity, thoroughly reviewed by Mr. Richards, I want to repeat again my caution about the scope of your questioning. You obviously have to be careful. If you ask questions that are broader than you intend, you can effectively immunize that witness for crimes for which you do not intend that he should receive immunity.[10] Remember the dimension of the immunity given in a transactional state is determined by the answers that are responsively given, and not by the question.

[7]See, e.g., People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

[8]N.Y. Crim. Proc. Law § 190.40(2) (McKinney 1975).

[9]Giving warnings, however, is the better practice. See United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976). The recent New York case is People v. Cutrone, 50 A.D.2d 838, 376 N.Y.S.2d 194 appeal dismissed, 40 N.Y.2d 988 (1976), 360 N.Y.S.2d 928 (abated on defendant's death). See also People v. Didio, 60 A.D.2d 978, 401 N.Y.S.2d 640 (4th Dep't 1978).

[10]N.Y. Crim. Proc. Law § 190.40(2) (McKinney 1975).

So, if you as prosecutor ask questions that are not carefully honed, that are not precisely fashioned, and the witness gives you a response that is arguably to the point, but that is broad enough to cover transactions you had no intention of asking him about, he is immunized, receiving use immunity in federal court and, of course, in state court full transactional immunity, if authorized. If you do not take care to control the character and the scope of the question, a broader immunity than you intended will result. So understand that your obligation as an examiner is to fashion clear, concise, and precise questions.

Now, the second obstacle that is often raised by lawyers and witnesses in terms of thwarting you in the grand jury is the "Gelbard"[11] or, in New York, "Einhorn"[12] objection. Now, as you all know, the decision in Gelbard allows a witness to refuse to answer questions before a grand jury on the ground that the questions are the product of illegal eavesdropping. It does not entitle that witness to a definitive disclosure as to whether he has in fact been the subject of eavesdropping. He is entitled to be advised that the questions are or are not based upon illegal eavesdropping. This is normally done in court, by a judge. That gives you an advantage. It does not tell the witness that you have taps. It merely indicates that if you do have taps, they were not unlawfully obtained. Now, of course, any of you

[11] Gelbard v. United States, 408 U.S. 41 (1972); see generally Appendix F, Section II, infra.

[12] People v. Einhorn, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974).

who have examined witnesses under a grant of immunity know how a wily organized crime figure may seek to avoid giving definitive statements for fear that his conversations have been recorded. If he gives definitive statements that are contradicted by tapes, he is subject to prosecution for perjury. If he gives ambiguous statements he might be indicted for evasive contempt but, of course, most seasoned lawyers know that a contempt prosecution is extremely difficult to build properly, is even more difficult to defend after the indictment is returned, and then is ultimately very difficult to persuade a jury to convict upon. So you can appreciate why the Gelbard-Einhorn procedure is a critical advantage to the examiner on this question of disclosing the basis of your questions.

Now, very briefly I am going to indicate for those who have never done it, how an Einhorn objection ought to be handled. The witness will tell you that, "I have been instructed by my lawyer to ask whether there has been any electronic surveillance used against me." And then you will say, "I advise you that the questions on which you are about to be examined are not the product of illegal eavesdropping." He then might say, "I've been instructed by my lawyer to have a court pass upon the issue." You then say, "Mr. Foreman, Mr. Stenographer, let us proceed to the courtroom of the judge who is supervising the grand jury." You then ask a recess and go to court. You then tell the judge that you are here in the matter of the recalcitrant witness, one Dominic Clam, that he is before the first August 1976 grand jury, that the jury is present, through

its Foreman, Mr. John Q. Citizen, that the witness, Mr. Clam, his attorney, Mr. Baxter Street, are also present in court. You tell his Honor that the grand jury is conducting an investigation to determine whether certain crimes are being committed, and then you enumerate them. You tell the Court that Mr. Clam has been granted immunity, and that he has refused to answer legal and proper interrogatories, upon an assertion that illegal electronic surveillance may have been used against him. You then ask the judge to proceed with an ex parte in camera discussion with you, the witness and his lawyer being excluded. If there is eavesdropping, the judge is shown the warrant. He need not be shown the underlying affidavits. You simply advise the judge that there is an order, and you show the judge the order. Of course, if there is no order and no tap or bug you simply tell the judge that. But the judge ought not then proceed to open Court and tell the lawyer that there is no electronic surveillance, directing the witness to go back and answer the question. The law does not require a judge to do that. Basically, the judge comes back out, goes on the bench, and he tells the Witness to proceed to the grand jury, to answer the questions and that there is no illegal electronic surveillance, that the witness has a legal obligation to perform his obligations as a witness.[13]

Now, the third obstacle that is often raised with respect

[13]Compare with the federal procedure in the First and Eighth Circuits. In re Lochiatto 497 F.2d 803 (1st Cir. 1974). In re Melickian, 20 Crim. L. Rptr. 2383 (8th Circuit 1977).

to challenging your right to ask questions in the grand jury relates to the issue of right to counsel. Now, as you know, the status of the law in all jurisdictions, is that a witness clearly has the right to the advice of a lawyer while he is before the grand jury.[14] Several states have recently enacted statutes that give a witness the right to have an attorney present in the grand jury room while he is being questioned.[15] Generally, the attorney may advise the witness but may play no other part in the proceedings. In the federal system and in the other states, the law remains that a witness may not have a lawyer in the grand jury chamber during questioning. There is a constitutional right to have access to a lawyer, however, and that access must be generously allowed. The witness, if he has a basis to see his lawyer, ought to be allowed to leave the chamber and speak with him.

In those jurisdictions where no right to an attorney in the grand jury room exists, a witness should be advised that he has the following rights with respect to consulting his attorney: number one, if he has any question as to his legal status as immunized witness; number two, to satisfy himself with respect to the relevancy of a particular question; and, number three, to establish whether particular information sought is legally privileged, and therefore, whether a lawful

[14]See generally Appendix F ¶24, infra. Compare Commonwealth v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971).

[15]See, e.g., An act to amend the criminal procedure law in relation to allowing a witness the right to counsel in the grand jury, 1978 N.Y. Laws, ch. 447, § 2 (to be codified as N.Y. Crim. Proc. Law § 190.52); an act to provide for Investigating Grand Juries, 1978 Pa. Laws act 271, §8(c).
In New York, the right to counsel attaches only if the witness waives immunity. In Pennsylvania, every witness has the right to counsel.

predicate exists for a refusal to answer.

Now, as you know, a matter of privilege is exceedingly difficult to deal with if the witness in the grand jury is himself a lawyer. Just very briefly, on the question of privileges, you know a privilege can be pierced or penetrated if you can establish there was no form of professional relationship, if the privilege was waived by disclosure of the communication to a third party, or if the parties themselves, the client and lawyer, were together involved in the commission of the crime.[16]

It is important, ladies and gentlemen, that when you are in the grand jury and the issue of counsel is raised that you be conscious of the record, and repeatedly note for the record the absences of the witness to consult with counsel. Always obtain from the witness, when he comes back in, his acknowledgement that he is satisfied with respect to the opportunity given to consult with his lawyer. You are not allowed to ask the witness what was said, of course. If he persists in his refusal to answer a proper question on advice of counsel, take them up to Court and have the judge overrule the lawyer and direct an answer. Now, that is basically the way in which the right to counsel question comes up.

While it is very frustrating to have a witness repeatedly leave the chamber to get advice from his counsel, the better rule if you anticipate returning an indictment against the witness is to let him go. In spite of the delay you will be

[16] See Appendix F, VIII-X, infra.

in an infinitely better posture with the petit jury that hears his trial for perjury or contempt, when you can demonstrate quite clearly from the record that the witness indeed had ample opportunity to obtain legal advice. On the other hand, if you prevent the witness from seeing a lawyer, even if he abuses the privilege, the argument will be tellingly made by counsel for the defendant, "Here was an assistant district attorney, or an assistant attorney general, with three college degrees and a command of the King's English, against my poor fellow who barely made it through high school and who was not even allowed to see his lawyer." It is much better to yield to the harassment in the grand jury chamber and let him go. Do not permit an issue of deprivation of counsel to exist in your record.

Now, obviously, if it gets to the point where it is absolutely outrageous then you may interrogate him as to what his purpose for going is. And, by the way, in New York and, I assume in the other jurisdictions, you may ask him why he wants to go to see his lawyer. You might say, "What is the purpose of that?" If he says, "I don't want to tell you," let him go. But very often he will disclose his intention, and it will be ambiguous. You have already advised him at the beginning of the proceedings as to his status, so you'll say, "Now do you have any questions about your legal status, Mr. Clam?" If he says he does then you explain it, and make it as simple as possible, so you eliminate the legal basis. "Now do you have any question with respect to the relevancy of this question, after all, the grand jury is investigating

a homicide by a .38 caliber gunshot wound and the question whether you possessed a .38 caliber pistol is relevant, isn't it, Mr. Clam?" And, of course, he is going to say yes, and you eliminate that one. And the last one is, "Are you suggesting there's a privileged relationship here?" And the answer is no, then, "What is the basis of your going?" Now, again, let him go, but always make sure that your record is effective, because if the grand jury indicts for perjury or contempt, you can flay that witness, as a defendant, by arguing to the trial jury that this man demonstrably impeded, and concealed relevant evidence from the grand jury.

That is the core of the contempt; it is an obstruction of justice; it is a concealment. The physical going out of the chamber can be argued as a physical demonstration of that obstruction. You see how much more effective it is than simply relying on the questions and answers.

The fourth obstacle which you must be aware of in terms of a challenge to questioning is a problem which is, I think, limited to New York. This problem involves what we call the "equivocal no" in New York testimonial crime.[17] This problem has developed as a result of two cases litigated in New York, People v. Thomas Renaghan[18] and later, People v. Neil Martin.[19] Basically, in New York and some other jurisdictions, you must

[17] See generally G. Blakey and R. Goldstock, Theft and Fencing: A Simulated Investigation, at 145-6 (1977).

[18] 33 N.Y.2d 991, 309 N.E.2d 425, 353 N.Y.S.2d 962 (1974).

[19] 47 A.D.2d 883, 367 N.Y.S.2d 8 (1st Dept. 1975), aff'd, 42 N.Y.2d 882, 366 N.E.2d 881, 397 N.Y.S.2d 794 (1977).

have a definite answer as a predicate for perjury indictment. In other words, if a person says, "I don't recall," "I don't remember," "I think so," "could be," "possibly," "who knows," that is not sufficiently definite or precise testimony by the terms of the New York perjury law.

Now, there is a New York case which is dated about the turn of the century which says it is appropriate to indict in New York for perjury when a person says, "I don't remember." In other words, the witness is alleged to have sworn falsely with respect to the state of his recollection. The issue, of course, is how one establishes two-witness proof directly to contradict the witness' asserted mental state in the grand jury. That case, though never explicitly overruled, has been effectively overruled by a whole series of contempt cases which draw a distinction in New York between the definite answer (perjury) and the non-definite answer (evasive contempt).

On the federal side, as you know, the statement, "I don't recall," or "I don't remember" can be the basis of perjury. In pleading and practice, evasive testimony is perjurious and not contemptuous. You have the Chapin case cited, and the other situation, I think a little better known, is the Voloshen-Sweig affair involving the office of the Speaker of the House of Representatives.[20] In my opinion, the New York rule is more logical and theoretically consistent with requirements of pleading and proof, but the federal rule is certainly

[20] United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975). The early New York case is People v. Doohy, 172 N.Y. 165, 64 N.E. 807 (1902). The Sweig affair is reported as United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

simpler, and in the realm of the practical, more desirable.

Now, on this question of the "equivocal no" in New York, I do want to tell you very briefly about the Renaghan case to illustrate this problem in New York and in other jurisdicitions where there is a requirement for you to get definite testimony for perjury. Thomas Renaghan, a high police official, was asked a very simple question: had he communicated certain information to a middle man for ultimate transmission to a racketeer? The investigation involved the promotion of another police officer to a very sensitive unit in the police department, arguably at the request of a notorious gangster. There was a very strong inferrential suggestion from other testimony that this middle man had advised the racketeer that the promotion would be made. To the question put to him, Renaghan gave an unequivocal answer. He said, "No, I did not." The prosecutor could not seek an indictment for perjury even though he believed the witness was lying, because there was no wiretap proof on the particular question and there was no other basis to satisfy the two-witness rule. Accordingly, Renaghan was further examined on the point and he then equivocated, backing off the definite "no", giving an equivocal "I don't remember, I don't know, possibly, could be" testimony. The appellate division opinion,[21] sustained by the court of appeals, held that once Renaghan gave that definite "no" he had satisfied his obligation as a witness and the prosecutor should have been

[21] People v. Renaghan, 40 A.D.2d 150, 338 N.Y.S.2d 125 (1st Dept. 1972), aff'd, 33 N.Y.2d 991, 309 N.E.2d 425, 353 N.Y.S.2d 962 (1974).

satisfied with this and gone on to something else, that it was the impetus of the prosecutor's questions which caused the doubt, and accordingly, the prosecutor in a very subtle and ambiguous way had undermined what was definite and final testimony.

The Neil Martin case, which grew out of the same investigation, was litigated thereafter, and the court, the same appellate division that decided the Renaghan case, seemed to modify the "equivocal no" rule. In Martin, the court said, in effect, if on the entire record it is clear that a pattern of sophisticated evasion--which, by the way, is the interesting language used by the minority in the Renaghan decision in the court of appeals--a pattern of sophisticated evasion to use definite answers and then back off of them is manifest from the record, then you may proceed with a criminal contempt indictment. Now, appreciate why it is critical, in terms of the tactics, to have an understanding, a sophisticated, practical understanding of what this distinction is. Obviously, you want this witness as a potential witness; you want his testimony. This is why you have given him immunity; you are not there for merely intelligence-gathering purposes. If the man gives an unequivocal no on page 10, and he gives a yes on page 20, and he gives an "I don't know, maybe, or could be," on 15 other pages, he has effectively defeated you. Why? Because he has vitiated the total impact and value of his testimony. If you call him as a witness at the trial of someone else, the defense lawyer will demonstrate that this man has utterly no credibility. And that is the implicit rationale of the Martin decision. And of course the problem with contempt and perjury, as I'll

get to in a few minutes, is that the courts are extraordinarily sensitive to the fairness issue, which is something that is very critical to understand and deal with.

Another point on the so-called "equivocal no" in New York--and this is true also in any jurisdiction where there is distinction between perjury and contempt--please understand, that when the grand jury indicts for contempt in New York and in most jurisdictions, you may not prove contempt by extrinsic evidence. In other words, the only basis on which you can ask a trial jury to conclude that the witness' testimony was so evasive, equivocal, and manifestly false as to amount to no answer at all or to answer in form as opposed to fact--the only basis on which you could prove that is the record of the witness' testimony before the grand jury.

Extrinsic proof is, of course, admissible in a perjury prosecution, and unless it is perjury by inconsistent statement, which is in the nature of criminal contempt, you must prove your case by extrinsic proof. Indeed, you must show two-witness proof or, as the outline indicates to you, one witness and some strongly corroborative evidence. In fact, there are some cases that suggest circumstantial and inferential evidence can support the missing witness in the two-witness rule situation.[22]

The next obstacle that is less of a problem, but which is sometimes raised to impede your questioning, and I just wanted to allude to it, is the question of jurisdiction. You may

[22] See, e.g., People v. Lee, 34 N.Y.2d 884, 316 N.E.2d 715, 359 N.Y.S.2d 280 (1974).

not base a perjury or contempt prosecution on an examination taken in the grand jury that did not have jurisdiction over the putative criminal conduct under investigation. Now, this becomes exceedingly difficult in places like New York where there is a special prosecutor, whose authority is limited by executive order. The special prosecutor's jurisdiction might not warrant him to be in the grand jury in the first place. Or, it might warrant him to be in the grand jury on investigative jurisdictional grounds, but not with indictable jurisdiction. All you need to show to support the materiality or the relevancy in the perjury or contempt indictment is that the grand jury had investigative jurisdiction. What I mean by that is, the grand jury must have been investigating the crime, and its investigative theory must encompass some arguable crime within the jurisdiction. So hence, if you call somebody who is a witness to an event in Saratoga, a horse race, and you are investigating a fix of a horse race as it effects betting at the OTB windows in Grand Central Station, you may call that witness from Saratoga, you may ask him questions about his activities in Saratoga, and if you can show there is a conspiratorial link in or effecting Manhattan, or you can show there is accessorial conduct in Manhattan, or you can show there is a viable theory of such connective legal tissue, then you have the investigative jurisdiction, and any perjury or contempt indictments will be well-founded jurisdictionally. Now there are some cases that are very instructive on the question of jurisdiction and what is indictable jurisdiction and you should

address them.[23]

Finally, in the sixth area of challenges to your right to proceed, we have the major one, prosecutorial misconduct. Now, if you look at the indictments in most of the cases that you've been given in your contempt and perjury brief, you will see names like Ward,[24] Dunleavy,[25] Zincand,[26] and Ianniello.[27] Most of these cases involve challenges of one kind or another, to the prosecutor's fairness. There is a very, very substantial body of law now on this subject and you really must familiarize yourself with it.[28] Just permit me to say very, very frankly that the balance between an aggressive and professional posture on the one hand and a fair and decent posture on the other is exceedingly difficult to strike in the circumstances that we're talking about. I can not emphasize enough the fact that the overall tone and character of your behavior will become the central issue in a testimonial crime trial as it has in case after case after case.

[23] See, e.g., Matter of Dondi v. Jones, 40 N.Y.2d 8, 351 N.E.2d 650, 386 N.Y.S.2d 4 (1976); People v. DiFalco, 54 A.D.2d 218, 388 N.Y.S.2d 395 (1st Dep't. 1976); People v. Blumenthal, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1st Dep't 1976).

[24] 37 App. Div. 2d 174, 323 N.Y.S.2d (1st Dep't 1971).

[25] 41 App. Div. 2d 717, 341 N.Y.S.2d 500 (1st Dep't), aff'd 33 N.Y.2d 573, 301 N.E.2d 432, 347 N.Y.S.2d 448 (1973).

[26] 41 App. Div. 2d 717, 341 N.Y.S.2d 500 (1st Dep't), aff'd 33 N.Y.2d 573, 301 N.E.2d 432, 347 N.Y.S.2d 448 (1973).

[27] 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968).

[28] See cases cited in note 3, supra.

There is basically divided authority now on whether a prosecutor's motives are germane in terms of an attack on a perjury indictment. Nickels,[29] the leading case on the point, holds that a prosecutor's motive is irrelevant, but other cases, including Cunningham[30] seem to hold otherwise. The jury may, of course, consider the overall conduct of the interrogation in the grand jury, to determine whether the prosecutor's methods affected the witness' ability to give clear and sensible answers. If a defendant can establish at his trial that the prosecutor's methods of interrogation were repugnant, the jury may decide the factual issue of lack of criminal intent in favor of the defendant, and the indictment may fail. So as a practical matter, you must proceed upon the assumption that the motive of the prosecutor is probably subject to attack at the motion stage, and is always a jury issue at the trial, as are his methods.

I obviously urge upon you a very sensitive understanding that if you do abuse a witness in the grand jury, if you ridicule him, if you ask patently unfair questions, if you recite portions of the record to him, "Oh, Mr. Witness, yesterday you testified to such-and-such," and your recitation of what he testified to is slightly off-center, a defense lawyer will say, "This was a public official who was out for a scalp.

[29] 502 F.2d 1173 (7th Cir. 1974).

[30] Matter of Cunningham v. Nadjari, 39 N.Y.2d 314, 347 N.E.2d 915, 383 N.Y.S.2d 590 (1976). See People v. Tyler, 42 N.Y.2d 251 (1978).

This is a fellow who was looking to hang my client, and indeed he has successfully done so. Look at these unfair questions, look at the double entendre, look at the sarcasm."

The witness very often will say, one who's been well-schooled, "No need to shout at me, Mr. D.A." If you have shouted, don't try and conceal it by saying, "I'm not shouting," because the grand jurors will not accept it. Further, it's a lie. If you have been shouting, apologize: "I'm very sorry." If, for instance, you are working in a grand jury chamber that faces out on a very busy street, you might mention for the record that the windows are open, and the traffic noise makes it difficult to hear, "But I will indeed modulate my voice if it makes you uncomfortable," that sort of thing.

The simple rule is that you must be scrupulously fair with these witnesses, but you need not convert a sense of scrupulousness with respect to the questioning into merely passive willingness to accept ludicruous and outrageous statements that are an insult to you and to the grand jury and ultimately to the court for whom you are acting. It requires a great deal of balance and care and a great deal of self possession and, really I guess in the end, self control and self respect in handling these matters. You have to understand what it is like to be a witness in a grand jury chamber, facing twenty-three people. You have got to understand what that is, the tension, the stress. And if you understand that, if you are sensitive to it, you will approach these problems with a degree of fairness which will support an indictment if an indictment is warranted.

Finally, in the prosecutorial misconduct area, there has been a serious problem litigated in a lot of these cases which you have studied, the need to confront a witness verging on perjured or contemptuous testimony with documentary evidence. A witness says, "I don't recall whether I told X to carry a loaded gun; I don't recall that," or "I never told X to carry a gun," and you have him on tape saying to X, "Hey, you better carry a loaded gun." Query: is it an obligation of a prosecutor to an immunized witness, when he denies or says he does not recall, to refresh his recollection by playing the tape? And then, after saying, "Is that your voice?" if he says, "yes, I said it but I was only kidding," or "I was trying to amuse him," you are out of the ball park. He has effectively admitted he made the statement. He is giving you an unequivocal answer, and he is telling the truth, so he cannot be indicted for perjury. And he cannot be indicted for criminal contempt, because another aspect of this contempt law is you cannot indict for what is called an Aesop's Fable.[31] In other words, if a person comes in and he is confronted with fifteen observations that establish he carries a wager list as part of a gambling operation, and he tells you that is was his laundry list, and he was conferring with these people with respect to his laundry, he has given a definite, responsive anser to the question which is in no way evasive. Absent proof of perjury, such testimony is not actionable as contumacious.

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[31] But see People v. Tilotta, 84 Misc. 2d 170, 375 N.Y.S.2d 247 (Sup. Ct. Kings County 1975).

Of course, relentless interrogation of Aesop's Fable witnesses often causes vital changes in their position.[32] Often, inconsistent statements are sworn to, which if mutually exclusive, are actionable as perjured testimony. With respect to the meaning of statements made, this is more easily handled. What you do in such a situation, if you have a transcript, is you get the witness to commit himself on portions of the conversation and he will invariably give you statements which are inconsistent with subsequent portions of the conversation. If you are careful enough with respect to giving him, by degree, the substance of the conversation, he will have no way rationally to connect his made-up story with the chapter and verse of what the conversation was. But remember, if a person gives a definitive answer, "Was this slip a gambling slip?" "No it was a laundry list." "Well, look at it, what is this notation?" And he gives an answer plausible on its face, the law is, an Aesop's Fable may not be the basis for criminal contempt, because the core of a criminal contempt is the refusal of a witness to give an answer. Now, the argument, of course, is--well, he's really not giving us an answer, he's lying. And the counter-argument to that is--if he's lying indict him for perjury. So you see how the conceptual problem of dealing with testimonial crimes repeatedly manifests itself.

Now, on the question of confrontation with evidence, you are under no obligation to confront the witness in a perjury

[32] For an example of this phenomenon, see G. Blakey and R. Goldstock, Theft and Fencing: A Simulated Investigation, at 135-36 (1977).

case, with particular items of evidence, particularly where the witness concedes that his memory does not need refreshing.[33] In those circumstances, you clearly do not have to confront the person with your documentary proof, as a matter of fairness, because the obvious answer is that the person will conform his testimony to what the truth is. However, there is the case where a person says, "I would like my recollection refreshed, do you have anything to refresh my recollection?" That is exceedingly difficult to deal with, with a lot of juries. Jurors will say, "Well for heaven's sake, if they had the wiretap and they wanted his testimony as a witness, why didn't they play the tapes for him?"

Now, as a practical matter, I think the generally sound procedure is to play the tapes for a person, if the conversations are substantial; let the witness explain without contradictions, equivocations, and evasions, the meaning of the conversation. Because, you see, once jurors in a trial hear that not only did you tell the witness in substance what he said, but you played the tapes of his own voice, and he still insisted he couldn't remember what the conversation was about, then you are going to get a conviction for criminal contempt. And you are going to be effective and successful in your argument because as a practical matter, everybody knows once they hear the full context of a conversation that the context evokes circumstances and those circumstances evoke more circumstances. Remember when you talk to people and question them in the grand jury

[33] See, e.g., United States v. DelToro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Winter, 348 F.2d 204 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

always ask them, "Give us the substance, give us the core, give us the context. No, we don't want exact words."

That's another ploy they will use. They will say, "I can't remember exactly what was said." The answer is, "The grand jury doesn't want precise detail; the grand jury doesn't expect that the human mind is capable, computer-like, of recording word after word. Rather we want the substance of it, Mr. Witness, we want the core of it." Now, you need not confront a witness with tapes or documentation if a perjury prosecution is mandated by the duty of the grand jury.[34] Remember, however, that juries are very reluctant to convict a man of criminal contempt, or even perjury, if the events on which he is examined occurred,say, five years ago. If they occurred last week, you generally are in a much better position with a jury. Of course, if the subject of the questioning is an underworld contract to murder, even a ten-year time lapse might not bother a jury.

Finally, on this question of prosecutorial misconduct, the prosecutor is not supposed to testify, yet very many prosecutors do that by putting their own opinions in the questions; by martialing evidence unfairly; or by making material mistatements--very often it's not intentional but you must be aware of the problem. For example, let's assume that you're examining a man on day 3; he's been in on 2 other days and you summarize his testimony from day 1 and it is just ever so imprecise and thus, more damaging to him. If he's indicted, his lawyer will see what you've done, and it might have been inadvertent, but

[34] United States v. DelToro, 513 F.2d 656 (2nd Cir.), cert. denied, 423 U.S. 826 (1975).

he will then again make the argument that here is this fellow, with three university degrees, and the command of the King's English, and my fellow never got out of high school, and here is what he's doing, isn't he a sneak, isn't he devious.

Those are some legal problems that may be raised in connection with the manner in which you have conducted your proceedings. One thing you have to understand, ladies and gentlemen, is that there are many times, like in other aspects of the law--and indeed in life--where you cannot control circumstances and the ebb and flow of certain investigations and certain situations, and you have to accept that. You must understand that the world will not come to an end if somebody beats you in the grand jury. Remember, equanimity is the critical and central quality here.

Now let's talk about preparing for the witness. The very first thing you must do in terms of your grand jury examination of a potentially hostile or recalcitrant witness is you must decide what your goals are. You must decide whether you want to neutralize this person with respect to potential testimony on the other side, or whether he is going to be a potential defendant, in the sense that he is an individual about whom, because of his background you can make a viable prediction that he is going to be hostile to you. Obviously, your manner of approaching a witness will be substantially different if he is going to be a hostile witness. For instance, if you called him into your office first and asked him whether he would be willing to answer questions and he, in effect, told

you no, if he'll fight your subpoenas, if he has a long criminal record, if he's done time for contempt of court before--these factors tend to persuade you that you had better go in there forewarned that you are going to the mat with this witness. As a practical matter, you have to know what ammunition you can fire in a grand jury context to demonstrate to the grand jury, if appropriate, that this person is concealing, he's thwarting, he's impeding, he's obstructing. So the first goal is to size him up in terms of what his status is going to be.

The second issue is what is the witness' relationship to other witnesses. Now, clearly, and this ties in with what Mr. Richards said this morning about the immunity decision, you have got to consider the effect of your putting questions to witness X vis-à-vis the later calling of witness Y. Because if X and Y are in a conspiracy X is going to walk out of that grand jury chamber and he is going to tell Y, "They know this, this, and this. This is what they're going to ask you about. I think they had a tap on the Madison Street Social Club, and from the questions, I can tell certainly it was as early as May 10, 1974, and my God, it went as late as May 15 of '75." So consider, if you will, the relationship of a witness to other witnesses, because it is a form of disclosure.

Lawyers very rarely recommend to their clients that they simply clam up and say, "I refuse to answer," and simply go into the slammer. What some of them do now is they advise their clients--I do not want to suggest that all lawyers who

represent hostile witnesses are quite this devious, but some are. I am sure you all know that some are certainly not above telling them--"simply say, 'I don't remember, I don't recall', for that way you have the appearance of cooperating and you will find out what their evidence is by the questions." This is a reason why many witnesses run out to see their lawyers, even after you've given them the advice; they do so on the ground that this is a good discovery procedure.

Thirdly, consider the likely posture of your witness, psychologically. Understand that the ignorant witness is the most difficult to deal with in terms of making a demonstrable record of perjury or contempt. If the witness is dumb, frankly, you are not going to have a very good shot at making a case, where the case deserves to be made. Even if you believe that he deserves to be prosecuted, the record is going to be riddled with unavoidable confusions, particularly if the subject matter of the interrogation is complex.

If a witness is arrogant, you will have the best record, because remember the core of these crimes is impeding, obstructing, concealing. Arrogance is a red flag you can point out to the jury. In the Matthew Ianniello case[35] the very first question he was asked was, "Did you have a meeting with the deputy police inspector last week?" and Ianniello responded, " I can't even remember what I had for breakfast this morning." Now, that statement at the very outset of the grand jury proceedings was used at the trial most effectively as the emblem, the flag that this witness flew in terms of that proceeding, and by

[35] 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968).

his colors you shall know him.

So when you get the arrogant witness, please do not rise to his bait, do not trade sarcasm for sarcasm. Take it to your best advantage. Show elaborate courtesy. Painstakingly advise him that, "These ladies and gentlemen have been laboring here, for all of these months, and they're entitled to your testimony, now, Mr. Ianniello, and may we please have a definite answer?" "Sir," "please," "Mr.," not last names, not contemptuous references, but elaborate courtesy. The arrogant witness is the best witness in this kind of a case.

The middle ground is the accommodating witness. Now, the accommodating witness will be desperate to show you that he is desirous of helping. So he will commit himself to trivial details. And, of course, what you do is you play on those trivial details. You get him to concede, yes, he remembers this fact, and yes, he remembers that fact, and, yes, he remembers another fact. And maybe you do it with the hop, skip, and jump technique, where he is not quite aware of the drift of your questions. And then you aggregate his concessions and you show every conceivable trivial fact about this meeting he had admitted to: he remembers it was at a particular restaurant; he remembers it was for breakfast; he remembers it was 8:10 in the morning; he remembers who was there; he remembers how he met these people; how he went in with them, but he cannot remember what was said! Now, that kind of aggregate concession is an extraordinarily helpful one in terms of dealing with the common sense argument to jurors when you get to the trial that he was volunteering trivia and concealing substance.

Consider, number four, the subpoena impact. Always understand, that if you issue a subpoena, or you issue a wiretap notice, during a grand jury proceeding, and you have wiretaps up, you are very likely to get discussions with respect to the grand jury subpoena or tap notice. If you are lucky you might even get discussions involving obstruction of the grand jury, as indeed has been the situation in a number of cases in New York. The next thing to do is to develop a theory of complicity. You've got to do this, ladies and gentlemen to really be effective. You've got to have some working hypothesis even if it's a fragmentary one, even if you have very little information on the witness. Try to determine to your own satisfaction what critical role this fellow played in the crime you think occurred.

The next issue really gets down to what I was talking about before--hard work. In order to prepare effectively for a witness, you have to do two things. You have to prepare what we call a synopsis of proof, based upon the physical observations, bugs, or wiretaps, which are really, I think, critical in terms of making good contempt and perjury cases. Before you go into the grand jury, indeed probably, as Mr. Richards suggested this morning, even before you decide to immunize anyone, you should have set out the precise details of every fact--I don't care whether it's trivial or not--that you can prove, that you can use to refresh your witness' recollections. You have the dates, you have the source of statements, you have the time, and you have the remarks. Particularly, you have the specific words of an overheard. You will see in

the Detective Keeley indictment[36] that this was a significant factor. He was observed in a bar, Manny Wolfe's Chop House in Manhattan, talking to a notorious racketeer. Detectives obtained three overheards which were very effectively used by the prosecutor in the grand jury. There was no wiretapping, just fragments of a conversation. All that was heard from the racketeer was that he was "going to put up the money." Keeley was examined as to what was meant by that and, of course, he spun a little story about how the money was for a stock deal, and he was caught in a contradiction. And it was really a very effective piece of cross-examination. You cannot be effective in a grand jury setting without a command of the precise language in the proof. If you recite for somebody a statement which he allegedly made and if it is even tangentially imprecise, you are dead. They are going to say, why didn't the prosecutor quote him accurately. If he had quoted him accurately, he would have remembered.

Let's assume you conducted a year long investigation. You have four wiretap conversations of the witness, you have sixteen observations by the detectives, you have a statement by an accomplice and you also have his background, a yellow sheet. You must take all that down and really master it; you've got to have a second nature command of this. You've got to have a sense of the ebb and flow of your interrogation. You've got to know the dates; don't make a mistake by giving the wrong dates--you know, there's nothing worse than having twenty pages of excellent

[36]Appendix B.

examination, and then find out that you were asking him about the wrong day, because you said November 20th instead of November 12th. And, 31 perjury counts are out the window. Remember, the U.S. Supreme Court has said that it is the obligation of the government's attorney to flush out the truth, to ask precise questions, to ask coherent questions, to ask well defined questions.[37] So, if there are mistakes in the questions and answers and a prosecution is vitiated it is a very, very substantial reflection upon the professional ability and the care brought to the effort by the prosecutor. So do not put yourself in the position of going in unprepared. Get your synopsis of the proof. Have it set out.

The next step is to make your grand jury agenda. Now, I am going to leave the synopsis[38] and the grand jury agenda[39] for this particular witness, a Detective Keeley, who was indicted for one count of perjury and four counts of criminal contempt, and you will see, if you look at this document, that the examination of John Keeley in the grand jury is broken down into, first of all, areas of inquiry. He has been under investigation for a year and you have him in three compromising situations so as a practical matter you divide your interrogation into those three areas. You say we are going to have the Forlano meet; we are going to have the Renaghan meet; we are going to have the XYZ homicide discussion--those three things. So you flesh those out in your mind, and you say, now, which one should

[37]United States v. Bronston, 409 U.S. 352 (1972).

[38]Appendix A, Section I.

[39]Appendix A, Section II.

I ask him about first? What about the consideration of refreshing a witness' recollection? How can we orchestrate the questions to show a kind of gathering awareness on the part of the grand jury, which will set him at odds and expose his hostility, cause him to display the classic marks of the evasive witness, for instance, the "deflective answer."

Iannielło[40] was really flayed at the trial with his constant answers to questions that were ever so slightly changed in the predicate. For instance, the question was, "Did you speak to Sergeant O'Shea on such and such a date?" and his answer would be, "I don't think I have seen Sergeant O'Shea for the last six months." That is not an answer to the question. The question is "speak". It is a telephone conversation, it's not "see". And as a practical matter you can argue to the trial jury, "You can see, ladies and gentlemen, what this witness was doing." You can demonstrate, you can show his pattern of behavior. You can show his habits of response. And believe me it is not done by sheer brilliance or fabulous command of language, it is done by work. It is done by what Learned Hand called, "the intolerable labor of thought."

You have to sit down; you have to spend hours preparing these things. You cannot do it by going in there off the top of your head and dazzling this fellow or this woman, whoever it might be, with questions of penetrating brilliance. It cannot be done. It has to be done systematically. So get your areas of inquiry first.

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[40] See, page 29, supra.

Then, after the interrogation agenda is set up, divide your examination into areas of primary and ancillary questions. Now the primary questions are going to be those that are the critical or key considerations in your effort to hit-pay-dirt.

There is an indictment here of the prize fighter, Frankie DePaula.[41] He was observed taking a sum of money in a restaurant the very night that he took a dive in a bout in Madison Square Garden. When he went to the coat check room, he was overheard to say, "Never mind, I'll pick it up. I really made a score." And he took out a wad of bills. The key factual matter was that the purse was not paid until the next day. He was knocked out in the first round and there was very great speculation that the fight had been fixed. DePaula was subpoenaed and immunized. The target was a major racketeer who had bribed him and who was later indicted. The prosecutor in the case decided the key angle of all of these questions had to be that moment at that check-out counter. Everything had to be orchestrated to that. He did not go to it right away. What he did was develop a search of the fighter's knowledge of the racketeer, then the preliminary training for the bout, then a series of meetings in New York, then the bout itself, then the post-bout party.

In summary, the first thing is your synopsis of the proof, then your agenda, then your areas of inquiry, then your primary questions, and finally ancillary questions. What is an ancillary question? Well, it might be something like this: The investi-

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[41] Appendix D.

gation of a racketeer by the name of Matthew Ianniello turned on whether he was bribing the members of the vice squad to allow his topless bars to operate without interference of the law. In the course of his grand jury appearance, Ianniello was observed entering a precinct house where he made an inquiry with respect to a notorious hoodlum, then in custody, whose bail was in question. It was at least implicit that Ianniello tried to intercede at the station house to get him bailed. He was asked about that in the grand jury. Well, the events surrounding the corruption charge were almost two years old. The event in the station house was less than 24 hours old when he was examined about it and, of course, he backed and filled. He claimed he couldn't remember how he got the message that the racketeer had been locked up because he was concerned about the appearance of his relationship with an arrested person to the grand jury. The fact was that this ancillary area of questioning was exceedingly helpful in terms of the work of the interrogator, because it allowed the jurors at the trial later on to see that, while he might have had some basis to say he couldn't remember in connection with the corruption events two years ago, the assertion that he couldn't remember when he was being properly examined about an incident less than 24 hours old, irrelevant to the scope of the investigation, but bearing on his credibility, was completely dishonest.

So remember the use of the ancillary question. It might not be the jugular vein item, but it can demonstrate again that, all right, maybe he claimed he could not remember, six months

ago, or three months ago--sometimes these grand jury investigations go for a year; sometimes you're dealing with a tap that was had eighteen months prior--but what if you could show as a result of the grand jury that he went immediately from the grand jury chamber--you have him tailed--and he went from the grand jury chamber to confer with the person who he was questioned about in the grand jury. And then he's called back the next day, and he is asked, and he hedges, and he equivocates. He doesn't know whether the place is still bugged. You are home free, because you are showing obstruction about an incident which occurred within a few days, or a day. So always remember, the ancillary questions can be very helpful.

Finally, in preparing for the witness, try and draw a mental picture of the indictment in your mind, whether in terms of a perjury indictment, or a contempt indictment, and spotlight the particular questions you have to plead. For example, upon the asking of the legal and proper interrogatory by the grand jury: "Did you accept $5,000 on the date in question?", he gave answers that were so conspicuously evasive, false, and inconsistent that they amounted to contempt or perjury. You've got to bear in mind the various counts. This is a running movie; as you go through this your brain has got to be clicking as to what is the current state of this record. Don't wait till the end of the session, run up to your office, have the stenographer bring them up two hours later, then read it. You must be thinking all the time. This is really the most challenging kind of work; it's very much like cross-examination at a trial, only

it's much more. There are infinitely more possibilities to it because you're approaching it with a great many arrows in your quiver that you very often don't possess when you cross-examine a defendant at trial.

Now, advice to the witness. When he comes in, tell him, number one, he is an immunized witness or a witness under a waiver, and explain to him his legal status. Number two, his right to counsel. Tell him explicitly what it involves and do it in plain ordinary language. Number three, the scope of the investigation. You must do that because remember, he has to be satisfied the questions are material, proper, relevant. Four, advise about the law of perjury and contempt. Do not do it in a threatening manner. Simply say, "Mr. Witness, now it is my obligation to advise you that though you have immunity from prosecution for any crimes you might testify about, you may nonetheless be prosecuted for perjury or contempt." Now the advice on the contempt is critical because you must tell him what evasive contempt is. You have to give him an example. "You know, Mr. Witness, suppose we asked you, 'Were you married last week,' and you said, 'I don't remember.' Now, Mr. Witness, you agree, do you not, that if a witness were to say that hypothetically, he would really be saying, 'I don't want to answer your question.' In other words, Mr. Witness, sometimes when people do not wish to disclose information they say, 'I don't remember.'" "Oh yes, I understand that." "You understand that from your everyday life, don't you, Mr. Witness?" So you get on the record the fact that he understands through a very simple

As I have said earlier, sarcasm, opinion, and cheap shots are out. They will come back and they will be hung around your neck like an albatross if you use them. And you can succeed without them.

Now, probably the most critical phase of this technique, the questions. There's been more ink spilled in this field of law, over imprecise questions,[43] than any of us would care to admit. It is very embarrassing for us who all take pride in ourselves as lawyers. When you read some of these records, they would make a strong man weep. The simple rules are these. Number one, short simple questions, use plain language. Number two, no multiple predicate questions. You cannot base a perjury count on a double predicate question. In other words, you do not ask two things in your question. Ask simple short questions. Do not multiply the predicates. Number three, do not use legal terms. Do not use the phrase quid pro quo or any other such phrase. The defendant can argue later, "What's this quid pro quo stuff?" And as a practical matter, the trial jury will be sympathetic. Precision: say what you mean. The hallmark of a good interrogation, at trial as in the grand jury, is everyday language which is simple and to the point.

Number four, never use conclusory terms. Do not say, "Did so-and-so threaten you?" Threaten is a conclusory term. Ask, "Did so-and-so state to you that, did so-and-so say that?". Do not use words like threaten, because a defendant can attack an indictment based on such state of mind language. In fact,

[43] See generally, G. Blakey and R. Goldstock, Theft and Fencing: A Simulated Investigation, at 147-157 (1976).

example what the core allegation is in a contempt case, an evasive contempt case. Finally, as I have already indicated, you do not have to give Miranda warnings.[42]

Now, what about the techniques of examination? I would like to talk at length about language and psychology. That is obviously central to this whole subject, but we do not have sufficient time.

The second thing to remember is consciousness of the record, particularly in contempts. You must, please, appreciate that everything you do is being taken down. Please attend yourself to what you say, be exceedingly careful about it. Do not, however, be straight-jacketed by formalistic questioning. Get into a good ebb and flow of conversation with the witness. Remember, always, have it as a conversation; try and get away from the Q and A. Get involved in the thoughts being conveyed, one to the other. More important than anything else, listen, please listen, to the answers. Most lawyers do not listen to the answers; they are thinking of the next question they want to ask. So listen to the answers, you are not going to the races on this thing. Take your time, listen to the answers. Be ready to seize upon an inconsistency, an ambiguity; listen to the answers.

Thirdly, the tone is very critical. Number one, the witness' tone may establish hostility to the grand jury examiner. Your tone must establish your fairness. Number two, always "the grand jury wishes to know," and never the District Attorney.

[42] United States v. Mandujano, 425 U.S. 564 (1976) (plurality opinion).

"threaten" has been the subject of some litigation. I used that term myself in a case recently, and got criticized for it and it really was an impediment to the prosecution to have that word in the record. As you know from your reading, the Supreme Court[44] has said it is the obligation of the lawyer, the government lawyer, to ask clear, precise questions to flush out the truth, to be aggressive, but not to be ambiguous, not to be trying to achieve too much at once.

In the Blumenthal[45] case, the question was put to a critical witness, "Did you vouch for the condition of the home?" "Vouch" is conclusory. Break the question down; have three questions instead of one. Ask, "Did you visit the homes?" "Did you discuss the visit with the licensing authority?" "Did you state that the condition of the home was such and such?". Take your time, have patience. You're building an edifice; do it brick by brick, don't worry about the pinnacle right away. Do it by degree.

Five, repetition and relentless pursuit of the truth are essential. This is something that you ought not to be ashamed of. If you read these records of, particularly Mr. Scotti,[46] you will see that many times he will say in the record, "Now ladies and gentlemen, I apologize that this is exceedingly repititious, but I have an obligation to get a definite answer." So be aggressive. Go in there and follow the object you have in

[44] United States v. Bronston, 409 U.S. 352, 362 (1972).

[45] People v. Blumenthal, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1st Dep't 1976).

[46] Alfred J. Scotti, formerly Chief Assistant District Attorney in charge of the Rackets Bureau, New York County.

mind here. The object in mind is to get the facts; now you have got to be aggressive, obviously appreciating that you are restrained by what the cases say you can and cannot do there.

Don't accept a ludicruous answer right away. Apologize if necessary, "Mr. Witness I apologize, if I do seem repetitious, but you understand, do you not, that I have an obligation on behalf of the grand jurors, who have been laboring here, for so many months, to do what I can to evoke every last piece of testimony or information that may be residing in your memory?" "Yes sir, I understand that." As long as you're courtly to them they will very rarely fence with you.

Genuine or feigned lack of memory is, of course, the paradigm problem in criminal contempt cases. Number one, go from the general to the specific, in both the time frame and the fact frame. Two, understand the probative value of recent as opposed to remote faulty memory, as in the Ianniello station house matter. Three, always repeat in the grand jury record, "In an effort to stimulate your recollection, Mr. Witness, let me tell you this or let me read to you that." Four, if you have tapes, put in the observation data first, give him that information, then read from the transcripts if you have his conversation, then give him the transcript, and then play him the tapes. Now, don't just go and play him the tapes, because if you do the three preliminary stages first, you can argue to the trial jury. "You can see how the grand jury labored systematically to refresh this man's recollection." Now, anybody, if

you read from a transcript, can be expected to give you, assuming you are not talking about an event ten years ago, definite responses.

The second factor is, is it a unique experience? If you are examining a police officer before the grand jury, you have him on the horns of a dilemma. You are asking him about a bribe, "Now have you ever taken a bribe, officer?" "Oh, never." "So if someone offered you a bribe it would be unique." "Absolutely." "In fact, you would have an obligation to report that wouldn't you?" "You're absolutely right." "And in addition to that you probably should have arrested him on the spot." "No question about it." "Did it happen?" "Gee, I don't remember." Now, effectively, you cannot expect somebody to remember an event that was trivial. What you have to do is you have to make it, as I say a waving banner, in the man's mental history. And that is what you do in the systematic refreshing of recollection. And, by the way, you cannot do this unless you've done what I've said before: conferred with your detective, spent hours working up an agenda, and a framework.

Now just a side point here - there are cases that stand for the proposition that you must give a person a warning that is at least a specie of the Miranda warning when he is about to verge on contempt or perjury.[47] Courts, including the U.S.

[47] See, e.g., People v. Cutrone, 50 A.D.2d 838, 376 N.Y.S.2d 593 (2d Dep't 1975), appeal dismissed, 40 N.Y.2d 988 (1976).

Supreme Court,[48] have said that a warning is not required, but as a practical matter it is not a problem to do it, and indeed it helps because you can show you gave the witness a specific warning that if he continued in his course of obstruction, he was going to be indicted. The one problem with it, of course, is if the defense lawyer then makes an application to the judge that the District Attorney is giving warnings only to prejudice the witness before the grand jury.

Now, also, be aware of the appearance of answering. For instance, Ianniello was asked, "From whom did you learn an investigation was in progress?" He said, "Oh I heard about it in the streets, bits and pieces." The answer to that is, "Look, we're not interested in rumor in the street; we're not interested in assumptions; that's not evidence. Could be, maybe, possibly, that's not evidence in a court of law. Who gave you that information?" "Well, gee, I heard about it in the streets." "That's not an answer." So he's giving the appearance of giving an answer you see, but it is not legal evidence. So do not be satisfied with it. Press him, push him, be aggressive. Hypothetical questions are permissible, but only to establish impact on memory. Do not generally get involved in hypothetical questions. It confuses the record and the witness can demonstrably show that maybe he was confused.

Codes and their use. You can have terrific fun, and score

[48] United States v. Mandujano, 425 U.S. 564 (1976); People v. Didio, 60 A.D.2d 978, 401 N.Y.S.2d 640 (4th Dep't 1978). In Didio, the court, however, indicated that although a formal warning is not required that it must appear from the record, either from a "warning given, statements made or from questioning, that the witness knew his answers were not being accepted and that . . . continued equivocation and unresponsiveness . . ." would leave him open to contempt charges.

great points with codes. We have one in one of these indictments.[49] Willie Flay gets on the phone and he says, "That guy, the grey-haired guy, is going to that place for that thing." The questioner says to him, "What were you talking about?" and then he gives a ludicrous explanation. And then the next question is, "Well, why didn't you use his name?" Answer: "Well, gee, we always talk that way." And then you establish that there is a code here. Don't you see how valuable that is, probatively? Because you go to the trial jury and say, "He was obstructing, impairing, and concealing." And there's the code right there! Get him to admit that it is a code. Ask him, does he talk this way normally? It can be very effectively used to establish guilty intent with respect to concealment.

Establish contrary facts of a lifetime. If the person says that he does not remember if the incident is unique, establish that this is the only time in his whole life that he has functioned in this particular way. Remember that there is a need to confirm seemingly harmless details. Here are some procedures you can use in your efforts to deal with a witness in this situation. If, for instance, a witness says, "I don't recall a meeting at such and such a place," you might establish that he'd never been at that place on a prior occassion. If the witness is a police officer assigned to vice and gambling and he claims "I met this underworld character in connection with my assignment for the purpose of maintaining informant relationship, you can show that they were discussing a homicide

[49] See Appendix C.

case and that his assignment is inconsistent with that.

Remember that there is a fear of taps in connection with perjury prosecutions. Remember that the deflected question is an extremely effective device in terms of summing up to a jury, or examining a witness, later, if he takes the stand. Remember that a trip to the judge for a direction, can be very helpful. Because if the defense at the trial is that you were a brow beater, that you abused the particular witness, if you can show that you went up to a judge and had the judge direct him to answer, then you invoke the impartiality and the solemnity of the court.

Always focus the questions; always underscore the grudging character of the answers. Remember credibility is the critical factor. Remember, also, if you are examining a witness with another assistant, expect what we call in our jurisdiction the "star chamber" defense. If you have a couple of assistant district attorneys in there, the defense lawyers get up and they say, "Oh my poor fellow was brutally man-handled by several lawyers." That is to be avoided. Try not to have more than one person asking the questions.

Also, the "allegro" defense. As you know, "allegro" in music means very rapidly. There is a problem in many contempt and perjury records of dashes in the record. The witness interrupts the prosecutor and vice versa. Please, let the witness respond, and you don't ask the next question until he has completely responded. If he interrupts you say, "Now, Mr. Witness, I really would ask you to please stop interrupting

me and let me finish the question." If there are fifty-five dashes in the record, it is very difficult to justify that.

Finally, and this is really the last thing I want to tell you, make the witness agree. Here is what I think you really ought to take away from this today on this subject if nothing else, other than the objective obligation to be fair and aggressive at the same time. Make the witness agree that a particular answer is ridiculous. Make him agree to that; he will. If you press him he'll say, "Yes, I think it does sound pretty ridiculous. Make him agree that the District Attorney has been fair; many times they will, because they don't want the appearance of hostility to the government, so they will agree that you were fair. Make him agree he is concerned about perjury. Ianniello did that in his record. Make him agree that the District Attorney has a duty to be aggressive. "You understand, Mr. Witness, that it is my job to do this, and I hope you are not uncomfortable." "Oh yes, Mr. District Attorney, I agree." Make him agree that there are serious crimes under investigation. Make him agree to the relevancy of your questions; in other words, make him understand and concede that all of these questions are germane to the grand jury record.

Finally, if you can do it in the perjury case, help yourself enormously by getting him to admit his memory does not need to be refreshed. Because then you can stop. If he says, "That's my answer, I don't need to be refreshed anymore, that's it," then you don't have to confront him with anything else.

You should also be aware of possible defenses to compromising circumstances typically used by two classes of witnesses:

1) government agents - be they federal agents or police officers or, indeed, prosecutors caught or observed in the company of a racketeer or a known gambler or any kind of underworld character and 2) public officials who have accepted a benefit or a gift. Of the possible defenses the government agent may first assert, as Keely did, that it was the character of his assignment that required him to meet with Forlano. Keely was in the homicide squad and Forlano was, of course, a notorious racketeer and loanshark. When examined about his relationship to Forlano, Keely had to make up some nexis between a homicide investigation and Forlano. You must then take a great deal of time and go through the case and show that this is a fabrication. The second defense often used is that they fortuitously came upon this situation in their general intelligence gathering function and they planned to make a report or advise their superiors. This is easily contravened by saying, "Fine, give us the reports," or, "Be good enough to name the superior, please." And then, he will probably start backing and filling, "Well, it might have been that one, or it might have been the other, I told him orally, I didn't make a report" - ludicruous. The third defense consists of telling you that he was dealing with a registered informant. Now, this of course, can be attacked on the basis of the registration procedures in your various departments, and more significantly, the standards that underlie the registration process. The fourth possible defense is a claim that it was a planned meet in the course of an ongoing investigation. That, of course, is very similar to his generalized statement that it was the char-

acter of his assignment. The fifth defense is that the racketeer had given him fruitful information on his assignments on prior occassions, and this happened to be a case where he didn't give my anything worthwhile. That is the most difficult to deal with because the further back in time you go, and the more ambiguous it is, the more difficult it is to make the contradiction. Public officials accepting benefits or gifts from persons with whom they have an official relationship or with whom they or their agencies do business, very often say that the benefit or the gift was accepted on a friendship basis and had nothing to do with any official act. Another possibility is that they will say that the property was taken on consignment for later purchase, or they will say that - particularly in political cases - the money is for campaign purposes and indeed, was merely support from a devoted follower, who just happened to have a state contract for $17 billion dollars awarded a few minutes before depositing that money in my account.

In summary, I have gone over a lot of these points too rapidly. I would urge you if you have some time, to go over these documents and see now effective cross-examination of a hostile witness in the grand jury can bring forth very good results.

Thank you for your attention.

APPENDIX A

Section I

GRAND JURY EXAMINATION

OF

DETECTIVE JOHN J. KEELEY

Age: 40 years old

Married

Appointed: June 1, 1954

Rank: 2nd Grade (February 2, 1966)

Residence: 97 Capt. Shankey Drive
Garnersville, N.Y. (Rockland Co.)(as of April 6, 1962)

Assignments:

9/1/54	Temp. 25 Pct.
1/21/55	Disc.
1/21/55	Patrol 28 Pct.
6/15/56	Temp. 47 Pct.
7/1/56	Patrol 47 Pct.
9/28/58	CIB (DD)
6/24/61	34 Squad
6/16/64	MN Homicide
6/6/66	19 Squad
9/28/67	MN Homicide

Section II

EVIDENCE

JOHN J. KEELEY

6/9/69

6:20 Keeley and another (m-W-50-6'-180 lbs) join HM, St. John, Flay, Callahan and unk. male (M-W-45-blk. hair-balding) at bar in Meenans. (RC)

Keeley speaks to HM, friend remains at other end of bar. (RC)

6:30 Keeley and friend leave Meenan's by side door. (RC)

Keeley and friend departed area in #559402NY, PD auto assigned to Man. North Hom. Sqd. (Killeen)

7:57 HM went to Old Siedelberg w/ Det. Falk from Meenan's. Called Man. N. Hom. Sqd. to Keeley. Keeley said he was trying all over to get that thing. "They want it done three proper procedures." Keeley said he had a man coming on that night at 11:30 who worked down there and Keeley was going to try him. If not it would have to be done on paper - during the day time, and it would be involved. If his friend could do it Keeley said he would have it that night. They arrange for Keeley to call HM the next day.

HM then says: "You remember that thing I gave you for that kid Larry (Det. Lawrence Sangiardi) you told me you'd give it to that guy ... in the meantime about 17 guys were put there but not him" (17 men had been assigned to Special Investigations in the Narcotics Unit) HM asks Keeley to call that guy again. Keeley said he'd call the guy at home because the guy had said he would do it if he could. HM said yes - because they are only going to take a certain number.

7/9/69

6:35 HM came from rear room of Meenan's and entered phone booth. Keeley walked over to booth and looked in, then left booth area and joined two unk. males at bar. HM exited booth and was joined by Keeley midway at bar, where they conversed for several minutes. (JC)

6:50 Keeley entered front phone booth and called Jiggs Forlano at home (274-1966). Keeley asked Forlano "are you going to be around tonight?" And Forlano replied "yes." When Keeley asked "same place"? Forlano agreed and a meeting time was set for 8:45. (JC)

7:00 Keeley left Meenan's through front door w/ two unk. males. (JC)

7:00 Keeley and two others left Meenan's and got into 559402N.Y. (LC)

7:10 Vehicle parks in vicinity of 54 St. & 3rd Ave. (Sgt. K)

7:20 Vehicle proceeds from above location with same passengers to MNHS (100 & Amsterdam). (Sgt. K)

8:30 Keeley gets into vehicle 559402NY at above location and drives to Manny Wolf's Chop House, 49 & 3rd. (Sget. K)

8:45 Keeley entered Manny Wolf's and sat at bar with Jiggs Forlano. Part of conversation overheard: Jiggs - 6th precinct; Keeley - I don't know him; Jiggs - Don't worry, I'll guarantee that she will put it up! Keeley asked "when will you know for sure"? Jiggs - 1 week - Keeley then gave Forlano a card, Jiggs said "I'll call" and makes a notation on the card,stating "that's 914". Keeley says yes. (Sgt. Kelleen)

9:00 Keeley observed through front window of Manny Wolf's at bar with Jiggs Forlano in conversation. (JC)

9:50 Keeley leaves Manny Wolf's alone, enters auto (559402NY) (apparently returns to MNHS) (Sgt. K.JC)

8/7/69

6:32 Willie Flay called Keeley's residence in Rockland from a public phone in Meenans, but spoke only with a child.

6:50 Keeley called back Flay at Meenan's: Flay - "I spoke to my friend - absolutely never went there, you know, where he's supposed to go. My question was - do you know him"? Keeley - "yeah". Flay - "Know him,met him once or twice; somebody brought him down here, to try and get him more money." Keeley - "yeah". Flay - "so you could take him there, you know .. because he appreciates that we ... we were talking about it, anyhow." Keeley - "well, I wonder why they are coming up with these stories?" Flay - "I told him that you will now go back to the same source." Keeley - "yeah." Flay - "I have to believe him don't I?" Keeley - "yeah, of course - but you know where it's coming from?

F I discussed that with him too - he doesn't know why - you're going back to check it out now?

K Yeah.

F Just for your own - see if you can get him more concrete - where - you know - if you can .... Remind me when you come down again cause I got something for you ... remind me in case I forget.

K O.K. Willie.

F And tell whosees that his thing is finally ready.

K Yeah.

F I'm not going to be in tomorrow John.

K O.K. I'll see you next week.

F Alright. I'll be in Mon. or Thurs.

K Is the other guy back?

F Yeah. He's here. I'm eating with him.

K I think I'll give him a call tomorrow and tell him.

F O.K.

K I want to talk to him about something anyway.

Section III

INTERROGATION

JOHN J. KEELEY

1. What is your occupation.
   a. how long a police officer.
   b. current assignment.
   c. how long in current assignment.
   d. ever been assigned to CIB? (yes)
   e. ever been assigned to plainclothes: division or borough (morals - gambling). (no)

2. Nature of Duties.
   a. type of crime exclusively investigated?
   b. to whom do you report?
   c. how is info re: homicides obtained?
   d. association w/ underworld elements?
   e. file reports re: these contacts?
   f. generally, what is the guid pro quo for such information?
   g. any contacts of this nature recently?
   h. within the last month, 3 months,6 months, 10 months?
   i. with who?
   j. about what homicides?

3. a. Do you know Hughie Mulligan? (picture)

b. From where? Business or pleasure? Does HM have a criminal record?

c. Who introduced you? When?

d. When was the last time you spoke with him?

e. In person or by phone?

f. About what?

g. Did you ever give HM your home or business phone number?

h. Have you ever been in Meenans Bar? When?

i. Did you ever meet HM there? When?

j. By pre-arrangement?

k. Have you ever done any official or unofficial favors at HM's request?

l. Did HM ever call you at MNHS? (6/9/69)?

m. About what?

n. Did you tell him you were "trying all over to get that thing." What "thing" were you referring to?

o. Did you tell him "they want it done through proper procedures."

p. Did you tell him that you "had a man coming on that night at 11:30 who worked down there"and that "you were going to try him" and that "if not it would have to be done on paper during the day time, and it would be involved." What man were you referring to?

q. Did you agree to call HM about this matter the following day?

r. Did you ever discuss Det. Lawrence Sangiardi with HM? (6/9/69)

s. When and in what context?

t. Did you ever discuss assignment of men to special investigations in the Narcotics Unit? With whom? With HM?

u. Did HM ever say to you "you remember that thing I gave you for that kid Larry, you told me you'd give it to that guy" "thing referred to" guy referred to?

APPENDIX B

Section I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-v-

JOHN J. KEELEY,

Defendant.

NOTE: This appendix consists of two counts of a five count, 100 page indictment. Counts 1,2, and 4 (pp. 1-28, 65-84) are ommitted.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the above-named defendant of the crime of CRIMINAL CONTEMPT, in violation of Section 215.50 of the Penal Law, committed on April 21, April 28, and April 30, 1970, in the County of New York, as follows:

That the Fourth Grand Jury of the County of New York for the April 1970 Term, having been duly and properly empanelled, has been conducting an investigation to determine whether violations of the Gambling Laws and crimes of Criminal Usury and Bribery have been committed and whether there has been in existence a Conspiracy to commit these crimes.

That as part of the said investigation the Grand Jury has sought to determine whether the defendant and certain members of the New York City Police Department have conspired with Hugh Mulligan and others to receive regular payments of money in return for transmitting certain confidential information of the New York City Police Department to the said Mulligan and others, thereby enabling the said Mulligan and others to circumvent and otherwise avoid enforcement of Penal Statutes against their unlawful Gambling and Loansharking operations.

In addition the Grand Jury has sought to determine whether Hugh Mulligan and others, in furtherance of their criminal activities, conspired to use their influence corruptly and unlawfully to bring about the promotions and transfers of certain members of the New York City Police Department. Accordingly the Grand Jury sought to ascertain the identities of those Police Officers whose promotions and transfers were brought about by Hugh Mulligan.

That on April 17, 1970, in the course of the said investigation, the defendant was called as a witness before the said Grand Jury, was duly sworn and was informed of the nature of the Grand Jury investigation.

That on April 21, April 28 and April 30, 1970 the said Grand Jury was still conducting the said investigation. On the said dates the defendant was recalled as a witness before the said Grand Jury.

It, therefore, became material and necessary, to question the defendant, a detective attached to the Manhattan North Homicide Squad, about the meaning of an apparently coded telephone conversation on August 7, 1969, between the defendant and William F. Flay, an associate of Hugh Mulligan, which was as follows:

Male In	Hello Meenan's.
Male Out	Willie er Willie there?
	Willie Flay.
M/I	(Flay) Hello.
M/O	Yeah Willie.
M/I	How are you.
M/O	All right.
M/I	I'm just eating with your friend.
	You know.
M/O	Yeah.
M/I	So er der er er I'll make the discussion very brief. And there's nothing you can say because I'll see you during the week anyhow. I spoke to my friend.
M/O	Yeah.
M/I	Absolutely never went there - or er er you know -- where he's supposed to go.
M/O	Right.
M/I	Now I'll -- My question was "Do you know him?" -- Yes.
M/O	Yeah.
M/I	Know him -- Met him once or twice. Somebody brought him -- to him down there -- to try to get him -- you know -- more money -- you know?

M/O Right, right.

M/I And that's about the substance of the whole thing.

M/O Yeah.

M/I So you could take him there -- you know -- because he appreciates that we -- we were thinking about it -- anyhow.

M/O Yeah.

M/I And er --

M/O Well I wonder why they are coming up with these stories?

M/I Well I told him that er -- you --

M/O You know.

M/I You will now go back to the same ear or you know the same source.

M/O Yeah.

M/I And er -- so I have to assume that er -- I have to believe him. -- Don't I?

M/O Yeah of course.

M/I You know.

M/O And you know where it's coming from?

M/I Yeah I er -- You er er er We -- er er I discussed that with him too-- He doesn't know why. Er -- oh you're going back and check it out again now?

M/O Yeah I'd like to know (indistinct) yeah.

M/I Just for your own our-- so er -- See if you can get him more concrete -- where -- you know -- if you can - you know.

M/O Yeah.

M/I So -- er you know -- er er -- So er so er -- Remind me when you come down again will you. Cause I've got something for you - you know - Remind me in case I forget so --

M/O Okay Willie.

M/I And er tell whosus that his er -- thing is ready you know that thing is finally ready.

M/O Yeah.

M/I Er - er well er -- And I'm not going to be in tomorrow John.

M/O Alright - So, I'll see you next week.

M/I Alright - I'll be there Monday to Thursday.

M/O Alright.

M/O Yeah. Is the other guy back?

M/I Yeah. He's here. I'm eating with him. I'm eating. I'm eating.

M/O I think I'll give him a call tomorrow. Tell him.

M/I Okay.

M/O Alright. I want to talk to him about something anyway.

M/I Okay.

M/O Alright.

M/I Right.

When questioned as to the meaning of the telephone conversation set forth above, the defendant contumaciously and unlawfully refused to answer legal and proper interrogatories in that he gave conspicuously unbelievable, inconsistent, evasive, equivocal and patently false answers as the following testimony demonstrates.

(On April 21, 1970 the defendant testified as follows:)

Q. . . . do you know Willie Flay?

A. Yes.

Q. Who is he?

A. I know him all my life.

Q. What is his occupation?

A. He's a jeweler on Canal and the Bowery.

* * *

Q. You say you know him all your life.

A. I know him as a jeweler. I have been buying jewelry there. I have sent a hundred cops down to buyjewelry.

Q. Have you ever seen Flayin the company of Mulligan?

A. Sure he has been with Mulligan.

* * *

Q. Did you ever have a conversation with Willie Flay where Flay called you at home -- rather, you called Flay at Meenan's from your home and Flay said to you, "I spoke to my friend. He absolutely never went there. Do you know where he is supposed to go?"

Q. In July of last year.

A. I called Willie Flay at Meenan's?

Q. He called you and you called him back.

A. I may have had a conversation with him. I don't know. He's called me plenty of times at home.

Q. What do you talk about at home?

A. Jewelry.

* * *

Q, Relative to this conversation in August, Flay said to you, "I spoke to my friend. He absolutely never went there. Do you know where he is supposed to go?" "My question was do you know him?" And you said, "Yeah." Flay said, "Know him? Met him once or twice. Someone brought him down here. Try to get him more money."

Do you remember that conversation?

A. Someone brought him down here and tried to get him more money?

Q. Right. Do you remember that?

A. Yes.

Q. What was it about?

A. Yes, a sergeant in my office . . . brought his son down to Flay's office to buy a diamond ring, an engagement ring. He said the kid came in -- and I'm trying to recreate the conversation to he best of my knowledge. The kid

came in. He said, "I gave him a ring. I told him to go out and have it appraised and I even paid for it at Macy's or someplace." He said he came back and he said he can get it for less money or better money or something like that. I said, "Gee, why did the guy bother going down if that were the case?" He asked me if he would give him a good buy and I said yes and that was it. And I believe that's the conversation you are pertaining to.

Q. Sergeant . . . sent --

A. No, no. Sergeant . . . at that time worked in my office. His son was getting married. He just got ou of the Navy. He asked me where he could go for a ring. I gave him Willie Flay's card and he went down there. And then is when I'm telling you the subsequent conversation to the best I can recall, and he said he could get less money or better money for the ring or something to that effect. Now I think that's the conversation.

Q. Why would Flay say, "Somebody brought him down here to try and get him more money?" Whom was he referring to when he said "somebody brought him down?" Who was that "somebody?"

A. I guess his father. Meaning the Sergeant brought him down to try and get him more money or get less money over the ring.

Q. If it's less money, why would you say more money?

A. I'm trying to answer your question the best I can.

Q. But you have to answer it to make common sense.

A. You are asking me about a conversation at that time and I'm trying to reply to you at that time. As faras I can recall Willie called me at home about that particular thing. He was talking about a diamond ring that a fellow had gone down to buy.

* * *

Q. . . . What was meant by the phrase "and get him more money?" Who is the "him" they were referring to?

A. I guess get him more money. I don't know how that would come in unless he meant that somebody else would give him more money or maybe he was trading in a ring. I don't know.

Q. All right. Let me ask you this: You then responded, "Well, I wonder why they are coming up with all these stories." What did you mean by that?

A. When I went back I said to the Sergeant about the ring, and he said something to me about, oh, "He didn't show us this or he didn't show us that and we went to someplace else and we got a much better deal." So I said, "Well, why is he coming up with all of these stories? Why didn't he tell me in the beginning that he wasn't going to buy the ring?" That's as far as I can recall. If I can do it any better I would tell it to you.

Q. All right. Then Flay says, "I told him that you will now go back to the same source." And you said, "Yes." What did you mean by that?

A. Flay said, "I told him you would now go back to the same source"?

Q. Who was Flay talking about when he says, "I told him"? Whom was he referring to?

A. I guess he was talking about the guy that went to buy the ring.

* * *

Q. . . . We are interested in this particular conversation.

A. The only thing I can think of is jewelry.

* * *

Q. Flay says, "I spoke to my friend. Absolutely never went there. You know where he's supposed to go." What did he mean by that? Where is he supposed to go?

A. I don't know.

Q. You don't know?

A. No, sir, I don't.

Q. "My question was do you know him?" And you, Keeley, you said, "Yeah," you know what he's talking about. Now will you give us the benefit of your intelligence? Tell us what you knew at the time you spoke to Flay.

A. Well, I don't remember -- I told you the only conversation I can recall is about this ring.

Q. . . . Do you deny having this conversation?

A. I don't deny if I had it, of course not.

Q. What did you mean by that?

A. I don't know what he meant by it.

Q. You don't know?

A. No, sir.

Q. And when you said, "Yeah, I know him" whom did you mean? Know whom?

A. Mr. Scotti, if I could tell you know whom, I'd tell you right now. I don't know "whom" is. Because I don't remember this happening.

* * *

Q. Okay. Let us go on with this. "Know him?" Flay: Know him, met him once or twice. Somebody brought him down here to try and get him, this man, more money. Him, him, more money." What did he mean by that?

A. To try and get this man more money?

Q. That's right. What did he mean by that?

A. It's got me mystified.

* * *

Q. You don't deny you had this conversation?

A. I don't deny it.

* * *

Q. Let me go on with this conversation. And you said, "Yeah, when he said to you, know him, met him once or twice, somebody brought him down here, try to get him more money."

You: "Yeah."

You certainly at this time knew what he was talking about, didn't you?

A. Maybe I did at that time but I'm telling you that I don't recall the conversation.

Q. It doesn't jog your memory? Now, Flay, "So you could take him there, you know. Because he appreciates what we're talking about anyhow."

You, Keeley, "Well, I wonder why they are coming up with these stories?"

You are the one who made the statement, "I wonder why they are coming up with these stories?" What stories?

A. I'm telling you the only story I can remember is when I sent this fellow for the ring and he came back and he told me a lot of garbage about my --

Q. What is the name of this fellow?

A. I told you, Sergeant . . . went down to buy a ring.

Q. What did Sergeant . . . tell you?

A. He said something about he didn't have what he wanted. Something to this effect.

* * *

Q. What stories? What are the stories about?

A. Something he could get a better ring someplace else and this Willie Flay didn't give him a good buy and all. And I said, "Well, why are they coming up with these stories?" Willie said, "I sent him out and even had it appraised. Why couldn't they just say they don't want the ring?"

Q. Now just a minute. Just a minute. Didn't Flay say to you, "I told him that you are now going back to the same source."?

A. Meaning you can go back where you got th other ring from.

Q. The same source?

A. The other ring. That's what he meant.

Q. The other ring? Look, if this were all legitimate, correct?

A. Right.

Q. Why be so obscure about all this? Why be so hidden in meaning? Why? Don't you appreciate how obscure this whole conversation is? How guarded both of you were talking?

A. Mr. Scotti, I told you about a Sergeant went down to buy a ring for his son. Now you can ascertain whether that's true or not. You can also ascertain whether or not there was such a discussion over that ring. You can ascertain whether they were given a ring to go --

* * *

Q. Now, Flay says, "I discussed that with him, too. He doesn't know why. You're going to check it out now?"

You: "Yeah."

Flay, "Just for your own -- see if you can get him more concrete -- where -- you know -- if you can. Remind me when you come down again cause I got something for you. Remind me in case I forget."

K: "Okay, Willie."

A. He probably had a piece of jewelry for me.

Q. Flay, "And tell whosis that his thing is finally ready."

K: "Yeah."

Flay: "I'm not going to be in tomorrow, John."

"Okay. I'll see you next week."

A. Right.

Q. Okay.

A. Right.

Q. Now, what did he mean? He says, "I discussed that with him, too. He doesn't know why. You are going to check it out now." You are going to check out what?

A. I don't know, Mr. Scotti.

Q. You don't know.

A. No, sir, I don't.

Q. This doesn't jog your memory as to what you were talking about?

A. No, it doesn't. The only conversation I can recall is the one I told you about. He called me many times.

Q. This means nothing to you now?

A. No, sir.

Q. This has no meaning to you, is that it?

A. I can't recall it.

Q. And you said, "Yeah." At that time you must have understood him. Correct?

A. Maybe I did. When was this conversation?

Q. In August of last year.

A. Of 1969?

Q. '69.

A. No, sir, I don't recall it.

Q. This conversation was about a ring, Detective Keeley. Will you explain to this Grand Jury why you and a jeweler, if you had nothing to hide, never mentioned the word "ring" once during the entire conversation?

A. Because it wasn't unusual for him to call me and say to me --

Q. This was an engagement ring that somebody was going to buy, legitimately, from a legitimate jeweler?

A. Right.

Q. And this was a legitimate conversation. Will you please explain to this Grand Jury why you talk about "things" and "hims" and "theirs", and never once say "ring" or "sergeant" or "the girl" or "the father"?

A. Because it's not unusual. When he called me up he said: "That fellow was down to see me and he picked up that watch." In fact, he called me the other day --

Q. Stop just there. "That fellow was down to see me and picked up that watch."

A. Right.

Q. Not once in this conversation do you mention any piece of jewelry: watch, ring, engagement ring, diamond ring. You testified earlier thatin this conversation you had about the sergeant, Flay said, "I had sent the Sergeant out to have the ring appraised." There is no mention of appraisal in here. There is no mention of Flay saying he sent the man out to have anything appraised. Will you tell this Grand Jury what you are talking about in this conversation?

A. I don't know what I am talking about in this conversation. If I knew I would tell you the truth.

Q. It's obviously not a ring.

A. Well, maybe it was something else but I don't know what the conversation was. I don't know.

Q. Whom were you referring to when you said, "Of course, but you know where it's coming from"? Whom was it coming from, Detective Keeley, whom was it you were doing this for?

A. I don't know.

* * *

Q. I am asking you now are you saying now you don't know whom you are talking about?

A. I am saying I thought this was the conversation about a ring.

Q. What is your present testimony?

A. If it's not, then it must be about something else.

Q. What is your present testimony?

A. I'm just explaining to you.

Q. What is it?

A. I don't remember what this conversation is about now.

Q. Now you don't know?

A. No, er, I don't.

* * *

(On April 28, 1970 the defendant was recalled as a witness before the Said Grand Jury. Whereupon, a tape recording of the above set forth conversation was played for the defendant before the Said Grand Jury. The defendant thereafter testified as follows:)

Q. I ask you to listen to this recording about to be played, Mr. Keeley.

A. Yes.

Male In: Hello Meenan's.

Male Out: Willie er Willie there? Willie Flay.

(pause)

M/I (Flay) Hello.

M/O Yeah Willie.

M/I How are you.

M/O All right.

M/I I'm just eating with your friend. You know.

M/O Yeah.

M/I So er der er er I'll make the discussion very brief. And there's nothing you can say because I'll see you during the week anyhow. I spoke to my friend.

M/O Yeah

Q. Right.

A. "Know him -- met him once or twice."

Q. Stop there.

A. Yes, six.

Q. Who knows whom?

A. That would mean Mulligan knows Renaghan.

Q. Okay.

A. That is the way I would get the impression.

Q. Next.

A. "Somebody brought him."

Q. Somebody introduced him?

A. "Somebody brought him to him down here.", somebody introduced him.

Q. Brought whom to whom?

A. "Somebody --

Q. Detective Keeley, explain that to the Grand Jury substituting the names of the people for the coded pronouns used in this. Use the actual names.

A. Right. "Somebody", I don't know, so I can't use the name.

Q. Yes.

A. "Brought him", which would mean Renaghan in my opinion.

Q. Go ahead.

A. "To him", which would mean Mulligan.

Q. Yes.

A. "Down here to try to get him", meaning Renaghan. "You know, more money, you know." Now, like I say, that is my assumption of that because of the suit that he was suppose to get for the transfer. Now, that is what I know about that.

Q. All right and you said, "Right Right", which meant that you understood that.

A. Because I knew he was suppose to get a suit for the transfer.

Q. You told us that.

A. Yes.

Q. And he said, "And that's about the substance of the whole thing."

A. Yes.

Q. He said, "So you could take him there because he appreciates we are thinking about it."

A. Yes.

Q. And you said, "Yeah."

A. Yes.

Q. What does that mean?

A. He meant I could take Renaghan there because -- "You know because he appreciates that we are thinking about it." He was telling me I could take Renaghan there. This did not happen. I did not take Renaghan to Meenan's to meet Mulligan. If he did, I don't know. But I didn't take him there. I told him about the suit.

* * *

Q. You said, "I wonder why they are coming up with these stories." What are the stories you are referring to?

A. That one's got me.

Q. He said, "Well, I told him that". You said, "You know."

A. Unless I -- I don't know. Again it got to do with the fact that the kid was being transferred out of Narcotics.

Q. "You will now go back to, you know, the same source", he tells you.

A. "You would now go back to the same --

Q. And you said, "Yeah."

A. Meaning I would go back to Chief Renaghan.

Q. For what?

A. I guess again about the kid.

Q. SanGerardi, whatever his name is?

A. Yes sir, as far as I know.

Q. "So I have to assume I have to believe him, don't I", "Yeah, of course." What does he mean by that?

A. Meaning that if he said he would do it, he would do it.

Q. All right. Then you said, "But you know where it is coming from."

A. "You know where it is coming from"?

Q. And he said, "Yeah I discussed that with him too. He doesn't know why. You're going back and check it out again."

A. That is when I said I am going back to Renaghan and I am going to find out what happened and -- or whatever this thing is.

Q. You mean -- what thing?

A. The SanGerardi thing.

Q. What is holding it up or what --

A. I am going to tell him he asked me a second time what happened to the kid.

Q. Was he asking for money, Renaghan?

A. No.

Q. All right.

A. I told you exactly what happened. When I first told him the thing, Mulligan wanted the kid transferred, he said, "I will look into it. I will see, the kid has a good record." Then I said to him that, "Hughie will give you a suit" or something to that effect. When I saw Mulligan the next time rather, he said, "Tell Tom thanks a lot if he can do it. And I'll buy him a suit."

Q. What did Tom say, Tom Renaghan?

A. He said, "Okay."

Q. Did he ask for more money?

A. He didn't ask me for more money.

Q. What is your interpretation of this, "Try to get him more money"?

A. It says, "Somebody brought him down down here to try to get him more money." He is not saying I brought him down. I never brought the man down.

* * *

Q. Keeley, "Well I wonder why they are coming up with these stories."

Q. You said that, right?

A. "Well, I wonder why they are coming up with these stories."?

* * *

Q. ... What stories were you referring to?

A. I am trying to recall the conversation. I had -- offhand, I can't think of what stories --

Q. Just a minute. You made that statement, did you not?

A. Yes, sir, I did. I am not going to lie to you. If I can --

Q. At the time you made that statement you knew exactly what you were talking about, didn't you?

A. I don't know.

* * *

Q. Just a minute.. Are you telling this Grand Jury you don't know what you were talking about at that time?

A. The story could have been anything. I don't recall the story.

Q. I ask you a simple question. When you made that statement to him on the telephone, did you know what you were talking about?

A. That is what I am trying to think, what story.

* * *

Q. You said those words, did you not?

A. Can I read the page before to see if it reflects anything else on my memory?

Q. Go ahead, read the whole thing if you want to.

* * *

(On April 30, 1970 the defendant testified as follows:)

* * *

Q. We asked you about a conversation you had with William Flay.

A. Right.

Q. Do you recall that?

A. Yes, sir.

Q. The conversation was played for you here?

A. That's right.

Q. Would you tell the Grand Jury what you were discussing during that conversation with William Flay?

A. I told you, to the best of myability, I am trying to recall the conversation. He called and he said something about, "That guy wants more money.", if I am wrong, you can correct me.

* * *

Q. ... What is your recollection now of that conversation?

A. To my best recollection --

Q. All right.

CONTINUED

1 OF 6

A. -- he called and he said, "I am eating with that guy." Is that true?

Q. Who is the guy?

A. I am assuming it is Mulligan.

Q. You are assuming? Did you know?

A. I was in Rockland County at the time, Mr. Scotti.

Q. ... Would you tell this Grand Jury what your recollection now is of the substance of that conversation and the meaning of it.

A. I said I think he was eating with Mulligan.

Q. Go on, what?

A. I -- there might have been five men in the booth. I don't --

Q. What was that?

A. I said there could have been five men in the booth.

Q. I don't care about that. Tell us about the conversation.

A. He said, "I'm eating with that guy." Is that correct? Something about --

Q. Look what was the purpose of that conversation?

A. This is what I am trying to --

* * *

Q. Well tell us.

A. He said something about money. "That guy wanted more money."

Q. Which guy?

A. I am telling you I am assuming he meant Renaghen.

Q. You are assuming that?

A. I am assuming that. And I am assuming that it is over this suit thing.

* * *

Q. Can it also be with respect to a promotion of a police officer?

A. I cannot say that.

* * *

Q. Isn't the expression "more money" very often used synonomous with promotion?

A. Yes.

Q. Does that refresh your memory that this conversation related to the matter of a promotion of a police officer?

A. No, sir, it doesn't.

Q. Do you deny it?

A. I deny I don't know anything about being promoted. I deny it -- I say the only thing I can recall about the money was the time he was talking to Renaghan about the suit.

* * *

Q. By the way, this is August, isn't it? Isn't it a fact that Renaghan was out of the Narcotics Squad in August -- if I should tell you he was out in July?

A. I wouldn't doubt it.

Q. How could he put across that contract, to use your words, if he no longer had control?

A. I don't know.

Q. If I were to tell you that SanGerardi was already out of the Narcotics Bureau and into the 63rd Squad before you had this conversation with Flay --

A. Again I don't know --

Q. Would you explain to the Grand Jury how that conversation could have referred to SanGerardi?

A. I don't know.

* * *

Q. ... Did you know on August 7th what you were talking about with Flay, that is the question?

A. The question I am answering right now is that I thought that the conversation was -- with Flay was that Renaghan had not gotten the suit.

* * *

Q. ... At that time did you know what you were talking about?

A. I am telling you, to the best of my knowledge, that I had the conversation with Flay and I thought that the conversation is referring to SanGerardi.

Q. Are you saying that on August the 7th --

A. Yes, sir.

Q. -- you knew that you were talking about Gerardi?

A. I am telling you, I am talking about the suit that Renaghan was suppose to get.

Q. You are not responding to the questions. Did you know what you were talking about on August the 7th, Mr. Keeley?

A. When Willie called me and he said, "That guy wants more money" -- right?

Q. Let me stop you there. On August 7th, did you know whom he meant by "that guy"?

A. I assumed it was Renaghan.

Q. You mean then you assumed or did you know it was?

A. I am saying it must have been Renaghan. That is the only person I can think of.

Q. Mr. Keeley --

A. Yes, sir?

Q. I am asking you again. Are you saying that on August the 7th you knew it was Renaghan he was talking about?

A. To the best of my knowledge, yes.

* * *

Q. So when you carried on this conversation with this Flay at that time you knew what you were talking about?

A. Right.

Q. Any doubt about it?

A. Right, right.

Q. Okay, and so did Flay?

A. I guess so.

Q. Right?

A. Right.

Q. And both of you were talking in coded language, correct?

A. Well, I don't know if it is, whether you call it coded language. To me -- I have many conversations with -- even with other people that might be coded -- considered coded.

Q. You didn't refer to the name of a single person. What do you call it?

A. I call other people. They know my voice.

Q. Are you saying that was a conversation in which you revealed the identity of the person you were talking about?

A. No, I don't think so.

Q. Isn't it a fact that you and Flay deliberately concealed the identity of the persons you were talking about?

A. I guess so.

Q. All right. Now, on August the 7th, did you know the identities of the persons which you were concealing in your conversation?

A. Again I say I think --

Q. On August the 7th -- never mind now --

A. Yes.

Q. On August 7th you did know, didn't you?

A. Yes, I guess I knew.

Q. No doubt about it?

A. Yes.

Q. Correct?

A. Right?

Q. How often did you have a conversation of that kind with anyone, not only with Flay, with anyone where you discussed a matter involving a police operation or a police action, whether it be promotion, bribe, whatever it is? How often did you have a discussion of that kind with anyone?

A. I told you that I had the conversation --

Q. Just a minute. Do you have many of those conversations with people?

A. No, no.

Q. About payoffs?

A. No, no, not payoffs.

Q. All right, just a minute. Okay.

A. Yes.

Q. Do you have many conversations concerning promotions of police officers with non-police officers?

A. No, sir.

Q. Do you have many conversations with non-police officers concerning payoffs?

A. No, sir.

Q. So, are you saying that this was about the only conversation you ever had with anybody concerning a payoff?

A. This is the only conversation I had wit any -- or anybody else, to the best of my recollection, in my life about any money, about anything.

Q. All right. So, therefore --

A. Right.

Q. -- that should stand out in your memory, as long as you are alive, correct?

A. Right.

Q. Now, what was clear in your memory on August 7th should be very clear today, shouldn't it?

A. Well, I'm trying to do the best I can. You ask me the question and I'll try to do the best I can.

Q. What is so difficult about this that you cannot recall? Explain to the jury, why? It was so clear in your memory on August the 7th.

A. Mr. Scotti --

Q. What is the difficulty about this that you can't recall it today?

A. It's not that I can't recall it. I am trying to give it to you the way I understand the question, the answer. He called and he said to me something about that guy wants more money. Right? I told you I assume this is Renaghan he is talking about. Right?

Q. Wait awhile. At that time did you assume it was Renaghan or did you know it was Renaghan?

A. Well, it must have been Renaghan.

Q. Now, just a minute. Did you have any doubt whom he meant?

A. No. I'm saying now I believed at that time it was Renaghan.

Q. Renaghan?

A. Right.

Q. Let us get one thing straight. So now you are certain that he meant Renaghan?

A. Yes. I think so, yes, sir.

Q. All right. You are under oath here.

A. Yes, sir.

Q. And he was telling you that Renaghan wanted more money?

A. Right.

Q. Correct?

A. I believe that's the gist of the conversation.

Q. Okay?

A. Right.

Q. And if I should tell you that Gerrardi at that time was not in the squad, had been transferred --

A. Right.

Q. -- and that Renaghan --

A. Right.

Q. -- was no longer connected with the Narcotics Squad, so that it was impossible for him to execute this contract, let us call it that.

A. Right.

Q. Would that refresh your memory that you weren't talking about Renaghan? Because how could he demand more money when he could not deliver? Does it make sense?

A. Yes, it does.

Q. Does that stimulate the recollection?

A. The only thing I can tell you is that it must have been something else and he wanted more money.

* * *

APPENDIX B

Section II

COUNT FIVE:

AND THE GRAND JURY AFORESAID, by this indictment, accuse the above-named defendant of the crime of CRIMINAL CONTEMPT in violation of Section 215.50 of the Penal Law, committed on April 17, 1970 in the County of New York as follows:

The Fourth Grand Jury of the County of New York for the April, 1970 Term, having been duly and properly empanelled, has been conducting an investigation to determine whether violations of the Gambling Laws and the crimes of Criminal Usury and Bribery have been commited and whether there has been in existence a conspiracy to commit these crimes.

As part of the said investigation, the Grand Jury has sought to determine whether the defendant conspired with certain members of the New York City Police Department to receive from Nicholas "Jiggs" Forlano and others, regular payments of money for transmitting certain confidential information of the New York City Police Department to the said Forlano, thereby enabling the said Forlano and others to circumvent and otherwise avoid enforcement of penal statutes against their illegal gambling and loansharking operations.

On April 17, 1970, in the course of the said investigation, the defendant was called as a witness before the said Grand Jury, was duly sworn and was informed of the nature of the Grand Jury's investigation.

The defendant testified that he has been a police officer since June 1, 1954 and has been assigned to the Manhattan North Homicide Squad since 1967.

The defendant also testified that he has known "Jiggs" Forlano since 1961 when he arrested him for unlawful gambling. In addition, the defendant testified that he "knew" Forlano "to be a loanshark."

He further testified that he met Forlano at a restaurant in New York County known as Manny Wolfe's on two occasions in 1969, once in July and the other time in October.

When questioned as to why he met Forlano on the said occasions, the defendant testified that he sought information from him relative to investigations of homicides.

The defendant further testified that over the years, he had sought information from Forlano about six or seven times but at no time received any information.

When questioned as to how a meeting between the defendant and Forlano in Manny Wolfe's came about, the defendant testified that it resulted from inquiries he had made of Forlano's associates. Later he testified that having had in his possession Forlano's home telephone number, he made a telephone call to his home and arranged a meeting in Manny Wolfe's restaurant.

According to his testimony, the defendant met Forlano again in Manny Wolfe's restaurant in October, 1969 as a result of a telephone call he had made to Forlano's home.

The defendant's testimony further discloses that although no mention was made in the telephone conversation in July 1969 of the place where they were to meet, the defendant understood on the basis of prior meetings with Forlano that he was to meet him at Manny Wolfe's.

In order to ascertain whether the defendant met Forlano on July 9, 1969 at Manny Wolfe's for the purpose of arranging the payment of a bribe to the said defendant, it became material and necessary to ask the defendant whether in the course of the conversation that took place on July 9, 1969 in Manny Wolfe's restaurant the following was said and what it meant:

Forlano: "Don't worry, I'll guarantee she will put it up."

Keeley: "When will you know for sure?"

Forlano: "One week."

Whereupon on April 17, 1970 when questioned as to the meaning of a portion of the conversation between the defendant and Forlano that took place at Manny Wolfe's restaurant on July 6, 1969, the defendant contumaciously and unlawfully refused to answer legal and proper interrogatories, in that he gave conspicuously unbelievable, inconsistent, equivocal, evasive, and patently false answers as the following testimony demonstrates:

Q. Did this man Forlano in July... ask you for information concerning someone connected with the Sixth Precinct?

A. The Sixth Precinct?

Q. That's right.

A. I don't know anybody in the Sixth Precinct. To my knowledge, no, sir.

Q. That is not the question, ... The question is whether he asked you for information concerning someone in the Sixth Precinct?

A. I don't think so. Like I say, I am trying to recall truthfully.

Q. Isn't it a fact that he asked you and you said "I don't know him."?

A. That is what I am telling you, I don't know.

* * *

Q. ...The question is whether Forlano asked you about someone connected with the Sixth Precinct? You said, "I don't know him"?

A. If you give me the name I will tell you if he asked me the question. I can't answer if I don't know it. Do you have the name of the person?

Q. Never mind the name of the person.

A. I don't recall him asking me about anybody in the sixth.

Q. Do you deny he asked you about someone connected with the Sixth Precinct?

A. I don't deny it. I said I don't recall it about anybody connected with the Sixth Precinct.

* * *

Q. When he asked you about someone connected with the Sixth Precinct, you, Keeley, said, "I don't know anybody." Jiggs, "Don't worry. I'll guarantee she will put it up." You, "When will you know for sure?" Jiggs, "One week."

A. Oh, no, no.

Q. Do you deny that that exchange took place between you and Forlano?

A. Yes, I can tell you what the exchange was. He was talking about a stock coming out in the market. He told me he would know in one week. I never heard of anyone in the Sixth Precinct, that night. That is why I said I don't understand the conversation.

Q. ... Do you deny that there was reference to the Sixth Precinct in this conversation?

A. As far as I can recall in this conversation that you refreshed my memory about, he told me about a stock coming out. He knew a broker. He said he would know about it in one week. He said it was a good stock. As far as the Sixth Precinct in that conversation, I don't recall anything about the Sixth Precinct.

* * *

Q. ... Didn't Jiggs tell you, "Don't worry, I guarantee that she will put it up?"

A. Not to my knowledge. I don't know who she will be. The only thing I can recall about that conversation was when he was saying about the stock market and he would put up money for the stock market and the broker would tell him in about a week. That is what he told me.

she will put it up?"

Q. Do you deny that he said, "I'll guarantee

A. I am telling you I don't know who she is. I don't recall that as part of the conversation.

* * *

Q. ... would you tell this Grand Jury whether Jiggs told you on that occasion, "Don't worry, I'll guarantee she will put it up"?

A. I'm saying I don't know who "she" is. I don't recall any such conversation, except he was talking about a stock--

Q. You deny--

A. --he was putting up a stock.

Q. Do you deny he said that?

A. No sir, I don't. I'm telling you I don't know what that means.

Q. Wouldn't that be unusual for a person to say to you "I'll guarantee she will put it up?"

A. I'm telling you what I think he was talking about was the stock and putting up the money for the stock.

* * *

Q. Detective Keeley, did Forlano tell you he would guarantee that she would put it up?

A. I told you the only question I -- the only thing I can recall him saying, he said, he will guarantee putting up money for a stock, not she.

Q. He would guarantee putting up money for a stock?

A. Yes.

Q. What stock?

A. I don't know. He said he was seeing a broker in about a week.

Q. What broker?

A. I don't know the broker's name.

* * *

Q. Do you recall telling him after he told you, "Don't worry, I will guarantee she will put it up", your saying, "When will you know for sure"?

A. About the stock.

Q. I thought you said you weren't interested in stock.

A. If a guy tellsme he knows a sure thing, I don't know anything about the stock market --

Q. What did you mean then when you said, "When will you know for sure"? What did you mean by that?

A. He said he was going to see a broker in about a week.

Q. Is that what he said to you?

A. Yes.

Q. "See a broker in about a week?"

A. That's right.

* * *

Q. Up until this time there was no reference to "a week". He said, "Don't worry, I will guarantee she will put it up. You asked, "When will you know for sure?", then Jiggs said, "One week."

A. Well, that is what I am saying. I don't recall the exact context of the conversation.

* * *

Q. He said, "I will guarantee she will put it up", what does this mean to you?

A. That doesn't mean anything to me. The way I heard it, he said, he would guarantee putting up the money for the stock.

Q. That is what he said?

A. That is what I recall.

Q. Not that somebody would put up money, not, in plain language, a payoff for a fix?

A. A fix?

Q. That's right.

A. No, sir. I don't know anything about a fix.

* * *

Q. Let me see if I understand you correctly. This man is telling you according to your recollection that he had a good buy?

A. That's right.

* * *

Q. Did he mean by that, that he was willing to offer you stock and he would put the money up for it?

A. Maybe that is what he was talking about.

Q. ...In plain language what Forlano was telling you was that "I got some good stocks. I can get you in on it, I'll put up the money for the stock."

A. That is the way the conversation could of went.

* * *

Q. --that he will make, will turn over to you some of the stock and he will put the money up?

A. No, he didn't say he'd turn over any stock. He was going to put up money and asked me if I wanted to go in on the stock. If I wanted to buy stock. I told him I didn't have any money for the stock market.

Q. Didn't he tell you he'd put it up?

A. No, he said, "Can you get any money for stock"?

Q. What would be the reason for his telling you, "I'll put the money up for the stock?"

A. I don't know, why he would say that.

Q. You told us a little while ago--

A. I can recall something about him saying he was going to put up money for stock.

Q. Let's stop there. He also offered you the stock, in other words?

A. No, he asked me if I had any relatives where I could get money to put up for stock.

* * *

Q. ... You said this man told you he was going to put the money up for the stock, correct?

A. I'm trying to recall to the best of my ability.

Q. There would be no sense in telling you that unless he was trying to get you interested in stock, correct?

A. Probably, yes.

Q. In the event you had no money available to you for the stock, he was offering to put up the money for you?

A. That might have been his intention.

Q. Did you accept his offer?

A. No, sir.

Q. What did you tell him when he made that offer to you?

A. I said I would find out if I could get any money, when would he know about the stock.

Q. I am talking about him. Did you tell him anything with respect to the offer he made to you?

A. No, sir I don't think so.

Q. Well now, let me ask you this, here is a man, in substance according to your testimony, telling you I have got a good stock. ...correct?

A. That's right.

Q. He will put up the money, meaning clearly that if you haven't got the money available, you can get the stock, "I will put up the money. Later on, you can pay me or whatever you want to do"?

A. He was putting up the money for the stock.

Q. For you?

A. Not only for me.

* * *

Q. The expression, "put up the money", is used in what connection?

A. I don't know.

Q. When a fellow says to you, "I am going to put up money", it doesn't mean for himself. I'm going to ask you point blank;did that man offer to put up money for stock for you?

A. He may have said, "I will put it up", I never took him up on the offer.

* * *

Q. Do you deny this man told you that he would put up money for stock for you?

A. (No response)

Q. Do you deny it?

A. I'm not denying it.

Q. Do you admit it?

A. As far as I can recall the conversation; he asked me about the stock. He told me about the stock. He said he was putting up --

* * *

Q. I am asking a very simple question. I will repeat the question; did this man in substance, tell you that he would put up the money for stock for you?

A. I don't recall, in substance, he said he would put it up for me.

Q. Do you deny that?

A. If I may say something, I believe he said "If you can get the money I will guarantee it". This is what I believe was said.

Q. Guarantee what?

A. Guarantee the money.

Q. I don't follow you.

A. If I could borrow the money--

Q. If you could get the money you wouldn't need any guarantee.

A. That is what I am telling you.

Q. Did he tell you -

A. What?

Q. -- that "I will put up the money for your stock"?

A. He never told me he'd put it up. He said, "if you will get the money I will guarantee you won't lose on it." That is what he said to me.

* * *

Q. Now, he said, if you get the money he will guarantee you won't lose?

A. That's right.

Q. That you remember definitely?

A. I believe that is the way the conversation went.

Q. Now, I ask you, did this man tell you that, "I will put up the money for the stock."?

A. No, me?

Q. Yes.

A. No. No, he said, I will guarantee the money if you can get the money.

Q. Did that man offer to put up money in stock for you?

A. No, he didn't.

Q. He did not offer?

A. He said to me --

Q. Let's get this straight. Do you deny it?

A. I'm telling you what the conversation was to the best of my ability. He offered me --

Q. Read the question back, please.

(Whereupon the reporter read as follows:)

"Did that man offer to put up money in stock for you?"

A. I said, I am trying to reply to your question. He said to me, "If you can get the money for the stock, I'll guarantee it", and that is it, to the best of my recollection that was the entire conversation.

Q. Well, I will repeat the question. Did he offer to put up money for the stock for you?

A. If he offered why would he say, "I'll guarantee your money."?

Q. Don't argue with me.

A. I'm not arguing with you.

Q. Confine your responses to my question.

A. I'm trying to reply to your question.

Q. Did that man offer to put up money for stock for you?

A. No sir.

Q. You deny that categorically?

A. I'm saying he asked me if I could get the money and he'd guarantee it. That is exactly the way I recall the conversation. I can't do any better than that. If he asked, if he said to me, "I will put up the money for you then why would he ask me, "Do you have any place to get the money, from a relative or friend."? That doesn't make sense.

Q. I'm asking you, did this man offer to put up money for stock for you?

A. I'm telling you to the best of my knowledge he said, "I will guarantee the money if you can get it." This is the way I recall the conversation.

Q. Guarantee what money?

A. The money I could get for the stock market, if I could get any money.

Q. I don't understand, he would guarantee your money?

A. Apparently, this is what he said. That is what I am trying to tell you.

Q. How much was involved?

A. No amount.

Q. You were talking just about any amount of money?

A. "Can you get your hands on any money?" That there was a good stock coming up, I know a broker.

Q. What general field was the stock in?

A. I haven't any idea of the stock.

Q. You didn't ask about the general merits of the stock or the prespects?

A. He said he would have the stock the following week. He would see the broker.

* * *

Q. How much money were you to get together?

A. I don't have any money. I'd have to borrow whatever I had.

Q. Ten shares, a thousand shares?

A. I don't know. He never mentioned the shares of stock or anything else. He heard from the broker a good thing was coming out. That is exactly what he told me.

Q. How were you going to get the money from a relative or friend without any idea how much you would need?

A. He must have talked about the particular-- It was big money, he wasn't talking about quarters, I imagine. To play the stock market you have to buy in amounts.

Q. Of course.

A. I don't have any money to buy in amounts.

Q. How much did you plan to try to raise?

A. I don't know. He said he would let me know if the stock came through. I never heard from him again on the stock.

Q. Just a minute. Do you deny that he told you he would call you on the telephone and let you know?

A. I don't think he could, he didn't have my phone number.

Q. Did he recite a telephone number on that occasion and write it down on a card you gave him?

A. I don't know if he did or not.

Q. Do you deny that?

A. I don't deny. I don't recall. I don't recall the Sixth Precinct.

Q. Wouldn't that be unusual?

A. What would be unusual?

Q. For Forlano to write a number on a card you gave him? Wouldn't it stick out in your memory?

A. I don't know, unless he was going to tell me about the stock. I don't know. I wouldn't give my home number. Nobody has ever called me at home. The only people that call me at home are police officers, relatives, friends. I don't give --

Q. You don't deny giving him a card, do you?

A. I'm not saying that. If you say I gave him a card --

Q. What would be the reason for giving him a card?

A. I don't know.

Q. Do you deny giving him aphone number where he could reach you?

A. I don't know whether I did or not. I know I never wrote my home number down.

Q. Do you deny giving Forlano a number where he could reach you?

A. That's possible. I don't know if I did, I know in that area is mine. I don't recall giving him my number. or not.

* * *

Q. Did you give Forlano a number where he could reach you?

A. I might have. I don't know.

Q. What number?

A. I don't know what number.

Q. What number would you give him where he could reach you?

A. I guess my work number.

Q. Outside of your work number?

A. I don't know. I don't recall. I don't know of any other place I could give him.

Q. Your work number?

A. Yes, sir.

Q. You mean the precinct?

A. Well, if I was going, if he was going to call me about stock numbers.

Q. Your work number wouldn't start with 914?

A. No, sir, my home number.

Q. You deny giving him a telephone number in the 914 area?

A. I don't deny giving him any phone number. I don't recall giving him a phone number at all.

Q. Did you give that man a phone number in the 914 area?

A. I don't know if I did. The only number

* * *

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FRANK S. HOGAN

District Attorney

APPENDIX C

Section I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

WILLIAM FLAY, :

Defendant. :

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the above-named defendant of the crime of CRIMINAL CONTEMPT, in violation of Section 215.50 of the Penal Law, committed on April 28, 1970 in the County of New York, as follows:

That the Fourth Grand Jury of the County of New York for the April 1970 Term, having been duly and properly empanelled, has been conducting an investigation to determine whether violations of the Gambling Laws and crimes of Criminal Usury and Bribery have been committed and whether there has been in existence a Conspiracy to commit these crimes.

That as part of the said investigation the Grand Jury has sought to determine whether the defendant and certain members of the New York City Police Department have conspired with Hugh Mulligan and others to receive regular payments of money in return for transmitting certain confidential information of the New York City Police Department to the said Mulligan and others, thereby enabling the said Mulligan and others to circumvent and otherwise avoid enforcement of Penal Statutes against their unlawful Gambling and Loansharking operations.

In addition the Grand Jury has sought to determine whether Hugh Mulligan and others, in furtherance of their criminal activities, conspired to use their influence corruptly and unlawfully to bring about the promotion and transfers of certain members of the New York City Police Department. Accordingly the Grand Jury sought to ascertain the identities of those police officers whose promotions and transfers were brought about by Hugh Mulligan.

On April 24, 1970, in the course of said investigation, the defendant was called as a witness before the said Grand Jury, was duly sworn and was informed of the nature of the Grand Jury's investigation. On April 28, 1970 the said Grand Jury was still conducting the said investigation when the defendant was recalled as a witness before the said Grand Jury.

On April 24, 1970, the defendant testified that he was the manager of a small jewelry business and a member of the Steamfitters Union, and that he had known Hugh Mulligan for over twenty-five years.

The defendant further testified that several days prior to his appearance he had discussed with John Keeley, a detective assigned to the Manhattan North Homicide Squad, the substance of a telephone conversation had between the two in August, 1969, and shortly thereafter he had a similar discussion at a prearranged meeting with Hugh Mulligan in an effort, he asserted, to refresh his recollection.

According to the defendant's testimony, he on about three occasions transmitted messages to Keeley on behalf of Mulligan.

It, therefore, became material and necessary, to question the defendant about the meaning of an apparently coded telephone conversation on August 7, 1969, between the defendant and Detective John Keeley which was as follows:

"Male In Hello Meenan's.

Male Out Willie er Willie there? Willie Flay.

Male In (Flay) Hello.

Male Out Yeah Willie.

Male In How are you?

Male Out All right.

Male In I'm just eating with your friend. You know.

Male Out Yeah.

Male In So er der er er I'll make the discussion very brief. And there's nothing you can say because I'll see you during the week anyhow. I spoke to my friend.

Male Out Yeah.

Male In Absolutely never went there -- or er er you know -- where he's supposed to go.

Male Out Right.

Male In Now I'll -- My question was "Do you know him?" -- Yes.

Male Out Yeah.

Male In Know him - Met him once or twice. Somebody brought him -- to him down -- to try to get him -- you know -- more money -- you know?

Male Out Right, right.

Male In And that's about the substance of the whole thing.

Male Out Yeah.

Male In So you could take him there -- you know - because he appreciates that we -- we were thinking about it -- Anyhow.

Male Out Yeah.

Male In And er --

Male Out Well I wonder why they are coming up with these stories?

Male In Well I told him that er -- you --

Male Out You know.

Male In You will now go back to the same er or you know the same source.

Male Out Yeah.

Male In And er -- so I have to assume that er -- I have to believe him. -- Don't I?

Male Out Yeah of course.

Male In You know.

Male Out And you know where it's coming from?

Male In Yeah I er -- You er er er We -- er er I discussed that with him too -- He doesn't know why. Er -- Oh you're going back and check it out again now?

Male Out Yeah I'd like to know (indistinct) yeah.

Male In Just for your own cur -- so er -- See if you can get him more concrete -- where -- you know -- if you can -- you know.

Male Out Yeah.

Male In So -- er you know -- er er -- So er so er -- Remind me when you come down again will you. Cause I've got something for you - you know - Remind me in case I forget so --

Male Out Okay Willie.

Male In And er tell whosis that his er -- thing is ready you know that thing is finally ready.

Male Out Yeah.

Male In Er -- er well er -- And I'm not going to be in tomorrow John.

Male Out Alright - So, I'll see you next week.

Male In Alright - I'll be there Monday to Thursday.

Male Out Alright.

Male Out Yeah. Is the other guy there?

Male In Yeah. He's here. I'm eating with him. I'm eating. I'm eating.

Male Out I think I'll give him a call tomorrow. Tell him.

Male In Okay.

Male Out Alright. I want to talk to him about something anyway.

Male In Okay.

Male Out Alright.

Male In Right."

When questioned as to the meaning of the telephone conversation set forth above, the defendant contumaciously and unlawfully refused to answer legal and proper interrogatories in that he gave conspicuously unbelievable, inconsistent evasive, equivocal and patently false answers as the following testimony demonstrates:

Q ... Now, sir, do you recall when you appeared before this jury last week you discussed a telephone conversation between you and Detective Keeley?

A Yes, I did.

Q Do you recall your testimony relative to that?

A I think I do.

Q Do you further recall you indicated you didn't know what the substance of the conversations was?

A I said that I didn't understand -- I said that the conversation didn't make sense, something to that effect.

Q Correct. Have you discussed that conversation with anybody since your appearance in the grand jury last Friday?

A Yes, with John Keeley.

* * *

Q Did you discuss your appearance here with anybody else?

A Yes, I saw Hughie Mulligan.

Q When?

A Thursday night.

Q Prior to your appearance here?

A Yes.

Q How long did you meet with Mulligan?

A I saw him on 18th Street and First Avenue. He was in the bar drinking there.

* * *

Q Did you go the bar deliberately to see him?

A No, Mr. Scotti, I'm in that neighborhood my entire life and I have been, you would say, hang out, that's the phrase.

* * *

Q Did you have any idea that Mulligan would be there?

A Did I have any idea he would be there? Yes, I thought he would be there.

Q Well, to be a little more direct --

A Yes, sir.

Q -- did you and he agree to meet at this bar?

A I called him up.

Q Why don't you say so?

A I'll come to that, yes. I called him up.

* * *

Q Tell us.

A I called him up and I said that I would like to see you. I said -- I am always at this corner. I have been on that corner for forty years. I live in that neighborhood. So he came down. I didn't know what time he was coming. I was around and he come down and I said something about a discussion. You know. Something about a discussion. I was supposed to call Keeley somewhere. And I asked him did he remember that he had --

* * *

Q What made you think of seeing him in order to refresh your memory with respect to this conversation which you had with Keeley? What caused you to call him?

A Because I have called Keeley a couple of times previous to Mulligan, that's what made me call.

Q Previous to what?

A I have called Keeley for Mulligan on previous occasions, a couple of times.

Q This is a conversation you had with Keeley.

A Yes.

Q I am asking you what prompted you to arrange a meeting with Mulligan for the purpose of refreshing your memory, as you claim you needed to do, with respect to this conversation with Keeley?

A Well, my purpose was to ask him did he remember asking me to call Keeley. And if he did I was looking to get my memory refreshed so I could come down here and tell the jury about it.

* * *

Q What would be the reasons for your calling Keeley on behalf of Mulligan?

A I absolutely don't know what transpired between them two. He just told me to call him on a few occasions.

Q You are not answering my question. What is the reason for his asking you to call him?

A Because he knows - he is related - Keeley happens to be my wife's first cousin and maybe he felt I could get him easier than he could. He never told me the reason.

* * *

Q Does he need you to call him?

A I really don't know. I haven't got the answer to that.

Q You have no idea at all?

A I don't know why he asked me.

Q And you were willing to oblige him?

A Well, I did oblige him on a few occasions. I called Johnny and told him he wanted to see him.

* * *

Q Did you tell Mulligan what the conversation was that Keeley was questioned about?

A I told him -- yes, I told him exactly -- well, not word for word.

* * *

Q ... How many times did Mulligan ask you to call Keeley in the past year and a half?

A Maybe three times.

Q On each of those occasions what happened?

A I just told -- I just called him and told him that he wanted to see him. I don't remember truthfully, I don't remember how I told him on the other two times.

Q What is the message you conveyed to Keeley on behalf of Mulligan?

A Well, the last call I don't know if it was Mulligan. About the other two calls, I don't remember either. But I did call and I told him that Hughie wants to see you.

Q That's all?

A That's about all.

Q Correct. You never discussed anything with Keeley beyond that?

A No.

* * *

Q In this conversation you don't tell him that Mulligan wants to see him.

A If it was Hughie.

* * *

Q And did you tell Mulligan what it referred to?

A I don't know what it referred to myself?

Q Did you tell Mulligan that?

A I told Mulligan that I don't remember making such a call.

Q What call?

A The call that Keeley says I was supposed to make or someone said I did.

Q Did you tell Mulligan what kind of call it was?

A Yes, I told him what kind of a call it was.

Q Did you tell him what was supposed to have been said by you in the call?

A Yes, I did.

* * *

Q ... Didn't you tell Hughie Mulligan what it was all about and didn't you go to see Mulligan for the purpose of getting advice from him as to what you should say?

A Oh, no, I did not. I don't need any advice from Mr. Mulligan.

* * *

Q Did Mulligan tell you not to disclose to the grand jury the truth of that conversation?

A He did not say anything of the kind. And he could never dare to try to tell me what to say.

* * *

Q And didn't you go to see Mulligan because Mulligan was the person who was referred to in coded language in that conversation?

A I didn't go to him for that purpose. I went to him for the purpose of asking him did he remember.

Q Wait a while. Do you deny that the person mentione in that conversation in coded language was Mulligan?

A To the best of my knowledge --

Q Now, do you deny it? Yes or no?

A I'm denying it because I don't remember it, Mr. Scotti.

Q Are you saying it's possible you were referring to Mulligan?

A Yes, I would say that.

Q You wouldn't deny it, would you?

A I wouldn't deny it's possible.

Q Yet you don't admit it either?

A Because I don't remember. I am not going to say I remember something if I don't, and I told the grand jury the last time I was here it could have been Mulligan.

* * *

Q From the subject matter of the conversation do you acknowledge that you participated in that conversation with Keeley?

A It sounds like my conversation. I wouldn't deny that.

Q All right. Now that you heard this played back, what is your recollection?

A It could have been Hughie Mulligan. I'm not certain. I just don't remember. It's eight months ago.

Q Could have been what?

A I don't know what the conversation --

Q You were talking about the man you had dinner with, you were eating with, right?

A Yes.

Q That was Hughie Mulligan, wasn't it?

A I don't remember, Mr. Scotti. It could have been. I wouldn't deny it.

* * *

Q Do you remember the call was in Meenan's or not?

A I don't know.

* * *

Q Then you say to Keeley, "I spoke to my friend. Absolutely never went there. Where he's supposed to go." What did you mean by that?

A I -- I don't knowwhat that -- I really don't know what that means.

Q Who was the "friend" you were referring to?

A I spoke to my friend and --

Q "I spoke to my friend." Keeley says, "Yeah." And you say, "Absolutely never went there. You know. Where he's supposed to go." Who was the friend?

A I don't remember, Mr. Yasgur, who that -- who I was referring to.

Q Well, both you and Keeley knew whom you were referring to on August 7, 1969.

A Well, maybe he'll remember but I just don't remember who I was discussing at the time.

* * *

Q Whose name were you trying not to say over the telephone when you spoke to Keeley?

A I don't remember who it was. And I still repeat that it could have been -- as you asked me before, it could have been Mr. Mulligan and I'm not going to say here and say positively it was him. If my memory doesn't tell me to say it, I'm not going to say it.

Q You acknowledge that this was a guarded and coded conversation. What were you trying to guard in code? Whose name were you trying to code when you say "my friend"?

A I don't remember what name. I wasn't trying to guard anyone.

Q You were the one who said that. You didn't give a man's name there. You said "my friend."

A I know it.

Q You acknowledged yourself, you volunteered before this grand jury a few minutes ago that it was a coded conversation and acknowledged that it was a guarded conversation.

A I say it sounds exactly like that, no doubt about it.

Q Whose name were you trying to conceal and keep from being mentioned over a telephone wire when you said "my friend"?

A I don't remember whose name it was.

* * *

Q It would be extremely unusual for you to have a coded and guarded conversation with Detective Keeley?

A Whoever told me told me to say it that way.

Q Is this an every day occurrence with Keeley to talk in code?

A No.

Q How many other times have you ever talked with Detective Keeley in code, other than on this occasion?

A I don't remember. Unless I called him maybe once before, once or twice before for Hughie Mulligan, I might have said, "A friend of yours is here" or something like that. That's the way he used to tell me. I would call on that basis.

* * *

Q Whose idea was it to talk in coded language?

A I don't remember, Mr. Scotti. If I knew who told me to make this call I would maybe say it was their idea.

Q Just a minute.

A I don't remember.

Q Do you deny that you decided to talk in coded language? You did this on your own initiative?

A I don't remember whether I decided or someone else told me to say it that way.

* * *

Q ... Isn't it a fact that both of you spoke in coded language?

A Evidently.

* * *

Q I ask you again, why did you talk in coded language?

A I just don't remember why I spoke that way.

* * *

Q So it must be a matter which is quite important, am I correct?

A Well, there was nothing of importance to me where Keeley and Mulligan was concerned. That I could tell you.

Q Are you saying that this involved a matter in which Keeley and Mulligan were interested?

A I don't know. If it was Mulligan that told me to call, it might have been.

* * *

Q Are you telling this grand jury at the time you engaged in this conversation with this man Keeley you had no idea what you were talking about?

A Well, maybe part of it I did and part I didn't.

Q No, at the time.

A At the time, that's what I'm talking about. Part of the conversation I might have and part I might not.

Q In other words, you were mouthing words? You were conveying thoughts to this man Keeley without knowing what those thoughts were? Is that what you are telling this grand jury?

A Part of it. It's a long conversation. Part yes and part no.

* * *

Q Are you telling this grand jury that part of what you said you had no idea what it was?

A Yes.

Q -- at the time?

A Yes.

Q How did you come to say it then?

A I might have been told to say it by whoever asked me to call.

Q What did you do, stop and turn around and say, "What am I going to say now?"

A You could have the door of that telephone booth open and talk to someone at the table right next to it. The booth is right next to the table.

Q ... Now, you go over this conversation here and tell this grand jury at what point someone stopped and gave you information or told you what to say?

(Mr. Scotti hands documents to witness.)

* * *

A I read this thing thoroughly and I can't recollect who I"m talking about there.

Q Are you -- you said a little while ago, part of that conversation you were familiar with, the other parts were being fed to you by others?

A I said it was possible. I didn't say -- it might have been the beginning, just say, "I'm just eating with your friend", something in that area. I think.

Q By the way, "your friend", did you leave him at the table? You made a telephone call, was the phone on the table or away from the table?

A I been eating there 20 years. I have eaten with my family and a lot of people.

Q Let's get back to what you said originally.

A Yes.

Q Part of that conversation you were familiar with at the time you engaged in the conversation and other parts you were not familiar with because someone told you what to say, that was your testimony, correct? Wasn't that your testimony?

A Yes.

Q All right. You were telling the truth at the time you said that?

A To the best of my recollection, I would say.

* * *

Q ... when you said, "your friend, you know", you assumed Keeley would know, didn't you, otherwise Keeley would say, "Which friend". He didn't say that, did he?

A No, I assumed he would know.

* * *

Q Let me stop there for a moment, "I'll make the discussion very brief", you used the word, "discussion."

A Isn't a discussion when you talk to somebody?

Q Just a minute. ... You didn't say, I will convey the message very briefly, did you? You said, "I'll make the discussion very brief", meaning that you were going to discuss something with him, you, yourself. Isn't that a fact? ...

A I don't know whether I wanted to discuss anything. I said, "I'll make it brief"?

Q I am quoting your word, "Discussion."

A I'm not denying it.

C.I.8

Q What does discussion mean?

A Conversation, a discussion.

* * *

Q Does it mean in plain language, you, Mr. Flay, wanted to talk to Keeley and you wanted to be brief about it?

A That is what it says here.

Q Do you see anything there about the suggestion of a message?

A (No response)

Q Do you?

A (No response)

Q Do you?

A (No response)

Q Do you?

A (No response)

Q Well --

A It doesn't say anything about a message here.

* * *

Q Aren't you, Mr. William Flay, aren't you telling that man, make the discussion very brief and there is nothing you can say because I will see you during the week, anyhow? You are going to see him, not somebody else?

A He sees me a lot. I see him --

Q Meaning you were going to talk to him at length about that?

A I don't know about it -- I -- I see Johnny often.

Q You were going to talk to him about this, why did you make that statement?

A I don't know.

* * *

Q Before that you said you don't have to say anything. When you told him you don't have to say anything, let me stop there. What did you mean to convey to him?

A I don't know.

* * *

Q ... "there's nothing you can say", what do you mean by that?

A I don't know what I mean by that.

Q What?

A I don't know.

Q That was your own language.

A I'm not denying that, this is all mine.

* * *

Q All right, let us go on. "I spoke to my friend", that is you, and he says, "Yeah". Now let me stop there for a moment. ... Looking at that conversation isn't it clear when you are telling this man, Keeley, "I spoke to my friend" and he said, "Yeah," that he knew exactly whom you meant when you said, "I spoke to my friend"?

A He might have known, I don't know.

* * *

Q You had a clear idea in your mind at the time whom you meant when you said, "I spoke to my friend", correct?

A Probably so.

* * *

Q You were using the pronoun "he" rather than the proper name of the person you had in mind in order to conceal the identity of the person whom you were talking about, am I correct?

A That is possible.

*** *

Q You knew definitely whom you were taling about, correct?

A At that time, I evidently did.

Q There is no doubt about it. He said, "right", he knew too, didn't he?

A According to that answer.

* * *

Q So that you are telling him you met him once or twice, the person, that this other guy was supposed to meet, you met him once or twice and somebody brought him "to try to get him, you know, more money." Let me ask you this question, at that time, at the time you made this utterance to him, by the way it is your words, isn't it?

A This whole thing is my words. I'll save you the trouble.

Q Your words reflected your own thoughts, correct?

A Probably. Of course, it was me speaking. It's got to be my thoughts.

Q Now, this Grand Jury would like to know what your thoughts were at the time that you expressed them in a cryptic, guarded fashion?

A Well, I would like to tell this Grand Jury, if I could remember what I was talking about, at that time. I am at a total loss.

* * *

Q ... You know police officers, don't you? You have a lot of friends in the police department?

A Yes, sir.

Q ... Instead of saying, we want a promotion, we say - more money. It means a higher rank.

A Second grade to first grade.

Q A common expression.

A No question about it.

* * *

Q If you had a conversation with someone on behalf of a police officer who sought a promotion it would be most unusual?

A Unusual for me.

Q It would stand out in your memory. It should stand out.

A To me, yes.

* * *

Q Now, I am asking you, do you deny in that conversation that you were talking to Keeley about a police officer who sought promotion?

A What police officer?

Q Any police officer?

A I don't remember.

Q Do you deny it?

A (No response)

Q Do you deny it?

A I don't remember mentioning about a police officer.

Q I am asking you, do you deny talking about, in a cryptic coded language, about a police officer?

A I don't remember.

Q In connection with a promotion?

A I don't remember if it was a police officer, Mr. Scotti.

* * *

Q Do you deny that you were talking about, in essence, a police officer who sought a promotion?

A I deny that, I deny that. I, to the best of my memory, whether it was a police officer or not, I don't remember. I am not going to sit here and say something just to make --

Q You said a little while ago, it would be a rarity for you to talk to anybody about a police officer in connection with a promotion.

A Yes.

Q Now, I am asking a question. I am asking you, do you deny it?

A I might have.

Q Will you listen? Do you deny that the person you were talking about when you said right down here, "you know -- more money -- you know"?

A I don't deny it. It could have been a police officer, Mr. Scotti.

Q Do you deny it was?

A I have to deny it was. No one ever told me about the name of a police officer, no one told me about a police officer. That question I have to deny.

Q Deny what?

A I was ever told that. There are plenty of police officers --

* * *

Q ... Were you seeking to convey to that man, Keeley that a police officer went down there and tried to get him, "you know -- more money"? Now, somebody in the Police Department was trying to get a promotion for a police officer, do you deny conveying that thought to him?

A I never, well this statement speaks for itself.

Q That's right.

A That is exactly how I told it to him. I don't deny I ever said, used the word Police Department or detective, I mean --

Q You're not being responsive to the question.

A Let me say this to you, this could have been meant for a police officer to get a promotion or something to that effect.

Q You tell the Grand Jury what is the thought you were conveying to that man? Tell us what was the thought?

A (No response)

Q Tell us.

A That could have been meant for a police officer to get a promotion. I'm not certain who the other officer was or who was interested in him, this is just a message, maybe someone told me to give it to Keeley. It was between them. I was bringing the message.

Q Are you saying to this Grand Jury you don't know, now, who that police officer was and on whose behalf you were having this talk with Keeley?

A Yes, I am saying that to this Grand Jury. I don't know who this police officer was.

Q At the time you had this conversation, did you know the police officer?

A I don't know who the police officer was then, I don't know who he is now.

Q How can you have this conversation with him?

A Because maybe Keeley had a conversation with someone else previous to this, about police officers, I don't know.

Q You were talking about conveying it.

A Was conveying a message to someone?

Q You were conveying a message.

A There's no police officer's I'm interested in.

Q We are not asking whether you are interested or not. Were you conveying a message?

A I -- this looks like I was conveying a message, yes sir.

Q From whom?

A I just don't remember.

Q Well now, were the words used by the man or were they your own words?

A This is probably how it was told to me to tell Keeley.

Q You mean the man told you, stopped and gave you the language?

A Might have spoken to me before I got to the phone. I used my own language, no one wrote the script for me on this. I got the phone and my mind runs --

Q How many times were you told by anyone to give this kind of a message?

A In regards to this?

Q To give this kind of a message.

A The only time.

Q The only time in your lifetime?

A Yes.

Q Now, I am asking you, will you tell us, will you tell this Grand Jury who this person was who gave you this message?

A I just don't remember. I told you who it possibly could have been. I absolutely don't remember eight months ago. I'm not going to sit here and perjure myself.

* * *

Q ... Now you are saying to him, "that's about the substance of the whole thing", meaning you had a clear idea of what you were talking about at the time, but you were giving it to him in cryptic fashion. Okay?

A Right.

Q So, at that time there was no doubt about the fact you knew what you were talking about?

A Yes.

Q "So you could take him there -- you know -- because he appreciates that we -- we were thinking about it -- anyhow." "We were thinking about it", who is the "we"?

A I don't remember who "we" was. I don't know. "Take him" where? Where could he take him?

Q Do you want me to tell you?

A No. I wish I knew where they took them all. I don't need them.

Q "I wonder why they are coming up with these stories?" Now he tells you, "I wonder why they are coming up with these storeis?" He doesn't tell you what the stories are?

A No.

Q Doesn't he assume by making the statement you, yourself know about these stories, it is clear, isn't it?

A Yes.

Q Both of you know what these stories are?

A Yes.

Q I ask you, what were these stories?

A (No response)

Q What were these stories?

A I don't remember what the stories were.

Q All right, you said, "Well I told him that er -- you --." You knew, didn't you at that time you knew what the stories were, correct?

A According to this, I should have known.

Q What do you mean, "you should have", you knew.

A According to that.

Q You said, you say, "You will now go back to the same you know the same source". Going to the source of the stories, right? You are talking about the source?

A Yes.

Q All right. Both of you knew what you were talking about at that time, correct?

A Evidently.

Q Let's go on. By the way, can you tell this Grand Jury what the "same source" was, what you meant?

A No, I can't.

Q You knew then. Now you don't know?

A I don't know right now.

Q And you say, "So I have to assume that er - I have to believe him -- don't I?"

A Something else, "I have to believe him." Him who?

Q Who is this "him"?

A I am asking myself that question.

Q At that time you knew who the "him" was, didn't you?

A He said, "Yeah of course."

Q He knew too, didn't he?

A I have to assume I have to believe him -- don't I." "Yeah of course."

Q Both of you knew who you meant by "him", right, at the time? Now you say you don't know?

A I don't remember.

Q All right, let's go on. He said, "But you know where it's coming from?" You say, "Yeah, I -- you -- we -- I discussed that with him too -- He doesn't know why. Oh you're going back and check it out again now?"

A I see this. I read it very thoroughly.

Q Right. At that time you knew what you were talking about, didn't you and he knew too?

A (No response)

Q Can you tell this Grand Jury what you were talking about?

A No, I can't.

Q You don't recall a single thing?

A No.

Q All right, let's go on. Then, "Yeah I'd like to know." You said, "Just for your own -- see if you can get him more concrete -- if you can -- you know." Get something more concrete?

A It doesn't make sense at all, at this point.

* * *

Q Then he says, "Is the other guy back?" You say, "Yeah, he's here. I'm eating with him." Whom does he mean by that?

A I don't know.

Q "Is the other guy back?", is that Hugh Mulligan?

A It could have been.

Q Do you deny it was Hugh Mulligan?

A I deny that I remember whether it was him or not. I'm not saying it was him.

Q Do you deny that, in fact, was Hugh Mulligan?

A I deny I remember whether it was him.

Q What do you mean?

A I don't deny it was he.

Q I am asking you whom Keeley referred to that you knew, a friend?

A It could have been Hugh Mulligan.

* * *

Q Do you deny you were talking to him about a police officer seeking a promotion?

A I deny it was a police officer. I wasn't in --

Q That is not the question.

MR. SCOTTI: Mr. Foreman, I request that you direct the witness to be responsive to the questions.

Q Don't add to my question.

A I will answer the question.

Q All right. Answer it.

A It's right here. As far as I am concerned, this paragraph about getting more money and all was probably a message I was delivering to him from someone who told it to me. I forget who it was at this point. However no one told me that it was a police officer. I wasn't told. I am not going to assume. I am not going to deny. I was never told it was a police officer.

Q Are you saying you were conveying a message?

A In this particular instance, yes.

Q All right, who was the one who asked you to convey a message?

A I absolutely forget, Mr. Scotti. I told you on numerous occasions.

FRANK S. HOGAN
District Attorney

C.I.14

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK :

-against-

FRANKIE DE PAULA, :

Defendant. :

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the above-named defendant of the crime of PERJURY IN THE FIRST DEGREE, committed on June 12, 1969, in the County of New York, as follows:

The Fifth June 1969 Grand Jury, having been duly and properly empanelled, was conducting an investigation to determine whether there had been in existence in the County of New York a conspiracy to commit the crimes of Sports Bribing and Sports Bribe Receiving.

Testimony adduced before the Grand Jury disclosed that the defendant was a professional prize fighter and that Gary Garafola was his manager.

Further testimony revealed that on January 22, 1969, the defendant had fought Bob Foster in Madison Square Garden in the County of New York for the light-heavyweight championship of the world, and that Foster had defeated DePaula by a technical knockout, having knocked him down three times in the first round.

It was also testified that on January 17, 1969, five days prior to said fight, Gary Garafola had met and conferred with James Napoli, also known as Jimmy Nap, at Grossinger's Country Club, where Frankie DePaula was training. According to the testimony, Napoli had asked

Garafola, "How does everything look?," and Garafola had replied, "Everything looks good. The kid will listen."

In addition, testimony was adduced before the Grand Jury that showed that the defendant and Gary Garafola had met James Napoli shortly after the aforementioned fight in the early morning of January 23, 1969 at the Unicorn Restaurant in the County of New York. The testimony further revealed that the defendant and James Napoli had engaged in a conversation at said time and place.

Further testimony disclosed that, as Gary Garafola and the defendant were leaving the restaurant, Garafola asked the defendant if he had any small change for the hat check girl, and that the defendant replied, "You're kidding. I scored today, man. All I got is hundreds."

According to further testimony adduced before the Grand Jury, the "purse" for the fight was not paid until the following morning.

It, therefore, became material and necessary to inquire of the defendant whether he had made the statement to Gary Garafola, to wit, "I scored today, man. All I got is hundreds," in order to ascertain whether the defendant had received from James Napoli and others a payment of money for not having given his best efforts in the light-heavyweight championship fight with Bob Foster.

On June 12, 1969, the defendant appeared before the Fifth June 1969 Grand Jury in the County of New York, and after having been duly sworn before the said Grand Jury, the foreman thereof having authority to administer an oath and said oath being required by law, the defendant stated that he would truthfully testify in connection with said investigation, and having had immunity conferred upon him, the defendant swore falsely as follows:

That he, Frankie DePaula, had not said on January 23, 1969, "I scored today, man. All I got is hundreds."

Whereas in truth and in fact, as the defendant well knew, said testimony was false and the truth was that the defendant had said on January 23, 1969, "I scored today, man. All I got is hundreds."

The said false testimony was to a material matter in that the purpose of said inquiry was to ascertain whether the defendant had received from James Napoli and others a payment of money for not having given his best efforts in the aforesaid light-heavyweight championship fight with Bob Foster.

SECOND COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse the above-named defendant of the crime of PERJURY IN THE FIRST DEGREE, committed on June 12, 1969, in the County of New York, as follows:

The Fifth June 1969 Grand Jury, having been duly and properly empanelled, was conducting an investigation to determine whether there had been in existence in the County of New York a conspiracy to commit the crimes of Sports Bribing and Sports Bribe Receiving.

Testimony adduced before the Grand Jury disclosed that the defendant was a professional prize fighter and that Gary Garafola was his manager.

Further testimony revealed that on January 22, 1969, the defendant had fought Bob Foster in Madison Square Garden in the County of New York for the light-heavyweight championship of the world, and that Foster had defeated DePaula by a technical knockout, having knocked him down three times in the first round.

D.2

It was also testified that on January 17, 1969, five days prior to said fight, Gary Garafola had met and conferred with James Napoli, also known as Jimmy Nap, at Grossinger's Country Club, where Frankie DePaula was training. According to the testimony, Napoli had asked Garafola, "How does everything look?," and Garafola had replied, "Everything looks good. The kid will listen."

In addition, testimony was adduced before the Grand Jury that showed that the defendant and Gary Garafola had met James Napoli shortly after the aforementioned fight in the early morning of January 23, 1969 at the Unicorn Restaurant in the County of New York. The testimony further revealed that the defendant and James Napoli had engaged in a conversation at said time and place.

It, therefore, became material and necessary to inquire and ascertain from the defendant whether he had engaged in a conversation with James Napoli in the early morning of January 23, 1969, at the Unicorn Restaurant, and whether such conversation related to a conspiracy with Gary Garafola, James Napoli and others to accept a payment of money upon the understanding that he would not give his best efforts in the light-heavyweight championship fight with Bob Foster.

Accordingly, it became material and necessary first to ask the defendant whether he was at the Unicorn Restaurant following his light-heavyweight championship fight with Bob Foster.

On June 12, 1969, the defendant appeared before the Fifth June 1969 Grand Jury in the County of New York, and after having been duly sworn before the said Grand Jury, the foreman thereof having authority to administer an oath and said oath being required by law, the defendant stated that he would truthfully testify in connection with said investigation, and having had immunity conferred upon him, the defendant swore falsely as follows:

That he, Frankie DePaula, had not gone to the Unicorn Restaurant after his championship fight with Bob Foster and had not been in the Unicorn Restaurant in the early morning of January 23, 1969.

Whereas in truth and in fact, as the defendant well knew, said testimony was false and the truth was that he had gone to the Unicorn Restaurant after his championship fight with Bob Foster and had been in the Unicorn Restaurant in the early morning of January 23, 1969.

The said false testimony was to a material matter in that the purpose of said inquiry was to ascertain whether the defendant had entered into a conspiracy with Gary Garafola, James Napoli and others to accept a payment of money on the understanding that he would not give his best efforts in the aforesaid light-heavyweight championship fight with Bob Foster.

THIRD COUNT:

D.3

And the Grand Jury Aforesaid, by this indictment, further accuse the above-named defendant of the crime of PERJURY IN THE FIRST DEGREE, committed on June 12, 1969, in the County of New York, as follows:

The Fifth June 1969 Grand Jury, having been duly and properly empanelled, was conducting an investigation to determine whether there had been in existence in the County of New York a conspiracy to commit the crimes of Sports Bribing and Sports Bribe Receiving.

Testimony adduced before the Grand Jury disclosed that the defendant was a professional prize fighter and that Gary Garafola was his manager.

Further testimony revealed that on January 22, 1969, the defendant had fought Bob Foster in Madison Square Garden in the County of New York for the light-heavyweight championship of the world, and that

Foster had defeated DePaula by a technical knockout, having knocked him down three times in the first round.

It was also testified that on January 17, 1969 - five days prior to said fight - Gary Garafola had met and conferred with James Napoli, also known as Jimmy Nap, at Grossinger's Country Club, where Frankie DePaula was training. According to the testimony, Napoli had asked Garafola, "How does everything look?," and Garafola had replied, "Everything looks good. The kid will listen."

In addition, testimony was adduced before the Grand Jury that showed that the defendant and Gary Garafola had met James Napoli shortly after the aforementioned fight in the early morning of January 23, 1969 at the Unicorn Restaurant in the County of New York. The testimony further revealed that the defendant and James Napoli had engaged in a conversation at said time and place.

It, therefore, became material and necessary to inquire and ascertain from the defendant whether, in the early morning of January 23, 1969, he had engaged in a conversation with James Napoli relating to a conspiracy with Gary Garafola, James Napoli and others to accept a payment of money upon the understanding that he would not give his best efforts in the light-heavyweight championship fight with Bob Foster.

Accordingly, it became material and necessary first to ask the defendant whether he had met James Napoli, also known as Jimmy Nap, at the Unicorn Restaurant following his light-heavyweight championship fight with Bob Foster.

On June 12, 1969, the defendant appeared before the Fifth June 1969 Grand Jury in the County of New York, and after having been duly sworn before the said Grand Jury, the foreman thereof having authority to administer an oath and said oath being required by law, the defendant stated that he would truthfully testify in connection with said investi-

gation, and having had immunity conferred upon him, the defendant swore falsely as follows:

That he, Frankie DePaula, had not met James Napoli, also known as Jimmy Nap, at the Unicorn Restaurant in the early morning of January 23, 1969, after his championship fight with Bob Foster.

Whereas in truth and in fact, as the defendant well knew, said testimony was false, and the truth was that he had met James Napoli, also known as Jimmy Nap, at the Unicorn Restaurant in the early morning of January 23, 1969, after his championship fight with Bob Foster.

The said false testimony was to a material matter in that the purpose of said inquiry was to ascertain whether the defendant had entered into a conspiracy with Gary Garafola, James Napoli and others to accept a payment of money upon the understanding that he would not give his best efforts in the aforesaid light-heavyweight championship fight with Bob Foster.

FOURTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse the above-named defendant of the crime of PERJURY IN THE FIRST DEGREE, committed on June 12, 1969, in the County of New York, as follows:

The Fifth June 1969 Grand Jury, having been duly and properly empanelled, was conducting an investigation to determine whether there had been in existence in the County of New York a conspiracy to commit the crimes of Sports Bribing and Sports Bribe Receiving.

Testimony adduced before the Grand Jury disclosed that the defendant was a professional prize fighter and that Gary Garafola was his manager.

Further testimony revealed that on January 22, 1969, the defendant had fought Bob Foster in Madison Square Garden in the County of New York for the light-heavyweight championship of the world, and that

Foster had defeated DePaula by a technical knockout, having knocked him down three times in the first round.

In addition, testimony was adduced before the Grand Jury that showed that the defendant and Gary Garafola had met James Napoli shortly after the aforementioned fight in the early morning of January 23, 1969, at the Unicorn Restaurant in the County of New York. The testimony further revealed that the defendant and James Napoli had engaged in a conversation at said time and place.

Further testimony disclosed that, as Gary Garafola and the defendant were leaving the restaurant, Garafola asked the defendant if he had any small change for the hat check girl, and that the defendant replied, "You're kidding. I scored today, man. All I got is hundreds."

According to fuzther testimony adduced before the Grand Jury, the "purse" for the fight was not paid until the following morning.

It, therefore, became material and necessary to inquire of the defendant whether he had made the statement to Gary Garafola, to wit, "I scored today, man. All I got is hundreds," in order to ascertain whether the defendant had received from James Napoli and others a payment of money for not having given his best efforts in the light-heavyweight championship fight with Bob Foster.

Accordingly, it became material and necessary first to ask the defendant whether he had been with Gary Garafola at the Unicorn Restaurant in the early morning of January 23, 1969.

On June 12, 1969, the defendant appeared before the Fifth June 1969 Grand Jury in the County of New York, and after having been duly sworn before the said Grand Jury, the foreman thereof having authority to administer an oath and said oath being required by law, the defendant stated that he would truthfully testify in connection with said investigation, and having had immunity conferred upon him, the defendant swore falsely as follows:

That he, Frankie DePaula, had not been with Gary Garafola at the Unicorn Restaurant in the early morning of January 23, 1969.

Whereas in truth and in fact, as the defendant well knew, said testimony was false and the truth was that he had been with Gary Garafola at the Unicorn Restaurant in the early morning of January 23, 1969.

The said false testimony was to a material matter in that the purpose of said inquiry was to ascertain whether the defendant had received from James Napoli and others a payment of money for not having given his best efforts in the aforesaid light-heavyweight championship fight with Bob Foster.

FRANK S. HOGAN

District Attorney
New York County

APPENDIX E:

Immunity

Outline

Summary

¶1 Federally, immunity is "use"; it prevents the use of any compelled testimony, and its fruits, in any subsequent criminal proceeding against the witness, other than for perjury or contempt committed under the immunity order. Use immunity squares with the Constitution. The constitutional rule is also that an immunity grant must protect against the use of immunized testimony between states and between a state and the federal system, no matter where the immunity was granted. Immunized truthful testimony may never be used criminally against the witness; untruthful testimony given under an immunity grant is not immunized. Corporations and associations have no privilege against self-incrimination; no immunity is necessary to compel production of their records. Partnerships may or may not have a privilege. No immunity is necessary when the crime about which the witness testified is one for which he cannot be prosecuted. Immunized evidence may be used against the witness in proceedings imposing only other than criminal sanctions. In general, real evidence, even if obtained under an immunity grant, is not immunized. In New York, a broad transactional immunity is provided for witnesses by statute. A witness may not be prosecuted for any crime concerning which he gave evidence other than for perjury or contempt committed by the witness while testifying under the immunity order. During grand jury proceedings, this immunity automatically protects any "responsive" answer by a witness; he need not first assert his privilege against self-incrimination. New York's constitutional immunity is use immunity, and protects a

a witness compelled to give incriminating evidence without previous compliance by the government with the immunity statute. New Jersey's statute provides use immunity. The Massachusetts statute of 1970 provides a witness with transactional immunity.

I. Federal Immunity--Generally

¶2 The general immunity statutes for federal proceedings are found in 18 U.S.C. §§6001-6005. The scope of federal statutory immunity is defined by section 6002:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

This statute provides "testimonial" or "use" immunity. A witness may be tried for a crime disclosed by his immunized testimony, but neither the testimony itself nor any information directly or indirectly derived from it may be used against him. Testimonial immunity affords, the Supreme Court held in Kastigar v. United States,[1] a witness protection coextensive with the Fifth Amendment privilege

[1] 406 U.S. 441 (1972).

against self-incrimination; consequently, it provides a sufficient basis for compelling testimony over a claim of the privilege.

¶3 When a person is prosecuted for a crime disclosed by his immunized testimony, however, the burden of proving that the testimony is not used, even indirectly, is on the prosecution. The Court in Kastigar observed:

> [O]n the prosecution [rests] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.[2]

¶4 The standard of proof the government must meet in carrying this burden is a "heavy" one of showing that all evidence sought to be admitted is from independent sources.[3] Once the defendant shows he gave testimony under an immunity grant, he is entitled to a pretrial evidentiary hearing[4] or other hearing[5] at which the government must prove lack of taint. By the same token, the government must be allowed the chance to prove lack of taint.[6]

¶5 In Kastigar, the Court also elaborated on the ban which section 6002 imposes on the use of compelled testimony; the Court observed:

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.[7]

The "fruit of the poisonous tree" doctrine, developed by the federal courts as a rule for determining whether government evidence was obtained in a manner prejudicial to an accused's other constitutional rights, applies, therefore, with full force in the immunity context.[8]

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[2] Id. at 460.

[3] United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974). See also Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973), where burden of proof required is "substantial." The most recent, and most novel, case illuminating the "independent source" requirement is the Second Circuit's decision in United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). There, testimony of one Steinman led to the indictment of the defendant, Kurzer. Previously, Kurzer had testified under an immunity grant (use immunity) against Steinman. Kurzer challenged his own indictment on the ground that Steinman's decision to cooperate, and hence his testimony, was based on Steinman's own indictment, to which Kurzer's testimony had contributed. If this were true, then Steinman's testimony was not "derived from a legitimate source wholly independent of [Kurzer's] compelled testimony," as required by Kastigar. The government claimed that Steinman would have testified against Kurzer because of the case the government had developed against him entirely apart from Kurzer's information, even if the prior indictment to which Kurzer had contributed never existed. The court held that if the government could prove that proposition to the satisfaction of the trier of fact, it would carry its burden of showing that Steinman was a source "wholly independent of the [immunized] testimony."

[4] United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

[5] United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975).

[6] Id.

[7] 406 U.S. at 460.

[8] For a discussion of this doctrine and the occasionally countervailing doctrines of "independent agent" and "attenuation of taint," see the Cornell Institute on Organized Crime memorandum on defending evidence against charges of illegality. Generally, a use-immunized witness is entitled to a copy of the immunized testimony. In re Minkoff, 349 F. Supp. 154 (D.R.I. 1972). Access may also be had to the minutes of an indicting grand jury. United States v. Dorhau, 356 F. Supp. 1091 (S.D.N.Y. 1973). The prosecution's burden to show no subsequent use may not be met with conclusionary assertions. United States v. Seiffert, 463 F.2d

II. Federal Immunity--Effect on Other Jurisdictions

A. States

¶6 The Supreme Court resolved a long-standing controversy in immunity theory with its 1963 opinion in Murphy v. Waterfront Commission:[9]

> [T]here is no continuing legal validity to, or historical purpose for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction. . . . We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.[10]

The Murphy case dealt with testimony compelled under a state grant of immunity, and held that the witness received, under the Fifth Amendment itself, testimonial immunity against any federal prosecution. The broad language of the opinion also indicates that evidence procured under the federal immunity statutes may not be used against the witness

8 (continued)
1089 (5th Cir. 1972). Proof must be made. United Stats v. Seiffert, 357 F. Supp. 801 (S.D. Tex. 1973), aff'd, 501 F.2d 974 (5th Cir. 1974). Mere prosecutor exposure, however, has been held to warrant dismissal of an indictment. United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973). This goes too far. Other untainted prosecutors could handle taint-free evidence. See Watergate: Special Prosecution Force Report 208 (1975)(filing of taint papers in reference to John Dean).

[9] 378 U.S. 52 (1964).

[10] Id. at 77-78.

in a state prosecution.[11]

B. Foreign Jurisdictions

¶7 A sovereign's administration of justice and enforcement of municipal law cannot be interfered with by any external authority. "[A] state is powerless to grant immunity against foreign prosecution."[12] The United States is not precluded from enforcing its laws by the grant of immunity of another sovereign,[13] and any foreign state most likely would take a similar position.

¶8 The question, therefore, arises whether a grant of immunity which is only domestically effective is truly co-extensive with the scope of the Fifth Amendment privilege. To date, the cases indicate that domestic immunity is adequate, since "the privilege protects against real dangers, not remote and speculative possibilities."[14] Other rationales

[11] See United States v. Watkins, 505 F.2d 545 (7th Cir. 1974). Between any two jurisdictions (i.e. federal-state or state-state) the immunity is testimonial or use immunity. Thus, even though a New York witness may be granted transactional immunity, another jurisdiction may prosecute him abiding by only use immunity; that is, he may be prosecuted for a crime arising out of a transaction to which his New York immunized testimony related, so long as the foreign jurisdiction makes no use of that immunized testimony or its fruits.

[12] 8 Wigmore, Evidence 346 (McNaughton Rev. 1961).

[13] United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974).

[14] Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972).

are sometimes used to allow compulsion of a witness, under domestic immunity, to give evidence concerning his activities within the United States. It is sometimes suggested that since criminal laws have no extraterritorial effect, Fifth Amendment "compulsion" (and hence immunity) should only include domestic laws.[15] It is also argued (and followed by three circuits) that the secrecy of grand jury proceedings is a sufficient protection of the witness's privilege.[16]

¶9 In re Cardassi[17] is an exception to this line of cases. There, it was held that grand jury secrecy rules were insufficient protection against disclosure of grand jury testimony to foreign prosecuting authorities, that the Fifth Amendment privilege can be asserted against a genuine danger of foreign prosecution, and that a witness in such danger may refuse to answer questions despite a grant of immunity.

¶10 The two sides seemingly stand in equipoise. It may be argued that since an immunity grant need be no broader than the Fifth Amendment privilege,[18] and the amendment

[15] United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

[16] In re Tierney, 465 F.2d 806 (5th Cir. 1972); In re Morahan, 359 F. Supp. 858, aff'd., 465 F.2d 806 (5th Cir. 1972); United States v. Armstrong, 476 F.2d 313 (5th Cir. 1973); In re Weir, 377 F. Supp. 919 (S.D. Cal. 1974), aff'd., 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); In re Parker, 411 F.2d 1067 (10th Cir. 1969).

[17] 351 F. Supp. 1080 (D. Conn. 1972).

[18] See Kastigar v. United States, 406 U.S. at 449.

impo es limitations only on actions within the United States, protection against actions of foreign governments is not constitutionally required. On the other hand, it is the action of the American court which compels the evidence, and under the Fifth Amendment, an American court may not compel any person to be a witness against himself in any criminal case. All that remains to be determined is whether a possible foreign prosecution is "any criminal case" within the meaning of the Fifth Amendment.

III. Federal Immunity--Effect of Non-Compliance with the Immunity Agreement

A. Perjury

¶11 18 U.S.C §6002 specifically provides that evidence given under a grant of immunity may be used in a subsequent "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[19] Clearly, such an exception is constitutional. Indeed, the Supreme Court has held[20] that perjurious testimony given under immunity could be used in a subsequent trial for perjury, even though the statute then before the court did not specifically pro-

[19] The exception both for perjury and for giving a false statement, though seemingly redundant, is necessary. Technically, perjury is giving a false statement under oath (Black's Law Dictionary, 1968 4th rev. ed.). Since immunity may be granted in certain administrative proceedings under 18 U.S.C. §6004, and possibly the witness would not be under oath, there is a need to include false statements as a separate exception.

[20] Glickstein v. United States, 222 U.S. 139 (1911).

vide a perjury exception.[21] The cases hold that the perjury which is committed is a breach of that particular immunity agreement.[22] The best discussion of the rationale underlying this exception to an immunity grant is found in the Second Circuit's opinion in United States v. Tramunti:[23]

> The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions . . . . The immunity granted by the Constitution does not confer upon the witness the right to perjure himself or to withhold testimony. The very purpose of the granting of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend in futuro (footnotes deleted).[24]

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[21] The Court reasoned:

> [I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances, and safeguards as to compel it to be truthful. . . . [S]ince the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word. 222 U.S. at 142-43.

See also United States v. Mandujano, 425 U.S. 564 (1976) (perjury in grand jury subject to prosecution even if testimony taken in violation of Fifth Amendment).

[22] United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); United States v. Watkins, 505 F.2d 545 (7th Cir. 1974); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (2d Cir.), cert. denied, 415 U.S. 989 (1974); In re Grand Jury Proceedings, 509 F.2d 1349 (5th Cir. 1975).

[23] 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

B. Contempt

¶12 The same reasoning that allows perjurious testimony given under oath to be used in a later trial for perjury allows conduct that amounts to failing to comply with the immunity order to be used in a later contempt hearing. The Supreme Court held, in United States v. Bryan, that it was proper to use a witness's otherwise-immunized testimony, in which she stated she refused to comply with a subpoena to produce records, in a subsequent trial for contempt based on such refusal.[25] This was permitted, even though the statute granting immunity did not make an exception for the use of such testimony in a contempt proceeding. In United States v. Cappetto,[26] the use of testimony given

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[24] Id. at 1342-44.

[25] 339 U.S. 323 (1950).

[26] 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

under a grant of immunity, per 18 U.S.C. §6002, in a subsequent contempt proceeding based on the witness's refusal to testify despite the grant of immunity was also held to be proper.[27]

IV. Federal Immunity--Inconsistent Statements in Other Proceedings

¶13 18 U.S.C. §1623 provides that a prosecution for false declarations may be based on irreconcilably contradictory statements made under oath.[28]

> False Declarations Made Before Grand Jury or Court
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--
>
> (1) each declaration was material to the point in question, and
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.[29]
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

[27] See also United States v. Leyva, 513 F.2d 774 (5th Cir. 1975).

[28] Note the recantation provision of subsection (d), which permits avoidance of such prosecution.

[29] The statute of limitations is five years. 18 U.S.C. §3282 (1961).

A. Generally

¶14 Immunized truthful testimony can never be used in any way against the witness; neither in prosecutions for past[30] nor future[31] crimes. To prove an immunized statement false, (1) non-immunized contradictory testimony of the witness or (2) other independent circumstantial evidence must be used. Once a statement made under a grant of immunity is shown to be false, however, that statement may be used in a variety of ways. The false immunized statement may be a basis for a witness's perjury

[30] United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

[31] Cameron v. United States, 231 U.S. 710 (1914); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973); Kronick v. United States, 343 F.2d 436 (9th Cir. 1965).

conviction.[32] Additionally, a false immunized statement may be used in other criminal trials not based on the original perjurious statement, or subsequently to impeach a witness's credibility, or to show prior similar acts.[33]

¶14a In United States v. Patrick[33a] the court held that testimony given under a grant of immunity pursuant to 18 U.S.C. §§ 6002-6003 (1976) could not be used as the basis for prosecution under § 1623 (c) for inconsistent statements.[33b]

B. Specific Situations

¶15 In determining the range of application of section 1623, it is helpful to view, one-by-one, the specific situations to which section 1623 would, at first, seem applicable. For this purpose, assume that a witness made two different statements before a court or grand jury, both statements being under oath. An immunity grant will raise the following problems:

[32] United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

> . . . If the witness thwarts the inquriy by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed (footnotes omitted). Id. at 1343-44.

[33] Id. at 1345, the court said:

> . . . The failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use. To hold otherwise in this situation, one not readily foreseeable by the legislature, would be to frustrate the purpose which this statute was designed to achieve (emphasis added).

In reaching this conclusion, the court cited Glickstein v. United States, 222 U.S. 139 (1911) and United States v. Bryan, 339 U.S. 323 (1950).

[33a] 542 F.2d 381 (7th Cir. 1976).

[33b] See also United States v. Frumento, 552 F.2d 534, 541-42 (3d Cir. 1977) (a grant of immunity under § 6002 bars the government from later using the defendant's testimony in any manner including impeachment, but it does not bar prosecution for perjury stemming from false testimony).

(1) Neither Statement Immunized

¶16 If neither statement is immunized, section 1623 will apply directly and allow prosecution for any inconsistency if it is to the degree that one of the statements is necessarily false.

(2) Both Statements Immunized

¶17 (a) First statement false, second statement true: the second immunity grant, under which the witness testified truthfully, protects the witness from the use of that truthful testimony to show any past perjury (or any other past crime).[34]

¶18 (b) First statement true, second statement false: likewise, the first immunized truthful testimony can never be used to prove the falsity of any later statement.[35]

(3) Only First Statement Immunized

¶19 (a) First statement false, second statement true: there is no clear authority on this situation, but it seems that before application of section 1623 would be allowed, besides the two statements there would have to be some independent evidence either of the falsity of the first statement or the truth of the second statement. Otherwise, it would be possible to assume from the statements' inconsistency that actually the first statement was true (therefore protected by immunity grant) and the second statement was false. If there were some evidence of the falsity of the first statement, however, its immunized

[34] United States v. Doe, 361 F. Supp. 226 (E.D. Pa. 1973), aff'd., 485 F.2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974).

[35] Cameron v. United States, 231 U.S. 710 (1914); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973).

Bellis v. United States.[49] The Bellis Court held that a three-man law partnership, which employed six other people and was in existence for almost fifteen years, had an established institutional identity of its own, independent of the partners. Thus, its records and books could be subpoenaed and no claim of privilege would attach to them. Several factors, supported the conclusion that the partnership was a separate entity. It had its own bank account, filed its own tax returns, and it could be sued in its own name. Further, the books reflecting receipts and disbursements of the partnership did not contain personal information and therefore were held in a representative, not personal, capacity.

¶28 The Court, however, did not abrogate the privilege against self-incrimination of all partnerships.[50] Each partnership must be examined individually to see whether or not its records are covered by the privilege.[51]

[49] 417 U.S. 85, 93-94 (1974):

> We think it is similarly clear that partnerships may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records. Some of the most powerful private institutions in the Nation are conducted in the partnership form. Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal, highly structured enterprises of essentially perpetual duration. The personal interest of any individual partner in the financial records of a firm of this scope is obviously highly attenuated. It is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from S.E.C. scrutiny solely because it operates as a partnership rather than in the corporate form. Although none of the reported cases has involved a partnership of quite this magnitude, it is hardly surprising that all of the courts of appeals which have addressed the question have concluded that White's analysis requires rejection of any claim of privilege in the financial records of a large business enterprise conducted in the partnership form.

VI. Federal Immunity--Civil Liabilities

¶29 18 U.S.C. §6002 specifically provides that immunized evidence may not be used against the witness in any criminal case. By negative implication, the use of such evidence in a civil action would be allowed. The Supreme Court holds that immunity statutes need not protect against penalties of a non-criminal nature in order to be constitutional.[52] Thus, while immunized evidence may be used

[50] The court intimated that temporary associations to carry out a few short-duration projects, or small family partnerships, or a partnership with some pre-existing relationship of confidentiality among the partners could present different cases. Bellis v. United States, 417 U.S. 85 (1974).

[51] If the partnership records are found to be personal and covered by the Fifth Amendment, the question arises: may one partner produce them, over the objections of the other? Couch v. United States, 409 U.S. 322 (1973)(accountant compelled to produce client's records) indicates that the answer would be yes. Cf. Fraiser v. Cupp., 394 U.S. 731 (1969)(consent by joint use of bag) and United States v. Matlock, 415 U.S. 164 (1974)(joint illicit relationship). Two Fourth Amendment cases also point toward an affirmative answer. But see In re Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948).

[52] Ullmann v. United States, 350 U.S. 422 (1956). There, the witness was granted full transactional immunity and asked to testify about his Communist Party membership. He refused to answer, saying the statutory immunity was insufficient since he could become subject to the loss of his job, expulsion from labor unions, restricted passport eligibility, and public opprobrium. The Court responded that the Fifth Amendment only applies where the witness is required to give testimony that might expose him to a criminal charge. Ullmann's contempt conviction was affirmed. See also In re Michaelson, 511 F.2d 892 (9th Cir. 1975); In re Bonk, 527 F. 2d 120 (7th Cir. 1975).

against a witness in a civil action,[53] if there is a possibility that the evidence will be used against the witness in a criminal proceeding, the privilege applies.[54] The main consideration is not the context in which the testimony is given, but the use to which the testimony may be put,[55] criminal or non-criminal.

¶30 If the privilege applies, i.e. there is a possibility of criminal use of the testimony, the witness may be penalized neither civilly nor criminally for asserting his privilege against self-incrimination.[56] If immunity is granted, however, thus removing the constitutionally-prohibited criminal sanction, civil or other penalties may be imposed on the witness.[57] Once the possibility of criminal use is removed, the testimony itself may be used in a proceeding

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[53] United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[54] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); Boulware v. Battaglia, 344 F. Supp. 889 (D. Del. 1972), aff'd., 478 F.2d 1398 (2d Cir. 1973).

[55] Clearly, the mere labelling of an action or penalty as civil or criminal is not decisive. Boyd v. United States, 116 U.S. 616 (1886). See also United States v. United States Coin & Currency, 401 U.S. 715 (1971).

[56] Lefkowitz v. Turley, 414 U.S. 70 (1973)(loss of government contracts); United States v. United States Coin and Currency, 401 U.S. 715 (1971)(loss of money seized in a gambling raid); Gardner v. Broderick, 392 U.S. 273 (1968)(loss of public employment); Spevack v. Klein, 385 U.S. 511 (1967)(disbarment proceedings); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975)(divestiture of a property interest in a building).

[57] Gardner v. Broderick, supra.

imposing a penalty on the witness. Thus in the case of Gardner v. Broderick,[58] the Supreme Court said that if a public employee, called to testify concerning the performance of his public trust, were given immunity he could be dismissed from his job on the basis of his compelled testimony.

¶31 Two recent state court decisions[59] hold that the testimony of a lawyer, given under a grant of immunity, could be used against that lawyer in a disbarment proceeding. The rationale was that a disbarment proceeding is not a criminal case within the meaning of the immunity statutes involved or the Fifth Amendment. Additionally, it was said, the purpose of disbarment was not to inflict punishment but to protect the public.

VII. Federal Immunity--Effect on Prior Convictions

A. Convictions

¶32 The grant of immunity under 18 U.S.C. §6002 has no effect on a prior conviction, even though the witness may be forced thereby to admit his involvement in the crime

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[58] Id.

[59] Maryland State Bar Ass'n. Inc. v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974), cert. denied, 420 U.S. 974 (1975) (18 U.S.C. §6002 involved); Committee on Ethics of West Virginia State Bar v. Graziani, 200 S.E.2d 353 (W. Va. Sup. Ct. App. 1973), cert. denied, 416 U.S. 995 (1974) (state immunity statute involved).

for which he was convicted.[60] Since 18 U.S.C. §6002 is a testimonial, or use, immunity statute, it merely requires that compelled evidence (or any evidence derived therefrom) not be used against the witness in any criminal case.[61]

¶33 When pronouncing sentence for the prior conviction, the judge may not in any way use the intervening immunized testimony of the defendant.[62] Even though the conviction is on appeal, this is not a reason for denying a grant of immunity since the appeal can only be based on the trial record.[63]

B. Guilty Pleas

¶34 A guilty plea waives the privilege against self-incrimination as to that crime. Questioning of a defendant about facts relating to the crime to which the guilty plea relates necessitates no grant of immunity. The guilty plea, however, is not a waiver of the privilege concerning other crimes, even those based on the same set of facts. To question a person who pleads guilty to a crime, immunity must be granted if the testimony could provide evidence

[60] Kastigar v. United States, 406 U.S. 441, 461 (1972). See also In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974). A similar rule obtained under the old federal transaction immunity statutes. See, e.g., Katz v. United States, 389 U.S. 347 (1967).

[61] In re Bonk, 527 F.2d 120 (7th Cir. 1975).

[62] United States v. Laca, 499 F.2d 922 (5th Cir. 1974); United States v. Wilson, 488 F.2d 1231 (2d Cir. 1973); rev'd, 421 U.S. 309 (1975) (defendant entitled only to resentencing by a judge who is unaware of the immunized testimony).

[63] In re Lysen, 374 F. Supp. 1122 (N.D. Ill. 1974). See also Katz v. United States, 389 U.S. 347 (1967) (transaction immunity grant).

that could be used in another prosecution for either a federal or state crime.[64]

VIII. Federal Immunity--Non-Testimonial Evidence

¶35 18 U.S.C. §6002 provides that "no testimony or other information" compelled under the immunity grant may be used against the witness. 18 U.S.C. §6001(2) states that "other information" includes any "book, paper, document, record, recording, or other material." The legislative history indicates that "other information" is to include all information "given as testimony."[65]

¶36 The "given as testimony" qualification on immunity is consistent with Supreme Court decisions that some evidence is not testimonial, but real, and thus is not entitled to the privilege against self-incrimination. The privilege is only to protect against compulsion of the accused's communications and not compulsion which makes the accused

[64] United States v. Stephens, 492 F.2d 1367 (6th Cir. 1974); United States v. Seavers, 472 F.2d 607 (6th Cir. 1973); In re Sadin, 509 F.2d 1252 (2d Cir. 1975).

[65] H. Rep. No. 61-1549, 91st Cong., 2d Sess. 42 (1970) observes:

> Subsection (2) defines "other information" to include books, papers, and other materials. The phrase is used in contradistinction to oral testimony. It would include, for example, electronically stored information on computer tapes. Its scope is intended to be comprehensive, including all information given as testimony, but not orally.

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a source of real or physical evidence.[66] Thus, even when given under a grant of immunity, any real or physical evidence which (under prevailing decisions) is not entitled to the protection of the Fifth Amendment privilege may be used in a criminal proceeding.[67] The wise prosecutor, however, will avoid this issue altogether by obtaining all real and physical evidence in a non-immunizing context.

IX. Federal Immunity--How Immunity is Conferred

A. Statutory Immunity

¶37 When a witness refuses to give evidence on the basis of his privilege against self-incrimination, he may be compelled to testify under an order of immunity, as provided

[66]On this basis it has been held that a witness-accused has no Fifth Amendment privilege to refuse to:

(1) exhibit his physical characteristics. Holt v. United States, 218 U.S. 245 (1910)(put on clothing to ascertain its fit); United States v. Wade, 388 U.S. 218 (1967)(appear in line-up, perform movements, and speak certain phrases);

(2) submit to standarized medical tests. Schmerber v. California, 384 U.S. 757 (1966)(taking blood samples);

(3) furnish handwriting exemplars and submit to finger-printing. Gilbert v. California, 388 U.S. 263 (1967); or

(4) submit voice exemplars. United States v. Dionisio, 410 U.S. 1 (1973).

[67]This must be so since "[t]his statutory immunity is intended to be as broad as, but no broader than the privilege against self-incrimination." S. Rep. No. 91-617, 91st Cong.,1st Sess. 145 (1969). See also, United States v. Hawkins, 501 F.2d 1029 (9th Cir. 1974), cert. denied, 419 U.S. 1079 (1974).

in 18 U.S.C. §§6001-6005. Sections 6003-6005 provide that an order may be issued even though the witness has not actually refused to testify, but the order does not become effective, under section 6002, until and unless there is a refusal grounded on the privilege against self-incrimination.[68]

¶38 1. Court or Grand Jury Proceedings, Section 6003: Orders to compel the testimony of witnesses or the production of information may be obtained prospectively from a district court by the United States Attorney, for the judicial district in which the proceeding is to be held, "with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General." The United States Attorney must indicate that in his judgment:

1. The witness's testimony or information may be necessary to the public interest; and

2. The witness has refused or is likely to refuse to testify on the basis of his privilege against self-incrimination.

The district court "shall issue" an immunity order upon receipt of such an application. The court is without discretion and its function is purely ministerial.[69] The judge cannot initiate an immunity order.[70] Witnesses

[68]United States v. Seavers, 472 F.2d 607 (6th Cir. 1973).

[69]United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); In re Grand Jury Investigation, 486 F.2d 1013 (3d Cir. 1973), cert. denied, 417 U.S. 919 (1974). The court also may not question the judgment of the United States Attorney that the testimony is necessary or that a refusal to testify is probable. In re Lochiatto, 497 F.2d 803 (1st Cir. 1974).

[70]For that reason, a defendant cannot demand that a judge grant immunity to a defense witness. Thompson v. Garrison, 516 F.2d 986 (4th Cir.), cert. denied, 423 U.S. 933 (1975) United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975).

whom the government seeks to immunize have neither a right to notice and a hearing, nor standing to contest the immunity order.[71] Minor variations in procedure are permissible so long as all statutory procedural requirements are satisfied by the time of the hearing to grant immunity.[72]

¶39 2. Proceedings Before Administrative Agencies, Section 6004:

Federal administrative agencies with power to issue subpoenas and take sworn testimony are empowered to issue immunity orders with the approval of the Attorney General. Since, however, the statute requires neither that the witness appear under subpoena nor that he testify under oath, absence of these factors should not render a witness's immunity ineffective.[73] Some agencies not covered by section 6004 are, in other sections of the U.S.C. given power to

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[71] United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

[72] The statute envisions a United States Attorney first obtaining the approval of the Attorney General, a Deputy, or a designated Assistant, and then proceeding to a district court for the issuance of an immunity order. In In re Di Bella, 499 F.2d 1175 (2d Cir. 1974), cert. denied, 419 U.S. 1032 (1974), however, a Special Attorney, attached to a Strike Force, sought Justice Department approval for an immunity order without the knowledge of the local United States Attorney. Only at the hearing on the application did the United States Attorney appear and sign the application for the order. The immunity order which issued was held valid since all of the statutory requirements were satisfied.

[73] United States v. Weldon, 377 U.S. 95 (1964).

grant immunity in connection with specific types of reports.[74]

¶40 3. Congressional Hearings, Section 6005:

The Houses of Congress and their committees may initiate a grant of immunity. A "duly authorized representative" of the House or the committee must apply to a United States district court and show:

1. The House or committee has approved the request for an immunity order by an affirmative vote of
   a. a majority of the "members present" of the House, or
   b. two-thirds of the full membership of the committee; and
2. That the Attorney General has been given at least ten days notice of an intention to request an immunity order.

Here, unlike Sections 6003 and 6004, the Attorney General has no veto, but he may [under Section 6005(c)] delay the issuance of an order for up to twenty days from the date of the request. The court, again, has no discretion to pass on the necessity or wisdom of the requested grant of immunity.[75]

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[74] For example: Environmental Protection Agency (records relating to the distribution of certain poisons) 7 U.S.C. §135c(1947); Department of Health, Education and Welfare (records concerning interstate shipments of hazardous substances) 15 U.S.C. §127 (1970); Commissioner of Immigration and Naturalization (records pertaining to the keeping of an alien woman for immoral purposes) 18 U.S.C. §2424 (1948); Food and Drug Administration (records concerning interstate movement of food, drugs, devices, and cosmetics) 21 U.S.C. §373 (1970).

[75] The courts have, however, indicated some willingness to let the procedure of application serve as

> . . . a sort of declaratory judgement proceeding not on the wisdom of conferring immunity or not, but on the question of constitutional jurisdictions of Congress over the inquiry area, statutory (or resolution) jurisdiction of the particular agent of Congress over the inquiry, and relevance of the information sought to the authorized inquiry.

Application of the Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1278 (D.C. D.C. 1973).

B. Constitutional Immunity

¶41 1. Indicted Witness

In the federal system, when the government calls an indicted defendant before a grand jury and interrogates him concerning the subject matter of the crime for which he already stands formally charged, there must be an intentional and knowing waiver of the privilege against self-incrimination by the defendant. Otherwise, the testimony and its fruits may not be used against him.[76]

¶42 2. Unindicted Witness

Even absent a statutory grant of immunity, a defendant may be entitled to constitutional immunity in the form of suppression of his incriminating testimony.[77] Based directly on the Fifth Amendment's prohibition of compulsion of a witness to testify against himself, this immunity is held, however, to apply only to situations similar to that of the Miranda case. That is, even absent an assertion of the privilege, any incriminating testimony will be barred from use against the defendant only if, when given, the defendant was the object of custodial interrogation.[78] As a rule,

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[76] United States v. Calandra, 414 U.S. 338, 345-46 (1974); United States v. Mandujano, 425 U.S. 564 (1976).

[77] See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966).

[78] Garner v. United States, 424 U.S. 648 (1976); United States v. Mandujano, 425 U.S. 564 (1976). See also United States v. Luther, 521 F.2d 408 (9th Cir. 1975); United States ex. rel. Sanney v. Montayne, 500 F.2d 411 (2d Cir.), cert. denied, 419 U.S. 1027 (1974); State v. Hall, 421 F.2d 540 (2d Cir.), cert. denied, 397 U.S. 990 (1969).

therefore, when an unindicted witness is called before a grand jury, if he reveals information instead of claiming his privilege, he has lost the benefit of the privilege.[79] The privilege must be asserted, the rationale generally being that a subpoena to testify is insufficient government "compulsion" to bring the privilege against self-incrimination automatically into play.[80] The Supreme Court case of Garner v.

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[79] Garner v. United States, 424 U.S. 648, 653 (1976), citing United States v. Kordel, 397 U.S. 1 (1970). The Court said, however, that this principle frequently has been recognized in dictum, citing Maness v. Meyers, 419 U.S. 449, 466 (1975); Rogers v. United States, 340 U.S. 367, 370-71 (1951); Smith v. United States, 337 U.S. 137, 150 (1949); United States v. Monia, 317 U.S. 424, 427 (1943); Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 112-13 (1927).

[80] In Garner, supra, note 79, the Court said at 654:

> These decisions stand for the proposition that, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not "compelled" him to incriminate himself.[9]

The Court's footnote 9 at 654 reads:

> This conclusion has not always been couched in the language used here. Some cases have indicated that a nonclaiming witness has "waived" the privilege, see, e.g., Vajtauer v. Commissioner of Immigration, 273 U.S. 102, 113 (1927). Others have indicated that such a witness testifies "voluntarily," see, e.g., Rogers v. United States, 340 U.S. at 371. Neither usage seems analytically sound. The cases do not apply a "waiver" standard as that term was used in Johnson v. Zerbst, 304 U.S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. See Schneckloth v. Bustamonte, 412 U.S. 218, 222-227, 235-240, 246-247 (1973). Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege, see, e.g., Smith v. United States, 337 U.S. 137, 150 (1949). The concept of "voluntariness" is related to the concept of "compulsion." But it may promote clarity to use the latter term in cases where disclosures are required in the face of a claim of privilege. . . .

United States,[81] restating these principles, involved the assertion of the privilege in the context of a voluntarily filed tax return. Significantly, the Court said:

> . . . the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment--the preservation of an adversary system of criminal justice. See Tehan v. Shott, 382 U.S. 406, 415 (1966). That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures. In areas where the government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings.[82]

¶43 A prosecutor has discretion as to when to charge a putative defendant with a crime. Suppose the putative defendant, not yet indicted, were subpoenaed before the grand jury and, without asserting his privilege against self-incrimination, unwittingly gave incriminatory testimony. Under the general federal rule, since there was no constitutional "compulsion," that testimony may be used against that defendant. Yet it can be argued that the witness has been compelled to incriminate himself.

¶44 Nevertheless, when the Supreme Court was faced with a closely related issue, in United States v. Mandujano,[83] it followed the traditional approach. There, Mandujano was subpoenaed before a grand jury investigating local

[81] 424 U.S. 648 (1976).

[82] Id. at 655-56.

[83] 425 U.S. 564 (1976).

narcotics traffic as a result of information concerning his attempted sale of heroin to an agent. He was warned by the prosecutor: he need not answer incriminating questions, all other questions must be answered truthfully on pain of perjury charges, and he could have a lawyer, though not inside the grand jury room. Later, Mandujano was charged with perjury for admittedly false statements made to the grand jury about his involvement in the attempted heroin sale. Reversing the Fifth Circuit, the plurality opinion held that Miranda warnings need not be given a grand jury witness called to testify about criminal activities in which he may have been personally involved. It was held, therefore, that the failure to give such warnings is no basis for having the false statements suppressed in the subsequent prosecution of the witness for perjury based on those statements.

¶45 Part of this holding in the plurality opinion was unnecessary to the decision of the case. Even if the subpoena to a putative defendant were held to be "compulsion," thereby protecting by constitutional immunity all statements from use against the witness, perjurious statements would not be so protected.[84] With this principle, the four concurring justices[85] agreed. The implication of the holding that no Miranda warnings were required before grand jury testimony of a putative defendant were taken is unnecessary

[84] See discussion of perjury in this memorandum, §3A, supra.

[85] Brennan, J., joined by Marshall, J. filed a separate concurring opinion. Stewart, J., joined by Blackmun, J. also filed a separate concurring opinion.

to the result, is far-reaching, and was not approved of by the four concurring justices. The implication is that the compulsion exerted over a putative defendant when subpoenaed before a grand jury is constitutionally insufficient to bring the Fifth Amendment privilege to bear. Hence, if he does not affirmatively assert the privilege his incriminating statements may be used against him. In Mandujano's case, then, his testimony could be used not only for his perjury conviction but also at a trial for attempted sale of heroin.[86]

¶46 All eight participating justices[87] agreed the testimony should be used to prove perjury. The justices split evenly on whether testimony in these circumstances, absent perjury, should be otherwise used against the witness.[88] A wise prosecutor, therefore, when calling a grand jury witness whom the prosecutor has probable cause to suspect committed a crime about which the witness will be asked to testify, will obtain an intentional waiver by the witness of his privilege against self-incrimination.

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[86]Indeed, Mandujano was convicted for attempting to distribute heroin. His grand jury testimony, however, was not utilized by the prosecution at the trial. Thus, Mandujano did receive a sort of immunity from the use of his statements, except with regard to the perjury conviction. This outcome is consistent with that of a statutory immunity grant.

[87]Justice Stevens took no part in the consideration or decision of the case.

[88]Justice Brennan, joined by Justice Marshall, argued that a putative defendant subpoenaed before a grand jury was under constitutional compulsion. In the absence of an intentional and intelligent waiver of the Fifth Amendment privilege by the witness, none of his testimony should be used against him; they also argued that the witness had the right to a lawyer inside the grand jury room.

X. New York Immunity--Generally

A. Statutory Immunity--Transactional

¶47 The basic definition of the scope of statutory immunity in New York appears in section 50.10 of the N.Y. Crim. Pro. Law (McKinney 1971) which provides:

> 1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty, or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

This statutory immunity is "transactional"; a witness cannot be convicted of any crime "concerning which" he gives evidence under circumstances rendering a grant of immunity effective. This is true even if the state is able to prove his guilt by evidence obtained wholly independently of the immunized evidence. Although this type of immunity is broader than that necessary to protect the privilege against self-incrimination,[89] transactional immunity prevails in New York.[90]

¶48 To determine the exact scope of New York's statutory immunity, the critical question always is: how much must

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[89]People v. La Bello, 24 N.Y.2d 598, 249 N.E.2d 412, 301 N.Y.S.2d 544 (1969). New York's privilege against self-incrimination is found in the New York Constitution, Article I §6.

[90]Matter of Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969).

a witness say about a crime to have given evidence "concerning" that crime, and thereby receiving total immunity?

¶49 The answer is: very little. In 1903, in People ex rel. Lewisohn v. O'Brien,[91] a leading decision, Lewisohn was questioned during the course of an investigation of another's conducting a gambling establishment at certain premises. Lewisohn was asked whether he had ever in his life been at that address. He refused to answer, but his subsequent conviction for contempt for such refusal was reversed. The court stressed that to invoke his constitutional privilege a witness need not be asked for an admission of guilt, but could refuse to supply any information which might constitute a link in an incriminatory chain of evidence.[92]

¶50 The scope of the implications of O'Brien is illustrated by People ex rel. Coyle v. Truesdell.[93] One of the co-relators in that case, a grocer, appeared under subpoena before a grand jury investigating corruption in the purchase of foodstuffs by city relief officers. He was later indicted for bribery. Before the grand jury he gave his address, and when asked if that was his store or residence, he replied, "residence and store both." In explaining why this testimony gave him immunity from the bribery charges, the court said:

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[91] 176 N.Y. 253, 68 N.E. 353 (1903).

[92] 176 N.Y. at 264-65, 68 N.E. at 356. See also People ex rel. Taylor v. Forbes, 143 N.Y. 219 (1894).

[93] 259 App. Div. 282, 18 N.Y.S.2d 947 (2d Dept. 1940).

> Thus it was established that he had a store at "101 Liberty Street." It is quite conceivable, in the light of the nature of the charge, that witnesses would be called to testify that directions were given them, attributable to [the allegedly corrupt official] Sloan, to go to this store to secure commodities. By this testimony, the appellant admits that it is his store. This may very well be a link in the chain of proof against him.[94]

The implicit premise is that if the nexus between solicited testimony and the crime with which the witness is later charged were sufficient to permit the witness, absent an immunity order, to refuse to respond on the basis of his constitutional privilege, then the nexus is also sufficient to extend immunity to that crime if a response is compelled under an immunity order.

¶51 This standard presents vexing practical difficulties to a prosecutor. Whether evidence given by a defendant might constitute a link in the chain of evidence tending to convict him of a particular crime ultimately depends on the degree of ingenuity a judge is prepared to use in fashioning a hypothetical chain. Fortunately, however, the courts have been loathe to indulge in liberal applications of the "any link" standard. A few months later the Second Department spoke again, saying:

> Relator testified to nothing before the grand jury except his name and address. Such evidence would not constitute a link in the chain of evidence against him. . . and did not entitle him to immunity.[95]

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[94] Id. at 285-86, 18 N.Y.S.2d at 950.

[95] People ex rel. Bekoris v. Truesdell, 259 App. Div. 1091 (2d Dept. 1940).

¶52 The result is that New York statutory immunity gives a witness "complete immunity as to any and all crimes to which [his] testimony relate[s]."[96]

¶53 In a grand jury proceeding, this immunity automatically protects any "responsive" answer by any witness; the witness need not assert his privilege before receiving immunity.

B. Constitutional Immunity--Testimonial

¶54 As a matter of New York constitutional law,[97] use of incriminatory evidence compelled from a witness is forbidden.[98] Moreover, and in contrast to federal law, when a "prospective defendant" or the "target of an investigation" is subpoenaed to testify before a grand jury, his testimony is automatically protected by constitutional immunity.[99] He need not assert his privilege against self-incrimination affirmatively since the subpoena itself is deemed sufficient "compulsion" to raise the privilege.[100]

¶55 This automatic immunity is testimonial, however, and does not have the breadth of the statutory transactional immunity.[101] It prohibits the direct and indirect use of the compelled testimony. The burden of proving non-use of the tainted evidence is on the prosecution.[102]

¶56 Questions relating to the scope of testimonial immunity in New York will probably develop along lines similar to

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[96] In re Cioffi, 8 N.Y.2d 220, 226, 168 N.E.2d 663, 665, 203 N.Y.S.2d 841, 844 (1960); see also Anonymous v. Anonymous, 39 App. Div. 2d 536, 331 N.Y.S.2d 144 (1st Dept. 1972). In the recent case of People v. McFarlan, 52 App. Div. 2d 112 (1st Dept. 1976), rev'd, 42 N.Y.2d 896, 366 N.E.2d 1357, 397 N.Y.S.2d 1003 (1977), a new limitation on the broad scope of transactional immunity was added. The witness had been indicted on drug charges for sales in June 1974. She was later called before a different grand jury investigating a murder occurring in December 1974. While testifying, she blurted out statements about the drug arrest. In denying her motion to dismiss the indictment on the drug sales, the First Department said immunity did not extend to her indictment since the answer was "unresponsive" to the question. The court went on to say, however, that her statement ("I sold drugs in the past") does not confer immunity "since the relationship between that statement and the 'transaction, matter or thing' for which defendant seeks immunity is not a substantial one. . . . The admission of illegal activity by the defendant did not specifically relate to the crimes charged and immunity, therefore, did not obtain." The Court Appeals, however, reinstated the order of the Supreme Court granting transactional immunity to the witness.

[97] N.Y. Const. art. I, § 6 (1974).

[98] People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

[99] People v. Avant, 69 Misc.2d 445, 330 N.Y.S.2d 201, rev'd., 39 App. Div.2d 389, 334 N.Y.S.2d 768, rev'd., 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973); People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961), appeal dismissed, cert. denied, 374 U.S. 104 (1961); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S. 2d 70, 90 A.L.R.2d 726 (1961). For a case distinguishing "prospective defendant" from mere witness, see People v. Yonkers Contracting Co., 24 App. Div.2d 641, 262 N.Y.S.2d 298 (2d Dept. 1965), modified on other grounds, 17 N.Y.2d 322, 217 N.E.2d 829, 270 N.Y.S.2d 745 (1965).

[100] United States ex rel. Laino v. Warden of Wallkill Prison, 246 F. Supp. 72 (S.D.N.Y. 1965), aff'd., 355 F.2d 208 (2d Cir. 1966). This case interpreted the New York constitutional privilege against self-incrimination.

[101] People v. Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y. S.2d 161 (1973); In People v. Laino, 10 N.Y.2d 161, 173, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 657 (1961), the court said:

> Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes.

[102] People v. Yonkers Contracting Co., 24 App. Div.2d 641, 262 N.Y.S.2d 298, modified on other grounds, 17 N.Y.2d 322, 217 N.E.2d 829, 270 N.Y.S.2d 745 (1966).

federal law.[103]

XI. New York Immunity--Effect on Other Jurisdictions

A. Prosecution in Another State

¶57 New York courts long held the view that:

> . . . a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under its laws, even though it may not protect against prosecution by the federal government or by another state.[104]

The United States Supreme Court, in Murphy v. Waterfront Commission of New York Harbor,[105] held, however, that any testimony given under a grant of immunity by one state will be afforded use immunity status in any subsequent federal (and, by implication, any other state) prosecution.[106]

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[103] Federal immunity is based on an act of Congress, while New York testimonial immunity is based on the New York constitution. Nevertheless, since the federal statute was intended to be coextensive with the Fifth Amendment privilege, the analogy will be strong: the Fifth Amendment privilege against self-incrimination and the New York constitutional privilege against self-incrimination are identical.

[104] People v. Riela, 9 App. Div.2d 481, 195 N.Y.S.2d 558 (3d Dept. 1959), rev'd. on other grounds, 7 N.Y.2d 571, 576, 166 N.E.2d 840, 842, 200 N.Y.S.2d 43, 45, reargument denied, 8 N.Y.2d 1008, 169 N.E.2d 439, 205 N.Y.S.2d 352, cert. denied, 364 U.S. 915,

[105] 378 U.S. 52 (1964).

[106] Federal courts have interpreted Murphy, supra at note 9, as providing use immunity, vis-a-vis other states, to testimony compelled under one state's immunity statutes. See, e.g., United States ex rel. Catema v. Elias, 449 F.2d 40 (3d Cir. 1971), rev'd. on other grounds, 406 U.S. 952 (1972).

B. Prosecution by the Federal Government

¶58 As noted above, Murphy held that state witnesses who are compelled to testify and incriminate themselves under a state grant of immunity automatically receive use immunity for their compelled testimony in federal prosecutions.

C. Prosecution by a Foreign Sovereign

¶59 The Supreme Court, in Zicarelli v. New Jersey Investigation Commission,[107] specifically declined to decide if the Fifth Amendment requires that a grant of immunity protect a witness from foreign prosecution to be co-extensive with the privilege against self-incrimination. The New York courts also have not squarely faced this question. A post-Murphy decision by a lower court,[108] however, indicates that New York follows the majority view that a state's immunity statute need not protect against foreign prosecution to be constitutional.

XII. New York Immunity--Effect of Non-Compliance with the Immunity Agreement

A. Perjury

¶60 The definition of immunity in Section 50.10 of N.Y. Crim. Pro. Law (McKinney 1971) provides that a witness who perjures himself while testifying under a grant of immunity

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[107] 406 U.S. 472 (1972).

[108] People v. Woodruff, 50 Misc.2d 430, 270 N.Y.S.2d 838 (Sup. Ct. Dutchess County 1966).

may be prosecuted for such perjury.[109]

B. Contempt

¶61 If the witness refuses to answer or evasively answers[110] while under a grant of immunity, such testimony may be used against him in a future contempt prosecution.[111] It must first, however, be explained to the witness that he will receive immunity before a contempt prosecution will be possible.[112] A witness may be tried for perjury or contempt for statements made while testifying after having been granted constitutional use immunity for testimony illegally coerced.[113] While the witness would be afforded use

[109] Ruskin v. Detken, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973). Perjury is also not excused because of some defect in the proceedings in which the false testimony is given. People v. Ward, 37 App. Div.2d 174, 323 N.Y.S.2d 316 (1st Dept. 1971).

[110] Consistent answers of "Don't remember" by a witness may constitute contempt. Second Additional Grand Jury of Kings County v. Cirillo, 16 App. Div.2d 605, 230 N.Y.S.2d 303, aff'd., 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1962).

[111] Matter of Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); this is the rule if answering violates the tenets of the witness's religion, People v. Woodruff, 26 App. Div.2d 236, 272 N.Y.S.2d 786, aff'd., 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1966). See N.Y. Penal Law §215.50(3) (McKinney 1967) for the statutory definition of this contempt.

[112] People v. Mulligan, 29 N.Y.2d 20, 272 N.E.2d 62, 323 N.Y.S.2d 681 (1971); People v. Tramunti, 29 N.Y.2d 28, 272 N.E.2d 66, 323 N.Y.S.2d 687 (1971); People v. Franzese, 16 App. Div.2d 804, 228 N.Y.S.2d 644, aff'd., 12 N.Y.2d 1039, 190 N.E.2d 25, 239 N.Y.S.2d 682 (1962).

[113] Ruskin v. Detken, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973). In this case two policemen were asked to testify about incriminating matters. The prevailing rule in the police department was one similar to that held unconstitutional in Garrity v. New Jersey, 385 U.S. 493 (1967). In this case, however, the constitutional

immunity for any crimes he revealed while testifying, he would receive no immunity for the crimes of perjury and contempt.

XIII. New York Immunity--Effect of Inconsistent Statements in Other Proceedings

¶62 There are no New York cases dealing with the effect of immunity where a witness testifies inconsistently on two occasions. Obviously, given two inconsistent statements under oath, where neither is immunized, a prosecution for perjury will be possible. Otherwise, the considerations already discussed regarding the federal system would seem to apply (see federal section, ¶¶15-22, supra). It should make no difference in the analogy that federal immunity is testimonial and New York immunity is transactional; perjury vitiates any immunity grant.[114]

XIV. New York Immunity--Application to Corporations, Associations, and Partnerships

A. Corporations

¶63 New York case law holds that the privilege against

113 (continued)
objection was removed since the policemen would have been granted immunity from use of their incriminatory testimony. The court reasoned that automatic immunity would not protect perjurious or contemptuous testimony.

[114] The New York case on this point is People v. Goldman, 21 N.Y.2d 152, 234 N.E.2d 194, 287 N.Y.S.2d 7 (1967). See also People v. Tomasello, 21 N.Y.2d 143, 234 N.E.2d 287, N.Y.S.2d 1 (1967).

self-incrimination does not apply to corporations.[115] When corporation books and records are subpoenaed, it may not refuse to produce them on the basis of the privilege. Further, an officer or agent of the corporation may not refuse to produce corporate records on the ground that the disclosures in them might incriminate him.[116] A witness who does not have possession of the corporate records, however, cannot be compelled over a claim of privilege to answer questions seeking to elicit either the fact of possession or knowledge of the whereabouts of the records.[117] This body of common law was recently supplanted by a consistent statutory provision which applies to grand jury proceedings, in Section 190.40(c) of N.Y. Crim. Pro. Law (McKinney 1975):

> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:
>
> (a) He has effectively waived such immunity pursuant to section 190.45; or
>
> (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive;
>
> (c) The evidence given by the witness consists only of books, papers, records or other physical evidence of an enterprise, as defined in subdivision one of section 175.00 of the penal law, the production of which is required by a subpoena duces tecum, and the witness does not possess a privilege against self-incrimination with respect to the production of such evidence. Any further evidence given by the witness entitles the witness to immunity except as provided in subdivisions (a) and (b) of this section.

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[115] Bleakey v. Schlesinger, 294 N.Y.312, 62 N.E.2d 85, 46 N.Y.S.2d 508 (1945).

[116] Id. Neither the officer nor agent receives immunity by virtue of the production of the records.

[117] People v. Gold, 7 App. Div.2d 739, 210 N.Y.S.2d 202 (2d Dept. 1959).

B. Associations

¶64 Associations and unions, under case law, are treated the same as corporations.[118] In grand jury proceedings N.Y. Crim. Pro. Law §190.40 is applicable to associations and unions.[119]

C. Partnerships

¶65 In grand jury proceedings, partnerships will not be granted immunity regarding their subpoenaed books and records under section 190.40 if they fit into the statutory definition of "enterprise."[120] This definition raises the controversial "entity versus aggregate" issue regarding partnerships. There are no New York cases

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[118] Id. See also Triangle Publications v. Ferrare, 4 App. Div.2d 591, 168 N.Y.S.2d 128; People v. Adams, 183 Misc. 357, 47 N.Y.S.2d 375, rev'd. 268 App. Div. 974, 52 N.Y.S. 2d 575, aff'd. 294 N.Y. 819, 47 N.Y.S.2d 943, 62 N.E.2d 244 (1944).

[119] N.Y. Crim. Pro. Law §190.40 (McKinney 1975) uses the word "enterprise," which is defined in N.Y. Penal Law §175.00 (1) (McKinney 1967) as:

> . . . any entity of one or more person, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

[120] Id.

in point. It is quite conceivable that a court faced with the issue would follow the federal procedure. A federal court looks to the characteristics of the particular partnership before it to determine whether the partnership more closely resembles a corporation, or whether it has no separate existence apart from the partners.[121]

XV. New York Immunity--Civil Liabilities

¶66 The constitutional privilege against self-incrimination prevents the use of testimony, obtained from any witness by compulsion, in any proceeding which may result in the imposition of a criminal penalty or forfeiture on that witness. There is no constitutional right to refuse to give testimony which would merely expose the declarant to civil liability or social obloquy.[122] The issue is not the nature of the proceeding or investigation in which the testimony is given, but rather the type of penalty or forfeiture to which the witness is exposed by the testimony.[123]

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[121] See discussion supra in text at ¶¶26-28.

[122] People ex rel. Lewisohn v. O'Brien, 176 N.Y.253, 68 N.E.353 (1903). In 1917, it was held that disbarment of a lawyer was not a criminal penalty, Matter of Rouss, 221 N.Y.81, 116 N.E. 782, reargument denied, 221 N.Y. 667, 117 N.E. 1083, cert. denied, 246 U.S. 661 (1917). See also In re Anonymous Attorneys, 41 N.Y.2d 506, 362 N.E.2d 592, 393 N.Y.S.2d 961 (1977).

[123] The testimony protected is any which "might serve to facilitate the discovery of other circumstances sufficient to lead to conviction" People v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903). See also Chappell v. Chappell, 116 App. Div. 573, 101 N.Y.S. 846 (4th Dept. 1906); New York C.P.L.R. § 4501 (1963).

The key inquiry, then, in ascertaining whether a witness's testimony is privileged, is whether it may lead to a criminal or civil sanction.

¶67 The decision of the first relevant case to reach the Court of Appeals was ambiguous.[124] The lower courts, however, have not given the concept of criminal penalty an expansive reading in this context. Thus, the possibility that adultery would be revealed, subjecting the witness to a potential divorce suit,[125] or to deportation for moral turpitude,[126] did not trigger the witness's privilege against self-incrimination. Punitive damages in civil actions are also held non-criminal penalties.[127] In 1973, the Court of Appeals also held that dismissal from public

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[124] In re Nicastro, 305 N.Y. 983, 106 N.E.2d 63 (1952), involved a witness in a grand jury investigation who was granted immunity from prosecution. Nevertheless, he refused to testify on the ground that his testimony might reveal he had filed false returns, the fine for which the immunity did not cover. The County Court convicted him of contempt, noting that the immunity statute "expressly grant[ed] immunity not only against prosecution, but also against the imposition of any penalty or forfeiture." This plainly intimated that the grant immunized the witness from the Tax Law fine. The Appellate Division affirmed in a brief memorandum decision, which did not specify whether the witness was obliged to answer because the fine was a criminal penalty (against which he had received immunity) or because the fine was a non-criminal penalty (susceptibility to which would not trigger his privilege against self-incrimination). The Court of Appeals affirmed without opinion.

[125] People v. Nowacki, 180 Misc. 100, 40 N.Y.S.2d 131 (County Ct., Erie Co. 1943).

[126] Mestichelli v. Mestichelli, 44 Misc.2d 707, 255 N.Y.S. 2d 185 (Supreme Ct., Nassau Co. 1964).

[127] People v. Ferro, 66 Misc.2d 752, 322 N.Y.S.2d 354 (Criminal Ct., New York Co. 1971).

employment is not a criminal penalty,[128] saying:

> [T]he State may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions, or furnishes information indicating that he is no longer entitled to public confidence.[129]

XVI. New York Immunity--Effect on Prior Convictions

¶68 The privilege against self-incrimination does not protect a witness from being compelled to give incriminating evidence if the criminal sanction is not applicable. This is true whether the criminal sanction is not applicable because it has already been applied (i.e., the witness was convicted and sentenced) or by the running of the statute of limitations. A witness so situated need not be granted immunity before being compelled to testify.

¶69 Because of the plethora of statutory offenses and since the statutory immunity extends to any crime concerning which the witness testified,[130] a wise witness will assert his privilege and request immunity. The factual web in which the crime for which he was convicted occurred likely includes various other crimes. Hence, he may make

[128] People v. Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S. 2d 161 (1973).

[129] 33 N.Y.2d 265 at 271, 307 N.E.2d 230 at 233, 352 N.Y.S. 2d 161 at 165.

[130] In re Cioffi, 21 Misc.2d 808, 192 N.Y.S.2d 754 (County Ct., Kings Co. 1959), aff'd., 10 App. Div.2d 425, 202 N.Y.S.2d 26 (2d Dept.), aff'd., 8 N.Y.2d 220, 168 N.E.2d 663 (1960).

a good argument that his privilege indeed does apply. Under N.Y. Crim. Pro. Law §190.40 (McKinney 1975), if the witness is called before a grand jury, he need not assert his privilege to receive transactional immunity. In any other context, however, unless he is a "prospective defendant," he must assert his privilege to receive constitutional immunity for his subsequent testimony. Constitutional immunity, moreover, is only "use" immunity.[131]

XVII. New York Immunity--Non-Testimonial Evidence

¶70 New York case law reflects the rule that "the privilege against self-incrimination applies only to evidence of a testimonial or communicative nature obtained from the defendant himself."[132]

¶71 The immunity statute, however, read literally, affords far broader protection. Immunity is granted in N.Y. Crim. Pro. Law §50.10 (McKinney 1971) against conviction for any transaction, matter, or thing concerning which the witness "gives evidence" (emphasis added). Moreover, in grand jury proceedings, any "evidence"[133] produced by the witness when under subpoena, affords him automatic transactional immunity. Logically, then, if a witness is subpoenaed before the grand jury and asked to furnish handwriting exemplars, or

[131] See People v. Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973).

[132] People v. Damon, 24 N.Y.2d 256, 261, 247 N.E.2d 651, 653, 299 N.Y.S.2d 830, 834 (1969).

[133] Referring to N.Y. Crim. Pro. Law §50.10 (McKinney 1971).

fingerprints, he will automatically receive an "immunity bath," even though such non-testimonial evidence is not protected by the constitutional privilege.

¶72 The very narrow[134] exception to this immunity for non-testimonial evidence is N.Y. Crim. Pro. Law §190.40(2)(c) (1975). This subsection excepts "books, papers, records, or other physical evidence of an enterprise" produced under subpoena before a grand jury.[135] Thus, the individual who merely produces and identifies such physical evidence should not receive immunity; any other testimony elicited from the witness, however, means automatic immunity for that witness.[136]

¶73 A possible solution to this dilemma was recently tried by two prosecutors. In Matter of Alphonso C.[137] and in Matter of the District Attorney of Kings County v. Angelo G.,[138] two prosecutors avoided granting an "immunity bath" to witnesses who were, nevertheless, forced to produce non-testimonial evidence. In Alphonso, the district attorney moved for and obtained an order directing a witness (for whom there was no probable cause for a crime) to appear in a line-up; in Angelo, during an investigation for falsely reporting motor vehicle accidents involving crimes of fraud and forgery, the district attorney obtained an order directing a witness to produce a handwriting sample.[139] On appeal of the orders, the two departments of the Appellate Division gave opposing holdings. The Court of Appeals dismissed the appeals, stating that the orders sought by the district attorneys and granted by the lower courts were not appealable.

¶74 Until the New York courts hand down more definitive decisions in this area, a firm judgment of what the law is and what the practical procedure ought to be, cannot be made.

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[134] See N.Y. Crim. Pro. Law §190.40 (McKinney 1975)(practice commentary). See also People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428 (Sup. Ct., New York Co. 1973).

[135] Presumably, the legislature could not have thought this addition necessary unless it believed the former immunity statute included such evidence.

[136] N.Y. Crim. Pro. Law §190.40 (McKinney Supp. 1975)(practice commentary).

[137] 50 App. Div.2d 97 (1st Dept. 1975), appeal dismissed, 38 N.Y.2d 923 (1976).

[138] 48 App. Div.2d 576 (2d Dept. 1975), appeal dismissed, 38 N.Y.2d 923 (1976).

XVIII. New York Immunity--How Immunity is Conferred

A. Statutory Immunity

1. Grand Jury Proceedings

¶75 Under N.Y. Crim. Pro. Law §190.40 (McKinney 1975) every witness called before a grand jury automatically receives transactional immunity for any crimes disclosed by any responsive answer to questions put to him.[140] When

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[139] Matter of Alphonso C., supra note 137; Matter of the District Attorney of Kings County v. Angelo C., supra note 138.

[140] The "responsive" limitation is to prevent a sophisticated witness from coming before a grand jury and blurting out irrelevant incriminating statements in the hope of receiving immunity from prosecution for those crimes. The responsiveness limitation was upheld against a void-for-vagueness challenge in People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428 (Sup. Ct. New York Co. 1973).

a witness merely delivers and identifies "books, papers, records, or other physical evidence of an enterprise" that witness receives no immunity.[141]

¶76 A grand jury witness may waive immunity.

2. Other Proceedings

¶77 In all other "legal proceedings," to receive immunity a witness must refuse to answer on the basis of his privilege against self-incrimination, be advised he will receive immunity, and be ordered to answer by an authority competent to confer immunity. N.Y. Crim. Pro. Law §50.20 (McKinney 1971).

¶78 Section 50.20(2)(a) further provides that only a person expressly declared by statute to be a competent authority in such "legal proceedings" may confer immunity. The statutory authorization to confer immunity in non-grand jury criminal proceedings is contained in section 50.30 which empowers "the court" to confer immunity when requested by the district attorney or assistant district attorney. "The court" refers to the court before which the proceeding occurs, and it includes the supreme court[142] and lower level criminal courts.[143]

¶79 The Attorney General has immunity powers in certain

[141] N.Y. Crim. Pro. Law §190.40(2)(c)(Supp. 1975).

[142] People v. Kozer, 33 App. Div.2d 617, 304 N.Y.S.2d 793 (3d Dept. 1969).

[143] As defined in N.Y. Crim. Pro. Law §10.10(3)(1971).

situations.[144] Additionally, a number of administrative and investigative agencies have power to grant immunity in the course of their proceedings.[145] Under certain circumstances, a family court may grant immunity.[146]

B. Constitutional Immunity

¶80 Constitutional immunity in New York is testimonial. In any proceeding other than a grand jury proceeding, the witness must, to receive immunity, assert his privilege against self-incrimination before he testifies. A "prospective defendant," however, receives automatic constitutional immunity upon testifying.[147]

[144] See, e.g., N.Y. Bus. Corp. Law §109(7)(1971)(special proceedings pertaining to corporations); N.Y. Bus. Corp. Law §343 (1971)(antitrust investigations).

[145] See, e.g., N.Y. Unconsol. Laws §7501 (1958)(the Commission of Investigation); N.Y. Const. art. VI §22(f)(1962)(the Court on the Judiciary); N.Y. Legis. Law §62-b(1971)(joint legislative committees); N.Y. Environmental Conservation Law §71-0503 (1972)(the Environmental Conservation Department); N.Y. Unconsol. Law §9971(n)(1970)(the Waterfront Commission); N.Y. Exec. Law §436 (1971)(the Bingo Control Commission); N.Y. Unconsol. Laws §§8586(7), 8608 (1971) (the division of housing and community renewal and city housing rent agencies).

[146] In a family court hearing to decide (1) whether a case should be transferred to a criminal court, or (2) what action is appropriate in a case transferred from a criminal court, the court has power to grant testimonial immunity for any subsequent criminal court proceeding. This is the only statutory provision for testimonial immunity in New York. N.Y. Family Ct. Act §1014(d)(1970).

[147] People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

C. Waiver of Immunity

¶81 As noted above, witnesses in grand jury proceedings receive immunity automatically, unless a written waiver is executed in accordance with N.Y. Crim. Pro. Law §190.45 (McKinney 1975). Once such a waiver has been validly executed it may not be withdrawn.[148] The waiver also retains its effectiveness vis-a-vis the grand jury before which it was sworn as long as that grand jury does not embark on a wholly new investigation.[149]

¶82 When a person is requested to sign a waiver of immunity he has a right to confer with counsel before deciding, and he must be informed of this right; otherwise the waiver is ineffective under section 190.45(2).
The failure of a purported waiver would simply allow the statutory transactional immunity to become effective.[150]

¶83 Subsection 4 of N.Y. Crim. Pro. Law §190.45 makes provision for a waiver of immunity with subject-matter limitations:

> If a grand jury witness subscribes and swears to a waiver of immunity upon a written agreement with the district attorney that the interrogation will be limited to certain specified subjects, matters or areas of conduct, and if after the commencement of his testimony he is interrogated and testifies concerning another subject, matter or area of conduct not included in such written agreement, he receives immunity with respect to any further testimony which he may give concerning such other subject, matter or area of conduct and the waiver of immunity is to that extent ineffective (emphasis added).

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[148] Bohland v. Markewich, 26 App. Div.2d 545, 270 N.Y.S.2d 817 (2d Dept. 1966).

[149] People ex rel. Hofsaes v. Warden of City Prison, 302 N.Y. 403, 98 N.E.2d 579, 100 N.Y.S.2d 478 (1951).

[150] People v. Avant, 33 N.Y.2d 265, 272, 352 N.Y.S.2d 161, 166, 307 N.E.2d 230, 233 (1973).

¶84 The one lower court that considered the problem of the witness's capacity to waive immunity held that a minor does not have the power to waive it.[151]

¶85 Evidence given under a grant of full transactional immunity may be used against the witness in subsequent perjury or contempt proceedings concerning that testimony under N.Y. Crim. Pro. Law §50.10. A fortiori, evidence given under an invalid waiver of immunity is subject to the same limitation.[152]

XIX. New Jersey Immunity--Generally

¶86 The privilege against self-incrimination, traditionally part of New Jersey's common law,[153] is now found in N.J. Stat. Ann. §2A:84A-18 (West 1960):

> . . . . a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended,

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[151] In re DeGaglia, 54 Misc.2d 423, 282 N.Y.S.2d 627 (Family Ct., Westchester Co. 1967).

[152] People v. Goldman, 21 N.Y.2d 152, 234 N.E.2d 194, 287 N.Y.S.2d 7 (1967).

[153] State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974); State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955).

other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

N.J. Stat. Ann. §2A:84A-19(1960) fills out the definition by listing exceptions:

> Subject to Rule 37, every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule:
>
> (a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;
>
> (b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;
>
> (c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;
>
> (d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein.[154]

[154]The "Rule 37" referred to is N.J. Stat. Ann. §2A:84A-29 (West 1960) which allows waiver of the privilege.

> A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

Thus, this statutory privilege is much the same as the federal privilege as this provision has been interpreted by the courts. Indeed, a requirement of "compulsion" by the state is held to be implied in the self-incrimination definition.[155]

A. Criminal Proceedings Before a Court or Grand Jury--Statutory Testimonial Immunity

¶87 Of course, where there is no privilege, no immunity is necessary. When the privilege is invoked, immunity may be granted pursuant to N.J. Stat. Ann. §2A:81-17.3 (West 1960):

> Order Compelling Person to Testify or Produce Evidence; Immunity from Use of Such Evidence; Contempt
>
> In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind

154 (continued)

> A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question.

This section was held not to be unconstitutionally vague in In re Bridges 120 N.J. Super. 460, 295 A.2d 3, cert. denied, 410 U.S. 991 (1972).

[155]State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974). A special provision for an accused in a criminal action is found in N. J. Stat. Ann. §2A:84A-17 (West 1960) subsections (1) and (3). These are:

> (1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.
>
> (3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

on the ground that he may be incriminated thereby and if the Attorney General or the county prosecutor with the approval of the Attorney General, in writing, requests the court to order that person to answer the question or produce the evidence, the court shall so order and that person shall comply with the order. After complying and if but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, such testimony or evidence, or any information directly or indirectly derived from such testimony or evidence, may not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered without regard to the expiration of the grand jury; provided, however, that if the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court.

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155 (continued)

N.J. Stat. Ann. § 2A: 93-3 (West 1969), in reference to § 2A: 93-2 (bribery of legislators) states as follows:

> Any party to violation of section 2A: 93-2 of this title who gives evidence thereof against the other party or parties in a legal proceeding in which the evidence is relevant and material, shall not be liable to prosecution or punishment for having made or received a gift, offer or promise in violation of that section.

N.J. Stat. Ann. § 2A: 93-9, which refers to § 2A: 93-7 (bribery of labor racketeering) and § 2A: 93-8 (bribery of foreman) provides that:

> On the trial of an indictment for violation of any of the provisions of sections 2A: 93-7 or 2A: 93-8 of this title, all witnesses sworn shall answer all proper and pertinent questions; and no witness shall be excused from answering on the ground that his answer might or would incriminate him, but his answers shall not be used or admitted in evidence in any proceeding against him, except in a prosecution for perjury in respect to his answers.

This section sets out the procedure for a grant of use immunity[156] in proceedings before a court or grand jury.[157] Generally, the witness must refuse to answer based on his privilege, the court must decide if the privilege is applicable, and the Attorney General (or prosecutor having Attorney General approval in writing) must request compulsion of the testimony.

¶88 The assertion of the privilege against self-incrimination must be by the witness himself,[158] only <u>after</u> the question is put to him.[159] The general rule, then, is that if the witness does not assert his privilege it is waived;[160] it is not necessary that the witness be advised of his privilege.[161] A narrow exception to this rule is made for a witness who is the "target" of the investigation. If a witness is a "target" of the investigation and is called to testify before the grand jury which eventually indicts him, before testifying he must be warned of his privilege against self-incrimination.[162]

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[156] The court in <u>State v. Spindel</u>, 24 N.J. 395, 132 A.2d 291 (1957), expanded on what "use" immunity means. It was said that use immunity does not include freedom from arrest and prosecution for a criminal offense acknowledged by a witness in the course of his testimony if provable by evidence independent of the testimony adduced under the privilege circumstances.

[157] <u>State v. Sotteriou</u>, 123 N.J. Super. 434, 303 A.2d 585 (1973).

[158] <u>New Jersey Builders, Owners and Managers Ass'n. v. Blair</u>, 60 N.J. 330, 288 A.2d 855 (1972). <u>See, e.g., State v. Jamison</u>, 64 N.J. 363, 316 A.2d 439 (1974) (voir dire examination, attorney made Fifth Amendment objections, held witness was the proper person).

[159] <u>State v. Browning</u>, 19 N.J. 424, 117 A.2d 505 (1955).

[160] <u>State v. Toscano</u>, 13 N.J. 418, 100 A.2d 170 (1953).

[161] <u>State v. Fary</u>, 19 N.J. 431, 117 A.2d 499 (1955).

[162] <u>State v. DeCola</u>, 33 N.J. 335, 164 A.2d 729 (1960). In <u>State v. Williams</u>, 59 N.J. 493, 284 A.2d 172 (1971), it also was held that a witness who informs the prosecutor that he will not stay with his sworn statement and who, nonetheless, is subpoenaed by the state to testify, should be advised of his right to remain silent.

¶89 Once the witness asserts his privilege the court decides the validity of the claim, and only then is the prosecutor put to the choice of granting immunity or abandoning the inquiry.[163] If the claim of privilege is held valid, however, and the prosecutor makes written request for immunity, "the court shall so order" and has not discretion in the matter.

B. Other Proceedings--Common Law Testimonial Immunity

¶90 The privilege in New Jersey means that a person shall not be compelled to give evidence against himself.[164] If this privilege is improperly denied or ignored the testimony many not be used against the witness.

> The court thereby honors the privilege when its genuineness appears, by shielding the witness from the self-injury against which the privilege was intended to protect.[165]

¶91 Both the statutory and common law immunities of New Jersey are "use" or "testimonial" immunities as in the federal system. As a general rule, therefore, when an immunity issue is raised for which there is no New Jersey judicial guidance, it is likely that the New Jersey courts will look to the more fully developed jurisprudence of the federal law as persuasive authority.

XX. New Jersey Immunity--Effect on Other Jurisdictions

A. Prosecution in Another State

¶92 New Jersey courts traditionally hold that the privilege

[163] In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968); State v. Toscano, 13 N.J. 418, 100 A.2d 170 (1953); In re Pillo 11 N.J. 8, 93 A.2d 176 (1953); State v. Craig, 107 N.J. Super. 196, 257 A.2d 737 (1969)

[164] State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968).

[165] State v. DeCola, 33 N.J. 335, 352, 164 A.2d 729, 738 (1960). See also Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975).

against self-incrimination does not extend to protect a witness as to matters that may tend to incriminate him under the laws of another jurisdiction.[166] The United States Supreme Court, in Murphy v. Waterfront Commission of New York Harbor,[167] held, however, that any testimony given under a grant of immunity by one state will be afforded use immunity status in any subsequent federal (and, by implication, any other state) prosecution.[168]

B. Prosecution by the Federal Government

¶93 As stated above, Murphy held that state witnesses who are compelled to testify and incriminate themselves under a state grant of immunity automatically receive use immunity for their compelled testimony in federal prosecutions. If, however, the federal grant is one of transactional immunity, New Jersey prosecutors and courts must honor that grant.[169]

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[166] In re Pillo, 11 N.J. 8, 93 A.2d 176 (1953).

[167] 378 U.S. 52 (1964).

[168] Federal courts have interpreted Murphy, supra note 167 as providing use immunity, vis-a-vis other states, to testimony compelled under one state's immunity statutes. See, e.g., United States ex rel. Catema v. Elias, 449 F.2d 44 (3d Cir. 1971), rev'd. on other grounds, 406 U.S. 952 (1972).

[169] Thus, the witness may not be prosecuted in New Jersey for any crime concerning which he was federally compelled to testify under the transaction immunity statute, even

C. Prosecution by a Foreign Sovereign

¶94 The Supreme Court in Zicarelli v. New Jersey State Commission of Investigation,[170] specifically declined to answer whether the Fifth Amendment requires that a grant of immunity must protect a witness from foreign prosecution to be co-extensive with the privilege against self-incrimination. It may be assumed, however, that New Jersey would follow the majority view that a state's immunity statute need not protect against foreign prosecution to be constitutional.

XXI. New Jersey Immunity--Effect of Non-Compliance with Immunity Agreement

A. Perjury

¶95 The immunity provision of N.J. Stat. Ann. § 2A:81-17.3 (1960) provides that a witness who perjures himself while testifying under a grant of immunity may be prosecuted for such perjury. The case law supports this.[171]

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169 (continued)
though the prosecution could be brought, and conviction obtained, on the basis of evidence totally independent of the compelled testimony. State v. Kenny, 68 N.J. 17, 342 A.2d 189 (1975). See also Marcus v. United States, 310 F.2d 143 (3d Cir. 1962), cert. denied, 372 U.S. 944 (1963).

170 Zicarelli v. New Jersey State Commission of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), aff'd., 406 U.S. 472 (1972).

171 See, e.g., State v. Mullen, 67 N.J. 134, 336 A.2d 481 (1975); State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972).

B. Contempt

¶96 N.J.Stat. Ann. §2A:81-17.3 (1960) also provides that any contempt committed by a witness, in answering or failing to answer under the immunity grant, may be prosecuted. Failing to answer questions under a grant of immunity may be treated as civil contempt.[172]

¶97 Thus, while a witness is, under N.J. Stat. Ann. §2A:81-17.3 (1960) afforded use immunity for any crimes revealed in the testimony, no immunity is received for perjury or contempt.

XXII. New Jersey Immunity--Effect of Inconsistent Statements In Other Proceedings

¶98 Likewise, no immunity is received under N.J. Stat. Ann. §2A:81-17.3 (1960) for the crime of false swearing. The crime of false swearing is defined in N.J. Stat. Ann. §2A:131-4 (1952)[173] and N.J. Stat. Ann. §2A:131-5 (West 1952) and states that the indictment need not allege which of the two statements is false.

¶99 Since in both New Jersey and the federal system use immunity prevails, and since both jurisdictions define false swearing as a crime, the effect of immunity on incon-

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172 Application of Waterfront Commission of New York Harbor, 39 N.J. 436, 189 A.2d 36 (1963), affirmed in part, 378 U.S. 52 (1964).

173 Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing. . . .

sistent statements is similar between the two jurisdictions. Research could not find any New Jersey decision on this issue.[174] (Reference should be had to the discussion of federal law in ¶¶15-22, supra).

XXIII. New Jersey Immunity--Application to Corporations Associations, and Partnerships

A. Corporations and Associations

¶100 New Jersey cases hold that the privilege against self-incrimination does not apply to corporations.[175] When corporation books and records are subpoenaed, it may not refuse to produce them on the basis of the privilege. Further, according to N.J. Stat. Ann. §2A:84A-19(b)(1960)(listing exceptions to the privilege) an agent of a "corporation or other association" may not refuse to produce corporate or association records on the ground that the disclosures therein might incriminate him.

¶101 Under N.J. Stat. Ann. §2A:84A-19(c)(1960) a broad exception to the privilege against self-incrimination is also made for certain records or reports:

> (c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose, except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential.

[174] The only case in point is State v. Williams, 59 N.J. 493, 284 A.2d 172 (1971). That case, however, says only that non-immunized testimony may be used in proving the falsity of immunized testimony; truthful immunized testimony may never be used against the witness.

[175] See, e.g., New Jersey Builders, Owners and Managers Ass'n. v. Blair, 60 N.J. 330, 288 A.2d 855 (1972); Hudson County v. New York Central Railroad Co., 10 N.J. 284, 90 A.2d 736 (1952).

B. Partnerships

¶102 Research has found no New Jersey cases on either the application of the privilege to partnerships or the granting of immunity to partnerships. If faced with the issue, it is probable that a New Jersey court would adopt the federal case-by-case approach. (See the discussion of federal law in ¶¶26-28, supra).

XXIV. New Jersey Immunity--Civil Liabilities

¶103 Under the statutory definition of "incrimination" found in N.J. Stat. Ann. §2A:84A-18(1960) upon which the privilege against self-incrimination is based,

> . . . a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution.

N.J. Stat. Ann. §2A:84A-19 (1960), however, reads in part:

> . . . every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or forfeiture of his estate. . . (emphasis added).

¶104 An issue is thus raised as to what kind of threatened "penalty" is required to support a claim of the privilege. On the one hand, if the testimony sought from the witness would likely expose him to a criminal prosecution, an assertion of the privilege against self-incrimination would obviously be justified, even though the context in which

the testimony is sought is itself civil in nature.[176] On the other hand, a witness has no privilege to refuse to give testimony in a criminal prosecution merely because the giving of the testimony might degrade him.[177] Between the two extremes, and despite the statutory language of N.J. Stat. Ann. §2A:84A-19 (1960), which does not limit application of the privilege to situations where the testimony could lead to a criminal sanction, the line drawn by the courts is that between a criminal sanction and a non-criminal sanction.[178] Indeed, in 1975 a lower court decision[179] construed New Jersey's immunity statute as protecting a testifying witness from the use of his testimony in a subsequent criminal proceeding, but as allowing the use of immunized testimony in a non-criminal disciplinary proceeding. The court said that "proceeding," in the statutory section which provides that immunized testimony or its fruits "may not be used against the person in any proceeding. . . for a crime or offense . . . ," is modified and qualified by the terms

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[176] In Mahne v. Mahne, 66 N.J. 53, 328 A.2d 225 (1974), it was held that the defendants in a divorce action could properly claim their privileges against self-incrimination when asked by pretrial interrogatories whether they had committed adultery. Such an admission would have exposed them to criminal liability.

[177] State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955).

[178] See, e.g., Laba v. Board of Education of Newark, 23 N.J. 364, 129 A.2d 273 (1957); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972).

[179] Young v. City of Paterson, 132 N.J. Super. 170, 330 A.2d 32 (1975).

"crime or offense." This interpretation of the permissible uses of testimony that is "use immunized" is consistent with the federal system's interpretation of use immunity (see, ¶¶29-31, supra). It is likely the New Jersey courts will often look to the body of federal use immunity law in this area, too.

XXV. New Jersey Immunity--Effect on Prior Conviction

¶105 From the preceding discussion, it follows that once the criminal penalty of a witness's testimony is removed, no privilege applies to that testimony and no immunity need be granted. Thus, when an element (i.e., pregnancy) of the crime (i.e., abortion), about which the witness was asked to testify was missing, she was not entitled to a claim of privilege.[180] Similarly, when the questions asked by the grand jury concerned transactions which transpired over two years prior to the time at which the witnesses were testifying, and the statute of limitations for the crimes to which the testimony related was two years, no privilege to refuse to testify could be claimed.[181]

¶106 A witness may not refuse to testify about a crime for which he was previously convicted.[182] This is consistent with the statutory exception from "incrimination"[183] which

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[180] In re Vince, 2 N.J. 443, 67 A.2d 141 (1949).

[181] In re Pillo, 11 N.J. 8, 93 A.2d 176 (1953).

[182] State v. Craig, 107 N.J. Super. 196, 257 A.2d 737 (1969).

[183] N.J. Stat. Ann. §2A:84A-18 (West 1960).

says that if the "witness has no reasonable cause to apprehend a criminal prosecution" concerning a matter, the matter is not "incriminatory." In State v. Tyson,[184] however, it was held that a defense witness, who plead guilty to a criminal charge but was not yet sentenced, retained the privilege to refuse to answer questions about the crime on the ground that his answers could incriminate him.

XXVI. New Jersey Immunity--Non-Testimonial Evidence

¶107 The New Jersey cases also hold that the privilege against self-incrimination does not confer on a witness a right to withhold evidence that is "non-testimonial in character"[185] or evidence that is not a "communication"[186] of the witness. N.J. Stat. Ann. §2A:84A-19(2)(West 1960) says:

> . . . no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental conditions. . . .

Consequently, a witness may not refuse, on the basis of his privilege against self-incrimination, to submit to such things as fingerprinting, photographing, examination of body for identifying characteristics, drunkometer tests, blood tests, and voice identification tests.[187] Immunity, then, need not be granted a witness to compel him to submit to these tests.

XXVII. New Jersey Immunity--How Immunity is Conferred

A. Generally

¶108 Under New Jersey statutory law, special provisions allow immunity grants in particular agencies' investigations.[188] The provision governing a grant of immunity in criminal proceedings before a court or grand jury, however, is found in N.J. Stat. Ann. §2A:81-17.3 (West 1960).

¶109 After a witness refuses to answer based on his privilege against self-incrimination and the court rules that the privilege is applicable,[189] the prosecutor must decide

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[184] 43 N.J. 411, 204 A.2d 864, cert. denied, 380 U.S. 987 (1964).

[185] State v. King, 44 N.J. 346, 209 A.2d 110, 9 A.L.R.3d 847 (1965).

[186] State v. Carr, 124 N.J. Super. 114, 304 A.2d 781 (1973).

[187] State v. King, 44 N.J. 346, 209 A.2d 110, 9 A.L.R. 3d 847 (1965).

[188] The following sections of N.J. Stat. Ann. govern immunity in particular proceedings: §17:9A-263 (bank examinations); §11:1-15 (civil service commission); §23:10-12 (game laws); §48:2-36 (public utility commission); §17:12A-90 (savings and loan associations); §§49:1-19 to -20 (securities law); §50:5-11 (shell fish proceedings to recover penalties); §32:23-86 (waterfront commission investigation); §58:1-29 (water policy council); §17B:30-22 (health insurance, unfair competition); §40:69A-167 (municipal officers and employees); and the important statutory provision regarding the duty of a public employee to testify, and the immunity to be granted, may be found in N.J. Stat. Ann. §§2A:81-17.2a1 and 2A:81-17.2a2.

[189] In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968). The court there further held that, in determining the validity of the claim of privilege, the court should consider a showing that the witness is the "target" of the grand jury investigation as sufficient to support a claim of the privilege.

whether to compel the testimony under an immunity grant or forego the line of inquiry. If the prosecutor decides to compel the testimony, he must request (with the approval of the Attorney General) in writing that the court order the witness to comply with the order and testify. The witness then receives protection from the use of any of his testimony, or its "fruits," in any subsequent criminal proceeding against him.

B. Waiver

¶110 There is no statutory provision in New Jersey for a waiver of immunity, but in some circumstances a witness may be deemed to have waived his privilege against self-incrimination, nullifying any need for an immunity grant. The most common and important instance of a waiver of the privilege occurs when a witness (other than the "target" of the investigation) when subpoenaed, appears before the court or grand jury and freely testifies about self-incriminatory facts.[190] Thus, in State v. Stavola,[191] where the defendant's counsel arranged with the prosecutor for the defendant's voluntary appearance before a grand jury, his appearance constituted an effective waiver of his

[190] A different way to view this, however, is that in such circumstances the witness is not being "compelled" to testify, but rather is testifying voluntarily. In that case, the relevant legal concept would be the absence of the privilege against self-incrimination, not the waiver of the privilege.

[191] 118 N.J. Super. 393, 288 A.2d 41 (1972), cert. denied, 415 U.S. 977 (1973).

right (as the "target") of the grand jury's investigation) to be warned of his right to remain silent and to be warned that any statement he gave could be used against him.

¶111 In contrast, in State v. DeCola,[192] the witness previously testifed about homicide before a grand jury; the court held that the first testimony did not operate to deprive her of her privilege when summoned before a second grand jury. The second grand jury was pursuing an investigation directed against the witness herself, in regard to a basis for her own indictment for perjury based on her initial testimony.

XXVIII. Massachusetts Immunity--Generally

¶112 The Massachusetts constitutional privilege against self-incrimination is found in Article XII; functionally, it is identical to the federal privilege.[193]

¶113 For criminal proceedings before grand juries and courts, the applicable immunity statute is Mass. Gen. Laws Ann. ch. 233, §§20C-20I (1970).[194] The procedure out-

[192] State v. DeCola, 33 N.J. 335, 164 A.2d 729 (1960).

[193] The Massachusetts courts, however, seem to interpret the privilege as easily waived by failure to claim it. See In re De Saulnier, 360 Mass. 761, 276 N.E.2d 278 (1971).

[194] Testimonial privileges with special immunity provisions applicable to other proceedings may be found in the following sections of Massachusetts General Laws: Mass. Gen. Laws Ann. ch. 3 §28 (1902)(testimony before general courts); Mass. Gen. Laws Ann. ch. 7 §11 (1962)(testimony before administration finance commission); Mass. Gen. Laws Ann. ch. 93 §7 (1971)(anitmonopoly proceedings); Mass. Gen. Laws Ann. ch. 271 §39 (1912)(bribery of employee or agent); Mass. Gen. Laws Ann. ch. 151B §3(7)(1972)(testimony before discrimination commission); Mass. Gen. Laws Ann. ch. 150A §7(3)(1961)(testimony before Labor Relations Commission); Mass. Gen. Laws Ann. ch. 110A §16 (1904)(Security Commission hearings).

lined in these sections provides full transactional immunity to a witness.

¶114 The immunity statute provides that in a proceeding before a grand jury involving specified offenses,[195] after the witness claims his constitutional privilege against self-incrimination,[196] the attorney general or a district attorney may make an application to a justice of the Supreme Judicial Court for an order granting immunity to the witness.[197] If, after a private hearing, the justice finds that the witness validly refused to answer on the ground of his privilege, the justice may order the witness to answer (or produce evidence) by issuing an order granting transactional

[195]The offenses, all involving crimes against the public safety and interest, are enumerated in Mass. Gen. Laws Ann., ch. 233, §20D(1970):

> . . . abortion, arson, assault and battery to collect a loan, assault and battery by means of a dangerous weapon, assault to murder, breaking and entering a dwelling house or a building, bribery, burning of a building or dwelling house or other property, burglary, counterfeiting, deceptive advertising, electronic eavesdropping, embezzlement, extortion, firearm violations, forgery, fraudulent personal injury and property damage claims, violation of the gaming laws, gun registration violations, intimidation of a witness or of a juror, insurance law violations, kidnapping, larceny, lending of money or thing of value in violation of the general laws, liquor law violations, mayhem, murder, violation of the narcotic or harmful drug laws, perjury, prostitution, violations of environmental control laws (pollution), violations of conflicts-of-interest laws, consumer protection laws, pure food and drug law violations, receiving stolen property, robbery, subornation of perjury, uttering, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

[196]See Mass. Gen. Laws Ann. ch. 233, §20C(1970).

[197]See Mass. Gen. Laws Ann. ch. 233, §20E(1970).

immunity.[198]

¶115 Immunity in court is permitted in Massachusetts only in criminal proceedings in a superior court, provided that the witness was previously granted immunity with respect to his testifying or producing evidence before a grand jury.[199]

¶116 A witness who was granted immunity cannot be prosecuted or subjected to "any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is so compelled. . . to testify or produce evidence."[200] Nor may the compelled evidence be used against him in any criminal or civil court proceedings in Massachusetts, except for perjury or contempt committed under the immunity order.[201]

¶117 Upon failure of a properly immunized witness to testify, contempt proceedings may be instituted against the witness. After a hearing, if the witness is adjudged in contempt of court, he may be imprisoned for a term not to exceed one year.[202]

[198]Id. Special requirements are imposed if the application is made by a district attorney.

[199]Mass. Gen. Laws Ann. ch. 233, §20F(1970).

[200]Mass. Gen. Laws Ann. ch. 233, §20G(1970).

[201]Id.

[202]Mass. Gen. Laws Ann. ch. 233, §20H(1970)(criminal contempt).

¶118 Finally, the immunity statute provides that no defendant in any criminal proceeding is to be convicted solely on the testimony of (or evidence produced by) a person granted immunity under the act.[203] The Supreme Judicial Court, in Commonwealth v. DeBrosky, narrowly interpreted this provision to minimize the amount of corroboration required to meet the provisions of the statute; it is said to "merely require support for the credibility of such a witness."[204]

XXIX. Massachusetts Immunity--Effect on Other Jurisdictions

¶119 Traditionally, the Massachusetts privilege against self-incrimination and hence immunity, was held not to extend to crimes of other jurisdictions.[205] Today the United States Supreme Court's decision in Murphy v. Waterfront Commission of New York Harbor[206] and its implications[207] would prevail; such witnesses would receive use immunity as against other jurisdictions.

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[203] Mass. Gen. Laws Ann. ch. 233, §20I(1970).

[204] 363 Mass. 718, 730, 297 N.E.2d 496, 505 (1973). The court observed that the statute simply "changed the law to require that there be some evidence in support of the testimony of an immunized witness on at least one element of proof essential to convict the defendant."

[205] See, e.g., Cabot v. Corcoran, 332 Mass. 44, 123 N.E.2d 221 (1955).

[206] 378 U.S. 52 (1963).

[207] See discussion in text supra at ¶2.

XXX. Massachusetts Immunity--Effect of Non-Compliance with Immunity Agreement

¶120 The use of immunized testimony in a subsequent prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion is provided for in Massachusetts's immunity statute.[208]

XXXI. Massachusetts Immunity--Application to Corporations

¶121 In Massachusetts, corporations have no privilege against self-incrimination.[209]

XXXII. Massachusetts Immunity--Civil Liabilities

¶122 In Massachusetts, as in other states, the privilege against self-incrimination protects a witness from being forced, by his testimony, to subject himself to criminal liability or "penalty or forfeiture."[210] Hence, such sanctions as embarrassment or fear of harm are constitutionally insufficient reasons for declining testimony.[211]

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[208] Mass. Gen. Laws Ann. ch. 233, §20G(1970). For further discussion see discussion in text supra at ¶3.

[209] London v. Everett H. Dunbar Corp., 179 F. 506 (1st Cir. 1910).

[210] See, e.g., Bull v. Loveland, 27 Mass. (10 Pick.) 9 (1838).

[211] Commissioner v. Johnson, 365 Mass. 534, 313 N.E. 2d 571 (1974).

XXXIII. Massachusetts Immunity--Effect on Prior Convictions

¶123 When the criminal sanction is removed by the running of the statute of limitations,[212] a plea of guilty,[213] or a conviction,[214] a witness may not refuse to testify regarding the relevant crime on the basis of the privilege against self-incrimination, nor is immunity required.

XXXIV. Massachusetts Immunity--Non-Testimonial Evidence

¶124 Massachusetts asserts that, once granted immunity, "a witness shall not be excused from testifying or from producing books, papers, or other evidence."[215]

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[212] In re De Saulnier, 360 Mass. 761, 276 N.E.2d 278 (1971). See also Duffy v. Brody, 147 F. Supp. 897, aff'd., 243 F.2d 378 (1st Cir.), cert. denied, 354 U.S. 923 (1957).

[213] United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973).

[214] Id.

[215] Mass. Gen. Laws Ann. ch. 233 §20C (1970)(grand jury). See also Mass. Gen. Laws Ann. ch. 233 §20F("answer question or produce evidence in Superior Court")(1970).

XXXV. Florida Immunity - Generally

A. Statutory Immunity--Transactional and Use

¶125 Florida immunity law is based on Fla. Stat. Ann. § 914.04[216] (West Supp. 1978):

> No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or state attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime, or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

¶126 This statute is considerably broader than is required by the Fifth Amendment privilege against self-incrimination;

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[216] Two other Florida provisions address immunity. Fla. Stat. Ann. § 914.05 (West 1973) provides for state use immunity in certain circumstances where federal immunity has been granted. There is no case law on this statute or its predecessor, and Murphy v. Waterfront Commission, 378 U.S. 52 (1964), appears to cover the same ground. Florida also has a separate immunity provision in the criminal usury and loansharking statute, Fla. Stat. Ann. § 687.071 (West Supp. 1978). This provision relates only to immunity arising out of an investigation under this statute. State v. Powell, 343 So. 2d 892, 894 (Fla. Dist. Ct. App. 1977).

it provides transactional and use immunity[217] for persons testifying under subpoena. Once compelled to testify, a witness receives immunity from prosecution

> for any offense substantially connected with the transaction, matter or thing concerning which he testified if any testimony so given in such inquiry constitutes a link in the chain of evidence needed to prosecute such witness....[218]

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[217] State ex rel. Hough v. Popper, 287 So. 2d 282, 284 (Fla. 1973), raises the question of whether transactional immunity is broader than use immunity or simply different in kind. Florida sees it as different in kind:

> At first glance, the use immunity provision would seem superfluous in view of the provisions for transactional immunity. The reason for the provision becomes evident, however...if one considers the situation of a person testifying as to one criminal transaction who, in the course of his testimony, discloses a fact, innocent in and of itself, which links him to an independent and separate criminal transaction; in such a situation, the transactional immunity would apply as to the first transaction, but not to the second criminal transaction.

Id. at 284.

The United States Supreme Court, however, views transactional immunity as broader than use immunity:

> We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination...While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.

Kastigar v. United States, 406 U.S. 441, 453 (1972).

[218] State ex rel. Mitchell v. Kelly, 71 So. 2d 887, 895 (Fla. 1954).

¶127 In general, the Florida courts view the immunity provision as an important prosecutorial tool,[219] and, when possible, interpret it in that light.

B. Constitutional Immunity

¶128 The Florida Constitution contains a privilege against self-incrimination which differs little in language[220] or impact from the Fifth Amendment. Because of the broad state transactional immunity statute, and the United States Supreme Court's interpretations of the Fifth Amendment, the state constitutional immunity has not developed as a discrete doctrine.[221]

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> [T]he very purpose for its enactment...[is] to aid the state in the prosecution of crimes... which by their nature usually cannot be sucessfully prosecuted without testimony of persons who may themselves be involved.

State v. Schell, 222 So. 2d 757, 758 (Fla. Dist. Ct. App. 1969) (speaking of the predecessor of section 914.04).

[220] In fact, Fla. Const. art.I § 9 changes only the word "case" to the possibly broader "matter:"

> No person shall...be compelled in any criminal matter to be a witness against himself.

[221] The Florida Supreme Court recently commented on the relative breadth of the state's statutory and constitutional provisions in State ex rel. Tsavaris v. Scruggs, No. 48-637 (Fla. March 17, 1977):

> [W]hether...this broader [statutory] grant of immunity is required by Art. I, [section] 9, Florida Constitution, is an open question.

XXXVI. Florida Immunity--Effect on Other Jurisdictions

A. Prosecution in Another State

¶129 Murphy v. Waterfront Commission of New York Harbor[222] held that no state prosecution could use testimony immunized by another state.[223] The Florida Supreme Court in Gilliam v. State[224] recognized Murphy as controlling in Florida:

> We concluded that Murphy was intended as a declaration of constitutional principle and has been uniformly interpreted to forbid the use or derivative use of testimony compelled under grant of immunity in another state.

B. Prosecution by the Federal Government

¶130 The holding in Murphy also applies to prosecution by the United States; in effect, all state-immunized testimony is automatically granted federal use immunity.

C. Prosecution by a Foreign Sovereign

¶131 The Supreme Court, in Zicarelli v. New Jersey Investigation Commission,[225] specifically declined to answer whether the Fifth Amendment requires that an immunity grant protect a witness from foreign prosecution.

Florida recognizes Zicarelli as the primary authority on this question and has not deviated from it.[226]

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[222] 378 U.S. 52 (1964).

[223] The protection provided by Murphy is in the form of use immunity, not transactional immunity.

[224] 267 So. 2d 658, 659-60 (Fla. Dist. Ct. A-p. 1972).

[225] 55 N.J. 249, 261 A.2d 129 (1970), aff'd, 406 U.S. 472 (1972).

[226] Gilliam v. State, supra note 224, at 660:

> Fear of foreign prosecution in this case is no more clearly shown than in Zicarelli.

XXXVII. Florida Immunity--Effect on Non-Compliance with the Immunity Agreement

A. Perjury

¶132 A witness who commits perjury while testifying under an immunity grant may be prosecuted for the perjurious testimony.[227] In Florida contradictory testimony, even when one or both statements are immunized, may establish perjury.[228]

B. Contempt

¶133 Florida law on contempt after immunization is best stated in McDonald v. State:[229]

> [I]mmunized witnesses' refusal to testify at trial, even though not delivered disrespectfully, constituted direct criminal contempts punishable summarily because such refusals were intentional obstructions of the orderly administration of justice.[230]

The contemnor is subject to punishment under Fla. R. Crim. P. 3.830 (West 1975).

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[227] Gordon v. State, 104 So. 2d 524, 532 (Fla. 1958):

> The statutory immunity granted to a witness who is required to testify with reference to certain specified crimes will not immunize him against a subsequent prosecution for perjury in the event that he testifies falsely.

[228] See ¶¶134-135, infra.

[229] 321 So. 2d 453 (Fla. Dist. Ct. App. 1975).

[230] Id. at 457 (citing United States v. Wilson, 421 U.S. 309 (1975)).

XXXVIII. Florida Immunity--Effect of Inconsistent Statements in Other Proceedings

¶134 Florida courts have developed an approach to inconsistent testimony which is at variance with federal case law [231] and which presents potential difficulty for prosecutors. An immunized witness may refuse to respond to questions despite his immunity, if he fears that a perjury prosecution may arise out of a conflict between that testimony and previous statements made under oath.[232]

¶135 The contrary position, taken by the federal courts[233] and by the dissent in Salem v. State,[234] is that inconsistency between the two statements does not by itself prove the immunized statement false. This view requires independent evidence to establish the falsity of the immunized testimony.

XXXIX. Florida Immunity--Application to Corporations, Associations, and Partnerships

¶136 Florida does not extend the privilege against self-incrimination to corporations. In State v. Dawson,[235] the court held:

> [T]he privilege against self-incrimination applies only to natural individuals and cannot be utilized by or on behalf of a corporation.[236]

¶137 In another Florida case, the court held that a corporation president had not waived immunity by producing records under a subpoena duces tecum, when it was unclear whether the subpoena was directed to the defendant individually or as custodian of the corporate records.[237]

XL. Florida Immunity--Civil Liabilities

¶138 The Florida Supreme Court recently extended the already broad statutory immunity to cover subsequent civil proceedings. The court, in Lurie v. Florida State Board of Dentistry[238] said:

> To be efficacious in securing testimony of a citizen the immunity extended must be coextensive with all possible governmental penalties and forfeitures, criminal or civil (Emphasis added).

The court held that the State Board of Dentistry could not properly revoke a license on the basis of immunized testimony before the county solicitor.

¶139 The court faced a different situation in State ex rel.

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[231] See ¶¶14-22, supra.

[232] Saunders v. State, 319 So. 2d 118, 123 (Fla. Dist. Ct. App. 1975); Salem v. State, 305 So. 2d 23, 28 (Fla. Dist. Ct. App. 1974).

[233] Supra notes 30-31. See also United States v. Frumento, 552 F.2d 534 (3d Cir. 1977).

[234] 305 So. 2d 23, 29 (Fla. Dist, Ct. App. 1975):

> The quoted grant of immunity at the trial was sufficient to protect the appellant from all but false statements at the trial....I think that a blanket excusal from testifying at this stage is not a proper way to protect the appellant.

[235] 290 So. 2d 79, 81 (Fla. Dist. Ct. App. 1974).

[236] The court went on to hold that the professional service corporation in question (made up of two attorneys and an accountant) was not a "corporation" in this sense, using the test in United States v. White, 322 U.S. 694, 701 (1944). See ¶26, supra.

[237] State v. Deems, 334 So. 2d 829, 832 (Fla. Dist. Ct. App. 1976).

[238] 288 So. 2d 223, 226 (Fla. 1973) (reinstating Florida State Board of Architecture v. Seymour, 62 So. 2d 1 (Fla. 1952) which was overruled in Headley v. Baron, 228 So. 2d 281 (Fla. 1969)).

Vining v. Florida Real Estate Commission.[239] The issue was whether the constitutional privilege against self-incrimination extended to administrative proceedings. The court held that it did:

> [I]t is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings "penal" in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood.[240]

This holding opens the possibility of invoking the privilege against even the danger of social obloquy, and establishes Florida's privilege against self-incrimination as far broader than the Fifth Amendment privilege.

¶140 In Minor v. Minor[241] the Florida Supreme Court set a limit to this tendency, specifically disapproving a lower court holding[242] that allowed a plaintiff in a divorce action to invoke the privilege against self-incrimination to avoid responding to a counterclaim of adultery.

XLI. Florida Immunity--Prior Convictions

¶141 There is no case law in Florida on the application of immunity to prior convictions. Although the state courts have extended the privilege against self-incrimination farther than many states, it seems unlikely that they would differ significantly in this area.

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[239] 281 So. 2d 487 (Fla. 1973).

[240] Id. at 491.

[241] 240 So. 2d 301, 302 (Fla. 1970).

[242] See Simkins v. Simkins, 219 So. 2d 724, 726-27 (Fla. Dist. Ct. App. 1969).

XLII. Florida Immunity--Non-Testimonial Evidence

¶142 Florida generally follows federal case law on the issue of non-testimonial immunity. In Lacey v. State,[243] a Florida appeals court quoted with approval Schmerber v. California:[244]

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

The Florida Supreme Court affirmed this view in Parkin v. State:[245]

> The constitutional privilege against self-incrimination in history and principle seems to relate to protecting the accused from the process of extracting from his own lips against his will an admission of guilt. In the better-reasoned cases it does not extend to the exclusion of evidence of his body or of his mental condition...even when such evidence is obtained by compulsion.

¶143 The Florida Supreme Court recently decided that the evidence must not only be of testimonial or communicative nature but must be obtained from the defendant himself.[246] Again, the court relied heavily on United States Supreme Court de-

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[243] 239 So. 2d 628, 629 (Fla. Dist. Ct. App. 1970), cert. denied, 401 U.S. 958 (1971).

[244] 384 U.S. 757, 764 (1966).

[245] 238 So. 2d 817, 820 (Fla. 1970), cert. denied, 401 U.S. 974 (1971).

[246] State ex rel. Tsavaris v. Scruggs, No. 48-637 (Fla. March 17, 1977).

cisions in so ruling.[247]

¶144 Given these foundations, Florida does not allow, on the basis of the privilege against self-incrimination, refusal to submit to handwriting exemplars,[248] voice identifications,[249] breath tests,[250] or police lineups.[251] The rule in Florida on medical examinations and blood tests, as first stated in Touchton v. State,[252] is stricter:

> Evidence resulting from a medical examination of accused for the purposes of the prosecution rather than for treatment, after an accusation has been made against him, is admissible where, in the absence of any compulsion, accused submits or consents to the examination (Emphasis added).

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[247] In fact, a major point of contention in this 4-3 decision was the degree to which Florida should or did follow the United States Supreme Court:

> In advocating his point, Mr. Justice Adkins asserts that the majority shifts with the winds which blow off the Potomac.

Id. (Sundberg, J., concurring).

[248] Lacey v. State, 239 So. 2d 628, 629 (Fla. Dist. Ct. App. 1970), cert. denied, 401 U.S. 958 (1971).

[249] Joseph v. State, 316 So. 2d 585, 586 (Fla. Dist. Ct. App. 1975).

[250] Gay v. City of Orlando, 202 So. 2d 896, 898 (Fla. Dist. Ct. App. 1967), cert. denied, 390 U.S. 956 (1968).

[251] Morris v. State, 184 So. 2d 199, 199 (Fla. Dist. Ct. App. 1966). The issue here was whether the privilege against self-incrimination was violated when the accused was required, in a police lineup, to wear an article of clothing identified by witnesses as that worn by the robber. The court held that the privilege was not violated.

[252] 154 Fla. 547, 548, 18 So. 2d 752, 753 (1944); State v. Coffey, 212 So. 2d 632, 634-35 (Fla. 1968) (relied on Touchton and is now the usual cite for the rule).

XLIII. Florida Immunity--How Immunity is Conferred

A. Generally

¶145 Immunity is not self-operating in Florida.[253] To receive immunity a witness must not only appear under subpoena, but must refuse to waiver immunity and must nevertheless be compelled to testify[254] before any court having felony trial jurisdiction, grand jury, or state attorney.[255]

The prosecuting attorney has the exclusive power to grant immunity,[256] based on his judgment of the potential value of the compelled testimony and the impact of the immunity grant on future prosecutions. Neither the state legislature nor state administrative bodies may grant immunity.

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[253] Orosz v. State, 334 So. 2d 26, 28 (Fla. Dist. Ct. App.), appeal dismissed, 341 So. 2d 292 (Fla. 1976).

[254] State ex rel. Foster v. Hall, 230 So. 2d 722, 723 (Fla. Dist. Ct. App. 1970):

> The mere fact that the defendant was under subpoena to appear is immaterial. Compulsory attendance is one thing and compulsory testimony is quite another. The compulsion required to bring into play the immunity provisions of the foregoing statute relates solely to compulsory testimony.

[255] Fla. Stat. Ann. § 914.04 (West Supp. 1978).

[256] State v. Schell, 222 So. 2d 757, 758 (Fla. Dist. Ct. App. 1969). The case of State v. [illegible]gis, 328 So. 2d 479, 481 (Fla. Dist. Ct. App. 197[illegible] bears to hold to the contrary:

> However, there are dangers [illegible]an unrestricted rule which would empower a [illegible]te attorney alone to grant immunity from cri[illegible]o an accused.

The immunity was given by a narcotic[illegible]gent, acting with approval of the state attorney, to t[illegible] defendants. The agent and the state attorney acted without court approval.

B. Waiver

¶146 There is no statutory provision for waiver of immunity in Florida, and the courts seem to follow the federal case law. If a witness testifies voluntarily, no immunity confers and the testimony may be used against him in a future prosecution. If, however, the witness is himself the subject of an investigation, the prosecution may have a duty to inform him of his rights before questioning to assure an intentional and knowing waiver of the privilege.[257]

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[257] State v. Newsome, 349 So. 2d 771, 772 (Fla. Dist. Ct. App. 1977).

APPENDIX F

Aspects of Grand Jury Practice

Outline

SUMMARY

¶1 The duty to testify before a grand jury is firmly established. Federal courts may summon a witness from anywhere in the nation, and most states have reciprocal agreements for summoning witnesses upon a showing of materiality and necessity. A witness may move to quash the subpoena in the court having jurisdiction over the grand jury. Orders denying a motion to quash are generally non-appealable, though state statutes may allow appeals. A witness may consult with counsel outside the grand jury room. An ordinary witness is entitled to no warnings prior to testifying, though he may invoke the Fifth Amendment. A potential defendant should be warned of his Fifth Amendment privilege and his right to consult with counsel. If a witness receives immunity, he can still refuse to answer a question based on unlawful electronic surveillance. A witness need not answer questions that violate a common-law or statutory testimonial privilege.

¶2 The federal policy of grand jury secrecy conflicts with the need for disclosure of federal grand jury minutes to state authorities combatting public corruption. The policy favoring secrecy of grand jury proceedings has existed for several hundred years,[1] and is "older than our nation itself."[2] Yet the policy "is not absolute, and cannot be applied blindly."[3] The rationale behind grand jury secrecy is based on protecting the workings of the grand jury. Grand jury secrecy is not a right of the witness. The traditional reasons for secrecy often become inapplicable after the return of an indictment or after trial.

¶3 Rule 6(e) of the Federal Rules of Criminal Procedure governs the disclosure of federal grand jury minutes, and permits disclosure to be made "in connection with a judicial proceeding." This is the primary avenue for state access to grand jury minutes. Even when disclosure would not be permitted under Rule 6(e), the courts have permitted it where a superior public interest is found. If the witness was granted immunity by the federal court, the testimony may still be used in a state civil proceeding. The fact that immunity was granted, may weigh heavily in favor of granting state access to the minutes.

¶4 In an involved grand jury investigation such as those looking into political corruption, a prosecutor may wish to subpoena those upon whom the investigation has focused as potential defendants in order to examine them as to allegedly criminal activities and suspicious transactions. The target witness is generally afforded less procedural and constitutional protection than a de jure defendant. The practice of subpoenaing a target has not been found to be violative of the target's Fifth Amendment rights. A target may consult his attorney outside the grand jury room, but he has no broader right to counsel than a mere witness. The courts have placed few limitations on the extent to which the target strategy may be used. Once the target is the subject of an indictment he can no longer be compelled to testify about the crime which is alleged in the indictment. Generally, the state courts provide greater protection than do the federal courts.[4]

I. GRAND JURY BACKGROUND

¶5 The power to compel persons to appear and testify before grand juries has developed over centuries. Until the 16th century, juries in civil or criminal cases were supposed to find facts based on their own knowledge, and a witness who volunteered to testify risked being sued for maintenance.[5] As juries became less able to find facts on their own, witnesses were allowed to testify in civil cases,[6] and the freedom to

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[1] For historical background, see R. Calkins, "Grand Jury Secrecy," 63 Mich. L. Rev. 455 (1964).

> At its inception in 1166, the "Grand Assize" (as the grand jury was then called) was not protected by secrecy. By 1368, "le grande inquest" had evolved, and began the custom of hearing witnesses in private. R. Calkins, supra, at 456, 457. "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." Id.

[2] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

[3] In re Cement-Concrete Block, Chicago Area, 381 F.Supp. 1108, 1109 (N.D. Ill. 1974).

[4] A survey of Illinois, Massachusetts, California, Florida and Ohio case law produced little, if any, reference to any litigation surrounding the strategy herein described.

[5] See, e.g., [1450] Y.B. 28 Hen. 6, 6, 1.

[6] Stat. of Elizabeth, St., 1563, 5 Eliz. 1, c.9, §12.

testify soon became a duty. In 1612, Sir Francis Bacon in the Countess of Shrewsbury Trial[7] asserted confidently:

> You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and land, but of their knowledge and discovery. If there be anything that imports the king's service they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.

In this country, the duty to testify before a grand jury is firmly established.[8]

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[7] [1612] 2 How. St. Tr. 769, 778.

[8] Blair v. United States, 250 U.S. 273, 280-281 (1919):

> At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment, a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act (September 24, 1789, c. 20, §30, 1 Stat. 73, 88), the mode or proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions, as modified by subsequent legislation, are found in §§861-865, Rev. Stats. By Act of March 2, 1793, c. 22, §6, 1 Stat. 333, 335, it was enacted that subpoenas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence. See 876, Rev. Stats. By §877, originating in Act of February 26, 1853, c. 80, §3, 10 Stat. 161,

II. OUT-OF-STATE WITNESSES

A. Background

¶6 The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings[9] (hereinafter

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8 (continued) 169, witnesses required to attend any term of the district court on the part of the United States may be subpoenaed to attend to testify generally; and under such process they shall appear before the grand or petit jury, or both, as required by the court or the district attorney. By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§848, 855. And §§879 and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

> In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (Wilson v. United States, 221 U.S. 361, 372, quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see Brown v. Walker, 161 U.S. 591); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

[9] 11 Uniform Laws Annotated, Crim. Law and Proc. §1.

the Act) has been enacted, with minor variations, in forty-eight states.[10] The Act does not, of course, apply in federal court,[11] nor does it extend the jurisdiction of a state court, but operates on principles of comity.[12] It applies to witnesses sought in grand jury proceedings.[13]

B. Procedure

¶7 Sections 2[14] and 3[15] of the Act define the procedure for procuring attendance of a witness. Application must be made to a judge of the court having jurisdiction over the grand jury. He issues a certificate stating that the person sought is a material witness and that his presence will be

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10 See, e.g., Massachusetts: Mass. Ann. Laws ch. 233 §§13 A-D (Michie/Law. Co-op 1974); New Jersey: N.J. Stat. Ann. §§2A: 81-18 to 2A:81-23 (West, 1976); New York: N.Y. Crim. Proc. Law §640.10 (McKinney 1971). Alabama does not follow the Act, whereas Iowa has similar but not identical provisions. The Act is also enacted in the District of Columbia, Puerto Rico, Panama Canal Zone, and the Virgin Islands.

11 United States v. Monjar, 154 F.2d 954 (3d Cir.1946). There is nationwide service of a subpoena in federal court. See Fed. R. Crim. Proc. 17(e). Under 28 U.S.C. §1783(a), a U.S. citizen living abroad can be subpoenaed to appear before a federal grand jury.

12 Thus the Act is ineffectual except as between two states that have enacted it. See State v. Blount, 200 Or. 35, 264 P. 2d 419, (1953), cert. denied, 347 U.S. 962 (1954).

13 Uniform Act, supra note 9, §1.

14 "Summoning Witness in this State to Testify in Another State", Uniform Act, supra note 9, §2.

15 "Witness from Another State Summoned to Testify in This State", Uniform Act, supra note 9, §3.

required for a specified number of days.

¶8 The certificate is then presented to a judge in a court of record in the county where the witness is located.[16] The judge in that county summons the witness to a hearing, at which he must determine that:

a) The witness is material and necessary to the investigation;

b) The witness will not suffer undue hardship by appearing before the grand jury;

c) The laws of the demanding state will immunize the witness from arrest and service of civil or criminal process as to matters arising before his entry into the state.[17]

¶9 Following this determination, the judge issues a summons directing the witness to attend in the demanding state. The witness is compensated by the demanding state, and failure to appear and testify is punishable in the manner prescribed by the state in which the witness is located.[18]

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16 The witness need not be a resident of that state. See People of the State of New York v. O'Neill, 359 U.S. 1 (1959) (upholding the constitutionality of the Act, in which an Illinois resident, vacationing in Florida, was issued a summons by a Florida court pursuant to an application from a New York court).

17 Section 4 of the Act provides that a witness entering or passing through the state pursuant to a summons under the Act shall be immune from arrest or sevice of civil or criminal process regarding matters arising before his entry into the state.

18 The witness is subject to punishment by the state having personal jurisdiction over him. If he is issued a summons by state A upon the request of state B, but fails to leave state A, he will be punished by state A. If he enters state B but fails to attend and testify, he will be punished by state B. See Uniform Act, supra note 9, §§2,3.

¶10 The courts are divided over the sufficiency of the demanding state's showing of "materiality." The Act says that the certificate issued by the demanding state shall be "prima facie evidence--of all facts stated therein."[19] Although one court has held that a conclusory statement in the certificate that the witness is material suffices,[20] most jurisdictions require an embellishment of the allegation of materiality.[21] Most commonly, this gloss takes the form of an accompanying

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Id. at §2.

20
Epstein v. People of State of New York, 157 So. 2d 705, 707 (Fla. Dist. Ct. of App. 1963): [I]nasmuch as the certificate is issued by a judge of the requesting state who has satisfied himself as to the sufficiency of the evidentiary facts to establish the necessary conditions for the making of the certificate, it is not required that he give the basis of his decision in order to have a certificate that is prima facie good. See also In re Cooper, 127 N.J.L. 312, 22 A. 2d 532 (1941) (materiality is largely for the requesting state to determine.)
The language of Epstein is diluted by the fact that the certificate was accompanied by an affidavit of the assistant district attorney detailing why the witness was needed.
Contra, in In re Grothe, 59 Ill. App. 2d 1, 208 N.E. 2d 581 (1965) the court held that although a certificate is prima facie evidence of all facts stated therein, a mere statement that the witness is material is conclusory rather than factual and is insufficient to cause a summons to issue. See also Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 275 N.E. 2d 33 cert. denied 407 U.S. 914 (1971) (bare allegation of materiality is insufficient).

21
See In re Saperstein, 30 N.J. Super. 373, 375, 104 A. 2d 842,843, cert. denied 348 U.S. 874 (1954) (certificate stated the subject of the grand jury investigation and explained how the witness was related to that investigation. This was cited by In re Grothe, supra note 20, as being sufficient). In re Andrews, 64 Ill. 2d 269, 356 N.E.2d 55 (1976).

affidavit explaining why the witness is needed.[22] In some cases, testimony may be heard at the hearing in the receiving state.[23]

C. Challenges to the Summons

¶11 Aside from challenging the showing of materiality, a witness can raise few objections to the summons. Since the hearing is not a criminal proceeding, he is not entitled to counsel or to cross-examine.[24] Matters of privilege are to be raised with the demanding state rather than at the hearing.[25] He, rather than the demanding state, has the burden of proof regarding undue hardship.[26] Low witness fees,[27] differences

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State of Florida v. Axelson, 80 Misc. 2d 419, 363 N.Y.S. 2d 200 (Sup. Ct. N.Y. , 1974) (witness sought for trial; attorney's affidavit details why he is needed); see also Epstein, supra note 20.

23
In re Pitman , 26 Misc.2d 332, 201 N.Y.S.2d 1000 (Ct. Gen. Sess., New York County 1960) (certificate plus testimony at hearing will be sufficient).

24
See Epstein, supra note 20, 157 So.2d at 707-708, Commonwealth v. Beneficial Finance Co., supra note 20, 360 Mass. at 306, 275 N.E.2d at 100-101.

25
Application of State of Washington in re Harvey, 10 App. Div.2d 691, 198 N.Y.S.2d 897 (1st Dep't), appeal dismissed, 8 N.Y.2d 865, 168 N.E.2d 715, 203 N.Y.S.2d 914 (1960); In re Pitman, supra note 23.

26
Terl v. State of Maryland ex rel. Grand Jury of Baltimore City, 237 So.2d 830 (Fla. Dist. Ct. of App. 1970) (proving a negative would be difficult for the state; the witness's willingness and ability to testify is a rebuttable presumption).

27
State of Florida v. Axelson, supra note 22, 80 Misc.2d at 420, 363 N.Y.S.2d at 202 (the witness fee of $5/day is "woefully inadequate" but is for the legislature to change).

in immunity,[28] or interruption of work[29] do not suffice to show undue hardship. Yet if it appears that the summons (some states refer to it as a subpoena) is issued in bad faith and that the witness is really sought to be made a defendant, the summons will not issue.[30]

D. Subpoena Duces Tecum

¶12 The Act is generally held to encompass a subpoena duces tecum,[31] though a narrow reading limits it to a subpoena ad testificandum.[32]

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[28] Matter of State Grand Jury Investigation, 136 N.J. Super. 163, 171, 345 A.2d 337, 341 (Superior Ct. of N.J., App. Div. 1975) (witnesses argue that certificate should be quashed since use immunity of the demanding state is less than transactional immunity of their own state):

> [W]e know of no authority, nor does justice or reason mandate that there be an identity of procedural or substantive rules in participating states in order for uniform acts to be applied.

[29] Axelson, supra note 22 (witness argued that his relationship with his patients would suffer; court answered that some burden is borne by all witnesses).

[30] In re Mayers, 169 N.Y.S.2d 839 (Ct. Gen. Sess., New York County, 1957); Wright v. State, 500 P.2d 582, 588 (Okla. Crim. App. 1972).

[31] In re Saperstein, supra note 21, 30 N.J. Super. at 377, 104 A.2d at 846 (statute defines "summons" as including "subpoena", and New Jersey case law has included subpoena duces tecum under that term. Statutory protection afforded the witness may also be given to the materials under the subpoena duces tecum, thus it cannot be attacked in the demanding state). See also In re Bick, 82 Misc.2d 1043, 372 N.Y.S.2d 447 (Sup. Ct. N.Y. County 1975) (citing Saperstein).

[32] In re Grothe, supra note 20, 59 Ill. App.2d at 10, 208 N.E.2d at 586 (court distinguishes Saperstein, supra note 21, in that Illinois case law does not define "subpoena" as including "subpoena duces tecum").

E. Appeals

¶13 Although an appeal of the determination at the hearing is discouraged,[33] it has been allowed in certain cases.[34]

III. QUASHING A GRAND JURY SUBPOENA

A. Federal Courts

1. Generally

¶14 The grand jury can subpoena any witness without having to give a reason.[35] The subpoena may call the witness to testify

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[33] In In re Harvey, supra note 25, the court noted that appealability of the order is "gravely doubtful" but allowed the appeal. 10 App. Div. 2d, 198 N.Y.S.2d at 898. The Court of Appeals, however, dismissed the appeal and directed the Appellate Division to dismiss the appeal taken to that court. 8 N.Y.2d at 866, 168 N.E.2d at 716, 203 N.Y.S.2d at 914.

[34] See In re Saperstein, supra note 21, In re Grothe, supra note 20 (question of appealability not raised). In New York, a denial of a motion to quash might be appealed under N.Y. Civ. Prac. L. § 2304, see note 73, infra, but this question has yet to be directly considered.

[35]

> The grand jury does not need to have probable cause to investigate; rather its function is to determine if probable cause exists. And if probable cause is not required to investigate, it follows that probable cause is not required to make the preliminary showing necessary to call a witness whose testimony may shed light on criminal activity which the grand jury must investigate if the national interest is to be effectively served.

In re Grand Jury Witnesses, 322 F. Supp. 573, 576 (N.D. Cal. 1970); Fraser v. United States, 452 F.2d 616, 620-21 (7th Cir. 1971). See also National Lawyer's Guild, Representing Witness Before Federal Grand Juries § 35(e) (1976) [hereinafter cited as 1976 Guild.] (advice concerning how a witness learns the subject of the grand jury investigation).

soon after it is served.[36] A United States attorney may not issue a subpoena that orders the witness to appear at his office and the prosecutor may not interrogate a witness outside the presence of the grand jury.[37] Once a subpoena has been properly issued and served a subsequent subpoena is not required to compel later appearances of the witness.[38] If the United States attorney has probable cause to believe a witness will avoid service or fail to comply with a subpoena, the government may make a material witness arrest.[39]

2. Venue

¶15 A motion to quash a grand jury subpoena should be made in the district court having supervision over the grand jury.[40] Although this may cause hardship to a witness subpoenaed from another state, no direct authority has been found allowing a motion in a district other than that from which the subpoena issued.[41]

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[36] 1976 Guild, supra note 35, at § 3.3(f).

[37] United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970); Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); United States v. Johns-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962); Matter of Archuleta, 432 F. Supp. 583, 595 (S.D.N.Y. 1977).

[38] United States v. Snyder, 413 F.2d 288 (9th Cir.); cert. denied, 396 U.S. 907 (1969), Blackmer v. United States, 284 U.S. 421 (1932).

[39] Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971) (the criteria for making a material witness arrest are that there be probable cause to believe that the witness' testimony is material and that it may be impracticable to secure the witness' presence by subpoena); United States v. Feingold, 416 F. Supp. 627 (E.D.N.Y. 1976).

[40] 1976 Guild, supra note 35, at § 66.

[41] Id.

3. Standing

¶16 In general, only the witness against whom the subpoena is directed has standing to move to quash it,[42] but a person whose papers are in the temporary possession of a third-party custodian may move to quash the subpoena against the third party on Fifth Amendment grounds.[43]

4. Grounds for challenges

¶17 There are several technical challenges that may be grounds to quash a subpoena. If the subpoena is not properly issued or served it may be quashed.[44] Rule 17(a) of the Federal Rules of Criminal Procedure and Rule 45(a) of the Federal Rules of Civil Procedure require that a subpoena be signed and sealed by the clerk of the court. A subpoena may be served by a United States Marshall, his deputy, a person not a party to the case,[45] or by an FBI agent.[46]

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[42] Application of Iaconi, 120 F. Supp. 589 (D. Mass 1954) (a defendant cannot object to grand jury subpoena or other witnesses. The court said, however, that it could quash under its supervisory power without a motion, responding to suggestions made by counsel, litigants, or strangers). Cf. In re Grand Jury for the November 1974 Term, 415 F. Supp. 242 (W.D.N.Y. 1976). (Court's general responsibility to oversee grand jury's work and to police excesses carries with it the authority to insure fair procedures).

[43] Couch v. United States, 409 U.S. 322, 333 (1973) (Fifth Amendment meant to prevent personal compulsion, which is not involved when a third-party custodian is subpoenaed. The Court recognizes that there may be situations: [W]here constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact).

[44] United States v. Davenport, 312 F.2d 303 (7th Cir.), cert. denied, 374 U.S. 841 (1963).

[45] Fed. R. Crim. Proc. 17(d); Fed. R. Civ. Proc. 45(c).

[46] 18 U.S.C. § 3052 (1970).

Service must be made personally.[47] The witness may also claim that the notice of subsequent appearances is unclear or ambiguous,[48] or that he is not competent to testify.[49] Failure to raise these procedural challenges prior to the witness' appearance may constitute a waiver of the defect.[50]

¶18 Motions to quash a subpoena based on substantive challenges are often considered premature.[51] A witness may still raise the issues in order to gain time for preparation and to alert the judge to the issues.[52] A witness may claim that the composition of the grand jury is not representative of the population

[47]Fed. R. Crim. Proc. 17(d); Fed. R. Civ. Proc. 45(c).

[48]1976 Guild, supra note 35, at § 4.10(c).

[49]See In re Loughram, 276 F. Supp. 393, 430 (C.D. Cal. 1967) (tests for determining a witness' competency are:

(1) the witness must have sufficient understanding to comprehend the obligation of an oath, and to tell the truth before the grand jury.

(2) the witness must be capable of giving a reasonably correct account of the matters he has seen or heard.

(3) these two issues are to be determined by the court based upon the testimony of expert medical witnesses and upon the court's own examination.

(4) the court must be assured that the witness' physical and mental health will not be harmed in any significant way).

[50]In re Meckley, 50 F. Supp. 274 (M.D. Pa.), aff'd, 137 F.2d 310 (3d Cir.), cert. denied, 320 U.S. 760 (1943) (After the defendant failed to raise a procedural defect prior to the contempt hearing, the court held that the defendant's appearance before the grand jury constituted a waiver of the claim.); United States v. Johns-Manville Corporation, 213 F. Supp. 65 (E.D. Pa. 1962).

[51]1976 Guild, supra note 35, at § 4.11.

[52]Id. at §3.8(c).

of the district[53] or that the grand jury is prejudiced.[54] The witness may also raise First,[55] Fourth,[56] and Fifth[57] Amendment challenges. The witness may also raise challenges based on privilege.[58] Where a privilege objection is raised against a subpoena duces tecum, the court will inspect the materials to determine whether they are privileged.[59] A witness may also claim that the subpoena was issued for purposes that are not within the proper function of the grand jury.[60]

[53]Alexander v. Louisiana, 405 U.S. 625 (1972). (The Court quashed an indictment because Negro citizens were included on the grand jury list in only token numbers); Castenida v. Partida, 430 U.S. 482 (1977) (habeus corpus relief granted to prisoner indicted by a grand jury on which Mexican-Americans were underrepresented); Matter of Archuleta, 432 F. Supp. 583 (S.D.N.Y. 1977) (witness' challenge to grand jury array for systematic exclusion of "Latins and Hispanic people" failed for lack of standing). See generally The Federal Jury Selection and Service Act of 1968, 18 U.S.C. § 1861 (1970).

[54]Lawn v. United States, 355 U.S. 339 (1958); 1976 Guild, supra note 35, at § 4.11(b).

[55]Branzberg v. Hayes, 408 U.S. 665 (1972), see infra ¶76; Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

[56]United States v. Calandra, 414 U.S. 338, 346 (1973) (although the exclusionary rule is inapplicable to grand jury proceedings, the grand jury itself may not invade a constitutionally protected interest); United States v. Washington, 431 U.S. 181, 185 n.3 (1977).

[57]Lawn v. United States, 355 U.S. 339, 349-50 (1958).

[58]Infra, ¶¶ 59-87; See also 1976 Guild, supra note 35, at § 4.11(f).

[59]Schwimmer v. United States, 232 F.2d 855, 864 (8th Cir.) cert. denied, 352 U.S. 833 (1956) (court appoints a master to examine documents to determine whether they are protected by attorney-client privilege).

[60]In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956) (the grand jury investigation may not be used as a subterfuge to obtain records that could not have been obtained in a civil proceeding); In re National Window

¶19 A subpoena duces tecum may be quashed on Fourth Amendment grounds if it is "unreasonable," and Fed. R. Crim. P. 17(c) authorizes the court to quash if the subpoena is "unreasonable and oppressive." The authority under Rule 17(c) is not dependent on the Fourth Amendment,[61] but courts usually consider them together.

¶20 To be reasonable, the subpoena must seek materials relevant to the grand jury inquiry,[62] but courts are split on who bears the burden of proving relevance. It has been held that the government must make a minimal showing of relevance,[63] but the Second Circuit approach is that the witness must show there is no conceivable relevance to any legitimate subject of investigation.[64] This may be an impossible burden.[65]

¶21 A subpoena duces tecum may also be challenged on the grounds that it does not specifically describe the items called for.[66] In addition, the objects called for must cover a reasonable time period,[67] the burden of compliance must not be oppressive,[68] and the person served must have possession or control of the items sought.[69]

60(continued)
Glass Workers, 287 F.219 (N.D. Ohio 1922) (the grand jury may not be used to prepare for a pending criminal trial): United States v. Remington, 191 F.2d 246 (2d Cir. 1951) (an investigation may not be called for the express purpose of intimidating witnesses); In re September 1971 Grand Jury (Mara), 454 F.2d 580, 585 (7th Cir. 1971), rev'd on other grounds, United States v. Mara, 410 U.S. 19 (1973) (the grand jury may not be used to pursue a "general fishing expedition").

61 Application of Radio Corp. of America, 13 F.R.D. 167, 171 (S.D.N.Y. 1952) (Rule 17(c) gives the court powers in addition to those granted under the Fourth Amendment, but the tests are considered together).

62 See In re Grand Jury Subpoena Duces Tecum (Local 627), 203 F. Supp. 575, 578 (S.D.N.Y. 1961); United States v. Gurole, 437 F.2d 239, 241 (10th Cir. 1970), cert. denied sub nom. Baker v. United States, 403 U.S. 904 (1971). In re Corrado Brothers, 367 F. Supp. 1126, 1130 (D.C. Del. 1973).

63 In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (ed Cir. 1973). See also In re Corrado Brothers, Inc. supra note 62, at 1131; In re Grand Jury Supoena Duces Tecum, 391 F. Supp. 991, 995, 997 (D.R.I. 1975) (government's prima facie showing of relevance is irrebuttable. Government need only show that there is an investigation and that documents bear some possible relation, however indirect, to the subject of the investigation).

64 See In re Horowitz, 482 F.2d 72, 79-80 (2d Cir.), cert. denied 414 U.S. 867 (1973) (as to older documents, government must make minimal showing, but as to recent documents, witness must show there is no conceivable relevance); In re Morgan, 377 F. Supp. 281, 284 (S.D.N.Y. 1974) (citing Horowitz and noting that the Second Circuit dissents from Schofield on the question of relevance).

65 Schofield, supra note 63, at 92, 93 (notes the difficulty a witness would have in showing irrelevance because of the secrecy of grand jury proceedings, and would allow the witness to utilize discovery to prove that there is no relevance). The District Court of Rhode Island, though following Schofield generally, would not allow discovery. In re Grand Jury Subpoena Duces Tecum, supra note 63, at 995.

66 Hale v. Henkel, 201 U.S. 43 (1906); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Brown v. United States, 276 U.S. 134 (1928).

67 In re Eastman Kodak Company, 7 F.R.D. 760 (W.D.N.Y. 1947); In re United Shoe Machinery Corp., 73 F. Supp. 207 (D. Mass. 1947); In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192 (N.D. Ga. 1975).

68 In re Shoe Machinery Corp. 73 F. Supp. 207 (D. Mass. 1947); Application of Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949); cf. Petition of Borden Co., 75 F.Supp. 857 (N.D. Ill. 1948) (a subpoena requiring a search of files covering a twenty year period was not unreasonable).

69 1976 Guild, supra note 35, at §4.12(e).

5. Appeal

¶22 Denial of a motion to quash a subpoena is generally considered not appealable.[70] Appeals by the government have been allowed from orders granting a witness's motion to quash or modify.[71] A witness seeking review may refuse to comply, be held in contempt, and appeal the contempt proceeding.[72]

B. State Courts

¶23 Although Fed. R. Crim. P. 17(c) is not available in state courts, most federal cases dealing with subpoenas were decided on constitutional grounds, and there is thus little difference betweeen state and federal law in this area. One important difference is that in New York, denial of a motion to quash a subpoena is appealable as of right if the subpoena

[70] Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("To be effective, judicial administration must not be leaden-footed.") See also United States v. Ryan, 402 U.S. 530, 532-533 (1971) (the court notes that there is an exception to the rule of non-appealability in the case where a third-party custodian of records is not likely to risk contempt to judge validity of the subpoena. In that case, the owner can appeal the denial of a motion to quash. See, e.g., Schwimmer v. United States, supra note 59; United States v. Guterma, 272 F.2d 344 (2d Cir. 1959) (appeals allowed). See also 1976 Guild, supra note 35, at §4.8 (c)(e)(Advises witnesses to seek immediate certification for appeal from the district court).

[71] United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

[72] Cobbledick v. United States, supra note 70, at 327; See also 1976 Guild, supra note 35, at § 3.14 (witness strategy on appeal from contempt proceedings).

was issued by a court having both civil and criminal jurisdiction.[73] In New Jersey, appeal does not lie as of right.[74] Florida allows interlocutory appeal from both the denial and the granting of a motion to quash.[74a] The cases do not specify whether appeal is of right or by leave of the court.

[73] A motion to quash a grand jury subpoena may be made under N.Y. Civ. Prac. L. § 2304 if the court from which the subpoena issued has civil as well as criminal jurisdiction. Matter of Queens Republican County Committee, 49 App. Div. 2d 956, 374 N.Y.S.2d 57 (2d Dep't 1975). An order denying a motion to quash a subpoena issued out of a court having only criminal jurisdiction is not appealable, since appeal lies only by virtue of statute, and the Criminal Procedure Law does not permit appeal of such orders. In re Ryan, 306 N.Y. 11, 16, 114 N.E.2d 183, 185 (1953) (denying appeal in the Court of General Sessions, which has only criminal jurisdiction). If the court has civil as well as criminal jurisdiction, the order can be appealed as of right. Cunningham v. Nadjari, 39 N.Y.2d 314, 347 N.E.2d 915, 383 N.Y.S.2d 590 (1976) (supreme court); Boikess v. Aspland, 24 N.Y.2d 136, 247 N.E.2d 135, 299 N.Y.S.2d 163 (1969) (county court). N.Y. Civ. Prac. L. § 2304 states that the motion to quash shall be made in the court in which the subpoena is returnable. In Massachusetts it is possible to appeal a final court order enforcing a subpoena. Finance Commission of Boston v. McGarth, 343 Mass. 754, 180 N.E.2d 808 (1962).

[74] Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 407. 120 A.2d 94, 98 (1956) (involving an appeal of an order refusing to quash a subpoena in pretrial discovery):

> In passing upon pretrial discovery orders, such as a denial or a motion to quash or limit a subpoena, addressed to either a party or a non-party witness, this court has...approved the pertinent principles expounded in the federal cases and has held the orders to be interlocutory and non-appealable as of right.

The court then cites Cobbledick v. United States, supra note 69, that a witness may disobey the subpoena, be held in contempt, and appeal the contempt order. The court also suggests that appeal may be had by leave of court if not as of right. 20 N.J. at 409, 120 A.2d at 99-100.

[74a] Atlantic Coast Line R. Co. v. Allen, 40 So. 2d 115 (Fla. 1949); Franklyn S. Inc. v. Riesenbeck, 166 So. 2d 831 (Fla. Dist. Ct. App. 1964); Pembroke Park Lanes, Inc. v. High Ridge Water Co., 186 So. 2d 85 (Fla Dist. Ct. App. 1966); Imparato v. Spicola, 238 So. 2d 503 (Fla. Dist. Ct. App. 1970).

IV. OTHER MOTIONS AND OBJECTIVES

¶24 A witness may desire to delay testifying until the last possible moment hoping to avoid jail for as long as possible, to gain time for preparation, or to have the subpoena withdrawn or postponed.[75] The witness may therefore make a variety of motions. If the witness is called to testify soon after the subpoena is served, the witness may make a motion for a continuance.[76] Generally, these motions are denied.[77] A witness may also seek injunctive relief[78] or a protective order.[79] It is also possible for a third party to intervene to challenge the introduction of evidence or the purpose of the grand jury proceeding.[80]

¶25 During the questioning, the witness may object to particular questions.[81] A witness is not allowed to challenge the relevancy of questions,[82] but a witness may attempt to show prejudicial prosecutiorial misconduct.[83] A prosecutor may not question a witness for the sole purpose of causing him to answer inconsistently and to commit perjury.[84]

¶26 The ABA has drafted standards for prosecutorial conduct in grand jury proceedings.[85] These standards are not binding upon prosecutors or the courts, but they may be useful as guidelines for professional conduct and they may be used by witnesses to attack prosecutorial conduct.[86] The ABA Standards state:

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[75] 1976 Guild, supra note 35, at §3.9(f), 3.12(d).

[76] Id. at §§ 3.8(b); 4.4.

[77] United States v. Polizzi, 323 F. Supp. 222, 225-226 (C.D. Cal.), rev'd on other grounds per curiam 450 F.2d 880 (9th Cir. 1971); 1976 Guild, supra note 35, at §4.4.

[78] 1976 Guild, supra note 35, at ch. 6.

[79] Id. at § 5.3.

[80] 1976 Guild, supra note 35, at § 3.8(d):

> When the grand jury is investigating matters which have already been the subject of an indictment, the indicted defendant or defendants may seek to intervene to enjoin the proceedings or obtain a protective order. The basis for such a motion would be that the grand jury is being used to obtain evidence to be used in the trial of their case.

[81] 1976 Guild, supra note 35, at § 3.11:

> [T]he attorney should look for objections raised by particular questions, such as questions which ask for an opinion, which infringe upon First Amendment protections, or which inquire into privileged communications.

[82] United States v. Doe, 460 F.2d 328 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973); United States v. Weinberg, 439 F.2d 743, 750 (9th Cir. 1971); Blair v. United States, 250 U.S. 273, 282 (1919).

[83] United States v. DiGrazia, 213 F. Supp. 232 (N.D. Ill. 1963) (presence of prosecutor during deliberations may be grounds for quashing the indictment; United States v. Whitted, 325 F. Supp. 520 (N.D. Neb. 1971), rev'd on other grounds, 454 F.2d 642 (8th Cir. 1972) (when a witness is asked questions not pertinent to the investigator and which are prejudicial the indictment must be dismissed as violative of due process, but the court does not have the power to dismiss following the return of a verdict); See also Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1115 n.29 (E.D. Pa. 1976).

[84] Brown v. United States, 245 F.2d 549 (8th Cir. 1957); See also States v. Schamberg, 146 N.J. Super 559, 370 A.2d 482 (App. Div. 1977) (Although expressing disapproval, the court held that it was not prosecutorial misconduct to state, before the grand jury, that the prosecutor had reason to believe that the witness had just perjured himself); United States v. Doss, 563 F.2d 265, 274-77 (6th Cir. 1977).

[85] A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Approved Draft, 1971) [Hereinafter cited as ABA Standards].

[86] See 1976 Guild, supra note 35, at § 10.3; United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970).

> The prosecutor should not make statements or arguments to influence grand jury action in a manner which would be impermissible at trial before a petit jury.[87]

The ABA Standards also provide guidelines for the examination of witnesses[88] and define the scope and quality of evidence that should be presented to the grand jury.[89]

V. ROLE OF COUNSEL IN THE GRAND JURY

¶27 There is no constitutional right to counsel in the grand jury room,[90] even if a witness has already been indicted on a

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[87] ABA Standards, supra note 85, at §3.5(b).

[88] ABA Standards, supra note 85, at §5.7.

[89] ABA Standards, supra note 85, at §3.6.

[90] A witness "before a grand jury cannot insist, as a matter of constitutional right, on being represented by counsel . . . . "In re Groban, 352 U.S. 330, 333 (1957); United States v. Allen, 556 F.2d 720, 723 (4th Cir. 1977); United States v. O'Kane, 439 F. Supp. 211, 214 (S.D. Fla. 1977). See also Fed. R. Crim. P. 6(d) (prescribes who may be present in the grand jury room). People v. Iannello, 21 N.Y.2d 418, 423, 235 N.E.2d 439, 442, 288 N.Y.S.2d 462, 467, cert. denied, 393 U.S. 827 (1968) (need for secrecy in grand jury proceedings and exclusion of all but authorized persons from the grand jury room). But see 1978 N.Y. Laws, Ch. 447, eff. Sept. 1, 1978 (to be codified as N.Y. Crim. Proc. L. § 190.50) (permitting lawyers of clients who have waived immunity inside the grand jury room. State v. Cattaneo, 123 N.J. Super. 167, 172, 302 A.2d 138, 141 (App. Div. 1973); Commonwealth v. Gibson, 333 N.E. 2d 400, 405 n.2 (1975). Although there is no constitutional right to counsel in the grand jury room, five states allow it. See Kan. Stat. Ann. § 22-3009 (1974); Mich. Comp. Laws § 767.3 (Mich. Stat. Ann. § 28.943 (1972); S.D. Compiled Laws Ann. § 23-30-7 (Supp. 1977); Utah Code Ann. § 77-19-3 (Supp. 1977); Wash. Rev. Code Ann. § 10.27.120 (Supp. 1977).

charge separate from the subject of the investigation.[91] Escobedo v. Illinois,[92] Miranda v. Arizona,[93] and United States v. Wade,[94] indicated that one's right to counsel attached "at any stage of the prosecution formal or informal...where counsel's absence might derrogate from the accused's right to a fair trial."[95] Such "critical" stages were to be determined by analyzing "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[96] In the light of these cases, strong arguments have been made that the right to the presence of counsel ought to be extended to the

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[91] United States v. George, 444 F.2d 310 (6th Cir. 1971) (a witness who had been indicted on an unrelated charge was not entitled to have counsel present in the room). The rule may be different if the witness has been indicted on a charge related to the grand jury's investigation. See United States v. Doss, 545 F.2d 548, 552 (6th Cir. 1976):

> Where a substantial purpose of calling an indicted defendant before a grand jury is to question him secretly and without counsel present without his being informed of the nature and cause of the accusation about a crime for which he stands already indicted, the proceeding... violates... the Sixth Amendment....

aff'd on rehearing, 563 F.2d 265 (1977).

[92] 378 U.S. 478 (1964).

[93] 384 U.S. 436 (1966).

[94] 388 U.S. 218 (1967).

[95] Id. at 226.

[96] Id.

grand jury especially in the case of a target.[97] Indeed, it has been urged that such a result is nothing more than an extension of Escobedo in order to protect the rights of the suspect in a white collar criminal case.[98]

¶28 In general, however, a witness is only allowed to consult with counsel outside of the jury room.[99] It is not clear that this is a right,[100] and an indigent witness is

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[97] See W. Steele, "Right to Counsel at the Grand Jury State of Criminal Proceedings", 36 Mo. L. Rev. 193 (1971); R. Meshbesher, "Right to Counsel before Grand Jury", 41 F.R.D. 189 (1967); 1976 Guild, supra note 35, at §7.5.

[98] R. Meshbesher, note 97 supra.

> Typically the prime suspect of a crime of violence is taken to the police station for interrogation much more frequently than the prime suspect of a "white collar crime,"... is called before the grand jury. Thus, requiring counsel for a "suspect" in the grand jury room hardly constitutes a radical extension of Escobedo.

Id. at 195.

[99] See People v. Ianniello, supra note 90, 21 N.Y.2d at 423-424, 235 N.E.2d at 442, 288 N.Y.S.2d at 467 (practice in New York State and the Southern District of New York is to allow witness to leave the room and consult with counsel. When a witness demands to see his lawyer to discuss legal rights rather than strategy, he should be allowed to do so). See also United States v. Capaldo, 402 F.2d. 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969):

> We think that the rule under which appellant was free to leave the Grand Jury room at any time to consult with counsel is a reasonable and workable accomodation of the traditional investigatory role of the grand jury... and the self-incrimination and right to counsel provisions of the Fifth and Sixth Amendments.

A recent case has held that a defendant on trial for extortion and perjury was not prejudiced by the introduction of a grand jury transcript which revealed that before answering two crucial questions the defendant left the room to consult with his attorney. United States v. Kopel, 552 F.2d 1265 (7th Cir. 1977).

not entitled to have counsel appointed,[101] though a witness in the posture of a defendant may be.[102]

¶29 Generally, a witness will be allowed to consult with counsel outside the grand jury regarding the extent of immunity granted to him or any privilege he wishes to raise.[103] If he should continue refusing to answer, forcing the state to seek a ruling in open court, counsel for the witness

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[100] Justices Brennan and Marshall, concurring in United States v. Mandujano, 425 U.S. 564 (1976), reason that the Fifth Amendment privilege against self-incrimination is meaningless without the advice of counsel. There is also strong language to that effect in People in Ianniello, supra note 90, 21 N.Y.2d at 424, 235 N.E.2d at 443, 288 N.Y.S.2d at 468:

> As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel.

Nevertheless, there is no case authority holding directly that an ordinary witness has a right to counsel outside the grand jury room.

[101] United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972) (advising an indigent witness that he may consult counsel does not mean that one must be appointed, since the grand jury is not a "critical" stage of criminal proceedings). See also Mandujano, supra note 100, 425 U.S. at 581.

[102] Perrone v. United States 416 F.2d 464 (2d Cir. 1969) (witness who had been arrested was warned of his right to consult with counsel outside the grand jury room and to have cousel appointed if he could not afford it. The questioning was related to the subject of his arrest).

[103] See People v. DeSalvo, 32 N.Y.2d 12, 16-17, 295 N.E.2d 750, 752, 343 N.Y.S.2d 65, 68 (1973), cert. denied, 415 U.S. 919 (1974) (the witness should be permitted to consult with counsel regarding relevancy of questions, extent of immunity conferred, or existence of testimonial privilege. He should raise all privileges at once or risk waiving them). See also In re Goldman, 331 F. Supp. 509 (W.D. Pa. 1971) (witness can consult with counsel regarding applicability of attorney-client privilege).

may be present.[104] If the witness is threatened with contempt for refusal to answer, due process requires that he be allowed to have counsel present during the contempt proceeding.[105]

¶30 An attorney will not himself be held in contempt for advising a witness, in good faith, to refuse documents on the ground that a privilege will be violated.[106]

¶31 Although cousel cannot accompany the witness into the grand jury room, his advice can prevent his client from surrendering any of the privileges available to him.

VI. WARNINGS TO WITNESSES

A. Fifth Amendment--Miranda

1. Federal courts

¶32 A grand jury witness can claim the Fifth Amendment

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[104] Id.

[105] Harris v. United States, 382 U.S. 162, 166 n.4 (1965).

[106] Maness v. Meyers, 419 U.S. 449, 466 (1975):

> A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege...
>
> ...We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert his Fifth Amendment privilege in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation." Id. at 468.

privilege against self-incrimination,[107] but he need not always be warned of the privilege. The Supreme Court has held that if the privilege is not cited in response to a question, and the witness answers the question, the privilege is considered waived as to that question.[108] If the witness is a defendant (under arrest, or has an information or indictment filed when he testifies) he must be warned of his Fifth Amendment privilege,[109] and of his right to counsel,[110] before he testifies.

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[107] United States v. Calandra, 414 U.S. 338, 346 (1974). See also Couch v. United States, 409 U.S. 322 (1973) (where another person received a subpoena for documents which belonged to and would incriminate the witness, the witness generally cannot assert the privilege to prevent surrender of the docuemnts).

[108] Rogers v. United States, 340 U.S. 367, 373 (1951) (once a witness makes an incriminating admission he cannot stop testifying by claiming the Fifth Amendment privilege and refuse to disclose details unless further disclosure would pose a real danger of further incrimination). See also United States v. Monia, 317 U.S. 424 (1943); United States v. Korbel, 397 U.S. 1 (1970); 1976 Guild, supra note 35, at § 13.6 (advice for arguing against a waiver of the privilege).

[109] United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y.) appeal dismissed sub nom. United States v. Roth, 208 F.2d 467 (2d Cir. 1953) (a witness against whom an information has been filed must be warned of his right against self-incrimination and consent to waive it before he answer an incriminating question). United States v. Mackey, 405 F. Supp. 854, 860-61 (E.D.N.Y. 1975).

[110] Perrone v. United States, supra note 102.

¶33 In three recent cases, United States v. Mandujano,[111] United States v. Wong,[112] and United States v. Washington,[113] the Supreme Court has addressed the issue of the Fifth Amendment privilege as applied to grand jury witnesses. Although the impact of these recent decisions is not yet settled, it appears that they would not justify failure to warn a potential defendant or target. Nevertheless, Mandujano and Wong hold that failure to warn will not affect the government's ability to press a perjury charge, but it remains unclear whether some warning as to his privilege and status may be necessary to render his testimony admissible at trial for the substantive offense or to support the validity of an indictment of the target on the substantive charge.

¶34 The issue as to whether warnings were constitutionally mandated, that is, making Miranda applicable to the situation of the potential defendant questioned by a grand jury, has generally not been reached by these cases. The question as to the applicability of a constitutional warning requirement similar to Miranda and the result of failing to so warn has two separate aspects. The first relates to what effect such a failure to warn, if required, would have on incriminating evidence of the substantive charge in the form of documents and admissions elicited from the target. The second relates

[111] 425 U.S. 564 (1976).

[112] 431 U.S. 174 (1977).

[113] 431 U.S. 181 (1977).

to the effect such a failure to warn might have on evidence elicited from the target supporting an independent charge of perjury (That is, the witness' own perjured testimony). Although the first aspect is important, the second aspect of perjury is perhaps more important as the prospect of eliciting damaging evidence from the sophisticated and well counselled target in a political corruption investigation is not very promising.

¶35 The Supreme Court was presented with the perjury issue in United States v. Mandujano.[114] The defendant in that case was a target of a grand jury investigation and was subpoenaed by that grand jury. He was given a general warning as to his privilege not to incriminate himself[115] and his right to have the assistance of counsel but that his attorney could not be present.[116] But the defendant was not given the full Miranda warnings. During his testimony the defendant was asked about certain illegal transactions about which the prosecutor already knew. In response to the questions Mandujano offered perjured testimony, which became the basis for an indictment on perjury charges. The defendant moved to suppress his testimony. The District Court granted the motion.[117]

[114] 425 U.S. 564 (1976).

[115] Id. at 567.

[116] Id. at 567-568.

[117] United States v. Mandujano, 365 F. Supp. 155 (W.D. Texas 1974).

CONTINUED

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¶36 On appeal the Fifth Circuit[118] held that the defendant as a target before the grand jury was entitled to full Miranda warnings.[119] In addition, where a target is unwarned and questioned about an alleged crime "already known to the satisfaction of the prosecuting agency . . . to be guilty of the precise crime,"[120] the perjured testimony elicited would be suppressed as having been gotten in violation of the defendant's due process rights. Hence, although the court found warnings necessary, it based its suppression decision on what it saw as an abuse of the grand jury process.[121]

¶37 The Supreme Court reversed. All of the justices agreed that the Fifth Amendment did not permit one, even if he has a right to refuse to speak, to testify falsely.[122] Such a result is nothing more than an affirmation of the doctrine established by the Court in United States v. Glickstein,[123] where it was stated that "the immunity afforded by the constitutional guarantee [privilege against self-incrimination] relates to the past, and does not endorse

[118] United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), rev'd, 425 U.S. 564.

[119] Id. at 1055.

[120] Id. at 1058.

[121] Id. The court found the proceedings as described above to be "beyond the pale of permissible prosecutorial conduct" and "smacking of entrapment." Id. at n. 8.

[122] No Majority Opinion was written; however, all three opinions agreed on this one point.

[123] 222 U.S. 139 (1911).

erson who testifies with a license to commit perjury."[124]

ry, a crime committed while testifying, is never cted.[125] Though a target's rights under the Fifth ent may include the right to warnings, failure to rn did not give Mandujano the right to lie. Intergly enough, the result reached by the Supreme Court in ano is the same as that which had been reached by most ts previously.[126]

n Mandujano, however, the Chief Justice in a plurality n went beyong the narrow holding necessary to decide The practice of calling the target to testify before nd jury was endorsed,[127] and Chief Justice Burger ted that Miranda, designed to offset the compulsion nt in custodial interrogation, was inapplicable. t was not entitled to remain silent, rather, like er witness he could be subpoenaed and must invoke vilege when called upon to answer an incriminating n.[128] Because Miranda was inapplicable, he had no endment right to the presence of counsel and as a

at 142.

ed States ex rel. Annunziato v. Deecan, 440 F.2d Cir. 1971).

d States v. Di Giovanni, 397 F.2d 409, 412 (7th t. denied, 393 U.S. 924 (1968); Cargill v. United 381 F.2d 849, 853 (10th Cir. 1967); Kitchell v. tates, 354 F.2d 715 (1st Cir. 1966); United States v. 348 F.2d 204 (2d Cir. 1965).

ano, supra note 114, at 573.

t 580.

witness had no Sixth Amendment right to the presence of counsel.[129]

¶39 Mandujano leaves many questions unanswered. While four justices (Burger, White, Powell, Rehnquist) state that Miranda does not apply, that statement is dicta in the sense that the case involved a conviction for perjury, which lack of Miranda warnings would not excuse. Justices Brennan, Marshall, Stewart, and Blackman concurred, solely on this perjury ground.[130] Brennan and Marshall also argued that a putative defendant[131] must be earned that he is currently subject to possible prosecution and that he has a constitutional right to refuse to answer any and all questions that may tend to incriminate him.[132]

¶40 The confusion is compounded by the fact that the witness was warned of his Fifth Amendment privilege and that he could consult with counsel.[133] The court deemed this warning "more than sufficient" to inform the witness of his rights,[134] but did not decide what, if any, warnings must be given to a

[129] Id. at 581.

[130] Id. at 584, 609.

[131] Justices Brennan and Marshall suggest that the test for a putative defendant should be whether the government has probable cause, measured by an objective standard, to suspect that person has committed a crime. Mandujano, supra note 114 at 598.

[132] Id. at 600.

[133] Id. at 567-568.

[134] Id. at 580.

putative defendant.[135] Thus, it is unclear what warnings must constitutionally be given.

¶41 In United States v. Wong,[136] the Supreme Court again addressed the issue of Fifth Amendment warnings as related to an independent charge of perjury. In that case, no effective Fifth Amendment warnings were made.[137] The defendant was advised of her Fifth Amendment privilege prior to any questions being asked, but later moved to dismiss the indictment perjury on the ground that, as a result of her limited command of English, she did not understand the warning and believed her only choice was between self-incrimination and indictment. The Government did not challenge the finding of the district court that the defendant was unwarned of her Fifth Amendment privilege.[138] The district court granted the defendant's motion to suppress the grand jury testimony in the subsequent perjury trial.

¶42 On appeal the Ninth Circuit held that due process required suppression where "the procedure employed by the government was fraught with the danger...of placing [respondent] in the position of either perjuring or

[135] The fact that warnings were provided in this case to advise respondent of his Fifth Amendment privilege makes it unnecessary to consider whether any warning is required.... [F]ederal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins. Id. at 582, n. 7.

[136] 431 U.S. 174 (1977).

[137] Id. at 177.

[138] Id.

incriminating herself."[139] The court concluded that due process required that the testimony be suppressed.[140]

¶43 The Supreme Court reversed, in a unaminous decision, holding that the defendant's failure to understand the government's warning did not warrant the suppression of her grand jury testimony.[141] The Court reiterated its position in Mandujano that the Fifth Amendment privilege does not protect perjury.[142] The Court also rejected the due process argument quoting Bryson v. United States:[143] "Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them."[144]

¶44 In United States v. Washington, the Supreme Court addressed the issue of whether a "target" witness must be warned of his status.[145] In that case, the defendant was called before the grand jury, but he was not advised that he might be indicted on a criminal charge relating to the grand jury investigation. The defendant was informed of his Fifth

[139] United States v. Wong, 553 F.2d 576, 578 (9th Cir. 1974).

[140] Id.

[141] United States v. Wong, 431 U.S. 174, 177-80 (1977).

[142] Id.

[143] 396 U.S. 64 (1969).

[144] Id. at 72.

[145] 431 U.S. 181 (1977).

Amendment rights.[146] The Superior Court of the District of Columbia suppressed the testimony and dismissed the indictment finding that the defendant had not waived his Fifth Amendment privilege and was not properly informed of his rights.[147]

¶45 The District of Columbia Court of Appeals affirmed the suppression order, but refused to dismiss the indictment.[148] The court of appeals took the position that the prosecutor should inform the witness that he was a potential defendant.[149]

¶46 The Supreme Court reversed, holding that a witness need not be informed that he is a potential defendant. The Court stated:

> Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to First Amendment rights.[150]

¶47 Justice Brennan, with whom Justice Marshall joined, dissented, taking the position that failure to warn a witness that he is a target was grounds for dismissal of the indictment when the:

> grand jury inquiry became an investigation directed against the witness and was pursued with the purpose of compelling him to give self-incriminating testimony upon which to indict him.[151]

[146] Id. at 183-84.

[147] Id. at 185.

[148] United States v. Washington, 328 A.2d 98 (D.C. 1974).

[149] Id. at 100.

[150] 431 U.S. at 189.

[151] Id. at 193.

¶48 The results in Mandujano, Washington, and Wong do not militate against the possibility that the Fifth Amendment requires some warning to be given. In Washington, the Court again sidestepped the issue of whether any warnings are constitutionally required.[152]

¶49 Although the Supreme Court appears to be leaning away from requiring warnings, several circuit courts, at least prior to these recent decisions, have explicitly favored warning witnesses.[153] Warning the target of his status has been labelled prudent,[154] and further, many courts have often pointed to such warnings as supporting the basic fairness of the proceedings where a target has been called.[155]

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[152] Id. at 186. Notwithstanding the Supreme Court holdings, the Justice Department has decided as a matter of internal policy to give a Miranda warning to all grand jury witnesses. The warning is printed on a card that will be appended to all grand jury subpoenas. 22 Crim. L. Rep. 2423 (Feb. 15, 1978).

[153] See United States v. Luxenberg, 374 F.2d 241, 246 (6th Cir. 1971); United States v. Morrison, 535 F.2d 223, 228 (3rd Cir. 1976).

[154] United States v. Scully, 225 F.2d 113 (2d Cir. 1955).

[155] See e.g., United States v. Friedman, 445 F.2d 1076, 1088 (9th Cir. 1971); United States v. Corallo, 413 F.2d 1306, 1330 (2d Cir.) cert. denied, 396 U.S. 958 (1969); Kitchell v. United States, 354 F.2d 715 (1st Cir. 1966).

¶50 In United States v. Jacobs,[156] the Second Circuit, acting in its supervisory capacity, ruled that the target was to be warned of his status. It did so in order to make uniform the practice of so warning targets throughout the circuit in addition to the general warnings as to one's right not to incriminate oneself usually given to all witnesses in the circuit. In establishing this rule for the circuit, the court pointed to the ABA Standards that recommend warning the target of his status[157] but explicitly refused to determine whether any warnings were mandated by the Constitution.[158]

¶51 On the other hand, whether failure to warn will result in the quashing of the indictment is a different issue. A district court has found quashing the indictment to be the proper remedy,[159] and the Jacobs[160] case also resulted in the quashing of the indictment. But it must be remembered that there the court acted in its supervisory capacity to enforce a uniform practice throughout the

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[156] 531 F.2d 87 (2d Cir. 1976), vacated and remanded, 429 U.S. 909 (1976) (remanded to the Court of Appeals for further consideration in light of United States v. Mandujano. Four justices dissented).

[157] ABA Project on Standards for Criminal Justice Standards Relating to the Prosecution Function (tent. draft 1970), §3.6(d).

[158] United States v. Jacobs, supra note 156, at 89.

[159] United States v. Kreps, 349 F. Supp. 1049 (W.D. Mich. 1972).

[160] See n. 156 and accompanying text supra.

circuit. It is unlikely that the Supreme Court would find the quashing of the indictment necessary where other evidence was heard by the grand jury and it is found that the target's rights were violated by failing to warn him of his rights. Previous decisions by the Supreme Court have indicated that the validity of an indictment will not be questioned merely because the grand jury considered evidence obtained in violation of the defendant's constitutional rights,[161] although such evidence will not be available at trial.[162]

¶52 Given the lack of clarity as to the necessity of warnings as a constitutional matter, the fact that the practice of so warning targets is one which many courts have pointed to approvingly, the ABA Standards and the Second Circuit's recent ruling, the prudent course would be to warn all targets as to their right to refuse to answer incriminating questions, and their right to consult with cousel outside of the grand jury room.

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[161] United States v. Calandra, 414 U.S. 338 (1974); United States v. Blue, 384 U.S. 251 (1966). As stated by the court in Calandra:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence; [cites omitted] or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

Id. at 344-345.

[162] See Lawn v. United States, 355 U.S. 339 (1958).

¶53 Finally, if a target is not warned any admissions he might make may be lost. Nevertheless, his testimony will still be available for the purpose of impeaching his testimony should he choose to take the stand on his own behalf.[163]

2. State courts

¶54 Without a constitutional imperative the states are virtually at liberty to develop singular approaches to the warnings problem generally and target witness practice particularly.[164]

¶55 New York: All grand jury witnesses receive immunity from prosecution with respect to any transactions uncovered by testimony solicited by the grand jury.[165] A witness cannot be compelled to answer an incriminating question until he is told the extent of the immunity granted to him.[166]

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[163] See Harris v. New York, 401 U.S. 222 (1971).

[164] See State ex rel. Pollard v. Criminal Court of Marion County, 329 N.E.2d 573 (Indiana 1975) (witness, whether or not he's a target, should be warned of his privilege against self-incrimination, since the grand jury may on its own shift the focus of the investigation).

[165] N.Y. Crim. Proc. Law § 190.40 (McKinney Supp. 1978). It is interesting to note that prior to the enactment of § 190.40, the New York Court of Appeals construed the state constitution's protection against self-incrimination to require automatic use immunity for putative defendants. People v. Steuding, 6 N.Y.2d 214, 160 N.E. 468, 189 N.Y.S.2d 166 (1959); People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d (1961), cert. denied, 374 U.S. 104 (1963).

[166] People v. Franzese, 16 App. Div. 2d 804, 228 N.Y.S.2d 644 (2d Dep't 1962), aff'd 12 N.Y.2d 1039, 190 N.E.2d 25 239 N.Y.S.2d (1963) (witness cannot be held in contempt for refusing to answer questions until he is told the extent of immunity given to him). See also Lefkowitz v. Cunningham, No. 76-260 (June 13, 1977) (The Court held unconstitutional the New York law which automatically stripped political party officers of their party jobs if they refused to waive immunity and testify before a grand jury).

¶56 New Jersey: As a "general rule" a grand jury witness is not entitled to advice of his privilege against self-incrimination.[167] The New Jersey Supreme Court has on several occasions approved the principle that a target must be informed of his status and of his Fifth Amendment privilege.[168] Failure to warn does not excuse perjury.[169]

¶57 Massachusetts: There is little case law in Massachusetts, but state courts would find support for warning target witnesses of their Fifth Amendment privilege in United States v. Chevoor.[170]

¶57a Florida: Florida law requires neither that a witness be advised of the nature of the inquiry[170a] nor of his privilege against self-incrimination.[170b] Testimony may be compelled over

[167] State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955); See also State v. DeCola, 33 N.J. 335, 164 A.2d 729 (1960); State v. Williams, 59 N.J. 493, 284 A.2d 172 (1971); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973) (In view of the secrecy of grand jury proceedings, this burden of proof may be impossible to meet). See Office of the Attorney General, Grand Jury Manual for Prosecutors: Criminal Justice Standards, 5 Crim. Just. Q., Winter 1977, at 24 (recommended procedures when questioning a target).

[168] See e.g., State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955); State v. Williams, 59 N.J. 493, 302 A.2d 172 (1971).

[169] State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973). The Fifth Amendment does not give one the right to commit perjury. Harris v. New York, 401 U.S. 222, 225 (1971).

[170] 526 F.2d 178, 181 (1st Cir. 1975) cert. denied, 400 U.S. 829 (1976). The court cites United States v. Scully (supra note 90) and United States v. Luxenberg (supra note 112) for the proposition that a putative defendant should be warned of his Fifth Amendment privilege, but this is dicta.

[170a] Wheeler v. State, 311 So. 2d 713 (Fla. Dist. Ct. App. 1975), cert. denied, 426 U.S. 948 (1976).

[170b] Orosz v. State, 334 So. 2d 26 (Fla. Dist. Ct. App.); appeal dismissed, 341 So. 2d 292 (1976); State v. Newsome, 349 So. 2d 771 (Fla. Dist. Ct. App. 1977); State v. Perkins, 349 So. 2d 802 (Fla. Dist. Ct. App. 1977).

objection on self-incrimination grounds, in which case the witness is automatically granted transactional immunity.[170c] It is important to note that if a witness does not object prior to giving self-incriminatory testimony, he will probably be understood as waiving both statutory and constitutional immunity, and to testify voluntarily.[170d] The cases do not evidence a right to confer with counsel during interrogation,[170e] but apparently it is a common practice.[170f]

B. Perjury

¶58 There is no duty to warn a witness that he must tell the truth[171] or that he can recant his perjurious testimony.[172] It is unclear whether the government must tell the witness that it has independent evidence that may contradict his

[170c] Fla. Stat. Ann. § 914.04 (West 1973).

[170d] Orosz v. State, supra note 9; State v. Perkins supra note 9.

[170e] Martin v. State, 208 So. 2d 630 (Fla. Dist. Ct. App. 1968); State v. Sievert, 312 So. 2d 788 (Fla. Dist. Ct. App. 1975).

[170f] Lewis v. State, 155 So. 2d 841 (Fla. Dist. Ct. App. 1963); Dineen v. State, 168 So. 2d 703 (Fla. Dist. Ct. App. 1964); Orosz v. State, supra note 9.

[171] United States v. Winter, 348 F.2d 204, 210 (2d Cir.) cert. denied, 382 U.S. 955 (1965) (warning would render oath meaningless). See also United States v. Mandujano, supra note 100, 425 U.S. at 581 (citing Winter), People v. Robinson, 66 Misc. 2d 639, 323 N.Y.S.2d 573 (Kings County 1971). United States v. DeRosa, 438 F. Supp. 548 (D. Mass 1977).

[172] United States v. Gill, 490 F.2d 233, 240-241 (7th Cir. 1973); United States v. Cuevas, 510 F.2d 848, 851-52 (2d Cir. 1975); United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975).

testimony.[173] The government might, however, at least tell him that he has been under investigation.[174]

VII. TESTIMONIAL PRIVILEGES OF GRAND JURY WITNESSES

A. Background

¶59 The duty to testify before a grand jury is subject to claims of privilege, whether established by the Constitution statutes, or the common law.[175] When a witness raises the Fifth Amendment as a ground for refusing to answer a question or produce materials, the prosecutor may immunize the witness and compel testimony.[176]

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[173] In State v. Redinger, 64 N.J. 41, 50, 312 A.2d 129 (1973) a perjury conviction was overturned where the prosecutor, at a pre-trial hearing, did not tell the witness that the state had testimony of other witnesses which would contradict his testimony. The court reversed the conviction "in the interest of fundamental fairness," describing the situation as "entrapment." But the Second Circuit, in United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975) held that a witness, having been sworn to tell the truth, need not be told that the government has independent evidence.

[174] United States v. Camporeale, Id.:

> In any event, the prosecutor in the present case acted fairly, advising Camporeale at the outset of his grand jury testimony that his "activities had been under surveillance for a considerable period of time."

[175] United States v. Calandra, 414 U.S. 338, 346 (1974).

[176] See, e.g., Kastigar v. United States, 406 U.S. 441, 453 (1972) (18 U.S.C. § 6002) (use immunity only--transactional immunity is not constitutionally required). See also 1976 Guild, § 3.6(a) (advice never to testify without immunity); § 3.9(c) (general strategic considerations regarding immunity); § 3.10 (objections to government's application for immunity); 13.13(k) (advice concerning subsequent prosecution of a witness who testified under immunity).

B. Existence of Federal Privilege for Unlawful Surveillance

¶60 Nevertheless, an immunized witness may still be reluctant to testify. He may attempt to avoid testifying by claiming that the questions are based upon an unlawful electronic surveillance. Consequently, he may assert that his testimony may not be received in evidence under the exclusionary rule of 18 U.S.C. § 2515.[177] When the witness makes this calim the government must affirm or deny the alleged unlawful

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[177] Omnibus Crime Control and Safe Streets Act, Title III, § 802, 187 U.S.C. § 2515 (1976):

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury... or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2515 was included in Title III to protect the privacy of those affected by an unlawful surveillance. S. Rep. No. 1097, 90th Cong. 2d Sess. 66 reprinted in [1968] U.S. Code Cong. & Ad. News 2112. "The perpetrator must be denied the fruits of his unlawful actions." Id. at 69. No use whatsoever is to be made of the product of such surveillance. Consequently, the witness usually bases his claim here on an assertion that but for the unlawful electronic surveillance, he would not have been able to ask certain questions. He argues that because section 2515 calls for the exclusion of evidence which is the result of both direct and derivative use of the unlawful electronic surveillance, he need not answer the questions.

the United States Supreme Court intended such an interpretation of its words, the argument has been forcefully made and has been accepted by one court. Thus, a new limitation on a court's civil contempt power may be on the horizon.

3. Federal Criminal Contempt

A. Generally

¶24 Criminal contempt is punitive in nature and is punishable by fine or imprisonment or both.[43] It is intended to serve the interests of the court and society by punishing a witness for deliberate violation of the court's order, and by deterring future violations in much the same way that other criminal penalties are intended to deter violations of the criminal law. The courts have recognized the similarities between criminal contempt and other forms of criminal sanctions in their effect on the witness. Subject to a very limited exception, therefore, most constitutional safeguards that protect a criminal defendant also apply to criminal contempt proceedings.

¶25 One charged with criminal contempt is presumed innocent unless proven guilty beyond a reasonable doubt, and he cannot be compelled to testify against himself.[44] He must be found to have possessed wrongful intent,[45]

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178 Organized Crime Control Act, Title VII, § 702(a), 18 U.S.C. § 3504(a) (1976):

> In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of any unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act (emphasis added)...

For comparable state rules, see infra ¶¶ 72-75. But see In re Millow, 529 F.2d 770, 775 (2d Cir. 1976) ("The majority opinion in In re Evans insofar as it allows a witness to rely on 'mere assertion' seems to us unsound"); Matter of Special February 1975 Grand Jury, 565 F.2d 407, 412-16 (7th Cir. 1977).

179 See, e.g., United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974) (witness's affidavit stating forthe belief that he was the subject of electronic surveillance, identifying telephone numbers, and time period in question sufficient to trigger government's obligation to respond); United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974) (court, in absence of sworn written representation indicating agencies checked, unable to affirm government's denial); United States v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973) (government denial was insufficient as it was conclusory, not concrete and specific); In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972) (witness's mere assertion of unlawful surveillance required government to affirm or deny allegation).

180 Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1911).

181 United States v. Seale, 461 F.2d 345 (7th Cir. 1972); In re Brown, 454 F.2d 999 (D.C. Cir. 1971).

ful electronic surveillance or fails to meet this
n, the witness may not be compelled to testify.[180]

1. Adequacy of witness's claim

A grand jury witness may claim that the questions he is asked are based upon an unlawful electronic surveillance

1. making a mere assertion; or
2. filing a factually based affidavit.[181]

re Evans,[182] the Court of Appeals for the District of
ia held that the mere assertion that an unlawful
p was used was adequate to trigger the government's
tion to respond.[183] It was argued that to require no
han a demand encouraged the elimination of unlawful
ions, while it imposed only a minimal additional burden
government; to require more could well impose a burden

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bard v. United States, 408 U.S. 41 (1972).

1976 Guild, supra note 35, at § 12.8(f) (Challenges to vernment's denial, involving specific showing of onic surveillance of the witness).

F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 972).

F.2d at 1247. Evans was followed in United States v. ino, 500 F.2d 267, 281 (2d Cir. 1974). See also Grusse, 402 F. Supp. 1232, 1234 (D.C. Conn.), aff'd, 2d 157 (2d Cir. 1975).

upon defendants and witnesses that could rarely be met.[184] This argument is not always persuasive. In In re Vigil,[185] the Tenth Circuit rejected the "mere assertion" rule. The court held that the claim asserted was insufficient since the affidavit filed lacked any concrete evidence, or even suggestions, of surveillance. To trigger a government response, factual circumstances from which it can be inferred that the witness was the subject of electronic surveillance must be set forth. This conflict in the circuits is as yet unresolved by the Supreme Court.[186]

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[184] In Evans, Chief Judge Bazelon stated his belief that because electronic surveillance functions best when its object has no idea that his communications are being intercepted, the burden upon defendants to come forward with specific information would, in most instances, be impossible to carry. He further stated that unless the government was in the habit of conducting lawless wiretaps, it could easily refute any ill-founded claims. He suggested that any additional burden upon the government could well be met through employing computors to record and sort government wiretap records. 452 F.2d at 1247-50. Judge Wilkey, in a dissenting opinion, vehemently disagreed, citing House reports concerning the number of inquiries and the time required to process each. 452 F.2d at 1255.

[185] 524 F.2d 209, 214, (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976).

[186] See also In re Millow, 529 F.2d 770 (2d Cir. 1976) (government, in response to claim based upon knowledge that some electronic surveillance was used in the investigation of other persons involved in the same activities leading to examination of witness, submitted authorizing orders to presiding judge; witness was not entitled to more as section 3504 was not intended to turn investigations by government into investigations of government).

¶62 When a grand jury witness claims that the basis of the questions he is being asked is an unlawful electronic surveillance of a third pary (i.e., an attorney), the adequacy of the claim is generally maesured by standards first set out in United States v. Alter, where the Ninth Circuit held that:

> Affidavits or other evidence in support of the claim must reveal
> (1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;
> (2) the dates of the suspected surveillance;
> (3) the outside dates of representation of the witness by the lawyer during the period of surveillance;
> (4) the identity of persons by name or description together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and
> (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.[187]

The witness does not, of course, have to plead or prove his entire case, but he must make a prima facie showing that

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[187] 482 F.2d at 1026. See also In re Vigil, 524 F.2d 209, 216 (10th Cir. 1975) cert. denied, 425 U.S. 927 (1976) (knowledgeable U.S. attorney, in charge of investigation, provided court with assurance that there was no surveillance by filing a responsive, factual affidavit); United States v. D'Andrea, 495 F.2d 1170 (3d Cir.), cert. denied, 419 U.S. 855 (1974) (a check of all agencies involved with an accompanying affidavit not required); Korman v. United States, 486 F.2d 926 (7th Cir. 1973) (an official government denial by officer of a responsible government office, sworn to by the prosecutor in charge of investigation or government agency conducting the grand jury investigation, is required); In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973) (oral testimony that every government agency related to investigation was checked was sufficient denial).

good cause exists to believe that there was an unlawful electronic surveillance.

2. Adequacy of denial

¶63 When the witness's claim is adequate to trigger the duty to respond, the government then has the burden of affirming or denying the allegation. The government may:

1. deny that there was any surveillance;

2. deny that there was any unlawful surveillance;[188] or

3. concede the existence of the electronic surveillance and that it was unlawful.

The government's response could take the form of:

1. a general statement;

2. an affidavit;

3. testimony under oath; or

4. a plenary suppression hearing.

¶64 When the government denies the existence of surveillance, the practical difficulties of proving a negative arise.[189] This dictates a practical rather than a technical approach. The problem is ascertaining a minimum standard.

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[188] Note: If the language of the prosecution in responding under section 3504 to an objection is: "The questions are not based upon an unlawful electronic surveillance," the objecting witness will not be sure if there was a surveillance unless he has received a section 2518(8) (d) inventory notice.

[189] See In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974).

> Proving a negative is, at best, difficult and in our review, a practical, as distinguished from a technical, approach is dictated.

Fortunately, there is a trend towards flexibility, and the necessary scope and specificity of a denial are tied to the concreteness of the claim.[190] As the specificity of the claim increases, the specificity required in response increases accordingly. Thus, a general claim may be met by a general response, but a substantial claim requires a detailed response. A detailed response means that the government agencies connected with the investigation must search their files scrupulously and a summarizing affidavit indicating the agencies contacted and their respective responses must be submitted to the court.[191]

¶65 Although this is the trend, some courts still adhere to the standards set out by the court in Alter for the govern-

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[190] In re Millow, 529 F.2d 770 (2d Cir. 1976) (where a substantial claim is made, the government agencies closest to investigation must file affidavits); In re Hodges, 524 F.2d 568 (1st Cir. 1975) (oral testimony of government attorney gave affirmative assurance that no information had come from unlawful surveillance where claim made one week after refusal to answer and 25 minutes before contempt hearing); In re Buscaglia, 518 F.2d 77 (2d Cir. 1975) (where only basis for claim was refusal of prosecutor to affirm or deny to witness's counsel that there had been surveillance, information tendered by prosecutor under oath to the court sufficient to establish no surveillance); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975) (where witness's claim was in general and unsubstantiated terms, government's unsworn general denial, given at the direction of the court, was sufficient); United States v. See, 505 F.2d 845 (9th Cir. 1074), cert. denied, 420 U.S. 992 (1975) (claim was vague to the point of being a fishing expedition); United States v. D'Andrea, 495 F.2d 1170 (3d. Cir.), cert. denied, 419 U.S. 855 (1974) (where there is no evidence showing government's representations to be false, witness has no right to a hearing as to the existence of wiretap). Matter of Archuleta, 561 F.2d 1059 (2d Cir. 1977) (where the questions are narrow in scope an affidavit by the prosecutor in charge, as distinguised from an all agency search, suffices since the prosecutor knows if his questions are the fruits of illegal surveillance).

[191] See 1976 Guild, supra note 35, at § 12.8(e) (defense challenges to the government's denial involving general factual showings of government inaccuracies or falsehoods concerning electronic surveillance).

ment's response.[192] Generally, under Alter, if the government's position is a denial, it should be given in absolute terms by an authoritative officer speaking with knowledge of the facts and circumstances; the response must be factual, unambiguous, and unequivocal.[193] Usually, such a denial will take the form of an affidavit stating that all agencies authorized to carry on electronic surveillance or those connected with the investigaton[194] have been checked, summarizing the respective responses.[195] The witness then contends that he should be granted a plenary suppression hearing to determine the existence of unlawful electronic surveillance. Such requests are universally denied.[196]

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[192] 482 F.2d 1016, 1026 (9th Cir. 1973). Alter has engendered a great deal of confusion. It has been widely miscited for the proposition that it sets forth a checklist of requirements that must be met by a witness to establish a claim which will trigger the government's obligation to respond under section 3504. This is not the case. Alter applies only to a claim by the witness that the questions he is being asked are tainted by surveillance of conversations in which he did not participate. See United States v. Vielguth, 502 F.2d 1257, 1259 (9th Cir. 1974).

[193] 482 F.2d at 1027.

[194] In re Quinn, 525 F.2d 222 (1st Cir. 1975).

[195] Generally, the denial will be in the form of an affidavit as it facilitates the task of the presiding judge in inspecting the papers. But this is not an absolute requirement. The denial may be in such terms as satisfy the district court judge. See United States v. D'Andrea, 495 F.2d 1170, 1174 n. 12, (3d Cir.), cert. denied, 419 U.S. 855 (1974).

[196] In re Persico, 491 F.2d 1156, 1162 (2d Cir.), cert. denied, 419 U.S. 924 (1974). The request would have to be in the form of a motion to suppress under 18 U.S.C. §2518 (10) which provides:

¶66 When the government acknowledges the existence of a wiretap but denies that it was unlawful, the courts generally accept the production of an authorizing court order as an adequate denial of illegality, providing, of course, that the order is not facially defective.[197] At this point, witnesses usually contend that the order should be turned over to them to examine, while the government counters that an in camera inspection is sufficient. For the most part, the

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196 (continued)

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication,
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

But section 2518 does not provide for such a motion in the context of a grand jury proceeding. The legislative history specifically states:

> Because no person is a party as such to a grand jury proceeding, the provision [section 2518 (10)] does not envision the making of a motion to suppress in the context of such a proceeding itself.

S. Rep. No. 1097, 90th Cong. Sess. 106, reprinted in (1968) U.S. Code Cong. & Ad. News 2195. See Cali v. United States, 464 F.2d 475 (1st Cir. 1972).

[197] See, e.g., In re Marcus, 491 F.2d 901 (1st Cir. 1974)(witness precluded from raising defense that questions were based upon improperly authorized electronic surveillance after judge found the interception order was not facially defective); Cali v. United States, 464 F.2d 475 (1st Cir. 1972) (witness may not make motion to suppress in grand jury).

courts accept the government's position.[198] The proper procedure is described by Judge Gee in In re Grand Jury Proceeding (Worobyzt):[199]

> The petitioner herein did not seek a full-blown adversary hearing... All that he sought was the opportunity to examine the underlying affidavits and the order authorizing the top in short, a peek...
>
> The relevant facts make this case indistinguishable from Persico, and we think the rule there the proper one. Where the only question raised is the facial regularity of a wiretap authorization, we prefer to rely on the district judge's in camera determination.[200]

This procedure, however, is not universally followed. The First Circuit, in In re Lochiatto,[201] has held that an in camera inspection is insufficient protection for the witness. Under Lochiatto, a witness is entitled to an opportunity to examine the authorizing application, affidavits, and orders for facial defects.

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[198] In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) (witness not entitled to inspect authorizing documents where district court judge has examined the facial regularity of the documents in camera); Droback v. United States, 509 F.2d 625 (9th Cir. 1974), cert. denied, 421 U.S. 964 (1975) (witness cannot delay grand jury proceeding to conduct a plenary challenge of electronic surveillance); In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974) (grand jury witness not entitled to hearing to determine whether questions are based upon unlawful surveillance). United States v. Marales, 566 F.2d 402 (2d Cir. 1977) (Persico extended to criminal contempt proceedings).

[199] 522 F.2d 196 (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976).

[200] Id. at 197-98. Such a procedure protects the privacy of all parties while still protecting the interest of the grand jury witness.

[201] 497 F.2d 803, 808 (1st Cir. 1974).

¶67 At this point, the witness would like a plenary suppression hearing to determine the validity of the authorizing orders, but the courts generally refuse to grant such a request.[202]

¶68 When the government concedes that there was an unlawful surveillance or the judge finds the orders to be facially defective, the grand jury witness has the privilege not to answer questions based upon the unlawful surveillance.[203] The problem then arises: how is the privilege vindicated? There are three possibilities:

1. trust the prosecutor not to ask any questions based upon the surveillance, with the witness challenging any suspected questions on an ad hoc basis;
2. have the presiding judge in an in camera proceeding limit the scope of questioning; or
3. hold a plenary suppression hearing to determine the extent of the taint.

There are no definitive cases on this point.[204]

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[202] In re Mintzer, 511 F.2d 471 (1st Cir. 1974); In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

[203] Gelbard v. United States, 408 U.S. 41 (1972).

[204] Standing may be determined by an in camera inspection, Taglianetti v. United States, 394 U.S. 316 (1969), but Alderman v. United States, 394 U.S. 165 (1969) requires an adversary hearing to determine whether a conviction was tainted by the existence of an illegal wiretap.

See Giordano v. United States, 394 U.S. 310 (1969) (Alderman limited to situation where violation present). The argument is that a similar hearing would also be required to determine the extent to which the illegality taints the

3. Refusal to testify after an adverse finding

¶69 If a witness still objects to questions and refuses to answer after an in camera inspection or an adequate denial, he may be held in civil contempt by the court.[205] At this point, the witness will again usually argue that he be granted a plenary suppression hearing, urging that the contempt hearing is a "proceeding" within 18 U.S.C. §2518(10). A contemporaneous contempt proceeding was not, however, held to be different from a grand jury proceeding in In re Persico, and the witness was not granted a suppression hearing. In Persico, the court looked to Justice White's concurring opinion in Gelbard, in which he observed:

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation... Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings.[206]

4. Disclosure

¶70 18 U.S.C. §§2518(8)(d), (9), and (10)[207] give an aggrieved party only limited pretrial disclosure of papers and the product of surveillance. A grand jury witness objecting to

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204(continued)
questioning. See United States v. Seale, 461 F.2d 345,365 (7th Cir. 1972) (sworn testimony, subject to cross-examination, of relevant government witnesses must be submitted to show lack of taint in a contempt proceeding where overheard conversation was link in communication from lawyer to defendant); United States v. Fox, 455 F.2d 131 (5th Cir. 1972) (a defendant who has been illegally overheard has a right not only to the intercept logs, but also to examine the appropriate officials to determine the connection between the records and the case made against him, but he is not allowed to rummage randomly through the government's files); United States v. Fannon, 435 F.2d 364 (7th Cir. 1970) (where there is conceded illegal surveillance of a co-defendant, neither an in camera inspection not the unsworn answers of the prosecutor are adequate); United States v. Cooper, 397 F. Supp. 277 (D. Neb. 1975) (transmittal to the prosecutor of information obtained through unlawful surveillance must be shown).

But see, In re Mintzer, 511 F.2d 471 (1st Cir. 1974) (limits Alderman as a post-conviction case to trial evidence, refusing to allow grand jury witness opportunity to develop case to show the taps found to be unlawful, i.e., without authorizing order on a facially defective order, are arguably relevant to the question posed).

205 28 U.S.C. §1826(a)(1970):

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

205(continued)

> (1) the court proceeding, or
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Contempt that may be purged by compliance is civil. Shillitani v. United States, 384 U.S. 364 (1966). Grand jury witnesses who refuse to testify are usually held in civil contempt since imprisonment for criminal contempt, under federal statutes, is limited to six months absent a jury trial. Cheff v. Schnackenberg, 384 U.S. 373 (1966).

206 408 U.S. 41, 70-71 (1972).

207 18 U.S.C. §2518(8)(d)(1976):

questioning and seeking to see the underlying documents or intercepted communications, therefore, will find himself

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207(continued)

> Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercept communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of--
>
> (1) the fact of the entry of the order or application;
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
> (3) the fact that during the period wire or oral communications were or were not intercepted.
>
> The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for insepection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice...

18 U.S.C. §2518(9) (1976):

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved...

18 U.S.C. §2518(10)(a) (1976):

> ... The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

with highly limited rights.[208] If the surveillance is terminated, he will receive notice in accordance with section 2518 (8) (d). But sections 2518 (9) and (10) are inapplicable to a grand jury proceeding or a contemporaneous civil contempt hearing.[209] If there is a conceded illegality or a finding by the presiding justice that the surveillance was unlawful, it is unclear as to what type of disclosure the aggrieved witness is entitled.[210] But this will be, hopefully, a rare situation. It is, therefore, likely that normally there will be limited disclosure, if any, in connection with the grand jury proceeding.

¶71 But if the contumacious grand jury witness is prosecuted for criminal contempt, he is entitled to a full disclosure under section 2518 (9). If the wiretap is found to be unlawful, then the witness is arguably entitled to disclosure and an adversary taint hearing under:

1. section 2518 (10); or
2. Alderman.[211]

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[208] In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

[209] In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

[210] Supra note 204.

[211] 394 U.S. 165 (1969). United States v. Fox, 455 F.2d 131 (5th Cir. 1972) elaborated upon Alderman; it granted an aggrieved party:

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Alderman, however, granted the right to an adversary hearing to determine the extent of taint in the context of pre-1968 surveillance. The Supreme Court has not reconsidered its holding in Alderman in light of Title III. See United States v. United States District Court, 407 U.S. 297, 324 (1972).

The question now left open is whether under Title III an in camera inspection procedure is authorized to determine whether unlawfully intercepted information is arguably relevant to a prosecution before the material must be turned over to the defendant. The issue of automatic disclosure versus an initial in camera proceeding cannot be settled by looking at a constitutional text. See Taglianetti v. United States, 394 U.S. 316 (1969) (not every issue raised by electronic surveillance requires an adversary proceeding and full disclosure).

It is unclear whether the decision in Alderman rested upon the Court's supervisory power over the admission of evidence or on the Constitution. It is a reasonable interpretation that it rested upon the supervisory power. If so, Alderman has arguably been superseded by Congress when it enacted Title III. The legislative history of Title III specifically states:

> This provision [section 2518(10)(a)] explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the property of the interception of an aggrieved person's communications.

The courts have held that the passage of section 1623 as part of the Organized Crime Control Act of 1970 was meant to supplement, not supersede, section 1621, [1968] U.S. Code Cong. & Ad. News at 2195; see e.g., 116 Cong. Rec. 35245 (1970).

(continued)

(1) a right to inspect the intercept logs;

(2) a right to examine appropriate officials in regards to the connection between the records and case made against him; and

(3) a right to find out who the appropriate officials are.

This is not, though, a right to rummage through all the government files.

These are the two false statement statutes of greatest use to the prosecution dealing with organized crime. The differences between the statutes make them complimentary tools and enhance the law's effectiveness against false testimony. For example, while recantation of the false testimony bars prosecution under section 1623 if made before the testimony significantly affects the tribunal and before the falsity of the testimony becomes obvious), recantation does not affect the offense of perjury under section 1621, except as the fact of recantation may bear on the issue of "willfulness"). On the other hand, while the falsity of the testimony must always be proved in a prosecution order section 1621, the government need not, under section 1623, show which of the inconsistent statements was false.

Additionally, the so-called "two witness rule," and its corollary, the "direct evidence rule," impede prosecutions

inued)

sclosure of overheard conversations may harm persons e completely innocent conversations with people rosecuted, or who are merely mentioned in such ations. See, e.g., Life Magazine, May 30, 1969, 47 (excerpts from transcripts of conversations overheard government electronic surveillances published ontained unflattering references to prominent inment figures, an elected official, and members of iciary, none of whom was a party to any of the pub- conversations); R. Conolly, "The Story of Patriarca ipts," Boston Evening Globe, September 2, 1971, p. 22 ripts, despite a protective order, appeared in the r three weeks after disclosure). The lives and of people identified in the conversations may be ed. Pending investigations can be significantly as disclosure frequently leads to flight by pot- efendants and the destruction of evidence.

argument against disclosure where the aggrieved is overheard merely by happenstance is particularly s the interception is incidental and wholly nt to the purpose of the surveillance. In this , an in camera review will protect the defendant's s because the judge is capable of determining that ception has no relation to a prosecution.

U.S.C. §3504(a)(2) further provides for only disclosure for pre-1968 interceptions. This statute, not applicable to post-1968 interceptions, can also d as expressing a congressional intent to limit the in Alderman. The legislative history reveals an o overrule Alderman as it pertains to pre-1968 tions. See, e.g., 112 Cong. Rec. H9649 (daily 6, 1970).

se arguments are particularly strong when made in ext of a national security surveillance. Secrecy solute necessity. Disclosure will include location istening device which can be devastating. The of agents may also be revealed. To disclose may se national security. If the information cannot osed under any circumstances, the entire invest- may have to be abandoned. Thus, there is a need aluate the present position on disclosure. Legality ational security area is generally now determined an in camera procedure. United States v. Lemonakis, 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 See also 1976 Guild, supra note 35, at ch. 12.

In sum, a grand jury witness is not entitled to a hearing to determine if surveillance was conducted or to test the legality of any such surveillance. He may refuse to answer only where surveillance was conducted and there was no authorizing order, where the government concedes that the surveillance was unlawful, or where there was a prior judicial adjudication of illegality. Consequently, while Gelbard recognizes the testimonial privilege of the grand jury witness, that privilege is effective only when there is either a conceded illegality or when the court finds insufficient the authorizing order or the governmental denial of illegality. In other instances, i.e., where the government shows that the questions are not based upon unlawful electronic surveillance, the witness will be compelled to testify.

5. Wiretap privilege in New York

¶72 New York wiretap—grand jury practice is not as fully developed as its federal counterpart. Nevertheless, in New York, a grand jury witness need not answer questions which are based upon an illegal wiretap.[212] Since section 3504 is not applicable to the states,[213] a slightly different procedure follows a recalcitrant witness's claim of unlawful

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[212] People v. Einhorn, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974).

[213] H. Rep. No. 1549, 91st Cong., 2d Sess. 3, 16 reprinted in (1970) U.S. Code Cong. & Ad. News 4007, 4009, 4027.

> As amended by the committee, the application of Title VII is limited to Federal judiciary and administrative proceedings.

interception. Upon the request of the witness[214] (which must be respectful), he is brought before the presiding justice who may make appropriate inquiry either in camera or in open court as to the soundness of the objection. Here, the inquiry by the presiding justice is not in the nature of a suppression hearing. Since lengthy suppression hearings are too disruptive of grand jury proceedings, they are not available to grand jury witnesses.[215] If the presiding justice finds that there was no wiretap or that there are no facial defects in the court order authorizing the wiretap, he may then compel the witness to testify or be subject to a contempt citation.

¶73 A prosecution for contempt in New York is generally

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[214] People v. Breindel, 73 Misc. 2d 734, 739, 342 N.Y.S.2d 428, 434 (Sup. Ct. N.Y. County 1973), aff'd, 45 A.D.2d 691, 356 N.Y.S.2d 626 (1st Dep't), aff'd, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974) (Ronald Chester Goldstock, of counsel, for plaintiffs).

> I hold, therefore, that the People are under no obligation to disclose to a grand jury witness that the questions about to be propounded are the product of electronic surveillance. '[A] balance must be struck between the due functioning of the grand jury system and a defendant's rights under the eavesdropping statutes.' (People v. Mulligan, 40 App. Div. 2d 165, 166, supra). The integrity of the grand jury's fact-finding process is what is at stake here. Providing an uncooperative or hostile witness with the type of information requested in this case permits him to tailor his testimony to matters already known to the grand jury, thereby defeating the purpose of calling him. Such disclosure also jeopardizes the secrecy of the investigation and hence its chances of success with respect to the targets thereof.

[215] People v. Mulligan, 40 A.D.2d 165, 338 N.Y.S.2d 488 (1st Dep't 1972); In re O'Brien, 76 Misc. 2d 303, 350 N.Y.S.2d 498 (Rockland County Court 1973).

criminal in nature.[216] Because it is, the witness being prosecuted is entitled to all applicable procedural safeguards: most importantly, a plenary suppression hearing.[217]

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[216] N.Y. Penal Law §215.51 (McKinney 1975) provides:

> A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or, having been sworn as a witness, he refuses to answer any legal and proper interrogatory. Criminal contempt in the first degree is a class E felony.

The legislative history of this statute provides clearly:

> The intent of the new enactment, as expressed in the Governor's Memorandum of Approval, was to increase 'the penalty for refusal to... testify before a grand jury--after having been granted immunity--from a possible jail sentence of one year to a maximum prison sentence of four years... Recently, district attorneys investigating organized criminal activity have been confronted by witnesses who refuse to testify before grand juries, even after they have been granted immunity. The increase in penalty... should encourage otherwise uncooperative witnesses to assist grand juries in their investigations.'

Hechtman, Comment, Penal Law (McKinney 1971).

N.Y. Penal Law §275.50, providing for misdemeanor contempt, is still occasionally used. Criminal contempt prosecution is preferred over civil contempt prosecution because the contumacious witness can only be imprisoned for the term of the grand jury when found to be civilly contempt, but he can be imprisoned for up to four years when he is found to be criminally contempt. The civilly contempt witness may also purge himself of the contempt by testifying. The criminally contempt witness cannot. The crime for which he is charged was completed in the grand jury. The prosecuting attorney may, however, dismiss any charges brought against a contumacious or recalcitrant grand jury witness if that witness subsequently cooperates. This, of course, is solely a matter of the prosecutor's discretion. Thus, there is a strong double incentive to testify.

[217] 18 U.S.C. §2518(10) and N.Y. Crim. Pro. Law art. 710 (McKinney, 1971).

But to guard against vague and unsupported allegations, the Court of Appeals established a set of criteria to be met by a defendant making such a claim. In People v. Cruz,[218] the court said:

> [The] defendant should have the burden of coming forward with the facts which reasonably lead him to believe that he or his counsel have been subjected to undisclosed electronic surveillance. The defendant's allegation should be reasonably precise and should specify, insofar as practicable
>
> [1] the dates of suspected surveillance,
> [2] the identity of the persons and their telephone numbers, and
> [3] the facts relied upon which allegedly link the suspected surveillance to the trial proceedings.[219]

Following such a showing, the people then have the burden of affirming or denying the allegations with a reasonably specific and comprehensive affidavit. The affidavit should specify:

> [1] [The] appropriate local, State, and if applicable, Federal law enforcement agencies contacted to determine whether electronic surveillance had occured,
> [2] the persons contacted,
> [3] the substance of the inquiries and replies, and
> [4] the dates of claimed surveillance to which the inquiries were addressed.[220]

These guidelines are to apply only in the context of a criminal trial, not in the context of a grand jury proceeding.[221]

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[218] 34 N.Y.2d 362, 314 N.E.2d 39, 357 N.Y.S.2d 709 (1974).

[219] Id. at 369, 314 N.E.2d at 43, 357 N.Y.S.2d at 714.

[220] Id.

[221] The standards set out in Cruz and in Einhorn are often confused and used interchangeably. See In re Myers, 173 N.Y.L.J. 17 (1975).

The right of a witness to raise this objection is not without limitation. There can be only one appearance before a justice to determine the existence or validity of a wiretap.[222] The right to object is not absolute and multiple challenges serve only to disrupt and delay the proceedings. The right is waivable.[223] A witness may not testify in hope that such testimony is later suppressable. The proper procedure is to raise the objection and request to be taken before the presiding justice. If the challenge fails, the witness must still remain silent when questioned before the grand jury to preserve his objection.

6. Wiretap privilege in New Jersey

¶74 The New Jersey wiretap statute is modeled on Title III; its legislative history is explicit:

> This bill is designed to meet the Federal requirements and to conform to the Federal act [Title III] in terminology, style and format which will have obvious advantages in its future application and construction.[224]

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[222] People v. Langella, 82 Misc.2d 410, 370 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1975).

[223] People v. McGrath, 86 Misc.2d 249, 380 N.Y.S.2d 976 (New York County 1976). In McGrath, the presiding justice, upon inspection, found no facial defects with the authorizing order and ordered the defendant to testify. The defendant did so "under protest." His answers were evasive and a prosecution for contempt followed. The court then found that the wiretap orders were, indeed, invalid because they were issued without probable cause; however, the court also found that the defendant had waived this objection by testifying.

[224] N.J. Stat. Ann. 2A:156A-1 et seq. (West 1971); Rep. on S. No. 897, Electronic Surveillance, S. Committee on Law, Public Safety and Defense, Oct. 29, 1968, p. 21.

The New Jersey courts have not faced a question of a privilege before a grand jury based on an unlawful electronic surveillance. A reasonable inference may be drawn, however, that federal decisions would be considered persuasive authority. This is even clearer after the recent appellate decision in State v. Chaitkin.[225] In response to a motion to suppress at trial, the court fashioned a procedural remedy to protect Fourth Amendment rights. The court said:

> The right to move to suppress evidence is conditional upon
>
> (1) a claim by the person that he is aggrieved by an unlawful search and seizure; and
> (2) a showing of reasonable grounds to believe that the evidence will be used against him in some penal proceeding...
>
> [In determining the reasonableness of each defendant's belief] the standards should be as follows:
>
> (1) Defendants's allegation should be reasonably precise;
> (2) The allegation should set forth, insofar as practicable:
>
> (a) the dates of suspected surveillance,
> (b) the identity of the persons and their telephone numbers, and
> (c) the facts relied upon which allegedly link the suspected surveillance to the trial proceedings.[226]

No standards were established defining the specificity required by the people's response, but in light of the heavy reliance upon Alter in formulating the standards in Chaitkin, a trial context, it is extremely likely that the New Jersey court would adopt Alter type standards in the grand jury context.

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[225] 135 N.J. Super. 179, 342 A.2d 897 (App. Div. 1975).

[226] Id. at 187-188, 342 A.2d at 902.

7. Wiretap Privilege in Massachusetts

¶75 The question of whether a grand jury witness has the privilege to refuse to answer questions based upon an unlawful electronic surveillance has not been decided by any court in Massachusetts but there is no reason why they, too, will not draw heavily from the decisions in federal courts.[227]

8. Wiretap Privilege in Florida

¶75a The Florida Security of Communications Act was patterned after Title III.[227a] Not surprisingly, a district court of appeals following Gelbard v. United States,[227b] denied that witnesses were privilege to invoke the evidentiary prohibition of the Florida Act.[227c] The Supreme Court, however, expressly declined to follow Gelbard, and held that a witness summoned before the grand jury was an "aggrieved person," and thus had standing to challenge the legality of an interception by way

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[227] In Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819 (1975), the Massachusetts wiretap statute, Mass. Ann. Laws ch. 272 § 99 (Michie/Law. Co-op Supp. 1978), was found to conform with the requirements of the comprehensive federal legislation. In so doing, the court set a standard for suppression questions. Suppression is required only where there has been a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of the extraordinary device. See 327 N.E.2d at 845. This approach follows the federal rule. See United States v. Giordano, 416 U.S. 505 (1974).

[227a] Fla Stat. Ann. ch. 934 (West 1973). § 934.06 is a replica of § 2515 of the federal act; § 934.09 a duplicate of § 2518.

[227b] Supra note 203.

[227c] In re Grand Jury Investigation, 276 So. 2d 235 (Fla. Dist. Ct. App. 1973).

of preindictment hearing on a motion to suppress prior to interrogation.[227d] Upon the filing of such a motion, the judge may make available to the movant such portions of the intercepted communication or evidence derived therefrom as he determines to be in the interests of justice.[227e]

C. Denial of Constitutional Newsman's Privilege

¶76 First Amendment claims of privilege are, for the most part, recognized in the context of a grand jury proceeding.[228] In a five to four decision, the Supreme Court, in Branzburg v. Hayes,[229] decided that the First Amendment guarantee of free dom of speech and press did not relieve a newsman of his obligation to appear or testify before a grand jury. The newsman's need to protect the confidentiality of his sources does not override the public's interest in the effective administration of justice.[230] Although Branzburg appears

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[227d] In re Grand Jury Investigation, 287 So. 2d 43 (Fla. 1973).

[227e] Fla. Stat. Ann. § 934.09(9)(a)(3) (West 1973).

[228] See 1976 Guild, supra note 35, at ch. 11.

[229] 408 U.S. 665 (1972).

[230] The Court's decision is in accordance with the criteria set out by Wigmore which should be met before a communication is recognized to be privileged. See 8 J. Wigmore, Evidence §§ 2285-296 (McNaughton Rev. 1961) [hereinafter cited Wigmore]. Although this communication did originate in a confidence which was essential to the satisfactory maintenance of the relation which would be injured by disclosure, the opinion of the community was that the relation was not to be fostered at the expense of impeding the grand jury function.

to be a flat denial of a constitutional newsman's privilege, it is not without qualification. The relationship between the need for the information and the subject of the investigation must not be remote or tenuous.[231] Indeed, the Ninth Circuit, in Bursey v. United States,[232] held that where the grand jury activity collides with the First Amendment, the government must establish that its interests are substantial, legitimate, and compelling and that the infringement be no

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[231] 408 U.S. at 710 (concurring opinion of Mr. Justice Powell):

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions (emphasis added).

Although the opinion seems to limit itself to criminal proceedings, the opinion has not been so construed. It has been applied in both civil and criminal judicial proceedings. See Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (non-grand jury case); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed pursuant to Rule 60, 417 U.S. 938 (1974) (action for libel based on newspaper column); United States v. Liddy, 478 F.2d 586 (D.C. Cir. 1972) (need of society asserted by counsel for defense in criminal proceeding for impeachment of a witness). Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977) (qualified privilege extended to documentary film maker in pre-trial proceeding).

[232] 466 F.2d 1059 (9th Cir. 1972).

greater than is essential.[233] Bursey states the general law.[234]

¶77 The court in Branzburg did not limit the power of a state to recognize a privilege by statute. Both New York and New Jersey have enacted statutes dealing with the newsman's priviliege.[235] Nevertheless, these statutes are strictly construed. In In re WBAI-FM,[236] a New York court narrowly construed the statute against the policy of the privilege.

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[233] 466 F.2d at 1083.

[234] See also In re Lewis, 377 F. Supp. 297 (C.D. Cal.), aff'd, 501 F.2d 418 (9th Cir. 1974), cert. denied, 420 U.S. 913 (1975).

[235] N.Y. Civil Rights Law §79-h (McKinney 1976):

> Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature, or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any news or the source of any news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or televison transmission station or network, by which he is professionally employed or otherwise associated in a newsgathering capacity.

N.J. Stat. Ann. 2A:84A-21 (West 1971):

> [A] person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered.

[236] 68 Misc. 2d 355, 326 N.Y.S.2d 434 (Albany County Ct. 1971), aff'd, 42 A.D.2d 5, 344 N.Y.S.2d 393 (3d Dep't 1973). See also Andrews v. Andreoli, 400 N.Y.S.2d 442 (Sup. Ct. Onondaga County 1977) (to invoke privilege journalist must offer

The information at issue there was from a letter. As there were no confidences involved and the information was not obtained as the result of questioning, the appellate court for the Third Department held that the privilege did not apply.

D. Denial of Privilege for Freedom of Worship

¶178 The privilege to refrain from testifying before a grand jury is sometimes asserted on grounds of freedom of worship. When such a claim is made, the interest of the individual in a right of religious worship must be balanced against the interest of the State.[237] In this process, the courts attempt to make a sensible and feasible accommodation of all interests. In so doing, the courts do not allow this privilege to nullify society's interest in a thorough investigation.[238] The right is not absolute. Although the claim may delay the taking of testimony, it will seldom entirely shield the claimant.

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236 (continued)
preponderant evidence of a mutual agreement of confidentiality); In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (App. Div. 1972), cert. denied, 410 U.S. 991 (1973) (disclosure of source operates as a waiver of privilege with respect to both published and unpublished information); In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), aff'd sub nom. Branzburg v. Hayes, 408 U.S. 665 (1972). The Florida Supreme Court has apparently adopted the Bursey reading of Branzburg, Morgan v. State, 337 So. 2d 951 (Fla. 1976), though the ambivalence of the opinion leaves unclear the status of the narrower interpretation of Branzburg in In re Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976).

237 Sherbert v. Verner, 374 U.S. 398 (1963). See also Wisconsin v. Yoder, 406 U.S. 205 (1972). See also 1976 Guild, supra note 35, at § 11.8.

238 Smilow v. United States, 465 F.2d 802 (2d Cir.), vacated and remanded on other grounds, 409 U.S. 944 (1972), on remand, 472 F.2d 1193 (2d Cir. 1973). See also United States v. Huss, 482 F.2d 38 (2d Cir. 1973); People v. Woodruff, 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (1966), aff'd mem., 21 N.Y.2d 848, 288 N.Y.S.2d 1004 (1968).

E. Legislative Privilege

¶179 The Speech or Debate Clause of the Constitution[239] grants a limited privilege which may be asserted by Senators, Representatives, or their aides.[240] The privilege is not absolute. It does not exempt members of Congress or their aides from the service or obligations of a subpoena if the subpoena is properly served.[241] Consequently, a motion to quash a subpoena based upon the assertion of this privilege will be denied. But it may be modified. The privilege does allow a member of Congress or his aide to refuse to answer questions concerning the "due functioning of the

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239 Article I, §6, cl. 1, of the Constitution:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

240 Gravel v. United States, 408 U.S. 606 (1972). The aide is protected only insofar as his conduct would be a protected legislative act if performed by the Member himself. Id., at 618. See also Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880). The privilege does extend to state legislative officers, United States v. Craig, 528 F.2d 773 (7th Cir.), cert. denied sub nom. Markert v. United States, 425 U.S. 973 (1976) (court recognized a common law privilege, but found that the officer had waived the privilege by testifying), but not to executive officers, United States v. Mandel, 415 F. Supp. 1025 (D.C. Md. 1976)(purpose of privilege, preserving the independence of the legislature, would not be promoted by extending immunity to acts, although legislative in nature, done by the governor).

241 United States v. Cooper, 4 U.S. (4 Dall.) 341 (1800).

discretion in determining the nature of a contempt adjudication;[137] the purpose of civil contempt is to compel compliance with the court's order, and the purpose of criminal contempt is to punish disobedience.[138] The privilege at no time extends to acts or communications having no connection with the legislative process.

¶64 New York's statutory provisions for civil contempt are found in New York Judiciary Law section 753(1962), and New York Civil Practice Law and Rules section 2308(1965). The statutory provisions for criminal contempt are: New York Penal Law sections 215.50 through 215.55(1972), and New York Judiciary Law sections 750 and 752.

B. Distinguishing Direct and Indirect Contempts

¶65 Direct contempts are those committed in the immediate view and presence of the court; indirect contempts are those committed "out of court."[139] Traditionally, summary procedure is permissible when the contempt is direct.[140]

1. the Senator's conduct, or the conduct of his aides at the subcommittee meeting;

2. the motives and purposes behind such conduct;

3. communications between the Senator and his legislative aides during the course of the meeting and related to legislative acts of the Senator; and

4. acts performed in preparation for meetings unless the acts are criminal or relevant to a third party crime.

F. Denial of privilege for illegal searches and seizures

¶80 Under United States v. Calandra,[244] a grand jury witness cannot avoid testifying before a grand jury by objecting to the questions as fruits of an illegal search and seizure. The exclusionary rule does not extend to the grand jury.[245] Historically, the character of the evidence presented to a grand jury did not affect the validity of an indictment.[246]

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137 Lane v. Lombardozzi, 7 App. Div. 2d 48, 180 N.Y.S.2d 496 (1st Dept. 1958), aff'd, 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550, cert. denied, 360 U.S. 930, appeal dismissed during term of certiorari and appeal dismissed, 361 U.S. 10 (1959).

138 King v. Barnes, 113 N.Y. 476, 21 N.E. 182 (1889). Regardless of whether the contempt is civil or criminal, however, if there is a factual issue as to whether the defendant did or did not disobey the order, he is entitled to a hearing. Ingraham v. Maurer, 39 App. Div.2d 258, 334 N.Y.S.2d 19 (3d Dept. 1972).

139 A witness may attack a subpoena duces tecum on Fourth Amendment grounds. See United States v. Dionisio, 410 U.S. 1, 11 (1973); 1976 Guild, supra note 35, at §12.15.

140 United States v. Bryan, 339 U.S. 323, 331 (1950); Blair v. United States, 250 U.S. 273, 282 (1919); Levine v. United States, 362 U.S. 610, 616 (1960); Brown v. United States, 359 U.S. 41, 49 (1959); Nye v. United States, 313 U.S. 33, 42 (1941); Gravel v. United States, 408 U.S. 606, 625 (1972). Id. at 629. The Supreme Court narrowed the scope of inquiry by not permitting questions concerning:

244 Grand jury may consider evidence obtained in violation of the Fifth Amendment); Lawn v. United States, 355 U.S. 339 (1958) (no hearing to determine the source of evidence); Costello v. United States, 350 U.S. 359 (1956) (grand jury may rely upon hearsay or on otherwise inadmissible evidence). The rule may be different in states by virtue of case law or statute.

e this additional burden upon the grand jury, the asoned, would seriously impede its functioning without antly furthering the goals of the exclusionary rule.[247]

rney-Client privilege

oldest of the common law privileges is that of -client.[248] It exists is some form in all juris-.[249] The privilege developed to provide "subjectively client's freedom of apprehension in consulting his visor."[250] This is the client's privilege.[251]

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urpose of the exclusionary rule is to deter police ct. United States v. Calandra, 414 U.S. at 351.

irst reported case dealing with the privilege is Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577), solicitor was exempted from examination. The case the policy that at that time the attorney was s having a duty not to disclose the secrets of nts.

Wigmore, Evidence § 2292 (McNaughton Rev. 1961).

t § 2290. See Fed.R. Evid. 1101(c):

> The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

Evid. 1101(d):

> The rules (other than with respect to privileges) do not apply in the following situations...
>
> (2) Proceedings before grand juries.

Evid. 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Wigmore, supra at § 2321.

Thus, only the client may waive the privilege and unless the client does, the attorney must assert it.[252] This privilege may be claimed before a grand jury.[253] The privilege is not without qualification. For the privilege to exist, legal advice must be sought from an attorney with the communications made in confidence relating to that purpose.[254] If the communications pertain to actual collusion to commit a crime, a continuing illegality, or contemplated future crimes, the communications are not privileged.[255] The attorney

[252]ABA Code of Professional Responsibility DR 4-401. See also United States v. Pappadio, 346 F.2d 5, 9 (2d Cir. 1965), vacated on other grounds sub nom. Shillitani v. United States, 384 U.S. 364 (1966) (the attorney-client privilege is not abrogated by a grant of immunity).

[253]Fed. R. Evid. 1101(d)(2).

[254]8 J. Wigmore, supra at § 2292.

[255]See Clark v. United States, 289 U.S. 1, 15 (1933), where Mr. Justice Cardozo, speaking for the Court, observed: "The privilege takes flight if the relation is abused." The privilege will not shelter consultations concerning how to commit a crime. The conflict between the need for full disclosure to enable justice to prevail and the need for secrecy to promote effective representation must here be decided in favor of disclosure. United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir.), cert. denied sub nom. Jacobs v. United States, 404 U.S. 958 (1971) (where attorneys were co-perpetrators of crime, the communications concerning the criminal conduct were not privileged); Commonwealth v. Dyer, 243 Mass. 472, 505, 138 N.E. 296, 312 (1923) (there is no privilege where conferences concern proposed crimes); In re Selser, 15 N.J. 393, 105 A.2d 395 (1954) (attorney-client privilege is lost when advice is sought to aid commission of crimes; attorney cannot be consulted professionally for advice to aid in committing a crime; questions asked by grand jury must be answered). See also People ex rel. Vogelstein v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (Sup. Ct. N.Y. County), aff'd, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934) (attorney found guilty of contempt for refusing to give name of client to grand jury as the fact of employemnt is not a privileged communication); Anderson v. State, 297 So. 2d 871 (Fla Dist. Ct. App. 1974) (Attorney-client privilege cannot prevent the disclosure of communications made in contemplation of a crime or the perpetration of a fraud).

is, at that time, viewed not as an attorney, even though he may be giving legal advice, but rather as a co-conspirator or co-participant. As such, there can be no attorney-client relationship or privilege. But, when the communications pertain to past crimes or activities, the communications are privileged[256] and, in certain circumstances, will provide an effective means of avoiding testifying before a grand jury.

¶82 The mere assertion of fraudulent or criminal abuse of the attorney relationship is not sufficient, however, to compel disclosure.[257] Some quantum of evidence must be produced by the government to show that illegality was involved in the subject matter of the communications. Wigmore suggests that some evidence of crime or fraud, along with evidence that there have been transactions with the attorney, should be sufficient to shift the burden of proof to the attorney "to satisfy the court (apart from jury) that the transaction has to his best belief not been wrongful before a claim of privilege is allowed."[258] But the courts do not apply this rule. Rather, the accepted rule, as laid out by Justice Cardozo in Clark v. United States,[259] is that in order to "drive the privilege away, there must be something

[256]J. Wigmore, Evidence, §2299. The attorney-client privilege applies only to communications. An attorney cannot claim the privilege as justification for refusing to appear. Losavio v. District Court, 188 Colo. 127, 533 P.2d 32 (1975).

[257]Clark v. United States, 289 U.S. 1, 14 (1933).

[258]J. Wigmore, Evidence, §2299.

[259]289 U.S. 1 (1933).

to give color to the charge; there must be prima facie evidence that it has some foundation in fact."[260] Proof need not be beyond a reasonable doubt before the privilege is defeated; rather it merely needs to be sufficient to sustain such a finding of fact.[261] When such a showing is made, the communications are held to be not privileged.

¶83 If a lawyer's grand jury testimony breaches the attorney-client privilege, the resulting indictment, however, is not subject to dismissal.[262] If there is no constitutional right to dismissal of an indictment based in part upon evidence obtained unconstitutionally,[263] then a fortiori this remedy cannot exist for violation of a mere common law privilege. The privilege is protected by the client's right to assert it at trial and the secrecy of grand jury proceedings. Dismissal is not, therefore, a proper remedy. There is a qualified privilege for work product materials prepared by an attorney acting for his client in anticipation of litigation.[264]

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[260] Id. at 15.

[261] In re Sesler, 15 N.J. 393, 105 A.2d 395 (1954). A showing that the attorney had held extraordinarily frequent conferences with his client, coupled with a clear showing of ongoing criminal activity on the part of the client, was held sufficient to make out a prima facie case and thus compel the attorney to testify ....Arguably, a showing of ongoing criminal activity at a time when there was a continuous attorney-client relationship is sufficient evidence to force disclosure of all relevant communications.

[262] United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975).

[263] See supra note 246.

[264] Hickman v. Taylor, 329 U.S. 495 (1947).

This doctrine, although most frequently asserted as a bar to discovery in civil litigation, also applies to criminal proceedings under United States v. Nobles.[265] The courts are now moving to allow the privilege to be asserted by grand jury witnesses.[266] But all that is protected is the work product of the attorney as defined in Hickman.

¶84 Electronic surveillance presents special problems in the context of the attorney-client privilege. Confidential attorney-client communication may be intercepted in the course of an investigation. The communications may be overheard in one of two ways:

> 1. There may be enough evidence prior to an application for an eavesdropping order to show probable cause that the attorney is a co-conspirator or otherwise involved in a crime; or
>
> 2. The communications may be incidentally overheard during an electronic surveillance authorized for another purpose. Of the twenty-four jurisdictions that have eavesdropping statutes, all but four have a provision relating to privileged communications.[267] Twelve of the remaining twenty statutes, including the federal statute, contain only a provision to the

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[265] 422 U.S. 225 (1975). Although the court recognized that indeed the privilege did exist in criminal proceedings, it held that it had been waived, leaving its scope open to definition.

[266] In re Grand Jury Proceedings (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976) See also In re Grand Jury Proceedings (Duffey), 473 F.2d 840 (8th Cir. 1973); In re Langswager, 392 F. Supp. 783, 788 (N.D. Ill. 1975).

[267] Ariz. Rev. Stat. §§ 13-3004 to 3014 (Sp. Pamphlet 1977); Ore. Rev. Stat. §§ 9.73.030-100 (1977) as amended by 1977 Wash. Laws ch. 363. Maryland now retains the privileged character of the communication notwithstanding electronic interception. Md. Cts. & Jud. Proc. Code Ann. §§ 10-401 to 410 (Supp. 1977).

effect that a privileged communication does not lose its privileged character by virtue of having been intercepted.[268] The remaining eight state jurisdictions have more individualized statutes that place greater restrictions on obtaining a warrant or amendment to allow eavesdropping on attorney-client communications.[269]

¶85 A client either seeking legal advice or preparing for litigation may give documents and papers in his possession to his attorney. Such documents and papers are not automatically privileged. The Supreme Court, in Fisher v. United States,[270] carefully set out the limits of the attorney-client privilege. The Court held that the privilege protects only those disclosures necessary to obtain informed legal advice which might not be made absent the privilege.[271]

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[268]The twelve jurisdictions and their respective statutes are: 18 U.S.C. §§2510-20 (1960); Colo. Rev. Stat. Ann. §§16-15-101 to 104, 18-9-301 to 310 (1973); Fla. Stat. Ann. §§ 934.01 to .10 (West 1973 & Supp. 1978); Ga. Code Ann. § 25-3001 to 3010 (1978); Mass. Ann. Laws. ch. 272 § 99 (Michie/Law. Co-op Supp. 1978); Neb. Rev. Stat. §§ 86-701 to 707 (1976 & Supp. 1977); N.H. Rev. Stat. Ann. §§ 570-A:1 to A:11 (1974 & Supp. 1977); N.M. Stat. Ann. §§ 40.A-12-1.1 to 1.10 (Supp. 1975); S.D. Compiled Laws Ann. § 23-13A-1 to 11 (Supp. 1977); Va. Code Ann. §§ 19.2-66 to 68 (Supp. 1977); Wis. Stat. Ann. §§ 968.27 to 33 (1971 Supp. 1977).

[269]New York's statutes, N.Y. Crim. Pro. Law §700.20 (McKinney 1971), N.Y. Penal Law §§250.00-.20 (McKinney 1967), require that the application for an eavesdropping warrant contain a statement that communications to be intercepted are not legally privileged. This creates a serious potential hazard to the surveillance because a subsequent defendant who can show that an intercepted communication was, in fact, privileged will have grounds to attack the good faith of the government, the sufficiency of the application and the legality of the eavesdropping order. This is potentially far more hazardous to the investigation than would be an attack on an item of intercepted conversation with the object of suppressing damaging evidence.

[270]Fisher v. United States, 425 U.S. 391 (1976).

[271]Id. at 403.

Pre-existing documents which could be obtained from the client can also be obtained from the attorney. The simple act of transferring the papers to the attorney does not give otherwise unprotected documents protection. But if the documents are unobtainable from the client, they are still protected, by the attorney-client privilege.[272]

H. Spousal Privilege

¶86 As a rule, confidential communications made from one spouse to another during marriage are privileged.[273] The

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[272]In Fisher, the taxpayers gave to their attorneys their accountants' work papers in connection with an I.R.S. investigation. The I.R.S. then served summonses upon the attorneys directing them to produce the papers. The attorneys challenged the summonses.

The Supreme Court, in Couch v. United States, 409 U.S. 322 (1973) ruled that documentary summonses directed to the taxpayer's accountant directing the production of the taxpayer's own records in the possession of the accountant did not violate the taxpayer's Fifth Amendment rights. [T]he ingredient of personal compulsion against an accused is lacking." Id. at 329. As there is no accountant-client privilege under federal law, the documents were unprotected. Id. at 335.

The Court relied upon Couch in holding that the taxpayer's Fifth Amendment rights were not violated by compelling production.

The Court, distinguishing Boyd v. United States, 116 U.S. 616 (1886), held that the papers were not privileged in the hands of the taxpayer and, therefore, were not protected by the attorney-client privilege.

Protection may be gained for the accountant's work papers only if the taxpayer first goes to an attorney to obtain legal advice and then has the attorney hire the accountant to prepare the papers.

[273]J. Wigmore, Evidence, §§2332-41; See also 1976 Guild, supra note 35, at §15.13.

protection of marital confidences is regarded as so essential to the preservation of the marriage as to outweigh any disadvantages to the administration of justice.[274] This rule of privilege extends to grand jury proceedings.[275] Thus, a grand jury witness may withhold testimony which would incriminate his spouse on the basis of the marital privilege.[276] But the privilege is not absolute. Two important exceptions have emerged. Testimony may be compelled where both spouses are granted immunity.[277] As neither spouse can be prosecuted for what is then said, the underlying precept of preservation of the family is maintained. Testimony may also be compelled under the co-conspirator exception.[278] If the husband and wife are co-conspirators or co-participants in

[274] Wolfle v. United States, 291 U.S. 7 (1934).

[275] Fed. R. Evid. 1101(d).

[276] Blau v. United States, 340 U.S. 332 (1951). See also Hawkins v. United States, 358 U.S. 74 (1958) (privilege serves goal of preserving family by preventing either spouse from committing the unforgivable act of testifying against the other in a criminal trial).

[277] United States v. Doe, 478 F.2d 194 (1st Cir. 1973). See also In re Snoonian, 502 F.2d 110 (1st Cir. 1974) (where wife was not a target of investigation and prosecutor filed an affidavit that he would not prosecute wife, husband's claim of marital privilege was overruled).

[278] This is not really an exception to the privilege. Communications between co-conspirators are not confidential marital communications; they are not, therefore, within the privilege.

a crime, the privilege does not apply.[279] The privilege still applies, though, where the spouse has merely seen or heard evidence of a past crime.[280]

I. Priest-Penitent Privilege

¶87 Another privilege which may be successfully used as a means of not testifying before the grand jury is that of priest-penitent. There are few cases on the subject. Two recent cases arose where the privilege was claimed by ministers acting in the capacity of counselors. The court, in In re Verplank,[281] held that draft counseling services performed by a clergyman and his staff were performed in the course of functioning as a clergyman and thus the privilege

[279] United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974) (where wife was an unindicted participant and was called as a witness by the government in a prosecution for illegally transporting aliens, the court held that the privilege did not extend to instances where the spouse was a party to the crime). In United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974), a wiretap order was issued authorizing interception of Kahn's telephone conversations with the objective of obtaining information concerning Kahn's illegal gambling activities. Some of the conversations overheard were with his wife. The surveillance terminated with the attainment of this objective. Both Kahn and his wife were indicted. They filed a motion to suppress, arguing that the surveillance violated their marital privilege. The court ruled that the intercepted conversations were not privileged because they had to do with the commission of a crime, not with the privacy of the marriage. See also "Future Crime or Tort Exception to the Communications Privileges," 77 Harv. L. Rev. 730, 734-35 (1964).

[280] Ivey v. United States, 344 F.2d 770, 772 (5th Cir. 1965) (admission of a past crime).

[281] 329 F. Supp. 433 (C.D. Cal. 1971).

could be asserted when questioned before a grand-jury. This issue was again raised in United States v. Boe,[282] but the case was decided on other grounds.

[282] 491 F.2d 970 (8th Cir. 1974). Both Boe and Verplank rely upon Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (admission of defendant to minister that she had abused her children was privileged and testimony by minister was inadmissible).

VIII. STATE ACCESS TO FEDERAL GRAND JURY MINUTES

A. Statutory Background

¶88 Rule 6(e) of the Federal Rules of Criminal Procedure, adopted in 1946,[283] governs secrecy and disclosure of federal grand jury proceedings. 18 U.S.C., Rule 6(e) provides:

> 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, stenographer, operator of a recorded testimony 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. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

¶89 The rule was intended to continue "the traditional practice of secrecy on the part of members of the grand jury except when the court permits disclosure...."[284] Disclosure

[283] For an historical account of the adoption of Rule 6, see L. Orfield, Criminal Procedure Under the Federal Rules § 6:1 (1966):

> 18 U.S.C. § 554 (1946 ed.) was the predecessor of Rule 6(e).

[284] Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 6, n.1 at 269 (1975). Rule 6(e) was amended in 1976 to permit disclosure to "such government personnel as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." 18 U.S.C.A. Rule 6(e) (Supp. 1978). This modification does not affect an analysis of state access to grand jury minutes.

under Rule 6(e) is committed to the discretion of the trial judge[285] and may be ordered under one of the three exceptions to secrecy provided in the rule or under other special statutory provisions.[286] In defining the parameters within which the trial judge's discretion may operate, the Supreme Court has held that there must exist a "particularized need" for disclosure which outweighs the policy of secrecy.[287]

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[285] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

[286] The Jencks Act, 18 U.S.C. § 3500, was amended in 1970 to allow a defendant to move at trial for production of portions of a witness' grand jury testimony. See 18 U.S.C. § 2500(e)(3) (1976). Prior to the amendment, a defendant was not entitled to the testimony. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

Rule 16(a)(1)(A) of the Federal Rules of Criminal procedure, 18 U.S.C., allows a defendant to "discover" his own recorded testimony before the grand jury.

[287] United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959).

Procter & Gamble actually involved a discovery request under Rule 34 of the Federal Rules of Civil Procedure, which required a showing of good cause. A federal grand jury failed to return a criminal indictment against the defendant. The Government then initiated a civil antitrust suit against the defendant. Defendant moved under Rule 34 for production of the criminal grand jury transcripts. The court, looking to the policy of secrecy expressed in Rule 6(e) and the reasons behind secrecy, held that the defendant failed to show the requisite good cause:

> We only hold that no compelling necessity has been shown for the wholesale discovery and production of a grand jury transcript under Rule 34. We hold that a much more particularized, more discrete showing of need is necessary to establish good cause. 356 U.S. at 683 (court's emphasis).

Typically, particularized need exists where grand jury testimony is used to impeach witnesses, attack credibility, or refresh recollection.[288] These are routine cases.[289] Since Rule 6(e) continues the common law policy of secrecy,[290] the "tougher" cases must be resolved by analyzing the reasons for secrecy and weighing them against the need for disclosure.[291]

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287 (continued)
In Pittsburgh Plate Glass, another antitrust case, the court was confronted with a direct request under Rule 6(e). It held that a party seeking disclosure must show that a particularized need exists which outweighs the policy of secrecy. 360 U.S. at 400. The court affirmed the trial judge's refusal to permit inspection of the minutes because the defendant failed to show particularized need.

Taken together, Proctor & Gamble and Pittsburgh Plate Glass indicate that a showing of particularized need is required before grand jury minutes may be disclosed, regardless of whether the request is made under (Criminal) Rule 6(e) or (Civil) Rule 34. The "good cause" requirement which formerly existed in Rule 34 merely incorporated Rule 6(e) in such cases.

The father of Proctor & Gamble and Pittsburgh Plate Glass was United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234, rehearing denied, 310 U.S. 658 (1940). This was a pre-Rule 6(e) case in which the court stated that after a grand jury has ceased functioning, disclosure is proper where the ends of justice require it. The court allowed use of the grand jury testimony to refresh the recollection of witnesses under the facts of the case.

[288] See, e.g., Dennis v. United States, 384 U.S. 855, 870 (1966).

[289] These routine exceptions to the secrecy rule will not be dealt with in detail.

[290] See In re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir.) (1962).

[291] In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974); see also Pittsburgh Plate Glass Co. v. United States, 360 U.S. at 403 (Brennan, J., dissenting); cf. Dennis v. United States, 384 U.S. 855, 870, 872-73 (1966).

A witness's refusal to testify before a grand jury is not a contempt committed in the presence of the court and, therefore, mandates notice and a hearing.[173] Further, where a court delays imposing sanctions for contempt until after the proceeding in which the contempt occurred, it may be inferred that there is no immediacy for dealing with the contempt; notice and hearing, therefore, will be required.[174] The notice and reasonable opportunity to defend depends on the particular circumstances of each case.[175]

E. Summary Disposition

Where a witness refuses to obey a court's order (e.g. refuses to testify before grand jury while under subpoena) and is taken before the court and repeats his refusal (e.g. again refuses to answer when asked questions by the judge) the contempt is committed in the immediate view and presence of the court and may be summarily punished.[176] But immediate disposition is required.[177] Review of the contempt

292 The modern rationale for secrecy is somewhat different from the original rationale:

> Significantly, four of the five reasons have nothing to do with protecting the accused.[294] In other words, secrecy of grand jury proceedings is not a right of the accused;[295] it is a policy designed to protect the workings

173 People v. Martin, supra note 166; People v. Woodruff, 50 Misc.2d 430, 270 N.Y.S.2d 938 (Sup. Ct. Dutchess County, 1966).

174 Kamrad Mortgage, 28 N.Y.2d 234, 269 N.E.2d 816, 321 N.Y.S.2d 1004 (1971).

175 Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1930). And see People v. Swed, supra note 172, People v. Martin, supra note 166.

176 Colton v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); Douglas v. Adel, 269 N.Y. 144, 199 N.E. 35 (1935); Hackley v. Kelly, 24 N.Y. 74 (1861), overruled on other grounds, People ex rel. Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903); Waterhouse v. Kelly, 71 Misc.2d 600, 336 N.Y.S.2d 960 (Sup. Ct. Monroe County, 1972), rev'd, 41 A.D.2d 1021, 343 N.Y.S.2d 820 (4th Dept. 1973). See People v. Knapp, 4 Misc.2d 449, 157 N.Y.S.2d 1 (N.Y. County Ct. Gen. Sess. 1956).

177 United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954). In re Cement-Concrete Block Co., Chicago Crushing, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974). United States v. Lakritz, 74 Misc.2d 322, 344 N.Y.S.2d 626 (Sup. Ct. Queens County, 1973). Contempts must be affirmed before punishment and hearing. Zolla Badger Paper Mills, Inc., 243 F. Supp. 443, 445 (E.D. Wisc. 1965). For a similar formulation, see United States v. American Medical Association, 26 F. Supp. 429, 430 (D.D.C. 1939).

United States v. Amazon Industrial Chemical Corp., 55 F.2d , 261 (D.C. Md. 1931).

California publishes grand jury transcripts as a matter course, unless there is a "reasonable likelihood" that lication "may prejudice a defendant's right to a fair impartial trial." Cal. Penal Code § 938.1 (Supp. 1978). all cases, transcripts are made public after the trial s. Id. Cal. Penal Code § 931.1 (1970) empowers a grand y to hold public sessions in official corruption cases. provision is rarely used. See A. Sherry, Grand Jury utes: The Unreasonable Rules of Secrecy, 48 Va. L. Rev. (1962):

> Where it is known that the grand jury has been inquiring into alleged official misconduct, its failure to take action where the evidence is insufficient or the charges unfounded is not readily or officially explainable if its proceedings must be secret. The loss of public confidence in the integrity of local government may be deepened instead of dissipated, and the reputation of blameless public servants irreparably damaged. Public sessions in such cases serve well to inform the public and to minimize misunderstanding. It should be added too, that the prospect of being called to account publicly for the conduct of public affairs may have a salutary effect on the performance of official duty." 48 Va. L. Rev. at 680.

Professor Sherry goes on to suggest that the California tem proves "[n]one of the dire forebodings of the enders of grand jury secrecy have been borne out." Va. L. Rev. at 684.

The primary focus of the Sherry article is on the airness of not permitting a defendant to have free ess to grand jury minutes to prepare for trial. (The icle was written before the 1970 amendments to the cks Act. See note 289, supra). Problems raised by mitting governmental authorities to use minutes in sequent proceedings were not dealt with.

of the grand jury itself.[296] Even policy formulations giving greater weight to personal interests of a witness or the accused do not raise these interests to the level of a constitutional right.[297]

¶92 Courts have pointed out that four of the five traditional reasons for secrecy become inapplicable after return of an indictment[298] or after trial.[299] The argument is that after

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[296] See, e.g., Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959):

> To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. 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.

[297] See In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973) for Judge Friendly's statement of the secrecy rationale:

> The tradition rests on a number of interests --the interest of the government against disclosure of its investigation of crime which may forewarn the intended objects of its inquiry or inhibit future witnesses from speaking freely; the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been subjected to prosecutorial browbeating without the protection of counsel; the similar interests of other persons who may have been unfavorably mentioned by grand jury witnesses or in questions of the prosecutor; protection of witnesses against reprisal; and the interests and protection of the grand jurors themselves.

[298] Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933); In re Report and Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C. 1974). See also R. Calkins, supra note 1 at 458-461.

[299] In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill., 1974); United States v. Scott Paper Company, 254 F. Supp. 759, 761 (W.D. Mich. 1966).

indictment, the grand jurors and witnesses are no longer subject to tampering since the grand jury functions have ended. The accused has been indicted, so the interest in protecting an exonerated party does not apply. "Tipping off" the target, allowing him to escape, is obviously not a factor once the indictment has been announced or the target has been taken into custody. The only remaining reason supporting post-indictment (or post-trial) secrecy, therefore, is the desire to encourage "free and untrammeled disclosures"[300] by witnesses.[301] The argument may be questionable in some respects. After indictment, there is no danger of tampering with witnesses insofar as their grand jury testimony is concerned, but there is still danger of tampering insofar as trial testimony is concerned. A witness giving inconsistent trial testimony may, of course be impeached with his grand jury testimony, but that is of little comfort to the prosecutor who loses the case due to the actions of that witness. Tampering may also result in witness conduct on the stand that does not involve giving testimony inconsistent with grand jury testimony. To the extent that pre-trial, post-grand jury tampering is a concern, the danger may be eliminated by requiring state officials to wait until the federal proceedings have terminated before allowing them to inspect the grand jury

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[300] United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D.C. Md. 1931).

[301] See In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974).

minutes.[302] Another problem with the argument is that a grand jury may investigate several parties but only indict some of them. The fifth reason for secrecy--protecting the exonerated accused--would, therefore, remain in force, even after indictment, with respect to some parties. In addition, some of the interests favoring secrecy do not become inapplicable after indictment or trial. Finally, the argument is of little help in cases where the minutes sought are those of a grand jury that returned no indictment.

¶93 To be sure, encouragement of witnesses is, to many courts, a very powerful reason for secrecy.[303] Yet this reason fails too, after a witness has given his testimony in open court.[304] Indeed, there is some question whether

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[302] In re Petition For Disclosure of Evidence Before October, 1959 Grand Jury, 184 F. Supp. 38, 41 (E.D. Va. 1960). [hereinafter In re Petition for Disclosure of Evidence].

[303] See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958), where the court emphasized the importance of encouraging witnesses to come forward in antitrust cases. Witnesses in such suits may be "employees or even officers of potential defendants, or their customers, their competitors, their suppliers," who might not step forward if secrecy was not guaranteed.

See also United States v. Scott Paper Co., 254 F. Supp. 759, (W.D. Mich. 1966).

[304] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 at 403 (Brennan, J., dissenting); R. Calkins, supra note 1, at 461; But see In re Grand Jury Transcripts. 309 F. Supp.

this reason is valid at all, since the names of grand jury witnesses are not secret in most jurisdictions.[305] "Reprisals against witnesses can and do occur,"[306] but the name of a witness (or grand juror) is all the would-be tamperer needs. Hence, a witness may not be encouraged to step forward by promise that his testimony will be kept secret, when he knows that his name may not be kept secret, and he expects that his testimony will eventually be required at a public trial.[307]

¶94 In sum, grand jury secrecy is not an end in itself.[308] It is a policy that should be applied only when there is some reason to apply it,[309] and it must be weighed against other

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304 (continued)
1050, 1052 (S.D. Ohio 1970), where the court refused to order turn over to state authorities of federal grand jury testimony of two witnesses precisely because their grand jury testimony was the same as their trial testimony and the latter was readily available.

[305] In re Petition, 184 F. Supp. 38, 41 (E.D. Va. 1960); L. Orfield, supra note 283 at § 6:120.

[306] Note Administrative Access to Grand Jury Materials, 75 Colum. L. Rev. 162, 183 (1975).

[307] See note 313, infra.

[308] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 403 (1958) (Brennan, J., dissenting).

[309] "Where the ends of justice can be furthered thereby and when reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised." Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933).

relevant interests.[310]

C. Reasons for Seeking Access to Federal Grand Jury Minutes

¶95 As previously noted,[311] testimony of a witness at trial will presumably be the same as his testimony before the grand jury. Any inconsistency may be disclosed anyway, through impeachment.[312] Trial testimony is readily available, so why would state authorities want to obtain grand jury testimony?

¶96 In cases where the witness has appeared both before the grand jury and at trial, the simple answer is that his grand jury testimony may be much broader in scope than his trial testimony. Testimony given before the grand jury may have been irrelevant at the trial. For example, a witness may have given testimony before a grand jury implicating a third pary not involved in the federal prosecution. Such testimony might be irrelevant at the federal trial. Or, the witness may have given hearsay testimony before the grand jury, not admitted at trial, which would give state authorities a valuable investigative lead. Note, however,

[310] See, e.g., In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974):

> In considering applications for disclosure of grand jury minutes, the court's task is to scrutinize the request against the reasons for the rule of secrecy.

[311] Supra ¶93.

[312] Supra ¶92.

that the state's reason for seeking the federal grand jury minutes in this instance may be the very reason for not allowing its access.[313] Unless the state proceedings in which the federal grand jury minutes are to be used provides adequate due process, Sixth Amendment, and evidentiary safeguards, use of the federal grand jury minutes may prove to be unconstitutional.[314] The manner in which the state intended to use the minutes would be highly relevant. For example, use as an investigative tool in preparation for a proceeding that has adequate evidentiary safeguards would be less offensive than admission of the grand jury transcript itself in the state proceeding, since there is no opportunity for cross-examination in that case. As shall be seen, courts have been sensitive to this problem, and they have dealt with it by tailoring the definition of "judicial proceeding" in Rule 6(e).[314a]

¶97 In addition, use of the grand jury minutes would save investigative time, effort, and expense.[315] Perhaps the

[313] In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973), the court recognized "the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant, or where he may have been subjected to prosecutorial brow-beating without the protection of counsel . . ."

[314] See Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 898 (7th Cir. 1973).

[314a] See text accompanying notes 326-55 infra.

[315] In re Grand Jury Proceedings, 309 F.2d 440, 444 (3rd Cir. 1962); Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229, 1232 (N.D. Cal. 1968). But see Smith v. United States, 423 U.S. 1303, 1304, stay vacated, 423 U.S. 810 (1975).

witness never testified at trial. He may not have been called as a witness at trial. Or, there may have been no trial because the defendant pleaded guilty or nolo contendere,[316] the government dropped the charges, the grand jury returned no indictment,[317] or the indictment was dismissed.[318]

¶98 Whether the reason in inadequacy of trial testimony or nonexistence of trial testimony, state authorities may have a legitimate need for grand jury minutes. State police authorities may want access to federal grand jury minutes to investigate possible violations of departmental regulations prohibiting officers from refusing to cooperate fully with grand juries.[319] State prosecutors, bar authorities, legislative committees, and police boards may want to see if facts adduced before the grand jury suggest violations of state law, disciplinary rules, or codes of ethics.[320]

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[316] Cf. In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108 (N.D. Ill. 1974).

[317] Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958)(L. Hand,J.).

[318] Cf. Application of Scro, 200 Misc. 688, 108 N.Y.S.2d 305 (Kings Co. Ct. 1951)(Leibowitz, J.), involving an analagous problem of access to state grand jury minutes by police disciplinary authorities.

[319] Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 895 (7th Cir. 1973).

[320] In re Holovachka, 317 F.2d 834 (7th Cir. 1963)(bar disciplinary proceeding); Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958)(bar disciplinary proceeding); In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970)(police misconduct); In re Bullock, 103 F. Supp. 639 (D.D.C. 1952) (police misconduct); In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974) aff'd sub nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974)

State prosecutors may prefer to use federal grand jury minutes as investigative tools rather than calling a particular witness before a state grand jury. This would be an important reason if state law only provided for transactional immunity,[321] or provided automatic immunity for certain classes of state grand jury witnesses,[322] or provided that targets could not be called to testify. Certain witnesses who appeared before the federal grand jury may have died or disappeared, or may not be subject to service of process in the state. Other witnesses may no longer be subject to criminal prosecution, either because their federal grand jury testimony was immunized, or the statute of limitations has run.[324] If these witnesses are corrupt public officials, lawyers, political figures, or policemen, the only way to remove them from the system may be via state proceedings.

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[320](continued) (presidential impeachment); In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960)(criminal investigation of city officials); United States v. Downey, 195 F. Supp. 581 (S.D. Ill. 1961)(criminal investigation of state employee); United States v. Crolich, 101 F. Supp. 782 (S.D. Ala. 1952)(misconduct of election officials).

[321] See, e.g., N.Y. Crim. Proc. Law §190.40 (McKinney 1971).

[322] See, e.g., In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960). A Virginia statute gave automatic immunity to grand jury witnesses testifying in bribery and gambling cases. The oommonwealth attorney's desire to use federal grand jury minutes in his state criminal investigation might have been motivated by his desire to avoid calling certain people before a state grand jury, thereby immunizing them. The court granted his request for access to the federal minutes.

[324] See note 320, supra.

¶99 Finally, a federal grand jury may request that evidence or testimony produced before it be turned over to state authorities.[325] Obviously, that gives state authorities a good reason to request access to the minutes.

D. The Approach Taken by Courts

¶100 Under Rule 6(e), disclosure may be made (a) "to attorneys for the government" or (b) "preliminarily to or in connection with a judicial proceeding" or (c) "at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment...."[326]

¶101 In order for state authorities to gain access to federal grand jury minutes, their request must fit in one of these categories.[327] Obviously, the third category is inapplicable. All courts construing the phrase "attorneys for the government" in Rule 6(e) have held that it does not include municipal, county, or state attorneys.[328] Thus, the only remaining avenue

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[325] In Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958), a federal grand jury failed to indict the defendant but voted that his activities be referred by the U.S. Attorney to the grievance committee of the New York City Bar Association. The grievance committee's subsequent request for the minutes was granted. Other cases involving similar requests by federal grand jurors include In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960)

[326] 18 U.S.C., Rule 6(e). See note 284, supra.

[327] But see ¶109, infra.

[328] In re Holovachka, 317 F.2d 834, 836 (7th Cir. 1963); United States v. Downey, 195 F. Supp. 581, 584 (S.D. Ill. 1961); cf. In re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962); Corona Construction Co. v. Ampress Brick Co., Inc., 376 F. Supp. 598, 601 (N.D. Ill. 1974). Fed. R. Crim. P. 54(c) stipulates that "attorneys for the government" as used in the Rules means only federal attorneys and authorized assistants.

for state access under Rule 6(e) is "in connection with a judicial proceeding."

¶102 "The largest breach in the wall of secrecy has been wrought by (this) exception."[329] This has been accomplished through a broad construction of the term "judicial proceeding."[330] The seminal case in this area is Doe v. Rosenberry,[331] in which Judge Learned Hand defined "judicial proceeding" as used in Rule 6(e) to include: "any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime."[332] Thus, the court held that a proceeding before the Appellate Division of the New York State Supreme Court to discipline an attorney was a "judicial proceeding" within Rule 6(e), and a bar association grievance

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[329] In re Biaggi, 478 F.2d 489, 492 (2d Cir. 1973). See also Note, "Administrative Agency Access to Grand Jury Materials," 75 Col. L. Rev. 162 at 169, 170 (1975):

> . . .[I]t is through this exception that the largest inroads into secrecy have been made. Much of this is due, of course, to the court's increasing willingness to permit defendants access to grand jury materials in the preparation of their defense. An equally significant factor, however, is the expanding interpretation which has been given to 'judicial proceeding,' resulting in the use of grand jury transcripts in a wide range of federal, state, and local proceedings. (footnotes omitted).

[330] Note, supra note 329

[331] 255 F.2d 118 (2d Cir. 1958).

[332] 255 F.2d at 120.

committee hearing was "preliminary to" a "judicial proceeding."[333]

¶103 Other courts, following the lead of Doe, have held that state criminal investigations[334] and police department disciplinary proceedings[335] fall within the "judicial proceeding" exception to Rule 6(e).

¶104 Not all courts, however, have taken the Doe approach. Some courts have held that the term "judicial proceeding" in Rule 6(e) refers only to pending federal court proceedings,

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[333] Id. at 119-120. Doe involved charges of corruption against an attorney who was a former IRS group chief. See note 328 supra.

[334] In re Petition for Disclosure of Evidence, 184 F. Supp. 38, 41 (E.D. Va. 1960) was a public corruption case in which the court held that a state criminal investigation was preliminary to a judicial proceeding, and therefore ordered turnover of the minutes to the state prosector.

Interestingly, the court refused to order turnover of minutes for use in a state administrative disciplinary proceeding. Since the court adopted the Doe definition of "judicial proceeding," it is doubtful whether the court meant to hold that an administrative action was not a judicial proceeding under Rule 6(e). More likely, the court was simply exercising its discretion (in not turning over the minutes) because particularized need was not shown by the administrative authorities. The court may have felt that disclosure to the prosecutor was adequate to handle the problem.

[335] In Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), the court upheld a turnover of federal grand jury minutes to the Chicago Superintendant of Police in connection with a police department inquiry. The department was investigating charges that several policemen violated departmental regulations by refusing to answer questions before the grand jury, which was investigating police corruption.

The Court noted that the departmental hearing regulations allowed policemen to appear with counsel, present evidence, and present and cross-examine witnesses. Furthermore, there was a right of extensive judicial review. This extensive power of judicial review was central to the court's holding that the departmental hearing was a "proceeding determinable by a court" within the Doe definition, and therefore a judicial proceeding under Rule 6(e).

not state proceedings. In United States v. Crolich,[336] a federal grand jury had indicted defendants for vote fraud. They pleaded nolo contendere. The court refused to turn over the federal grand jury minutes to the state election board charged with the duty of appointing election officials, saying the "judicial proceeding" exception in Rule 6(e) contemplates a proceeding pending in a federal district court "which would necessitate the disclosure of matters occurring before a grand jury impanelled by that court."[337]

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335 (continued)

In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970) involved facts very similar to Conlisk. The Columbus, Ohio, Chief of Police sought access to federal grand jury testimony of certain witnesses for use in proceedings before the Director of Public Safety with respect to charges against policemen who were defendants in the federal case. The court held that the "quasi-judicial" nature of the proceedings before the Director of Public Safety brought these proceedings within the exception of Rule 6(e). Here, as in Conlisk, judicial review of the administrative proceeding was clearly contemplated.

Having held that the "proceedings" requirement of Rule 6(e) was met, the court then considered whether particularized need was shown. It concluded that particularized need was shown as to the grand jury testimony of a witness who gave inconsistent trial testimony and who "took the fifth" before the Public Safety Board, but not as to the testimony of two other witnesses whose trial testimony was consistent with their grand jury testimony.

Note that the Conlisk court expressly declined to follow the "quasi-judicial" approach of the In re Grand Jury Transcripts court, saying that the holding in Doe "was not framed simply on the Grievance Committee's quasi-judicial nature, but rather on the fact that judicial action on charges predicated on the Committee's findings necessarily followed the Committee's hearings." 490 F.2d at 896, 897. Id. at 897. Procedures to impeach a civil officer were preliminary to a judicial proceeding in United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977).

[336] 101 F. Supp. 782 (S.D. Ala. 1952).

[337] Id. at 784.

under Rules of Court 1:10-2 through 1:10-4.[211] Whether direct or indirect, if the criminal penalty actually imposed is greater than six months, a jury trial will also be required.[212]

12. Civil and Criminal Contempt in New Jersey

A. Misbehavior

¶96 In general, any conduct which is disrespectful or scornful of the court is contemptuous,[213] if it tends to obstruct the administration of justice.[214] Disorderly behavior that interrupts the proceedings of a judicial body,[215] or refusal to give unprivileged answers to a grand

[211] In re [illegible] 63 N.J. 112, 305 A.2d 72, cert. denied, 414 U.S. 855 (1973); In re Finklestein, 112 N.J. Super. 534, 271 A.2d 916 (1970); In re Boyd, 36 N.J. 285, [illegible] (1962); In re Szczepanik, 37 N.J. 503, 181 A.2d 772 (1962). The court's directive, however, [illegible] which constitutes contempt, must be written. In re Callan, 66 N.J. 401 (1975).

[212] In re Buehrer, supra note 209.

[213] In re Callan, 122 N.J. Super. 479, 300 A.2d 868, aff'd, 126 N.J. Super. 103, 312 A.2d 881, rev'd on other grounds, 66 N.J. 401, 331 A.2d 612 (1975).

[214] In re Caruba, 139 N.J. Eq. 404, 51 A.2d 446 (1947), aff'd, 140 N.J. Eq. 563, 55 A.2d 289, application denied, 142 N.J. Eq. 358, 61 A.2d 290 (sentence imposed by trial court and affirmed on appeal, is not then to be modified by trial court), cert. denied, 335 U.S. 846 (1948); State v. Gonzalez, 69 N.J. 397, 354 A.2d 325 (1975) (second conviction of contempt vacated; first conviction and sentence affirmed--no opinion).

[215] State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (1969).

¶105 A similar result was reached in United States v. Downey.[338] A secretary in the governor's office was convicted of federal income tax evasion. The offense had nothing to do with state funds. In denying a motion for disclosure of the federal grand jury minutes to the state attorney general, the court said that the Federal Rules of Criminal Procedure govern procedures in federal courts only and that the term "judicial proceeding" in Rule 6(e) refers to federal proceedings.[339] The court, however, went on to say that:

movants are not entitled as a matter of court discretionary right to have the transcript until an adequate showing is made with factual reasons to justify disclosure.[340]

This sounds very much like a holding that particularized need was not shown, however. (The court was concerned about the fact that the state attorneys produced no facts showing a possible violation of state law; it was a "fishing expedition.") An inquiry into particularized need, however, is not necessary until after a court has decided that disclosure is sought in connection with a judicial proceeding. If there is no judicial proceeding, even an "adequate showing" of factual reason for disclosure would not permit disclosure.[341]

[338] 195 F. Supp. 581 (S.D. Ill. 1961).

[339] Id. at 584.

[340] Id. at 588.

[341] This confusion in the Downey opinion may no longer be significant. To the extent that Downey held that state pro-

These cases are of questionable validity. The history adoption of Rule 6(e) and the decisional trend seem to t the broader construction of "judicial proceeding."[343] The "judicial proceeding" exception to secrecy is not available to accomplish disclosure in cases where feel disclosure is desirable: "[The] difficulty in ation of Rule 6(e) to specific fact situations likely from the fact that its language regarding 'judicial dings' can imply limitations on disclosure much more ive than were apparently intended."[344] Some courts, izing this problem, have granted disclosure requests there is no "judicial proceeding" within the meaning 6(e).[345]

In In re Bullock,[346] District of Columbia Commissioners ed access to federal grand jury minutes to see if a

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e 6(e), it was overruled sub silentio by Special ary 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir.
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e, e.g., In re Report and Recommendation of June 5, 1972 ury, 370 F. Supp. 1219, 1278 (D.D.C.) (aff'd sub nom. n v. Sirica, 501 F.2d 714 (D.C. Cir. 1974)[hereinafter eport].

F. Supp. at 1229.

e Biacci, 478 F.2d 489, 492 (2d Cir. 1973); In re Bullock, Supp. 639 (D.D.C. 1952); In re Report, supra note 343 ing a grand jury report rather than actual minutes).

F. Supp. 639 (D.D.C. 1952).

police official was guilty of dereliction of duty. The court found that none of the Rule 6(e) exceptions to secrecy applied--including the judicial proceeding exception[347]--but ordered the minutes turned over anyway.[348] The court thought the public interest in the integrity of the police force overrode the policy of secrecy.[349]

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[347] Bullock was decided in 1952, before Doe v. Rosenberry. If Bullock arose today, the court would probably reach the same result by holding that disclosure was "preliminary to or in connection with a judicial proceeding," Rule 6(e), 18 U.S.C., following the approach of Conlisk and In re Grand Jury Transcripts (see note 338 supra).

[348] The court said, 103 F. Supp. at 641:

> . . .by way of interpretation the Federal Courts have extended their jurisdiction so that they may remove the seal of privacy from Grand Jury proceedings when in the court's discretion the furtherance of justice requires it. (court's emphasis).

[349]

> In cases of this nature, the sole question to be resolved is which policy shall be served to bring about justice, the one requiring secrecy or the other permitting disclosure. . . .Where public interest is superior to the purpose of the secrecy of Grand Jury testimony, the latter protection will be disregarded and the minutes divulged within limits proscribed by law.

103 F. Supp. at 642, 643. Cf. Application of Scro, 200 Misc. 688, 108 N.Y.S.2d 305 (Kings Co. Ct. 1951)(Leibowitz, J.), which involved an analagous situation in which a local Police Commissioner sought, and won, access to state grand jury minutes:

> If they were guilty of the reprehensible conduct attributed to them, namely of accepting graft in return for protecting Gross in his illegal business, their continued retention on the police force would have made law enforcement a mockery. Public interest, therefore, required that this testimony be made available to the Police Commisssion, to be used by him within limits prescribed by law.

¶109 Bullock may be viewed as creating a "public interest" exception to secrecy.[350] Even where disclosure would not be permitted under Rule 6(e), a court may permit it where it finds a superior public interest.

¶110 Alternatively, Bullock may be viewed in combination with In re Biaggi[352] and In re Report and Recommendation of June 5, 1972 Grand Jury (hereinafter In re Report)[353] as

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[350] In fact, courts have viewed it that way. See, e.g., In re Biaggi, 478 F.2d 489 (2d Cir. 1973), 370 F. Supp. 1219 (D.D.C. 1974); In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108 (N.D. Ill. 1974).

See also Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 897-98 (7th Cir. 1973) and In re Grand Jury Transcripts, 309 F. Supp. 1050, 1052 (S.D. Ohio 1970), in which the courts, after holding that the literal requirements of Rule 6(e) were met, alternatively found (citing Bullock) that even if they were not met, the public interest in police force integrity warranted disclosure.

[352] 478 F.2d 489 (2d Cir. 1973). In Biaggi, newspaper reports indicated that a congressman "took the fifth" before a federal grand jury. The congressman denied it, and sought a court order requiring the grand jury minutes to be made public. None of the exceptions to Rule 6(e) were applicable; there was no judicial proceeding in which the minutes were relevant. The Court of Appeals, per Friendly, J., affirmed a lower court order allowing disclosure of relevant portions of the minutes, with names of third parties deleted. The court essentially found that none of the reasons for grand jury secrecy applied under the facts of the case.

[353] 370 F. Supp. 1219 (D.D.C. 1974). The court ordered contents of a grand jury report disclosed, subject to safeguards, to the Judiciary Committee of the House of Representatives. None of the Rule 6(e) exceptions applied, since a legislative committee investigation is not preliminary to or in connection with a judicial proceeding, etc. The court found that the reasons favoring secrecy were not offended by disclosure under the circumstances. It is open to question whether the court could have found that an impeachment proceeding, being in essence a trial, was a "judicial proceeding" and therefore the House investigation was preliminary to a judicial proceeding.

part of a more broadly based exception to Rule 6(e). This broad exception was pinpointed by Judge Sirica in In re Report:[354]

> The phrase in the Rule, "preliminarily to or in connection with a judicial proceeding", evidently derived from the fact that the Advisory Committee had in mind only cases where the disclosure question arose at or prior to trial. It left the courts their traditional discretion in that situation and apparently considered no others. It affirmed judicial authority over persons connected with the grand jury in the interest of necessary secrecy without diminishing judicial authority to determine the extent of secrecy. The Court can see no justification for a suggestion that this codification of a "traditonal practice" should act... to render meaningless an historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance.

¶111 In other words, Rule 6(e) was intended to codify the traditional practice of allowing a court, in its discretion, to order disclosure of grand jury minutes (in certain circumstances) at or prior to trial.[355] The rule was not intended to preclude, in other instances, the traditional common law balancing of secrecy against the need for disclosure. Bullock may simply be an illustration of this principle as applied to cases involving disclosure to state authorities.

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[354] Id. at 1228.

[355] Cf. note 287 supra.

E. Special Problems when Immunity is Involved

¶112 State access to grand jury testimony given by a witness testifying under a grant of immunity[356] may pose Fifth Amendment problems.

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[356] Immunity of grand jury witnesses is governed by 18 U.S.C. §6002:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--
> (1) a court or grand jury of the United States,
> (2) an agency of the United States, or
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

A U.S. Attorney may request an immunity order under the terms of 18 U.S.C. §6003:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to

¶113 "The accomodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is the immunity statute."[357] Of necessity, the protection afforded by a grant of immunity must be no less than that afforded by the Fifth Amendment.[358] The Fifth Amendment requirement is met by the current federal statute providing for use and derivative use immunity.[359]

¶114 In Murphy v. Waterfront Commission of New York Harbor,[360] the Supreme Court held, "that the constitutional

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356(continued)

> give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

357 United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir. 1974).

358 Counselman v. Hitchcock, 142 U.S. 547, 584-86 (1892); Kastigar v. United States, 406 U.S. 441, 449 (1972).

359 Kastigar v. United States, 406 U.S. 441, 453 (1972).

360 378 U.S. 52 (1964).

privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[361] Hence, grand jury testimony given by a witness testifying under federal use immunity, or its fruits, may not be used against the witness in a subsequent state criminal proceeding.[362]

¶115 The Fifth Amendment only protects a witness from having to give testimony which may subject him to a criminal charge.[363] Thus, testimony given pursuant to a federal grant of immunity may be used against a witness in a state civil proceeding.[364] Courts have, in fact, allowed the use

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361 Id. at 77-78. In Murphy, witnesses appearing in a state proceeding under a state immunity grant refused to testify on the ground that their answers might incriminate them under federal law. The court's holding, however, also covered the situation in which a witness testifying in a federal proceeding under federal immunity refused to testify, claiming possible incrimination under state law. Even though the latter situation was not before the court, the court was able to decide it because the Fifth Amendment was fully applied to the states the same day in Malloy v. Hogan, 378 U.S. 1 (1964).

362 Ullman v. United States, 350 U.S. 422, 434-35 (1956).

363 Hale v. Henkel, 201 U.S. 43, 67 (1906).

364 The federal immunity statute, 18 U.S.C. § 6001, et. seq., was intended to allow such a result. See H. Rep. No. 91-1549, 91st Cong., 2nd Sess. 42 reprinted in (1970) U.S. Code Cong. & Ad. News 4007, 4017:

> No oral testimony or other information secured from a witness can be used against him in a criminal proceeding. This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. (emphasis added).

of immunized federal trial testimony in state civil proceedings.[365] Obviously, there is no Fifth Amendment prohibition against the use of immunized federal grand jury testimony in state civil proceedings;[366] the question simply reduces itself to one of whether the state can gain access to the grand jury testimony in the face of Rule 6(e).

¶116 The state should be given access to federal grand jury minutes for use in state civil proceedings, especially if immunity has been granted in federal court. If a corrupt public official, policeman, lawyer, etc., testifies under federal use immunity, federal or state criminal prosecution becomes virtually impossible without wholly independent

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364(continued)

See also II National Commission on Reform of the Federal Criminal Laws, Working Papers 1432, 1433 (1970):

> Because of the major public interest considerations involved in the various fields of licensing, particularly in the areas of health and safety, there should be an effort to avoid immunity statute clauses which may be construed not only to bar punitive action, but also to bar remedial actions to protect the public . . . . It would seem to be sufficient for an immunity statute to be formulated as is the Fifth Amendment itself. . .in terms of protection against "incriminatory" consequences of compelled disclosure.

[365] In re Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied 98 S. Ct. 1508 (1978)(allowing use of immunized federal testimony in State bar proceedings); Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976)(allowing use of federally immunized testimony in state proceedings for revocation of engineer's license).

[366] Cf. Napolitano v. Ward, 457 F.2d 279 (7th Cir.), cert. denied, 409 U.S. 1037 (1972), where the court held that the Fifth Amendment was not violated when a state grant of transactional immunity before a state grand jury did not protect the witness (a judge) from state proceedings for removal from the bench based on the immunized grand jury testimony.

evidence. Consequently, the only way to remove him from the system may be via state civil disciplinary proceedings. The very fact that the witness received a grant of immunity may be the factor that weighs most heavily in favor of disclosure of the federal grand jury testimony to state authorities. Under these circumstances, there may be a "particularized need" for the grand jury testimony, and disclosure may be accomplished by using the "judicial proceeding" or "public interest" exceptions to Rule 6(e).[367]

¶117 In several cases, grand jury witnesses have refused to testify notwithstanding federal immunity grants, alleging that under the circumstances of the case, the immunity did not afford them protection coextensive with the Fifth Amendment. These cases fall into two categories. In one category, the claim was that the testimony, if given, would subject the witness to extradition and prosection by foreign nations.[368] In the other category, the claim was that the testimony, if given, could be used against the witness in subsequent prosecutions (for prior false statements) under 18 U.S.C. §1001.[369]

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[367] See ¶¶109-111, supra.

[368] In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); In re Parker 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom., Parker v. United States, 397 U.S. 96 (1970); In re Weir, 377 F. Supp. 919, (S.D. Cal.), aff'd 495 F.2d 879 (9th Cir.,), cert. denied, 419 U.S. 1038 (1974).

[369] United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973); In re Weir, 377 F. Supp. 919, 924 (S.D. Cal. 1974).

¶118 The correct approach to both situations is for the court to determine whether subsequent prosecution is possible.[370] If it is legally possible, the Fifth Amendment should apply to allow the witness to remain silent with respect to the specific questions which raise the possiblity of subsequent prosecution.

¶119 Unfortunately, several courts have compelled the testimony in these cases, on the ground, inter alia, that Rule 6(e) will prevent disclosure, and the subsequent prosecutions will therefore never materialize.[372] The use of Rule 6(e) and the concept of secrecy to resolve a Fifth Amendment problem may be wholly inappropriate. It may

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[370] In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) the court found that the witness' fear of a subsequent Mexican prosecution was reasonable. The court thought Rule 6(e) could not be relied upon as effective protection. Thus, the court simply required the prosecutor to refrain from asking particular questions in a context that might make the answers incriminating under foreign law.

In United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973), the court held that the witness' fear of subsequent prosecution (under 18 U.S.C. §1001) for giving a false statement to a government agency was unfounded. This holding was based on the court's construction of 18 U.S.C. §6002 as requiring immunity to extend to all criminal prosecutions except a prosecution for perjured testimony given in response to the command to testify. In other words, the testimony could not be used against the witness in any prosecution for false statements made to anyone outside of the grand jury. But see United States v. Tramunti, 500 F.2d 1334, 1344-1346 (2d Cir. 1974).

[372] In re Tierney, 465 F.2d 806 (5th Cir. 1972) (Bell, J.); In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970); In re Weir, 377 F. Supp. 919 (S.D. Cal.) cert. denied, 419 U.S. 1038 (1974); In re Lysen, 374 F. Supp. 1122 (N.D. Ill. 1974).

unnecessarily complicate the disclosure question, may not adequately answer the Fifth Amendment question, and may not be the least drastic way to accomodate the rights of the witness, the needs of the prosecutor, and the interest in disclosure in appropriate cases.

F. Observations and Conclusions

¶120 Given that state authorities have legitimate reasons for seeking access to federal grand jury minutes, they should be permitted such access when the reasons for secrecy are no longer applicable or are outweighed by greater public policy interests.

¶121 Typically, disclosure should occur:

(1) in cases involving corruption of public officials or employees, attorneys, judges, policemen, political leaders, i.e., cases where the strong public interest in removing these people from their positions outweighs the policy of secrecy (the public interest would, in effect, supply the requisite "particularized need");

(2) where the federal proceedings have ended and most of the reasons for secrecy have therefore become inapplicable; and

(3) where the party against whom the minutes are to be used was not a witness or subject in the grand jury proceeding, and again the reasons for secrecy become inapplicable.

¶122 Disclosure may be accomplished by convincing the court that:

(1) the state proceeding for which the minutes are sought falls within the "judicial proceeding" exception to Rule 6(e), and that a "particularized need" exists;

(2) a public interest exception should be engrafted onto Rule 6(e); or

(3) although Rule 6(e) only applies to disclosure at or prior to the federal trial, a common law balancing of policy interests should be made.

¶123 The lack of strict evidentiary standards, presence of counsel, and cross examination in grand jury proceedings suggests that, when available, federal grand jury minutes must be used in a manner consistent with the constitutional rights of the party against whom they are being used. The proceedings in which they are used should afford adequate due process and Sixth Amendment protection--notice, hearing, right to counsel, cross examination, reasonable evidentiary standards and judicial review. (The "judicial proceeding" exception is, in reality, one way of ensuring compliance with these standards.) In camera inspection by the federal court may be necessary prior to disclosure to ensure that illegally seized evidence is not made available to state authorities. Portions of the transcript irrelevant to the state inquiry should be excised, and the transcript should be edited where necessary to protect innocent parties and witnesses.

¶124 In the special case where a witness's immunized testimony is sought for use against him, the very fact that he has been immunized from criminal prosecution may favor the disclosure of the testimony for use in a civil

proceeding. This should not cause witnesses to "clam up" as the more information the witness gives, the greater the scope of the use immunity. Should a criminal prosecution result, the witness may then be faced with the same civil disciplinary proceeding he sought to avoid in the first place. Thus, the incentive to cooperate provided by use immunity should prevent any chilling effect caused by use of the minutes in civil proceedings.

¶125 Subject to these proceedural and constitutional safeguards, federal courts should be liberal in allowing state access to grand jury minutes where the reasons for secrecy are inapplicable. Courts should no longer assume that protection or encouragement of witnesses is a justification for secrecy in all cases. As previously noted, this reason for secrecy is weaker than it appears to be at first glance. The government should instead be permitted to show, in particular cases, that protection or encouragement of witnesses is a relevant factor weighing against disclosure.

¶126 Unfortunately, courts have shown a tendency to simply repeat the "five reasons for secrecy" formula, and apply it in an unthinking fashion, without determining whether the formula reasons are the real reasons for secrecy, or whether they apply to the specific facts of the case before them. An approach that started out as a legitimate interest analysis has evolved into a pat, formularized approach. Hopefully, courts will begin taking another look at this problem, to insure that the policy of grand jury secrecy does not stand in the way of legitimate state action in public corruption cases.

IX. THE GRAND JURY AS AN INVESTIGATIVE TOOL

A. Distinction: Target, De Jure Defendant and Mere Witness

¶127 Three possible categories of witnesses must be identified. A mere witness is one called to testify before the grand jury because it is thought that he may have some relevant information. At the time he is called he is suspected of no crime that the grand jury is investigating. At the other extreme is the de jure defendant who has already been indicted or against whom formal charges have been filed.[373] Between these two extremes lies a middle category of witnesses who are generally referred to as targets or subjects of the investigation, virtual or potential defendants or de facto defendants (hereinafter referred to as targets).

¶128 For one to be classified as a target more than a "mere possibility that the witness may later be indicted"[374] must exist. At the time that he is called it must appear that investigation has focused upon him as someone whom the government suspects of wrongdoing and plans to indict.[375] The determination of one's target status depends not upon the subjective intent of the prosecutor but rather it rests upon an objective examination as to the scope of the inquiry, the matters and transactions sought to be discussed and the

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[373] 53 Texas L. Rev. 156, 158 (1975).

[374] United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955).

[375] See United States v. Mandujano, 496 F.2d 1050, 1053 (5th Cir. 1974), rev'd 425 U.S. 564 (1976).

e of the questions put to the witness.[376]

he Rights and Obligations of a Mere Witness and a
e Jure Defendant

The de jure defendant occupies the most protected
s. He may not be compelled to appear before a grand
investigating matters related to the crime with which
charged. His appearance requires a knowing and
ligent waiver of his rights,[377] which include a right to
ain silent and to have counsel present at any questioning.[378]
ce, in United States v. Doss, the Sixth Circuit Court of
ls held that a grand jury proceeding where the witness
lready the subject of two sealed indictments but was not
med of this, the proceedings were held to be in violation
defendant's Sixth Amendment right to counsel and due

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le v. Laino, 10 N.Y.2d 161, 170, 176, 218 N.E.2d 571,
Y.S.2d 647, 655 (1961); State v. Sibilia, 88 N.J.
er. 546, 212 A.2d 869 (Essex Co. 1965).

As Justice Brennan wrote:

> It is clear that the government may not in the absence of an intentional and knowing waiver call an indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he already stands formally charged.

States v. Mandujano, 425 U.S. 564, 594 (1976) (con-
g Opinion); accord, United States v. Doss, 545 F.2d
51 (6th Cir. 1976).

iah v. United States, 377 U.S. 201, 206 (1964)(6th
ent right to presence of counsel at all post-indictment
ogation); United States v. Doss, 545 F.2d at 552. But
. R. Crim. P. 6(d)(restricting those who may be present
d jury to only the government's attorneys and not
ses' attorney).

process rights and were void.[379] As a result, indictments for perjury resulting from his testimony were quashed.[380] Similarly, it has been stated that the examination of an indicted defendant before a grand jury for the purpose of "freezing" his testimony at trial is an improper use of the grand jury.[381]

¶130 In contrast, a mere witness may not refuse to appear if subpoenaed.[382] He is entitled to the protection of his privilege against self-incrimination[383] but he must claim it and if he fails to do so it is waived.[384] Further, the prosecutor is under no duty to inform him of his rights.[385]

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[379] United States v. Doss, 545 F.2d 548 (6th Cir. 1976). Doss did not deal with the situation whereby an indicted defendant is subpoenaed to testify in a grand jury investigation of unrelated crimes. Id. at 552 n.1.

[380] Id. at 552.

[381] United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972).

[382] Blair v. United States, 250 U.S. 273 (1919).

> [T]he giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person... is bound to perform upon being duly summoned.

Id. at 281.

[383] In re Groban, 352 U.S. 330, 333 (1957).

[384] See Rogers v. United States, 340 U.S. 367, 370-71 (1951).

[385] United States v. Zeid, 281 F.2d 825, 830 (3d Cir. 1960); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955); State v. De Cola, 33 N.J. 335, 164 A.2d 729 (1960); People v. Smith, 257 Mich. 319, 241 N.W. 186, 188 (1932). But see Comm. v. McCloskey, 443 Pa. 117, 143, 277 A.2d 764, 777 (1971).

The mere witness has no right to have counsel present.[386] Nevertheless, as discussed previously, the general practice is to allow the witness to have counsel present outside the grand jury room and to allow him to leave the room to consult with his attorney should he have any questions as to the exercise of his privilege against self-incrimination.[387]

¶131 The question that now must be addressed is whether a target is to be treated as a mere witness or whether he is to be afforded the broader protections given to a de jure defendant.

C. The Target Strategy under Federal Law

1. The propriety of subpoenaing a target

¶132 The issues surrounding the use of the target strategy have been litigated in the federal courts more extensively than in any state. Upon review of the federal law in the area, the only conclusion to be reached is that the target is not treated as a de jure defendant but rather is afforded much less protection and is generally to be treated like a mere witness.

¶133 The basic practice at issue here, the target strategy, has not been found to be in any way violative of the

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[386] In re Groban, 352 U.S. 330, 332-33 (1959); State v. Cattaneg, 123 N.J. Super. 167, 172, 302 A.2d 138, 141 (1973); People v. Ianniello, 21 N.Y.2d 418, 424, 235 N.E.2d 439, 443, 288 N.Y.S. 2d 462, 468 (1968); People v. Blachura, 59 Mich. App. 664, 666-67, 229 N.W.2d 877, 878 (1975) (no right to presence of counsel before a citizen's grand jury).

[387] See ¶28, supra.

target's Fifth Amendment rights.[388] Indeed, the practice of calling "those persons who appear to know most about the matters under inquiry" [389] has been seen as an entirely proper means by which the grand jury may fulfill its function as a shield against arbitrary accusation. The duty of the grand jury to investigate completely may not be carried out fully without questioning those implicated in order to give them an opportunity to explain or implicate others.[390] Such a strategy has been recognized as particularly relevant in investigations involving political corruption[391]

[388] United States v. Mandujano, 425 U.S. 564, 573 (1976) (opinion by Burger, C.J. with three justices concurring); United States v. Friedman, 445 F.2d 1076, 1088 (9th Cir.) cert. denied, 404 U.S. 958 (1971); Kitchel v. United States, 354 F.2d 715, 720 (1st Cir. 1966) cert. denied, 384 U.S. 1011 (1967); United States v. Winter, 348 F.2d 204 (2d Cir.), cert. denied, 382 U.S. 955 (1965), In re Liddy, 506 F.2d 1293, 1305 (D.C. Cir. 1974).

[389] United States v. Sweig, 441 F.2d 114, 121 (2d Cir.) cert. denied, 403 U.S. 932 (1971).

[390] Id. as stated by Chief Justice Burger in the Mandujano case:

> It is in keeping with the grand jury's historic function as a shield against arbitrary accusation to call before it person suspected of criminal activity so that the investigation can be complete ....It is entirely appropriate--indeed imperative--to summon individuals who may be able to illuminate the shadowing precincts of corruption and crime....[I]t is unrealistic to assume that all witnesses capable of providing useful information will be pristine pillars of the community untainted by criminality.

425 U.S. at 573.

[391] The technique of subpoenaing the target has been utilized in many political corruption cases. See,

where the subject involves "a long devious and complicated conspiracy" and "sophisticated people, with varying motives to save themselves."[392] Though the procedure is generally accepted by the courts, the procedures surrounding its use and the limits of its application are not quite so clear and must be examined.

2. A target's right to counsel

¶134 A target's right to counsel appears to be no broader than that afforded a mere witness called before a grand jury. He may take advantage of the practice of consulting with counsel outside of the grand jury room.[393] Thus, the witness, a target against whom the investigation is proceeding and who will, no doubt, be asked questions directed at eliciting further evidence of his criminality, may permissibly be left alone to decide which questions are potentially incriminating and when he should ask to see his attorney. Moreover, although allowing the witness to consult with his attorney outside is a common practice, it is doubtful whether such a practice is required as a Sixth Amendment

391 (continued) e.g., United States v. Isaacs, 493 F.2d 1124 (7th Cir. (1974); United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971); United States v. Corallo, 413 F.2d 1306 (2d Cir.) cert. denied, 396 U.S. 958 (1969); United States v. Addonizio, 313 F. Supp. 486 (D. N.J. 1970), aff'd 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

[392] United States v. Corallo, 413 F.2d at 1328.

[393] United States v. Corallo, 413 F.2d 1306, 1328 (2d Cir. 1969); United States v. Levinson, 405 F.2d 971, 980 (6th Cir. 1968), cert. denied, 395 U.S. 958 (1969); United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969).

right to counsel in the grand jury setting.[394]

¶135 The limited scope of attorney availability to the witness may give the prosecution a distinct advantage, but it must be remembered that in political corruption cases the targets will be sophisticated people who will probably have sought out legal advice prior to testifying.[395]

3. Limits on the strategy

¶136 Just as it appears that the federal courts have readily accepted the use of the strategy, it also appears that the courts have placed few limitations on the extent to which the strategy may be used. Indeed, there are very few ways by which a reluctant target can resist an appearance before the grand jury, even if such an appearance would only result in his claiming his Fifth Amendment privilege. The ABA Standards state:

> (e) The prosecutor should not compel the appearance of a witness whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify.[396]

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[394] See United States v. Mandujano, 425 U.S. at 581; United States v. Winter, 348 F.2d at 208; Langello v. Comm. of Corrections, State of N.Y., 413 F. Supp. 1214, 1220 (S.D.N.Y. 1976). No federal case has decided whether a witness has a constitutional right to consult with his attorney during questioning. But see People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968); 1976 Guild, supra note 35, at §7.5 (arguments in favor of the right to counsel).

[395] See 1976 Guild, supra note 35, at §3.6(a) (Advising and preparing witnesses prior to appearance before the grand jury so as to limit the prosecutorial advantage of limited attorney availability).

[396] ABA Standards §3.6(e).

Clearly, however, this rule has not received widespread recognition by federal courts. On the contrary, it appears to be the rule that a target may be forced to appear before the grand jury even though he intends to assert his privilege against self-incrimination and communicates his intentions to the prosecuting agency.[397] Only one district court appears to have adopted the ABA Standard and quashed the subpoena of a target who had informed the Justice Department of his intention to assert his Fifth Amendment privileges if compelled to appear.[398]

¶137 The rationale for the ABA Standard §3.6(e) lies in attempting to avoid prejudicing the target in the eyes of the grand jury by compelling him to exercise his privilege.[399] But even as to this issue the federal courts appear to be less sympathetic. Although the better practice is to have the prosecutor instruct the grand jury to draw no inferences from the target's assertion of his constitutional privilege,[400] failure to do so will not result in the dismissal of the

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[397] United States v. Wolfson, 405 F.2d 779, 784-85 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969); United States v. Fortunato, 402 F.2d 79 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969); United States v. Addonizio, 313 F. Supp. 486 (D. N.J. 1970), aff'd 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972); United States v. Issacs, 347 F. Supp. 743, 759 (E.D. Ill. 1972); United States v. De Sapio, 299 F. Supp. 436 (S.D.N.Y. 1969).

[398] In re Possible Grand Jury Investigation, 17 Crim. L. Rptr. 2398 (D.D.C. 1975).

[399] ABA Standards at 90 (commentary).

[400] See United States v. Wolfson, 405 F.2d 779, 785 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

indictment.[401]

¶138 The proper time for subpoenaing the target is controlled by only one outer limit. Once the grand jury indicts the target he becomes a de jure defendant and becomes entitled to all the protection afforded by the Constitution.[402] Once the subject of an indictment, he can no longer be compelled to appear before the grand jury investigating the crime charged, even where the target is as yet unaware of the indictment.[403] Indeed, the use of the grand jury to adduce further evidence against a defendant already indicted is considered improper even where it seeks such evidence from sources other than the target.[404] But one indicted for one crime may be brought before the grand jury as a target where the investigation involves a similar but separate offense.[405]

¶139 Beyond this one time limit, there appears to be little else which would require the prosecutor to subpoena the target at any particular point. The grand jury is under no duty to cease its investigation once it has

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[401] United States v. De Sapio, 299 F. Supp. 436, 440 (S.D.N.Y. 1969).

[402] See notes 380-384 and accompanying text supra.

[403] See United States v. Doss, 545 F.2d 548, 551 (6th Cir. 1976).

[404] United States v. Sellaro, 514 F.2d 114, 122 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975); United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964), cert. denied, 379 U.S. 845 (1964).

[405] United States v. George, 444 F.2d 310, 314 (6th Cir. 1971). In this case, the defendant was afforded the right to consult with his attorney outside of the grand jury room after each question.

developed enough information to support an indictment.[406] Hence, the questioning of the target may be delayed until the end of the investigation.

¶140 The advantages of waiting until the end are obvious. Once independent evidence has established or indicated the criminality, more focused questions can be put to the target. More important, with information supporting a conclusion of criminality, questions directly aimed at the criminal transactions may induce the target to perjure himself providing a second criminal charge, which may be joined with the substantive charge,[407] and it is easily proved if the substantive crime is proved. The practice of questioning the target about transactions when the government already has independent evidence, without disclosing the existence of such evidence to the target, in the hope or expectation that he will perjure himself was found by the court of appeals in Mandujano as being violative of due process.[408] But this view was not shared by the Supreme Court.[409] Nor have other circuits shared this view. Indeed, the practice described above has been explicitly upheld in

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[406] United States v. Sweig, 441 F.2d at 121.

[407] See United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).

[408] See ¶40, supra.

[409] 425 U.S. at 583; 425 U.S. at 609 (Stewart, concurring).

both the Second and Seventh Circuits.[410]

¶141 A final caveat is necessary as to the application of the target strategy. Where a target's testimony is sought, the government may be tempted to grant him use immunity[411] and still hope to indict him on the basis of independent evidence before the grand jury. Although the propriety of such a procedure has not been tested at least one circuit has indicated the validity of such an indictment would be questionable.[412]

4. A note on the use of the subpoena duces tecum

¶142 Although it is still true that the cost of producing documents rests primarily upon the witness,[413] there is some recent authority supporting the proposition that where the cost of production becomes financially unreasonable and burdensome, the government may be liable for the cost. This is true where the government seeks documents held by a third party (e.g. bank records)[414] or where the records sought are in the target's custody.[415]

D. Aspects of Selected State Law

1. Michigan

¶143 Michigan law requires that a target be informed of his right against self-incrimination.[416] Failure to do so will not necessarily result in quashing the indictment. Rather, the court will apply an exclusionary rule as to the target's testimony and then decide whether sufficient independent evidence existed to support the indictment.[417] Like the federal system, perjury is not excused by a failure to warn.[418] Further, no witness is entitled to the presence of counsel before a citizen's grand jury.[419] Nevertheless,

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[410] United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826 (1975)(target questioned about statements he made which the government had recorded without disclosing this fact to the target); United States v. Nickels, 502 F.2d 1173, 1176 (7th Cir. 1974), cert. denied, 426 U.S. 911 (1976).

[411] 18 U.S.C. § 6002 (1974); See also 1976 Guild, supra note 35, § 3.7 (Advises witness never to testify without immunity).

[412] United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976) cert. denied, 430 U.S. 982 (1977) (court dismissed indictment where grand jury heard defendant's immunized testimony, relying on Kastigar holding that the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony"). 406 U.S. at 460.

[413] See Application of Radio Corp. of America, 13 F.R.D. 167 (S.D.N.Y. 1952).

[414] See United States v. Dauphin Deposit Trust Company, 385 F.2d 129, 130 (3d Cir. 1967); cert. denied, 390 U.S. 921 (1968); United States v. Farmers Merchant Bank, 397 F. Supp. 418, 420 (C.D. Cal. 1975).

[415] In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192, 1198-1200 (N.D. Ga. 1975). Of course, generally the target's Fifth Amendment privilege would protect most of his papers. In this case, however, the target was a corporation.

[416] People v. Smith, 257 Mich. 319, 323, 241 N.W. 186, 188 (1932); People v. DiPonio, 48 Mich. App. 128, 131, 210 N.W.2d 105, 107 (1973); People v. Hunley, 63 Mich. App. 97, 234 N.W.2d 169 (1975).

[417] People v. DiPonio, 48 Mich. App. 128, 133, 210 N.W.2d 105, 107-108 (1973).

[418] People v. Blachura, 59 Mich. App. 664, 667, 229 N.W.2d 877, 879 (1975), appeal dismissed, 396 Mich. 723, 242 N.W.2d 391 (1976).

[419] Id. at 666, 229 N.W.2d at 878.

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where a witness is called before a "one-man grand jury" he is afforded the statutory protection of the right to have an attorney present.[420]

2. Pennsylvania

¶144 Pennsylvania law makes no distinction between a mere witness and a target. Neither has a right to refuse to appear nor an unqualified right to remain silent.[421] Under the Pennsylvania Supreme Court decision in Commonwealth v. McCloskey[422], however, all witnesses are entitled to a warning that they have a right to consult with an attorney before and after testifying and should he have a question as to whether he may properly refuse to answer any question he may go before the court accompanied by his counsel to obtain a ruling. This right to a warning is constitutional and failure to so warn may result in quashing an indictment where testimony is taken and the indictment is based in "any way" upon such tainted testimony.[423] A failure to give the warning required by McCloskey, however, will not immunize perjured testimony.[424]

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[420] Mich. Stat. Ann. §28.943 (1972).

[421] Commonwealth v. Columbia Investment Corp., 457 Pa. 353, 366, 325 A.2d 289, 295 (1974).

[422] 443 Pa. 117, 277 A.2d 764 (1971).

[423] Id. at 140-47, 277 A.2d at 776-79.

[424] Commonwealth v. Good, 461 Pa. 482, 337 A.2d 288 (1975).

3. New Jersey

¶145 It is the rule in New Jersey that where it is clear that the purpose of the proceeding is directed at "securing the potential defendant's indictment"[425] or the witness's "criminal liability is the object of the grand jury inquiry"[426] the target is entitled to be warned of his privilege against self-incrimination. In addition, there is some indication that the target is also entitled to be apprised as to the nature of the investigation so that he may exercise his privilege intelligently.[427]

¶146 Nevertheless, the test for determining one's status as a target may require a more direct and purposeful focus on the witness and a more specific purpose for his presence before the grand jury. Some of the cases speak of the need to show that the proceeding was merely "a ruse by which it is sought to induce [the target] unwittingly to give evidence against himself."[428] But generally, where the witness has been found to be the target, the court tended to follow the same approach as other jurisdictions, looking to the nature

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[425] State v. Browning, 19 N.J. 424, 427, 117 A.2d 505, 507 (1955).

[426] State v. De Cola, 33 N.J. 335, 342, 164 A.2d 729, 732 (1960).

[427] State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (Law.Div. 1967); State v. Rosania, 96 N.J. Super. 515, 233 A.2d 413 (Law.Div. 1967). See also Office of the Attorney General, Grand Jury Manual for Prosecutors: Criminal Justice Standards, 5 Crim. Just. Q., Winter 1977, at 23-25 (recommended warnings for target witnesses).

[428] State v. Fary, 19 N.J. 431, 438, 117 A.2d 499, 503 (1955); State v. Cattaneo, 123 N.J. Super. 167, 172, 302 A.2d 138, 141 (App. Div. 1973).

and scope of the questions posed in relation to transactions to which the witness was a party.[429] Like the federal rule, a target cannot refuse to appear[430] and is not entitled to the presence of an attorney merely because of his status as a target.[431]

¶147 Although some earlier cases pointed to the dismissal of the indictment as the proper remedy for the failure to warn,[432] recently this remedy was rejected by an appellate court. In State v. Vinegra,[433] the court stated that the Supreme Court's decision in Calandra indicated that assumptions as to the scope of the Fifth Amendment privilege inherent in the earlier New Jersey cases may have been unwarranted. Hence, indictments procured in violation of the target rule were not per se invalid. Rather, the target's rights could be adequately protected by the application of the exclusionary rule as to his testimony at trial.[434]

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[429] See State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (Law.Div. 1967); State v. Siblia, 88 N.J. Super. 546, 212 A.2d 869 (Essex County Ct. 1965).

[430] State v. Browning, 19 N.J. 427, 117 A.2d at 507; State v. Sarcone, 96 N.J. Super. at 502, 233 A.2d at 407.

[431] State v. Cattaneo, 123 N.J. Super 167, 172, 302 A.2d 138, 141 (App. Div. 1973).

[432] State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955); State v. Sarcone, 96 N.J. Super. 501, 233 A.2d 406 (1967); State v. Siblia, 88 N.J. Super. 546, 212 A.2d 869 (1965). But note the court in Fary left open the possibility that where many other witnesses gave evidence as well as the target the indictment may not be invalid. 19 N.J. at 439, 117 A.2d at 504.

[433] 134 N.J. Super 432, 341 A.2d 673 (App. Div. 1975).

[434] Id. at 437-38, 341 A.2d at 676.

¶148 One further aspect of New Jersey law in the context of political corruption cases is worth noting. Generally, immunity in New Jersey must be conferred by the court after the witness has invoked his privilege, but this is not true for public employees. A public employee is under a duty to testify upon all matters related to the conduct of his office in return for which he is entitled to a self-executing grant of use of immunity as to his testimony.[435] A refusal to testify will result in his removal from the office or job.[436] Hence, any public employee will be automatically compelled to testify and such testimony, if perjured, is not immunized.[437] Moreover, it appears that the requirement as to warning a target will not apply where the individual is protected by the immunity granted to public employees.[438]

4. New York

¶149 Unlike other jurisdictions the target strategy described in these materials is rendered considerably less effective in New York by the state constitution and the state's immunity statute for witnesses testifying before the grand jury.

¶150 The state's privilege against self-incrimination as

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[435] N.J. Stat. Ann. §2A:81-17.2a-2. (West Supp. 1978).

[436] N.J. Stat. Ann. §2A:81-17.2a-1. (West Supp. 1978).

[437] State v. Mullen, 67 N.J. 134, 336 A.2d 481 (1975).

[438] State v. Vinegra, 134 N.J. Super. 432,440, 341 A.2d 673, 677 (App. Div. 1975). But see Office of the Attorney General, Grand Jury Manual for Prosecutors: Criminal Justice Standards, 5 Crim. Just. Q., Winter 1977 at 26-27 (recommended warnings for public-employer target witnesses).

interpreted by the New York Court of Appeals has given rise to an extremely broad protection of the target. As the Court stated in People v. Steuding:[440]

> By virtue of the constitution of this State (art. I §6)--and it is solely the constitution of New York with which we are now concerned--a prospective defendant or one who is a target of an investigation may not be called and examined before a grand jury, and, if he is, his constitutionally conferred privilege against self-incrimination is deemed violated even though he does not claim or assert his privilege.[441]

The result of any such violation is use immunity for any testimony given by the target[442] and the dismissal of any indictment returned by the grand jury before which he testified[443] unless the witness expressly waives his privilege before testifying.[444] Clearly, the protection afforded by the New York rule is broader than that required by the federal constitution.[445] Nevertheless, like the

[439] N.Y. Const. Art. I §6.

[440] 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).

[441] Id. at 216-217, 189 N.Y.S.2d at 167; accord, People v. Laino, 10 N.Y.2d 161, 171, 176 N.E.2d 571, 577, 218 N.Y.S.2d 647, 655 (1961).

[442] 6 N.Y.2d at 217, 189 N.Y.S.2d at 166.

[443] People v. Avant, 33 N.Y.2d 265, 352 N.Y.S.2d 161 (1973); People v. Steuding, 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).

[444] People v. Ianniello, 21 N.Y.2d 418, 421, 235 N.E.2d 439, 288 N.Y.S.2d 462, 468 (1968).

[445] See United States ex rel. Laino v. Warden of Wallkill, 246 F. Supp. 72, 77-78 (S.D.N.Y. 1965), aff'd, 355 F.2d 208 (2d Cir. 1966).

federal privilege against self-incrimination, perjury is not protected by the broader New York rule.[446]

¶151 Beyond the target rule lies the even greater obstacle of the New York immunity statute for grand jury witnesses. Any witness subpoenaed by a grand jury must give any evidence requested in return for which he receives an automatic grant of immunity so long as: (1) no written waiver as to his privilege has been made; (2) the evidence is responsive to a question or request; and (3) such evidence did not consist of documents of an enterprise to which the witness did not possess a privilege against self-incrimination.[447] The immunity conferred is transactional.[448]

¶152 Nevertheless, perjury is not protected by the statute,[449] and a prosecutor is under no duty to disclose the existence of evidence or recordings that he uses as a basis on which to question the target.[450] Hence, if it is decided that the target's testimony is important with respect to the entire

[446] People v. Tomasello, 21 N.Y.2d 143, 234 N.E.2d 190, 287 N.Y.S.2d 1 (1967).

[447] N.Y. Crim. Proc. Law § 190.40 (McKinney Supp. 1977).

[448] Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); N.Y. Crim. Proc. Law §50.10 (1971).

[449] N.Y. Crim. Proc. Law §50.10 (1971).

[450] People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428, aff'd 45 App. Div.2d 691, 356 N.Y.S. 626, aff'd, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

investigation, the substantive charge may be foregone and the target may be questioned extensively as to his own actions, and his dealings with others, about which the prosecutor may already have evidence. Should he lie, a conviction for perjury may be possible. Moreover, if he is a public official and chooses the route of a refusal to testify despite the possibility of contempt, he may be removed from office.[451]

5. Florida

¶153 The case law on target witness practice in Florida is undeveloped.[451a] The Supreme Court has declined to classify witnesses;[451b] no lower court has squarely confronted the issue. The most that may be said is that at least some district courts of appeal require that the Miranda warning be given, and that the suspect be permitted to consult his attorney during the questioning.[451c] The only discussion of the

[451] People v. Avant, 34 N.Y.2d 271, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973). But see Lefkowitz v. Cunningham, no. 76-260 (June 13, 1977)(The Supreme Court held unconstitutional the New York statute which removed public officials from office if they refused to waive immunity and testify.)

[451a] In Florida, the state's attorney may subpoena witnesses to appear before him and interrogate them for possible violations of criminal law. Fla. Stat. Ann. § 27.04 (West 1974). The cases treat "these one-man grand juries" as analogues to the more conventional citizen's grand jury.

[451b] State ex. rel. Lowe v. Nelson, 210 So. 2d 197 (Fla. 1968); Englander v. State, 246 So. 2d 746 (Fla. 1971).

[451c] For holdings in first and second districts, see n.9 supra. See also the opinion of the Supreme Court in Tsavaris v. Scruggs, no. 48-637 (March 17, 1977).

consequences of a failure to warn is the concurring opinion of Justice Ervin in Lowe v. Nelson. Statements secured in violation of the Miranda safeguards will be excluded, but an indictment will not necessarily be quashed. The question becomes whether there is enough untainted evidence to support the finding.[451d] There is no authority on whether a failure to warn will upset a perjury conviction.

APPENDIX

Warnings to Witnesses:

A. Ordinary Witness (one against whom the investigation is not directed):

No warnings are constitutionally required.[452]

B. Defendant:[453]

You have the right to refuse to answer any question that may tend to incriminate you.[454] You have the right to consult with counsel outside the grand jury room[455] when you so desire, and counsel will be appointed if you cannot afford it.[456]

[451d] Lowe v. Nelson, supra, n. 15 at 198.

[452] See note 164, supra (states may have different requirements).

[453] See note 109, supra.

[454] Id.

[455] See note 102, supra. But see United States v. Doss, 545 F.2d 548 (6th Cir. 1976), note 91, supra (defendant may have right to counsel in the grand jury room).

[456] See note 102, supra.

C. Putative Defendant (Target Witness):[457]

You have the right to refuse to answer any question that may tend to incriminate you. You are a subject of the grand jury's investigation,[458] and you have been under investigation.[459] You may consult with counsel outside the grand jury room when you so desire.[460]

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[457]For a definition of "putative defendant", see ¶127-128 infra.

[458]This is the practice in the Second Circuit. See United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated and remanded, 429 U.S. 909 (1976).

[459]See note 174, supra.

[460]See United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969). See also United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972).

APPENDIX G

Contempt and Perjury

Outline

¶4 As a result, federal law, New York, and New Jersey now define the crime of false swearing which allows punishment for two irreconcilably inconsistent statements without requiring proof of the falsity of either statement. Massachusetts has not yet followed this trend.

1. Federal Contempt: Generally

¶5 The contempt power has roots which run deep in Anglo-American legal history.[1] Under modern law, there is no question that courts have power to enforce compliance with their lawful orders.[2] At common law, contempt proceedings were sui generis and punishable summarily.[3]

A. Statute

¶6 Title 18 of the United States Code §401 (1948) now provides for the federal courts' contempt power.

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

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[1] See generally, Goldfarb, The Contempt Power (1963). The Judiciary Act of 1789, 1 Stat. 83 (1789) first recognized the contempt power. A limitation to conduct that obstructs justice was enacted in 1831 and sustained as constitutional in Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1874).

[2] United States v. United Mine Workers, 330 U.S. 258, 330-32 (1947). Both persons directly involved in a judicial proceeding and mere spectators are subject to all reasonable orders of the court, United States v. Abascal, 509 F.2d 752 (9th Cir. 1975), cert. denied, 422 U.S. 1027 (1975).

[3] Myers v. United States, 264 U.S. 95 (1924).

¶7 The following section, 18 U.S.C. §402(1948), in paragraph three, defines crimes constituting contempt and provides for their punishment "in conformity to the prevailing usages at law."[4] These sections, though authorizing both civil and criminal contempt sanctions,[5] were intended to limit the contempt power traditionally possessed by federal judges to the least possible power adequate to the end proposed.[6]

B. Distinguishing Civil from Criminal Contempt

¶8 Case law draws two functional distinctions in the law of contempt.[7] Under civil contempt, the refusal is brought to the attention of the court,[8] and the witness may be confined until he testifies.[9] The witness is said, in an oft-quoted phrase, to carry "the keys of the [prison] in [his] own pocket."[10] The confinement cannot extend beyond the life of the grand jury although the sentence can be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.[11]

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[4] 18 U.S.C. §402 (1949) provides in paragraph 3 that the section shall not be construed to relate to contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, or to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of the United States. Such contempts, and all other cases of contempt not specifically embraced in this section, may be punished "in conformity to the prevailing usages at law."

[5] United States ex rel. Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970); Taylor v. Finch, 423 F.2d 1277 (8th Cir. 1970), cert. denied sub nom. Taylor v. Richardson, 408 U.S. 881 (1970).

[6] Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821); Cammer v. United States, 350 U.S. 399 (1956); In re McConnell, 370 U.S. 230 (1962).

[7] Procedurally, the issue arises as follows. When subpoenaed before a grand jury the witness must attend; see, e.g., United States v. Neff, 212 F.2d 297 (3d Cir. 1954). The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions, Wong Gim Ying v. United States, 231 F.2d 776 (D.C. Cir. 1956). Then two courses are open when a witness thus refuses to testify after a proper court order: civil or criminal contempt. The courses, however, are not exclusive; the same conduct may be proceeded against both civilly and criminally. United States v. United Mine Workers, 330 U.S. 258, 299 (1947).

[8] The usual procedure is set out in In re Hitson, 177 F. Supp. 834, 837 (N.D. Cal. 1959), rev'd on other grounds, 283 F.2d 355 (9th Cir. 1960):

> A legally constituted grand jury must call the witness and place him under oath. The witness must refuse to answer a pertinent question on the grounds that the answer would tend to incriminate him under some federal law. The grand jury, prosecuting official, and witness must then come before the court in open session where the foreman must inform the court of the matter and ask its advice. The court then hears the question and makes certain that the witness understands it. If the question does not on its face disclose that the answer would tend to incriminate the witness, he must be given opportunity to be heard and introduce any relevant evidence; if the court is satisfied that an answer would not tend to incriminate it must direct the witness to return to the grand jury room and answer the question. Should the witness continue to refuse, such fact is reported to the court in open session, with the grand jury and court again listening to the question. The question is again put to the witness and if he still refuses to answer he has committed a contempt.

[9] McCrone v. United States, 307 U.S. 61 (1939). Under civil contempt, the court may also order the payment of damages caused by a violation of a court order or decree. McComb v. Jacksonville Paper Co., 336 U.S. 176, 193 (1949).

[10] In re Nevitt, 117 F. 448, 461 (8th Cir. 1902).

[11] Shillitani v. United States, 384 U.S. 364 (1966).

¶9 Under criminal contempt, the witness, after a hearing,[12] may be fined or imprisoned, not to compel compliance but rather to vindicate the court's authority.[13] In general, a jury trial is required if the sentence to be imposed exceeds six months.[14] The precise procedure is governed by the Federal Rules of Criminal Procedure, Rule 42.[15] Thus, the nature of the sanction to be imposed, as opposed to the nature of the act itself, determines whether the act constitutes a civil or a criminal contempt.

¶10 While criminal contempt is punitive in nature and cannot be purged by any act of the contemnor, civil contempt is conditional in nature and terminable if the contemnor purges himself by compliance with the court's order.[16] Logically, criminal contempt is essentially reserved for willful contumacy and not good faith disagreement.[17] Even

[12] Harris v. United States, 382 U.S. 162 (1965) ; Taylor v. Hayes, 418 U.S. 488 (1974).

[13] Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 441 (1911); Lamb v. Cramer, 285 U.S. 217 (1932).

[14] See Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

[15] Sentencing for contempt lies within the sound discretion of the trial judge, United States v. Seavers, 472 F.2d 607 (6th Cir. 1973).

[16] Skinner v. White, 505 F.2d 685 (5th Cir. 1974); United States v. Greyhound Corp., 363 F. Supp. 525 (N.D. Ill. 1973), aff'd, 508 F.2d 529 (7th Cir. 1974). In addition, criminal contempt, but not civil contempt, is subject to the pardoning power. Ex parte Grossman, 267 U.S. 87, 119-20 (1925).

[17] Floersheim v. Engman, 494 F.2d 949 (D.C. Cir. 1973).

when the contempt is characterized by the court as criminal, however, if the court conditions release from custody on the contemnor's willingness to testify, the contempt is civil[18] and confinement must end when the grand jury dissolves,[19] or possibly when the confinement loses its coercive impact.[20] The Supreme Court has said that the trial judge should first consider the feasibility of coercing testimony through the imposition of civil contempt before resorting to criminal contempt.[21] Additionally, three circuits have held that a valid civil contempt sentence operates to interrupt a criminal sentence then being served by the contemnor,[22] reasoning that such is the only method of bringing civil contempt's coercive power to bear on an incarcerated witness.

¶11 As a rule, the order of a court must be obeyed on pain of contempt, even if the order is ultimately ruled incorrect.[23] If the contempt is clear, no bail is allowed

[18] Shillitani v. United States, 384 U.S. 364 (1966).

[19] Id.

[20] See discussion in text at ¶19 infra.

[21] Shillitani v. United States, 384 U.S. 364, 371 note 9 (1966). The First Circuit has interpreted this suggestion to be mainly a discretionary matter, so that if the judge does impose a criminal sanction for the contempt, the appellate court will be loathe to recharacterize it as civil, Baker v. Eisenstadt, 456 F.2d 382 (1st Cir.), cert. denied, 409 U.S. 846 (1972).

[22] Martin v. United States, 517 F.2d 906 (8th Cir. 1975); In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974); Anglin v. Johnston, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975). But see In re Liberatore, 22 Crim. L. Rep. 2546 (2d Cir. Feb. 24, 1978) (federal contempt sentence may not interrupt a state prison term).

[23] Maness v. Meyers, 419 U.S. 449, 458-59 (1975).

when an appeal is taken.[24]

C. Distinguishing Direct from Indirect Contempt

¶12 Direct contempts are those committed in the actual physical presence of the court[25] or so near to the court as to interfere with or interrupt its orderly course of procedure. Traditionally, such contempts are punished in a summary manner.[26] Indirect contempts are those committed outside the presence of the court which tend by their operation to interfere with the orderly administration of justice. Since the behavior constituting " indirect contempt" occurs beyond the sight and hearing of the court, a hearing of some type[27] is required to inform the court of the facts constituting the alleged contempt. Consequently, with

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[24] 28 U.S.C. §1826(b)(1970)(no bail if frivolous or for delay); see United States v. Coplon, 339 F.2d 192 (6th Cir. 1964). When an appeal of a civil contempt is taken, the Federal Rules of Civil Procedure control, McCrone v. United States, 307 U.S. 61, 64 (1939).

[25] Nye v. United States, 313 U.S. 33 (1941). Even when it occurs in the presence of the court, the contempt must be open. Compare Ex parte Terry, 128 U.S. 289 (1888) (assault of court officer in court upheld) with Cooke v. United States, 267 U.S. 517, 534-35 (1925)(letter submitted in court remanded).

[26] In re Michael, 326 U.S. 224 (1945); In re Murchison, 349 U.S. 133 (1955).

[27] The constitutional "non-crimes" of civil and criminal contempt are tested by standards of due process, rather than under specific strictures of particular amendments, United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971).

criminal contempt there must be a formal hearing.[28]

¶13 A contempt before a grand jury is considered an indirect contempt; it cannot be summarily punished without some sort of a hearing.[29]

D. Summary of Procedural Settings of Contempt

¶14 The four situations in which contempt is committed, relevant to this discussion, may be generally described as follows:

¶15 a. Direct civil contempt: A refusal to testify before a judge (direct contempt), which he punishes conditionally (civil contempt), does not entitle the contemnor to a formal hearing before punishment or to a jury trial, but punishment extends only for the life of the proceeding, or eighteen months, whichever is less.

¶16 b. Indirect civil contempt: A refusal to testify before a grand jury (indirect contempt), which the judge punishes conditionally (civil contempt), does not entitle the contemnor to a formal hearing before punishment or to a jury trial, but punishment extends only for the life of the grand jury, or eighteen months, whichever is less.

¶17 c. Direct criminal contempt: A refusal to testify before a judge (direct contempt), which he immediately punishes unconditionally (criminal contempt) does not

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[28] Groppi v. Leslie, 404 U.S. 496 (1972); In re Oliver, 333 U.S. 257 (1948); United States v. Peterson, 456 F.2d 1135 (10th Cir. 1972); United States v. Marshall, 451 F.2d 372 (9th Cir. 1971); United States v. Willett, 432 F.2d 202 (4th Cir. 1970).

[29] Harris v. United States, 382 U.S. 162 (1965), overruling, Brown v. United States, 359 U.S. 41 (1959).

entitle the contemnor to a formal hearing before punishment, but does entitle him to a jury trial if the sentence imposed by the judge is more than six months.

¶18 d. Indirect criminal contempt: A refusal to testify before a grand jury (indirect contempt), which the judge punishes unconditionally (criminal contempt) entitles the contemnor to a formal hearing before punishment, and to a jury trial if the sentence imposed is for more than six months. The trial may be required to be held before a different judge.

2. Federal Civil Contempt

¶19 Where contempt consists of a witness's refusal to obey a court order to testify[30] at any stage in the proceedings, the witness may be confined until he complies.[31] This is true of both direct (in the presence of the court) and indirect (outside the presence of the court, e.g. before a grand jury) contempts. Title 28 U.S.C. §1826(1970) provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of---
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> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.
>
> (b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

The conditional nature of the imprisonment justifies holding civil contempt proceedings absent the safeguards of indictment and jury trial, provided that basic due process requirements are met.[32] A violation of the court's order need not be found intentional for the party to be guilty of civil contempt.[33] The

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[30] See Federal Rules of Civil Procedure, Rule 37(b)(failure to comply with a discovery order as contempt) and Rule 45(f) (failure to obey a subpoena as contempt). The grand jury is essentially an agency of the court; it is the court's process which summons witnesses to attend, and it is the court which must compel the witness to testify, United States v. Stevens, 510 F.2d 1101 (5th Cir.), rehearing denied, 512 F.2d 1406 (1975).

[31] 18 U.S.C. § 401 (1948) and see McCrone v. United States, 307 U.S. 61 (1939). United States v. First Nat'l State Bank, 540 F.2d 619 (3d Cir. 1976), cert. denied, 431 U.S. 954 (1977) (witness in administrative summons enforcement proceeding not subject to contempt for refusing to answer questions beyond the scope of the proceeding).

[32] In re Long Visitor, 523 F.2d 443, 448 (8th Cir. 1975), the court there citing Shillitani v. United States, 384 U.S. 364, 368 (1965). See also Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), aff'd sub nom. Kastigar v. United States, 406 U.S. 441, rehearing denied, 408 U.S. 931 (1972).

[33] N.L.R.B. v. Local 282 Teamsters, 428 F.2d 994 (2d Cir. 1970); United States v. Greyhound Corp., 363 F. Supp. 525, aff'd, 508 F.2d 529 (7th Cir. 1974). Fear of gangland reprisal does not make a failure to comply any less voluntary. See Piemonte v. United States, 367 U.S. 556, 559, 561 (1961); Reina v. United States, 364 U.S. 507 (1960).

contemnor remains imprisoned only until he complies with the court's order, or until the proceeding (by grand jury) before which he refused to testify is over, or eighteen months, whichever occurs sooner.[34]

¶20 The Supreme Court has said, however, that sentences of imprisonment for civil contempt may be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.[35] The possibility that a witness may be imprisoned indefinitely again and again for eighteen month periods for civil contempt poses problems. Obviously, due process considerations arise. Since the purpose of the civil contempt sanctions is to coerce testimony, it can be argued that incarceration for too great a period of time, for a continuing, stubborn refusal to testify, eventually loses any coercive impact for the witness and so should be terminated to avoid becoming punitive.

¶21 In affirming the validity of a judgment for civil contempt, Judge Friendly, speaking for the Second Circuit, addressed the appellant's argument that his non-compliance with the court's order left him vulnerable

[34] Shillitani v. United States, 384 U.S. 364 (1966). But if a grand jury witness shows that the interrogation which he refused to answer was based on illegal interception of the witness's communications, he need not testify and may not be found in contempt for his refusal, Gelbard v. United States, 408 U.S. 41 (1972).

[35] Shillitani v. United States, 384 U.S. 364, 371 note 8 (1966). Justice Fortas, in dissents to Gilbert v. California, 388 U.S. 263, 291 (1967) and United States v. Wade, 388 U.S. 218, 260 (1967), suggested that the majority meant that a non-complying accused could be held "indefinitely."

to indefinite incarceration.[36] The court stated that:

> [e]ven though evidence is not within a testimonial privilege, the due process clause protects against the use of excessive means to obtain it. While exemplars of Devlin's handwriting may be important to the Government, they can hardly be essential. . . (citations omitted and emphasis added).[37]

¶22 A due process defense to indefinite imprisonment for civil contempt, therefore, may arise where the evidence sought by the relevant court order is not "essential." Judge Friendly went on the say that it would be sufficient in such cases for the government to rely, at trial, on the strong inference to be drawn from the witness's continued refusal to comply with the order. In any event, in that case, the sentence actually imposed for the contempt was "relatively mild,"[38] since the grand jury expired about thirty days later. The defense of due process can be raised by a contemnor, based on this dictum, probably only when the evidence he is asked to produce is not "essential" and his sentence was not "relatively mild."

¶23 In a recent state case[39] where the evidence which the contemnor was asked to produce was "essential," five years imprisonment of the seventy-three year

[36] United States v. Doe, 405 F.2d 436, 438 (2d Cir. 1968).

[37] Id. at 438.

[38] Id. at 439.

[39] Catena v. Seidl, 68 N.J. 224, 343 A.2d 744 (1975).

old witness was held to have lost its "coercive impact" and to have no legal justification for its continuance. The court considered as relevant the factors of the age of the witness, his failing health, and his continued "obstinancy." While each case must be decided on its own merit, said the court, sufficient evidence was presented in that case to meet the standard that there existed "no substantial likelihood" that continued confinement would cause the witness to change his mind and testify. The court cited one of its prior decisions[40] for the proposition that "[o]nce it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated." There the court based its reasoning on a statement in the United States Supreme Court case of Shillitani v. United States[41] that "[t]he justification for coercive imprisonment, as applied to civil contempt, depends upon the ability of the contemnor to comply with the court's order" (emphasis added by Supreme Court of New Jersey). The New Jersey court then interpreted this to mean that when the contemnor is adamant, "continued imprisonment may reach a point where it become more punitive than coercive and thereby defeats the purpose of the commitment."[42] Although it is unclear whether

[40] Catena v. Seidl, 65 N.J. 257, 262, 321 A.2d 225, 228 (1974).

[41] 384 U.S. 364, 371 (1966).

[42] 65 N.J. 257, 262, 321 A.2d 225, 228 (1974). But see Gruner v. Superior Court, 429 U.S. 1314 (1976). In Gruner, applicants sought a stay of a civil contempt sentence, asserting that they were entitled to a hearing to determine whether or not the commitment for contempt had a reasonable propsect of accomplishing its purpose. Justice Rehnquist, issuing the opinion in his capacity as Circuit Justice for the Ninth Circuit, denied the stay, stating, "None of our cases supports the existence of any such requirement, and applicants' position seems to boil down to a contention that if they but assure the court of their complete recalcitrance the court is powerless to commit them for contempt." (None of the special circumstances in Catena v. Seidl were present in this case.)

the United States Supreme Court intended such an interpretation of its words, the argument has been forcefully made and has been accepted by one court. Thus, a new limitation on a court's civil contempt power may be on the horizon.

3. Federal Criminal Contempt

A. Generally

¶24 Criminal contempt is punitive in nature and is punishable by fine or imprisonment or both.[43] It is intended to serve the interests of the court and society by punishing a witness for deliberate violation of the court's order, and by deterring future violations in much the same way that other criminal penalties are intended to deter violations of the criminal law. The courts have recognized the similarities between criminal contempt and other forms of criminal sanctions in their effect on the witness. Subject to a very limited exception, therefore, most constitutional safeguards that protect a criminal defendant also apply to criminal contempt proceedings.

¶25 One charged with criminal contempt is presumed innocent until proven guilty beyond a reasonable doubt, and he cannot be compelled to testify against himself.[44] He must be found to have possessed wrongful intent,[45]

[43] Bloom v. Illinois, 391 U.S. 194 (1968).

[44] Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1911).

[45] United States v. Seale, 461 F.2d 345 (7th Cir. 1972); In re Brown, 454 F.2d 999 (D.C. Cir. 1971).

and is entitled to a hearing on the issue[46] where he has a right to assistance of counsel and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or to extenuation of the offense and in mitigation of the penalty to be imposed.[47] If the penalty to be imposed exceeds six months, the witness must be afforded a jury trial.[48] Evidence seized in violation of the Fourth or Fourteenth Amendments is subject to the exclusionary rule of Mapp v. Ohio[49] in criminal contempt proceedings.[50] A criminal contempt proceeding, however, need not be initiated by an indictment, no matter what the sentence is to be.[51]

[46] Harris v. United States, 382 U.S. 162 (1965).

[47] Cooke v. United States, 267 U.S. 517 (1925).

[48] Codispoti v. Pennsylvania, 418 U.S. 506 (1974). For purposes of the "six month" rule, the Court said that in the case of post-verdict adjudications of various acts of contempt committed during a proceeding, a jury trial is required if the sentences imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt. Further, in the companion case of Taylor v. Hayes, 418 U.S. 488 (1974), the Supreme Court held that a sentence of longer than six months could be reduced to satisfy this rule and thereby no retrial with jury was necessary. As to other penalties the Court, in Frank v. United States, 395 U.S. 147 (1969) held that a penalty of probation for up to five years would not entitle the contemnor to a jury trial.

[49] 367 U.S. 643 (1961).

[50] Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[51] In re Dellinger, 461 F.2d 389 (7th Cir. 1972); Mitchell v. Fiore, 470 F.2d 1149 (3d Cir. 1972), cert. denied, 411 U.S. 938 (1973); United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970), cert. denied, 404 U.S. 911 (1971); and see Green v. United States, 356 U.S. 165, 183-85 (1958).

¶26 A good faith reliance on one's Fifth Amendment privilege, even when granted immunity, is not a defense to criminal contempt when one has been unequivocally ordered by the judge to answer.[52] In addition, the invalidity of a court order is not a defense in a criminal contempt proceeding alleging disobedience of that order.[53]

¶27 The procedure for criminal contempt is governed by Rule 42 of the Federal Rules of Criminal Procedure, which reads as follows:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an Act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt involves disrespect to or criticism of a judge, that judge is disqualified from

[52] United States v. Leyva, 513 F.2d 774 (5th Cir. 1975).

[53] United States v. Seale, 461 F.2d 345 (7th Cir. 1972); and see Maness v. Meyers, 419 U.S. 449 (1975).

presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment. [54]

B. Conduct Constituting Contempt

¶28 Under Rule 17(g) of the Federal Rules of Criminal Procedure[55] failure to obey a subpoena "without adequate excuse" is behavior constituting contempt of court. Proceedings may be conducted under Rule 17(g) as well as under Rule 42.[56]

¶29 In general, the "misbehavior" necessary to support a contempt conviction is conduct "inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator."[57] There must be an "intent to obstruct," which entails an intentional act done by one "who knows or should reasonably be aware that his conduct is wrongful."[58]

[54] "Summary" as used in Rule 42(a), refers to dispensing with formality, Sacher v. United States, 343 U.S. 1, rehearing denied, 343 U.S. 931 (1952).

[55]
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

[56] Nilva v. United States, 352 U.S. 385, 395, rehearing denied, 353 U.S. 931 (1957). Refusing to testify before a grand jury after a grant of immunity is criminal contempt. United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971).

[57] United States v. Seale, 461 F.2d 345, 366 (7th Cir. 1972).

[58] Id. at 368.

¶30 In contrast to the standards of Rule 42(b), contemptuous conduct which may be summarily punished under Rule 42(a) must not only be committed directly under the eye of the court, but must also threaten the orderly procedure of the court.[59] Thus, whether for disorderly behavior[60] or for refusal to obey an order of the court, for purposes of Rule 42 a distinction is drawn between contempt at trial and contempt before a grand jury. To be punishable summarily under Rule 42(a), the contempt must be an intentional obstruction of trial court proceedings that disrupts the progress of a trial and hence the orderly administration of justice.[61] Any other conduct constituting contempt must be punished upon notice and hearing as provided in Rule 42(b).

C. Double Jeopardy Considerations

¶31 Since civil and criminal sanctions for contempt

[59] In re Little, 404 U.S. 553 (1972); Jessup v. Clark, 490 F.2d 1068 (3d Cir. 1973); United States v. Marra, 482 F.2d 1196 (2d Cir. 1973); United States v. Pace, 371 F.2d 810 (2d Cir. 1967).

[60] Many types of conduct can constitute criminal contempt: (insulting the judge so as to disrupt the proceedings) United States v. Seale, 461 F.2d 345 (7th Cir. 1972); (failure to produce records under subpoena) James v. United States, 275 F.2d 332 (8th Cir. 1960), cert. denied, 362 U.S. 989 (1960); (bribing of jurors) Hawkins v. United States, 190 F.2d 782 (4th Cir. 1951); (bribing of witness) Ex parte Savin, 131 U.S. 267 (1889); (perjury, if shown that the purpose of the perjury is to obstruct justice) United States v. Brown, 116 F.2d 455 (7th Cir. 1940).

[61] United States v. Wilson, 421 U.S. 309, 314-16 (1975).

serve distinct purposes, the one coercive, the other punitive, that the same act may give rise to those distinct sanctions presents no double jeopardy problem.[62] But the rule against double jeopardy does apply to criminal contempt proceedings,[63] so that a contemnor could not be found in criminal contempt twice for the same act.[64]

¶32 A witness who is punished for criminal contempt for an act which is a crime under other statutes, however, may also be prosecuted for that criminal act.[65] For example, when a defendant, during his trial for robbery, threw a water pitcher at the prosecutor, the defendant could be summarily punished for criminal contempt, as well as prosecuted for assault with a dangerous weapon and assault on a federal officer in the performance of his official duties, as a result of the same act.[66]

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[62] Yates v. United States, 355 U.S. 66 (1957); and see United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 419 U.S. 1079 (1974).

[63] United States v. United Mine Workers, 330 U.S. 258 (1947).

[64] Baker v. Eisenstadt, 456 F.2d 382 (1st Cir.), cert. denied, 409 U.S. 846 (1972). A witness who responded that she would not, no matter how many times asked, identify any person as a Communist was guilty of only one contempt, despite her refusals to answer numerous subsequent questions also relating to whether persons were Community party members, Yates v. United States, 355 U.S. 66 (1957).

[65] United States v. Mirra, 220 F. Supp. 361 (S.D. N.Y. 1963).

[66] United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971).

D. Federal Criminal Contempt: Disposition on Notice and Hearing

¶33 In all situations where there is a criminal contempt, except in the limited class of cases to which Rule 42(a) applies, the contemnor is entitled to notice and an opportunity to be heard on the charge of criminal contempt. In In re Oliver[67] (1947) the Supreme Court said:

> If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . . . [68]

In any case where it is not clear that the judge was personally aware of the contemptuous action when it occurred, the accused must be provided the procedural safeguards set out in Rule 42(b).[69] A refusal to testify before a grand jury, therefore, even where the questions are restated by the judge and the witness still refuses to answer, must be punished pursuant to Rule 42(b).[70] Further, even when the contempt was committed

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[67] In re Oliver, 333 U.S. 257 (1948).

[68] Id. at 275-76. Recently, the Ninth Circuit has interpreted Rule 42(b) as applicable to a grand jury witness cited for civil contempt for refusal to testify. The court said a proceeding in contempt to compel a grand jury witness to testify is "civil enough" that the witness is not entitled to a jury trial, but "criminal enough" that notice and hearing are mandated, United States v. Alter, 482 F.2d 1016, 1023 (9th Cir. 1973). This holding has not yet been followed; if followed it will drastically change the law of civil contempt.

[69] Johnson v. Mississippi, 403 U.S. 212 (1971).

[70] United States v. Wilson, 421 U.S. 309, 318 (1975).

at a trial in the presence of the judge, if the judge waits until after trial to adjudge the contemnor guilty of contempt and sentence him, reasonable notice of the specific charges and an opportunity to be heard must be provided.[71] What constitutes sufficient notice and time to prepare to be heard is in the discretion of the judge.[72]

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[71] Taylor v. Hayes, 418 U.S. 488, 497-498 (1974). The court said:

> We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888). The usual justification of necessity, see Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L.Ed.11 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial. Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. Sacher v. United States, 343 U.S. 1, 72 S. Ct. 451, 96 L.Ed.717 (1952); cf. Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S. Ct. 499, 504, 27 L.Ed.2d 532 (1971). But Sacher noted that "[s]ummary punishment always, and rightly, is regarded with disfavor. . . . " 343 U.S. at 8, 72 S. Ct. at 454. . . .
>
> On the other hand, where convictions and punishment are delayed, "it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business." Id. at 497-498. [footnotes omitted].

See also Paul v. Pleasants, 551 F.2d 575 (4th Cir.), cert. denied, ___ U.S. ___ (1977) (postponing hearings held on appellant's contempt citation until conclusion of the trial coupled with notification of charges against him and dual opportunity given appellant to speak in his own behalf satisfied due process).

[72] United States v. Hawkins, 501 F.2d 1029 (9th Cir. 1974), cert. denied, 419 U.S. 1079 (1974). There the defendant was one day ordered to provide exemplars of his signature, he refused, was given one day to reconsider, and was then found in contempt. This was found to be a reasonable time to prepare a defense.

E. Federal Criminal Contempt: Summary Disposition

¶34 Where a contempt is committed in the actual presence of the court at trial, and where immediate corrective steps are needed to restore order or halt an obstruction of the administration of justice, the contempt may be punished summarily under Rule 42(a).[73] With summary procedure no formal hearing is necessary: "[a]ll that is necessary is that the judge certify that he 'saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court'."[74] A fair reading of the most recent relevant Supreme Court case suggests that, in general, proper summary disposition for criminal contempt requires that there be:

1. a face to face
2. unjustified refusal to comply with the court's order,
3. which constitutes an affront to the court,
4. disrupting and frustrating an ongoing trial,
5. which is immediately[75] cited by the judge as contempt and immediately punished.

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[73] United States v. Wilson, 421 U.S. 309 (1975); Harris v. United States, 382 U.S. 162 (1965).

[74] United States v. Wilson, 421 U.S. 309, 315 (1975).

[75] Even if the procedure of Rule 42(a) were otherwise applicable, if the judge waits until the end of the trial to find the contemnor guilty of contempt and impose sentence for acts of contempt committed during the trial, that delay necessitates following the procedure of Rule 42(b), i.e. allowing notice and a hearing, Taylor v. Hayes, 418 U.S. 488 (1974).

F. Disqualification of the Judge

¶35 Although, generally, a judge before whom a contempt is committed will preside at the hearing on contempt, and may preside at the contempt trial,[76] due process may require otherwise under some circumstances.[77] The most recent decision in which the Supreme Court addressed this issue was the 1974 case of Taylor v. Hayes.[78] In repudiating the former test of whether the contemptuous conduct is a "personal attack" on the trial judge, the Court said:

> . . . [b]ut contemptuous conduct though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot 'hold the balance nice, clear, and true between the state and the accused . . .' . . . In making this ultimate judgement, the inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused' . . . . From our own reading of the record, we have concluded that 'marked personal feelings were present on both sides' and that the marks of 'unseeming conduct [had] left personal stings' . . . . A fellow judge should have been substituted for the purpose of finally disposing of the charges of contempt made by [the judge] against petitioner. 79

In that case, the contempt proceeding had been a Rule 42(a) summary proceeding. The Court distinguished the requirements for a different judge in a Rule 42(b) context.

[76] Sacher v. United States, 343 U.S. 1 (1952).

[77] Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

[78] 418 U.S. 488.

[79] Id. at 501, 503.

> [The judge] relies on Ungar v. Sarafite, [376 U.S. 575 (1964)] but we were impressed there with the fact that the judge 'did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.' 80

On an appeal from a summary contempt conviction under Rule 42(a), therefore, the reviewing court will more easily find that a different judge should have intervened than will be the case when the original judge followed the non-summary procedure of Rule 42(b).

G. Jury Trial

¶36 When the punishment imposed for criminal contempt exceeds six months, the contemnor is entitled to a jury trial.[81] Moreover, in the absence of legislative authorizations of serious penalties for contempt, a court may reduce a contempt sentence solely to meet this requirement and thus avoid giving the accused a jury trial.[82] When a person during the course of a proceeding is cited for many acts of contempt the "six month rule" is applied differently, depending on whether the judge employed a summary [Rule 42(a)] or non-summary [Rule 42(b)] procedure.

[80] Id. at 503.

[81] Bloom v. Illinois, 391 U.S. 194 (1968); Baldwin v. New York, 399 U.S. 66 (1970).

[82] Taylor v. Hayes, 418 U.S. 488, 497 (1974).

¶37 In the 1974 case of Codispoti v. Pennsylvania,[83] the petitioners, who were convicted of criminal contempt, contended that under the Sixth Amendment they were entitled to a jury trial. At their trial, they had been sentenced to serve six months or less for each of several individual acts of contempt, but the total sentences aggregated to three years and three months in one case, and two years and eight months in the other case. The Supreme Court said that, though there were separate criminal contempts, since the trial judge waited until the end of the trial to impose sentence for all of the contempts [i.e., proceeded under Rule 42(b) type procedure], due process requires a jury trial for the contempt charges if the aggregate sentence exceeds six months.[84] In contrast, if a contemnor is summarily tried for an act of contempt during the proceeding [a Rule 42(a) type procedure] and punished by a term of no more than six months, the judge does not exhaust his power and no jury trial is required, even when the total sentence for the contempts, each separately and summarily dealt with, exceeds six months.[85]

¶38 The anomalous result of a judge having the power to impose sentences for criminal contempt but to deny the contemnor a jury trial merely by proceeding summarily rather than on notice and hearing was

[83] 418 U.S. 506.

[84] Id. at 516.

[85] Id. at 515.

justified to the Court:

> Neither are we impressed with the contention that today's decision will provoke trial judges to punish summarily during trial rather then awaiting a calmer, more studied proceeding after trial and deliberating 'in the cool reflection of subsequent events' . . . Summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review. 86

In any event, the sentences imposed must bear some reasonable relation to the nature and gravity of the contumacious conduct.[87]

4. Federal Perjury: Generally

a. Title 18 U.S.C. Section 1621 Compared to Title 18 U.S.C. Section 1623

¶39 The general federal perjury statute is title 18 U.S.C. §1621 (1964):

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years or both. This section is applicable whether the statement or subscription is made within or without the United States.

Perjury or false swearing in particular proceedings

[86] Id. at 517.

[87] United States v. Conole, 365 F.2d 306 (3d Cir. 1966), cert. denied, 385 U.S. 1025 (1967).

may also be prosecuted under other statutes.[88]

¶40 Alternatively, false declarations before a grand jury or court may be prosecuted under title 18 U.S.C. §1623 (1970):

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) This section is applicable whether the conduct occurred within or without the United States
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

¶41 These are the two false statement statutes of greatest use to the prosecutor dealing with organized crime. The differences between the statutes make them complimentary tools, and enhance the law's effectiveness against false testimony.[89] For example, while recantation of the false testimony bars prosecution under section 1623 (if made before the testimony significantly affects the tribunal and before the falsity of the testimony becomes obvious), recantation does not affect the offense of perjury under section 1621 (except as the fact of recantation may bear on the issue of "willfulness"). On the other hand, while the falsity of the testimony must always be proved in a prosecution order section 1621, the government need not, under section 1623, show which of the inconsistent statements was false. Additionaly, the so-called "two witness rule," and its corollary, the "direct evidence rule," impede prosecutions

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[88] See, e.g., 15 U.S.C.§§80b-7, 80b-9 (1940)(perjury in matters concerning the Securities and Exchange Commission); 18 U.S.C. §2424 (1970)(perjury in Mann Act proceedings); 26 U.S.C. §7206 (1954)(tax matters); 18 U.S.C. §1015 (1948) (perjury in naturalization proceedings).

[89] The courts have held that the passage of section 1623 as part of the Organized Crime Control Act of 1970 was meant to supplement, rather than supplant section 1621, see, e.g., United States v. Kahn, 472 F.2d 272 (2d Cir.) cert. denied, 411 U.S. 982 (1973).

for perjury under section 1621. These evidentiary rules, in contrast, are inapplicable to prosecutions for false testimony under section 1623. The element of "materiality," of the false statement to the proceeding in which the statement is made, is common to both statutes. The courts have consistently applied, to section 1623, the tests of materiality developed under section 1621. The requirement that the statements be made under oath is, of course, also common to both statutes.[90]

¶42 The two statutes will be treated separately in the remaining discussion.

5. Federal Perjury: Title 18 U.S.C. Section 1621

A. Elements

¶43 There are five elements of perjury: lawful oath, proper proceedings, false swearing, willfulness, and materiality.[91] In the contexts in which perjury occurs relevant to this discussion, i.e., grand jury and trial proceedings, a witness need not be given Miranda-type warnings before his false testimony may be used against him to prove perjury, even when the proceedings have become accusatory, focusing on him.[92]

[90]Any oath having a legislative basis is sufficient, Caha v. United States, 152 U.S. 211 (1894). See also United States v. Edwards, 443 F.2d 1286 (8th Cir.), cert. denied, 404 U.S. 944 (1971) (regarding oath in section 1621 prosecution); United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975)(regarding oath in section 1623 prosecution). It is no longer necessary that the statement be made under oath. Sections 1621 and 1623 have been amended to include statements made "under penalty of perjury as permitted under section 1746 of title 28, United States Code." Unsworn Declarations-Perjury, Pub. L. No. 94-550, 90 Stat. 2534 (1976).

[91]United States v. Stone, 429 F.2d 138 (2d Cir. 1970).

[92]United States v. Mandujano, 425 U.S. 564 (1976).

B. Intent and Falsity

¶44 Crucial to the crime of perjury is the witness's belief concerning the truth of his sworn testimony; generally, the statements must be proved false, and it must be shown that the witness did not believe his statements to be true.[93] "Willfulness" is a question for the jury,[94] but it may be inferred from proof of falsity itself.[95] Intent may also be proved by prior similar acts.[96]

¶45 Since falsity of the statements is an essential element of perjury, as a rule perjury cannot be based on a reply to a question which although incomplete, misleading, or unresponsive, is literally true or technically accurate,[97] even if for devious reasons the statement was intentionally misleading,[98] or was

[93]United States v. Bronston, 453 F.2d 555 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 352 (1973); United States v. Dowdy, 479 F.2d 213 (4th Cir.), cert. denied, 414 U.S. 823, 414 U.S. 866 (1973), rehearing denied, 414 U.S. 1117 (1974); United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971); United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968); United States v. Wall, 371 F.2d 398 (6th Cir. 1967).

[94]United States v. Letchos, 316 F.2d 481 (7th Cir.), cert. denied, 375 U.S. 824 (1963).

[95]United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975); La Placa v. United States, 354 F.2d 56 (1st Cir. 1965), cert. denied, 383 U.S. 927 (1966).

[96]United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971).

[97]Bronston v. United States, 409 U.S. 352 (1973); United States v. Franklin, 478 F.2d 703 (5th Cir. 1973); United States v. Cook, 489 F.2d 286 (9th Cir. 1973); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, rehearing denied, 418 U.S. 955 (1974).

[98]See United States v. Slutzky, 79 F.2d 504 (3d Cir. 1935).

shrewdly evasive, and it intentionally conveyed false information by implication.[99] Lower courts have held that perjury cannot be based on a nonresponsive and therefore ambiguous statement the literal truthfulness of which cannot be ascertained.[100] In reversing a perjury conviction for an unresponsive, literally true, but misleading answer by the witness, the Supreme Court in Bronston v. United States, observed:

> . . . the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true. . . . If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.
>
> It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe [his answer] to be true.' [101]

If the witness does not understand the question and gives a nonresponsive answer, the answer cannot be perjurious.[102] Even when nonresponsive, however,

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[99] Bronston v. United States, 409 U.S. 352 (1973).

[100] United States v. Esposito, 358 F. Supp. 1032 (N.D. Ill. 1973); United States v. Cobert, 227 F. Supp. 915 (S.D. Cal. 1964). In Esposito, supra, the court said the government must prove beyond a reasonable doubt that a defendant charged with perjury both literally and as a matter of substance lied under oath.

[101] 409 U.S. 352, 357-60 (1973).

[102] United States v. Paolicelli, 505 F.2d 971 (4th Cir. 1974).

if the statement is not literally true, it is perjurious.[103]

C. Materiality

¶46 For a false statement to be perjurious, it must be material to the investigative proceeding in which it is made.[104] The rule applied by the courts to test whether the false testimony is "material" is whether it has the capacity or tendency to influence the decision of the tribunal or inquiring or investigative body, or to impede the proceeding, with respect to matters which the tribunal or body is competent to consider.[105] The testimony need not be directed to the primary subject of the investigation to be material, and the government

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[103] United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974), cert. denied, 426 U.S. 911 (1976); United States v. Andrews, 370 F. Supp. 365 (D. Conn. 1974); United States v. Crandall, 363 F. Supp. 648 (W.D. Pa. 1973), aff'd 493 F 2d 1401 (3d Cir. 1974), cert. denied, 419 U.S. 852, aff'd, 495 F.2d 1369 (3d Cir. 1974).

[104] United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971); United States v. Stone, 429 F.2d 138 (2d Cir. 1970). Lord Coke seems to have been the originator of this requirement. He said that, for perjury, a false statement must be "in a matter material to the issue, or cause in question. For if it be not material, then though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudicial," as quoted in McKinney's commentary to N.Y. Penal Law §210.15 (1965).

[105] United States v. Saenz, 511 F.2d 766 (5th Cir.), cert. denied, 423 U.S. 946 (1975); United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973); United States v. Lardieri, 497 F.2d 317 (3d Cir.), rehearing, 506 F.2d 319 (1974). Or, stated another way, for the false statement to be "material" it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry that a minimum of additional, fruitful investigation would have occurred. United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971).

need not prove that the false testimony actually impeded the investigation.[106] "Materiality" is a question of law for the court,[107] and it must be established only in reference to the time the statement was given; subsequent events (e.g., abandonment of the proceedings at which the testimony was given) will not render testimony "immaterial," which was "material" when given.[108]

D. Two-Witness Rule

¶47 Since the time of Blackstone a conviction for perjury could not be sustained when it was based solely on the uncorroborated testimony of only one witness.[109] Generally,

[106] United States v. Makris, 483 F.2d 1082 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974), cert. denied after remand, 430 U.S. 954, rehearing denied, 431 U.S. 909 (1977); United States v. Masters, 484 F.2d 1251 (10th Cir. 1973); United States v. Lococo, 450 F.2d 1196 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972); United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972). And see United States v. Lee, 509 F.2d 645 (2d Cir.), stay denied, 421 U.S. 927 (1975) cert. denied, 422 U.S. 1044 (1975).

[107] Tasby v. United States, 504 F.2d 332 (8th Cir. 1974), cert. denied, 419 U.S. 1125 (1975); United States v. Demopoulos, 506 F.2d 1171 (7th Cir. 1974), cert. denied, 95 S. Ct. 1427 (1975); United States v. Gugliaro, 501 F. 2d 68 (2d Cir. 1974); United States v. Wesson, 478 F.2d 1180 (7th Cir. 1973); United States v. Rivera, 448 F.2d 757 (7th Cir. 1971); Vitello v. United States, 425 F.2d 416 (9th Cir.), cert. denied, 400 U.S. 822 (1970). Since the issue of "materiality" of false testimony is one to be resolved by the court, clearly evidence bearing only on the issue of "materiality" should be heard outside the presence of the jury, see, e.g., United States v. Alu, 246 F.2d 29 (2d Cir. 1957); Harrell v. United States, 220 F.2d 516 (5th Cir. 1955).

[108] United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), cert. denied, 387 U.S. 906 (1967).

[109] United States v. Wood, 39 U.S. 430 (1840). This is because, otherwise, there would be nothing more than an oath against an oath.

in prosecutions under section 1621, this rule still prevails.[110] The rule, as interpreted by the courts, requires that the element of falsity in a perjury charge be proven by the testimony of two witnesses, or by one witness corroborated by independent evidence.[111] This evidentiary rule applies only to the element of falsity.[112]

¶48 There are two ways to satisfy the rule. First, if two witnesses each give testimony, as to distinct incidents or transactions, which if believed, would prove that what the accused said under oath was false, the rule is satisfied.[113] Second, the two-witness rule is satisfied by corroborative evidence of sufficient content and quality to persuade the trier of fact that

[110] Hammer v. United States, 271 U.S. 620 (1926); Weiler v. United States, 323 U.S. 606 (1945). The rule, however, has been held not to be constitutionally mandated, United States v. Koonce, 485 F.2d 374 (8th Cir. 1973); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

[111] United States v. DeLeon, 474 F.2d 790 (5th Cir.), cert. denied, 414 U.S. 853 (1973); United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971); United States v. Brandyberry, 438 F.2d 226 (9th Cir.), cert. denied, 404 U.S. 842 (1971); Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

[112] Hammer v. United States, 271 U.S. 620 (1926). Once the falsity of the testimony is established under this strict requirement the witness's belief as to the falsity of the testimony may be established by circumstantial evidence, or by inference drawn from proven facts, United States v. Rivera, 448 F.2d 757 (7th Cir. 1971); United States v. Sweig, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

[113] United States v. Weiner, 479 F.2d 923, 928 (2d Cir. 1973). It is of no consequence whether the testimony of the second witness is corroborative of the first witness's story in whole, in part, or not at all.

what the principal prosecution witness testified to about the falsity of the accused's statement under oath was correct.[114]

E. Direct Evidence Rule

¶49 When the government's evidence of falsity rests primarily upon documentary evidence, the document in itself constitutes sufficient "direct" evidence to support conviction, and the two-witness rule is inapplicable.[115]

¶50 The trend of decisions, moreover, seems to be toward abrogation of even the direct evidence rule. Circumstantial evidence of falsity, if it meets standards such as "sufficiently probative,"[116] or "of substantial weight,"[117] among others,[118] has been found sufficient. The Ninth Circuit recently said:

> The responses to the questions involved in these counts were invariably "I don't recall" or "I don't know" or "I don't remember." Given answers of this nature, it would be difficult to find two witnesses to testify that the defendant did know or believe or recall a matter which he said **he did** not. Absent a contrary admission by the defendant, there would be no way to get direct evidence that the defendant did know or recall the fact that he denied knowing or recalling under oath. Therefore, only circumstantial evidence can be used to establish the knowing lies of the defendant.[119]

Depending upon the form of the perjurious statements at issue, therefore, the court will demand the most trustworthy kind of evidence possible to be obtained, but nothing more.

F. Recantation

¶51 In contrast to section 1623, in a prosecution under section 1621 a witness's recantation or retraction of his perjurious statement is no defense.[120] Such willingness to correct a false statement, however, is relevant in showing absence of intent.[121]

G. Separate Perjuries and Double Punishment

¶52 If a witness before a grand jury tells two "separate and distinct" lies, he may be prosecuted on a separate count for each.[122] Where a witness is asked to give answers to

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[114] Id. at 927. The split among the circuits as to exactly what standard must be met by the corroborative evidence is discussed in this case. The court there notes, however, that in the rules' applications, the divergences are "very few and very narrow."

[115] Barker v. United States, 198 F.2d 932 (9th Cir. 1952); Strassi v. United States, 401 F.2d 259 (5th Cir. 1968), vacated and remanded on other grounds, 394 U.S. 310 (1969). Vuckson v. United States, 354 F.2d 918 (9th Cir.), cert. denied, 384 U.S. 991, rehearing denied, 385 U.S. 893 (1966).

[116] United States v. Goldberg, 290 F.2d 729 (2d Cir.), cert. denied, 368 U.S. 899 (1961).

[117] United States v. Bergman, 345 F.2d 931 (2d Cir. 1966).

[118] See United States v. Collins, 272 F.2d 650 (2d Cir. 1959), cert. denied, 362 U.S. 911 (1960); Weinheimer v. United States, 283 F.2d 510 (D.C. Cir. 1960), cert. denied, 364 U.S. 930 (1961); United States v. Manfredonia, 414 F.2d 760 (2d Cir. 1969).

[119] Gebhard v. United States, 422 F.2d 281, 287-88 (9th Cir. 1970).

[120] United States v. Norris, 300 U.S. 564 (1937); United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973); United States v. Lococo, 450 F.2d 1196 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972).

[121] United States v. Kahn, supra, note 120.

[122] United States v. Tyrone, 451 F.2d 16 (9th Cir. 1971), cert. denied, 405 U.S. 1075 (1972); Richards v. United States, 408 F.2d 884 (5th Cir.), cert. denied, 395 U.S. 986 (1969).

questions which are "substantially the same," however, only one perjury count is proper.[123]

¶53 A charge of perjury is not barred merely by acquittal in the case in which the false testimony is given, but the doctrine of collateral estoppel may be applicable.[124] The test is whether a rational jury could have discredited the defendant's allegedly false testimony and still conclude that the government failed to prove its case.[125]

H. Subornation

¶54 Title 18 U.S.C. §1622(1948) defines the offense of subornation of perjury:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

This section includes both procuring another to commit perjury, as defined in section 1621, but also procuring another to make false statements before a court or grand jury, as defined in section 1623.[126] To make out a charge

[123] Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970); Masinia v. United States, 296 F.2d 871 (8th Cir. 1961).

[124] Wheatley v. United States, 286 F.2d 519 (5th Cir. 1961); In re Bonk, 527 F.2d 120 (7th Cir. 1975).

[125] United States v. Haines, 485 F.2d 564 (7th Cir. 1973), cert. denied, 417 U.S. 977 (1974). And see United States v. Barnes, 386 F. Supp. 162 (E.D. Tenn. 1973), aff'd, 506 F.2d 1400 (6th Cir.), cert. denied, 420 U.S. 1005 (1975); United States v. Gremillion, 464 F.2d 901 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); United States v. Nash, 447 F.2d 1382 (4th Cir. 1971).

[126] United States v. Gross, 511 F.2d 910 (3d Cir.), cert. denied, 423 U.S. 924 (1975). Since the two-witness rule was abrogated in prosecutions for false declarations before a grand jury or court by section 1623, the rule does not apply in prosecutions for subornation of false declarations.

of subornation, the false statement crime of section 1623 or the perjury of section 1621 must in fact have been committed.[127]

6. Federal False Swearing: Title 18 U.S.C. Section 1623

A. Elements

¶55 Title 18 U.S.C. §1623(1970), set out earlier in ¶40, makes it a crime to utter under oath, before a court or grand jury, any false material declaration, or to use other material knowing that it contains a false material declaration. It is sufficient proof to show that the two statements are irreconcilably contradictory; the government need not prove one of the statements false. Subsection (d) provides a recantation defense. Subsection (e) abrogates both the two-witness rule and the direct

[127] United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972). An interesting sort of "subornation" of perjury was at issue in the Second Circuit case of U.S. ex. rel. Washington v. Vincent, 525 F.2d 262 (2d Cir.), cert. denied, 424 U.S. 934 (1976). There a prosecutor had made a promise to a witness about getting charges against him dropped. At trial, as the prosecutor stood silently by, the witness falsely swore that no deal had been made. The court held this to be grounds for federal habeas corpus relief, despite the failure of the defendant and his counsel to challenge what they had reason to know was false testimony. The court said:

> The knowing use by a State prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the 14th Amendment and requiring a new trial [citations omitted]. Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle; nor does the rule lose force because the perjury reflects only upon the credibility of the witness.

evidence rule; proof beyond a reasonable doubt by any type of admissible evidence is sufficient for conviction. This statute provides an alternative type of "perjury" crime[128] and does not repeal the general perjury statute, section 1621.[129]

¶56 A witness, even a potential defendant, need not be given Miranda warnings before being asked to testify; failure to give such warnings does not bar a prosecution for false declarations.[130]

B. Intent and Falsity

¶57 The statement's falsity need not be directly proven in section 1623 prosecutions; it is sufficient that the prosecution show two statements made by the witness which are "inconsistent to the degree that one of them is necessarily false."

¶58 Regarding intent, the jury must infer defendant's state of mind from the things he said or did, and such an

[128] United States v. Gross, supra, note 126.

[129] United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973). The abrogation of section 1623 of the two-witness rule is not unconstitutional, and a defendant is not denied equal protection of the laws by being prosecuted under section 1623 rather than under section 1621. United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974). Nor is section 1623 unenforceably vague. United States v. Lee, 509 F.2d 645 (2d Cir.), stay denied, 421 U.S. 927 (1975), cert. denied, 422 U.S. 1044 (1975).

[130] United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088, rehearing denied, 420 U. S. 939 (1974); United States v. Mandujano, 19 Crim. L. Rptr. 3087 (U.S. May 19, 1976).

inference may come from proof of the objective falsity itself, from proof of a motive to lie, or from other facts tending to show that the defendant was lying.[131] Vagueness or ambiguity in the questions asked the witness is not a defense; the possibility that the question has many interpretations is immaterial as long as the jury is charged to determine that the question as the witness understood it was falsely answered.[132]

C. Materiality

¶59 The courts have applied the same test of "materiality" in section 1623 prosecutions as is used in section 1621 perjury prosecutions.[133] It is sufficient if the untrue testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation.

D. Two-Witness Rule

¶60 Section 1623(e) allows conviction upon the evidence of a single witness.[134]

[131] United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. at 1015 (1975).

[132] Id.

[133] See United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 95 S. Ct. 1974 (1975); United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973).

[134] United States v. Isaacs, 493 F.2d 1124 (7th Cir.) cert. denied, Kerner v. United States, 417 U.S. 976 (1974). This is not unconstitutional. United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975).

E. Direct Evidence Rule

¶61 Section 1623(e) allows proof by any type of admissible evidence, including circumstantial evidence.[135]

F. Recantation

¶62 Section 1623(d) provides a right to a witness to recant, and bars any perjury prosecution, if the declaration is admitted to be false in the same continuous proceeding and if, at the time the admission is made, the false declaration

a. has not substantially affected the proceeding, and

b. it has not become manifest that such falsity has been or will be exposed.

This right to recant applies both to trials and grand jury proceedings, but in no case is the witness entitled to be warned of his right to recant.[136]

7. New York Contempt: Generally

A. Distinguishing Civil and Criminal Contempts

¶63 As in the federal system, the New York courts have

[135] United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. at 1015 (1975). For examples of the amount of evidence sufficient to support a section 1623 conviction, see United States v. Lee, 509 F.2d 645 (2d Cir.), stay denied, 421 U.S. 927 (1975) cert. denied, 422 U.S. 1044 (1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Clizer, 464 464 F.2d 121 (9th Cir.), cert. denied, 409 U.S. 1086, rehearing denied, 410 U.S. 948 (1973).

[136] United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975); United States v. Lardieri, 506 F.2d 319 (3d Cir. 1974); United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

discretion in determining the nature of a contempt adjudication;[137] the purpose of civil contempt is to compel compliance with the court's order, and the purpose of criminal contempt is to punish disobedience.[138]

¶64 New York's statutory provisions for civil contempt are found in New York Judiciary Law section 753(1962), and New York Civil Practice Law and Rules section 2308(1965). The statutory provisions for criminal contempt are: New York Penal Law sections 215.50 through 215.55(1972), and New York Judiciary Law sections 750 and 752.

B. Distinguishing Direct and Indirect Contempts

¶65 Direct contempts are those committed in the "immediate view and presence of the court"; indirect contempts are those committed "out of court."[139] Traditionally, summary procedure is permissible when the contempt is direct.[140]

[137] Lane v. Lombardozzi, 7 App. Div.2d 48, 180 N.Y.S.2d 496 (1st Dept. 1958), aff'd, 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550, cert. denied, 360 U.S. 930, appeal dismissed, 361 U.S. 7, cert. denied and appeal dismissed, 361 U.S. 10 (1959).

[138] King v. Barnes, 113 N.Y. 476, 21 N.E. 182 (1889). Regardless of whether the contempt is civil or criminal, however, if there is a factual issue as to whether the defendant did or did not disobey the order, he is entitled to a hearing. Ingraham v. Maurer, 39 App. Div.2d 258, 334 N.Y.S.2d 19 (3d Dept. 1972).

[139] People v. Albany County, 147 N.Y. 290, 41 N.E. 700 (1895).

[140] Id. See also Douglas v. Adel, 269 N.Y. 144, 199 N.E. 35 (1935).

The procedural distinction between direct and indirect contempts is now statutory, and found in New York Judiciary Law section 755(1962):

> Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge, or referee, stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor. Such order is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.

8. New York Civil Contempt

¶66 The New York courts have long recognized their inherent power to commit a recalcitrant witness to jail until he testifies as ordered. As the court in People ex rel. Phelps v. Fancher observed:

> Independent then of any statute authorizing the court. . . to commit a witness for refusing to answer a proper question until answered, that court has ample power at common law to order such a commitment. Such a proceeding is not one to punish a party as for contempt, but the exercise of a power necessarily conferred to elicit truth and to administer justice. It was not necessary to bring [the witness] before the court, and formally adjudge him to be guilty of a contempt, but upon his refusal to answer the question which the court adjudged to be proper, it might, by simple rule, have ordered him to be confined until he should answer.[141]

Great discretion is vested in the courts when punishing for a civil contempt.[142] And, even if the court's order is

[141] 4 Thomp. & C. 467, 471-72 (1st Dept. 1874).

[142] Stamen Bldg. Materials Corp. v. Gould, 79 Misc. 2d 97, 359 N.Y.S.2d 394 (Dist. Ct. Suffolk County 1974).

erroneous, a witness is obligated to obey it (until it is vacated or reversed) or be held in contempt.[143]

¶67 The courts' civil contempt power is now set out in New York Judiciary Law section 753(1962). The relevant parts are:

> A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
>
> 1. An attorney, counsellor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience of a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge. . . .
>
> 5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

In civil proceedings, the relevant civil contempt statute is New York Civil Practice Law and Rules section 2308(1965), which reads, in pertinent part, as follows:

> (a) Judicial. Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. . . . A court may issue a warrant directing a sheriff to bring the witness into court. If a person so subpoenaed attends or is brought into court, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he was directed to produce by the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him to jail, there to remain until he submits to do the act which he was so required to

[143] Marguiles v. Marguiles, 42 App. Div.2d 517, 344 N.Y.S. 2d 482 (1st Dept.), appeal dismissed, 33 N.Y.2d 894, 307 N.E.2d 562, 352 N.Y.S.2d 447 (1973).

do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant. . . .

(c) Review of proceedings. Within ninety days after the offender shall have been committed to jail he shall, if not then discharged by law, be brought, by the sheriff, or other officer, as a matter of course personally before the court issuing the warrant of commitment and a review of the proceedings shall then be held to determine whether the offender shall be discharged from commitment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from such commitment, shall be brought, by the sheriff, or other officer, personally before the court issuing the warrant of commitment and further reviews of the proceedings shall then be held to determine whether he shall be discharged from commitment. The clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in the proceeding resulting in the issuance of the warrant of commitment, at their last known address.

All of the governing detail and procedure for the contempt punishment comes from the Judiciary Law; whether the witness's imprisonment is governed by New York Civil Practice Law and Rules section 2308 or by New York Judiciary Law section 753, periodic review of the commitment is assured.[144]

¶68 Whether the witness must be afforded notice and a hearing on his alleged contempt is governed by New York Judiciary Law section 755(1962), set out in ¶65 above.

[144]The 90-day period for review commences from the date that all matters relating to the prior review were finally submitted by counsel to the court for its determination. People v. Rosoff, 82 Misc.2d 199, 368 N.Y.S.2d 969 (Sup. Ct. N.Y. County 1975).

9. New York Criminal Contempt

A. Generally

¶69 New York's statutory scheme regarding criminal contempt is unique. New York Judiciary Law, sections 750 through 752, delineates the power of the courts to punish for criminal contempts. The offenses that constitute it are listed in section 750(1966).

> A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:
>
> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. . . .
>
> 3. Wilful disobedience to its lawful mandate. . . .
>
> 5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn to answer any legal and proper interrogatory. . . .
>
> C. A court not of record has only such power to punish for a criminal contempt as is specifically granted to it by statute and no other.

Section 751 sets out the punishment.

> 1. Except as provided in subdivisions (2), (3) and (4), punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. . . .[145]

Section 752 provides for a review of the mandate.

> Where a person is committed for contempt, as prescribed in section seven hundred fifty-one, the particular circumstances of his offense must be set forth in the mandate of commitment. Such mandate, punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.[146]

[145]New York Judiciary Law §751 (McKinney 1975).

[146]New York Judiciary Law §752 (McKinney 1975).

¶70 Obviously, in the context of an organized crime investigation, the light penalty provided for criminal contempt renders the criminal contempt sanction relatively ineffective. Beside criminal contempt, and the more potent sanction of civil contempt, New York has defined the crime of criminal contempt in the New York Penal Law. Section 215.50 provides:

> A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:
>
> 1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or. . . .
>
> 3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or
>
> 4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory; or. . . .[147]
>
> * * * *
>
> A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfuly refuses to be sworn as a witness before a grand jury, or, when after having been sworn as a witness, before a grand jury, he refuses to answer any legal and proper interrogatory. Criminal contempt in the first degree in a class E felony.[148]

Section 215.51 was enacted in 1970 with the intent of increasing the penalty for a witness's contumacious refusal to testify before grand juries investigating organized

[147] New York Penal Law §215.51 (McKinney 1975).

[148] New York Penal Law §215.51 (McKinney 1975).

crime.[149] The maximum jail sentence is now four years. Additionally, the interrelation between the two degrees of the crime affords latitude in plea bargaining situations.

¶71 The question arises whether a witness may be adjudged in criminal contempt, under the Judiciary Law, and also be prosecuted for the crime of criminal contempt, under the Penal Law, for a single instance of contumacious conduct. New York Penal Law section 215.55(1965) provides:

> Adjudication for criminal contempt under subdivision A of section seven hundred fifty of the judiciary law shall not bar a prosecution for the crime of criminal contempt under section 215.50 based upon the same conduct but, upon conviction thereunder, the court, in sentencing the defendant shall take the previous punishment into consideration.

This section, however, does not settle the question. In 1972, the New York Court of Appeals held that, where the same evidence proved both judiciary law criminal contempt (for which the defendant had been punished) and the crime of criminal contempt (with which the defendant was charged in a later indictment), double jeopardy barred indictment for the crime of criminal contempt.[150] Recent decisions follow this holding.[151] When a strong sanction is sought, therefore,

[149] See Practice Commentary to New York Penal Law §215.51 (McKinney 1975). In organized crime investigations immunity grants are useful. N.Y. Crim. Pro. Law §50.10 (1971) provides, therefore, that a witness possessing immunity may nevertheless be adjudged in contempt for having contumaciously refused to give evidence. See also Ruskin v. Detken, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973).

[150] People v. Columbo, 31 N.Y.2d 947, 293 N.E.2d 247, 341 N.Y.S.2d 97 (1972).

[151] People v. Menna, 36 N.Y.2d 930, 335 N.E.2d 848, 373 N.Y.S.2d 541 (1975); People v. Failla, 74 Misc.2d 979, 347 N.Y.S.2d 502 (Nassau County Ct. 1973).

proceedings under the penal law crime of criminal contempt should be begun in lieu of proceedings for judiciary law criminal contempt.

¶72 In general, proof of a criminal contempt must be established beyond a reasonable doubt.[152] The statute's listing of causes for which a person may be punished for criminal contempt is exclusive;[153] disobeying the court's mandate must be intentional.[154] Before a person may be punished for criminal contempt for refusing to testify before a grand jury, the prosecutor must show that the evidence demanded was relevant and proper;[155] the relevancy, however, need not be conclusively established.[156]

¶73 In establishing the existence of intent in a prosecution for penal law criminal contempt, where the only evidence consists of the contemnor's grand jury testimony, it is sufficient merely to find that the contemnor's refusal to

[152] Yorktown Central School Dist. No. 2 v. Yorktown Congress of Teachers, 42 App. Div.2d 422, 348 N.Y.S.2d 367 (2d Dept. 1973); Gold v. Valentine, 35 App. Div.2d 958, 318 N.Y.S.2d 360 (2d Dept. 1970).

[153] Briddon v. Briddon, 229 N.Y.452, 128 N.E. 675 (1920).

[154] Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939). See People v. Renaghan, 40 App. Div.2d 150, 338 N.Y.S.2d 125 (1st Dept. 1972), aff'd, 33 N.Y.2d 991, 309 N.E.2d 425 (1974), it was held that an essential ingredient of criminal contempt, arising out of a refusal to answer questions before a grand jury, is an intent to obstruct justice. Further, the defendant is entitled to introduce evidence relative to his intent and state of mind, when he is prosecuted for criminal contempt.

[155] In re Koota, 17 N.Y.2d 147, 216 N.E.2d 568, 269 N.Y.S. 2d 393, cert. denied, 384 U.S. 1001 (1966).

[156] Id. It is enough if the evidence's bearing on the subject of investigation is susceptible to intelligent estimate or there is a justifiable suspicion of relation.

answer was the product of rational choice.[157] It constitutes no defense to a criminal contempt prosecution that the refusal to testify was based on advice of counsel, on a good-faith belief that the questions were improper, or on the failure of the prosecutor to answer defendant's inquiries concerning electronic surveillance.[158]

B. Misbehavior

¶74 A refusal to produce documentary evidence, when under subpoena to produce it, is a contempt if it is shown that the evidence is in the possession of the subpoenaed witness.[159] A witness who refuses to testify, when clearly so ordered by the court,[160] and informed of any immunity he may have

[157] People v. Breindel, 73 Misc.2d 734, 342 N.Y.S.2d 428 (Sup. Ct. New York County 1973), aff'd, 45 App. Div.2d 691, 356 N.Y.S.2d 626 (1st Dept.), aff'd, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

[158] Id. See also People v. Einhorn, 74 Misc.2d 958, rev'd, 45 App. Div.2d 75, 356 N.Y.S.2d 620 (1st Dept.), rev'd and remitted for consideration of the facts, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974), aff'd mem., 47 App. Div.2d 813, 368 N.Y.S.2d 804 (1st Dept. 1975).

[159] People v. Gold, 210 N.Y.S.2d 202 (N.Y. County Ct. Gen. Sess. 1959).

[160] The mandate of the court, or district attorney's subpoena, must be "clear," Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939); People v. Balt, 34 App. Div.2d 932, 312 N.Y.S.2d 587 (1st Dept. 1970). There need not be formal direction by the grand jury foreman to answer. People v. Breindel, 45 App. Div.2d 691, 356 N.Y.S.2d 626 (1st Dept. 1973), aff'd mem., 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

received,[161] commits a contempt.

¶75 In some circumstances, even if a witness does respond to the question the response may constitute contempt. False testimony is not punishable as civil contempt[162] or as criminal contempt.[163] With respect to both civil and criminal contempt, however, when the testimony is so plainly inconsistent, manifestly contradictory, and conspicously unbelievable as to make it apparent from the face of the record itself that the witness has deliberately concealed the truth and has given answers which are as useless as a complete refusal to answer, there is contempt.[164] If the witness's answers must be proven false by extrinsic evidence there is no contempt.[165] When the testimony, however, is so

[161] People v. Sparaco, 39 App. Div.2d 753, 332 N.Y.S.2d 351 (2d Dept. 1972), aff'd, 32 N.Y.2d 652, 295 N.E.2d 653, 342 N.Y.S.2d 854 (1973); People v. Mulligan, 29 N.Y.2d 20, 272 N.E.2d 62, 323 N.Y.S.2d 681 (1971); Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); People v. Saperstein, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160, cert. denied, 353 U.S. 946 (1957).

[162] Fromme v. Gray, 148 N.Y. 695, 43 N.E. 215 (1896).

[163] Finkel v. McCook, 247 App. Div. 57, 286 N.Y.S. 755 (1st Dept.), aff'd, 271 N.Y. 636, 3 N.E.2d 460 (1936).

[164] People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 160 N.E.2d 647, 189 N.Y.S.2d 898 (1959).

[165] People v. Renaghan, supra note 154. As stated by the Appellate Division in that case at 40 App. Div. 2d 150, 152, 338 N.Y.S.2d 125, 128 (1st Dept. 1972):

> Unless the record, without resort of external proof of falsity (emphasis supplied), indisputably shows the response is false and the clearly false testimony was given to obstruct the investigation of the grand jury, there is no basis for criminal contempt.

The witness may, however, be convicted of perjury.

patently false on its face, as to be considered no testimony at all, it is a basis for civil or criminal contempt.[166]

¶75A A grand jury witness who refuses to testify must be directed by the court to answer a proper interrogatory, before he may be charged with civil contempt. Formal direction to answer is not, however, a prerequisite to conviction of criminal contempt. People v. Miranda, 31 App. Div. 2d 657, 296 N.Y.S.2d 804 (2d Dept. 1968). Where the answer is evasive, a problem may arise with regard to the notice afforded the witness that his answer is insufficient.

¶75B In People v. Cutrone, 50 App. Div. 2d 838, 376 N.Y.S.2d 593 (2d Dept. 1975), the court held that before charges of criminal contempt are brought, an evasive witness must be warned that his answer may constitute a refusal to answer. The court reasoned that this pre-indictment warning is implicit in the court's power to compel an answer.

¶75C In People v. Didio, 60 App. Div. 2d 978, 401 N.Y.S.2d 640 (4th Dept. 1978), however, the court, refused to distinguish between a refusal to answer (requiring no formal direction) and an evasive answer equivalent to no answer at all. Thus, the court explicitly rejected Cutrone. Id. at 978, 401 N.Y.S.2d at 641.

[166] People ex rel. Valenti v. McCloskey, supra note 164. For examples of responses which were held to be "no testimony at all" and, therefore, contemptuous see: People v. Ianniello, 36 N.Y.2d 137, 325 N.E.2d 146, 365 N.Y.S.2d 821, cert. denied, 423 U.S. 831 (1975); Ruskin v. Detken, supra note 149; People v. Martin, 47 App. Div. 2d 883, 367 N.Y.S.2d 8 (1st Dept. 1975), aff'd, 42 N.Y.2d 882, 366 N.E.2d 881, 397 N.Y.S.2d 794 (1977); People v. Tilotta, 84 Misc.2d 170, 375 N.Y.S.2d 965 (Sup. Ct. Kings County 1975); Holtzman v. Tobin, 78 Misc.2d 8, 358 N.Y.S.2d 94 (Sup. Ct., App. T. 1st Dept. 1974).

¶75D Didio appears sound for two reasons. First, for an evasive answer to constitute criminal contempt, the answer must be shown to be so equivocal, evasive, and obstructive as to be equivalent to no answer at all. People v. Rehaghan, 40 App. Div. 2d 150, 338 N.Y.S.2d 125 (1st Dept. 1972), aff'd, 33 N.Y.2d 991, 309 N.E.2d 425, 353 N.Y.S.2d 962 (1974); Ruskin v. Detken, 32 N.Y.2d 293, 298 N.E.2d 101, 344 N.Y.S.2d 933 (1973). The answer must be indicative of a "distinctive intent to both mislead and obstruct the Grand Jury." People v. McGrath, 86 Misc. 2d 249, 257, 380 N.Y.S.2d 976, 985 (1976). The defendant's conduct must show "beyond any doubt whatever" that he refuses to testify. United States v. Appel, 211 F. 495, 495 (S.D.N.Y. 1913). The defendant is allowed to submit any evidence (including the lack of a warning) relevant to his intent or state of mind at the time of his appearance before the grand jury. People v. Martin, 47 App. Div. 2d 883, 367 N.Y.S.2d 8 (1st Dept. 1975), aff'd, 42 N.Y.2d 882, 366 N.E.2d 881, 397 N.Y.S.2d 794 (1977). The requirement of intent appears to render a pre-indictment warning unnecessary. Additionally, People v. Rappaport, 60 App. Div. 2d 565, 566 400 N.Y.S.2d 351, 352 (1st Dept. 1977), noted that warning for each evasive answer might well approach harassment.

¶75E Second, to charge the defendant with criminal contempt, the grand jury must have probable cause to believe that he "contumaciously and unlawfully" refused to testify. The petit jury must find these elements beyond a reasonable doubt. Labella v. Commissioner of Corrections, 413 F. Supp. 1214, 1219 (S.D.N.Y. 1976). Ironically, Cutrone's warning, designed

to protect the witness, may actually allow the prosecutor to suggest his own determination of the factual sufficiency of the answers to constitute a contumacious refusal to answer. See People v. Swanson, 278 App. Div. 846, 846, 104 N.Y.S.2d 400, 401 (2d Dept. 1951)(prejudicial error to permit counsel to influence jury by expressing personal belief in defendant's guilt). But see State v. Schamberg, 146 N.J. Super. 559, 563, 370 A.2d 482, 484-85 (A.D. 1977) (not prosecutorial misconduct for prosecutor to state before grand jury that he believed witness committed perjury). See also A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, § 3.5(b) (Approved Draft, 1971). The prosecutor's factual evaluation may encourage the grand jury subsequently considering the issue to issue a criminal indictment. Similarly, the contempt trial jury cannot help but be influenced by the prosecutor's evaluation which must appear in the record. Unwittingly, the Cutrone court may have extended the application of the criminal contempt sanction.

C. Double Jeopardy Considerations

¶76 As discussed above in ¶71, a witness cannot be both punished for criminal contempt and then prosecuted for the crime of criminal contempt.[167]

¶77 Where it is clear at the outset that the witness will not answer any question, and where all the questions relate

[167] See cases in notes 150 and 151. See also Capio v. Justices of Supreme Court, Kings County, 41 App. Div. 2d 335, 342 N.Y.S.2d 100 (2d Dept. 1973), aff'd, 34 N.Y.2d 603, 310 N.E.2d 547, 354 N.Y.S.2d 953 (1974).

to a"single area of inquiry," only one contempt is committed, no matter how many questions are asked.[168] No immunity from later charges of contempt is conferred, however, merely because the witness has served his term of imprisonment for contempt.[169] If the witness refuses to testify to separate question on separate days,[170] or to questions involving separate and distinct transactions,[171] separate contempts occur.

D. Disposition on Notice and Hearing

¶78 A prosecution for penal law criminal contempt, being for a crime, requires a trial, or guilty plea. Criminal contempt under the judiciary law,however, may be punished summarily if committed in the immediate view and presence of the court.[172]

[168] People v. Chestnut, 26 N.Y.2d 481, 260 N.E.2d 501, 311 N.Y.S.2d 853 (1970); People v. Cavalieri, 36 App. Div. 2d 284, 320, 320 N.Y.S.2d 390 (1st Dept.), aff'd, 29 N.Y.2d 762, 276 N.E.2d 624, 326 N.Y.S.2d 562 (1971), cert. denied, 406 U.S. 962 (1972); Second Additional Grand Jury of Kings County v. Cirillo, 16 App. Div. 2d 605, 230 N.Y.S.2d 303, (2d Dept. 1962), aff'd, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963); People v. Epps, 32 App. Div. 2d 625, 299 N.Y.S.2d 878 (1st Dept. 1969); People ex rel. Vario v. Kreuger, 58 Misc.2d 1023, 297 N.Y.S.2d 488 (Sup. Ct. Nassau County 1969).

[169] Second Additional Grand Jury of Kings County v. Cirillo, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963).

[170] People v. Matra, 42 App. Div. 2d 865, 346 N.Y.S.2d 872 (2d Dept. 1973).

[171] People v. Saperstein, 1 App. Div. 2d 402, 150 N.Y.S.2d 842 (1st Dept. 1956), aff'd, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160, cert. denied, 353 U.S. 946 (1957); Lombardozzi, supra note 137.

[172] New York Judiciary Law § 755 (1962), see section (7)(B), supra. And see Interfaith Hospital v. People, 71 Misc.2d 910, 337 N.Y.S.2d 358 (Sup. Ct. Queens County, Crim. T. 1972); People v. Zweig, 32 App. Div. 2d 569, 300 N.Y.S.2d 651 (2d Dept. 1969).

A witness's refusal to testify before a grand jury is not a contempt committed in the presence of the court and, therefore, mandates notice and a hearing.[173] Further, where a court delays imposing sanctions for contempt until after the proceeding in which the contempt occurred, it may be inferred that there is no immediacy for dealing with the contempt; notice and hearing, therefore, will be required.[174] What constitutes sufficient notice and reasonable opportunity to defend depends on the particular circumstances of each case.[175]

E. Summary Dispostion

¶79 Where a witness refuses to obey a court's order (e.g. refuses to testify before grand jury while under subpoena) and is taken before the court and repeats his refusal (e.g. again refuses to answer when asked questions by the judge) the contempt is committed in the "immediate view and presence of the court" and may be summarily punished.[176] But immediate disposition is required.[177] Review of the contempt is provided for in New York Civil Practice Law and Rules

[173] People v. Martin, supra note 166; People v. Woodruff, 50 Misc.2d 430, 270 N.Y.S.2d 838 (Sup. Ct. Dutchess County, 1966).

[174] Katz v. Murtagh, 28 N.Y.2d 234, 269 N.E.2d 816, 321 N.Y.S.2d 104 (1971).

[175] Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1930). And see People v. Sweig, supra note 172; People v. Martin, supra note 166.

[176] Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); Douglas v. Adel, 269 N.Y. 144, 199 N.E. 35 (1935); Hackley v. Kelly, 24 N.Y. 74 (1861), overruled on other grounds, People ex rel. Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903); Waterhouse v. Celli, 71 Misc.2d 600, 336 N.Y.S.2d 960 (Sup. Ct. Monroe County 1972); People v. Knapp, 4 Misc.2d 449, 157 N.Y.S.2d 820 (N.Y. County Ct. Gen. Sess. 1956).

[177] If the judge awaits completion of the proceeding before punishing contempts, he must afford contemnor notice and hearing. Zols v. Lakritz, 74 Misc.2d 322, 344 N.Y.S.2d 626 (Sup. Ct. Queens County 1973).

section 7801(1962).[178]

F. Disqualification of the Judge

¶80 When the contempt, although disruptive, is not an insulting attack upon the integrity of the judge, there is no need for disqualification of the judge.[179] Disqualification occurs when the contempt is "of such personal character as to indicate virtual impossibility of detached evaluation."[180]

G. Jury Trial

¶81 Since the maximum punishment for the crime of criminal contempt (New York Penal Law sections 215.50 and 215.51) is thirty days in jail and/or $500, no jury trial is required.[181] In all other circumstances, the constitutional requirements, spelled out by the Supreme Court, would be followed (see ¶¶36-38 above).

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[178] Waterhouse v. Celli, supra note 176; Cahn v. Vario, 32 App. Div. 2d 564, 300 N.Y.S.2d 657 (2d Dept. 1969); People v. Epps, 21 App. Div. 2d 650, 249 N.Y.S.2d 639 (1st Dept. 1964), cert. denied, 379 U.S. 940 (1964), rehearing denied, 380 U.S. 928 (1965).

[179] Katz v. Murtagh, 28 N.Y.2d 234, 269 N.E.2d 816, 321 N.Y.S.2d 104 (1971).

[180] Id. at 239, 269 N.E.2d 816, 819, 321 N.Y.S.2d 104, 108.

[181] Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968).

10. New York Perjury

A. Generally

¶82 New York's statutory scheme for perjury is organized into degrees of the crime. Perjury in the third degree, found in New York Penal Law section 210.05(1965), covers all forms of perjury, whether the statement is oral or written, whether it is material or immaterial; it provides:

> A person is guilty of perjury in the third degree when he swears falsely.
> Perjury in the third degree is a class A misdemeanor.

Perjury in the second degree, New York Penal Law section 210.10(1965), applies only to written instruments; it provides:

> A person is guilty of perjury in the second degree when he swears falsely and when his false statement is (a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved.
>
> Perjury in the second degree is a class E felony.

The most serious crime is perjury in the first degree, New York Penal Law section 210.15(1965), which requires materiality and that the statement be in the form of testimony; it provides:

> A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made.
>
> Perjury in the first degree is a class D felony.

Definitions of terms relating to perjury are set out in

New York Penal Law section 210.00(1965); they provide:

> The following definitions are applicable to this article:
>
> 1. "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.
>
> 2. "Swear" means to state under oath.
>
> 3. "Testimony" means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered. . . .
>
> 5. "Swear falsely." A person "swears falsely" when he intentionally makes a false statement which he does not believe to be true (a) while giving testimony, or (b) under oath in a subscribed written instrument shall not be deemed complete until the instrument is delivered by its subscriber, or by someone acting in his behalf, to another person with intent that it be uttered or published as true. . . .

The key term defined here is "swears falsely," which amounts to an overall definition of perjury. It contains the five basic elements which are common to the three degrees of perjury:

a. a statement,

b. intentionally made, which is,

c. false, made,

d. under oath,[182] and

e. not believed by the maker to be true.

The degrees of the crime of perjury are not mutually exclusive; the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior

[182] Regarding the oath requirement, see People v. Grier, 42 App. Div. 2d 803, 346 N.Y.S.2d 422 (3d Dept. 1973).

thereto.[183]

¶83 Perjury is not excused because of some defect in the proceedings in which the false testimony is given.[184]

Additionally, New York Penal Law section 210.30(1965) provides:

> It is no defense to a prosecution for perjury that:
>
> 1. The defendant was not competent to make the false statement alleged; or
>
> 2. The defendant mistakenly believed the false statement to be immaterial; or
>
> 3. The oath was administered or taken in an irregular manner or that the authority or jurisdiction of the attesting officer who administered the oath was defective, if such defect was excusable under any statute or rule of law.

B. Intent and Falsity

¶84 Generally, the falsity of testimony does not alone establish willfulness;[185] a perjury conviction cannot be based on evidence that is as consonant with fallibility of memory as with willful lying.[186] Testimony to a fact that a person has no reason to believe to be true may be perjury even though in fact it is true.[187]

[183] People v. Samuels, 284 N.Y. 410, 31 N.E.2d 753 (1940). Other sections of New York Penal Law relating only to perjury in written instruments are §§210.35, 210.40, and 210.45 (McKinney 1975).

[184] People v. Ward, 37 App. Div. 2d 174, 323 N.Y.S.2d 316 (1st Dept. 1971).

[185] Samuels, supra note 183.

[186] Id. See also People v. Lombardozzi, 35 App. Div. 2d 508, 313 N.Y.S.2d 305 (2d Dept. 1970), aff'd, 30 N.Y.2d 677, 283 N.E.2d 609, 332 N.Y.S.2d 630 (1972).

[187] People v. Doody, 72 App. Div. 372, 76 N.Y.S. 606 (3d Dept.), aff'd, 172 N.Y. 165, 64 N.E. 807 (1902).

¶85 When two statements are made under oath and one is false, however, their inconsistency alone may prove perjury. New York Penal Law section 210.20(1965) defines perjury involving inconsistent statements:

> Where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, where the circumstances are such that each statement, if false, is perjuriously so, and where each statement was made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged, the inability of the people to establish specifically which of the two statements is the false one does not preclude a prosecution for perjury, and such prosecution may be conducted as follows:
>
> 1. The indictment or information may set forth the two statements and, without designating either, charge that one of them is false and perjuriously made.
>
> 2. The falsity of one or the other of the two statements may be established by proof or a showing of their irreconcilable inconsistency.
>
> 3. The highest degree of perjury of which the defendant may be convicted is determined by hypothetically assuming each statement to be false and perjurious. If under such circumstances perjury of the same degree would be established by the making of each statement, the defendant may be convicted of that degree at most. If perjury of different degrees would be established by the making of the two statements, the defendant may be convicted of the lesser degree at most.[188]

Under this section, contradictory statements presumptively establish the falsity of the false statement.[189] The people, however, must establish a willful contradiction and show that the oaths were required by law.[190]

[188] A similar statute was recently upheld against Fifth Amendment challenges. The Florida Supreme Court construed "inconsistent statements" to mean statements which are mutually exclusive, and "willfully" to mean that the statement was knowingly false when made. With this construction the statute's presumption of falsity, said the court, is constitutional. Brown v. State, 334 So. 2d 597 (Fla. 1976).

[189] People v. Ashby, 8 N.Y.2d 238, 168 N.E.2d 672, 203 N.Y.S.2d 854 (1960).

C. Materiality

¶86 The materiality of the allegedly false testimony is an essential ingredient of perjury.[191] Since the crime of perjury is divided into several degrees, the gravity of the offense (of which materiality is partly determinative) is an issue of fact for the jury.[192] A preliminary determination is made by the judge, and the test is whether the statement made can influence the tribunal on the issue before it.[193] As the court in People v. Perna observed:

> Thus a statement is usually held sufficient to support a charge of perjury if it is material to any proper matter of inquiry, and if, furthermore, it is calculated and intended to bolster the testimony of a witness on some material point, or to support or attack the credibility of the witness, or if it is a link in a chain of circumstantial evidence, or supports a conclusion or

[190] People v. Lillis, 3 App. Div. 2d 44, 158 N.Y.2d 191 (4th Dept. 1956). Additionally, the jurisdictional element is a limitation. An irreconcilable inconsistency between a statement sworn in a state proceeding and another sworn in a federal proceeding may not be the basis for a charge of perjury under this section. People v. Iadarola, 85 Misc.2d 271, 377 N.Y.S.2d 431 (Sup. Ct. N.Y. County, 1975).

[191] People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909).

[192] People v. Clemente, 285 App. Div. 2d 258, 136 N.Y.S.2d 202 (1st Dept. 1954), aff'd, 309 N.Y. 890, 131 N.E.2d 294 (1955); People v. Dunleavy, 41 App. Div. 2d 717, 341 N.Y.S.2d 500 (1st Dept. 1973).

[193] People v. Perna, 20 App. Div. 2d 323, 246 N.Y.S.2d 920 (4th Dept. 1964).

> opinion of the witness. A person swearing falsely to a material fact cannot defend himself on the ground that the case did not ultimately rest on the fact to which he swore.[194]

D. The Two-Witness Rule and the Direct Evidence Rule

¶87 The two-witness rule is a well-established rule of law in New York.[195] New York Penal Law section 210.50(1965) codifies this principle by stating that, with respect to the crimes defined in New York Penal Law article 210, the "falsity of a statement may not be established by the uncorroborated testimony of a single witness." This rule does not, however, apply to prosecutions based upon inconsistent statements pursuant to section 210.20, supra ¶85.

¶88 In establishing a prima facie case of perjury, the government in proving falsity must at least corroborate the testimony of a single witness by independent corroborative circumstances, or make a prima facie case by circumstantial proof.[196]

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[194] Id. at 327, 246 N.Y.S.2d at 924.

[195] People v. Doody, 172 N.Y. 165, 64 N.E. 807 (1902); People v. Sabella, 35 N.Y.2d 158, 316 N.E.2d 569, 359 N.Y.S.2d 100 (1974).

[196] People v. Sabella, supra note 195; People v. Fitzpatrick, 47 App. Div. 2d 70, 364 N.Y.S.2d 190 (1st Dept. 1975), rev'd on other grounds, 40 N.Y.2d 44, 351 N.E.2d 675, 386 N.Y.S.2d 28 (1976); People v. Ginsberg, 80 Misc. 2d 921, 364 N.Y.S.2d 260 (Nassau County Ct. 1974), aff'd, 50 App. Div. 2d 804, 375 N.Y.S.2d 855 (1975). Even the testimony and behavior of the defendant need not be discounted as a possible corroborative factor. People v. Deitsch, 237 N.Y. 300, 142 N.E. 670 (1923). But circumstantial evidence that points equally to defendant's innocence as to his guilt may leave the testimony of the one witness uncorroborated and insufficient to convict. People v. Fellman, 42 App. Div. 2d 764, 346 N.Y.S.2d 334 (2d Dept. 1973). And a conviction cannot be based on evidence that is as consonant with fallibility of memory as with willful falsification. People v. Lombardozzi, supra note 186.

E. Recantation

¶89 New York Penal Law section 210.25(1965) provides a defense to perjury:

> In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.

This section codifies previous case law.[197] The defense is designed primarily to encourage witnesses to correct knowingly false testimony, but to disallow blame from being purged when the testimony has influenced the investigation, or when the witness sees that his falsehood is soon to be discovered anyway.

F. Double Punishment

¶90 Exoneration of a witness in the proceeding in which the false testimony is given does not bar a perjury prosecution;[198] collateral estoppel, however, may apply.[199]

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[197] People v. Gillette, 126 App. Div. 655, 111 N.Y.S. 133 (1st Dept. 1908) (recantation defense); People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957) (limitation on the defense).

[198] Wood v. People, 59 N.Y. 117 (1874).

[199] People v. Berger, 199 Misc. 543, 106 N.Y.S.2d 761 (Monroe County Ct. 1950).

11. New Jersey Contempt: Generally

A. Statutes

¶91 The primary[200] sections governing contempt are found in the New Jersey Statutes and in the Rules of Court. N.J. Stat. Ann. sections 2A:10-1, 10-3, 10-5, 10-7, and 10-8 (West 1965) provide respectively:

> The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:
>
> a. Misbehavior of any person in the actual presence of the court;
>
> b. Misbehavior of any officer of the court in his official transactions; and
>
> c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, of command of the court.
>
> Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.
>
> * * * *
>
> Every summary conviction and judgment, by the Superior Court in the law division or chancery division or by a County Court or any inferior court except the municipal court, for a contempt, shall be reviewable by the appellate division of the Superior Court and all convictions and judgments for contempt by the municipal courts shall be reviewable by the County Court. Such review shall be both upon the law and the facts and the court shall give such judgment as it shall deem to be lawful and just under all the circumstances of the case and shall enforce the same as it shall order.
>
> * * * *
>
> Any person who shall be adjudged in contempt of the superior court of county court by reason of his disobedience to a judgment, order or process of the court, shall, where the contempt is primarily civil in nature and before he is discharged therefrom, pay to the clerk of the court, for the use of the state or the county, as the case may be, for every such contempt, a sum not exceeding $50 as a fine, to be imposed by the court, together with the costs incurred.
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> * * * *
>
> The county courts, juvenile and domestic relations courts, county district courts, county traffic courts, criminal judicial district courts, municipal courts and park police courts in this state shall have full power to punish for contempt in any case provided by section 2A:10-1 of this title.
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> * * * *
>
> Any court may issue a warrant for the arrest of any person subject to punishment for a contempt pursuant to the provisions of chapter 10 of Title 2A of the New Jersey Statutes, directed to any officer or person authorized by law to serve process, who shall be empowered to serve such warrant in any county of this State and to produce the person subject to punishment for contempt as herein provided before the judge of such court issuing said warrant.

Rules 1:10-1 to 1:10-4 of the New Jersey Rules of Court (1969) provide respectively:

> Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.
>
> * * * *
>
> Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceedings shall be captioned "In the Matter of _____ Charged with Contempt of Court."
>
> * * * *
>
> A person charged with contempt under R. 1:10-2 shall be admitted to bail pending the hearing. The amount and sufficiency of bail shall be reviewable by a single judge of the Appellate Division.

[200] New Jersey's immunity statute makes a provision for contempt. If a person refuses to testify after being granted immunity he may be adjudged in contempt and committed to jail until he testifies. N.J. Stat. Ann. §2A:81-17.3 (1973).

* * * *

> A proceeding under R. 1:10-2 may be prosecuted on behalf of the court only by the Attorney General, the County Prosecutor of the county, or where the court for good cause designates an attorney, then by the attorney so designated. Except with the consent of the person charged, the matter may not be heard by the judge allegedly offended or whose order was allegedly contemned. Unless there is a right to a trial by jury, the court in its discretion may try the matter without a jury.

All New Jersey courts of record, civil and criminal, inherently possess the power to punish contempts;[201] section 2A:10-1 delimits this power. Section 2A:10-3 provides a safeguard to a contemnor summarily punished in allowing review of the contempt judgment "both upon the law and the facts." The "fine" provided in section 2A:10-5 for civil contempt, despite its penal connotation, is merely an imposition of costs in favor of the state to reimburse it for the proceeding.[202]

¶92 The rules of court regarding contempt were amended in 1965 in response to the New Jersey Supreme Court's reconsideration of the contempt offense in New Jersey Department of Health v. Roselle;[203] the rules now reflect the court's reasoning. There is no distinction between civil and criminal contempt; any contempt is the same offense in every case. The real distinction is between cases which may be dealt with summarily pursuant to Rule 1:10-1, and cases which must be prosecuted as crimes

[201] In re Merrill, 88 N.J. Eq. 261, 102 A. 400 (1918). The court's power to punish for contempt is over court officers, parties, or strangers. In re Megill, 114 N.J. Eq. 604, 169 A. 501 (1934); See In re Borough of West Wildwood, 42 N.J. Super. 282, 126 A.2d 233 (1956).

[202] New Jersey Department of Health v. Roselle, 34 N.J. 331, 169 A.2d 153 (1961).

[203] Id.

pursuant to Rule 1:10-2 [then N.J. Stat. Ann. section 2A:85-1(1965)[204]] or disposed of on notice and hearing preceding a conditional commitment.

¶93 The offense may be responded to by either punitive or coercive measures, or both. If there has been a direct contempt (in the judge's "actual presence"), the judge may punish the contemnor summarily; no notice or order to show cause is necessary. Any other contempt (indirect contempts) may only be punished pursuant to the procedures specified in Rules 1:10-2 through 1:10-4. Although the term "summary proceeding" is used, the proceedings clearly are not "summary" as that term has been used in this discussion and in other jurisdictions.

B. Distinguishing Civil and Criminal Contempts

¶94 For purposes of this discussion, the distinction between civil and criminal contempt is important in three contexts.[205]

[204] N.J. Stat. Ann. §2A:85-1. Offenses indictable at common law and not otherwise covered, punishable as misdemeanors

> Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors.

Under this section contempt may be prosecuted as a crime. In re Buehrer, 50 N.J. 501, 236 A.2d 592 (1967); State v. Byrnes, 109 N.J. Super. 105, 262 A.2d 420, aff'd, 55 N.J. 408, 262 A.2d 408, cert. denied, 398 U.S. 941 (1970).

[205] Of course, the purpose of the punishment, punitive or coercive, determines whether the contempt will be deemed "criminal" or "civil." Roselle, supra note 202.

First, the pardoning power applies to criminal contempt, but not to civil contempt.[206] Second, the contemnor must be informed as to whether his contempt is civil or criminal.[207] Third, based upon the actual sentence imposed,[208] the maximum criminal penalty which may be imposed without a jury trial is six months.[209]

C. Distinguishing Direct and Indirect Contempts

¶95 "Direct" contempts under Rule of Court 1:10-1 are those committed "in the actual presence of a judge"; they may be adjudged summarily without notice or order to show cause. This procedure may be employed where the judge witnessed the contempt, but not where proof of the contempt depends on proof from persons other than the judge himself.[210] All other contempts, including obstructive misbehavior outside the presence of the court, misbehavior of an officer of the court, and violation of an order of the court, must be prosecuted after notice and hearing

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[206] In re Caruba, 142 N.J. Eq. 358, 61 A.2d 290 (1948); In re Borough of West Wildwood, 42 N.J. Super. 282, 126 A.2d 333 (1956).

[207] New Jersey Department of Health v. Roselle, supra note 202.

[208] State v. Owens, 54 N.J. 153, 254 A.2d 97 (1969), cert. denied, 396 U.S. 1021 (1970).

[209] In re Bruehrer, 50 N.J. 501, 236 A.2d 592 (1967).

[210] Swanson v. Swanson, 8 N.J. 169, 84 A.2d 450 (1951).

under Rules of Court 1:10-2 through 1:10-4.[211] Whether direct or indirect, if the criminal penalty actually imposed is greater than six months, a jury trial will also be required.[212]

12. Civil and Criminal Contempt in New Jersey

A. Misbehavior

¶96 In general, any conduct which is disrespectful or scornful of the court is contemptuous,[213] if it tends to obstruct the administration of justice.[214] Disorderly behavior that interrupts the proceedings of a judicial body,[215] or refusal to give unprivileged answers to a grand

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[211] In re Fairlawn Education Assn., 63 N.J. 112, 305 A.2d 72, cert. denied, 414 U.S. 855 (1973); In re Finklestein, 112 N.J. Super. 534, 271 A.2d 916 (1970); In re Boyd, 36 N.J. 285, 176 A.2d 793 (1962); In re Szczepanik, 37 N.J. 503, 181 A.2d 772 (1962). The court's directive, however, disobedience of which constitutes contempt, must be written. In re Callan, 66 N.J. 401, 331 A.2d 612 (1975).

[212] In re Buehrer, supra note 209.

[213] In re Callan, 122 N.J. Super. 479, 300 A.2d 868, aff'd, 126 N.J. Super. 103, 312 A.2d 881, rev'd on other grounds, 66 N.J. 401, 331 A.2d 612 (1975).

[214] In re Caruba, 139 N.J. Eq. 404, 51 A.2d 446 (1947), aff'd, 140 N.J. Eq. 563, 55 A.2d 289, application denied, 142 N.J. Eq. 358, 61 A.2d 290 (sentence imposed by trial court and affirmed on appeal, is not then to be modified by trial court), cert. denied, 335 U.S. 846 (1948); State v. Gonzalez, 69 N.J. 397, 354 A.2d 325 (1975) (second conviction of contempt vacated; first conviction and sentence affirmed--no opinion).

[215] State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (1969).

jury when so ordered,[216] are contemptuous acts. That the court's order was unlawful[217] or that disobedience to the order was in good faith,[218] are not defenses to the resulting contempt charge.

¶97 In New Jersey, perjury or false swearing is a contempt of court and may be punished as such;[219] the falsity, however, must be shown incontrovertibly.[220]

B. Double Jeopardy Considerations

¶98 Repetition of direct contempts during the course of a trial was recently held to support separate contempt offenses with separate sentences.[221]

¶99 A contempt which is also an assault may be punished

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[216] State v. Kenny, 68 N.J. 17, 342 A.2d 189 (1975); In re Boyd, 36 N.J. 285, 176 A.2d 793 (1962); In re Schwarz, 134 N.J.L. 267, 46 A.2d 804 (1946).

[217] State v. Corey, 117 N.J. Super. 296, 284 A.2d 395 (1971), opinion adopted, 119 N.J. Super. 579, 293 A.2d 196, cert. denied, 409 U.S. 1125 (1973); Oddo v. Saibin, 106 N.J. Eq. 453, 151 A. 289 (1930); Forrest v. Price, 52 N.J. Eq. 16, 29 A. 215 (1894).

[218] In re Brown, 50 N.J. 435, 236 A.2d 142 (1967).

[219] In re Caruba, supra note 214; Swanson v. Swanson, 8 N.J. 169, 84 A.2d 450 (1951); State v. Illario, 10 N.J. Super. 475 (1950). Recantation of the false testimony does not purge the contempt.

[220] Harbor Tank Storage Co. v. LoMuscio, 45 N.J. 539, 214 A.2d 1 (1965); In re Malisse, 66 N.J. Super. 195, 168 A.2d 838 (1961).

[221] Further, as long as the direct contempts are adjudged as such immediately, a jury trial will not be required, even though the sentences aggregate more than six months. State v. Gonzalez, 69 N.J. 397, 354 A.2d 325 (1975) (second conviction of contempt vacated; first conviction and sentence affirmed--no opinion).

as both without violating double jeopardy principles.[222]

C. Disposition on Notice and Hearing

¶100 Referring to the procedures set out in Rules of Court 10:1-2 through 10:1-4, the New Jersey Supreme Court in In re Buehrer said:[223]

> But since the summary power lends itself to arbitrariness, it should be hemmed in by measures consistent with its mission. To that end, our rules embody sundry restraints. The judge whose order was allegedly breached may not hear the charge unless the defendant consents; the contempt process may be instituted only by the court, lest a litigant turn it to private gain; the defendant shall be informed plainly that the proceeding is penal as distinguished from one for the further relief of a litigant; the penal charge may not be tried with a litigant's application for further relief unless the defendant consents; a conviction is reviewable upon appeal both upon the law and the facts, and the appellate court shall give such judgment as it shall deem just. The presumption of innocence of course obtains, and the burden of the prosecution is to prove guilt beyond a reasonable doubt. Thus the defendant is afforded all the rights of one charged with crime except the right to indictment and to trial by jury.[224]

Such a "summary" conviction for contempt is not a "conviction" within statutes imposing a disability or disqualification on an individual because of a conviction for a crime.[225]

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[222] In re Burroughs, 125 N.J. Super. 221, 310 A.2d 117 (1973).

[223] 50 N.J. 501, 515-16, 236 A.2d 592,600 (1967).

[224] See also New Jersey Department of Health v. Roselle, 34 N.J. 331, 169 A.2d 153 (1961); Essex County Welfare Board v. Perkins, 133 N.J. Super. 189, 336 A.2d 16 (1975); In re Fair Lawn Education Ass'n., 63 N.J. 112, 305 A.2d 72, cert. denied, 414 U.S. 855 (1973).

[225] State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (1969).

D. Summary Disposition

¶101 In In re Bridge[226] the court observed that for proceedings under Rule of Court 1:10-1, where the contempt is in the "actual presence of the judge" and no notice or hearing is necessary for disposition of the contempt, the confinement must be terminable upon the contemnor's compliance with the order disobeyed.[227] In State v. Gonzalez,[228] however, the immediate summary procedure of Rule 10:1-1 was not limited only to coercive, as opposed to punitive, punishment. The court observed:

> . . .[A] court may summarily convict and impose punishment for contempt, without any provision for notice and opportunity to be heard, provided that the contemptuous conduct occurred in the immediate presence of the judge and was personally witnessed by him, and that the conduct created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that if 'not instantly suppressed and punished, demoralization of the court's authority would follow.'[229]

Obviously, this procedure is of very limited application; whether it is limited to coercive punishment, however, is unclear.

¶102 Summary convictions are reviewable by appeal under N.J. Stat. Ann. section 2A:10-3(West 1965).

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[226] 120 N.J. Super. 460, 295 A.2d 3 (1972), certif. denied, 62 N.J. 80, 299 A.2d 77 (1972); cert. denied, 62 N.J. 80, 299 A.2d 78 (1972).

[227] See also Essex County Welfare Board v. Perkins, 133 N.J. Super. 189, 336 A.2d 16 (1975).

[228] 134 N.J. Super. 472, 341 A.2d 694 (1975).

[229] Id. at 475, 341 A.2d at 696 (1975).

E. Limitation on Coercive Commitment

¶103 The New Jersey Supreme Court recently became the first court to hold that civil confinement may become unjustified and will be discontinued when it loses its "coercive impact." Noting that each case must be decided on its own merit, the court in Catena v. Seidl[230] said the relevant question is "whether there is a substantial likelihood that continued confinement will cause [the witness] to change his mind and testify." Factors to be weighed in deciding each case are age, state of health, and length of confinement. Catena was seventy-three years old, continued confinement posed a great danger to his heart condition, and he had been imprisoned for five years, steadfastly refusing to testify. Catena's confinement was held no longer coercive, and it was ended.

13. New Jersey Perjury

A. Generally

¶104 New Jersey, like the federal system, punishes both perjury and false-swearing.[231] The perjury statute, in N. J. Stat. Ann. section 2A:131-1(West 1969) provides that:

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[230] Catena v. Seidl, 68 N.J. 224, 343 A.2d 744 (1975).

[231] There are other statutes more specifically tailored to particular situations, See, e.g., N.J. Stat. Ann. §2A:131-2 (West 1953) (perjury before commissioner of another state or of the United States); N.J. Stat. Ann. §2A:131-3 (West 1953) (using false oaths or depositions); N.J. Stat. Ann. §41:3-1 (West 1937) (partnerships--perjury in taking oaths or making affidavits).

> Any person who willfully and corruptly commits perjury or by any means procures or suborns any person to commit corrupt and willful perjury, on his oath, in any action, pleading, indictment, controversy, matter or cause depending or which may depend in a court of this state, or before a referee or arbitrator, or in a deposition or examination taken or to be taken pursuant to the laws of this state or the rules of the supreme court of this state, before any public officer legally authorized to take the same, is guilty of a high misdemeanor.

The false-swearing statute follows at New Jersey Stat. Ann., section 2A:131-4(West 1969); it provides:

> Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable as for a misdemeanor.

Further definition is provided by the next section, which provides:

> If a person has made contrary statements under oath, it shall not be necessary to allege in an indictment or allegation which statement is false but it shall be sufficient to set forth the contradictory statements and allege in the alternative that one or the other is false.
>
> Proof that both statements were made under oath duly administered is prima facie evidence that one or the other is false; and if the jury are satisfied from all the evidence beyond a reasonable doubt that one or the other is false and that such false statement was willful, whether made in a judicial proceeding or before a person authorized to administer an oath and acting within his authority, it shall be sufficient for a conviction.

¶105 The purpose of the false-swearing statute was to relieve the prosecution of many of the technical difficulties of a perjury prosecution.[232] False swearing is a lesser included offense of perjury[233] includes certain classifications of falsehoods not reached by perjury,[234] and allows a conviction without proof of falsity. Perjury requires that a formal oath was administered[235] while false swearing does not.

B. Intent and Falsity

¶106 Perjury is a willful assertion as to a fact, knowing such to be false, with the intent of misleading a court or jury.[236] Willfulness in the use of false swearing was defined by the Supreme Court of New Jersey to be intentionally testifying to something known to be false.[237] A statutory

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[232] State v. Kowalczyk, 3 N.J. 51, 68 A.2d 835 (1949); State v. Angelo's Motor Sales, 125 N.J. Super. 200, 310 A.2d 97 (1973), aff'd, 65 N.J. 154, 320 A.2d 161 (1974).

[233] Perjury is a high misdemeanor, punishable by a fine of not more than two thousand dollars or imprisonment for not more than seven years or both. False swearing is classified as a misdemeanor. A misdemeanor is punishable by a fine of not more than one thousand dollars or imprisonment for not more than three years or both. New Jersey Stat. Ann. §2A:85-6 (West 1952) and §2A:85-7 (West 1952).

[234] State v. Siegler, 12 N.J. 520, 97 A.2d 469 (1953). Under the false swearing statute, for example, one may prosecute false statements formally sworn to by means of an oath as well as solemn verification of false statements during various stages of judicial proceedings. State v. Angelo's Motor Sales, 125 N.J. Super. 200, 310 A.2d 97 (1973); aff'd, 65 N.J. 154, 320 A.2d 161 (1974).

[235] State v. Randazzo, 92 N.J. Super. 579, 224 A.2d 341 (1966).

[236] Cermak v. Hertz Corp., 53 N.J. Super. 455, 147 A.2d 800, aff'd, 28 N.J. 568, 147 A.2d 795 (1959). See also State v. Sullivan, 24 N.J. 18, 130 A.2d 610, cert. denied, 355 U.S. 840 (1957).

[237] State v. Fuchs, 60 N.J. 564, 292 A.2d 10 (1972). See also State v. Browne, 43 N.J. 321, 204 A.2d 346 (1964); State v. Doto, 16 N.J. 397, 109 A.2d 9 (1954), cert. denied, 349 U.S. 912 (1955).

definition of willfulness is now found in N. J. Stat. Ann. section 2A:131-7(West 1969) and applies to both crimes; it provides:

> "Willful" shall, for the purposes of this article, be understood to mean intentional and knowing the same to be false.

¶107 Falsity must be established for perjury, but not for false swearing.

C. Materiality

¶108 Even though never a requirement for a false swearing conviction, traditionally the allegedly false statement had to be material to be perjury.[238] Under N. J. Stat. Ann. section 2A:131-6(West 1969) materiality is no longer required; it provides:

> Corroboration or proof by more than 1 witness to establish the falsity of testimony or statements under oath is not required in prosecutions under this article. It shall not be necessary to prove, to sustain a charge under this article, that the oath or matter sworn to was material, or, if before a judicial tribunal, that the tribunal had jurisdiction.

D. Two-Witness and Direct Evidence Rules

¶109 Although once required by the case law,[239] these rules were often ignored or evaded.[240] N.J. Stat. Ann. section

[238] State v. Ellenstein, 121 N.J.L. 304, 2 A.2d 454 (1938). Materiality was a question of law. State v. Lupton, 102 N.J.L. 530, 133 A. 861 (1926).

[239] State v. Camporale, 16 N.J. 373, 108 A.2d 841 (1954).

[240] See State v. Siegler, 12 N.J. 520, 97 A.2d 469 (1953); State v. Haines, 18 N.J. 550, 115 A.2d 24 (1955); State v. Cattaneo, 123 N.J. Super. 167, 302 A.2d 138 (1973).

2A:131-6, above, abrogates these rules as to perjury and false swearing prosecutions.

E. Recantation

¶110 Recantation of perjury or false swearing neither neutralizes the false testimony nor exculpates the witness of the crime.[241]

F. Separate Perjuries

¶111 Acquittal of the substantive crime does not necessarily preclude subsequent prosecution for perjury.[242]

G. Subornation

¶112 To establish this crime the government must show that the defendant requested the individual to swear falsely and that the individual in fact did so.[243]

[241] State v. Kowalczyk, 3 N.J. 51, 68 A.2d 835 (1949); In re Foster, 60 N.J. 134, 286 A.2d 508 (1972). When the prosecutor is told, however, that the witness intends to recant, he may have a duty to advise the witness of his privilege against self-incrimination. State v. Williams, 112 N.J. Super. 563, 272 A.2d 294 (1970), aff'd, 59 N.J. 493, 284 A.2d 172 (1971).

[242] See State v. Redinger, 64 N.J. 41, 312 A.2d 129 (1973).

[243] State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962).

14. Massachusetts Contempt

A. Generally

¶113 Massachusetts does not have a general contempt statute,[244] but the superior courts,[245] district courts,[246] and courts of chancery[247] possess inherent power to punish for contempt.

B. Distinguishing Civil and Criminal Contempts

¶114 Under Massachusetts case law the purpose of the punishment for contempt fixes its nature as either civil or criminal; civil contempt is remedial and its punishment is contingent, while criminal contempt is punitive and its punishment is unconditional and fixed.[248] Good faith is not a defense to a contempt charge, civil or criminal.[249]

¶115 The only important procedural consequence turning on the distinction between civil and criminal contempt is the method of review of the contempt. Judgments of criminal contempt are reviewed by writ of error[250] while appeal is the proper remedy for review of adjudication of civil contempt.[251]

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[244] There are, however, contempt statutes for particular proceedings. See, e.g., Mass. Gen. Laws Ann. ch. 220, §13A (1974) (regarding labor disputes); Mass. Constitution pt. 2, ch. 1, §3, arts. 10, 11 (1967) (power of House of Representatives, Senate and Governor to punish for contempt); Mass. Gen. Laws Ann. ch. 30A, §12(5) (1954) (contempt before certain state agencies); Mass. Gen. Laws Ann. ch. 233, §8-11 (1974) (contempt before specified town officials); Mass. Gen. Laws Ann. ch. 233, §5 (1974) (contempt of court-appointed master or auditor); Mass. Rules of Civil Procedure §37 (1974) (refusal to honor a court-ordered deposition or to answer a question in such a deposition).

[245] Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N.E. 429 (1920); Home Investment Co. v. Iovieno, 246 Mass. 346, 141 N.E. 78 (1923); Silverton v. Commonwealth, 314 Mass. 52, 49 N.E.2d 439 (1943); New England Novelty Co. Inc. v. Sandberg, 315 Mass. 739, 54 N.E.2d 915, cert. denied, 323 U.S. 740, rehearing denied, 323 U.S. 815 (1944).

[246] Silverton v. Commonwealth, 314 Mass. 52, 49 N.E.2d 439 (1943). And see Mass. Gen. Laws Ann. ch. 218, §4 (1916).

[247] Root v. Mac Donald, 260 Mass. 344, 157 N.E. 684 (1927).

[248] Sodones v. Sodones, 74 Adv. Sheets 1303, 314 N.E.2d 906 (1974). And see In re De Sauliner, 360 Mass. 769, 279 N.E.2d 287 (1971); Blackenburg v. Commonwealth, 260 Mass. 369, 157 N.E. 693 (1927), cert. denied, 283 U.S. 819 (1930); Root v. Mac Donald, 260 Mass. 344, 157 N.E. 684 (1927); Hurley v. Commonwealth, 188 Mass. 443, 74 N.E. 677 (1905).

[249] United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35, 278 N.E.2d 716 (1972). Inability to comply with the court's order, however, though a defense to civil contempt, Milano v. Hingham Sportswear Co., Inc., 74 Adv. Sheets 2121, 318 N.E.2d 827 (1974); is no defense to criminal contempt, In re Cartwright, 114 Mass. 230 (1873). Furthermore, criminal contempts will survive reversal of the decree which was disobeyed. Town of Stow v. Marinelli, 352 Mass. 738, 227 N.E.2d 708 (1967).

[250] Hansen v. Commonwealth, 344 Mass. 214, 181 N.E.2d 843 (1962); New England Novelty Co. v. Sandberg, supra note 245; In re Opinion of the Justices, 301 Mass. 615, 17 N.E.2d 906 (1938).

[251] Nickerson v. Dowd, 342 Mass. 462, 174 N.E.2d 346 (1961); Commonwealth v. McHugh, 326 Mass. 249, 93 N.E. 2d 751 (1950); Godard v. Babson-Dow Mfg. Co., 319 Mass. 345, 65 N.E.2d 555 (1946). Under Mass. Gen. Laws Ann. ch. 233, §20H (1970) the government can appeal the failure of the court to find contempt in cases dealing with immunized witnesses.

C. Distinguishing Direct and Indirect Contempts

¶116 For purposes of determining whether summary procedure is allowed or whether notice and hearing are required, the distinction between direct and indirect contempts is decisive. Direct contempts, those committed in the "court's presence," are punishable summarily.[252] In a 1971 case where the witness was summarily convicted of criminal contempt for refusals to testify before a grand jury, after the refusals were repeated to the judge, the Supreme Judicial Court, not following the federal rule, characterized the contempt as direct and upheld the summary conviction.[253] In the case of a direct contempt, the trial judge may rest on his judicial knowledge of the facts constituting the contempt,[254] but it is advisable for the judge to set forth the acts constituting contempt in the contempt order.[255]

¶117 In a prosecution for contempt not committed in the court's presence, the witness must be given notice of the charges against him and an opportunity to be heard.[256]

[252] Joyce v. Hickey, 337 Mass. 118, 147 N.E.2d 187 (1958); Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209, cert. denied, 283 U.S. 819 (1930); Silverton v. Commonwealth, 314 Mass. 52, 49 N.E.2d 439 (1943).

[253] In re De Sauliner, 360 Mass. 769, 279 N.E.2d 287 (1971).

[254] Blankenburg v. Commonwealth, supra note 252.

[255] Albano v. Commonwealth, 315 Mass. 531, 53 N.E.2d 690 (1944); Silverton v. Commonwealth, supra note 252.

[256] Meranto v. Meranto, 75 Adv. Sheets 227, 323 N.E.2d 723 (1975); Garabedian v. Commonwealth, 336 Mass. 119, 142 N.E.2d 777 (1957); Woodbury v. Commonwealth, 295 Mass. 316, 3 N.E.2d 779 (1936).

¶118 For criminal contempts where the actual sentence imposed is over six months the federal constitutional rule requires a jury trial.[257]

D. Double Jeopardy Considerations

¶119 Only one penalty may be imposed for contempt when separate questions are designed to establish a single fact, or relate to only a single subject of inquiry.[258] But if the witness makes no effort to define his area of refusal and each question seeks to elicit new facts, repeated refusals to answer constitute separate contempts of court.[259] If the same act constitutes a contempt and a criminal offense double jeopardy does not automatically bar bringing both proceedings.[260]

E. Misbehavior

¶120 Noncompliance with an order of the court constitutes contempt.[261] In Massachusetts, perjury, if sufficient to be an "obstruction of justice," can constitute contempt.[262]

[257] Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

[258] In re De Sauliner, supra note 253.

[259] Id.

[260] New England Novelty Co. v. Sandberg, 315 Mass. 739, 54 N.E.2d 915, cert. denied, 323 U.S. 740, rehearing denied, 323 U.S. 815 (1944).

[261] Commissioner of Banks v. Tremont Trust Co., 267 Mass. 331, 166 N.E.2d 848 (1929).

[262] Blankenburg v. Commonwealth, 260 Mass. 369, 157 N.E. 693 (1927), aff'd 272 Mass. 25, 172 N.E. 209, cert. denied, 283 U.S. 819 (1930).

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F. Disqualification of Judge

¶121 A witness accused of an indirect contempt may under Mass. Gen. Laws Ann. ch. 220, §13b(1935) file for withdrawal of the presiding judge whose person or conduct was the object of the contempt, thus resulting in possible prejudice. This statute provides:

> The defendant in any proceeding for contempt of court in such a case may file with the court a demand for the retirement of the justice sitting in such case, if the contempt arises from an attack upon the character or conduct of such justice and the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand, prior to the hearing in the contempt proceeding, the justice shall thereupon proceed no further, but another justice shall be assigned by the chief justice of the court.

15. Massachusetts Perjury

A. Generally

¶122 Perjury is defined in Mass. Gen. Laws Ann. ch.268, section 1(1920) as follows:

> Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, wilfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury. Whoever commits perjury on the trial of an indictment for a capital crime shall be punished by imprisonment in the state prison for life or for any term of years, and whoever commits perjury in any other case shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars or by imprisonment in jail for not more than two and one half years, or by both such fine and imprisonment in jail.

The first sentence defines two classes of perjury. The first part of the first sentence defines perjury committed in a judicial or ancillary proceeding, or committed in a proceeding in the course of justice, e.g. an adjudicatory proceeding before some administrative officer or agency other than a court. The second part of the first sentence, which requires neither a judicial nor adjudicatory proceeding, defines perjury as the making of false statements under oath where there was statutory or other legal justification for the requiring of an oath in the particular circumstances.[263]

¶123 Under the first part, perjury in a judicial proceeding occurs whenever one willfully swears or affirms falsely in a matter material to the issue or point in question.[264]

¶124 Under the second part, all willfully false and relevant statements under oath, where the oath reasonably should be regarded as required by law, are defined as perjury.[265] In this regard, perjury has been found to exist before the State Crime Commission,[266] which had the statutory authority to require testimony under oath; before the Commissioner of the Department of Public Works,[267]

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[263] Commonwealth v. Giles, 350 Mass. 102, 213 N.E.2d 476 (1966).

[264] Commonwealth v. Geromini, 357 Mass. 61, 255 N.E.2d 737 (1970).

[265] Commonwealth v. Giles, supra note 263.

[266] Id.

[267] Commonwealth v. Bessette, 345 Mass. 358, 187 N.E.2d 810 (1963).

who had the power to administer oaths in removal hearings; and before a bail commissioner.[268]

B. Intent and Falsity

¶125 In Massachusetts, knowledge that the testimony is false may be inferred from the falsity of the statement itself if considered in relation to the facts relating to the witness's opportunity to have knowledge.[269] If the jury concludes that the witness believed his statement to be true, however, perjury is not shown.[270] A party is not to be convicted of perjury because, in the opinion of the jury, he has no reasonable cause for the opinion he expressed.[271] Thus, where a witness relates untrue facts in his testimony, but they are derived from a source that he has no reason to doubt, his testimony is not intentionally untrue.[272] Where the answer is susceptible of a reasonably ascertainable meaning, a conviction for perjury requires proof beyond a reasonable doubt as to the intentional falsity of the answer.[273]

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[268] Commonwealth v. Sargent, 129 Mass. 115 (1880). The definition is also broad enough to include perjury in hearings before legislative and investigative bodies. Commonwealth v. Giles, 350 Mass. 102, 108, 213 N.E.2d 476, 481 (1966).

[269] Commonwealth v. Giles, supra note 268.

[270] Id.

[271] Commonwealth v. Brady, 71 Mass. 78, 79 (1855).

[272] Commonwealth v. Geromini, 357 Mass. 61, 255 N.E. 2d 737 (1970).

[273] Commonwealth v. Giles, supra note 268.

C. Materiality

¶126 A false answer, to be perjurious, must be material to a matter under investigation.[274] The test is whether the testimony could have influenced the final outcome.[275] Materiality is a question of law.[276]

D. Two-Witness and Direct Evidence Rules

¶127 In 1848 in Commonwealth v. Parker,[277] Massachusetts adopted the traditional two-witness rule. Dicta in that case, however, suggest the possibility that documentary evidence be of such a character as to overcome the oath of the defendant and his presumption of innocence.[278]

E. Recantation

¶128 Recantation is not a defense to a charge of perjury. But any testimony given by the defendant, subsequent to the perjurious testimony and which tends to qualify it, must be taken into consideration. If the subsequent

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[274] Commonwealth v. Louis Construction Co., 343 Mass. 600, 180 N.E.2d 83 (1962).

[275] Commonwealth v. Giles, 350 Mass. 102, 213 N.E.2d 476 (1966). In Commonwealth v. Grant, 116 Mass. 17 (1874), it was held perjury to swear falsely to any "material circumstances" which tend to prove or disprove a fact. See also Commonwealth v. Baron, 356 Mass. 362, 252 N.E.2d 220 (1969).

[276] Commonwealth v. Giles, supra note 275; Commonwealth v. Hollander, 200 Mass. 73, 85 N.E. 844 (1908).

[277] 56 Mass. (2 Cush.) 212.

[278] Id. at 223.

testimony indicates that no falsity was intended, the original testimony is not an intentionally false statement.[279]

F. Subornation and Related Matters

¶129 The following sections, related to the general perjury statute, may be useful.

> No written statement required by law shall be required to be verified by oath or affirmation before a magistrate if it contains or is verified by a written declaration that it is made under the penalties of perjury. Whoever signs and issues such a written statement containing or verified by such a written declaration shall be guilty of perjury and subject to the penalties thereof if such statement is wilfully false in a material matter.[280]
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> Whoever is guilty of subornation of perjury, by procuring another person to commit perjury, shall be punished as for perjury.[281]
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> Whoever attempts to incite or procure another person to commit perjury, although no perjury is committed, shall be punished by imprisonment in the state prison for not more than five years or in jail for not more than one year.[282]

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[279] Commonwealth v. Geromini, 357 Mass. 61, 255 N.E. 2d 737 (1970). In that case the subsequent testimony indicated that the defendant, in giving the original testimony as to a fact, had no personal recollection as to the fact but was relying on a written record. He had no reason to think the record was inaccurate at the time, but it turned out to be inaccurate. No intentional falsity was shown.

[280] Mass. Gen. Laws Ann. ch. 268, §1A (1947)(verifying certain written statements by written declaration instead of by oath).

[281] Mass. Gen. Laws Ann. ch. 268, §2 (1812)(subornation of perjury).

[282] Mass. Gen. Laws Ann. ch. 268, §3 (1812)(inciting to perjury).

> * * * *
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> If it appears to a court of record that a party or a witness who has been legally sworn and examined, or has made an affidavit, in any proceeding in a court or course of justice has so testified as to create a reasonable presumption that he has committed perjury therein, the court may forthwith commit him or may require him to recognize with sureties for his appearance to answer to an indictment for perjury; and thereupon the witnesses to establish such perjury may, if present, be bound over to the superior court, and notice of the proceedings shall forthwith be given to the district attorney.[283]

16. Florida Contempt

A. Generally

¶130 Florida courts possess inherent power to punish for contempt.[284] The Florida legislature has recognized this authority and restated it in statutory form.[285] The Florida statute provides that "[e]very court may punish contempts against it whether such contempts be direct, indirect or constructive,[286] and in any such proceeding the court shall proceed to hear and determine all questions of law and fact."[287]

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[283] Mass. Gen. Laws Ann. ch. 268, § 4 (1812) (commitment on presumption of perjury).

[284] In re Hayes, 72 Fla. 558, 73 So. 362 (1916); Ex parte Earman, 85 Fla. 297, 95 So. 755, 31 A.L.R. 1226 (1923).

[285] See, Fla. Rev. Gen. St. § 2534 (1920).

[286] Florida law uses "constructive" as a synonym for "indirect."

[287] Fla. Stat. Ann. § 38.22 (West 1974). The Court's competence to try issues of fact does not extend to criminal contempt cases where the sentence exceeds six months. Aaron v. State, 345 So. 2d 641 (Fla. 1977), cert. denied, 98 S. Ct. 208 (1977). Other

B. Distinguishing Civil and Criminal Contempts

¶131 The courts distinguish along familiar common-law lines between civil and criminal contempt.[288] The distinction lies not in the nature of the conduct constituting contempt, but in the purpose for which the court punishes contumacious conduct. Criminal contempt vindicates the authority of the court or punishes conduct offensive to the public in violation of an order of the court. Civil contempt exists solely to coerce action or non-action by a party.[289] The litmus test for determining the purpose of a proceeding is the sentence imposed. If the contemnor is imprisoned unconditionally, the order is presumed to have deterrence as its purpose, and it may be characterized as "criminal." Incarceration conditioned upon compliance with a court order indicates "civil" contempt.[290]

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287 (continued)

statutory provisions more specific in nature include Fla. Stat. Ann. § 900.04 (West 1973) (empowering criminal courts to punish for contempt); Fla. R. Civ. P. 1.510 (g) (West 1967) (authorizing order of contempt for affidavits made in bad faith pursuant to motion for summary judgment).

288 Ex parte Earman, supra note 284; Demetree v. State 89 So. 2d 498 (Fla. 1956); Theide v. State, 189 So. 2d 490 (Fla. Dist. Ct. App. 1966); Martinez v. State, 339 So. 2d 1133 (Fla. Dist. Ct. App. 1976), aff'd 346 So. 2d 68 (Fla. 1977).

289 Pugliese v. Pugliese, 347 So. 2d 422 (Fla. 1977).

290 In re Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976); see also Pugliese, supra note 289 (the Supreme Court of Florida held that unconditional imprisonment was for criminal contempt despite the trial judge's declaration that "this is an order of punishment for civil contempt").

C. Distinguishing Direct and Indirect Contempts

¶132 Direct contempt is an insult committed before a presiding judge, or an interference with the lawful authority of the court so as to interrupt or hinder judicial proceedings. Where a contumacious act is committed outside the presence of the court, it constitutes indirect contempt.[291]

D. Procedure

¶133 Characterizations of contemptuous conduct as direct or indirect, and as civil or criminal, have far-reaching consequences. Statutory law governs all criminal contempt proceedings. Florida Rule of Criminal Procedure 3.830 states the operative rule for direct criminal contempt:

> A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating cirucmstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

Appellate courts have taken seriously the procedural requirements of Rule 3.830. Contempt judgments have been vacated for failure to comply generally with the rule[292] and for non-compliance with

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291 In re SLT, 180 So. 2d 374 (Fla. Dist. Ct. App. 1965); Sharp v. Sharp, 209 So. 2d 245 (Fla. Dist. Ct. App. 1968).

292 Mathis v. State, 317 So. 2d 778 (Fla. Dist. Ct. App. 1975); Ledlow v. State, 346 So. 2d 609 (Fla. Dist. Ct. App. 1977).

one or more of its specific safeguards.[293]

¶134 Rule 3.840, which governs indirect criminal contempt, provides:

> (a) Indirect (Constructive) Criminal Contempt. A criminal contempt except as provided in the proceeding subsection concerning direct contempts, shall be prosecuted in the following manner:
> (1) Order to Show Cause. The judge, of his own motion or upon affidavit of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the essential facts constituting the criminal contempt charged and requiring him to appear before the court to show cause why he should not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant.
> (2) Motions; Answer. The defendant's personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.
> (3) Order of Arrest; Bail. The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant shall be admitted to bail in the manner provided by law in criminal cases.
> (4) Arraignment; Hearing. The defendant may be arraigned at the time of the hearing, or prior thereto upon his request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and all issues of law and fact shall be heard and determined by the judge.[294]
> (5) Disqualification of Judge. If the contempt charged involves disrespect to or criticism of a judge, he shall disqualify himself from presiding at the hearing. Another judge shall be designated by the Chief Justice of the Supreme Court.
> (6) Verdict; Judgment. At the conclusion of the hearing, the judge shall sign and enter of record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.
> (7) The Sentence; Indirect Contempt. Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against him and inquire as to whether he has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.[295]

¶135 Civil contempt proceedings are controlled by case law. Due process requires that the accused be advised of the charges against him and accorded an opportunity to defend himself. The burden of proof is upon the party bringing the charge to show by a preponderance of the evidence that there was a violation.[296] Where disobedience to a court order is involved, the trial judge must make an affirmative finding that either (1) the accused presently has the ability to comply with the order but refuses to do so,

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[293] Krathen v. State, 310 So. 2d 381 (Fla. Dist. Ct. App. 1975); Jacobs v. State, 327 So. 2d 896 (Fla. Dist. Ct. App. 1976); Simkovitz v. State, 340 So. 2d 959 (Fla. Dist. Ct. App. 1976), all were vacated for failure to inform contemnor of the accusation against him and for failure to provide an opportunity to present evidence. See also Duncan v. State, 349 So. 2d 723 (Fla. Dist. Ct. App. 1977) (overturned for failure to recite facts). But see Saunders v. State, 319 So. 2d 118 (Fla. Dist. Ct. App. 1975) ("step-by-step recitation of each provision of the procedural rule is not requisite on the trial judge; the record when taken in its totality is the scale upon which fundamental rights are weighed").

[294] This provision is subject to the same limitation as described in note 287 supra.

[295] Fla. R. Crim. P. 3.840 (West 1975).

[296] In re SLT, 180 So. 2d 374 (Fla. Dist. Ct. App. 1965); Martin v. State, 194 So. 2d 8 (Fla. Dist. Ct. App. 1967).

or (2) that the accused presently has the ability to comply, but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order.[297] Appeal from a judgment for civil contempt is interlocutory and should be made within sixty days of judgment.[298]

E. Misbehavior

¶136 Contempt is defined by statute as "a refusal to obey any legal order, mandate or decree made or given by any judge. . . relative to any business of said court."[299] The courts, however, generally prefer a more pragmatic test for defining contemptuous conduct: whether the act complained of has a reasonable tendency to obstruct the orderly administration of justice.[300] Specifically, where the Rules of Civil Procedure provide for contempt when a witness does not respond to a

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[297] Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976); Crutchfield v. Crutchfield, 345 So. 2d 831 (Fla. Dist. Ct. App. 1977).

[298] Local Lodge No. 1248 of Intern. Ass'n. of Machinists v. St. Regis Paper Co., 125 So. 2d 337 (Fla. Dist. Ct. App. 1960); In re Rasmussen's Estate, 335 So. 2d 634 (Fla. Dist. Ct. App. 1975).

[299] Fla. Stat. Ann. § 38.23 (West 1975).

[300] Baumgartner v. Joughin, 105 Fla. 335, 141 So. 185 (1932), rehearing denied and affirmed, 107 Fla. 858, 143 So. 436 (1932); Harper v. State, 217 So. 2d 684 (Fla. 1969); Sandstrom v. State, 309 So. 2d 17 (Fla. Dist. Ct. App. 1975).

subpoena without adequate cause,[301] the courts have construed contempt to extend to failure to respond to a subpoena duces tecum.[302] Testimony which is obviously false or evasive is equivalent to a refusal to testify and is punishable as contempt, assuming that such a refusal would be so punishable.[303] To sustain a contempt judgment, the false testimony must have an obstructive effect, the court must be able to take judicial notice of falsity, and the question must be pertinent to the issue. Mere belief or suspicion of falsity is not enough.[304] Moreover, where a person immunized from prosecution failed to recollect facts contained in an earlier statement upon which was based a narcotics prosecution, the court considered it a refusal to testify that amounted to contempt of court.[305] Unauthorized disclosure of grand jury proceedings is defined by § 905.27 of the Florida Statutes (West 1975) as criminal contempt of court.

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[301] Fla. R. Civ. P. 1.510 (g) (West 1967).

[302] Aron v. Huttoe, 258 So. 2d 272 (Fla. Dist. Ct. App. 1972) (there was direct contempt where witness was visibly not present, and summary procedure was proper). But see Studnick v. State, 341 So. 2d 808 (Fla. Dist. Ct. App. 1977) for holding of indirect contempt in a similar situation.

[303] State ex rel. Luban v. Coleman, 138 Fla. 555, 189 So. 713 (1939).

[304] Mitchell v. Parrish, 58 So. 2d 683 (Fla. 1952); State ex rel. Laramie v. Boggs, 151 So. 2d 456 (Fla. Dist. Ct. App. 1963); Chavez-Ray v. Chavez-Ray, 213 So. 2d 596 (Fla. Dist. Ct. App. 1968) (one may be held in contempt for falsely testifying even though the statute of limitations would bar prosecution for perjury).

[305] Brinson v. State, 269 So. 2d 373 (Fla. Dist. Ct. App. 1972).

¶137 Appellate courts have ordinarily declined to review the lower court's characterization of particular conduct as contemptuous. This rule does not apply, however, when the clarity and definiteness of the order or decree disobeyed can be legitimately questioned. In such instances, proof of contemptuous intent is required.[306]

F. Double Jeopardy Considerations

¶138 A single penalty for contempt is proper where there were separate refusals to answer the same question[307] or where a series of contemptuous acts were part of a single contemptuous outburst.[308] Both civil and criminal contempt sentences, however, may be imposed for the same contemptuous offense, where the offense comprised repeated refusals to answer the same question.[309]

17. Florida Perjury

A. Generally

¶139 The two principle perjury statutes are §§ 837.02 and 837.021 of Fla. Stat. Ann. (West 1976).[310] The former, pertaining to perjury in official proceedings, reads:

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[306] Dep't of Health and Rehabilitative Servs. v. State, 338 So.2d 220 (Fla. Dist. Ct. App. 1976).

[307] In re Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976).

[308] Butler v. State, 330 So. 2d 244 (Fla. Dist. Ct. App. 1976), cert. denied, 429 U.S. 863 (1976).

[309] In re Tierney, supra note 307.

[10] In addition, Fla. Stat. Ann. § 837.05 (West 1976) makes it a misdemeanor in the first degree to give false reports to a law enforcement officer concerning the alleged commission of any crime. Section 837.06 punishes as a misdemeanor in the second degree the making of false statements in writing with the intent to mislead a public servant in the performance of his duty.

> (1) Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding in regard to any material matter shall be guilty of a felony of the third degree...[311]
> (2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense.

Section 837.021, defining the crime of perjury by contradictory statements, provides:

> (1) Whoever, in one or more official proceedings, wilfully makes two or more material statements under oath when in fact two or more of the statements contradict each other is guilty of a felony of the third degree. The prosecution may proceed in a single count by setting forth the willful making of inconsistent statements under oath and alleging in the alternative that one or more of them are false.
> (2) The question of whether a statement was material is a question of law to be determined by the court.
> (3) In any prosecution for perjury by contradictory statements under this act, it is not necessary to prove which, if any, of the statements is not true.
> (4) In any prosecution under this act for perjury by contradictory statements, it shall be a defense that the accused believed each statement to be true at the time he made it.

An "official proceeding" is defined by § 837.011 Fla. Stat. Ann. (West 1976) as:

> a proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding.[312]

Grand jury investigations are official proceedings within this

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[311] A felony of the third degree is punishable by up to five years imprisonment and up to a $5,000 fine. Fla. Stat. Ann. §§775.082 to 775.083 (West 1976). On punishment of habitual offenders, see § 775.084.

[312] Fla. Stat. Ann. § 837.012 (West 1976) punishes perjury when not in an official proceeding as a misdemeanor in the first degree.

statute.[313]

B. Intent and Falsity

¶140 Wilfulness, defined by the Florida Supreme Court as knowledge of falsity,[314] is an element of both § 837.02 and § 837.021. To convict for perjury in an official proceeding, the state must prove that a person making a false statement knew that it was false at the time it was given.[315]

Section 837.021, however, carries with it a presumption of wilfulness. Individuals charged with perjury by inconsistent statements may plead "good faith," but this requires a positive showing on their part, either through independent evidence or through their own testimony at trial.[316]

Conviction under § 837.02 requires a showing of falsity. A showing that two statements are "mutually exclusive" suffices under § 837.021.[317]

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[313] Craft v. State, 42 Fla. 567, 29 So. 418 (1900); Tindall v. State, 99 Fla. 1132, 128 So. 494 (1930).

[314] Brown v. State, 334 So. 2d 597 (Fla. 1976).

[315] Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Gordon v. State, 104 So. 2d 524 (Fla. 1958); Wells v. State, 270 So. 2d 399 (Fla. Dist. Ct. App. 1972), cert. denied, 414 U.S. 1024 (1973).

[316] Brown v. State, supra note 314. This shift of the burden of demonstrating non-wilfulness to the defendant has led to questioning of the constitutionality of § 837.021. The statute was upheld by the Florida Supreme Court over vigorous dissent in Brown v. State. Nevertheless, it was subsequently struck down by a lower court judge, in a decision which the state did not appeal. State v. Stockdale, 44 Fla. Supp. 191 (Cir. Ct. 1976). Note that in this respect, § 837.021 is unlike New York Penal Law § 210.20 (McKinney 1965), discussed in ¶85, supra, which requires the people to establish a wilful contradiction.

[317] Brown v. State, supra note 314.

C. Materiality

¶141 The statutory definition of "material matter," applicable to both sections, is "any subject, regardless of its admissibility under the rules of evidence, which could affect the outcome of the proceeding." Whether a matter is material in a given factual situation is a matter of law.[318] Whether the testimony is believed or not does not deprive it of its material character,[319] nor need the facts sworn be material to the main issues.[320]

D. Two-Witness and Direct Evidence Rules

¶142 To convict of the crime of perjury in an official proceeding, the offense must be proved by the oaths of two witnesses, or by the oath of one witness, and by other independent and corroborating circumstances equal in weight to another witness.[321]

E. Recantation

¶143 Although neither § 837.02 nor § 837.021 provides for recantation, Florida case law traditionally permitted the retraction

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[318] Fla. Stat. Ann. § 837.011 (3) (West 1976).

[319] Wells v. State, supra note 315.

[320] Tindall v. State, supra note 313.

[321] Yarbrough v. State, 79 Fla. 256, 83 So. 873 (1920); Keir v. State, 11 So. 2d 886 (Fla. 1943); Rader v. State, 52 So. 2d 105 (Fla. 1951); Womack v. State, 283 So. 2d 573 (Fla. Dist. Ct. App. 1973).

of erroneous or false statements as a defense to perjury.[322] Some judges, however, have read § 837.021 to abolish recantation as a defense to all perjury prosecutions.[323] Thus, where a witness identified the defendant as a heroin seller, but testified the following day to the effect that her previous testimony was false and that she could not identify the defendant, she was amenable to a charge of perjury by contradictory statements.[324] This line of reasoning has fueled a controversy over the constitutionality of § 837.021.[325] At least one court has held that a witness could not be held in contempt for refusing to testify, when the refusal was grounded in a valid fear of innocently contradictory previous testimony.[326]

F. Separate Perjuries

¶144 Defendant acquitted of the charge against him may still be prosecuted for falsely swearing as a witness in his own behalf.[327]

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[322] Brannen v. State, 94 Fla. 656, 114 So. 429 (1927); Wolfe v. State, 256 So. 2d 533 (Fla. Dist. Ct. App. 1972).

[323] See Brown v. State, supra note 314 (dissenting opinion); State v. Stockdale, supra note 316 (dissenting opinion).

[324] Johnson v. State, 343 So. 2d 110 (Fla. Dist. Ct. App. 1977).

[325] See, e.g., State v. Newsome, 349 So. 2d 771 (Fla. Dist. Ct. App. 1977) (dissenting opinion).

[326] Feldman v. State, 348 So. 2d 415 (Fla. Dist. Ct. App. 1977).

[327] Yarbrough v. State, supra note 321; Page v. State, 130 So. 2d 304 (Fla. Dist. Ct. App. 1961).

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