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CHAPTER III
THE GRAND JURY AND IMMUNITY

The Constitution requires that federal felonies be charged by grand jury indictment. U.S. Const. Amend. V. The grand jury may use its subpoena powers to determine whether there is probable cause to believe a crime has been committed and that a particular individual or corporation committed it. Information gathered during the course of a grand jury's investigation is also a primary source of evidence which may be offered by the prosecution at trial.

The powers of the grand jury are not defined in federal statutory law. The statutes authorize district courts to call grand juries, provide for the manner of such calling, define a quorum, and give the court the right to excuse or discharge grand jurors; but, the powers of the grand jury, a common-law institution, have been defined by the courts on a case-by-case basis.

A. PROCEDURES

Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. §§3331-3334 vest in the district courts the power to summon regular and special grand juries. Special grand juries serve for a term of 18 months, and a district court may extend that term for another 18 months. 18 U.S.C. §3331(a). The term of a regular grand jury is limited to 18 months and cannot be extended by judicial action. *See U.S. v. Fein*, 504 F.2d 1170 (2d Cir. 1974). Extension of a special grand jury's term is not reviewable on appeal, absent a showing of flagrant abuse. *In re Korman*, 486 F.2d 926 (7th Cir. 1973).

Federal grand juries must consist of at least 16 and not more than 23 persons. An indictment may be found upon the concurrence of 12 or more jurors. Rule 6(f), Fed. R. Crim. P. While the Second Circuit has taken the position that the absence of some grand jurors during the presentation of some of the evidence does not affect the validity of an indictment, *U.S. v. Colasurdo*, 453 F.2d 585 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), at least one district court has taken the view that at least 12 jurors must be present at all sessions of the grand jury where evidence is heard. *U.S. v. Leverage Funding Systems, Inc.*, 478 F. Supp. 799 (C.D. Cal. 1979). *But see U.S. v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979).

All grand jury proceedings, except deliberations or voting, must be recorded electronically or by a stenographer. Rule 6(e)(1), Fed. R. Crim. P. The attorney for the government is responsible for maintaining the recordings or the reporter's notes.

No federal grand jury can indict without the concurrence of the attorney for the government. He must sign the indictment. Rule 7(c), Fed. R. Crim. P. A court cannot compel an attorney for the government to sign an indictment because in

signing the indictment the attorney for the government is exercising a power belonging to the executive branch of the government. *See Smith v. U.S.*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *U.S. v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970).

In *U.S. v. Mandujano*, 425 U.S. 564 (1976), the Supreme Court ruled that the sixth amendment right to counsel does not apply to grand jury appearances because criminal proceedings have not yet been instigated. However, a witness may leave the grand jury room to consult with counsel. *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *U.S. v. George*, 444 F.2d 310 (6th Cir. 1971). Such departures from the grand jury room to consult with counsel may be subject to reasonable limitations. *See In re Tierney*, 465 F.2d 806, 810 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973).

A witness has the right to object to the presence of unauthorized persons during his testimony. *In re Grand Jury Investigation*, 424 F. Supp. 802 (E.D. Pa.), *appeal dismissed*, 576 F.2d 1071 (1976), *cert. denied*, 439 U.S. 953 (1978); *U.S. v. DiGirlomo*, 393 F. Supp. 997 (W.D. Mo. 1975), *aff'd*, 520 F.2d 372, *cert. denied*, 423 U.S. 1033 (1975). The presence of unauthorized persons may also serve to void the grand jury's indictment. *Latham v. U.S.*, 226 F. 420, 424 (5th Cir. 1915); *U.S. v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977). *But see U.S. v. Glassman*, 562 F.2d 954 (5th Cir. 1977), where the presence of an agent operating a movie projector did not vitiate an indictment.

Defendants have frequently challenged the validity of letters of appointment of Justice Department attorneys appearing before grand juries. These challenges have been uniformly rejected. *U.S. v. Sklaroff*, 552 F.2d 1156, 1160-1161 (5th Cir. 1977), *cert. denied*, 434 U.S. 1009 (1978); *U.S. v. Cravero*, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *Schebergen v. U.S.*, 536 F.2d 674 (6th Cir. 1976); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975). However, courts are increasingly sensitive about potential conflicts created by attorneys from other federal agencies appearing before grand juries by special appointment. Following are cases which should be reviewed before a decision to make a special appointment of an agency attorney is reached: *U.S. v. Birdman*, 602 F.2d 547 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 703 (1980); *In re April 1977 Grand Jury Subpoenas: General Motors Corp. v. U.S.*, 573 F.2d 936 (6th Cir.), *appeal dismissed en banc*, 584 F.2d 1366 (1978), *cert. denied*, 440 U.S. 934 (1979); *U.S. v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979).

B. SUPERVISORY POWERS OF DISTRICT COURT

Although the grand jury must turn to the court for enforcement of its orders, it has an independent constitutional identity and is not subject to the courts' directions and orders with respect to the exercise of its essential functions. *U.S. v. U.S. District Court, 238 F.2d 713, 719 (4th Cir. 1956), cert. denied*, 352 U.S. 981 (1957). The courts of appeals do have authority to issue mandamus to district courts under the All Writs Act, 28 U.S.C. §1651(a), when the district court exceeds its authority by interfering with the work of a grand jury. *Id.* at 718. A court may not order a grand jury to come to a decision concerning an indictment, *id.* at 722; nor, may a court stay a grand jury's investigation pending the outcome of state litigation. *In re Grand Jury Proceedings*, 525 F.2d 151 (3d Cir. 1975). A court may not interfere with the prosecutor's decision of what evidence to present

to the grand jury and how to present it. *U.S. v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1972).

C. EVIDENCE BEFORE GRAND JURY

If an indictment is valid on its face, it is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even evidence obtained in violation of the defendant's fifth amendment privilege against self-incrimination. *U.S. v. Calandra*, 414 U.S. 338, 345 (1974); *U.S. v. Blue*, 384 U.S. 251 (1966); *Lawn v. U.S.*, 355 U.S. 339 (1958); *Costello v. U.S.*, 350 U.S. 359 (1956). A grand jury may return an indictment based partly or solely on hearsay evidence. *U.S. v. Brown*, 573 F.2d 1274 (5th Cir. 1978); *U.S. v. Newcomb*, 488 F.2d 190 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974); *U.S. v. Hickok*, 481 F.2d 377 (9th Cir. 1973); *Doss v. U.S.*, 431 F.2d 601 (9th Cir. 1970).

Courts have rejected defense arguments that the government's failure to produce key witnesses before the grand jury and its reliance upon hearsay before the grand jury substantially undermined the policy underlying the Jencks Act, 18 U.S.C. §3500. *U.S. v. Head*, 586 F.2d 508 (5th Cir. 1978); *U.S. v. Short*, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974). However, the grand jury should not be misled into believing that a witness is basing his testimony on firsthand knowledge when he is not. *U.S. v. Harrington*, 490 F.2d 487 (2d Cir. 1973); *U.S. v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). Use of hearsay testimony when non-hearsay testimony is readily available could invalidate an indictment if the court finds that there is a high probability that had the grand jury heard the eyewitnesses it would not have indicted. *U.S. v. Curz*, 478 F.2d 408, 410 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973). An indictment may not be based solely on the informal unsworn hearsay testimony of the prosecutor. *U.S. v. Hodge*, 496 F.2d 87 (5th Cir. 1974).

✓ Because the grand jury determines only probable cause, the prosecutor may be selective in deciding what evidence to present to the grand jury. There is no obligation to present all evidence that might be exculpatory or undermine the credibility of the government's witnesses. *U.S. v. Smith*, 595 F.2d 1176 (9th Cir. 1979); *U.S. v. Smith*, 552 F.2d 257 (8th Cir. 1977); *U.S. v. Y. Hata & Co. Ltd.*, 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976); *U.S. v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 422 U.S. 861 (1976); *Jack v. U.S.*, 409 F.2d 522 (9th Cir. 1969); *Loraine v. U.S.*, 396 F.2d 335 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968); *U.S. v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978). Some courts have made exceptions to the general rule that a prosecutor need not present exculpatory evidence to the grand jury in factual situations where fairness would dictate such a result. In *U.S. v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977), the court held that a prosecutor's failure to present exculpatory testimony after advising the witness that his statements would be considered part of the grand jury records was an abuse that rendered the proceedings defective. In *U.S. v. Provensano*, 440 F. Supp. 561 (S.D.N.Y. 1977), the prosecutor knew that the identifying witness in a one-witness identification case had expressed doubts about the identification and this fact was not presented to the grand jury; the court found this procedure improper. *See also U.S. v. Carcaise*, 442 F. Supp. 1209 (M.D. Fla. 1978).

Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires that arguments regarding the propriety of matters occurring before the grand jury must be raised before trial or they will deemed to be waived. *U.S. v. Daley*, 564 F.2d 645 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); *U.S. v. Kaplan*, 554 F.2d 958 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977).

1. CALLING AND QUESTIONING OF WITNESSES AND WARNINGS

The grand jury's broad authority to subpoena witnesses is considered essential to its task and the Supreme Court has declined to make exceptions to the longstanding principle that "the public has a right to every man's evidence." *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972); *U.S. v. Mandujano*, 425 U.S. 564 (1976). A witness may not refuse to answer questions before a grand jury unless he can assert his fifth amendment privilege or establish that some other common-law privilege applies. *U.S. v. Mandujano*, 425 U.S. at 571. (*See* chapter on Privileges, *infra*.) Even when a grand jury witness asserts his fifth amendment right, a prosecutor may continue the examination by pursuing other lines of inquiry. *U.S. v. Cohen*, 444 F. Supp. 1314 (E.D. Pa. 1978).

The grand jury's right to inquire into possible offenses is generally "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *U.S. v. Calandra*, 414 U.S. 338, 343 (1974). The only rule in the Federal Rules of Evidence that applies to grand jury proceedings is Rule 501 (privileges). *See* Rules 101 and 1101(c) and (d), Fed. R. Evid.

A witness may not refuse to respond to a subpoena or refuse to answer questions on the grounds of relevance, *Blair v. U.S.*, 250 U.S. 273 (1919); *U.S. v. Doe*, 457 F.2d 895 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973); *U.S. v. Weinberg*, 439 F.2d 743 (9th Cir. 1971), or because he feels that testifying may result in physical harm, *U.S. v. Gomez*, 553 F.2d 958 (5th Cir. 1977); *Dupuy v. U.S.*, 518 F.2d 1295 (9th Cir. 1975); *U.S. v. Doe*, 478 F.2d 194 (1st Cir. 1973); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *Latona v. U.S.*, 449 F.2d 121 (9th Cir. 1971). A witness must respond to a grand jury subpoena even if his compliance results in hardship or inconvenience. *U.S. v. Calandra*, 414 U.S. at 345.

The first amendment does not protect a newsman from being called by a grand jury to testify concerning his news sources. *Branzburg v. Hayes, supra.* However, post-*Branzburg* departmental policy requires approval of the Attorney General before a newsman is subpoenaed. The first amendment also does not preclude questioning a grand jury witness concerning his past political associations. *U.S. v. Weinberg, supra.*

A potential defendant may properly be subpoenaed to appear before a grand jury that is investigating his activities. "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete." *U.S. v. Mandujano*, 425 U.S. 564, 573 (1976). However, a potential defendant does not have the right to appear before the grand jury. *U.S. v. Smith*, 552 F.2d 257 (8th Cir. 1977); *U.S. v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *U.S. v. Neidelman*, 356 F. Supp. 979 (S.D.N.Y. 1973). There is no duty of the prosecution to tell a grand jury witness what evidence it may have against him. *U.S. v. Del Toro*, 513 F.2d 656, 664 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975). A defendant who falsely testified and is later charged with perjury cannot claim entrapment because the government used taped conversations between the

defendant and an informant to frame its questions and did not advise the defendant that such tapes existed. *U.S. v. Edelson,* 581 F.2d 1290 (7th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979).

Once an indictment has been returned, it is an abuse of process to call a defendant to testify concerning pending charges or to use the grand jury's subpoena power to gather other evidence for trial. *U.S. v. Doss,* 563 F.2d 265 (6th Cir. 1977); *U.S. v. Fahey,* 510 F.2d 302 (2d Cir. 1974) (held to be harmless error and usable for impeachment); *U.S. v. Fisher,* 455 F.2d 1101 (2d Cir. 1972). However, despite the fact that a prosecution is pending, the government may call witnesses before the grand jury if the primary purpose of calling them is to investigate the possible commission of other offenses, even if the evidence received may also relate to the pending indictment. *U.S. v. Gibbons,* 607 F.2d 1320 (10th Cir. 1979); *In re Grand Jury Proceedings (Pressman),* 586 F.2d 724 (9th Cir. 1978); *U.S. v. Zarattini,* 552 F.2d 753 (7th Cir.), *cert. denied,* 431 U.S. 942 (1977); *U.S. v. Beasley,* 550 F.2d 261 (5th Cir.), *cert. denied,* 434 U.S. 863 (1977); *U.S. v. Woods,* 544 F.2d 242 (6th Cir.), *cert. denied,* 429 U.S. 1062 (1976); *U.S. v. Braasch,* 505 F.2d 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). While ordinarily the party alleging abuse must bear the burden of proving that grand jury process is being used to gather evidence for trial, *Woods, supra,* where the underlying facts sought to be established are the same for both investigations, the burden may shift to the government to demonstrate good faith. *U.S. v. Kovaleski,* 406 F. Supp. 267 (E.D. Mich. 1976). A grand jury should never be used to gather evidence for a civil case, *In re Grand Jury Subpoenas April 1978, Etc.,* 581 F.2d 1103 (4th Cir. 1978), *cert. denied,* 440 U.S. 971 (1979); *FTC v. Atlantic Richfield Co.,* 567 F.2d 96, 104 n.19 (D.C. Cir. 1977); *In re Special March 1974 Grand Jury, Etc.,* 541 F.2d 166 (7th Cir. 1976), *cert. denied,* 430 U.S. 929 (1977); but a witness' fear that evidence may improperly find its way into the hands of governmental agencies for use in future civil litigation is no basis for failure to comply with a subpoena, *Coson v. U.S.,* 533 F.2d 1119 (9th Cir. 1976).

A grand jury witness should be given fair opportunity to respond fully to questions and, whenever possible, should not be limited to the "yes" or "no" answers that typify responses to leading questions. *U.S. v. Boberg,* 565 F.2d 1059 (8th Cir. 1977). A perjury conviction that rests on a witness' response to leading questions will be strictly scrutinized for fairness. *Id.* at 1063. Unnecessary, repetitious questioning designed to coax a witness into the commission of perjury or contempt of court is an abuse of the grand jury process. *Bursey v. U.S.,* 466 F.2d 1059 (9th Cir. 1972). In *U.S. v. Bruzgo,* the Third Circuit criticized a prosecutor for threatening a reluctant witness with loss of citizenship and calling her a "thief" and a "racketeer." 373 F.2d 383, 384 (3d Cir. 1967). Gratuitous comments by the prosecutor that the defendants were connected with organized crime have also been condemned. *U.S. v. Serubo,* 604 F.2d 807 (3d Cir. 1979); *U.S. v. Riccobene,* 451 F.2d 586 (3d Cir. 1971). And an indictment has been dismissed where a district court found that the prosecutor misled the potential defendant-witness into believing he could be compelled to answer without explaining his fifth amendment rights and the immunity procedure. *U.S. v. Pepe,* 367 F. Supp. 1365 (D. Conn. 1973).

The Supreme Court has declined to extend the fourth amendment's exclusionary rule to grand jury proceedings. Questions based on evidence obtained from an illegal search and seizure do not constitute independent violations of a grand jury witness' fourth amendment rights. *U.S. v. Calandra, supra. Costello v. U.S.,* 350 U.S. 359 (1956), prevents the same sort of issues being raised to

invalidate the indictment. In a case involving a confession obtained by torture, the Ninth Circuit has extended the *Calandra* analysis to statements given in violation of the fifth amendment. *In re Weir*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974).

Questions derived from illegal electronic surveillance, however, are not permissible because of the specific statutory prohibition in the Omnibus Crime Control and Safe Streets Act of 1968 against the use of such evidence, 18 U.S.C. §§2510-2520. *Gelbard v. U.S.*, 408 U.S. 41 (1972). *Gelbard* left open the issue of whether a witness who refuses to answer a question because he believes that it was derived from illegal electronic surveillance is entitled to a plenary hearing on the issue. In cases where the legality of court-ordered surveillance is challenged the Second, Fifth, Seventh, and Ninth Circuits have held that a judge's findings of facial validity after an *in camera* review of electronic surveillance documents is sufficient, and no discovery or further hearing is required. *Matter of Special February 1977 Grand Jury*, 570 F.2d 674 (7th Cir. 1978); *In re Grand Jury Proceedings (Worobyst)*, 522 F.2d 196 (5th Cir. 1975); *Droback v. U.S.*, 509 F.2d 625 (9th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975); *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974). In contrast, the First, Eighth, and District of Columbia Circuits have held that the witness is entitled to inspect the application for the wiretap, the supporting affidavits, the court order, and the affidavit stating the length of the surveillance. If the government interposes a secrecy objection, the court should excise the secret information and then release the documents. *In re Grand Jury Proceedings (Katsouros)*, _____ F.2d _____ (D.C. Cir. 1979); *Melickian v. U.S.*, 547 F.2d 416 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977); *In re Lochiatto*, 497 F.2d 803 (1st Cir. 1974).

In cases where a witness alleges that illegal electronic surveillance occurs and there is no court order, the necessity for and the specificity of the denial that the government must make depend upon the specificity of the witness' claim. *Matter of Archeluta*, 561 F.2d 1059 (2d Cir. 1977); *In re Millow*, 529 F.2d 770 (2d Cir. 1976); *In re Grand Jury Impaneled January 21, 1975 (Freedman)*, 529 F.2d 543 (3d Cir.), *cert. denied*, 425 U.S. 992 (1976); *U.S. v. Tucker*, 526 F.2d 279 (5th Cir.), *cert. denied*, 425 U.S. 958 (1976); *In re Quinn*, 525 F.2d 222 (1st Cir. 1975); *Matter of Grand Jury (Vigil)*, 524 F.2d 209 (10th Cir. 1975), *cert. denied*, 425 U.S. 927 (1976) (this opinion has an appendix that discusses all earlier cases by circuit). A general denial by affidavit of the government attorney is sufficient in response to a general unsubstantiated allegation, *U.S. v. Stevens*, 510 F.2d 1101 (5th Cir. 1975), whereas a hearing might be appropriate where there are particularized allegations. *See Vigil, supra.* A person who is not a witness or a defendant has no standing to allege improper use before a grand jury of evidence derived from illegal electronic surveillance. *In re Vigorito*, 499 F.2d 1351 (2d Cir. 1974).

The Supreme Court has not decided whether fifth amendment warnings are constitutionally required for grand jury witnesses. *See U.S. v. Washington*, 431 U.S. 181, 186 (1977). The Court has decided that a grand jury witness' incriminating testimony, if not compelled, is admissible against him in a subsequent prosecution even if he was not told that he was a potential defendant, *Washington, supra;* and, the failure of the prosecution to give full *Miranda* warnings or of the witness to understand them does not require suppression of perjured testimony in a subsequent perjury trial, *U.S. v. Mandujano, supra; U.S. v. Wong*, 431 U.S. 174 (1977). Nonetheless, the Justice Department has established an internal policy of advising grand jury witnesses of their fifth amendment rights and of their status as "targets," if that is the case. The Second Circuit has affirmed

the suppression of perjured grand jury testimony because a Strike Force attorney failed to warn a witness that he was a putative defendant. That court based its ruling on its supervisory powers rather than on constitutional grounds, observing that it was the uniform practice among federal prosecutors in the Second Circuit to give such warnings. *U.S. v. Jacobs,* 547 F.2d 772 (2d Cir. 1976), *cert. dismissed,* 436 U.S. 931 (1978). While other circuits have not followed the Second, such rulings are possible in view of the Justice Department's announced practice of giving warnings. *See U.S. v. Crocker,* 568 F.2d 1049, 1055 (3d Cir. 1977).

2. SUBPOENAS DUCES TECUM

The grand jury has the power to subpoena physical evidence in addition to testimony. It can subpoena voice exemplars, *U.S. v. Dionisio,* 410 U.S. 1 (1973), and handwriting samples, *U.S. v. Mara,* 410 U.S. 19 (1973). It can summon a witness to appear in a lineup, *In re Melvin,* 550 F.2d 674, 677 (1st Cir. 1977); and a district court may order reasonable physical force to compel a defiant grand jury witness to appear in a lineup, *Appeal of Maguire,* 571 F.2d 675 (1st Cir.), *cert. denied,* 436 U.S. 911 (1978). However, the majority of cases concerning subpoenas duces tecum involve requests by grand juries for documents.

Grand jury subpoenas are governed by Rule 17(c) of the Federal Rules of Criminal Procedure which provides that a court may quash or modify any subpoena duces tecum if compliance therewith would be unreasonable or oppressive. The party opposing enforcement of the subpoena bears the burden of showing that it is unreasonable or oppressive. *In re Lopreato,* 511 F.2d 1150 (1st Cir. 1975); *In re Grand Jury Proceedings (Schofield I),* 507 F.2d 963 (3d Cir. 1975). The issue can be raised by the witness filing a motion to quash pursuant to Rule 17(c) or by the witness' refusal to comply, thereby forcing the government to move for enforcement. (*See* Procedures for Enforcement of Subpoenas and Compulsion Orders, this chapter, *infra.*) An order denying a motion to quash is not appealable. *U.S. v. Ryan,* 402 U.S. 530 (1971); *In re Grand Jury Subpoenas, April 1978, At Baltimore,* 581 F.2d 1103 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 1533 (1979). However, any court order suppressing evidence during a grand jury investigation is appealable by the government pursuant to 18 U.S.C. §3731. *In re February 1978 Grand Jury,* _____ F.2d _____ (3d Cir. 1979). A contempt order is appealable. *In re Grand Jury Subpoena, May 1978, At Baltimore,* 596 F.2d 630 (4th Cir. 1979); *In re Grand Jury Investigation, Etc.,* 566 F.2d 1293 (5th Cir.), *cert. denied,* 437 U.S. 905 (1978). Where the district court has permitted a non-witness intervenor to be heard, courts will permit appeal by an intervenor without the necessity of a contempt sentence. *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577 (3d Cir. 1977).

The Tenth Circuit has adopted a three-pronged test that has been widely used by district courts for evaluating grand jury subpoenas duces tecum for documents: (1) the material sought must be relevant to the investigation being pursued; (2) the documents sought must be described with reasonable particularity; and (3) the subpoena must be limited to a reasonable period of time. *U.S. v. Gurule,* 437 F.2d 239 (10th Cir.), *cert. denied,* 403 U.S. 904 (1970). The requirement of relevance is not the same test of probative value used at trial; rather, the court should determine whether the records sought have some conceivable relation to a legitimate object of grand jury inquiry. *In re Rabbinical Seminary, Etc.,* 450 F. Supp. 1078 (E.D.N.Y. 1978); *In re Special November 1975 Grand Jury, Etc.,* 433 F. Supp. 1094 (N.D. Ill. 1977); *in re Grand Jury Subpoenas Duces Tecum, Etc.,*

391 F. Supp. 991 (D.R.I. 1975). In deciding what constitutes "reasonable particularity," courts are cognizant of the limitations on a grand jury's ability to know precisely how a witness' books and records are kept; thus, a subpoena calling for the entire contents of three file cabinets could meet the requirement of reasonable particularity because the witness knew what was wanted. *In re Horowitz*, 482 F.2d 72 (2d Cir. 1973). Designation of records by general terms used in the accounting and finance fields is sufficiently definite and reasonable. *Matter of Witness Before the Grand Jury*, 546 F.2d 825 (9th Cir. 1976). The statute of limitations may be used as a guide to determine what constitutes a reasonable time period; however, the statute of limitations is not necessarily determinative because time-barred facts might be relevant to issues such as intent. *Coson v. U.S.*, 533 F.2d 1119 (9th Cir. 1976).

Since the cost of compliance normally falls on the party being subpoenaed, it is one of the factors that a court may consider in determining whether a subpoena is unreasonable or oppressive under Rule 17(c). Cost should be measured by what it costs to provide original documents since copying is generally undertaken by the witness for his own convenience. *In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306 (5th Cir. 1977). *See also In re Grand Jury Subpoena Duces Tecum, Etc.*, 436 F. Supp. 46 (D. Md. 1977). Financial institutions may be entitled to reimbursement for the costs associated with subpoena compliance under the Right to Financial Privacy Act, 12 U.S.C. §3415, depending upon the kinds of documents subpoenaed.

The fact that successive grand juries subpoena the same documents does not demonstrate an abuse of process. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976); *U.S. v. Culver*, 224 F. Supp. 419 (D. Md. 1963). *See U.S. v. Thompson*, 251 U.S. 407 (1920).

Motions to quash grand jury subpoenas frequently rely on the case of *Hale v. Henkel*, 201 U.S. 43 (1906), to support the proposition that an overly broad grand jury subpoena constitutes a forbidden search in violation of the fourth amendment. Although not explicitly overruled, that decision has been substantially undermined by a subsequent Supreme Court decision. *In Re Horowitz*, 482 F.2d (2d Cir. 1973). In *U.S. v. Dionisio*, 410 U.S. at 9, the Supreme Court held that"... a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome."

The records of a state are not immune from grand jury process because of any constitutional considerations of state sovereignty. *In re Special April 1977 Grand Jury (Scott)*, 581 F.2d 589 (7th Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978). If subpoenaed records do not bear on protected legislative acts, the federal common-law legislative privilege or state constitutional speech and debate clauses do not protect state senators and other legislative officials from subpoenas for their records. *In re Grand Jury Proceedings (Cianfrani)*, 563 F.2d 577 (3d Cir. 1977).

Recognizing that direct delivery of a mass of documents to 23 laymen would be "unproductive if not chaotic," courts have upheld the use of subpoenas which provided that they could be satisfied by delivery of the described documents to agents of the IRS or FBI. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. at 1118. Court orders providing that records may be delivered to investigative agents are proper. *U.S. v. Universal Manufacturing Co.*, 525 F.2d 808 (8th Cir. 1975). Such arrangements are not the same as the "forthwith subpoenas" that were severely criticized by the Sixth Circuit in *Consumer Credit Insurance Agency, Inc. v. U.S.*, 599 F.2d 770 (6th Cir. 1979),

cert. denied, 100 S. Ct. 1078 (1980), and the Third Circuit in *U.S. v. Hilton*, 534 F.2d 556 (3d Cir. 1976), *cert. denied*, 429 U.S. 828 (1976), as improper attempts to circumvent the requirements of the fourth amendment for obtaining search warrants. Subpoenas duces tecum should only direct compliance on dates when the grand jury is sitting. *See U.S. v. Hilton, supra.* It should be noted that, in deciding to allow production of documents without a witness appearing to testify that compliance is complete, a prosecutor may give up testimony that could have impeachment value in later contempt proceedings or at trial, if documents covered by the subpoena should later be discovered.

D. SECRECY OF PROCEEDINGS AND DISCLOSURE

The Supreme Court has consistently held that the proper functioning of the grand jury system depends upon maintaining the secrecy of grand jury proceedings. In *Douglas Oil Company of California v. Petrol Stops, Etc.*, 411 U.S. 211, 219 (1979), the Court reiterated the four distinct interests that are served by this policy.

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Rule 6(e)(2) of the Federal Rules of Criminal Procedure imposes an obligation to maintain the secrecy of matters occuring before the grand jury upon grand jurors, interpreters, stenographers, operators of recording devices, typists who transcribe testimony, attorneys for the government and government personnel authorized to assist attorneys for the government. Rule 6(e) further defines four limited exceptions to the secrecy requirement: (1) disclosure to an attorney for the government in the performance of such attorney's duty; (2) disclosure to such government personnel as an attorney for the government deems necessary to assist such attorney in the enforcement of federal criminal law; (3) disclosure by a court preliminary to or in connection with a judicial proceeding; and (4) disclosure to a defendant who can demonstrate that matters occurring before the grand jury may be grounds for dismissing the indictment.

Rule 6(e) does not impose a secrecy obligation on witnesses, *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976); and it is improper for a prosecutor to instruct a witness that he must keep his knowledge of the proceedings confidential, *U.S. v. Radetsky*, 535 F.2d 556, 569 nn.15-16 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976). However, a witness has no general right to a transcript of his testimony. *In re Bianchi*, 542 F.2d 98 (1st Cir. 1976); *Bast v. U.S.*, 542 F.2d 893 (4th Cir. 1976). This rule has been applied even where a witness asserts a need for a transcript in order to decide whether to recant his testimony to avoid perjury charges, but refuses to verify his petition at the request of the court. *U.S. v. Clavey*, 565 F.2d 111 (7th Cir.), *cert. denied*, 439 U.S. 954 (1978).

The phrase "matters occurring before the grand jury" is not limited to the testimony of witnesses, but also extends to internal memoranda that would reflect what transpired before the grand jury. *U.S. Industries, Inc. v. U.S. District Court,* 345 F.2d 18 (9th Cir. 1965). As a general rule, however, physical evidence, such as a document, does not become secret merely because it has been presented to a grand jury if it was created for purposes other than the grand jury investigation, and its disclosure "does not constitute disclosure of matters occurring before the grand jury." *U.S. v. Stanford,* 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied,* 99 S. Ct. 1794 (1979). *Stanford* involved the use of subpoenaed documents by FBI agents during interviews of defendants, but courts have similarly interpreted the phrase where private parties sought documents, subpoenaed by a grand jury, for use in civil litigation. *See also U.S. v. Interstate Dress Carriers, Inc.,* 280 F.2d 52 (2d Cir. 1960); *U.S. v. Saks & Co.,* 426 F. Supp. 812 (S.D.N.Y. 1976); *Capital Indemnity Corp. v. First Minnesota Construction Co.,* 405 F. Supp. 929 (D. Mass. 1975); *Davis v. Romney,* 55 F.R.D. 337 (E.D. Pa. 1972); *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.,* 211 F. Supp. 729 (N.D. Ill. 1962). A court order must be obtained to disclose documents or physical evidence subpoenaed by a grand jury if some form of privilege, such as the right of the owner to maintain the confidentiality of his records, would otherwise shield them from inspection. *See U.S. v. RMI Co.,* 599 F.2d 1183 (3d Cir. 1979), which held that third parties from whom documents were subpoenaed have a right to intervene at the stage of a Rule 16 discovery motion. *See also In Re Grand Jury Investigation (General Motors Corporation),* 210 F. Supp. 904 (S.D.N.Y. 1962). Situations may also arise where disclosing documents may in fact reveal what transpired before the grand jury. An example would be a general request for "all documents collected or received in connection with the investigation of antitrust violations ...." *In re Grand Jury Investigation of Ven-Fuel,* 441 F. Supp. 1299, 1303 (M.D. Fla. 1977). *See also Corona Construction Co. v. Ampress Brick Co.,* 376 F. Supp. 598 (ND. Ill. 1974).

The phrase "attorney for the government" is limited by Rule 54(c) to "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of the United States Attorney ...." It does not include attorneys for state and county government. *In re Holovachka,* 317 F.2d 834 (7th Cir. 1963). The phrase "for use in such attorney's duty" has been construed by the Second Circuit to mean that a court order need not be sought where the purpose of presenting grand jury minutes to a second grand jury is enforcement of perjury and false statement statutes. *U.S. v. Garcia,* 420 F.2d 309 (2d Cir. 1970). The Fifth Circuit, however, has held that a court order should be sought before a prosecutor presents a grand jury with a transcript of testimony before another grand jury. *U.S. v. Malatesta,* 583 F.2d 748, 752-754 (5th Cir. 1978).

Attorneys for the government may in turn disclose grand jury material to other government personnel whom they deem necessary to assist them, but the attorney must disclose to the court a list of the persons to whom such disclosure has been made. Rule 6(e)(2)(A)(ii) and (B), Fed. R. Crim. P. But, there is no requirement that the assistance offered by other government personnel be technical in nature. *In re Perlin,* 589 F.2d 260 (7th Cir. 1978). And, the disclosure notice need not be filed prior to disclosure, though the legislative history recommends doing so. *In re Grand Jury Proceedings (Larry Smith),* 579 F.2d 836 (3d Cir. 1978). There is no requirement that a witness be given a copy of the government's disclosure notice before he can be required to comply with a subpoena. *Id.* at 840.

The phrase "other government personnel" has been interpreted by one district court as limiting disclosure to federal government personnel. *In re Grand Jury Proceedings*, 445 F. Supp. 349 (D.R.I.), *appeal dismissed*, 580 F.2d 13 (1st Cir. 1978). The First Circuit declined to review that decision because the order of the district court denying disclosure was not a final order pursuant to 28 U.S.C. §1291, and the government did not seek an extraordinary writ under 28 U.S.C. §1651, or certification of the issue under 28 U.S.C. §1292(b). In *U.S. v. Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979), the Seventh Circuit upheld a court order permitting disclosure to employees of the Illinois Department of Public Aid and Illinois Department of Law Enforcement. The *Stanford* court approved such disclosure orders where the grand jury took the precautions of swearing in the state government personnel as agents of the grand jury, instructed them as to their duties, and cautioned them as to their secrecy obligations.

Reasoning that a witness is aware of his own testimony, courts have held that permitting a witness to review a transcript of his own testimony prior to trial is not a prohibited disclosure. *U.S. v. Heinze*, 361 F. Supp. 46, 57 (D. Del. 1973); *King v. Jones*, 319 F. Supp. 653, 657 (N.D. Ohio 1970). It is improper, however, to disclose the grand jury testimony of one witness to another witness. *U.S. v. Bazzano*, 570 F.2d 1120, 1124-1126 (3d Cir. 1977), *cert. denied*, 436 U.S. 917 (1978). *Bazzano* distinguishes prohibited verbatim disclosure from the acceptable practice in which a prosecutor states in general terms the evidence which other witnesses may give. 570 F.2d at 1125.

Courts may order disclosure preliminary to or in connection with judicial proceedings. Rule 6(e)(3)(C)(i), Fed. R. Crim. P. In *Douglas Oil Co. of California v. Petrol Stops, Inc.*, 441 U.S. 211, 221 (1979), the Supreme Court restated its earlier opinion in *U.S. v. Proctor and Gamble Co.*, 356 U.S. 677 (1958), and held that

> a private party seeking to obtain grand jury transcripts must demonstrate that "without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." 356 U.S., at 682. Moreover, the Court required that the showing of need for the transcripts be made "with particularity" so that "the secrecy of the proceedings [may] be lifted discretely and limitedly." *Id.*, at 683.

The Supreme Court, in denying disclosure in *Douglas Oil, supra*, held that the party seeking disclosure bears the burden of demonstrating that the public interest in disclosure outweighs the interest in secrecy, and describes the procedure to be followed when private plaintiffs who sue in one district seek to discover transcripts of grand jury proceedings that occurred in another district. More than a general need for discovery must be shown in order to tip the balance in favor of lifting the veil of secrecy, and courts also consider such factors as whether the grand jury investigation is on-going and whether there is a possibility that disclosure might deter future witnesses from freely coming forward to testify. *Douglas Oil, supra; U.S. v. Proctor & Gamble Co.*, 356 U.S. 677 (1958); *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied*, 424 U.S. 889 (1977); *Texas v. U.S. Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *U.S. Industries, Inc. v. U.S. District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965); *SEC v. National Student Marketing Corporation*, 430 F. Supp. 639 (D.D.C. 1977). The standard for reviewing orders granting or denying disclosure is abuse of discretion. *Douglas Oil, supra.*

The phrase "preliminary to judicial proceedings" has been held to include

impeachment hearings, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974), bar association grievance committee hearings, *U.S. v. Salanitro*, 437 F. Supp. 240 (D. Neb. 1977); *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958), and police disciplinary hearings, *Special February Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973); *In re Grand Jury Transcripts*, 309 F. Supp. 1050 (S.D. Ohio 1970). One court has released transcripts to the public when it deemed that the public interest required disclosure, even though no judicial proceeding was involved or even contemplated. *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). There is no first amendment right of the press to grand jury testimony not made public at trial. *U.S. v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

A defendant seeking pretrial disclosure of grand jury transcripts other than those he can obtain under the Jencks Act, 18 U.S.C. §3500, must demonstrate a particularized need. *Dennis v. U.S.*, 384 U.S. 855, 870 (1966). Unsubstantiated assertions of impropriety occurring before the grand jury do not establish particularized need. *U.S. v. Migely*, 596 F.2d 511 (1st Cir. 1979); *U.S. v. Edelson*, 581 F.2d 1290 (7th Cir. 1978); *U.S. v. Kim*, 577 F.2d 473 (9th Cir. 1978); *U.S. v. Wallace*, 528 F.2d 863 (4th Cir. 1976); *U.S. v. Tucker*, 526 F.2d 279 (5th Cir.), *cert. denied*, 425 U.S. 958 (1976). The Freedom of Information Act, 5 U.S.C. §552, does not create a right to obtain grand jury transcripts. *Thomas v. U.S.*, 597 F.2d 656 (8th Cir. 1979). The need to ascertain the existence of a double jeopardy claim or the need to challenge the validity of search warrants may constitute particularized need for disclosure. *U.S. v. Hughes*, 413 F.2d 1244 (5th Cir. 1969). However, *in camera* inspection may also be appropriate. *See Star of Wisconsin v. Schaffer*, 565 F.2d 961 (7th Cir. 1977), which held that a grand jury transcript could be released to a state court judge with suitable instructions to release it to counsel for a state defendant if it developed that grand jury minutes might be exculpatory. Disclosure in habeas corpus actions is also governed by the particularized need test. *DeVincent v. U.S.*, 602 F.2d 1006 (1st Cir. 1979).

Disclosure of grand jury material to agency attorneys or other government personnel for use in civil enforcement actions requires a court order based upon a showing of good faith that the grand jury process has not been abused. *In re Grand Jury*, 583 F.2d 128 (5th Cir. 1978). The courts may exercise closer scrutiny where the grand jury fails to return an indictment because, in such a case, there is a greater likelihood of improper use of grand jury process. *In re Grand Jury Subpoenas, April 1978, Etc.*, 581 F.2d 1103 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 1533 (1979).

E. MOTIONS CHALLENGING MULTIPLE REPRESENTATION OF WITNESSES

A district court has jurisdiction to discipline an attorney whose unethical conduct relates to a grand jury proceeding within that court's control. *U.S. v. Gopman*, 531 F.2d 262, 266 (5th Cir. 1976). When it appears that a conflict of interest exists on the part of an attorney representing multiple grand jury witnesses, the prosecutor may ask the court to disqualify the attorney from representing more than one witness or category of witnesses. Before making such a motion, the prosecutor should be prepared to demonstrate that an actual conflict (as opposed to a potential conflict) exists and that the actions of witnesses would have been different, but for the conflict. *Matter of Investigative Grand Jury Proceedings*, 480 F. Supp. 162 (N.D. Ohio 1979); *In re Special Grand Jury*, 480 F. Supp. 174 (E.D. Wis. 1979).

An actual conflict exists when an attorney represents an organizational client, such as a labor union, that would have an interest in making full disclosure, and individual witnesses who have an interest in resisting disclosure. *Gopman, supra.* An actual conflict also exists where one attorney represents an immunized witness and a target witness, because it would be in the immunized witness' interest to make full disclosure, *Matter of Grand Jury Proceedings,* 428 F. Supp. 273 (E.D. Mich. 1976), or where the attorney himself is a target of the investigation or a defendant in a related case, *U.S. v. Clarkson* 567 F.2d 270 (4th Cir. 1977) (contempt proceeding against an attorney who continued representation); *In re Investigation Before February 1979, Lynchburg Grand Jury,* 563 F.2d 652 (4th Cir. 1977). In such situations, a witness cannot waive the right to conflict-free representation because of the competing public interest in the effective functioning of the grand jury. *In re Grand Jury Investigation,* 436 F. Supp. 818 (W.D. Pa. 1977).

Because of the importance attached to the right to counsel of one's choosing, courts are reluctant to disqualify counsel where only a potential for conflict can be shown. Such a situation exists where several witnesses who are jointly represented all claim their fifth amendment privilege or experience a failure of recollection, but where none has been immunized. *In re Taylor,* 567 F.2d 1183 (2d Cir. 1977); *Matter of Grand Jury Empaneled January 21, 1975,* 536 F.2d 1009 (3d Cir. 1976); *In Re Investigation Before April 1, 1975 Grand Jury,* 531 F.2d 600 (D.C. Cir. 1976); *In re Grand Jury,* 446 F. Supp. 1132 (N.D. Tex. 1978).

The Seventh Circuit has held that the government need not show an actual conflict but only a grave danger of conflict. However, in the same case, the court ruled that the government must do more than show that some jointly represented witnesses have been immunized while others have not, it must further demonstrate that the immunized witnesses could in fact provide information incriminating to the attorney's other clients. *Matter of Special February 1977 Grand Jury,* 581 F.2d 1262 (7th Cir. 1978).

F. IMMUNITY

The Organized Crime Control Act of 1970 added sections 6001-6005 to Title 18 of the United States Code, creating a single comprehensive provision to govern immunity grants in judicial, administrative, and congressional proceedings, and amending or repealing all prior immunity provisions. The immunity granted under this provision is that "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." 18 U.S.C. §6002.

The act was designed to reflect the "use" and "derivative use" immunity concept of *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964), rather than the "transactional" immunity concept of *Counselman v. Hitchock,* 142 U.S. 547 (1892). This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. In *Kastigar v. U.S.,* 406 U.S. 441, 462 (1972), the Supreme Court held that this limited grant of immunity by which testimony is compelled under threat of imprisonment is constitutional:

> We conclude that the immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

In addition to granting only use and derivative use immunity, these provisions differ from prior immunity statutes in three ways: (1) the immunity may be granted without regard to the particular federal violation at issue; (2) the witness must claim his privilege; and (3) use of the immunity provisions must be approved in advance by the Attorney General or certain other designated persons.

Before application to the court, the United States Attorney must make a judgment that the testimony or information sought may be necessary and in the public interest and that the witness has refused or is likely to refuse to testify. 18 U.S.C. §6003(b). Within these parameters, the choice of who should receive immunity is extremely broad. Under the act, even the target of an investigation who has been arrested and charged with a crime the grand jury is investigating may be compelled to respond to questions concerning that very crime. *Goldberg v. U.S.*, 472 F.2d 513 (2d Cir. 1973). And, the court may not withhold the order granting immunity if the factual prerequisites are met. *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *U.S. v. Vancier*, 515 F.2d 1378 (2d Cir. 1975), *cert. denied*, 423 U.S. 857 (1975); *U.S. v. Henderson*, 406 F. Supp. 417 (D. Del. 1975); (1970) U.S. Code Cong. & Ad. News 4018.

Witnesses who are granted immunity are not entitled, under the due process clause, to notice and hearing on an immunity request. *Ryan v. Commissioner, supra.* The immunity authorized by the statute is not self-executing; the witness must physically appear and claim the privilege before he can be held in contempt for refusing to testify. *U.S. v. DiMauro*, 441 F.2d 428 (8th Cir. 1971). A second immunity order is not required when a witness who was called to testify and held in contempt for his refusal to testify before one grand jury is recalled before a second grand jury. *In re Weir*, 520 F.2d 662 (9th Cir. 1975).

Once the witness has been granted immunity, he may not refuse to testify on the ground of the privilege against self-incrimination. Such refusal may be followed by contempt and a sentence. (*See* section on Enforcement of Subpoenas and Compulsion Orders, *infra.*) However, a witness may not be held in contempt if the body or court before which he testified clearly led him to believe he might still claim the privilege. *Raley v. Ohio*, 360 U.S. 423 (1959).

Neither the courts nor defense counsel have a legal or constitutional right to use the immunity statute to compel the testimony of defense witnesses. *U.S. v. Lenz*, _____ F.2d _____, 48 U.S.L.W. 2683 (6th Cir. 1980); *U.S. v. Herman*, 589 F.2d 1191, 1200 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *U.S. v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *U.S. v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *U.S. v. Bautista*, 509 F.2d 675 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); *U.S. v. Allstate Mortgage Corporation*, 507 F.2d 492 (7th Cir. 1974); *U.S. v. Ramsey*, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); *Cerda v. U.S.*, 488 F.2d 720 (9th Cir. 1973); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *U.S. v. Berrigan*, 482 F.2d 171 (3d Cir. 1974); *U.S. v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *Morrison v. U.S.*, 365 F.2d 521 (D.C. Cir. 1966); *Earl v. U.S.*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

Even after a witness has been granted "derivative use" immunity, he may still be prosecuted for crimes about which he has testified. Such prosecutions, however, face two hurdles. First, because it is the policy of the Department of Justice to avoid future prosecutions of witnesses for offenses disclosed under a grant of immunity, any such prosecution must be authorized in writing and personally signed by the Attorney General. Second, the immunity prohibits the prosecution from using the compelled testimony in any respect. The testimony therefore may

not be used either for investigative leads or to focus investigation on the witness. Once the defendant establishes that he has testified under a grant of immunity to matters related to the federal prosecution, the government has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar v. U.S.*, 406 U.S. 441, 453, 460 (1972). That is, the government cannot satisfy its burden merely by denying that immunized testimony was used; it must affirmatively prove an independent source of evidence. *U.S. v. Nemes*, 555 F.2d 51 (2d Cir. 1977).

Where immunity is conferred on a potential defendant, the government has been strongly advised to make a written certification, prior to the testimony, stating what evidence it already has. *Goldberg v. U.S.*, 472 F.2d 513, 516 n.5 (2d Cir. 1973). If testimony relevant to the charges is compelled from a witness before a grand jury, and the government then seeks his indictment, it may be appropriate to present the case to a different grand jury. *Id.* at 516 n.4. *But see U.S. v. Calandra*, 414 U.S. 338 (1974). In the view of some courts that have adopted a highly attenuated notion of "taint" in connection with use immunity statutes even these procedures may be insufficient. *U.S. v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); *U.S. v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir.), *cert. denied*, 419 U.S. 872 (1974). *But see U.S. v. Bianco*, 534 F.2d 501, 511 n.14 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976).

The use immunity statute applies only to past offenses. Specifically excepted by the statute are "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. §6002. These exceptions were considered unnecessary by the drafters, *see Glickstein v. U.S.*, 222 U.S. 139 (1911), but were included out of caution, (1970) U.S. Code Cong. & Ad. News 4018. The grant of immunity covers only truthful testimony. It does not protect the witness against the subsequent use by the government of falsehoods or willful evasion in his immunized testimony. *U.S. v. Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). The fifth amendment clause itself would not protect a witness' refusal to answer questions which would incriminate him in the future as to crimes about to be committed. *See U.S. v. Freed*, 401 U.S. 601, 606-607 (1971).

In *New Jersey v. Portash*, 440 U.S. 450 (1979), the Supreme Court ruled that testimony compelled pursuant to a grant of use immunity could not be used to impeach a defendant in a later trial. In *U.S. v. Apfelbaum*, 100 S. Ct. 948 (1980), the Supreme Court held that the prosecution may use all relevant portions of an immunized witness' testimony in a subsequent perjury prosecution, and that the evidence should not be limited to those portions of the witness' testimony that constitute the *corpus delicti* or core of the false statement offense. *See also U.S. v. Frumento*, 552 F.2d 534 (3d Cir. 1977) (*en banc*); *U.S. v. Hockenberry*, 474 F.2d 247 (3d Cir. 1973). Truthful immunized testimony cannot be used to prove earlier or later perjury. *U.S. v. Berardelli*, 565 F.2d 24 (2d Cir. 1977); *U.S. v. Housand*, 550 F.2d 818 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977).

The requirement that every sovereign, state or federal, recognize immunity granted by another sovereign protects a witness from use of immunized testimony in a subsequent state prosecution. *In re Bianchi*, 542 F.2d 98 (1st Cir. 1976); *U.S. v. Watkins*, 505 F.2d 545 (7th Cir. 1974). Because Rule 6(e) strictly limits disclosure of grand jury proceedings, a witness cannot refuse to testify because he fears prosecution by the authorities of foreign countries. *In re Grand Jury Proceedings (Postal)*, 559 F.2d 234 (5th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970).

Because the fifth amendment privilege extends only to use in criminal proceedings, compelled testimony can be used in subsequent civil proceedings. *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *In re Grand Jury Proceedings*, 443 F. Supp. 1273 (D.S.D. 1978). Immunized testimony may be used in subsequent state bar disciplinary proceedings. *In re Daley*, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977). It may also be used in license revocation hearings. *Childs v. Schlitz*, 556 F.2d 1178 (4th Cir. 1977).

G. PROCEDURES FOR ENFORCEMENT OF SUBPOENAS AND ORDERS COMPELLING TESTIMONY

When a witness refuses to testify or to provide other information to a grand jury, the attorney for the government can ask the court for an order to show cause why the witness should not be held in contempt. Rule 17(g), Fed. R. Crim. P. The Supreme Court has decided that the district court should first consider the feasibility of effecting compliance through the imposition of civil contempt pursuant to the Recalcitrant Witness Statute, 28 U.S.C. §1826, before resorting to more drastic criminal contempt powers under 18 U.S.C. §401 as applied by Rule 42 of the Federal Rules of Criminal Procedure. *U.S. v. Wilson*, 421 U.S. 309 (1975); *Shillitani v. U.S.*, 384 U.S. 364 (1966). Successive contempts are punishable as separate offenses. *U.S. v. Hawkins*, 501 F.2d 1029 (9th Cir.), *cert. denied*, 419 U.S. 1079 (1974); *U.S. v. Gebhard*, 426 F.2d 965 (9th Cir. 1970). The court may use a combination of civil and criminal contempt to vindicate its authority. *U.S. v. Morales*, 566 F.2d 402 (2d Cir. 1977); *U.S. v. Marra*, 482 F.2d 1196, 1202 (2d Cir. 1973).

Civil contempt proceedings brought under 28 U.S.C. §1826 do not give rise to a constitutional right to trial by jury because any fines or incarceration resulting is coercive and not punitive. *Shillitani v. U.S., supra; U.S. v. Boe*, 491 F.2d 970 (8th Cir. 1974); *U.S. v. Handler*, 476 F.2d 709 (2d Cir. 1973). However, courts have held that Rule 42(b) does apply to such proceedings, and a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense. *In re Grand Jury Investigation*, 545 F.2d 385 (3d Cir. 1976); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975); *In re Sadin*, 509 F.2d 1252 (2d Cir. 1975); *U.S. v. Alter*, 482 F.2d 1016 (9th Cir. 1973). While five days is generally deemed to be adequate, what constitutes a reasonable time to prepare a defense is committed to the discretion of the district judge. *In re Grand Jury Proceedings*, 550 F.2d 1240 (3d Cir. 1977); *Matter of Grand Jury*, 524 F.2d 209 (10th Cir.), *cert. dismissed*, 425 U.S. 927 (1975); *In re Sadin, supra; U.S. v. Alter, supra.* As little as one day has been held to be sufficient. *U.S. v. Hawkins, supra.* A witness who may be held in contempt is entitled to representation and an indigent is entitled to court-appointed counsel. *U.S. v. Anderson*, 553 F.2d 1154 (8th Cir. 1977); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973).

The party seeking to demonstrate that a subpoena is improper bears the burden of proof in a proceeding brought under 28 U.S.C. §1826. *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978); *In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). While accepting that the witness has the burden of showing cause for noncompliance, the Third Circuit requires that the United States make a

minimum showing by affidavit that the information sought is relevant to an investigation properly within the grand jury's jurisdiction and is not sought primarily for another purpose. *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973). Other circuits have declined to require such affidavits. *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978); *In re Grand Jury Investigation (McLean)*, 565 F.2d 318 (5th Cir. 1977); *In re Hergenroeder*, 555 F.2d 686 (9th Cir. 1977). The First Circuit has held that the right is waived unless the witness requests such an affidavit. *In re Lopreato*, 511 F.2d 1150 (1st Cir. 1975). *See also Universal Manufacturing Co. v. U.S.*, 508 F.2d 684 (8th Cir. 1975). An affidavit may be presented *in camera* if disclosure of its contents might result in the destruction of evidence or otherwise disrupt the grand jury proceedings. *Schofield I*, 486 F.2d at 93. Exclusion of the public from civil contempt proceedings does not violate a defendant's sixth amendment right to public trial. *In re DiBella, supra.*

When a witness is found in civil contempt, he may be incarcerated for the term of the grand jury, including extensions, but his confinement cannot exceed 18 months. 28 U.S.C. §1826(a)(2). Although not explicitly stated in 28 U.S.C. §1826, a court may impose a fine; however, a fine and incarceration should not be imposed simultaneously absent a finding that such severe action is necessary. *Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543 (3d Cir.), *cert. denied*, 425 U.S. 992 (1976). A district court may increase or decrease a penalty once imposed. *Id.; In re Cueto*, 443 F. Supp. 857 (S.D.N.Y. 1978). A witness already incarcerated is not entitled to credit against his sentence for time spent in civil contempt confinement. *In re Grand Jury Proceedings*, 534 F.2d 41 (5th Cir. 1976); *In re Grand Jury Proceedings*, 532 F.2d 410 (5th Cir.), *cert. denied*, 429 U.S. 924 (1976); *Martin v. U.S.*, 517 F.2d 906 (8th Cir.), *cert. denied*, 423 U.S. 856 (1975).

Appeals taken from civil contempt judgments must be disposed of within 30 days of the filing of the appeal. 28 U.S.C. §1826; *In re Berry*, 521 F.2d 179 (10th Cir. 1975), *cert. denied*, 423 U.S. 928 (1975). New reasons for the witness' failure to comply with the court's order cannot be raised on appeal, even if they would have constituted justification for the witness's silence. *In re Bianchi*, 542 F.2d 98 (1st Cir. 1976); In re Grand Jury Investigation, 542 F.2d 166 (3d Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977). Bail pending appeal is not available if it appears that the appeal is frivolous or taken for delay. 28 U.S.C. §1826(b). The provisions of 18 U.S.C. §3148 do not apply to determinations by the district court to grant bail. *In re Visitor*, 400 F. Supp. 446 (D.S.D. 1975). Instead, the considerations governing stays pending appeal in civil proceedings are applicable. Rule 62, Fed. R. Civ. P.; Rule 8, Fed. R. App. P.; *Beverly v. U.S.*, 468 F.2d 732 (5th Cir. 1972).

Criminal contempt may be more appropriate if a contempt occurs near the end of a grand jury's term. If it is appropriate to impose punishment upon a recalcitrant witness, a court may invoke the provisions of 18 U.S.C. §401 by giving oral notice on the record or by directing the United States Attorney to file appropriate criminal charges. Rule 42(b), Fed. R. Crim. P.; *U.S. v. DiMauro*, 441 F.2d 428 (8th Cir. 1971). A grand jury may also charge a violation of 18 U.S.C. §401. *See U.S. v. Sternman*, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

The Supreme Court held in *Harris v. U.S.*, 382 U.S. 162 (1965), that where the contempt consists of a refusal to testify before a grand jury, the court must proceed under Rule 42(b) with its requirements of notice and hearing; the

summary contempt provisions of Rule 42(a) may not be brought into play merely by having the witness repeat his refusal in the court's presence. Refusals to testify during a trial by a witness who has been granted immunity, however, may be punished summarily under Rule 42(a). *U.S. v. Wilson, supra.* While case law limits summary punishment under Rule 42(a) to imprisonment for six months, there is no maximum set for punishing criminal contempt after notice and hearing under Rule 42(b). A court may not impose a sentence of more than six months unless a defendant in a criminal contempt action is afforded a right to jury trial. *Frank v. U.S.*, 395 U.S. 147 (1969); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). Bail for a defendant in a criminal contempt action is controlled by the provisions of Rule 46 of the Federal Rules of Criminal Procedure.

H. GRAND JURY REPORTS

In addition to its authority to indict or return a no true bill, a federal grand jury possesses common law authority to issue a report that does not indict for a crime. *In re Johnson*, 484 F.2d 791 (7th Cir. 1973) (and cases cited therein). *See also U.S. v. Cox*, 342 F.2d 167, 185-190 (5th Cir. 1965) (Wisdom, J., concurring), *cert. denied*, 381 U.S. 935. Congress has specifically authorized special grand juries to issue reports and has spelled out the procedures to be followed. 18 U.S.C. §3333. The subject matter of such reports is limited by that section to matters relating to organized crime conditions in the district or the noncriminal misconduct in office of appointed public officers or employees. The district judge who receives the grand jury's report may expunge portions of such a report and order that it be disseminated. *In re Report of Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973). Decisions to disseminate such reports are appealable by interested parties under the All Writs Act, 28 U.S.C. §1651; the standard of review is abuse of discretion, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974).