Misuse of the Grand Jury: Forcing a Putative Defendant to Appear and Plead the Fifth Amendment

*Aaron M. Clemens**

I. INTRODUCTION

In this article, I consider the propriety of an indictment of a person who was subpoenaed to testify before a grand jury at which the person invoked the Fifth Amendment privilege against self-incrimination on any questions relevant to the investigation and where the government knew that this person would assert the privilege. In Part I, I explore the prosecutor's power to secure evidence and present it the grand jury. In Part II, I describe how the Fifth Amendment's privilege against self-incrimination limits the prosecutor's power to secure evidence and present it to the grand jury. In Part III, I apply the privilege to a situation where a prosecutor knows that the person will invoke the privilege and refuse to testify, yet still forces the person to exercise her privilege in front of the grand jury which later indicts her.

I conclude that because of the inherent prejudice, if a person informed the government of her intent to invoke her Fifth Amendment privilege, then any indictment handed down by a grand jury that personally observed this person invoke this privilege must be dismissed. A contrary rule undermines the Fifth Amendment privilege by allowing a prosecutor to force a person to invoke the privilege in front of the grand jury, thus raising the presumption of guilt in the grand jurors' minds while concomitantly presenting an unnecessary opportunity for prosecutorial harassment, imposing an unnecessary burden on the witness and potentially causing unnecessary embarrassment, all while wasting grand jurors' time.[1]

---

* Office of the Public Defender, Palm Beach County, Florida; B.A. 2001, University of Nevada, Las Vegas; J.D. 2004, Georgetown University Law Center. Special thanks to Professor Roger A. Fairfax, Jr., Adjunct Professor of Law at Georgetown University, for his encouragement and supervision of this article. The views expressed herein are my own, as are any errors or omissions.

1. *See infra* Part V.

If a person raises these issues and eventually brings her case to the United States Supreme Court, the Court may approve of the dismissal of such an indictment, without prejudice, to deter the government from such actions in the future.

II. THE POWER TO SUBPOENA TO A GRAND JURY

A. The Federal Grand Jury Serves As an Arm of the Prosecutor

Federal prosecutors can issue subpoenas at their discretion.[2] Rule 17 of the Federal Rules of Criminal Procedure guides the prosecutor during the subpoena process.[3] Under Rule 17, a subpoena may order any person to testify under oath at a certain time and place.[4] Prosecutors issue these orders by filling out blank subpoenas already signed by the court.[5] Prosecutors are empowered to issue subpoenas by their connection to a federal grand jury.[6] The grand jury has been defined as the following:

> A jury of inquiry who are summoned and returned by the sheriff to each session of the criminal courts, and whose duty is to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and find bills of indictment in cases where they are satisfied a trial ought to be had. . . . This is called a "grand jury" because it comprises a greater number of jurors than the ordinary trial jury or "petit jury." At common law, a grand jury consisted of not less than 12 nor more than 23 men. . . . If the grand jury determines that probable cause [to indict] does not exist, it returns a "no bill." It is an accusatory body and its function does not include a determination of guilt.[7]

---

2. *See* H. Richard Uviller, *Symposium: The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1705 (2000).

3. FED. R. CRIM. P. 17.

4. *See generally* 1 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE §§ 6:1-01 to 6:0-3 (1986).

5. The Federal Rules of Criminal Procedure provide as follows:

> A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

FED. R. CRIM. P. 17(a).

6. Glenn A. Guarino, Annotation, *What Actions of United States Attorney Constitute Usurpation of Authority of Federal Grand Jury, Thus Warranting Exclusion of Evidence Obtained Thereby*, 65 A.L.R. Fed. 957 §1 (1984 & Supp. 2003).

7. Jack Kaufman, *Section 1983: Absolute Immunity for Pretrial Police Testimony*, 16 FORDHAM URB. L.J. 647, 688 n.179 (1988) (citing BLACK'S LAW DICTIONARY 768 (5th ed. 1979)). Grand jury hearings, however, are always ex parte proceedings. The only persons present are jurors, attorneys for the prosecution, witnesses, a recorder, and interpreters (if required). Grand jury witnesses

The prosecutor, who must be duly appointed,[8] is not supposed to usurp the power of the grand jury when subpoenaing people to a grand jury.[9] The grand jury is composed in a regulated manner to meet constitutional requirements.[10] Courts often note that the government cannot use the grand jury solely as a discovery device.[11] But the prosecutor's power over the grand jury is great enough that the United States Court of Appeals for the Third Circuit described grand juries as "for all practical purposes an investigative and prosecutorial arm of the executive branch of government."[12] Similarly, in *United States v. Kleen Laundry & Cleaners, Inc.*,[13] the court noted that "the grand jury's independence in the criminal justice system has declined with the increasing complexity of crime and the growth of the role of prosecutors, professional police, and investigative forces."[14] The *Kleen* court explained that Assistant United States Attorneys now are the ones who gather the evidence for the grand

---

do not have a right to counsel while testifying, and defendants have no right to attend their grand jury hearing. *Id.* (internal citations omitted).

8. Keri L. Bowles, *Thirty-First Annual Review of Criminal Procedure: Preliminary Proceedings: Grand Jury*, 90 GEO. L.J. 1305, 1310 (2002) ("The Attorney General, or any attorney authorized by the Attorney General, may conduct grand jury proceedings in the federal courts.").

9. In an annotation regarding a prosecutor's authority in a federal grand jury proceeding, Glenn A. Guarino wrote the following:

> It has been said that one of the most valuable functions of the grand jury is to stand between the prosecutor and the accused, that is, to protect the citizen against unfounded accusations, whether they come from the government or are prompted by partisan passion or private enmity. It is important, therefore, that the integrity and autonomy of the grand jury's proceedings be maintained intact, and that the prosecutor who brings evidence before the grand jury not be allowed to usurp any of the grand jury's authority.

Guarino, *supra* note 6, at 958 (footnote omitted).

10. *See* Bowles, *supra* note 8, at 1305–09.

11. *See* United States v. Sells Eng'g Inc., 463 U.S. 418 (1983). The Court stated the following:

> If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*.

Id. at 432 (citing Proctor & Gamble, 356 U.S. 677, 683–84 (1958)); United States v. Wadlington, 233 F.3d 1067, 1074 (8th Cir. 2000); United States v. Salameh, 152 F.3d 88, 109 (2d Cir. 1998); United States v. Alred, 144 F.3d 1405, 1413–14 (11th Cir. 1998); *In re* Grand Jury Proceedings No. 92-4, 42 F.3d 876, 878 (4th Cir. 1994); United States v. Breitkreutz, 977 F.2d 214, 217 (6th Cir. 1992); United States v. Santucci, 674 F.2d 624, 628, 632 (7th Cir. 1982); Beverly v. United States, 468 F.2d 732, 742–44 (5th Cir. 1972); United States v. Star, 470 F.2d 1214 (9th Cir. 1972); Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 523 (E.D.N.Y. 1974); United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970); *In re* Nat'l Window Glass Workers, 287 F. 219 (N.D. Ohio 1922).

12. *In re* Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973).

13. 381 F. Supp. at 519.

14. *Id.* at 521.

jury, call and examine witnesses, present documents, explain the law, sum up the evidence, and request an indictment.[15] The court also noted that "the conduct of the prosecutor in obtaining an indictment is virtually unreviewable,"[16] and upheld the prosecutor's action by rejecting the argument that "the use of the power on behalf of, but without direction from, a grand jury results in an invalid indictment which should be dismissed and in illegally obtained evidence which should be suppressed."[17] Citing numerous cases[18] and the language of Rule 17,[19] the *Kleen* court held that the prosecutor had the power to independently issue subpoenas.[20]

The prosecutor's power to use a grand jury was viewed expansively in *United States v. Santucci*,[21] where the United States Court of Appeals for the Seventh Circuit upheld a prosecutor's subpoena of suspects to a non-existent grand jury.[22] The *Santucci* court claimed that "[t]he defendants are themselves in part responsible for the absence of grand jury involvement" and noted that the defendants could have tried to appear before this imaginary grand jury.[23] Perhaps pointing to the futility of a defendant's appearance at an empty grand jury room before an imaginary grand jury, the court explained that "[e]ven if a grand jury had not been

15. *Id.*

16. *Id.* (citing 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 6.04 at 6–47 (2d ed. 1973)).

17. *Id.*

18. *Id.* (citing, among others, United States v. Thompson, 251 U.S. 407, 413 (1920) ("United States district attorney . . . has the power to present . . . information"); Wilson v. United States, 221 U.S. 361, 372 (1910) (production of documents without testimony may be required).

19. *Id.* at 522 ("Rule 17 of the Federal Rules of Criminal Procedure, which governs the issuance of subpoenas in all criminal proceedings in general and in grand jury proceedings in particular, lends statutory authority to the prosecutor's role.").

20. *Id.* at 521.

21. 674 F.2d 624 (7th Cir. 1982).

22. *Id.* at 625, 632 (in a case which had not been opened before the grand jury where subpoenas were not sought or obtained from any grand jury, the court held that "the United States Attorney may select witnesses, obtain blank subpoenas to be completed and served on witnesses without consultation with the grand jury," and that "[w]e see no constitutional violation; we see no egregious conduct by the government"); *see also* United States v. Smith, 687 F.2d 147 (6th Cir. 1982) (following *Santucci*). *But see* Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); *In re* Melvin, 546 F.2d 1, 5 (1st Cir. 1976) (holding that the trial court's order requiring attendance of a person who the government lacked probable cause to arrest outside grand jury room at proceeding not under the grand jury's supervision went "considerably beyond the routine issuance of subpoenas and other actions in which the United States Attorney has proceeded without specific direction of the grand jury," and labeled this as "a major intrusion upon personal liberty," and a power of such magnitude in the United States Attorney was unacceptable); United States v. O'Kane, 439 F. Supp. 211 (S.D. Fla. 1977).

23. *Santucci*, 674 F.2d at 632.

sitting at that time the subpoenas could have been continued."[24] In sum, case law makes it clear that "[a]lthough grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch."[25] Furthermore, "[w]hile there are some limits on the investigative powers of the grand jury, there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or present evidence."[26]

The grand jury has evolved to become an instrumentality of the prosecutor. Notably, the grand jury is not "subject to the direction of the court's directions and orders with respect to the exercise of its essential functions."[27] The prosecutor has ultimate power to guide the grand jury subpoena and indictment processes. This is an awesome power for the following three reasons: (1) A grand jury investigation may be triggered by tips or rumors heard by prosecutors;[28] (2) a grand jury investigation cannot be enjoined;[29] and (3) the grand jury's right to inquire into possible offenses is unrestrained by technical or evidentiary rules.[30] For these reasons, the danger is that in the hands of an unsavory or overzealous prosecutor,[31] abuses of the grand jury may occur.

---

24. *Id.*

25. *In re* Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973).

26. United States v. Sells Eng'g Inc., 463 U.S. 418, 433 (1983) (citation omitted).

27. United States v. United States Dist. Court, 238 F.2d 713, 719 (4th Cir. 1956); *see also* United States v. Williams, 504 U.S. 36, 47 (1992) ("[T]he grand jury is an institution separate from the courts . . . . In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.").

28. Branzburg v. Hayes, 408 U.S. 665, 701 (1972); *see also* United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) ("[T]he grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'") (quoting United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950)).

29. *In re* Grand Jury Proceedings, 525 F.2d 151, 157 (3d Cir. 1975).

30. United States v. Calandra, 414 U.S. 338, 343 (1974).

31. In his dissent in *Chandler v. Miller,* 520 U.S. 305, 321–22 (1997) (holding that a symbolic "commitment to the struggle against drug abuse" cannot justify drug testing all candidates for public office without showing some problems of drug abuse among such candidates), Justice Brandeis put it this way:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Id. at 322 (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

B. The Court Will Punish Failure to Comply with a Subpoena

If a person refuses to comply with a lawful subpoena, the government can seek contempt charges.[32] Only a court has the authority to punish a failure to comply with a subpoena;[33] however, through a citizen's duty to help the government enforce the laws, the prosecutor who sought a subpoena can assist the court in bringing contempt charges.[34]

Two types of contempt charges can be imposed against someone who fails to comply with a subpoena: civil and criminal, each with a different aim. A contempt charge is civil or criminal based "on the 'character and purpose' of the sanction involved."[35] A contempt proceeding is civil if the sanction "is remedial, and for the benefit of the complainant,"[36] and this "benefit" can accrue indefinitely.[37] A contempt proceeding is criminal if the sentence is "punitive, to vindicate the authority of the court."[38] With civil contempt charges a person is only punished until he complies with a subpoena or until the grand jury has been discharged.[39] But with criminal contempt, punishment can be imposed long

---

32. FED. R. CRIM. P. 17 (g).

33. United States v. Williams, 504 U.S. 36, 48 (1992) (noting that a grand jury cannot compel the appearance of a witness and the production of evidence, and must appeal to the constituting court for compulsion); *see also* 18 U.S.C. § 401 (2004) (describing the civil contempt power of federal courts); § 402 (describing the criminal contempt power of federal courts); *Calandra*, 414 U.S. at 346 (observing that grand jury's subpoena power is not unlimited and indicating that a grand jury must rely on a court to compel production of books, papers, documents, and the testimony of witnesses under Rule 17).

34. In *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), the court opined as follows:

> The concept that citizens have a duty to assist in enforcement of the laws is at least in part the predicate of Fed. Rule Crim. Proc. 17, which clearly contemplates power in the district courts to issue subpoenas and subpoenas *duces tecum* to nonparty witnesses and to hold noncomplying, nonparty witnesses in contempt. Of course we do not address the question of whether and to what extent such a general duty may be legally enforced in the diverse contexts in which it may arise.

Id. at 175 (italics in original) (citation omitted).

35. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826–27 (1994).

36. *Id.*

37. 28 U.S.C. § 1826(a) (2004) (providing that a witness who refuses to testify may be confined until he complies with the court's order, and the confinement may continue for the term of the grand jury); *see also* 18 U.S.C. § 3331(a) (2004) (a grand jury's term is eighteen months unless an order for discharge is entered earlier by the court); FED. R. CRIM. P. 6(g) (providing for a six-month extension if in the "public interest"). If two years of imprisonment is not enough, once a grand jury's term ends, a recalcitrant witness may be again called to testify before a subsequent grand jury.

38. *Bagwell*, 512 U.S. at 828; *see also, e.g.*, Nilva v. United States, 352 U.S. 385, 395 (1957) (in rejecting the defendant's contention that there was no willful default and failure to comply under FED. R. CRIM. P. 17(g), the Court upheld his conviction for criminal contempt under FED. R. CRIM. P. 42(b), holding that "the trial court had a sufficient basis for concluding that petitioner intentionally, and without 'adequate excuse,' defied the court" by failing to produce subpoenaed records).

39. *See* Michael J. Yaworsky, Annotation, *Contempt: State Court's Power to Order Indefinite Coercive Fine or Imprisonment to Exact Promise of Future Compliance with Court's Order—*

after a person has complied with a subpoena.[40] Lying to the court in response to a subpoena exposes a person to potential criminal perjury charges[41] as well as further criminal contempt charges.[42]

When a witness refuses to comply with a subpoena directing him to answer questions before a federal grand jury, even after receiving immunity from the court, this act is seen as criminal contempt, not civil, and therefore requires full criminal process[43] including notice of the charges, a hearing,[44] and trial by jury.[45] However, courts will not punish failure to comply with a subpoena that impermissibly orders a person to appear in the United States Attorney's office for interrogation.[46] Similarly, a subpoena is unenforceable if it compels attendance at an unauthorized pro-

---

Anticipatory Contempt, 81 A.L.R. 4th 1008, § 2a (2003) ("[C]ontempt consisting of present, ongoing behavior may be dealt with by an indeterminate fine or term of imprisonment which continues in effect until the violative behavior ceases; this is a coercive sanction."); *see, e.g.*, Steven Labaton, *Clinton Ex-Partner Is Held in Contempt in Whitewater Case*, N.Y. TIMES, Sept. 5, 1996, at A1 ("A Federal judge held Susan McDougal in contempt today for refusing to answer a Whitewater prosecutor's questions about whether her former business partner, Bill Clinton, had testified honestly at her trial."); *News Summary: Susan McDougal, In Transition*, N.Y. TIMES, Mar. 10, 1998, at A2 ("Susan McDougal finished serving her 18-month Federal contempt sentence on Sunday for refusing to testify against President Clinton in the Whitewater case and she began serving a 2-year sentence for bank fraud.").

40. Diana Lowndes, Note, *Thirty-First Annual Review of Criminal Procedure: Trial: Authority of the Trial Judge*, 90 GEO. L.J. 1659, 1675–76 (2002) ("Criminal contempt sanctions are imposed to vindicate the authority of the court and may be imposed even after the action in which the contempt arose is terminated.") (footnote omitted).

41. 18 U.S.C. § 1621 (2004) (perjury generally); § 1623 (false declarations before grand jury or court).

42. J. A. Bock, Annotation, *Perjury or False Swearing as Contempt*, 89 A.L.R.2d 1258, §12 (1963) ("The commission of perjury or false swearing while testifying before a grand jury has frequently been held or recognized as constituting a contempt of court."). *But see In re* Persico, 491 F.2d 1156, 1162 (2d Cir. 1974) (where the purpose of holding a person in contempt was to coerce him to answer the grand jury's question and not to punish him for reprehensible conduct, he was deemed only a recalcitrant witness whose "contempt was manifestly civil in character," to which the summary procedure set forth in 28 U.S.C. § 1826 was applicable, rather than the procedure for criminal contempt that is set out in FED. R. CRIM. P. 42).

43. *Bagwell*, 512 U.S. at 828; *see, e.g.*, *In re* Murchison, 349 U.S. 133, 137–38 (1954) (a contempt proceeding does not comply with the due process requirement of an impartial tribunal under circumstances where the judge presiding at the contempt hearing also served as a one-man grand jury, out of which the contempt charges arose).

44. *See generally* Harris v. United States, 382 U.S. 162 (1965) (holding that a witness's refusal to answer questions posed by the Federal District Court was not such an open and serious threat to orderly judicial procedure as to justify summary contempt punishment under FED. R. CRIM. P. 42(a) without notice and an opportunity to be heard where the witness, having been granted immunity, invoked the privilege against self incrimination).

45. 18 U.S.C. § 3691 (2004).

46. *See* Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954) (a grand jury subpoena may not be used "as a compulsory administrative process of the United States Attorney's office . . . . for the purpose of conducting [its] own inquisition."); United States v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976).

ceeding.[47] Additionally, a prosecutor must not threaten to use the court's contempt power to force cooperation with an allegedly voluntary proceeding,[48] nor take advantage of inherently coercive circumstances.[49]

Although a federal prosecutor has the power to proceed with actions that arguably usurp the grand jury's power, the courts approving these actions never found that such actions prejudiced any constitutional rights.[50] But does prejudice occur where a prosecutor brings a targeted person before the grand jury although the prosecutor knows, or should know,[51] that she will assert her privilege against self-incrimination? Does prejudice exist where a grand jury indicts the person who appeared before it and invoked her rights? To make this determination, I explore the nature of the protection given by the Fifth Amendment privilege against self-incrimination.

---

47. *See* United States v. Keen, 509 F.2d 1273 (6th Cir. 1975) (per curiam).

48. *See* United States v. O'Kane, 439 F. Supp. 211 (S.D. Fla. 1977).

49. *See* United States v. Duncan, 570 F.2d 292, 293 (9th Cir. 1978) (per curiam) (holding that the government carried its burden of showing the legality of evidence seized pursuant to a subpoena to the grand jury):

> Appellant testified he thought it would be better for him to cooperate, he cooperated voluntarily, he understood he did not have to talk with [the postal inspector] if he did not want to and could stop talking and leave whenever he wished, he gave the written statement willingly, and he volunteered to get the stamps for [the postal inspector].

Id. at 293; United States v. Smith, 687 F.2d 147, 152 n.2 (6th Cir. 1982) (finding that "the circumstances surrounding [the prosecutor's] suggestion of voluntarily producing the handwriting exemplars in lieu of Smith's scheduled grand jury appearance [were not] inherently coercive").

50. In *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519 (E.D.N.Y. 1974), the court explained as follows:

> Our decision should not be viewed as a license for prosecutors to run roughshod over the form of grand jury proceedings. In this case no prejudice whatsoever has been shown. No intent by the prosecutor to circumvent the defendants' rights has been suggested. . . . Careless prosecutorial methods may so prejudice a defendant's rights so as to cause the courts to raise once again the "sword and shield of justice." But this motion does not provide the occasion.

Id. at 524.

51. Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423, 1462 (2001) (citing Giglio v. United States, 405 U.S. 150 (1972)) ("[L]ower courts have applied *Giglio* to attribute to the prosecution knowledge on the part of other government employees."); *see also id.* at 1462 n.235 (citing United States *ex rel.* Smith v. Fairman, 769 F.2d 386, 391–92 (7th Cir. 1985)) (although unknown to the prosecution at trial, police knowledge of the inoperability of the gun allegedly used in the crime was attributable to the prosecution as nondisclosure); United States v. Antone, 603 F.2d 566, 569–70 (5th Cir. 1979) (although not material, information known to state investigators should be imputed to federal prosecutors when a joint investigation takes place); United States v. Butler, 567 F.2d 885, 888–89 (9th Cir. 1978) (imputing knowledge to the prosecution of a "probable dismissal" deal with eyewitness made by government agents); United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975) (declaring that government agents, who knew of witness's role as a government informant and his subsequent dealings with the government, were an "arm of the prosecutor").

III. The Fifth Amendment Limits Prosecutorial Power

It is a long-recognized principle that witnesses are "legally bound to give testimony" when subpoenaed to the grand jury. The United States Supreme Court, however, found limits to this principle in *United States v. Mandujano*.[52] Anyone subpoenaed before a grand jury retains a privilege against self-incrimination.[53] The Court explained that this limit originates in the Fifth Amendment, which is "[t]he same Amendment that establishes the grand jury[.]"[54]

A plurality of the Court in *Mandujano* recognized as a "reality of law enforcement" that it is unrealistic that "witnesses capable of providing useful information will be pristine pillars of the community untainted by criminality."[55] The plurality noted that "[t]he obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry[,]"[56] implying that even a putative defendant "can be required to answer before a grand jury" because the "Constitution does not forbid the asking of criminative questions."[57] The Court then held that "[a]bsent a claim of the privilege, the duty to give testimony remains absolute. The stage is therefore set when the question is asked."[58]

After the incriminating question is asked, the putative defendant may assert her privilege. The grand jury then has two choices:[59] (1) It can either make another inquiry, or (2) it "can seek a judicial determination as to the bona fides of the witness's Fifth Amendment claim."[60] This plurality holding in *Mandujano* supports the notion that no witness, even a putative defendant, can quash a grand jury subpoena on the ground that the witness will assert the Fifth Amendment: The witness must appear and assert the privilege as to each question asked.[61]

IV. Applying the Fifth Amendment to the Subpoena Process

If a putative defendant can be subpoenaed to a grand jury, a prosecutor would be allowed to subpoena such a person simply to get her to

---

52. 425 U.S. 564, 572 (1976) (plurality opinion).

53. *Id.*

54. *Id.*

55. *Id.* at 573.

56. *Id.* at 574 (citing United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973) (alterations in original)).

57. *Id.* (citing United States v. Monia, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting)).

58. *Id.* at 575.

59. *Id.*

60. *Id.* (citing Malloy v. Hogan, 378 U.S. 1, 11–12 (1964); Hoffman v. United States, 341 U.S. 479, 486–487 (1951)).

61. *See, e.g.*, United States v. Pilnick, 267 F. Supp. 791, 798–99 (S.D.N.Y. 1967).

invoke the privilege in front of the grand jury prior to her indictment. This is not supposed to happen, according to the handbook given to each grand juror.[62] Yet, because prosecutors wield so much power over the process, one could certainly subpoena a defendant that the government aims to indict, even if the prosecutor knew that she would invoke the Fifth Amendment. By doing so, the prosecutor could make the putative defendant travel hundreds or even thousands of miles. If permissible in the lone case, prosecutors could start handing out such subpoenas with regularity, perhaps even deciding to do so in all cases.

This procedure would strike the indigent the hardest, because they might be more likely to collect contempt charges for failing to appear at such hearings, particularly if these hearings are far from home. In addition, since these putative defendants have no right to counsel at the grand jury, it is unlikely anyone would inform them of their rights to potential immunity or duties to appear before the grand jury.

A federal court should disapprove of prosecutors issuing subpoenas to putative federal defendants, just as several state courts have found such action inappropriate in their jurisdictions.[63] Although the holding in

---

62. *See, e.g.*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, HANDBOOK FOR FEDERAL GRAND JURORS, HB-101, 9 (1999), which instructs as follows:

> Normally, neither the person under investigation (sometimes referred to as the "accused," although this does not imply he or she is guilty of any crime) nor any witness on the accused's behalf will testify before the grand jury.
>
> Upon request, preferably in writing, an accused may be given the opportunity by the grand jury to appear before it. An accused who does so appear cannot be forced to testify because of the constitutional privilege against self-incrimination. If the grand jury attempts to force the accused to testify, an indictment returned against that person may be nullified.
>
> Because the appearance of an accused before the grand jury may raise complicated legal problems, a grand jury that desires to request or to permit an accused to appear before it should consult with the United States Attorney and, if necessary, the court before proceeding.

63. *See* E. LeFevre, Annotation, *Privilege Against Self-Incrimination as to Testimony Before Grand Jury*, 38 A.L.R.2d 225, §4 (1954) ("[W]here a grand jury investigation is directed against a particular person in such a way that, as to [the grand jury], he stands in the status of a defendant in an ordinary criminal trial, then his constitutional privilege has the effect of preventing his being called to take the witness stand at all."); Commonwealth v. Kilgallen, 108 A.2d 780 (Pa. 1954); New York v. Luckman, 297 N.Y.S. 616 (1937); New York v. Bermel, 128 N.Y.S. 524 (1911) ("[I]f a person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be subpoenaed and sworn, even though he claim no privilege."); Boone v. Illinois, 36 N.E. 99, 101 (1894) (where a target was forced to take the stand "[a] right of the highest character was violated. A privilege sacredly guaranteed by the constitution was disregarded, and a dangerous innovation on the uniform practice in this state made."); Minnesota v. Froiseth, 16 Minn. 296 (1871). *But see* United States v. Wong, 431 U.S. 174, 179 n.8 (1977) (Burger, C.J.) (obiter dictum) ("There is no constitutional prohibition against summoning potential defendants to testify before a grand jury.") (citing *Dionisio*, 410 U.S. at 10 n.8; *Mandujano*, 425 U.S. at 584 n.9).

Mandujano may support the proposition that a subpoena cannot be quashed by a person on the ground that she is a present or future target of the investigation,[64] the case does not detract from the vast support for the notion that the remedy to such prosecutorial misconduct, particularly if it occurs with regularity, must be dismissal of the indictment without prejudice.

A. The Fifth Amendment Privilege Against Self-Incrimination Applied to the Federal Grand Jury

Grand jury testimony has been described as a "grinding routine."[65] But, when a suspect testifies, "the grand jury sit[s] up and take[s] notice."[66] Grand juries are very interested in hearing from the actual defendant.[67] If the grand jury thinks that a suspect is being candid, the suspect's candor "can make the difference."[68] Conversely, if a grand juror thinks a defendant is less than forthcoming, this failure to testify can also make the difference.

If courts allow inquisitorial methods to seep into our justice system, the foundations of our constitutionally based criminal justice system are impermissibly violated. The justice system in the Anglo-American tradition has been "accusatorial as opposed to . . . inquisitorial . . . since it freed itself from practices borrowed by the Star Chamber from the Continent."[69] This alteration from inquisitorial to accusatorial was enshrined in America by the Fifth Amendment privilege against self-incrimination, a privilege that protects the guilty and the innocent alike by banishing practices such as England's powerful Star Chamber Court and the Spanish Inquisition.[70] Although the legislative debate on the privilege was

---

64. *See Mandujano*, 425 U.S. at 574.

65. William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES, June 20, 2004, at 32.

66. According to the Chief Assistant District Attorney in Queens, John M. Ryan. *Id.*

67. *See id.* ("'Grand jurors want to hear from the officer who discharged his gun,' Stuart London, the lawyer for both officers, said in an interview.").

68. According to Jennifer L. Ritter, a Legal Aid lawyer in Brooklyn. *Id.*

69. Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2466 (2002) (citing Watts v. Indiana, 338 U.S. 49, 54 (1949)).

70. Withrow v. Williams, 507 U.S. 680, 691–92 (1993). The Court stated the following:

> [The Fifth Amendment Privilege] embodies principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle. . . . [O]ur realization [is] that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent[, and that] a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation.

limited,[71] the Framers undoubtedly intended to foster the tension between the government's power to compel "every man's evidence"[72] and the individual's constitutional right against self-incrimination.[73] In *Branzburg v. Hayes*,[74] the Court elaborated on this concept when it held that in grand jury proceedings, "the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege."[75] As described earlier, the privilege triggered when a putative defendant is called before the grand jury is the Fifth Amendment privilege against self-incrimination.[76]

If a subpoena infringes upon a constitutional right, then there must be a reasonable relationship to achieving the government's purpose.[77] For example, in *Branzburg,* the Court found that the State's interest justified an indirect burden on First Amendment rights.[78] The Court held that a journalist could not refuse to testify before a grand jury, because

> the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."[79]

In sum, *Branzburg* stands for the proposition that if a person is subpoenaed in a manner that indirectly infringes on a constitutional right, namely the First Amendment, then the governmental purpose in issuing

---

71. *See, e.g.,* Daniel E. Will, *"Dear Diary—Can You be Used Against Me?": The Fifth Amendment and Diaries*, 35 B.C. L. REV 965, 970 (1994) ("Sparse congressional debate over adoption of the Self-incrimination Clause in America, however, left unclear whether the First Congress simply embraced the same policies that prompted the development of the self-incrimination concept in England, or sought additional safeguards with the Self-incrimination Clause of the Fifth Amendment.") (citing VIII JOHN H. WIGMORE, EVIDENCE § 2251 at 324–35 (McNaughton rev. 1961)).

72. United States v. Nixon, 418 U.S. 683, 710 (1974) (noting that constitutional, common-law, and statutory privileges are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

73. Jerome A. Murphy, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity,* 51 MD. L. REV. 1011, 1050 (1992) ("[T]he fundamental public policy debate [on the Fifth Amendment is] how to balance the government's interest in attaining the truth and the individual's protection against compelled self-incrimination.").

74. 408 U.S. 665 (1972).

75. *Id.* at 688 (citing United States v. Bryan, 339 U.S. 323, 331 (1950); Blackmer v. United States, 284 U.S. 421, 438 (1932); Wigmore, *supra* note 70, at § 2192).

76. *See supra* notes 55–58 and accompanying text.

77. Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

78. *Id.*

79. *Id.* (quoting Bates v. Little Rock, 361 U.S. 516, 525 (1960)).

this subpoena must have a "reasonable relationship to the achievement of the governmental purpose asserted as its justification."[80]

When the reasoning in *Branzburg* is applied to a situation where a prosecutor calls a putative defendant with knowledge that this defendant will simply invoke her constitutional rights, it becomes clear that such an action fails to "bear[] a reasonable relationship to the achievement of the governmental purpose asserted as its justification."[81] If the government has a legitimate interest in investigating and prosecuting a crime by calling a defendant before a tribunal to highlight the defendant's choice to invoke the privilege against self-incrimination, then calling such a defendant before a grand jury would be allowed, even when the prosecutor knows the defendant will invoke their privilege. But there is no such legitimate interest in underlining, and thus undermining, a person's exercise of their Fifth Amendment rights. The government has long been prohibited from drawing the fact finder's attention to the defendant's failure to testify after invoking the Fifth Amendment. The Supreme Court has repeatedly declared that "prosecutorial comment relating to a defendant's insistence on his right to remain silent generally constitutes reversible error."[82] A jury cannot even be instructed that an adverse inference can be made about a witness's credibility when the witness invoked the privilege before a grand jury but later testified at trial and indicated innocence.[83]

There is further support for limiting the government's ability to call putative defendants to a grand jury where they know the defendants will invoke their right to remain silent. As discussed before, prosecutors gain great power from their association with grand juries.[84] As the Court held in *United States v. Sells Engineering, Inc.*,[85] "if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited

---

80. *Branzburg*, 408 U.S. at 700.

81. *Id.*

82. Wainwright v. Greenfield, 474 U.S. 284, 288 (1986); *see also* Griffin v. California, 380 U.S. 609, 615 (1965); Stewart v. United States, 366 U.S. 1, 9 (1961). In Johnson v. United States, 318 U.S. 189 (1943), Justice Douglas wrote of the Fifth Amendment privilege as follows:

> If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.

Id. at 196–97 (quoting Phelin v. Kenderdine, 20 Pa. 354, 363 (1853)).

83. Grunewald v. United States, 353 U.S. 391, 423–24 (1957).

84. *See supra* Part I.A.

85. 463 U.S. 418 (1983).

as far as reasonably possible to the accomplishments of the task."[86] If the task is to investigate a crime, nothing is gained by calling a putative defendant and forcing her to invoke her privilege, unless the prosecutor prays for undue prejudice to come from this testimony (or lack of testimony). A prosecutor may hope to add a charge of contempt for the defendant who invariably fails to appear, thereby improving the government's bargaining position when it comes time to plea bargain before trial.[87]

But, just as a witness should not be placed on the stand for the purpose of exercising her Fifth Amendment privilege before the petit jury,[88] a putative defendant should not be placed before a grand jury for the purpose of exercising the same privilege. When a prosecutor calls a codefendant of the accused at trial to elicit an assertion of the privilege, this codefendant is indirectly, yet improperly, denied her constitutionally guaranteed right to remain silent. [89] A putative defendant who is forced to exercise this right is also indirectly, yet improperly, denied this constitutional right. The former case is exemplified by the Florida District Court of Appeals case, *Hankerson v. State,* where the court reasoned that the codefendant's testimony would force the defendant to testify in order to counter any assumption made by the jury that because the defendant refused to testify on Fifth Amendment grounds the defendant is guilty as well.[90]

Some United States Supreme Court obiter dictum supports the notion that a prosecutor should not have the leeway to potentially taint grand jurors where no benefit could be gained.[91] In *United States v. R. Enterprises,*[92] the Court held that "[a] grand jury investigation 'is not

---

86. *Id.* at 434–35.

87. Hope Viner Samborn, *The Vanishing Trial*, A.B.A.J., Oct. 2003, at 24, 27 (asserting that plea bargaining seems to have become a near requirement for overloaded prosecutors in recent years, as 62% of defendants pleaded guilty and waived trial in the 1970s, versus 85% in 2001).

88. *See* Commonwealth v. Champney, 832 A.2d 403, 455 (Pa. 2003) (citing Commonwealth v. Greene, 285 A.2d 865, 867 (Pa. 1971); United States v. Salerno, 505 U.S. 317, 321 (1992) (holding that a witness who properly invokes the privilege against self-incrimination and refuses to testify is therefore unavailable to the defense as a witness)).

89. Hankerson v. State, 347 So. 2d 744 (Fla. Dist. Ct. App. 1977).

90. In *Hankerson*, the court opined as follows:

> There can be little doubt that when an admittedly implicated witness takes the Fifth Amendment in front of the jury, the defendant, then before the court, is prejudiced in the eyes of said jury, which may, not surprisingly, conclude that both are guilty. In such event, it would appear that the defendant has indirectly lost his basic right to remain silent and not have his failure to take the stand cast up before the jury.

Id. at 745.

91. *See, e.g.*, United States v. R. Enters., 498 U.S. 292 (1991).

92. *Id.*

fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'"[93] The Court continued that "[r]equiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise 'the indispensable secrecy of grand jury proceedings.'"[94] *R. Enterprises* supports *Mandujano* by suggesting that allowing putative defendants to challenge a grand jury subpoena may threaten to compromise grand jury secrecy.[95] However, where a defendant, who has already been arrested and is simply waiting for indictment, has indicated she will invoke her Fifth Amendment right before the grand jury, the government cannot reasonably argue that proffering a reason for calling this defendant will jeopardize the grand jury secrecy. Quite simply, this action would go beyond "run[ing] down . . . all witnesses . . . in every proper way,"[96] and instead would appear as an arbitrary fishing expedition, or a prosecutor's decision to select a target out of malice or with an intent to harass.

Furthermore, there is no necessity to argue for the remedy sought in *R. Enterprises*, namely the idea of allowing a grand jury subpoena to be challenged.[97] The remedy I propose is not to challenge a grand jury subpoena, but simply that the indictment should be dismissed without prejudice. This dismissal should occur when a prosecutor calls a putative defendant knowing she will assert her Fifth Amendment privilege, and then the defendant is later indicted. In such a case, the grand jury secrecy would not be compromised by allowing the concurrent examination of the prosecutor's arguably impermissible exercise of discretion, but would simply provide a warning to prosecutors to prevent them from abusing the immense, discretionary subpoena power that they wield.

The Supreme Court has made explicitly clear that neither a prosecutor nor a self-motivated grand jury has such license.[98] The *R. Enterprises* Court held that "[g]rand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or intent to harass."[99] Thus, the Court, deciding to "fashion an appropriate standard of reasonableness,"[100] held that "a court may be jus-

---

93. *Id.* at 297 (quoting Branzburg v. Hayes, 408 U.S. 665, 701 (1972)).

94. *Id.* at 299 (quoting United States v. Johnson, 319 U.S. 503, 513 (1943)).

95. *Id.*

96. *Id.* at 297.

97. In *R. Enterprises*, the defendant sought to quash a subpoena duces tecum. *Id.* at 295.

98. *Id.* at 299.

99. *Id.*

100. *Id.* at 300 ("Our task is to fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong gov-

tified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion."[101] Although *R. Enterprises* concerned a motion to quash a subpoena decus tecum and not a motion to dismiss an indictment, the Court provided some guidance when holding that "a district court may require that the Government reveal the subject of the investigation to the trial court in camera, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party."[102] Analogous to this standard, while the government is free to subpoena anyone to the grand jury, including putative defendants who will invoke their privilege, the government should be required to proffer, in camera, a reason to overcome the presumption that these putative defendants should not be subpoenaed to the grand jury.

B. Remedy for Fifth Amendment Violations Before a Grand Jury: Dismissal Without Prejudice

The Court will not force compulsion, which would override constitutional rights, but what is the appropriate remedy? I do not suggest that a defendant can challenge an indictment because the evidence presented to the grand jury was not reliable or sufficient—an approach disallowed by the United States Supreme Court in *United States v. Williams*.[103] But the *Williams* Court, while not finding a prosecutorial duty to present exculpatory evidence to the grand jury, did note that "the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required."[104] More importantly, the *Williams* Court stated "the court will refuse to lend its assistance when the compulsion the grand jury seeks would override

---

ernmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy.").

101. *Id.* at 302.

102. *Id.* (italics in original).

103. Justice Scalia wrote of this challenge to the grand jury as follows:

> We accepted Justice Nelson's description in Costello v. United States, where we held that "[i]t would run counter to the whole history of the grand jury institution" to permit an indictment to be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury." . . . Review of facially valid indictments on such grounds "would run counter to the whole history of the grand jury institution [,] [and] [n]either justice nor the concept of a fair trial requires [it]."

United States v. Williams, 504 U.S. 36, 54–55 (1992) (alterations in original) (citations omitted) (quoting Costello v. United States, 350 U.S. 359, 363–64 (1956)).

104. *Williams*, 504 U.S. at 48 (citing Brown v. United States, 359 U.S. 41, 49 (1959)).

rights accorded by the Constitution[105] or testimonial privileges recognized by the common law."[106] The five-member majority in *Williams* explained that "[w]e have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation."[107] Although it might be advisable, I do not propose that a Sixth Amendment right to counsel attach for all targets of investigation. I simply suggest that a prosecutor violates his duty when he calls a putative defendant to the grand jury, knowing that she will invoke her rights and no immunity will be offered. Four members of the *Williams* Court, in dissent, described the federal prosecutor's duty in the following terms:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . [A federal prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much [a federal prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[108]

The *Williams* dissenters followed this assertion by finding that "[i]t is equally clear that the prosecutor has the same duty to refrain from improper methods calculated to produce a wrongful indictment."[109] In determining a solution to prosecutorial misconduct, the Court concluded that "[u]nrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods."[110] With three justices who had signed the pertinent part of the *Williams* dissent remaining on the Court,[111] and with the addition of Justices Ginsburg and Breyer, when faced with the

---

105. *Id.* (citing Gravel v. United States, 408 U.S. 606 (1972)).

106. *Id.* (citing *In re* Grand Jury Investigation of Hugle, 754 F.2d 863 (9th Cir. 1985)).

107. *Id.* at 49 (citing United States v. Mandujano, 425 U.S. 564, 581 (1976); *In re* Groban, 352 U.S. 330, 333, (1957)).

108. *Id.* at 62 (Stevens, J., dissenting) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

109. *Id.*

110. *Id.* at 69 n.12 (noting further that "even the Solicitor General [acknowledges] that unrestrained prosecutorial misconduct in grand jury proceedings 'could so subvert the integrity of the grand jury process as to justify judicial intervention.'") (citing Franks v. Delaware, 438 U.S. 154, 164–71 (1978))).

111. Justices Stevens, O'Connor, and Thomas. *Id.* at 55.

question of whether subpoenaing a putative defendant with knowledge that the defendant will assert her Fifth Amendment rights constitutes prosecutorial misconduct, a modern Court might find misconduct and thus approve the dismissal of the indictment, without prejudice, to encourage the government to avoid such actions in the future.

1. *Hubbell* Establishes the Rule of Dismissal Without Prejudice

Knowing that a putative defendant will assert her Fifth Amendment rights, when a prosecutor forces her to assert her privilege against self-incrimination before the grand jury responsible for the indictment, the United States Supreme Court suggested the appropriate remedy is dismissal without prejudice.[112] In *United States v. Hubbell*, the Court dismissed the indictment upon finding that Hubbell's privilege had been violated when he was compelled to produce evidence that "could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"[113]

In 1994, Independent Counsel Kenneth Starr was "appointed . . . to investigate possible violations of federal law relating to the Whitewater Development Corporation."[114] In December of that year, Starr secured a cooperation agreement from Webster Hubbell. Hubbell "[plead] guilty to charges of mail fraud and tax evasion arising out of his billing practices as a member of an Arkansas law firm from 1989 to 1992, and was sentenced to twenty-one months in prison."[115] When the prosecution of President Bill Clinton stalled, Starr wanted to see if Hubbell had fulfilled his promise to give "'full, complete, accurate, and truthful information' about matters relating to the Whitewater investigation."[116] To that end, Starr subpoenaed a broad swath of personal papers from Hubbell.[117]

The Court found that Hubbell in fact provided materials which led to incriminating evidence and provided a link in the chain of the evi-

112. U.S. v. Hubbell, 530 U.S. 27 (2000).

113. The *Hubbell* court concluded the following:

> Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence," or "a link in the chain of evidence needed to prosecute."

Id. at 42.

114. *Id.* at 30.

115. *Id.*

116. *Id.* at 30–31.

117. *Id.* at 46–49.

dence needed to prosecute.[118] Because the government violated Hubbell's privilege under the Fifth Amendment, the indictment garnered from this violation was dismissed without prejudice.[119] Following this ruling, the government was still constrained from bringing charges unless it could prove that indictment was based upon evidence that was obtained independent of Hubbell's immunized testimony related to the documents he provided.[120]

Extrapolating from *Hubbell*, if the government violates a person's privilege against self-incrimination before a grand jury, the proper remedy consists of (1) a dismissal without prejudice and (2) an admonishment to the government that if it chooses to proceed with the indictment, it must not use the tainted evidence or the tainted procedure (namely the calling of a putative defendant before the grand jury to force her to invoke her Fifth Amendment right).

2. Applying this Rule Beyond Wealthy Suspects

The holding in *Hubbell* will be widely utilized by defendants with the wealth to have access to legal counsel any time they are called before a grand jury. Those who have "lawyered-up" will, like *Hubbell*, file a motion to quash their appearance based upon a pending violation of their Fifth Amendment right against self-incrimination. Unlike the plaintiff in *R. Enterprises*,[121] these putative defendants have some chance of success. A putative defendant advised by counsel will clearly communicate whether or not she desires to testify before a grand jury, often including a specific answer as to whether she plans to invoke her privilege if called. Most defendants will not have this ability. The typical criminal defendant

---

118. *Id.* at 42–43. However, in cases besides *Hubbell*, the Court has held that is not necessary that a person prove that the evidence requested by the government *would* "provide a prosecutor with a 'lead to incriminating evidence' or 'a link in the chain of evidence needed to prosecute," only that such an answer *could* do so. Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (holding that the privilege is "sometimes 'a shelter to the guilty,' [but it] is often 'a protection to the innocent'"); *see also* Ohio v. Reiner, 532 U.S. 17, 19 (2001) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)):

> [T]his privilege not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. . . . [I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Reiner, 532 U.S. at 20–21 (alterations in original) (internal quotations omitted).

119. *Hubbell*, 530 U.S. at 46.

120. *Id.* at 45.

121. *See supra* notes 97–109 and accompanying text.

is indigent,[122] and those without counsel are most easily exploited in a manner that mocks the ideal behind the phrase "Equal Justice Under Law" inscribed on the façade of the United State Supreme Court building's west pediment.[123]

The Supreme Court announced the expansion of the right to counsel in *Gideon v. Wainwright*[124] with the following declaration: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[125] In *Miranda v. Arizona,*[126] the Court further elucidated the relationship between a defendant's Fifth Amendment's rights and his ability to secure counsel. The Court held the following:

> The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. . . . While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in Gideon v. Wainwright and Douglas v. California. [127]

Treating defendants differently based upon their financial status does not allow individuals to stand equally before the law with those with the means to obtain counsel.[128] In *Miranda*, the Court prescribed the method police must use to provide constitutional warning, making no distinction between a Martha Stewart and a Joe Public.[129] When the police read a suspect her *Miranda* rights and she invoked her privilege to remain silent, her request must be noted and further police questioning

---

122. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 7 n.7 (1997) (by 1992, eighty percent of those accused of state felonies were indigent) (citing STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 1, 4 (Feb. 1996).

123. Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIPIAC L. REV. 151, 221 (2004).

124. 372 U.S. 335 (1963).

125. *Id.* at 344.

126. 384 U.S. 436 (1966).

127. *Id.* at 472–73 (citations omitted) (citing Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963)).

128. *See id.*

129. *Id.*

must cease unless she approaches the government[130] to knowingly, intelligently, and voluntarily waive the privilege.[131] Further, once a suspect is arrested, she is assigned a defense attorney to protect her rights,[132] whom the prosecutor must approach instead of directly contacting the represented party.[133]

Even if a prosecutor does not have actual knowledge of a defendant's previous invocation of her Fifth Amendment privilege, such knowledge could be imputed to the prosecutor.[134] Such imputed knowledge, combined with a presumption that most defendants will invoke their Fifth Amendment privilege at some point, render it unreasonable for a prosecutor to expect a putative defendant to provide testimony. Additionally, if operating ethically, a prosecutor calling a grand jury must have the belief that the targeted person is involved in a crime and will soon need an attorney. Finally, a prosecutor should know that an unrepresented person, as a putative defendant, has not properly waived her privilege.

Because a waiver of a constitutional right should not be lightly inferred,[135] a putative defendant should not be brought before a grand jury unless she has knowingly, intelligently, and voluntarily waived her right to invoke her Fifth Amendment privilege. In *Smith,* the United States Supreme Court found it desirable to reserve the term 'waiver' of the privilege for cases by which one affirmatively renounces the protection of the privilege.[136] Therefore, if a prosecutor has or should have knowledge that an unrepresented putative defendant does not want to testify, this assertion of her right should raise the same concerns that exist where a wealthy defendant with advice of counsel has formally notified the government of her intention to invoke the Fifth Amendment. Thus, if any person is indicted after having been called before the grand jury and invoking her Fifth Amendment right where the prosecutor had or should have had knowledge of the person's desire to invoke the privilege, the indictment should be dismissed without prejudice.

---

130. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

131. Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (Rehnquist, C.J.) (plurality opinion).

132. Escobedo v. Illinois, 378 U.S. 478, 484–85 (1964).

133. Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence,* 79 CHI.-KENT L. REV. 1111, 1123 (2004) (noting that "codes of professional responsibility . . . limit prosecutors' contacts with represented parties . . . .").

134. *See* sources cited *supra* note 51.

135. Smith v. United States, 337 U.S. 137, 150 (1949).

136. *Id.* at 151.

V. CONCLUSION

Because of the potential for prejudice, an indictment must be dismissed if it was handed down by a grand jury that personally observed the subject of the indictment invoke her Fifth Amendment privilege against self-incrimination and the subject had previously informed the government of her intent to invoke the privilege. Any invocation of the privilege by the putative defendant should be presented solely, out of view of the grand jurors, and before the grand jurors are told that the suspect is coming to testify.

Support is found in the final report issued by the District of Columbia Grand Jury Committee.[137] The Committee cited two of my main reasons for supporting the conclusion in their report. First, they found that forcing a putative defendant to invoke her privilege in front of the grand jury would "[undermine] the Fifth Amendment privilege [by raising] the presumption of guilt in the grand jurors' minds."[138] As the Committee explained:

> It is one thing for the grand jurors to hear the evidence that the prosecution presents . . . but it is quite another for the grand jurors to watch as the target or subject invokes his Fifth Amendment privilege time and time again. This process necessarily colors the grand jurors' perception of the witness, and may create an unwarranted presumption of guilt.[139]

The Committee also found that no constitutional benefit counterbalanced this derogation of the privilege.[140] Instead, the Committee only found additional reasons why the practice is inappropriate. For example, the Committee found the following:

> [F]orcing a target or subject of a grand jury investigation to invoke the Fifth Amendment privilege on the stand [who has already formally indicated that he or she will not answer any questions] present[s] an unnecessary opportunity for prosecutorial harassment[,] . . . impose[s] an unnecessary burden on the witness[,] . . . may cause unnecessary embarrassment . . . and waste[s] grand jurors' time.[141]

---

137. COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA GRAND JURY STUDY COMMITTEE FINAL REPORT 42 (July 2001) (Recommendation 9 asserts, in part, that a witness who is the target or subject of an investigation and who has formally indicated his intention to assert his Fifth Amendment right not to testify should not be subpoenaed before the grand jury and forced to assert that right).

138. *Id.*

139. *Id.*

140. *Id.* at 43.

141. *Id.*

With one dissent,[142] the Committee took the position that: "[F]orcing witnesses who are also targets of a grand jury investigation to invoke their constitutional privilege against self-incrimination on the stand violates the spirit of the Fifth Amendment and serves no appropriate purpose."[143] This sentiment was shared by former United States Attorney for the District of Columbia Roscoe Howard.[144]

We hope that such prosecutorial misconduct will not occur anywhere due to the ethical considerations that should bar prosecutors from parading a putative defendant before a grand jury. But, if prosecutors refuse to govern themselves, the Court must step in to correct this inappropriate behavior in order to achieve the court's primary goal of protecting our constitutional rights.[145]

---

142. *Id.* at n.60 (Judge Warren R. King dissented because Recommendation 9 was proposed by an ad hoc committee that did not set forth "the various views that were advanced in support of, or in opposition to" the recommendation.).

143. *Id.* at 43.

144. Roscoe Howard, Presentation to Georgetown Law Professor Roger Fairfax's Federal Grand Jury Seminar (Feb. 11, 2004) (then-U.S. Attorney Howard stated that he disagreed with such tactics).

145. *Cf.* United States v. Laymon, 730 F. Supp. 332, 341–42 (D. Colo. 1990) where the court opined the following:

> It ill behooves a great nation to compromise or sacrifice the freedoms of its citizens as the price of more efficient law enforcement. . . . Our tradition . . . requires judges and police officers, who are equally sworn to uphold the same Constitution, to enforce constitutionally guaranteed rights, even when their enforcement is unpopular and even when those rights are asserted on behalf of persons whose activities are considered despicable. . . . As a practical matter if we are not all free, none of us is really free, for exceptions which deny constitutional rights to some erode them for all. While we deal today only with denial of Mr. Laymon's rights, who knows which of us may be next.
>
> A society cannot remain free or strong if it undermines its own principals. Law enforcement officials are not licensed to disregard the law—especially not the law enshrined in the Constitution.