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# THE SUSPECT AND THE GRAND JURY: A NEED FOR CONSTITUTIONAL PROTECTION

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## I. INTRODUCTION: THE ISSUES ARE JOINED

In *United States v. Mandujano*,[1] the Supreme Court, while ostensibly reaffirming the proposition that the fifth amendment does not insulate a person charged with perjury from the prosecution's introduction of his false statements, has sanctioned the use of the grand jury as a subterfuge for circumventing the constitutional proscription against compulsory self-incrimination.

Mandujano, a bartender in San Antonio, Texas, suspected of dealing in narcotics, was contacted by federal agents who provided him with money to make a heroin purchase. Although willing to complete the transaction, Mandujano was unable to reach his supplier, and consequently returned the advance to the agent. This investigative strategy was abandoned, but six weeks after the aborted transaction, Mandujano was subpoenaed to testify before a federal grand jury investigating area drug traffic.

Prior to initiating his examination, the federal prosecutor warned the witness that a response was required except where the answer would incriminate him "in the commission of a crime;"[2] he was further informed that he could retain counsel, but that counsel

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1. 96 S. Ct. 1768 (1976).

2. *Id.* at 1772.

would not be allowed inside the grand jury room.[3] The prosecutor then proceeded to question Mandujano about his familiarity with the local narcotics trade. While he admitted to having knowledge of activity which transpired at an earlier time, he insisted that he was unaware of current operations, and he specifically denied having offered to procure heroin for the special agent.[4]

Mandujano was subsequently charged in a two-count indictment with attempting to distribute heroin[5] and willfully and knowingly making a false material declaration to the grand jury.[6] Entertaining a defense motion to suppress, the district court, finding that Mandujano was questioned "with an eye to possible prosecution," ruled that a fuller explanation of his rights before the grand jury was constitutionally required and accordingly held the false statements to be inadmissible.[7] The Court of Appeals for the Fifth Circuit,

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3. *Id.* The following exchange reflects the full extent of the warnings given the witness:

Q: Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?

A: Do I answer all the questions you ask?

Q: You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

A: Yes, sir.

Q: You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those questions truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury. . . .

United States v. Rangel, 365 F. Supp. 155, 160 (W.D. Tex. 1973) (*Rangel* and *Mandujano* were consolidated cases).

Q: Have you discussed your presence here with anybody?

A: My wife.

Q: Have you contacted a lawyer in this matter?

A: No, sir, I haven't.

Q: I take that to mean then that you do not wish the services of a lawyer here today?

A: I don't have one. I don't have the money to get one.

Q: Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so choose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A: Yes, sir.

Q: Is that clear?

A. (Nod affirmative).

*Id.* at 162 n.7.

4. Mandujano's testimony is set out in 365 F. Supp. at 157-58 n.1.

5. 21 U.S.C.A. §§ 841(a)(1), 846 (1970).

6. 18 U.S.C.A. § 1623 (1970).

7. 365 F. Supp. at 164.

arguing that the investigation, as it related to Mandujano, had progressed beyond a stage of a general inquiry and had focused upon his criminal conduct, affirmed the decision of the lower court.[8]

The Supreme Court reversed.[9] It reasoned that (1) the public has a right to every person's evidence; (2) the public's right is limited only by the witness' right to refrain from self-incrimination; and (3) where potentially incriminating evidence is sought to be elicited, the witness must insist upon his right, whereupon the prosecution may either choose to forego the particular line of questioning or pursue the interrogation further by successfully procuring for the witness a grant of immunity. Since Mandujano sought to deflect the grand jurors' attention through deceit rather than insisting upon his constitutional right (which clearly applied to this portion of Mandujano's examination),[10] he committed per-

8. United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974).

9. 96 S. Ct. 1768 (1976).

10. The prosecutor sought to elicit testimony concerning the attempted narcotics purchase six weeks earlier:

Q: Have you ever talked with anybody about selling it?
A: No, sir.
Q: Are you sure of that?
A: Yes, sir.
Q: In other words, no one has ever come up to you and wanted to buy heroin?
A: No, sir.
Q: And you have never told anybody that you would try to get heroin to sell to them?
A: No, sir.
Q: Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year.
A: I don't understand you, sir.
Q: Have you talked to anybody about selling heroin to them during the last year?
A: No, sir.
Q: You are sure about that?
A: I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.
Q: Has anyone ever asked you if they could buy an ounce of heroin or more from you?
A: No, sir.
Q: Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?
A: No, sir.
Q: No one has ever given you any money—
A: No.
Q: —to go buy them heroin?
A: No, sir . . . .
Q: In other words, if you had $650 right now . . .
A: Yes, sir.

jury, and the fifth amendment does not preclude the prosecution's introduction of perjurious statements.[11] Aside from the questionable fairness of the prosecution's tactics in interrogating Mandujano in this manner,[12] the decision is consistent with prior Supreme Court pronouncements relating to perjury.

Nevertheless, in the course of its opinion, the Court seemingly felt that a grand jury witness need not be warned of his constitutional privilege[13] and apparently indicated that the right to counsel does not attach to any such witness.[14] This article will first examine the potential for abuse created by *Mandujano*, and will then contrast the Court's rationale with other decisions recognizing parallel rights at other stages of the criminal process.

A grand jury proceeding qualifies as a "criminal case" for purposes of the fifth amendment,[15] even though no formal charges have

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Q: . . . [d]o you think you would be able to purchase an ounce of heroin?

365 F. Supp. at 157 n.1. There is no doubt that a claim of fifth amendment privilege could have been validly asserted.

11. *See, e.g.*, United States v. Knox, 396 U.S. 77 (1969); Bryson v. United States, 396 U.S. 64 (1969); Glickstein v. United States, 222 U.S. 139 (1911).

12. The district court felt that the "questioning of the defendants before the grand jury smacks of entrapment." 365 F. Supp. at 158. The court of appeals agreed, stating that the "questioning was primarily baiting Mandujano to commit perjury," as the Government knew full well that a truthful response would have caused him to confess a crime. 496 F.2d at 1055. It is clear that the questioning was aimed at incriminating the witness; he was asked about heroin purchases which *he made* rather than being asked about heroin dealers known to him. Further, since no new evidence was elicited through the questioning the unfolding of subsequent events demonstrated that sufficient evidence already existed to indict Mandujano for the substantive narcotics offense. Thus, it would seem that the prosecution was seeking either a binding admission of guilt or, in the alternative, to invite a further violation of law. While it is doubtful that an entrapment defense could have been asserted successfully (*see* Hampton v. United States, 96 S. Ct. 1646 (1976)), it is here that the specter of fundamental unfairness is raised by this prosecutorial action. Perhaps, as Justice Brennan suggests, the prosecutorial action will vitiate the willfullness of Mandujano's false testimony and will thus make difficult the Government's task of establishing this element of the statutory offense. 96 S. Ct. at 1654 (concurring opinion).

13. *See* 96 S. Ct. at 1781 n.1. It is submitted that the warning given this witness (see note 3 *supra*), to which the Court seemed to attach some weight, was tantamount to no warning at all. A perusal of the warning shows that its emphasis was aimed at compelling full disclosure, and did not attempt to define or delimit the concept of self-incrimination. It is contended that if this warning was deemed adequate by the Court, then a record totally devoid of a *Miranda*-type warning would nevertheless compel the same result.

14. 96 S. Ct. at 1779.

15. United States v. Monia, 317 U.S. 424 (1943).

been brought against the subpoenaed witness.[16] It has been held, however, that one who anticipates questions concerning his or her own criminal involvement may not assert a blanket privilege; instead, the privilege may be raised only in response to particular questions.[17] Moreover, the privilege *must* be asserted if it is to be preserved.[18] Once the incriminating response has been made, the privilege is deemed to have been waived.[19] An indictment based upon evidence so obtained is clearly valid.[20] Further, the grand jury testimony will, of course, be admissible at trial if the witness is subsequently charged with a crime.[21]

While it is clear that a person who has been formally charged is better able to resist self-incrimination because he is aware of the charges against him and is much more likely to have sought legal counsel who has explained the scope of his fifth amendment protection,[22] the Supreme Court adheres to the view that the mere fact that a witness is a suspect does not relieve him of the duty to testify, nor does his appearance preclude the grand jury from subsequently indicting him.[23] Thus, the indicted witness can resist, but the person already under suspicion, who has not been indicted, must, without the benefit of counsel, respond to questions which might furnish the government with damaging evidence admissible at trial, remain

16. Counselman v. Hitchcock, 142 U.S. 547 (1892).

17. *See, e.g.*, United States v. Benjamin, 120 F.2d 521 (2d Cir. 1941); O'Connell v. United States, 40 F.2d 201 (2d Cir.), *cert. dismissed*, 296 U.S. 667 (1930). *See also* 8 WIGMORE, EVIDENCE § 2268 (McNaughton rev. 1961).

18. Garner v. United States, 96 S. Ct. 1178 (1976); United States v. Monia, 317 U.S. 424, 427 (1943).

19. Rogers v. United States, 340 U.S. 367 (1951). The witness also runs the risk of falling prey to the rule that "where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details." *Id.* at 373.

20. United States v. Calandra, 414 U.S. 338 (1974); Lawn v. United States, 355 U.S. 339 (1958).

21. 8 WIGMORE, EVIDENCE § 2363 (McNaughton rev. 1961).

22. *See* 96 S. Ct. at 1786 (Brennan, J., concurring). It has been held that the person indicted may successfully avoid even the duty to appear before the grand jury. *See* United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y.), *appeal dismissed sub nom.* United States v. Roth, 208 F.2d 467 (2d Cir. 1953). *See also* MCCORMICK, EVIDENCE §§ 257-59 (2d ed. 1961); 8 WIGMORE, EVIDENCE § 2363 (McNaughton rev. 1961); Note, *Self-Incrimination Before a Federal Grand Jury*, 45 IOWA L. REV. 564 (1960).

23. United States v. Dionisio, 410 U.S. 1, 10 n.8 (1972). A minority of states would grant a motion to quash an indictment based upon self-incriminating grand jury testimony and the "fruits" of that testimony. *See* cases cited in Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189, 191 n.12 (1966).

silent and risk contempt or rest upon his layman's understanding of his right to avoid self-incrimination. Had the grand jury maintained its traditional role in our legal system as "a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens . . . ,"[24] the necessity of warning the witness of his rights would be greatly diminished. However, it has been stated that the grand jury's "decision to indict or not is usually a rubber stamp of what the prosecutor has already determined,"[25] and that "[a]ny experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."[26] Thus, if the defendant is not accorded adequate procedural protection, the grand jury can be utilized as a most effective discovery tool, notwithstanding constitutional and statutory prohibitions.[27] As pointed out in *Michigan v. Tucker*,[28] the fifth amendment right at trial would be an empty one indeed if its force could be circumvented by this type of prosecutorial action at the "pre-indictment" stage.

## II. The Right to Remain Silent and the Fifth Amendment

The court rejected the proposition that *Miranda*[29] warnings were applicable to this situation because of the "marked contrasts between a grand jury investigation and custodial interrogation."[30] Further, it emphasized the technical inapplicability to a grand jury proceeding of the *Miranda* warnings concerning the right to remain silent. While the detainee has an absolute right to refuse to respond to police interrogation, and by indicating a desire to remain silent may force the police to stop questioning him, the grand jury witness

24. 96 S. Ct. at 1774.

25. Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1966).

26. Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972), *quoted in* United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

27. Fed. R. Crim. P. 16(c) severely limits the prosecution's discovery rights. *See* Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 Mich. St. B.J. 693, 700 (1971).

28. 417 U.S. 433 (1974).

29. Miranda v. Arizona, 384 U.S. 436 (1966). The four-part warning required by *Miranda* before a suspect may be subjected to custodial interrogation consists of the following: (a) you have the right to remain silent; (b) anything that you say may be used against you; (c) you have a right to an attorney and to have him present; and (d) if you cannot afford an attorney, we will appoint one. *Id.* at 479.

30. 96 S. Ct. at 1778.

has only the right to avoid self-incrimination and must respond to the succeeding question.[31]

It is clear that the main thrust of *Miranda* is to obviate the effect of the compulsion exerted by police where a defendant is being questioned while in custody or "otherwise deprived of his freedom of action in any significant way."[32] Nevertheless, the *Miranda* Court also realized that the compulsion is often psychological rather than physical[33] and that the goal of its decision was to "insure that the statements were truly the product of free choice"[34] by informing the suspect of his fifth amendment privilege in a situation which is "inherently compelling."[35]

While it cannot be disputed seriously that "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations where there are often impartial observers to guard against intimidation or trickery,"[36] it is equally true that the grand jury room is a coercive atmosphere for the solitary witness. The witness is confronted with a three-pronged compulsion: (1) that insistence upon his right to remain silent might create the inference of guilt;[37] (2) that an invalid claim of privilege might result in a contempt charge; and (3) that failure to be truthful can result in a perjury prosecution. In the stationhouse, one must be warned of his fifth amendment rights because of the presumed compulsion exerted by the interrogators. It would follow, therefore, that warnings should be given in the grand jury room where there are *real legal sanctions* which necessarily effect the voluntariness of any response to an incriminating question.

The fifth amendment guarantees "the right of a person to remain silent [in response to incriminating questions] unless he chooses to

31. *Id.* at 1779. The Court seemingly attached significance to the warning given Mandujano. *See* note 3 *supra*. It is submitted, as the lower courts found, that the warnings did little to convey to the witness his fifth amendment rights, but rather emphasized the need to answer every question truthfully. *See also* note 13 *supra*.

32. 384 U.S. at 445.

33. *Id.* at 448.

34. *Id.* at 457.

35. *Id.* at 467.

36. *Id.* at 461.

37. *See* Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189, 197 (1966). *See also The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 222-23 (1964).

speak in the unfettered exercise of his own will."[38] The Supreme Court has defined the constitutional standard for waiver of such a guarantee as "an *intentional* relinquishment or abandonment of a *known* right or privilege."[39] Before admitting a statement rendered in the stationhouse, where the right to remain silent is absolute, not only do courts require a showing that the right was made known to the suspect, they also demand compliance with procedures intended to demonstrate affirmatively that waiver of that right was both unequivocal and voluntary.[40] Should we allow the summoning of a suspect before the grand jury—where his right to remain silent is tempered by the public's countervailing right to every person's evidence and where he faces the additional hazard of legal sanctions for wrongful invocation of that right—to extract damaging testimony from his own mouth without first explaining to that witness the nature and scope of his right, and then state in retrospect that the witness voluntarily abandoned his fifth amendment protection? To accept this is to tolerate the "subversion of the adversary process."[41]

To require that a warning be given to the grand jury witness who is suspect does not place an excessively onerous burden upon prosecutors. If it impedes the extraction of incriminating data, so be it;[42] such a result would be consistent with at least the spirit of the fifth amendment. However, it is doubtful that the majority of those subpoenaed would be entitled to that right, as most grand jury witnesses are not "suspects," de facto defendants or the objects of

38. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

39. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973).

40. Even where the stationhouse suspect is warned of his rights, the Government has a heavy burden of showing that waiver was informed and voluntary. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966). *See, e.g.*, United States v. Guzman-Guzman, 488 F.2d 965 (5th Cir. 1974). Compliance with the mandate of *Miranda* does not terminate inquiry into the issue of voluntariness. *Id.* Nor will they end their inquiry when presented with a written waiver of rights form. *See, e.g.*, United States v. Hayes, 385 F.2d 375, 377 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968). Instead, courts will scrutinize the individual facts of the particular case. *See, e.g.*, Narro v. United States, 370 F.2d 329 (5th Cir. 1966). Does it follow, therefore, that in the grand jury situation, where failure to claim the privilege will invariably be deemed a waiver, that the courts should demand that the right to withhold response to an incriminating question be fully explained to the grand jury's suspect?

41. 96 S. Ct. at 1788 (Brennan, J., concurring).

42. *See id.* n.17.

a prosecutorial focus.[43] Moreover, several courts, pursuant to various configurations, have for years required that the witness be afforded adequate warnings in a situation where prosecution was either contemplated by the government or where sufficient facts existed for the issuance of the indictment when the witness/suspect was called.[44]

## III. The Right to Counsel

The Court, finding that no criminal proceedings had yet been instituted against Mandujano,[45] and relying upon *In re Groban*,[46] rejected the notion that a witness even in the position of a virtual defendant should be entitled to the assistance of counsel.[47]

*Groban* concerned the interrogation of a witness by a state fire marshal who was fulfilling his statutory duty to investigate the cause of fires. The majority felt that the proceedings did not constitute a criminal prosecution within the meaning of the sixth amendment. In a vigorous dissent, Justice Black expressed his belief that

> [t]he Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law enforcement officers which may be instrumental in his prosecution and conviction . . . .[48]

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43. *See* text accompanying notes 91-98 *infra* discussing the facts which would entitle a person to the protections examined in this article.

44. *See, e.g.* United States v. Friedman, 445 F.2d 1076, 1088 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970); United States v. Levinson, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); United States v. Di Michele, 375 F.2d 959 (3d Cir.), *cert. denied*, 389 U.S. 838 (1967); United States v. Luxenberg, 374 F.2d 241, 246 (6th Cir. 1967); Kitchell v. United States, 354 F.2d 715, 720 (1st Cir.), *cert. denied*, 384 U.S. 1011 (1966); United States v. Orta, 253 F.2d 312 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958). *See also* cases cited in United States v. Mandujano, 96 S. Ct. 1778, 1788 n.18 (1976).

45. The Court cited Kirby v. Illinois, 406 U.S. 682 (1972), as authority for using this cut-off date as the triggering mechanism for sixth amendment rights.

46. 352 U.S. 330, 333 (1957) (witness has no right to counsel at an investigatory proceeding).

47. 96 S. Ct. at 1779. The Court, having previously ruled *Miranda* inapplicable as it pertained to warning the grand jury witness of his fifth amendment rights, logically rejected the proposition embraced by *Miranda* that the presence of an attorney is necessary to protect the witness' right to be free from self-incrimination. *Id.* at n.6.

48. 352 U.S. at 344 (Black, J., dissenting).

The pressures operating against the will of the witness clearly are greater in the grand jury room and it might well be presumed that a prosecutor can more skillfully frame questions aimed at eliciting incriminating data. Moreover, it has been suggested that *Groban* has lost its vitality in light of more recent Supreme Court pronouncements in the area of criminal procedure.[49] Two Justices of the five-member *Groban* plurality subscribed to the view by stating:

> We are not justified in invalidating this Ohio statute on the assumption that people called before the Fire Marshal would not be aware of their privilege not to respond to questions the answers to which may tend to incriminate. At a time when this privilege has attained the familiarity of the comic strips, the assumption of ignorance about the privilege by witnesses called before the Fire Marshal is too far-fetched an assumption on which to invalidate legislation.[50]

A decade later, the *Miranda* Court expressly rejected that assessment:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.[51]

Three other Justices attached controlling weight to the fact that the state inquiry was nothing more than an administrative proceeding, not a criminal trial, wherein no criminal liability was determined.[52] It is unfortunate that the *Mandujano* Court relied upon so questionable a precedent as *Groban*, where three Justices drew a "mechanistic distinction"[53] as a basis for their decision and two others relied upon the since-discarded notion that no one need be informed of basic constitutional rights.[54] Pursuant to any one of

49. Note, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97, 126.

50. *In re* Groban, 352 U.S. 330, 337 (1957).

51. Miranda v. Arizona, 384 U.S. at 468.

52. *In re* Groban, 352 U.S. at 332.

53. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); Powell v. Alabama, 287 U.S. 45 (1932).

54. *See* Note, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97, 127.

three avenues of constitutional analysis, existing precedent seemingly would mandate the right to counsel in this situation.

### A. *Grand Jury Examination as a Critical Stage*[55]

> [T]he accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial.[56]

Therefore, each court must "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[57] Thus, the Supreme Court has recognized the right to counsel at pretrial arraignment where certain rights may be lost,[58] at a pretrial line-up[59] and at a preliminary hearing.[60] While it is technically true that the suspect called before the grand jury is not an "accused" or a "defendant," the unfettered prosecutorial discretion as to the timing of an indictment[61] has caused numerous courts to recognize that such a person is a "potential defendant,"[62] a "de facto defendant"[63] or one "virtually in the position of a defendant."[64] Any formalistic rejection of this notion would lose sight of the fact that "potential substantial prejudice to the defendant's rights inheres in the particular (grand jury) confrontation"[65] and that the assistance of counsel would help the witness avoid that prejudice by advising him when to interpose his fifth amendment privilege.

Professor Samuel Dash urges that the characterization of the preliminary hearing as a "critical stage" in *Coleman* requires that the

55. *See generally* Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807 (1972).

56. United States v. Wade, 388 U.S. 218, 226 (1967).

57. *Id.* at 227.

58. White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

59. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

60. Coleman v. Alabama, 399 U.S. 1 (1970).

61. *See* text accompanying notes 25-26 *supra*.

62. *See, e.g.*, United States v. Pepe, 367 F. Supp. 1365, 1369 (D. Conn. 1973).

63. *See, e.g.*, United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

64. United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967).

65. United States v. Wade, 388 U.S. 218, 227 (1967).

grand jury interrogation of a potential defendant be similarly designated.[66] Theoretically, both proceedings are aimed at a determination of probable cause. At the preliminary hearing, the defendant cannot be called as a witness; yet, because of considerations concerning trial, the presence of his attorney is necessary to keep questioning within proper bounds. A fortiori, the grand jury is a critical stage because there the potential defendant *can* be called as a witness, and an incriminating response to an improper question will be frozen for use at trial.

Moreover, recognition of the line-up as a critical stage further underscores the need to extend the right of counsel to the grand jury situation. In the secrecy of the grand jury room, just as in the police station, the proceeding is under the total control of a law enforcement official who may and occasionally does ask prejudicial questions,[67] aimed at extracting incriminating statements from a defendant. The *Wade* Court was wary of proceedings which could "seriously, even crucially, derogate from a fair trial."[68] If it is recognized that a fair trial includes the defendant's right to stay off the witness stand, then the presence of an attorney is needed to deter the prosecutor from achieving indirectly what he cannot do directly.

### B. *The Grand Jury and* Escobedo[69]

Where the potential defendant is called before the grand jury, it can be argued convincingly that "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect."[70] It is submitted that considerations similar to those which compelled the court to extend the right to counsel in *Escobedo* are equally applicable to the grand jury witness under prosecutorial "focus."

There are three aspects of *Escobedo* which are analogous to the grand jury proceeding. First, in *Escobedo*, the suspect had been "taken into police custody." While the grand jury witness is not

66. Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807 (1972).
67. *Id.* and notes 41-42 *supra*.
68. United States v. Wade, 388 U.S. 218, 228 (1967).
69. Escobedo v. Illinois, 378 U.S. 478 (1964).
70. *Id.* at 490. It should be recalled that the *Miranda* Court announced that that decision did not affect its resolve to "adhere to *Escobedo*." 384 U.S. at 444.

technically in custody, he is nevertheless subject to the same physical constraints; he can't "walk out the door,"[71] nor can he terminate the questioning. Moreover, the compulsions to speak are at least as coercive as the mere fact of custody where one may merely remain mute. Second, the police were carrying out a process of interrogation that lends itself to eliciting incriminating statements from Escobedo. The prosecutor has the same aim when he calls the suspect in a grand jury proceeding; he is interrogating a witness who under most circumstances must answer, and he has been better trained to engage in this process. Finally, the *Escobedo* Court emphasized that the suspect had not been warned effectively of his limited right to remain silent. Thus, it would seem that the focus test of *Escobedo* also requires that the right to counsel attach. "[W]hen the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer."[72]

### C. *Counsel to Preserve Fifth Amendment Rights*

As the plurality in *Mandujano* properly noted, the sixth amendment was not implicated in *Miranda*; rather, the right to counsel "was fashioned to secure the suspect's Fifth Amendment privilege in a setting thought inherently coercive."[73] Even if one were not to embrace the writer's view that the grand jury setting is similarly coercive, it is indisputable that the fifth amendment right is more elusive in the latter atmosphere. The need for counsel in the grand jury room was artfully explained by Justice Black:

> It is said that a witness can protect himself against some of the many abuses possible in a secret interrogation by asserting the privilege against self-incrimination. But this proposition collapses under anything more than the most superficial consideration. The average witness has little if any idea when or how to raise any of his constitutional privileges . . . . [I]n view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it.[74]

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71. 378 U.S. at 479.
72. *Id.* at 492.
73. United States v. Mandujano, 96 S. Ct. 1768, 1779 n.6 (1976).
74. *In re* Groban, 352 U.S. at 345-46 (Black, J., dissenting), *quoted in* United States v.

If the fifth amendment is to have any vitality within the context of the grand jury, the right to counsel must be recognized as a requisite for active exercise of that right.

D. *Right to Counsel: Inside or Outside*

Under the present federal practice, the attorney is not allowed inside the grand jury room; if the witness desires to confer with counsel, he must leave the room.[75] The effective implementation of the right to counsel would require the abandonment of this rule. Since the attorney's role is restricted to advice as to the assertion of the fifth amendment privilege, the attorney must be allowed to hear each question within the context of the questions that preceded it if the advice is to be meaningful. Moreover, the right might well be diminished where the attorney offers advice based upon the witness' rendition of the question rather than in response to the question itself. Additionally, from the perspective of pure administrative economy, it would be wise to allow the attorney inside the grand jury room since the disruptive elements of the present procedure would be eliminated.[76]

The rationale most often proposed to justify exclusion of the attorney from the grand jury room is that it is necessary for the preservation of the secrecy of the proceedings. It is questionable whether this view is valid, since a witness, especially a witness who will be indicted, will relate the questions to his attorney—either during the course of the grand jury inquiry or while preparing a defense for trial.[77] It has been suggested, however, that the underlying consideration is not to maintain secrecy, but to avoid providing a potential defendant with a mechanism for discovery.[78] Given the recent liberalization of discovery rules,[79] exclusion of the attorney seems to be

Mandujano, 96 S. Ct. at 1790 (Brennan, J., concurring). This view was restated recently in Maness v. Meyers, 419 U.S. 449, 466 (1975). *See also The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 221 (1964).

75. FED. R. CRIM. P. 6(d). *See also* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 105 (1969).

76. *See generally* Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972).

77. *Id. See also* Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 818-20 (1972), where he attacks the entire concept of grand jury secrecy as an antiquated legal fiction.

78. *Id.* at 824.

79. FED. R. CRIM. P. 16.

ineffective. Additionally, the exclusion seems patently unfair, since a paramount purpose in summoning the potential defendant is to discover any anticipated defense.

### *E. Counsel and the Indigent Grand Jury Witness*

Mandujano was advised by the prosecutor that he was free to retain counsel if he desired to do so.[80] The plurality viewed this warning as an accurate statement of existing law.[81] By refusing to recognize a constitutional right to counsel in the grand jury, the due process and equal protection clauses are rendered inapplicable[82] as they pertain to the indigent defendant. Thus, the type of witness least equipped to deal with the nuances of the right to avoid self-incrimination will be totally foreclosed from obtaining legal counsel. However, if the witness/suspect's right to counsel before the grand jury is recognized as being a constitutional requirement, it then becomes inescapable that if the witness cannot afford counsel, one must be appointed.[83] "Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would [not] be . . . supportable by reason or logic."[84]

## IV. Fashioning a Remedy

In *United States v. Lawn*,[85] several defendants who had been charged with a criminal information were subpoenaed to appear before a grand jury investigating activities upon which the informations were based. The subsequent indictments were challenged on

80. *See* note 3 *supra*.

81. United States v. Mandujano, 96 S. Ct. at 1779.

82. In the area of the rights of the criminal defendant, a state, where it provides a certain procedural mechanism, may not withhold that right from certain persons because of their inability to pay for that right. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18-19 (1956). The equal protection clause of the fourteenth amendment has, of course, been recognized as being applicable to the federal government through the fifth amendment.

83. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

84. Miranda v. Arizona, 384 U.S. at 472-73.

85. 115 F. Supp. 674 (S.D.N.Y.), *appeal dismissed sub nom.* United States v. Roth, 208 F.2d 467 (2d Cir. 1953). *See also* United States v. Scully, 225 F.2d 113 (2d Cir. 1955); Maffie v. United States, 209 F.2d 225 (1st Cir. 1954); Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); United States v. Edgerton, 80 F. 374 (D. Mont. 1897).

the basis that the defendants were compelled to testify without receiving adequate warnings of their right to remain silent. The district court ordered the indictments quashed because compelling the defendant to appear before the grand jury invalidated the indictment in the same way that compelling the defendant to assume the witness stand would invalidate the trial.[86] By logical extension, one might argue that the same reasoning would require the quashing of an indictment based upon the grand jury testimony of a witness upon whom the government has focused its investigation.

It would, however, seem doubtful that a proper remedy would be to quash the indictment. Historically, grand jurors have been allowed to draw upon all types of information. It may be based upon hearsay[87] or upon illegally-seized evidence.[88] Since the grand jury is not adjudicating the issue of guilt or innocence, it would seem that to quash is a radical step which would too often preclude the prosecution of clear criminal violations because of the indiscretion of a prosecutor. It would obviously be a useless exercise to require the government to reconvene a grand jury and again present all the evidence save for the incriminating remark.

A more rational remedy would be to prohibit the introduction of an incriminating statement at trial. This approach would seem to strike a satisfactory balance between the defendant's fifth amendment rights and the public's interest in the enforcement of the criminal laws. Just as the motion to suppress may be utilized to vindicate the constitutional rights of the victim of an illegal search, a similar motion should be entertained where the government has wrongfully invaded the witness' right to resist compelled self-incrimination. The Supreme Court has expressed a view that the use of the exclusionary rule should be restricted "to those areas where its remedial objectives are thought most efficaciously served."[89] The availability of the exclusionary rule would insure that any witness/suspect called before the grand jury would be satisfactorily warned of his rights and would be provided with counsel to protect these rights. As the Court has recognized, "the need for

86. 115 F. Supp. at 677.
87. United States v. Costello, 350 U.S. 359 (1956).
88. United States v. Calandra, 414 U.S. 338 (1974).
89. *Id.* at 348.

deterrence and hence the rationale for excluding the evidence are strongest where the government's unlawful conduct would result in the imposition of a criminal sanction on the victim."[90]

## V. When Does the Right Attach?

Several courts have recognized the necessity to warn grand jury witnesses of their fifth amendment rights when they have achieved a certain status. Some jurisdictions have required that an indicted witness be advised of his right against self-incrimination *and* that he affirmatively waive that right before any questions may be asked of him by the prosecutor.[91] A more limited number of courts have held that the probable or de facto defendant, one whose prosecution is contemplated but who has not been formally charged, is entitled to a similar admonition,[92] while they have denied the same right to one who is merely a "possible defendant."[93]

It is clear that the de facto defendant should be afforded the same treatment as his de jure counterpart, since important rights should not be subject to the power of the prosecutor to manipulate the timing of the indictment.[94] Further, the application of this probable-possible dichotomy is susceptible to criticism on the ground that so important a right should not depend upon so precarious a distinction; what quantum of evidence is required to change one's status from possible defendant to probable defendant? Moreover, where such distinctions are made, "the witness' rights depend on the prosecutor's subjective intent."[95]

A more rational approach is suggested by Justice Brennan in his concurring opinion: where probable cause, measured by objective standards, exists for the indictment of a particular suspect, he must be informed of his right to remain silent when asked incriminating questions, and he should not be interrogated until he has affirma-

90. *Id.*

91. *See, e.g.*, United States v. Miller, 80 F. Supp. 979, 981 (E.D. Pa. 1948).

92. *See, e.g.*, United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

93. *See* Comment, *The Grand Jury Witness' Privilege Against Self-Incrimination*, 62 Nw. U.L. Rev. 207, 222-26 (1967).

94. Note, *Self-Incrimination Before a Federal Grand Jury*, 45 Iowa L. Rev. 564, 574 (1960).

95. Comment, *The Grand Jury Witness' Privilege Against Self-Incrimination*, 62 Nw. U.L. Rev. 207, 223 (1967).

tively demonstrated his desire to waive that right.[96] In addition, he should be allowed the presence of counsel to explain the applicability of that right to any particular line of questioning. Such a standard would obviate the need to speculate as to the intent of the prosecutor or to apply standards which are not susceptible to precise definition. No hardship would result to the government in terms of "constitutionally permissible criteria."[97] If such a standard were to be applied and enforced through implementation of an exclusionary rule, prosecutors would learn to resolve any doubt in favor of the putative defendant.[98]

## VI. Conclusion and Proposed Warnings

The *Mandujano* decision correctly holds that one who testifies falsely under oath cannot seek to exclude his statements from a subsequent perjury prosecution. However, the Court went beyond that basic proposition and intimated that the grand jury witness need not be advised of his fifth amendment rights nor need he be provided with counsel, even where probable cause to indict the suspect exists prior to the issuance of the subpoena.[99] The opinion indicates that had Mandujano incriminated himself, those statements would have been admissible at trial.

This article has demonstrated that such a view is inconsistent with the protection afforded by the fifth amendment to a person suspected of criminal involvement. The grand jury room exudes pressures on a witness which are as great, if not identical, to those created by custodial interrogation. Thus, it would seem that a *Miranda* warning of the right not to speak is equally necessary

96. United States v. Mandujano, 96 S. Ct. at 1787 (Brennan, J., concurring).

97. *Id.* at n.15.

98. Justice Brennan expressed his concern about the need to protect the "possible" defendant whose testimony before the grand jury furnishes sufficient evidence to satisfy the objective probable cause standard. *Id.* It is suggested that such a situation is unlikely to arise. As stated, close cases will be resolved in favor of the witness. In those cases wherein the probable cause standard is not even approached, the dangers encountered by Mandujano will not be present; the less the prosecutor knows, the more difficult it is for him to frame an incriminating question which will not immediately alert even the most ignorant witness that he need not respond to the question.

99. Probable cause to indict necessarily existed at the time Mandujano was subpoenaed, as while he feigned ignorance, the grand jury nevertheless indicted on the substantive drug charge.

within the context of the grand jury. Moreover, since that right is not absolute before the grand jury, and since severe sanctions are available for wrongful invocation of that right, the presence of counsel would seem necessary for its meaningful protection. Alternatively, because in such a situation, the grand jury is a critical prosecutorial stage and because the government has focused upon a particular suspect, the sixth amendment seemingly should attach independently. To make such representation meaningful, counsel should be allowed in the courtroom, and the availability of counsel should not be made contingent upon financial capability.

Thus, in the interest of effectuating the purpose and spirit of the fifth amendment, as well as achieving consistency with other Supreme Court decisions in this area, the author suggests that where probable cause exists to indict a suspect, he should be given the following warnings prior to his being interrogated before the grand jury:

> (1) You need not respond to any question where your answer will in any way implicate you in the commission of a crime.
> (2) Your refusal to answer an incriminating question will not be held against you.[100]
> (3) If, however, you do incriminate yourself, that statement will be used against you.
> (4) You are entitled to have an attorney present, and you may consult with him before responding to any question.
> (5) If you cannot afford a lawyer, one will be appointed to represent you.

Any incriminating evidence elicited without this admonition should be vulnerable to suppression at a subsequent trial. The integrity of the adversarial process will tolerate nothing less.

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100. Such a warning would be an accurate reflection of the current status of the law. *See* Grunewald v. United States, 353 U.S. 391 (1957).