CRIMINAL PROCEDURE—GRAND JURY—GOVERNMENT MUST DEMONSTRATE RELEVANCY PRIOR TO SEEKING ENFORCEMENT OF GRAND JURY SUBPOENAS THROUGH CIVIL CONTEMPT—*In re Grand Jury Proceedings (Jacqueline Schofield)*, 486 F.2d 85 (3d Cir. 1973).

Jacqueline Schofield was subpoenaed on April 5, 1973, to testify before a federal grand jury sitting in Philadelphia, Pennsylvania.[1] She obeyed the subpoena and was then directed by an Assistant United States Attorney to submit samples of her handwriting to the Government and to allow her fingerprints and photograph to be taken.[2] Mrs. Schofield was not, however, asked to give any oral testimony before the grand jury, nor was she given any rationale as to why the information was being requested. After conferring with counsel, she refused to comply with these requests which had been made in the presence of the jury.[3]

The Government moved to enforce the grand jury subpoena in the federal district court. As a result, an order was entered by the court requiring the witness to present herself to the local offices of the Federal Bureau of Investigation within ten days to provide the exemplars and identification originally sought by the grand jury.[4] Jacque-

[1] The subpoena which "commanded" Mrs. Schofield to appear at the United States Court House was printed on a standard form issued by the Office of the Clerk, Eastern District of Pennsylvania and signed by a deputy clerk. The subpoena was captioned as follows: "United States of America v. Grand Jury Investigation." The document indicated the place, time, and date at which Mrs. Schofield was required "to testify in the above-entitled case." *See* Brief for Appellant at A-2, *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85 (3d Cir. 1973) [hereinafter cited as Brief for Appellant]. Pursuant to FED. R. CRIM. P. 17(a), this type of subpoena is delivered blank to the United States Attorney, who then fills in the pertinent information prior to its being served. *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85, 87 (3d Cir. 1973).

[2] *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85, 87 (3d Cir. 1973).

[3] *Id.*

[4] *Id.* at 87-88. The enforcement procedure is well outlined in the context of a criminal contempt conviction in *In re* Hitson, 177 F. Supp. 834 (N.D. Cal. 1959), *rev'd on other grounds sub nom.* Shane v. United States, 283 F.2d 355 (9th Cir. 1960). The district court outlined a fifteen point procedure which included some of the requirements summarized as follows.

First, the witness is summoned before a grand jury and placed under oath. A pertinent question must be asked to the witness either by the prosecutor or a member of the grand jury. After refusing to answer, the witness, grand jury, and prosecuting official must come before the district court. The court must then be informed of the occurrences before the jury. The district court judge considers the question asked and any defense which may be proposed by the witness. If the defense advanced by the witness is adjudged to be insufficient, the court instructs the witness to answer the questions asked. Should the witness continue to refuse to answer, the witness' action is again reported to the court. At this

line Schofield refused to comply with the court order, and the Government then moved for an order to show cause why she should not be held in civil contempt in accordance with 28 U.S.C. § 1826(a)[5] and FED. R. CRIM. P. 17 (g).[6]

Throughout the district court proceedings, Mrs. Schofield urged that two conditions should be met by the Government prior to her being compelled to obey the grand jury subpoena. These conditions would have required the Government to file a statement of purpose in requesting the exemplars, fingerprints, and photographs, as well as to provide for inspection by the witness of any documents allegedly signed by her.[7] These requests were rejected, however, by the district court at the contempt hearing which ensued.[8] As a consequence, Mrs. Schofield was ordered to be held in civil contempt[9] until such time as she would comply with the subpoena's requirements.[10]

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point, the district court may find the witness to be in either civil contempt, or, as in *Hitson*, criminal contempt pursuant to FED. R. CRIM. P. 42(a). 177 F. Supp. at 837-38. For a discussion of the distinctions between civil and criminal contempt see note 9 *infra*.

5 28 U.S.C. § 1826(a) (1970) reads as follows:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
> (1) the court proceeding, or
> (2) the term of the grand jury, including extensions,
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

6 *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85, 88 (3d Cir. 1973). FED. R. CRIM. P. 17(g) states:

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

7 *In re* Grand Proceedings (Jacqueline Schofield), 486 F.2d 85, 88 (3d Cir. 1973).

8 The only findings made by the district court at this time were that Jacqueline Schofield had

> refused to submit and furnish samples of her handwriting and handprinting and having refused to allow her fingerprints and photograph to be taken, all in violation of this Court's Order . . . .

Brief for Appellant at A-8.

9 *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85, 88 (3d Cir. 1973). Civil contempt differs from criminal contempt in a number of significant ways. Chief among these is that the purpose of civil contempt is to place "the keys of their prison in their [recalcitrant witnesses'] own pockets." *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902). Thus, civil contempt is coercive rather than punitive in nature. Conversely, the purpose of criminal contempt is to vindicate the court. For a general discussion of these and other distinctions see Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-44 (1911); Wright,

On appeal to the United States Court of Appeals for the Third Circuit, the court closely reviewed

> the procedural steps which must be followed and the factual showing which must be made before a district court may adjudge a [grand jury] witness in civil contempt pursuant to 28 U.S.C. § 1826(a) and Fed. R. Crim. P. 17(g).[11]

After considering this issue, the court reversed the finding of contempt in *In re Grand Jury Proceedings (Jacqueline Schofield)*.[12] The court held that the Government must make a showing of relevancy by affidavit before a district court may properly enforce a grand jury subpoena by means of civil contempt. In reaching this conclusion, the court defined several functions of the grand jury with regard to its role in collecting information.

Writing for the majority, Judge Gibbons emphasized the contemporary view of the grand jury's effect by noting that federal grand juries are " 'basically . . . a law enforcement agency.' "[13] Furthermore, the grand jury's function was viewed "for all practical purposes [as] an investigative and prosecutorial arm of the executive branch of government."[14] While this opinion is illustrative of one attitude, the grand jury has been viewed in other contexts. From varying perspectives, it also has been considered "a primary security to the innocent against hasty, malicious and oppressive prosecution."[15]

Although the lineage of the grand jury system cannot be traced with exact certainty, the earliest ancestor of our present grand jury seems to have originated in England.[16] It was employed in various capacities from as far back as 1166 during the reign of King Henry

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Byrne, Haakh, Westbrook, & Wheat, *Civil and Criminal Contempt in The Federal Courts*, 17 F.R.D. 167 (1955).

10 *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85, 88 (3d Cir. 1973).

11 *Id.*

12 486 F.2d 85, 94 (3d Cir. 1973).

13 *Id.* at 90 (quoting from United States v. Cleary, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959)).

14 486 F.2d at 90. *Cf.* United States v. Bailey, 332 F. Supp. 1351, 1354 (N.D. Ill. 1971).

15 Branzburg v. Hayes, 408 U.S. 665, 687 n.23 (1972) (quoting from Wood v. Georgia, 370 U.S. 375, 390 (1962)); *see* Hale v. Henkel, 201 U.S. 43, 59-66 (1906).

16 The grand jury system was employed by various early European groups such as the Romans and Scandinavians. However, our present institution has been so influenced by the English model as to largely preclude any effect by these other sources. *See generally* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 140-41 (2d ed. 1898); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 703 (1972).

17 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 642 (2d ed. 1898). *See also* United States v. Smyth, 104 F. Supp. 283, 288-89 (N.D. Cal. 1952).

II,[17] until 1933 when it was formally abolished.[18] From its inception until 1681, the grand jury functioned in close association with the powers of the monarch.[19]

With the *Trial of Stephen Colledge*[20] and the *Earl of Shaftesbury's Case*,[21] the concept of the grand jury as an institution free from royal dependence initially emerged.[22] Also, it was in those cases that the element of secrecy was introduced into the grand jury proceedings against the wishes of the monarch. Both of the accused were alleged to have committed high treason against the Crown. In each of these matters, the grand juries were required to conduct their proceedings publicly as commanded by the Crown's counsel. However, after conducting open examinations, the juries insisted upon rehearing testimony in private and conducting closed deliberations. After following this procedure, the grand jury refused to indict in both cases. These acts signaled a new stage in the evolution of grand jury inquiries by shifting the emphasis toward a position of neutrality between the accused and the prosecutor.[23] As a result, the grand jury came to be viewed as a basis of protection for the individual accused of crime.

It was in this context that the grand jury was incorporated into the American judicial system during colonial times.[24] The institution was then formally guaranteed with the adoption of the fifth amendment to the United States Constitution.[25] The responsibility of the grand jury in this country was then, as it remains to present day, threefold.[26] First, the grand jury is charged with investigating crimes or

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18 Administration of Justice (Miscellaneous Provisions) Act of 1933, 23 & 24 Geo. 5, c. 36 § 1, at 578-79.

19 *See* R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 1-4 (1963); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & C. 174, 175 (1973); Schwartz, *supra* note 16, at 705-07.

20 8 Cob. St. Tr. 550 (1681).

21 8 Cob. St. Tr. 759 (1681).

22 For an excellent discussion of these cases see Schwartz, *supra* note 16, at 710-21.

23 *See* R. YOUNGER, *supra* note 19, at 2.

24 *Id.* at 15-16.

25 U.S. CONST. amend. V provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger . . . .

26 Campbell, *supra* note 19, at 177; Comment, *Grand Jury Proceedings: The Prosecutor, the Trial Judge and Undue Influence*, 39 U. CHI. L. REV. 761, 763 (1972). Some commentators have claimed that these responsibilities generally fall into an accusatorial and investigatorial function. *See, e.g.*, Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394-402, 436-47 (1958), wherein the author stated:

> The grand jury serves two great functions. One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against un-

"public offenses" committed within its jurisdiction.[27] Second, it must determine who is responsible for the offense, and then decide whether probable cause exists to charge that individual with the crime.[28] Finally, the body must formulate a public indictment, presentment, or report.[29]

The use and function of the grand jury as incorporated in the Constitution has consistently been upheld and even encouraged by the Supreme Court.[30] This attitude is well demonstrated by the discussion in *Ex parte Bain*.[31] The Court, in quoting from a jury instruction concerning the function of the grand jury, explained that the institution served

> "as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from

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> founded or malicious prosecutions by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt. The inquisitorial function has been called the more important.

Id. at 394 (footnotes omitted).

27 Campbell, *supra* note 19, at 177; Comment, *supra* note 26, at 763. *See also* Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

28 Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). The Supreme Court has indicated in a number of cases what this probable cause standard should be. *See, e.g.*, Beavers v. Henkel, 194 U.S. 73 (1904), wherein the Court stated:

> "A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities . . . ."

Id. at 84 (quoting from 4 W. BLACKSTONE, COMMENTARIES *303). For a district court view see United States v. Atlantic Comm'n Co., 45 F. Supp. 187, 192 (E.D.N.C. 1942).

29 In United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952), the court indicated:

> Under the Federal Constitution, a grand jury may either present or indict. The word "presentment" technically characterizes the process whereby a grand jury initiates an independent investigation and asks that a charge be drawn to cover the facts should they constitute a crime.

Id. at 295 (footnotes omitted).

30 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681-82, 686-88, 695-700 (1972); Kastigar v. United States, 406 U.S. 441, 443-44 (1972); Hale v. Henkel, 201 U.S. 43, 59-65 (1906). As to the position long accorded the grand jury in the United States system of justice see Levine v. United States, 362 U.S. 610 (1960), wherein Justice Frankfurter stated:

> The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes.

Id. at 617 (quoting from Cobbledick v. United States, 309 U.S. 323, 327 (1940)). *See also* Crowley v. United States, 194 U.S. 461, 475 (1904) (grand jury indictment may not be treated as an information); Hurtado v. California, 110 U.S. 516, 534 (1884) (information may not be a substitute for grand jury consideration of aggravated crimes); United States v. Hill, 26 F. Cas. 315 (No. 15,364) (C.C.D. Va. 1809) (grand jury's jurisdiction stems from courts, not Congress).

31 121 U.S. 1, 9-12 (1887).

government, or be prompted by partisan passion or private enmity."[32]

While the Supreme Court has demonstrated considerable support for the grand jury system, critics whose membership includes persons from the bench,[33] bar,[34] and academic community[35] have not always agreed that the jury's theoretical function was matched by its operation in practice.[36] Generally, these criticisms relate to the protection of the individual from alleged prosecutorial manipulation coupled with a lack of meaningful control by the district court.[37]

Although the grand jury is technically a creation of the district court,[38] the judiciary provides little supervision over the jury's activities.[39] For example, the district court exercises no real power over the

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32 *Id.* at 11 (quoting from Charge to Grand Jury, 30 F. Cas. 992, 993 (No. 18,255) (C.C.D. Cal. 1872)).

33 *See* Antell, *The Modern Grand Jury: Benighted Supergovernment,* 51 A.B.A.J. 153 (1965); Campbell, *supra* note 19. *See also In re* Russo, 53 F.R.D. 564 (C.D. Cal. 1971), wherein Judge Ferguson stated:

> Over the years, as fear of the oppressive power of the government has subsided, the government prosecutor has regained substantial influence over the grand jury and, consequently, that institution has lost much of its former independence.

Id. at 569.

34 *See* Foster, *Grand Jury Practice in the 1970's,* 32 OHIO S.L.J. 701 (1971); Kranitz, *The Grand Jury: Past—Present—No Future,* 24 MO. L. REV. 318 (1959).

35 *See* Comment, *Federal Grand Jury Investigation of Political Dissidents,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 432 (1972); Comment, *supra* note 26.

36 For example, one commentator has noted:

> The prevalent belief that the grand jury's historic mission has been to serve as a buffer between the state and the individual helps explain its wide acceptance on the American scene. Yet nothing could be farther from the truth than the thought that the grand jury system was sponsored by an intent to safeguard personal liberty.

Antell, *supra* note 33, at 155.

37 *Id.;* Campbell, *supra* note 19, at 177; Foster, *supra* note 34, at 702; Kranitz, *supra* note 34, at 328; Comment, *Federal Grand Jury Investigation of Political Dissidents,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 432, 444-45 (1972); Comment, *supra* note 26, at 765-69.

38 The grand jury serves as an "arm of the court" which charges and appoints its own members. However, to enforce any of its actions, the grand jury must return to the court, which considers the request and then may or may not accept the grand jury's position. *See In re* Lazarus, 276 F. Supp. 434, 447 (C.D. Cal. 1967); United States v. Smyth, 104 F. Supp. 283, 291-92 (N.D. Cal. 1952); *In re* National Window Glass Workers, 287 F. 219, 224-25 (N.D. Ohio 1922).

39 As a practical matter, the district court judge, once he charges the grand jury as to its functions, intervenes only when necessary to enforce grand jury subpoenas, to grant immunity, or to give advice when requested by the grand jury. Justice Stewart has assessed the relationship between the district court and a grand jury in Brown v. United States, 359 U.S. 41 (1959), *overruled on other grounds,* Harris v. New York, 382 U.S. 162 (1965). There he explained that

> [a] grand jury is clothed with great independence in many areas, but it remains

direction of a grand jury's investigation.[40] The prosecutor, on the other hand, must serve at least two different functions for the grand jury. In one instance, the prosecutor must represent the Government by presenting information, suggesting inquiry, and providing direction to grand jury inquiries.[41] At the same time, he must serve as legal advisor to the grand jury in the ultimate determination of probable cause and other matters.[42] Thus, in the context of the traditional grand jury functions, the prosecutor must fill a number of different and potentially conflicting roles. The opportunity for Government abuse through manipulation of the grand jurors is therefore present if a Government attorney were to simply emphasize one of his functions at the expense of the other.

In addition to the problems presented by the relationship of the judiciary and prosecutor to the grand jury, the difficulties faced by a witness subpoenaed to appear before a jury are numerous. The standard subpoena form used by the United States Government requires no specificity as to why testimony, records or exemplars are being sought.[43]

> an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

Id. at 49.

40 A district court judge does have the power to stop an investigation by dismissing a grand jury "for any reason or for no reason." United States v. Smyth, 104 F. Supp. 283, 292 (N.D. Cal. 1952) (footnote omitted).

41 As one commentator has explained:

> As an officer of the state, he must exert his best efforts to prosecute successfully those who have violated the criminal laws. As an officer of the court, he is required to act as the grand jury's legal advisor, to aid, but not direct, its determination of probable cause.

Comment, *supra* note 26, at 765 (footnotes omitted).

42 Wayne Morse, in his classic study of the grand jury, indicated that the grand jury acted largely only to approve the work of the prosecutor. He stated that grand juries function as "a fifth wheel in the administration of criminal justice." Morse, *A Survey of the Grand Jury System,* 10 ORE. L. REV. 295, 363 (1931). Morse concluded that the grand jury acted to "rubber-stamp" the views of the prosecutor who acts as chief conduit of information to the body. The functions served by the grand jurors, when viewed from their most favorable perspective, were only a duplication of work that could be accomplished by the committing magistrate and the prosecutor. *Id.*

The statistical influence of the prosecutor was shown by the study which concluded in part that:

> Prosecutors probably seldom disagree with grand juries in the disposition of cases as is shown by the fact that out of 6,453 cases, the prosecutors disagreed as to only 348 or 5.39%.

Id. at 362.

43 FED. R. CRIM. P. 17(a) provides the manner in which subpoenas are issued, distributed, and returned. The Rule states:

Such particularization is not included, in part, because the grand jury operates in secrecy. However, this can create difficulty for witnesses in deciding when to invoke both certain constitutional rights[44] and other non-constitutional defenses.[45] Also, in the course of the actual questioning or delivery of items requested by the prosecutor and grand jury, no attorney is permitted to be present in order to offer counsel to the witnesses.[46] Finally, failure to properly respond to a subpoena may cause enforcement proceedings with the accompanying threat of civil or even criminal contempt.[47]

In the cases of *United States v. Dionisio*[48] and *United States v. Mara*,[49] the Supreme Court considered some of these problems and established standards for compelling voice exemplars in a grand jury setting. In *Dionisio*, the Court was presented with a case from the Seventh Circuit,[50] which had ruled that a requested voice exemplar violated a witness' fourth amendment rights[51] absent a preliminary

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A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

44 The court in *Schofield* distinguished between constitutional and non-constitutional defenses. Strict constitutional defenses were illustrated by cases such as Hoffman v. United States, 341 U.S. 479, 485-86 (1951) (self-incrimination as grounds for refusal to answer questions before a grand jury); and Hale v. Henkel, 201 U.S. 43, 76-77 (1906) (unreasonable search and seizure as applying to grand jury inquiries).

In a case decided subsequently to *Schofield*, the Supreme Court, in United States v. Calandra, 94 S. Ct. 613 (1974), set out more definitive guidelines for raising fourth amendment defenses in a grand jury setting. The Court held that the "exclusionary rule" may be raised as a defense only if the grand jury itself, through such means as a subpoena, violated the witnesses' rights. Any evidence obtained by other parties outside of the grand jury context would be allowed to determine probable cause even though inadmissable at trial. *See id.* at 619.

45 Judge Gibbons listed several examples of non-constitutional defenses. 486 F.2d at 91. *See* Electric Bond & Share Co. v. SEC, 303 U.S. 419, 442 (1938) (lack of authority to conduct the investigation); Brown v. United States, 276 U.S. 134, 143 (1928) (requests for so much information as to be unreasonable); McGarry v. SEC, 147 F.2d 389, 392 (10th Cir. 1945) (including of information not pertinent to the inquiry).

46 At this stage of the proceeding the grand jury functions as an investigative body. Thus, courts have taken the view that representation by counsel is not warranted. *E.g.*, *In re* Groban, 352 U.S. 330, 333 (1957); United States v. Corallo, 413 F.2d 1306, 1330 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969).

47 For a discussion of the distinctions between civil and criminal contempt see note 9 *supra*.

48 410 U.S. 1 (1973) [hereinafter cited as *Dionisio*].

49 410 U.S. 19 (1973) [hereinafter cited as *Mara*].

50 *In re* Dionisio, 442 F.2d 276 (7th Cir. 1971).

51 Traditionally, the fourth amendment has been used to attack unreasonable sub-

showing of reasonableness.[52] In reversing the decision, the Supreme Court quoted from *United States v. Doe (Schwartz)*,[53] explaining that

> "no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large."[54]

Thus, since *Dionisio* raised no valid fourth amendment claim in the eyes of the court, there was no corresponding duty to show reasonableness.[55]

Similarly, in *Mara*, the Supreme Court was confronted with the question of an individual's fourth amendment rights when subpoenaed by a grand jury to give handwriting samples.[56] As in *Dionisio*, the lower court had considered the problem and found that there had been a violation of constitutional rights.[57] The Seventh Circuit would have required a showing prior to enforcement that the grand jury investigation was "for a purpose Congress can order," that it was then "properly authorized," that the information requested was relevant to

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poenas in an effort to insure that the grand jury's subpoena power is not "so exercised as to impinge upon the prohibition against unlawful searches and seizures." *In re* Certain Chinese Family Benevolent and Dist. Ass'ns, 19 F.R.D. 97, 99 (N.D. Cal. 1956). As to potential fifth amendment problems, personal handwriting, fingerprints, and photographs fall into a category known as identifying physical characteristics which lie outside of the protection afforded by the fifth amendment privilege against self-incrimination. In Gilbert v. California, 388 U.S. 263 (1967), for example, the Supreme Court explained:

> One's voice and handwriting are, of course, means of communications. . . . [However, a] mere handwriting examplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its [fifth amendment's] protection.

Id. at 266-67.

52 *In re* Dionisio, 442 F.2d 276, 280 (7th Cir. 1971).

53 457 F.2d 895 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973).

54 410 U.S. at 14 (quoting from United States v. Doe (Schwartz), 457 F.2d 895, 899 (2d Cir. 1972)).

55 The reasonableness standard as discussed by Justice Marshall in his dissent to both cases involved a concept that the Court had previously concerned itself with when discussing the elements of a minimal government showing in the enforcement of an administrative subpoena:

> This "reasonableness" requirement has previously been explained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry."

410 U.S. at 48 (Marshall, J., dissenting) (quoting from Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946)).

56 410 U.S. at 20.

57 *In re* September 1971 Grand Jury, 454 F.2d 580, 585 (7th Cir. 1971).

the investigation being conducted, and finally that the grand jury process was not being abused.[58] To accomplish this end, the Government would be required to file an affidavit showing why satisfactory handwriting and printing exemplars could not be obtained by means other than grand jury compulsion.[59] However, the Supreme Court, relying upon *Dionisio,* held that handwriting samples could be compelled without requiring the Government to make a showing of reasonableness.[60]

It is significant to note that in both *Dionisio* and *Mara* the petitions filed in the district court requesting the exemplars stated that they "were 'essential and necessary' to the grand jury investigation."[61] Furthermore, these petitions included the notification that the requested exemplars "would be used solely as a standard of comparison"[62] for the purpose of identification.

Despite the preliminary statements of necessity and proposed use made before the district courts in *Mara* and *Dionisio,* the Supreme Court rulings in these cases served as the sole basis of the Government's arguments in *Schofield.* The Government relied upon the Supreme Court's language in *Mara* which stated that "the Government was under no obligation here . . . to make a preliminary showing of 'reasonableness.' "[63] This language seems to indicate that the Supreme Court, in contrast with the lower court's ruling, had rejected any need for a preliminary demonstration.

The Third Circuit, however, indicated that such a broad application of the construction found in these holdings was unwarranted in view of the facts in *Schofield.* The court reasoned that a reading of *Dionisio* and *Mara* as the Government proposed would limit the role of the district court to a pro forma procedural step in the civil contempt process.[64]

In dealing with the issue of relevance, the Third Circuit attempted to distinguish the difficulties in *Mara* and *Dionisio* with those encoun-

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58 *Id.* at 584-85. This showing is basically the same that Justice Marshall would have required when the Supreme Court considered the issue upon appeal. See note 55 *supra.*

59 *In re* September 1971 Grand Jury, 454 F.2d 580, 585 (7th Cir. 1971).

60 410 U.S. at 21-22.

61 *Dionisio,* 410 U.S. at 3; *Mara,* 410 U.S. at 20.

62 *Dionisio,* 410 U.S. at 3; *Mara,* 410 U.S. at 20.

63 Brief for Appellee at 1, *In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85 (3d Cir. 1973) (quoting from United States v. Mara, 410 U.S. 19, 22 (1973)).

64 486 F.2d at 92. Judge Gibbons explained:

> Clearly the Supreme Court in *Dionisio* and *Mara* did not so intend, for if it did it overruled *sub silentio* a large body of established caselaw in which the courts have sought to confine the use of subpoenas within appropriate bounds.

Id.

tered by Mrs. Schofield.[65] The court gave special significance to the Government's admission in those cases that the exemplars sought "were essential and necessary to the grand jury investigation."[66] This, coupled with the fact that the witnesses in *Dionisio* and *Mara* were informed as to the purpose for the commands of the grand jury, contrasted with the total lack of information that was supplied to Mrs. Schofield.[67]

Moreover, the court recognized that a subpoena is not a self-executing instrument, even though at first blush FED. R. CRIM. P. 17(g)[68] appears to make it so.[69] To support this view, the court turned to both the enactment of and legislative history behind Title III of the Organized Crime Control Act of 1970,[70] which codified the federal civil contempt procedure.[71]

Title III, which deals with recalcitrant witnesses, requires that in the event a witness before a court or grand jury refuses without just cause to comply with an order to testify or provide other information, the witness may be brought before the district court. If the witness again refuses to give the requested information, the witness may be confined until such time as he or she does comply.[72] The intention of this statutory enactment was explained in a House of Representatives report which preceded the passage of the legislation:

> Title III is intended to codify present civil contempt practice with respect to recalcitrant witnesses in Federal grand jury and court proceedings.[73]

The Senate, in considering this act, explained the intended operation of the statute within the limits of grand jury powers by stating:

> When subpenaed [*sic*] before a grand jury, the witness must attend. The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions. . . .

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65 *Id.* at 89-92.

66 *Id.* at 89.

67 For the information provided on the face of the subpoena which requested Mrs. Schofield's presence before the grand jury see note 1 *supra*.

68 For the text of Rule 17(g) see note 6 *supra*.

69 486 F.2d at 88.

70 28 U.S.C. § 1826 *et seq.* (1970).

71 Prior to the statutory enactment of 28 U.S.C. § 1826 *et seq.*, the procedure for civil contempt in grand jury and court proceedings where a witness refused to give testimony was established by case law. *See* Shillitani v. United States, 384 U.S. 364 (1966); Brown v. United States, 359 U.S. 41, 55 (1959) (Warren, C.J., dissenting); United States v. Coplon, 339 F.2d 192, 193-94 (6th Cir. 1964).

72 28 U.S.C. § 1826(a) (1970).

73 H.R. REP. No. 1549, 91st Cong., 2d Sess. 33 (1970).

> Under civil contempt, the refusal is brought to the attention of the court, and the witness may be confined until he testifies . . . .[74]

In considering this procedure and the role to be played by the district court, the court in *Schofield* analogized the present situation to the enforcement of administrative subpoenas.[75] Subpoenas issued by administrative agencies are similar to those of a grand jury in that they come before the district court "without any prior judicial control" as to their propriety.[76] Thus, the potential for injustice would be considerable if at the court proceedings the defendant was required to rely solely upon the scant information available on the face of the subpoena. This in combination with the diverse defenses available[77] at the enforcement proceedings dictates that some additional showing be made prior to enforcement.

This problem becomes particularly acute inasmuch as "a presumption of regularity attaches to the grand jury's proceedings, and hence to a grand jury subpoena."[78] When all relevant information relating to the subpoena is controlled by the Government, the witness is at a disadvantage regarding any potential challenge which may be available to him. This problem is dealt with in the case of administrative subpoenas by allowing the use of discovery to explore the basis of a subpoena.[79]

In the case of a grand jury proceeding, however, the problem becomes more complex. FED. R. CRIM. P. 6(e)[80] requires that matters occurring before the grand jury remain undisclosed. While recognizing

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74 S. REP. No. 617, 91st Cong., 1st Sess. 56 (1969) (footnote omitted).

75 486 F.2d at 90-91.

76 *Id.* at 90.

77 For a summary of the defenses available to a defendant at enforcement proceedings see notes 44 and 45 *supra.*

78 486 F.2d at 92.

79 *See, e.g.,* United States v. Newman, 441 F.2d 165, 169-70 (5th Cir. 1971); United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970); United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969).

80 FED. R. CRIM. P. 6(e) provides:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

that a court has greater license for discovery in dealing with the enforcement of subpoenas in situations where Rule 6(e) would not apply, the court in *Schofield* stated:

> Certainly the fact of grand jury secrecy suggests that the party seeking enforcement of a grand jury subpoena be required to make some minimum showing of the existence of a proper purpose before it can trigger the enforcement machinery of the judicial branch.[81]

Thus, the necessity of grand jury secrecy should not be used as an excuse to obviate all protections afforded by a district court review.[82]

Once the requirement that the Government must demonstrate a "proper purpose" was established, the Third Circuit proceeded to discuss the manner in which this was to be accomplished. It concluded that this could effectively be done by requiring a "showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction."[83]

Although this specific issue has been litigated in few instances, the court found precedent for such a decision in *George v. United States*[84] and in *In re Grand Jury Subpoena to Central States*.[85] In both of these cases, a district court reviewed and inquired into the investigation of a grand jury for the purposes of deciding whether it should be enjoined from questioning a certain witness and whether the intention of the investigation was proper. The judge in *George v. United States* inspected an affidavit by the Government at an *in camera* hearing which indicated the purpose and scope of the grand jury's investigation.[86] Similarly, in *In re Grand Jury Subpoena to Central States*, Judge Campbell held an *in camera* meeting with the grand jury in order to evaluate the direction of the investigation.[87]

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81 486 F.2d at 92.

82 Contrary to the Third Circuit's view regarding relevancy demonstrations and the sanctity of grand jury subpoenas, the United States Court of Appeals for the Ninth Circuit has indicated that there must be a showing of "unusual circumstances" before the issue of relevance can be inquired into in cases concerning grand jury investigations. Although recognizing that the issue of relevancy may be important in legislative and administrative inquiries, the court felt that acts of the grand jury should not be viewed from the same perspective unless a special showing is made to the court. However, in dealing with this issue, the Ninth Circuit was presented with a case in which the witness had received knowledge regarding the investigation when the Government made application to the district court for a grant of immunity. United States v. Weinberg, 439 F.2d 743, 749-50 (9th Cir. 1971).

83 486 F.2d at 93.

84 319 F. Supp. 598 (E.D. Mich. 1970), *aff'd*, 444 F.2d 310 (6th Cir. 1971).

85 225 F. Supp. 923 (N.D. Ill. 1964).

86 319 F. Supp. at 599.

87 225 F. Supp. at 925. The court explained its procedure and purpose by stating:

While the Third Circuit adopted the use of the affidavit employed in *George*, no ruling was made as to whether an *in camera* examination would be proper.[88] The court was careful not to exclude the use of such proceedings, although they did specifically hold "that Rule 6(e) does not require *in camera* presentation."[89] In an effort to satisfy the requirement that grand jury matters remain secret, the court attempted to distinguish between the disclosure of " 'matters occurring before the grand jury' " and those "requested by the subpoena [which] are relevant to an investigation it is conducting."[90]

This distinction creates certain practical dangers. If the Government could disclose the affidavit, either in open court or by filing an unsealed affidavit with the clerk of the court, then a prosecutor in the course of seeking enforcement of a grand jury subpoena would be free to publicly reveal that certain individuals were either under investigation or being asked to appear. This practice would plainly contravene one of the major reasons for secrecy in grand jury proceedings—to protect the public from unfair prosecutorial tactics through the disclosure of investigations which result in no grand jury action.[91] Proceedings held *in camera* would, however, provide the subpoenaed individual with an opportunity to be informed of the relevancy while in no way subjecting him to possible publicity of an unfavorable or even prejudicial nature.[92]

> In the interest of justice and pursuant to my aforementioned supervisory power I have . . . met and conferred with the August 1963 Grand Jury. My purpose in holding this *in camera* meeting was and is to determine the intended scope and purpose behind investigations here challenged.

Id.

[88] 486 F.2d at 93.

[89] *Id.*

[90] *Id.* (quoting from FED. R. CRIM. P. 6(e)).

[91] There are four primary reasons advanced for maintaining the system of grand jury secrecy. These are to (1) prevent possible reprisals against witnesses and thus encourage honest testimony; (2) prevent perjury by not allowing witnesses to view prior testimony; (3) prevent a witness from learning that he or she is a subject of investigation and fleeing the jurisdiction; and (4) prevent disclosure of grand jury investigations that result in no criminal action. Goodman v. United States, 108 F.2d 516, 519 (9th Cir. 1939); *see* United States v. Smyth, 104 F. Supp. 283, 289-90 (N.D. Cal. 1952).

[92] The issue of whether prejudicial publicity is of such a nature as to preclude a fair trial will turn on the facts of each specific case. The trial judge possesses "broad discretion" in determining if prejudice has in fact occurred. United States v. Persico, 425 F.2d 1375, 1382 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970). The trial court has a wide range of options where the defendant's right to a fair trial has been jeopardized due to pretrial publicity. The trial judge may conduct a voir dire examination of potential jurors in an attempt to ascertain whether they have been tainted by the publicity. *See, e.g.*, Addison v. United States, 317 F.2d 808, 814 (5th Cir. 1963), *cert. denied*, 376 U.S. 905 (1964). Once influence of jurors by publicity is established the court may grant a change of venue, continuance, or new trial. *See, e.g.*, United States v. Collins, 472 F.2d 1017, 1020

Chief Judge Seitz indicated in his concurring opinion in *Schofield*, that a minimal requirement in the enforcement proceeding would afford citizens a modicum of "protection against the possible arbitrary exercise of power by a prosecutor through use of the grand jury machinery."[93] As a corollary to this, an individual wishing to challenge a subpoena should not have to fear being subjected to what may be undesirable publicity.

A further issue discussed by the court was the extent of participation to be allowed the witness in reviewing the Government's demonstration. While the use of *ex parte* proceedings was not totally ruled out, the court indicated that

> unless extraordinary circumstances appear, the nature of which we cannot anticipate, the Government's supporting affidavit should be disclosed to the witness in the enforcement proceeding.[94]

Thus, it appears that in most instances the witness should be allowed to have information regarding the relevancy of the subpoena. However, no rigid rule regarding the amount of information to which a witness would have access was established by the court. The court indicated that the degree to which the Government must inform a witness who is unsatisfied with the Government's disclosure would be determined by a "balancing test:"

> [T]he court must in deciding that request weigh the quite limited scope of an inquiry into abuse of the subpoena process, and the potential for delay, against any need for additional information which might cast doubt upon the accuracy of the Government's representations.[95]

On the same issue, Judge Seitz established more definitive standards for the disclosure of further information. Recognizing that any other standard would subject the courts to the "minihearings" condemned by the Supreme Court in *Dionisio*,[96] Judge Seitz indicated

(5th Cir. 1973) (prejudice must be shown to demonstrate it was an abuse of discretion to deny a continuance); United States v. Nix, 465 F.2d 90, 95-96 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972) (it is within the discretion of the trial court to grant relief on the basis of pretrial publicity).

93 486 F.2d at 94 (Seitz, C.J., concurring).

94 *Id.* at 93.

95 *Id.*

96 Justice Stewart, in delivering the opinion of the Court in *Dionisio*, explained:

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

410 U.S. at 17. This view was recently reiterated by the Court in United States v. Calandra, 94 S. Ct. 613 (1974), which held that the exclusionary rule could not be raised as a

that "if the district court is satisfied as to its [affidavit's] sufficiency, [it] cannot be made the subject of an adversary hearing by the witness."[97]

The firmer solution advocated by Chief Judge Seitz is perhaps the better approach. Any other result would permit the subpoenaed individual to subject the grand jury and Government to potential delays and harassment through the use of time-consuming hearings. On the contrary, there appears to be no valid reason why a district court judge would be unable to arrive at a just conclusion without the use of an adversary proceeding.

In the future, the requirements mandated by the Third Circuit will help to insure that grand juries place proper emphasis on their role as an insulator between the individual investigated and the Government bringing charges. If the grand jury as an institution is to continue as a viable entity, it must not be allowed to become a further tool of the prosecuting branch of Government.

Moreover, the burden placed upon the Government by this ruling should be easily borne in the vast majority of cases where individuals are subpoenaed before the grand jury for a reason pertinent to a situation or circumstance receiving grand jury consideration. In those rare instances where an individual is subpoenaed for some ulterior motive, or for some reason which should not be supported in an enforcement proceeding, the individual is then provided a reasonable basis from which to challenge the command.

The ruling in favor of Jacqueline Schofield should not, however, be subverted through the use of a public affidavit used to create publicity. Thus, if implemented in a manner to eliminate any possible unfair publicity, the Third Circuit decision could serve as a valuable model for allowing witnesses to avail themselves fully of their rights and privileges before a grand jury.

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defense by a grand jury witness unless the grand jury itself was instrumental in the unreasonable search. *Id.* at 618-19. Justice Powell, writing for the majority, stated that any suppression hearings would lead to unnecessary and disruptive delay and conceivably could be "fatal" to law enforcement. *Id.* at 621.

[97] 486 F.2d at 94 (Seitz, C.J., concurring).