
Volume 28

Number 4 *First Women: The Contribution of
American Women to the Law*

pp.1377-1413

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Recommended Citation

Patrick F. Mastrian, *Indainhead Poker in the Grand Jury Room: Prosecutorial Suppression of Exculpatory Evidence*, 28 Val. U. L. Rev. 1377 (1994).

Available at: <https://scholar.valpo.edu/vulr/vol28/iss4/8>

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Notes

INDIANHEAD POKER IN THE GRAND JURY ROOM: PROSECUTORIAL SUPPRESSION OF EXCULPATORY EVIDENCE

I. INTRODUCTION

Historically, the grand jury has been insulated from public scrutiny, shielded by procedural rules that veil its operations and permit secrecy of the indictment proceeding.¹ The grand jury is an *ex parte* criminal proceeding which can operate to inflict injury without the recipient of its accusations ever being aware that he was a target.² It operates behind closed doors, is unfettered by procedural or evidentiary rules associated with trial,³ and arrives at

1. Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides, with few exceptions, that the disclosure of matters occurring before the grand jury are prohibited. Failure to obey this mandate is punishable as contempt of court. FED. R. CRIM. P. 6(e)(2). Additionally, Rules 6(e)(4)-(6) contribute to the secrecy of the proceeding. Rule 6(e)(4) addresses the indictment itself. It provides:

Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon, the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

FED. R. CRIM. P. 6(e)(4). Rule 6(e)(5) directs that all proceedings affecting the grand jury shall be held in secret. The Rule states: "*Closed Hearings.* Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." FED. R. CRIM. P. 6(e)(5). Lastly, Rule 6(e)(6) seals all records concerning the grand jury. It states: "*Sealed Records.* Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." FED. R. CRIM. P. 6(e)(6).

2. Rule 6(d) addresses the concern of who may be present during the grand jury proceeding. The rule does not include the accused as a permitted member, and the courts have long held that an accused has no constitutional right to be present or to appear before the grand jury. FED. R. CRIM. P. 6(d). See *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 605-06 (2d Cir.), cert. denied, 323 U.S. 790 (1944).

3. The Supreme Court has refused to enforce the hearsay rule in grand jury proceedings, stating that such a result "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Costello v. United States*, 350 U.S. 359, 364 (1956). More important than the Court's holding that the rules of trial do not apply in grand jury proceedings, the Court found that a facially valid indictment cannot be challenged on the competency or adequacy of the evidence assessed by the grand jury. *Id.* at 363.

accusations which are virtually unreviewable.⁴ Although the grand jury process does not afford many protections for the individual alleged to have committed a crime, the few protections history has witnessed are eroding. Recently dissolved by this erosion is the mandate that the prosecutor make a fair and accurate presentation of the evidence for grand jury assessment.

The Fifth Amendment to the United States Constitution directs that no individual can be held to answer for a felony offense unless an indictment or presentment⁵ is rendered by a grand jury.⁶ The Supreme Court has held that this is not a fundamental right of individuals and, therefore, it is not required by the Fourteenth Amendment in state criminal proceedings.⁷ In the federal system, however, all serious federal crimes⁸ must be initiated upon a grand jury

4. Generally, indictment errors are discovered, if at all, during trial. Typical challenges to the indictment occur at that time. When reviewing challenges at this stage in the proceeding, the court will employ a standard of harmless error. This prevents the petitioner from presenting the merits of the complaint. See *infra* notes 84-93 and accompanying text. The harmless error rule, coupled with the *Costello* mandate that an accused cannot challenge the sufficiency of the evidence presented before the grand jury, greatly restricts, if not eliminates, the avenues open to challenge.

5. A presentment is distinguished from an indictment. For example, when the attorney for the government introduces allegations and evidence against an individual, the grand jury's determination of probable cause is expressed by an indictment. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 17 (7th ed. 1990). Conversely, a presentment is rendered when the grand jury itself initiates the process against an individual. The Supreme Court defined the presentment in *Hale v. Henkel*, 201 U.S. 43 (1906). The Court stated:

If the Grand Jury, of their own knowledge, or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the country, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the state, of the nature of the offense, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment.

Id. at 62. Contemporary federal law permits, however, only the use of the indictment. See FED. R. CRIM. P. 7.

6. U.S. CONST. amend. V.

7. See *Hurtado v. California*, 110 U.S. 516 (1884). The *Hurtado* Court held that the fifth amendment guarantee of prosecution by indictment was not a fundamental right applicable to the states through the Fourteenth Amendment's due process requirement. *Id.* at 534-35. However, although there is no constitutional requirement that the states institute prosecutions by means of an indictment returned by a grand jury, the states that employ grand juries are not relieved from complying with the commands of the Fourteenth Amendment in the operation of those juries. *Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979).

8. The Court did not define the line separating serious from petty federal crimes. However, in *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), the Court held that for purposes of the Sixth Amendment, petty crimes were crimes carrying a maximum prison term of less than six months or crimes in which the defendant cannot demonstrate a clear legislative determination that the offense in question is serious. *Id.* at 541-42.

indictment.⁹

The grand jury and the indictment proceeding have two judicially recognized purposes. First, as stated by the Supreme Court in *Wood v. Georgia*,¹⁰ the primary function of the grand jury is to protect the innocent against "hasty, malicious, and oppressive persecution."¹¹ Courts adhering to this purpose regard the grand jury as a screen between the accuser and the accused, which functions to filter out unfounded criminal allegations and shield an individual from a malicious prosecutor.¹² This function is referred to as the grand jury's screening function.¹³

The second purpose of the grand jury is to act as an accusatory body that determines the existence of probable cause to believe an individual has committed a crime.¹⁴ A finding of probable cause is expressed by a corresponding indictment. Typically, when federal courts render a decision that erodes the protections previously afforded a grand jury target, emphasis is placed upon this accusatory function.¹⁵ Because presentation of exculpatory evidence facilitates the screening function of the grand jury at the cost of the grand jury's accusatory purpose, conflict and debate abound regarding this issue. The prevalent trend in the federal courts is to place more emphasis upon the

9. *KAMISAR ET AL.*, *supra* note 5, at 914. The Fifth Amendment thus ensures that a federal charge for a felony offense will not be brought without granting the accused the protection of the review and acceptance of the charge by the grand jury (as expressed through its issuance of the indictment).

10. 370 U.S. 375 (1962).

11. *Id.* at 390. The Court also stated that society's interest in the grand jury indictment process is best served by a "thorough and extensive investigation" which is impartial and disinterested. *Id.* at 392. See also *Hale v. Henkel*, 201 U.S. 43, 59 (1906) ("The most valuable function of the grand jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused . . ."). When the prosecution suppresses exculpatory evidence, the grand jury does not have the opportunity to be impartial. Therefore, society's interest in the grand jury process, by implication, is not served by suppression of exculpatory evidence.

12. See *United States v. Dionisio*, 410 U.S. 1, 16 (1972); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 619 (N.D. Okla. 1977); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975).

13. See, e.g., *infra* text accompanying notes 53-55.

14. See *United States v. Williams*, 112 S. Ct. 1735 (1992); *Costello v. United States*, 350 U.S. 359, 362 (1956).

15. See *Williams*, 112 S. Ct. at 1744; *Costello*, 350 U.S. at 364; *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (holding that the indictment was valid where pervasive prosecutorial misconduct occurred but did not prejudice the defendant); *United States v. Mechanik*, 475 U.S. 66 (1986) (applying harmless error review of grand jury abuses discovered during trial); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that presentation of unconstitutionally seized evidence to a grand jury is not grounds for dismissal of the indictment).

grand jury's accusatory function than upon the its screening function.¹⁶

Currently, according to *United States v. Williams*,¹⁷ no duty to present exculpatory evidence to the grand jury can be imposed upon the prosecutor pursuant to the federal courts use of their supervisory power.¹⁸ To date, *Williams* is the only case decided by the Supreme Court concerning this issue. Exclusive philosophies concerning the purpose and function of the grand jury, along with the practical difficulties of defining the scope and nature of such a duty,¹⁹ contribute to the reluctance of the courts to impose a system-wide obligation upon prosecutors to present exculpatory evidence.²⁰

If a duty is not imposed upon the prosecutor, the grand jury cannot accurately be informed of the facts of the case, nor can it exist independent from the government. Failure of the prosecutor to present exculpatory evidence to the grand jury misinforms that body of the pertinent facts of the case and causes it to become an extension of the arm of government. Suppression of exculpatory evidence can expose an innocent individual to the adverse and irreversible effects of an indictment and public trial.²¹ A grave injustice results, and an

16. See *Williams*, 112 S. Ct. at 1744. The Supreme Court only recognized the grand jury's accusatory purpose and therefore found that it is sufficient to present only the government's side of the case in securing an indictment. *Id.*

17. 112 S. Ct. 1735 (1992).

18. *Williams*, 112 S. Ct. at 1746. This does not imply that an ethical duty to present the evidence does not exist. The Supreme Court merely concluded that the judiciary may not use its supervisory powers to oblige a duty upon the prosecutor. The Court did not opine the possibility whether a duty is required by the Constitution as the defendant did not raise the argument. For explanation of the supervisory power of the court, see *infra* notes 132-34.

19. For example, how will the courts assess the significance of the contested evidence without reviewing the quality and sufficiency of other evidence presented to the grand jury, an inquiry proscribed by *Costello*? See *supra* note 3. Should the duty encompass any evidence that creates a reasonable doubt about the defendant's connection with the crime, or should it be restricted to evidence which negates a prima facie element of an offense? While most federal courts do not require the prosecutor to seek out exculpatory evidence, see, e.g., *United States v. Ciambone*, 601 F.2d 616 (2d Cir. 1979), should the prosecutor's duty vicariously extend to government personnel related to the investigation? See *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977) (holding that the government's duty extends to evidence of which the government is aware or should be aware). Finally, the courts must deal with the danger that an overly broad definition of exculpatory evidence would impose an impossible administrative burden on the government attorneys, yet an unduly narrow definition may eliminate any practical significance the obligation was intended to effectuate. See Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 554 (1980).

20. Arenella, *supra* note 19, at 553-66.

21. These adverse effects were illustrated in *United States v. Filippatos*, 307 F. Supp. 564 (S.D.N.Y. 1969). The District Court stated that "there can be no doubt that an indictment by a grand jury places on a defendant the heavy burdens of expending time, energy, and capital in the defense of his case and almost certainly of meeting the social opprobrium that shadows him while

element of unfairness is injected into the federal system, a system that is supposed to initiate criminal proceedings pursuant to an impartial determination of probable cause. Absent a duty upon the prosecutor, an individual's fifth amendment guarantee to a grand jury indictment is abridged.²²

The purpose of this Note is to solidify the traditional role of the grand jury's screening function, introduce a statute which will resolve the inequities associated with the *Williams* decision, provide workable definitions of traditionally ambiguous terms which impede the practicality of imposing the duty,²³ and introduce a procedure of implementation which will be consistent with the existing body of federal law.²⁴ In Section II, this Note discusses the history and rationale associated with an affirmative obligation upon the prosecutor to present exculpatory evidence to the grand jury.²⁵ This section will track the theory of the duty from its inception in the state courts to its recognition in the federal circuits. Section III will analyze the appellate review of indictment errors and explain how court decisions and legislative enactments contribute to the rationale that no duty should be imposed.²⁶ Specifically, this section focuses on Rule 6 of the Federal Rules of Criminal Procedure, the Jenck's Act, and the harmless error doctrine. Section IV will discuss exceptions to the harmless error review of the indictment procedure and explain the similarity between the rationales supporting these exceptions and the imposition of a prosecutorial duty to present exculpatory evidence to the grand jury.²⁷ Section V will discuss and criticize the *Williams* decision and thereby explain the current state of the law.²⁸ Finally, Section VI will propose a legislative rule placing an affirmative duty on the government to introduce exculpatory evidence for grand jury assessment and will explain the rationale and ramifications of

under the charge of the indictment." *Id.* at 565. See also *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979) (holding that the handing up of an indictment will often have a devastating personal and professional impact [on an individual] that a later dismissal or acquittal can never-undo). These burdens are further evidenced by the large percentage of cases which are disposed of by guilty pleas. According to a 1966 study, roughly 90% of all defendants convicted of a crime plead guilty rather than face the harsh effects of a public criminal trial. DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966). There is a heightened cause for concern when in reality the greatest pressure to plead guilty is exerted upon defendants who are actually innocent. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-61 (1968). See also Arnold N. Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS 108, 112-14 (1967) (stating that there is need for concern for innocent defendants who plead guilty to avoid the harshness of trial).

22. See, e.g., *infra* notes 32, 41-42, 55 and accompanying text.

23. See *infra* notes 148-89 and accompanying text.

24. *Id.*

25. See *infra* notes 30-66 and accompanying text.

26. See *infra* notes 67-99 and accompanying text.

27. See *infra* notes 100-22 and accompanying text.

28. See *infra* notes 123-47 and accompanying text.

such a mandate.²⁹

II. HISTORY OF THE DUTY TO PRESENT EXCULPATORY EVIDENCE

The few protections traditionally provided to a grand jury target have been slowly dissolved by recent court decisions.³⁰ These decisions have sparked a heated debate focusing on the purpose and function of the grand jury. This debate is evidenced by the conflict in the various district courts when forced to rule on issues associated with prosecutorial presentation of evidence in the indictment process.³¹ On one side of this conflict, jurists who emphasize the grand jury's screening function do so pursuant to the constitutional mandate that an indictment must be based upon an "independent and informed" finding of probable cause.³² These authorities conclude that permitting only the prosecutor's side of the case destroys the grand jury's independence and misinforms the grand jury of the facts of the case. Conversely, other authorities argue that the grand jury proceeding is an *ex parte* determination of probable cause, not meant to be adversarial,³³ and only accusatory in nature.³⁴ Courts that adhere to this view fear that requiring the prosecutor to present exculpatory evidence to the grand jury will have the effect of evolving the grand jury proceeding into a mini-trial.³⁵

29. See *infra* notes 148-88 and accompanying text.

30. See *Costello v. United States*, 350 U.S. 359 (1956) (upholding the validity of an indictment based on hearsay testimony); *Coppedge v. United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963) (holding that indictment based in part on perjured testimony was valid); *United States v. Calandra*, 414 U.S. 338 (1974) (deciding that the grand jury proceeding is not susceptible to technical procedural and evidentiary rules of trial, and finding that an indictment supported by illegally seized evidence was valid); *United States v. Mechanik*, 475 U.S. 66 (1986) (holding that grand jury error discovered at trial is harmless).

31. For cases recognizing a duty to present exculpatory evidence, see *United States v. Page*, 808 F.2d 723 (10th Cir. 1987); *United States v. Ciambone*, 601 F.2d 616 (2d Cir. 1979); *United States v. Phillips Petroleum*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977). For cases not recognizing such a duty, see *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976); *United States v. Ruyle*, 524 F.2d 1133 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

32. *Wood v. Georgia*, 370 U.S. 375 (1962). See also *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (stating that the fifth amendment guarantee of an indictment issued by a grand jury "presupposes an investigative body acting independently of either prosecuting attorney or judge").

33. *Y. Hata*, 535 F.2d at 512.

34. *Calandra*, 414 U.S. at 343.

35. See *United States v. Williams*, 112 S. Ct. 1735, 1744 (1992) ("Requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."); see also *United States v. Calandra*, 414 U.S. 338 (1974). The *Calandra* case presented the issue of admissibility of illegally seized evidence into grand jury. The United States Supreme Court stated that the strict procedural and evidentiary rules associated with trial are not applicable to the grand jury context as the grand jury is not capable to apply these complex legal rules. *Calandra*, 414 U.S. at 349. Imposition of these

A. Inception of the Duty to Present Exculpatory Evidence

The first court to recognize and compel the duty to present exculpatory evidence was the California Court of Appeals. In *Johnson v. Superior Court of California*,³⁶ the prosecutor suppressed evidence from the grand jury that contradicted a prima facie element of the charged crime.³⁷ Recognizing that the traditional role of the grand jury is to stand as a buffer between an innocent individual and an overzealous prosecutor,³⁸ the court placed an affirmative duty upon the prosecutor to produce evidence that "tends to negate guilt" to the grand jury.³⁹ Emphasizing this screening function of the grand jury,⁴⁰ the court stressed that the imposition of such a duty enables the grand jury to fulfill its

rules would frustrate and prolong the indictment process to the point that the grand jury proceeding would become a mini-adversarial trial necessitating litigation of side issues only tangentially related to the finding of probable cause.

36. *Johnson v. Superior Ct. of Calif., Cty. of San Joaquin*, 113 Cal. Rptr. 740 (Cal. Ct. App. 1974).

37. *Johnson*, 113 Cal. Rptr. at 742-43. While the defendant Johnson was awaiting sentence on a prior narcotics charge, he entered into a sentencing bargain with the deputy district attorney. The deal held that in return for information on narcotics dealers, the district attorney would recommend that Johnson's sentence be served in a local jail rather than a state facility. Attempting to receive this information, Johnson accompanied a dealer to a motel where a buy was to occur. Coincidentally, the police raided the sale and proceeded to arrest Johnson for conspiracy to sell, the sale of, and transportation of narcotics.

At the preliminary hearing, Johnson disclosed the existence of the agreement with the prosecutor and testified that his involvement was only in furtherance of that agreement. This directly contradicted the required mens rea necessary to make out a prima facie case against Johnson. Ultimately, the magistrate dismissed the charges against Johnson due to insufficiency of the evidence. The disgruntled district attorney then brought the same charges in front of the grand jury. However, in presenting the case, the prosecutor suppressed the results of the preliminary hearing and Johnson's exculpatory testimony. In addition, the prosecutor placed a police officer on the stand who testified that Johnson refused to make any statements regarding the transaction. Consequently, the grand jury indicted Johnson on all three charges. (See *People v. Uhlemann*, 511 P.2d 609 (Cal. 1973) (magistrate's order dismissing felony complaint against petitioner not a bar to another prosecution for the same offense, either by a second complaint or by a grand jury indictment).) The court found that by withholding Johnson's exculpatory testimony and suppressing evidence of the bargain between Johnson and the government, the prosecutor had impaired the grand jury's assessment of probable cause. *Johnson*, 113 Cal. Rptr. at 742-43.

38. *Johnson*, 113 Cal. Rptr. at 748. See *Berger v. United States*, 295 U.S. 78, 88 (1934). The *Berger* Court held that while the prosecution may strike hard blows, they are not at liberty to strike foul ones. It is as much their duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.*

39. This wording is adopted from the American Bar Association's Standards for Criminal Justice, Standards Relating to the Prosecution and the Defense Function, § 3.6, which states in part: "The prosecutor should disclose to the Grand Jury any evidence which he knows will tend to negate guilt." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1993). See also *infra* note 160.

40. *Johnson v. Superior Ct. of Calif., Cty. of San Joaquin*, 113 Cal. Rptr. 740, 747 (1974).

role as an "independent adjudicator of probable cause."⁴¹ In this case, the prosecutor's twisted presentation of the evidence biased the grand jury against the defendant and prevented the grand jurors from impartially assessing probable cause.⁴² Thus, the court determined that the defendant's fifth amendment due process rights were violated, and the indictment against the defendant was dismissed.⁴³

Johnson's case was then considered by the California Supreme Court.⁴⁴ While the California Supreme Court's rationale was similar to the Appellate Court's evaluation, the court resolved Johnson's case on statutory grounds. The court held that when the prosecutor is aware of evidence reasonably tending to negate guilt, section 939.7 of the California Penal Code places a duty upon the prosecutor to disclose the existence and nature of the evidence, so that the grand jury may order the evidence produced.⁴⁵ Section 939.7 specifically requires the grand jury to call for evidence, which the grand jury has reason to believe will explain away the charge.⁴⁶ The court's rationale centered on the logic that because the statute requires the grand jury to call for exculpatory evidence, and as the grand jury is only aware of the evidence which the prosecutor presents, then, without a duty upon the prosecutor to present exculpatory evidence, the grand jury will not know what evidence to call for.⁴⁷ In short, the grand jury will not call for evidence of which it is kept ignorant. Thus, the prosecutor violated section 939.7 when he suppressed Johnson's exculpatory testimony and preliminary hearing results. The court granted relief on statutory, rather than

41. *Id.* at 749. The court recognized the role of the grand jury as a shield or screen between the accused and the arbitrary accusations of the government. The role of the grand jury as this buffer mandates its independence from government influence. *Id.* at 748.

42. Manipulation of the evidence prevents an independent evaluation of probable cause and prevents the grand jury from functioning as a buffer between the accused and arbitrary or oppressive government accusation in violation of the accused's constitutional guarantees. *Id.* at 750.

43. *Id.*

44. *Johnson v. Superior Ct. of San Joaquin Cty.*, 539 P.2d 792 (Cal. 1975).

45. *Id.* at 796. The language of § 939.7 states:

The Grand Jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and where *it has reason to believe that other evidence exists within its reach which will explain away the charge*, it shall order the evidence to be produced and for that purpose may require the district attorney to issue process for the witness.

CAL. PENAL CODE § 939.7 (West 1985) (emphasis added).

46. Various states have provisions which are similar to § 939.7 of the California Penal Code. *See, e.g.*, ARIZ. REV. STAT. ANN. § 21-412 (1971); N.Y. CRIM. PROC. LAW § 190.50 (McKinney 1971); ORE. REV. STAT. § 132.320(4) (1975); UTAH CODE ANN. § 77-19-4 (1953).

47. *Johnson*, 539 P.2d at 796. The court recognized that during an adversarial proceeding, the prosecutor can rely on the defense attorney to come forward with exculpatory evidence. But because the grand jury process is an *ex parte* proceeding, the grand jury and the accused have to rely on the prosecutor to make this showing. *Id.*

upon constitutional, grounds.⁴⁸

B. Recognition of the Prosecutor's Duty of Fairness in Federal Courts

Soon after California recognized the duty to present exculpatory evidence, several federal courts followed suit.⁴⁹ However, since there is no correlative federal statute to section 939.7, the federal courts had to devise an alternative rationale to justify imposition of the prosecutorial duty. Similar to the first *Johnson* opinion, this rationale took the form of a due process analysis.

The first federal case to do this was *United States v. Phillips Petroleum, Inc.*⁵⁰ The *Phillips* court held that suppression of an exculpatory explanation for incriminating evidence is violative of due process and an abuse of the grand jury proceeding.⁵¹ *Phillips* presented the issue of whether a prosecutor is under a legal and ethical obligation to inform the grand jury of exculpatory testimony of a witness questioned outside the grand jury room.⁵² In answering this question, the United States District Court for the Northern District of Oklahoma first defined the function and purpose of the grand jury. The court regarded the function of the grand jury as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."⁵³ The court reasoned that to fulfill this function and make an independent and impartial evaluation of

48. *Id.*

49. *See, e.g.,* *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), *aff'd* 550 F.2d 1224 (9th Cir. 1977).

50. 435 F. Supp. 610 (N.D. Okla. 1977).

51. *Phillips*, 435 F. Supp. at 621. The district court expressly stated that this was a fact-specific holding, based on the totality of the circumstances, and the court did not consider the question of whether in every case in which the prosecutor obtains exculpatory evidence, he is under an obligation to present it to the grand jury. *Id.*

52. The defendant in *Phillips* was indicted for filing false tax returns. *Id.* at 612. The prosecutor presented exculpatory and explanatory evidence outside the presence of the grand jury members. *Id.* at 612-13. This scheme enabled the evidence to become part of the record while not being susceptible to grand jury consideration. *Id.* at 613.

At the close of a day of questioning, the special attorney for the government excused the grand jury members for the evening and requested that the witness who was currently testifying reappear "for just a short period in the morning." *Id.* at 615. However, rather than eliciting the witness's statements the next day, the prosecutor recorded the testimony later that evening after the grand jury members had gone. The substance of the witness's statements were exculpatory in nature and explanatory of previous conduct of the defendant. While the witness's evening statements were made part of the grand jury transcript, the statements were never disclosed to the grand jurors. *Id.* at 615-16.

53. *Phillips*, 435 F. Supp. at 621 (citing *United States v. Dionisio*, 410 U.S. 1, 16 (1962)). This is similar to the buffer and shield function analyzed by the appellate court in *Johnson*. *See Johnson v. Superior Ct. of Calif., Cty. of San Joaquin*, 113 Cal. Rptr. 740 (Cal. Ct. App. 1974).

probable cause as required by the Constitution, the grand jury was entitled to the exculpatory testimony.⁵⁴ Because the prosecutor withheld this testimony, he prevented the grand jury from performing its historic role and thereby violated the defendant's fifth amendment due process right.⁵⁵

Although the decision in *Phillips* added a layer of protection to an accused's constitutional rights in a grand jury proceeding, the case did very little in terms of specifying the extent of the prosecutorial duty or what standard should be used to determine the exculpatory nature of the evidence. Some clarification of these ambiguities was offered by the subsequent rationale in *United States v. Provenzano*.⁵⁶ Prefacing the holding in *Provenzano*, the court reiterated a well-established United States Supreme Court mandate that the fifth amendment guarantee to indictment by grand jury "presupposes an investigative body acting independently of either prosecuting attorney or judge."⁵⁷ The *Provenzano* court then held that where the government is aware or should be aware of exculpatory evidence, and the government fails to present that evidence to the grand jury, the government deprives that body of the opportunity to make an independent evaluation of probable cause.⁵⁸ As such, this results in an abuse

54. *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 619 (N.D. Okla. 1877). The district court's finding is consistent with the United States District Court for the Central District of California's ruling in *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975). In *DeMarco*, the court held that the grand jury was entitled to be apprised of exculpatory information so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances. *Id.* at 513.

55. The court quoted the language and rationale verbatim from the first *Johnson* decision, and in that rationale, formulated their due process analysis.

The grand jury's ability to safeguard accused persons against felony charges which it believes unfounded is an attribute of due process of the law inherent in the grand jury proceeding, this attribute exists for the protection of persons accused of a crime which is to say that it is a "constitutional right;" any prosecutorial manipulation which substantially impairs the grand jury's ability to reject charges which it may believe unfounded is an invasion of the defendant's constitutional right When the prosecutor manipulates the array of evidence to the point of depriving the grand jury of independence and impartiality, the courts should not hesitate to vindicate the demands of due process.

Phillips, 435 F. Supp. at 621 (citing *Johnson v. Superior Ct. of Calif., Cty. of San Joaquin*, 113 Cal. Rptr. 740, 749-50 (Cal. Ct. App. 1974)).

56. 440 F. Supp. 561 (S.D.N.Y. 1977). Pursuant to a *Brady* request (discussed *infra* note 67), *Provenzano's* attorney received a letter from the government's key witness in which the witness recanted his prior incriminating identification of *Provenzano*. However, rather than allowing the witness to testify in front of the grand jury, the prosecutor entered into the record the previous 22-month-old recanted identification of *Provenzano*. *Id.* at 563, 565.

57. *Provenzano*, 440 F. Supp. at 564 (quoting *United States v. Dionisio*, 410 U.S. 1, 16 (1973)).

58. *Id.* at 565 (emphasis added). By employing this objective awareness standard, the court fails to recognize the government's argument that it acted in good faith or failed to realize the exculpatory nature of the evidence.

of the grand jury and a violation of due process.⁵⁹

The *Provenzano* decision departs from earlier cases in using an objective inquiry into the intent or culpability of the prosecutor's failure to present exculpatory evidence. To obtain relief under *Johnson*, the accused would have to establish an intentional suppression of evidence by the prosecutor.⁶⁰ Presumably, this would entail a subjective analysis to determine the actual intent or culpability of the prosecutor. This leads to the logical conclusion that the accused could not have the indictment dismissed if the prosecutor asserts that the failure to present the exculpatory evidence was the result of a good-faith mistake. Likewise, the *Phillips* court employed a subjective inquiry into the prosecutorial intent.⁶¹ Thus, regardless of how unfair or tainted the presentation of evidence was, relief in these cases could not be obtained absent a showing of intentional suppression of evidence by the prosecutor.

Unlike the analyses and holdings of previous cases, *Provenzano* employs an objective inquiry and enables relief by showing actual awareness or disregard for the evidence within the prosecutor's possession or control.⁶² Unfortunately, *Provenzano* did not consider what evidence should be considered exculpatory and thereby left uncertain the extent of the prosecutor's duty. However, this case at least defined a standard to be employed by the reviewing courts faced with a challenge to the fairness of the indictment proceeding. In addition, *Provenzano* relieved some of the burden shouldered by an accused attempting to dismiss an indictment obtained unfairly and prejudicially; it is easier to demonstrate the existence of exculpatory evidence within the government's possession or control than it is to prove the evidence was intentionally suppressed.

Though the accused has a constitutional right to an independent grand jury evaluation of her case, and even though the prosecutor's one-sided presentation

59. *Id.* at 566. The court cites the holding in *Phillips* to support the due process and grand jury abuse rationale for dismissal of the indictment.

60. *Johnson v. Superior Ct. of Calif., Cty. of San Joaquin*, 113 Cal. Rptr. 740, 749 (Cal. Ct. App. 1974). *Johnson* stated that the accused's constitutional rights are violated when the grand jury's independence is eliminated due to "prosecutorial manipulation." *Id.* The facts of the case indicate that this manipulation is intentional. The court's imposition of the duty is premised on the idea of unfairness and the bad faith of the prosecutor. For a discussion of this premise, see *id.* at 748-49.

61. The standard the court used to impose the duty is not stated in the opinion. However, the facts of this case indicate an intentional suppression of the exculpatory evidence. The court emphasized that its decision was case specific and applicable only to the fact scenario under consideration. Therefore, this case must be interpreted as one employing the intentional, subjective standard.

62. *United States v. Provenzano*, 440 F. Supp. 561, 565 (S.D.N.Y. 1977) (emphasis added).

of the evidence logically eliminates the independence of the grand jury,⁶³ most courts are unwilling to impose a duty on the prosecutor to present exculpatory evidence for grand jury review.⁶⁴ This reluctance may stem from the failure of the courts to specify and resolve the ambiguities of such a doctrine. For example, if the duty is realized, what evidence should be considered exculpatory? To what extent must the prosecutor present the evidence? Can the accused seek remedy after the trial begins? What remedy should be prescribed? What standard of error should be used?⁶⁵ These questions, unanswered by the courts, prevent the duty from being required and implemented.⁶⁶ This Note resolves these ambiguities.

III. PROCEDURAL OBSTACLES AND BURDENS FACING THE ACCUSED

Assuming the preceding ambiguities and reservations are excised and an obligation is imposed upon the government to present exculpatory evidence to the grand jury, there are three procedural obstacles which would impede the defendant's ability to receive relief from an indictment rendered by a biased and misinformed grand jury. Namely, these obstacles are Rule 6 of the Federal Rules of Criminal Procedure, the Jenck's Act, and *Mechanik's* harmless error doctrine.

A. Rule 6 of the Federal Rules of Criminal Procedure

Rule 6 of the Federal Rules is the general rule governing the grand jury indictment process.⁶⁷ Rule 6 proscribes disclosure of any matters occurring

63. See *Johnson*, 113 Cal. Rptr. at 749-50.

64. See *United States v. Williams*, 112 S. Ct. 1735 (1992), discussed *infra* notes 123-47 and accompanying text.

65. Presently, appellate courts use the harmless error standard when considering challenges to an indictment's validity raised after commencement of the trial. See *infra* notes 87-91 and accompanying text.

66. See *Arenella*, *supra* note 19, at 553.

67. FED. R. CRIM. P. 6. The following portions of Rule 6 will be relevant to the analysis of the obstacles facing an accused seeking to dismiss an indictment for the prosecutor's failure to present exculpatory evidence to the grand jury:

Rule 6(d) Who May Be Present.

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording And Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the

before the grand jury under threat of criminal contempt.⁶⁸ This is not an absolute rule as disclosure can be made to the prosecuting attorney⁶⁹ and government personnel assisting the prosecutor.⁷⁰ However, Rule 6 presents a

attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

- (i) an attorney for the government for use in the performance of such attorney's duty; and,
- (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government on the performance of such attorney's duty to enforce federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

- (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
- (ii) when permitted by a 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;
- (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or,
- (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state for the purpose of enforcing such law.

FED. R. CRIM. P. 6(d)-(e) (West 1985).

In addition to Rule 6, the Federal Rule governing discovery and disclosure of evidence places no obligation upon the prosecutor to disclose statements made by the government witnesses or prospective witnesses to the defendant. FED. R. CRIM. P. 16. The Supreme Court, in *Brady v. Maryland*, partially circumvented this rule when it imposed a duty upon the government to disclose exculpatory evidence in the government's possession or control to the defendant upon request. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This is an objective obligation which does not take into account the good or bad faith of the prosecutor, similar to *Provenzano*. However, prior exculpatory statements by witnesses are exempted from the pretrial discovery mandate and need only be disclosed to the defendant in time for use at trial. *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988).

68. FED. R. CRIM. P. 6(e)(2).

69. FED. R. CRIM. P. 6(e)(3)(A)(i).

70. FED. R. CRIM. P. 6(e)(3)(A)(ii).

significant obstacle to the criminal defendant who believes the prosecutor has failed to present exculpatory evidence, because it generally does not allow disclosure of the grand jury transcripts to the accused.⁷¹ An accused who is not permitted to inspect the grand jury minutes or attend the indictment proceeding itself, has little, if any, chance of discovering prosecutorial failure to present exculpatory evidence.

Various rationalizations have been offered to justify the protection of the grand jury minutes. For example, the Court in *Douglas Oil v. Petrol Stops Northwest*⁷² justified Rule 6(e) by postulating on the chilling effects disclosure would have on future witnesses who wish to remain anonymous out of fear of retribution from the accused.⁷³ Additionally, there exists a fear of witness intimidation or tampering and the possibility that the testimony of the defendant or defense witnesses might be altered at trial to accommodate the information contained in the transcripts.⁷⁴ It is ironic that in a criminal system that presumes the innocence of the individual until guilt is proven beyond a reasonable doubt, rules exist which assume that an individual alleged to have committed a crime is presumed to commit other crimes, such as perjury or terroristic threats, to conceal his wrongdoing.⁷⁵

B. *The Jenck's Act*

This is not to imply that the accused will never come into at least partial possession of the grand jury transcripts. The Jenck's Act governs a criminal defendant's right to inspect statements made by witnesses in a federal prosecution.⁷⁶ The Act directs that the defendant, upon request, is entitled to

71. FED. R. CRIM. P. 6(e)(3)(C)(ii). This is not an exhaustive list of exceptions to the general rule of non-disclosure. For other parties entitled to review of grand jury proceedings, see FED. R. CRIM. P. 6(e)(3), *supra* note 67.

72. 441 U.S. 211 (1979).

73. *Id.*

74. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 290 n.37; Hon. H. Lee Sarokin & William Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089 (1991).

75. See Sarokin & Zuckerman, *supra* note 74, at 1089 (stating that limitations on discovery anticipate that those who are presumed innocent will suborn or commit perjury).

76. 18 U.S.C.A. § 3500 (West 1985). Section 3500(a) states:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be subject to subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C.A. § 3500(a) (West 1985). Section 3500(e) defines the word "statement" as:

(1) a written statement made by said witness and signed or otherwise adopted or

a witness's prior statements after that witness has testified at the trial.⁷⁷ The Jenck's Act also applies to the witness's grand jury testimony.⁷⁸ Therefore, Rule 6 does not apply as a justification for suppression of the witness's statements after the witness has testified at trial. Although the Jenck's Act was promulgated to facilitate cross-examination of witnesses and enable the defense to impeach the prosecution's witnesses,⁷⁹ it also serves the purpose of revealing what testimony was brought before the grand jury. Thus, the Jenck's Act enables the accused to discover the existence of exculpatory testimony possessed by the prosecutor or within the prosecutor's control at the time of the indictment proceeding. Depending on the extent and nature of the evidence received, the accused may make the required showing necessary to receive the grand jury minutes *in toto*,⁸⁰ and possibly succeed with a motion to dismiss the indictment.⁸¹ However, because disclosure of grand jury testimony is not required before direct trial testimony, this showing is practically unattainable prior to trial.⁸² Succeeding on a motion to dismiss the indictment raised during trial is highly unlikely due to the Supreme Court's decision in *United States v. Mechanik*.⁸³

C. *Mechanik and the "Harmless" Error Doctrine*

Mechanik presented the issue of what effect a direct violation of grand jury procedure by the prosecutor should have on an indictment when raised in a

approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C.A. § 3500(e) (West 1985).

77. 18 U.S.C.A. § 3500(a) (West 1985).

78. 18 U.S.C.A. § 3500(e)(3) (West 1985).

79. *Palermo v. United States*, 360 U.S. 343, *reh'g denied*, 361 U.S. 855 (1959). Sarokin and Zuckerman postulate that Jenck's special treatment is premised on the same fear that justifies other discovery restrictions: the fear that defendants, if given such information before trial, might commit perjury by altering defense testimony so as not to conflict with testimony to be given by government witnesses. Sarokin & Zuckerman, *supra* note 74, at 1099.

80. FED. R. CRIM. P. 6(e)(3)(C)(ii); *see supra* note 67.

81. FED. R. CRIM. P. 12(b)(6).

82. *United States v. Mechanik*, 475 U.S. 66, 80 (1986) (Marshall, J., dissenting).

83. 475 U.S. 66 (1986). Justice Marshall's dissent supports the contention that the defendant will most often fail with a motion to dismiss. *See also* 1 CHARLES WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 108, at 263-65 (2d ed. 1982).

timely manner, either during the trial or after a jury verdict has been entered.⁸⁴ The prosecutor in *Mechanik* allowed government agents to testify in tandem before the grand jury, a direct violation of Rule 6(d).⁸⁵ In deciding this case, the majority held that the petit jury's finding of guilt beyond a reasonable doubt necessarily includes a finding that there was probable cause to believe that the defendants committed the charged offenses.⁸⁶ Thus, the majority concluded that any error in the grand jury proceeding "connected with the charging decision was harmless beyond a reasonable doubt,"⁸⁷ as measured by the petit jury's verdict.⁸⁸

In essence, this ruling was the kiss of death for any defendant hoping to exercise the right to dismiss an indictment which was unfairly and unconstitutionally granted. There are two fatal effects the *Mechanik* decision has upon criminal defendants.

First, the decision provides judges with a rationale and an incentive to delay consideration of motions to dismiss until a time when the motion is either irrelevant or moot.⁸⁹ According to *Mechanik*, when a trial judge is faced with a motion to dismiss an indictment for either a Rule 6 violation or prosecutorial

84. *Mechanik*, 475 U.S. at 73. The defendants were indicted on drug-related offenses and conspiracy. During trial, a Drug Enforcement Agency (DEA) agent testified for the government. After the agent's testimony, defense counsel requested disclosure of the agent's prior statements made to the grand jury pursuant to the Jenck's Act. Disclosure of this material revealed that the prosecutor permitted the witness to testify in tandem with another DEA agent, a direct violation of Rule 6(d). The defendants immediately moved for dismissal of the indictment. Rather than making a contemporaneous ruling on the motion, the trial judge took the motion under advisement, deferring a decision until after the jury rendered a verdict. *Id.* at 68.

After the petit jury returned a guilty verdict, the trial judge denied the defendants' motion to dismiss the indictment. The judge justified his ruling upon finding that the grand jury violation did not harm or substantially prejudice the defendants as evidenced by the petit jury's finding of guilt beyond a reasonable doubt. *Id.*

85. *See supra* note 67. The Supreme Court assumed that the simultaneous presence and tandem testimony by the two government witnesses violated this rule. The Court also stated that the indictment's dismissal would have been the appropriate remedy upon a showing of actual prejudice had the challenge been raised prior to commencement of the trial. *Mechanik*, 475 U.S. at 69-70.

86. *Mechanik*, 475 U.S. at 70.

87. Rule 52(a) defines harmless error as: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a).

88. *United States v. Mechanik*, 475 U.S. 66, 73 (1986). Justice O'Connor, writing the concurring opinion, disagreed with using the standard of the petit jury's verdict to determine harmless error. In her view, the harmless error inquiry should focus on the effect the error had on the charging decision rather than the verdict. The Court's analysis of the error viewed in the context of the trial is inconsistent with the federal rules and existing precedent, in that a Rule 6(d) violation is a grand jury error, not a trial error. Consequently, according to O'Connor, the proper focus should center on the effect the error had upon the grand jury's charging decision rather than the petit jury's verdict. *Id.* at 76 (O'Connor, J., dissenting).

89. *See Mechanik*, 475 U.S. at 83-84 (Marshall, J., dissenting).

misconduct,⁹⁰ the judge is able to defer ruling on the motion until the jury renders its verdict. At this point, the issue of grand jury violations is moot because the harmless error doctrine will be triggered. If the defendant is acquitted by the verdict, the motion to dismiss is irrelevant. Alternatively, if the jury finds guilt beyond a reasonable doubt, the verdict subsumes any contention of an incorrect finding of probable cause and the motion will fail. Thus, by delaying consideration of the motion, the court gets away with not having to determine the issue, in addition to reducing its judicial workload.⁹¹

Second, not only does *Mechanik* moot the issue of Rule 6 violations, it also renders Rule 6 unenforceable.⁹² Pursuant to the strictly enforced tradition of non-disclosure and Rule 6(e) provisions of grand jury secrecy,⁹³ the defendant is prevented from examining the minutes of the grand jury prior to trial.⁹⁴ The Jenck's Act permits access to the material only after the government's witness has testified at trial.⁹⁵ Accordingly, if the defendant is to become aware of any prosecutorial misconduct or grand jury abuse at all, it will not be until the trial has commenced. A timely motion to dismiss the indictment upon the immediate time of discovery will be deferred until the jury renders a verdict. As mentioned earlier, the issue at this point is moot because *Mechanik's* harmless error review will be employed. While the majority did limit the *Mechanik* holding to cases in which the abuse is discovered after the trial has begun,⁹⁶ it is functionally improbable that any abuse will be discovered beforehand. Therefore, the harms caused by Rule 6 violations and prosecutorial abuse of the indictment process are essentially without remedy.

90. Failure to present exculpatory evidence to the grand jury is generally regarded as a facet of prosecutorial misconduct. See BENNETT GERSHMAN, PROSECUTORIAL MISCONDUCT, §§2.6, 2-42.1-42.2; AMERICAN BAR ASSOCIATION'S PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.6(b) (1980) (see *infra* note 159 for text); U.S. JUSTICE DEPARTMENT, UNITED STATES ATTORNEY'S MANUAL § 9-11.334 (1978) (see *infra* note 160 for text).

91. *Mechanik*, 475 U.S. at 81 (Marshall, J., dissenting). Justice Marshall considers the majority's decision an "invitation" to delay consideration of a motion to dismiss until said motion is mooted by the verdict. *Id.*

92. *United States v. Mechanik*, 475 U.S. 66, 80 (1986). Rule 6 violations arise, if at all, during trial, when § 3500 will trigger disclosure of some grand jury minutes. Once the violation has been discovered, however, it will be too late to bring a motion to dismiss for, as in *Mechanik*, the court will take the motion under advisement until the jury renders its verdict, thereby mooting the issue. Therefore, as there is no way to discover the violation before the court employs the harmless error rule, Rule 6 proscriptions are unenforceable.

93. See *supra* note 67.

94. See *supra* notes 67, 76.

95. See 18 U.S.C.A. § 3500(a) (West 1985), discussed in *supra* note 76.

96. *United States v. Mechanik*, 475 U.S. 66, 72 (1986). "We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought before the commencement of trial." *Id.* (emphasis added). The Court did not preclude the possibility of correcting grand jury errors if the errors are substantial and brought before the trial has commenced. *Id.*

Denying the defense remedy in cases of flagrant prosecutorial abuse of grand jury procedures reduces the laws governing grand jury proceedings to "pretend rules."⁹⁷ The *Mechanik* majority justified its finding on the grounds that the relief requested, reversal of the conviction and reindictment proceedings, would entail substantial costs to society.⁹⁸ However, the majority fails to recognize the cost to the individuals comprising society, who will end up facing an *ex parte* proceeding with no procedural or substantive guidelines, protections, or remedies.⁹⁹ Additionally, the majority ignores the deterrent effect that enforcement of Rule 6 would have on prosecutors forced to retry a criminal case due to their misconduct; with the large workload already experienced by the prosecutors, a greater incentive will exist to employ preventative measures to ensure that an indictment will not be susceptible to a successful motion to dismiss.

IV. EXCEPTIONS TO THE "HARMLESS" ERROR DOCTRINE

Although the *Mechanik* decision crippled the review of errors occurring in the grand jury room, it did not completely lay the possibility of review to rest. A few situations exist where the reviewing court will not apply a harmless error analysis to a challenge of the indictment's validity. Specifically, these are situations in which the indictment was handed down by a grand jury discriminately composed and situations where the indictment is supported by perjured testimony.

A. Grand Jury Discrimination

In *Vasquez v. Hillery*,¹⁰⁰ the Supreme Court granted habeas corpus review of the petitioner's challenge to a state court conviction. The petitioner claimed he was denied equal protection of the laws because African-Americans were systematically excluded from the grand jury that indicted him.¹⁰¹ The

97. *Mechanik*, 475 U.S. at 83 (citing *United States v. Borello*, 766 F.2d 46, 58 (2d Cir. 1985)). Justice Marshall also states that prosecutorial misconduct will be punished only by "purely ceremonial words" of appellate displeasure. *Id.* (quoting *United States v. Anotelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946)).

98. *Mechanik*, 475 U.S. at 69.

99. The Court makes note of the economic expense incurred by the defendant yet makes no mention of the liberty expense exacted when a defendant is unfairly and unconstitutionally brought to trial. *Mechanik*, 475 U.S. at 82.

100. 474 U.S. 254 (1986) (decided one month prior to *Mechanik*).

101. *Id.* at 257. The defendant was indicted and convicted of a brutal, first-degree murder 24 years prior to the Supreme Court's resolution of the case. Before the trial, defendant Hillery moved to quash the murder indictment on the grounds that African-Americans were denied the opportunity to serve as grand jurors. The trial judge denied Hillery's motion and, subsequently, Hillery was convicted of first-degree murder. The motion was denied because the trial judge personally selected the grand jurors and could swear absence of any discriminatory intent or motive, previously a prima

Supreme Court adamantly refused to accept the government's argument that any prejudice the defendant might have experienced as a consequence of racial discrimination in the grand jury composition was corrected by the subsequent, fundamentally fair, jury trial conviction.¹⁰² In this case, the Court did not consider the actual fairness of the trial as a curative remedy of grand jury defects and abuses.¹⁰³ The Supreme Court refused to apply harmless error review because it found that an indictment rendered by a grand jury discriminately composed is a "fundamental flaw"¹⁰⁴ which "undermines the structural integrity of the criminal tribunal."¹⁰⁵ The Court justified its reversal¹⁰⁶ as an effort to deter prejudicial grand jury proceedings and an

facie element necessary for an equal protection argument. *Id.* at 619. Throughout his incarceration, Hillery sought appellate review and collateral relief challenging his grand jury indictment. *See* *People v. Hillery*, 386 P.2d 477 (Cal. 1963) (affirming conviction; rejecting discrimination claim); *People v. Hillery*, 401 P.2d 382 (Cal. 1965) (on rehearing, rejecting discrimination claim, reversing sentence), *cert. denied*, 386 U.S. 938 (1967); *People v. Hillery*, 423 P.2d 208 (Cal. 1967) (after remand, affirming sentence), *cert. denied*, 389 U.S. 986 (1968); *In re Hillery*, 457 P.2d 565 (Cal. 1969) (original petition for habeas corpus, reversing sentence); *People v. Hillery*, 519 P.2d 572 (Cal. 1974) (after remand, reducing sentence); *In re Hillery*, Crim. No. 20424 (Cal. 1978) (affirming denial of state habeas corpus). In Justice O'Connor's concurring opinion, she argued that federal habeas relief should not be granted in this case as the state courts had a full and fair opportunity to rule on Hillery's claim of discrimination and found it without merit. *Vasquez*, 474 U.S. at 266-67 (O'Connor, J., concurring).

102. *Vasquez*, 474 U.S. at 266-67. This was the harmless error argument accepted by the *Mechanik* majority. In reversing the conviction, the Supreme Court ignored the unduly harsh burden upon the state to retry the defendant 24 years after the original jury trial.

103. *Id.* at 625 (O'Connor, J., concurring).

104. The court found Hillery's situation similar to the circumstances where a defendant is judged by a jurist having a financial interest in the outcome of the case, where the petit jury is chosen by improper selection criteria, and where prejudicial pre-trial publicity has pervaded the context of the trial. *See* *Davis v. Georgia*, 429 U.S. 122 (1976); *Tumey v. Ohio*, 273 U.S. 510 (1927). These situations, as Hillery's, call for mandatory reversal because the effect of the error or violation cannot be measured. *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986). *See also* *Rose v. Mitchell*, 443 U.S. 545 (1979) (stating that discrimination on the basis of race in selection of grand jurors strikes at "fundamental values" of our judicial system and denies the defendant equal protection of the laws).

105. *Vasquez*, 474 U.S. at 263-64. The "structural integrity" of the criminal system is called into question when a constitutional error affects the objectivity and impartiality of individuals responsible for assessing judgment, either judge, jury, or grand jury. *Id.*

106. A point of interest in *Vasquez* is that relief was provided absent any evidence of prejudice or intentional discrimination, previously a prima facie element for recovery in a discrimination allegation. By providing relief to the defendant in *Vasquez*, the Court seems more concerned with the idea that the grand jury proceeding appear fair rather than the reality that the grand jury proceeding actually be fair. *See also* *United States v. Seruba*, 604 F.2d 807, 817 (3d Cir. 1979 (citing *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979)) (stating that federal courts have an institutional interest in preserving and protecting the appearance of fair practice before the grand jury); *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979) (stating that grand jury discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process"). For cases requiring a finding of discriminatory intent, see *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239

incentive to eliminate discrimination throughout the criminal justice system.¹⁰⁷

Three rationales were provided for the refusal to employ the *Mechanik*-like harmless error review. In these rationales, the Court defined three discretionary judgments of the grand jury that have ramifications on the criminal trial beyond the preliminary finding of probable cause. First, the Court stated that a fair trial does not purge grand jury defects because a grand jury, on the basis of identical facts, can indict on a higher or lesser charge, on single or multiple counts, or for a capital or non-capital offense.¹⁰⁸ Thus, an error in the grand jury proceeding extends into the criminal trial with regard to the severity and magnitude of the offense to be adjudicated. Second, even though the facts are sufficient to support a conviction on a petit jury trial, the grand jury is not bound to indict a defendant at all.¹⁰⁹ Therefore, defects in the indictment proceeding may effect whether or not there is a prosecution altogether.¹¹⁰ Finally, although a guilty verdict beyond a reasonable doubt confirms the presence of probable cause, the conviction does not cure the defect in the grand jury, which frames the indictment.¹¹¹ The indictment defines the nature and

(1976).

107. *Vasquez*, 474 U.S. at 263-64. Citing *Rose v. Mitchell*, 443 U.S. 545 (1979), the Court concluded that reversal was the only effective remedy for Hillery's situation. 18 U.S.C. § 243 and 42 U.S.C. § 1983 prohibit grand juror discrimination, but suits brought under these statutes are rare because of the costs involved and because those eligible to bring suit are often ignorant of the opportunity. *Vasquez*, 474 U.S. at 263-64. Therefore, to enforce these statutes, vindicate the interests of African-Americans in general, and purge the criminal system of this unconstitutional practice, reversal of cases infected by such racial discrimination is required. *Id.*

The deterrent effect a dismissal will have upon future actions of the government is another reason why no other remedy is sufficient. In *United States v. Seruba*, 604 F.2d 807 (3d Cir. 1979), the Third Circuit defined the value of dismissal of a conviction due to prosecutorial misconduct in the grand jury. The Third Circuit realized that "judicial tongue clicking" and verbal reprimands have little impact on the problem of grand jury abuses. Yet this is the relief when a harmless error review is employed to resolve issues of prosecutorial misconduct in the grand jury. The court stated that the "only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the Grand Jury process" is by dismissing the indictment. *Seruba*, 604 F.2d at 817. The prospect or threat of lost cases due to attorney misconduct will also enhance the overall fairness of the system. *Id.*

108. *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

109. See *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting).

110. This is similar to the nullification power of petit juries. When a petit jury resolves an issue in a case, legal or factual, guided by their moral or common sense judgments, rather than the judge's instructions, the jury has employed its power and right of nullification. See *Sparf and Hansen v. United States*, 156 U.S. 51 (1895); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972). Similarly, the grand jury, guided by their moral or common sense, can refuse to return an indictment in the face of conclusive facts which independently establish probable cause.

111. *Vasquez*, 474 U.S. at 263.

magnitude of the criminal trial.¹¹² If the indictment process is defective, the ensuing criminal proceeding is similarly defective. Thus, although the Court has to concede that the petitioner's trial was fundamentally fair, the petitioner's paramount interest in a fair grand jury determination of probable cause is not only a right that, if violated, will be remedied upon review, but is also a prerequisite for a fair criminal trial.

The three rationales supporting the Court's conclusion that a subsequent fair jury trial does not purge grand jury abuses or defects can easily be applied to the issue of prosecutorial failure to present exculpatory evidence. The prosecutor's suppression of exculpatory evidence taints the grand jury's decision to indict. It logically follows that, upon such suppression, the entire criminal proceeding will be tainted. Therefore, it is in the interests of the defendant, the courts, and the criminal justice system that suppression of exculpatory evidence is not promoted by allowing the practice to continue.

B. *Indictments Supported by Perjury*

Similar to the refusal to employ a harmless error analysis in situations like *Vasquez*, some district courts refuse to apply the harmless error review in cases where the prosecutor is aware that an indictment is based in part on perjured testimony and remains silent.¹¹³ In these jurisdictions, a duty is placed upon the prosecutor to notify the court, the grand jury, and the defense counsel of the existence of perjured testimony.¹¹⁴ For example, in *United States v. Basurto*,¹¹⁵ the Ninth Circuit reversed the defendant's conviction on the ground that the prosecutor's failure to comply with the aforementioned duty violated the defendant's fifth amendment right of due process.¹¹⁶ In justifying its holding,

112. *Id.*

113. See *United States v. Spillone*, 879 F.2d 514, 524 (9th Cir. 1989); *United States v. Adamo*, 742 F.2d 927, 939-40 (6th Cir. 1984); *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983); *United States v. Levine*, 700 F.2d 1176, 1180 (8th Cir. 1983); *United States v. Lawson*, 502 F. Supp. 158, 171 (D. Md. 1980); *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1976).

114. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). This duty is a requirement of due process and is mandated by the Fifth Amendment, established by the Supreme Court in *Mooney v. Holoran*, 294 U.S. 103 (1935), and *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that the defendant's due process right is violated when the prosecutor is aware of the existence of perjury and suppresses it).

115. 497 F.2d 781 (9th Cir. 1974). The Assistant United States Attorney was aware that the government's key witness committed perjury while testifying before the grand jury. The prosecutor informed the defense attorney but kept the information from both the court and the grand jury.

116. *Basurto*, 497 F.2d at 785. In so holding, the court formulated the duty discussed at *supra* note 115 and accompanying text. The rationale of the court recognized that the grand jury was dependent upon the prosecutor to initiate, investigate, and present criminal cases for grand jury consideration. *Id.* With this dependency comes power and authority. Correspondingly then, a duty is placed upon the prosecutor to reveal instances of perjury when known, and thereby "correct the

the court quoted *Napue v. Illinois*,¹¹⁷ a United States Supreme Court case deciding the issue of prosecutorial reaction to the existence of perjured testimony.¹¹⁸ The Supreme Court stated, “[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. *The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.*”¹¹⁹

An indictment is a fundamental part of any criminal proceeding, and failure to correct perjured testimony in front of the grand jury inhibits its assessment of probable cause. As this inadequate and unfair assessment of probable cause defines the nature and magnitude of the trial offense,¹²⁰ the court determined that reversal of Basurto’s conviction was the only fair remedy.¹²¹

Perjury is defined as giving false assertions or testimony under oath,¹²² and when it is introduced at any stage of the criminal proceeding, it can be interpreted as a fraud upon the court. If a duty is placed upon the prosecutor to present exculpatory evidence and attest under oath to the fulfillment of that

cancer of justice that has become apparent to him.” *Id.* The duty to disclose perjured testimony, however, is only triggered when the testimony relates to a material element in the case and the prosecutor is notified prior to the attachment of jeopardy.

The *Basurto* decision was somewhat limited by a later Ninth Circuit case defining the standard of materiality to be used. In *United States v. Bracy*, 566 F.2d 649 (9th Cir. 1977), the court held that the duty to disclose is triggered when the perjured testimony is of such nature that it casts reasonable doubt on the grand jury’s finding of probable cause. *Bracy*, 566 F.2d at 655-56. This definition of materiality was adopted from the United States Supreme Court case of *United States v. Agurs*, 427 U.S. 97 (1976). Absent such a finding of materiality, harmless error review will control and a finding will be made that the defendant’s fifth amendment rights have not been violated enough to warrant a dismissal of the indictment. *Bracy*, 566 F.2d at 657.

117. 360 U.S. 264 (1959).

118. The perjured testimony in *Napue* was introduced during trial, not during the indictment process. The Court’s holding, however, stated that the knowing use of false testimony to obtain a conviction violates due process. *Napue*, 360 U.S. at 269. Clearly, in light of Justice Marshall’s opinion in *Vasquez*, see *supra* notes 112-13 and accompanying text, procurement of the indictment is a necessary step in obtaining a conviction. The Court opined that this principle is implicit in “any concept of ordered liberty.” *Napue*, 360 U.S. at 269. While *Napue* dealt with perjury arising during the trial, the Court’s holding extended the due process rationale beyond that narrow scope. See also *Giles v. Maryland*, 386 U.S. 66, 74 (1967).

119. *Napue*, 360 U.S. at 269 (emphasis added).

120. See *supra* notes 108-09.

121. *United States v. Basurto*, 497 F.2d 781, 786-87 (9th Cir. 1974). See also *supra* note 107 (discussing the *Vasquez* Court’s finding that reversal of Hillery’s conviction was the only effective remedy).

122. Under federal law, whoever willfully subscribes as true any material matter which he does not believe to be true in any declaration, verification, certificate, statement, oath, or affidavit is guilty of perjury. 18 U.S.C.A. § 1621(2) (West 1993) and 28 U.S.C.A. § 1746 (West 1992) (emphasis added).

duty, the prosecutor would commit perjury if an attestation is made but the exculpatory evidence is not presented. If the prosecutor's attestation is needed to support any indictment, an indictment containing the false attestation would be supported by perjury. Consistent with the *Basurto* line of cases, such an indictment would be immune from harmless error review and the right of a defendant to an untainted determination of probable cause could be vindicated.

Vasquez and *Basurto* support the assertion that although *Mechanik's* harmless error analysis is sufficient for some grand jury abuses and errors, it is not an all-pervasive obstacle which must be conquered to obtain relief from an unfair or unjust indictment. Moreover, these cases stand for the proposition that the indictment proceeding cannot be considered separate and distinct from the criminal trial. As such, errors in the grand jury room have ramifications which infect the entire criminal adjudication of guilt. Suppression of exculpatory evidence from the grand jury leads to a possibly erroneous and conclusively prejudiced determination of probable cause. In light of the aforementioned cases, the effects of such a suppression cannot be confined to the contours of the grand jury room, but will alter and pervert the petit trial as well.

V. THE CURRENT STATE OF THE LAW

Consistent with the current conservative trend to relax the constitutional rights of defendants in the grand jury room, the United States Supreme Court failed to impose a duty upon the government to present exculpatory evidence in an indictment proceeding in *United States v. Williams*.¹²³ This case represents the latest opportunity for the Court to scrutinize the fairness of the grand jury indictment process. However, unfortunately for any member of the public who has to face the grand jury, the decision merely renders the fifth amendment guarantee of an independent and impartial determination of probable cause a dead-letter doctrine.

Williams was indicted on seven counts of making false statements to a federal financial institution.¹²⁴ In presenting its case before the grand jury, the government misrepresented *Williams's* interest income and suppressed evidence which directly contradicted an intent to mislead the banks, the necessary mens rea for the charged offense.¹²⁵ *Williams* was apprised of the prosecutor's partial and unfair presentation after reviewing the grand jury minutes prior to

123. 112 S. Ct. 1735 (1992).

124. 18 U.S.C.A. § 1014 (West 1976 & Supp. 1992). Section 1014 prohibits anyone from making a false statement or report, or willfully overvaluing any land or property for the purpose of influencing any action of certain federal financial institutions under penalty of a fine not to exceed \$1,000,000.00 or imprisonment up to 30 years, or both.

125. *Williams*, 112 S. Ct. at 1738.

trial.¹²⁶ He immediately moved to dismiss the indictment on the basis that the government failed to fulfill its disclosure obligation.¹²⁷ The district court granted the motion and the indictment was dismissed without prejudice.¹²⁸ The Tenth Circuit affirmed the dismissal of the indictment upon review, finding that the government's behavior "substantially influenced" the grand jury's decision to indict or at the very least raised a 'grave doubt that the decision to indict was free from such substantial influence.'¹²⁹

The Supreme Court granted certiorari to decide the sole issue of "whether a district court may dismiss an otherwise valid indictment because the government failed to disclose to the grand jury 'substantial exculpatory evidence'¹³⁰ in its possession."¹³¹ The Court emphasized two rationales to support its refusal to impose the duty upon the prosecutor. Nevertheless, these rationales and the Court's resolution of the issue have adverse ramifications beyond the scope of whether or not the prosecutor can suppress exculpatory evidence.

First, the majority concluded that the judiciary is helpless to impose a duty upon the prosecutor or to provide a remedy for an abuse of the grand jury process, because issuing such a mandate or remedy would be improper use of

126. Disclosure was permitted by the court following a specific *Brady* request by Williams's attorney. This result is rare and deemed "highly unlikely" by Justice Marshall in *Mechanik*. See *supra* note 84 and accompanying text. For explanation of a *Brady* request, see *supra* note 67 and accompanying text.

127. The Tenth Circuit placed an affirmative obligation upon the prosecutor to present substantial exculpatory evidence in its possession or control discovered in the course of an investigation. See *United States v. Williams*, 899 F.2d 898, 900-03 (10th Cir. 1990). This duty did not require the prosecutor to search out all evidence favorable to the accused for such a requirement would be too great a burden for the government. See *United States v. Page*, 808 F.2d 723, 728 (10th Cir. 1987).

128. Such a remedy enables the government to seek reindictment and prevents an undeserved windfall for the defendant. *Mechanik*, 475 U.S. at 69 (stating findings of the District Court). The District Court in the present case found that the suppressed evidence was "relevant to an essential element of the crime charged and created a reasonable doubt about [respondent's] guilt . . . and thus rendered the Grand Jury's decision to indict gravely suspect." *United States v. Williams*, 112 S. Ct. 1735, 1738 (1992) (quoting *United States v. Gray*, 502 F. Supp. 150, 152 (D.C. Cir. 1980)).

129. *Williams*, 899 F.2d at 903 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988)). This standard was the standard first articulated by Justice O'Connor in the *Mechanik* concurring opinion and employed by the majority, per Justice Kennedy, in *Bank of Nova Scotia*. It states: "[D]ismissal of the indictment is appropriate only if it establishes that the violation substantially influenced the Grand Jury decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia*, 487 U.S. at 256.

130. See *United States v. Page*, 808 F.2d 723 (10th Cir. 1987).

131. *Williams*, 112 S. Ct. at 1737.

the Court's supervisory power.¹³² The Court defined the grand jury's existence as separate and independent from the judicial branch of government.¹³³ Because the courts do not have the power to "formulate procedural rules not specifically required by the Constitution or Congress"¹³⁴ to entities existing outside the penumbra of the judicial branch, the Supreme Court concluded the Tenth Circuit exceeded its authority when it provided a remedy to Williams.¹³⁵

This rationale disregards the context in which the grand jury exists and the limitations under which the grand jury operates. Without the judiciary's assistance, the grand jury is helpless to perform any investigatory functions or enforce compliance with any of its requests.¹³⁶ The majority supported its rationale with a litany of one-sided cases in which a remedy was denied to the petitioner seeking redress from an indictment that was arguably defective.¹³⁷ Specifically, the Court quoted *United States v. Costello*, in which the Court declined to enforce the hearsay rule in grand jury proceedings, because that

132. *Id.* at 1746. *But see* Ballard v. United States, 329 U.S. 187 (1946) (supervisory power used to reverse a conviction due to invalid indictment procedure); United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976) (supervisory power exercised to insure uniformity in warnings given to defendants testifying before the grand jury). The Supreme Court has formulated an independent doctrine to remedy inequities in the federal criminal court. When the Court employs this doctrine to decide a case, the Court exercises its "supervisory power." The doctrine was introduced into criminal jurisprudence in *McNabb v. United States*, 318 U.S. 332 (1943). In *McNabb*, the Supreme Court recognized that "judicial supervision of the administration of justice implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb*, 318 U.S. at 341. This recognition was elaborated in *United States v. Hastings*, 461 U.S. 499 (1983), when the Court held that federal courts may construct procedural rules not specified in the Constitution or by Congress, within limits, guided by considerations of justice. *Hastings*, 461 U.S. at 505. *See also* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

133. *United States v. Williams*, 112 S. Ct. 1735, 1741 (1992). *But see* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 59 (1928) ("[A] grand jury is neither an officer nor an agent of the United States, but a part of the court.").

134. *Williams*, 112 S. Ct. at 1741 (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)). The Court concluded that the use of the Court's supervisory power is only proper to regulate "their own procedure." Because the Court opined that the grand jury has a separate existence from the judiciary, the Court concluded it is not possible to proscribe rules regulating grand jury procedure. *Id.* at 1741. *See also supra* note 15 and accompanying text.

135. *Williams*, 112 S. Ct. at 1742.

136. *Id.* at 1752 (Stevens, J., dissenting) (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959)).

137. *United States v. Williams*, 112 S. Ct. 1735, 1743 (1992). This litany includes *United States v. Calandra*, 414 U.S. 338, 346 (1974) (noting that an indictment based on improperly obtained evidence is valid); *United States v. Blue*, 384 U.S. 251 (1966); *Lawn v. United States*, 355 U.S. 339 (1958); *Costello v. United States*, 350 U.S. 359 (1956) (holding that evidentiary rules of admissibility and exclusion are not applicable in grand jury proceeding); *Ex parte United States*, 287 U.S. 241 (1932); *United States v. Thompson*, 251 U.S. 407 (1920) (noting that double jeopardy does not bar a grand jury from indicting an accused where a prior grand jury refused to do so).

“would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules.”¹³⁸ However, *Costello* and these other supporting cases were not premised on an inability of the Court to apply its supervisory power. Rather, these cases were justified on various grounds explaining different reasons why “technical rules” would not be wise or efficient to employ, not because redress was beyond the scope of the Supreme Court’s constitutional authority.¹³⁹

The relaxing of technical rules such as hearsay or the exclusionary rule can be justified by the fact that the enforcement of these rules contributes to determination of factual guilt or innocence. One of the grand jury’s functions is to determine if a crime was actually committed and, if so, if the accused probably was the perpetrator.¹⁴⁰ These questions focus on the factual guilt of the suspect. The rules of exclusion and hearsay are in place to enhance the accuracy of finding legal guilt, not factual guilt.¹⁴¹ The determination of legal guilt is the purpose of the trial court and any interest that the accused has in enforcement of these technical rules will be realized in that venue. However, exculpatory evidence is indicative of factual guilt or innocence because it answers the question of whether or not a crime has been committed, and if the accused probably committed the offense. Accordingly, because the indictment proceeding focuses on factual guilt, there is an interest of the accused and the criminal justice system to present exculpatory evidence to the grand jury.

138. 112 S. Ct. at 1743.

139. See *Costello*, 350 U.S. at 359; *Calandra*, 414 U.S. at 338.

140. KAMISAR ET AL., *supra* note 5, at 191.

141. The difference between factual and legal guilt and the principles associated with each determination is sufficiently distinguished by Arenella in *Reforming the Federal Grand Jury*, *supra* note 19. Factual guilt refers to “the substantive criminal law’s definition of criminal conduct.” *Id.* at 476-77. An individual who is factually guilty is one who commits “the proscribed act or omission with the requisite intent under circumstances that neither excuse or justify that conduct.” *Id.* at 476. However, in order to determine whether or not an individual is factually guilty, the criminal process provides certain procedural mechanisms to insure fair resolution of factual issues.

These procedural mechanisms respect individual rights, rules of evidence, and community participation in resolving the factual guilt questions. Legal guilt refers to the final outcome of applying the procedural mechanisms to the factual issues. These procedures reduce the states’ ability to detect the factually guilty. For example, the state obtains reliable evidence of an individual’s participation in a crime which establishes conclusively that the individual was factually guilty. However, because the state employed an unconstitutional technique in securing the evidence, the incriminating evidence is not admissible. Thus, if the state’s case depends primarily upon the illegally seized evidence, the factually guilty individual will be adjudged legally innocent. See *id.* at 476-77.

The procedural mechanisms used to determine legal guilt are employed during the trial. Issues of factual guilt are typically screened during the preliminary stages of the trial, such as the grand jury indictment phase. Exculpatory evidence establishing the absence of a prima facie element of a crime is an issue of factual guilt. As such, this evidence should be presented during the phase of factual guilt screening, i.e., the grand jury indictment proceeding.

The practical consequences of a ruling that the Supreme Court does not have the power to remedy grand jury abuses and violations not expressly carved in the Constitution or by Congress are grave. For example, failure to provide redress for the defendant against the prosecutor who ignores undefined principles of fairness and justice enables the prosecutor to act with virtual impunity within the confines of the grand jury room. This effect was neither argued by the petitioner nor considered by the majority.

In addition to justifying its ruling with assertions of limited authority, the Supreme Court also rationalized its decision on historical grounds, ruling that the imposition of a prosecutorial duty would "alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body."¹⁴² The Court supported this rationale with a historical, eighteenth-century explanation of the logic behind the principle that only the prosecutor's side of the case should be presented for consideration.¹⁴³ Thus, an obligation upon the prosecutor to present exculpatory evidence within the government's control is "incompatible with this historical system" of probable cause assessment.¹⁴⁴

The Court's focus completely disregards the purpose of the grand jury as a "bulwark standing solidly between the ordinary citizen and overzealous prosecutor."¹⁴⁵ By centering only on the grand jury's accusatory function, the majority ignored the grand jury's "equally important" and historically recognized protective role. The majority's narrow definition of the grand jury's function ensures that the grand jury will lose its independence and will ultimately become an extension of the prosecutor's arm, a possibility hardly given adequate consideration.¹⁴⁶ The *Williams* decision will bring about the dissolution of the fifth amendment guarantee of an "independent and informed" probable cause assessment.¹⁴⁷

The *Williams* Court forewent the opportunity to resolve some of the

142. *United States v. Williams*, 112 S. Ct. 1735, 1744 (1992).

143. *Id.* The majority's analysis ignores any case supporting the contention that the grand jury has the dual role of screening unwarranted prosecutions and determining probable cause. Instead, the court digresses as far back as 1769 in England to establish support for the rationale that only incriminating evidence should be presented to the grand jury. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *300 (1769); 2 SIR MATTHEW HALE, PLEAS OF THE CROWN 157 (1st Am. ed. 1847). Additionally, the majority supports its contention with various early American authority. *See, e.g.*, *Respublica v. Shaffer*, 1 U.S. 236, 1 L. Ed. 116 (Philadelphia Oyer and Teminer 1788); FRANCIS WHARTON, CRIMINAL PLEADING AND PRACTICE § 360, 248-49 (8th ed. 1880).

144. *Williams*, 112 S. Ct. at 1745.

145. *See supra* note 11.

146. *United States v. Williams*, 112 S. Ct. 1735, 1753 (1992) (Stevens, J., dissenting) ("We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room.")

147. *See supra* notes 32, 42, 55 and accompanying text.

inequity inherent in the grand jury indictment process. With excuses of powerlessness and an obsolete historical analysis of the purpose of the grand jury, the Supreme Court recognized, but did not impose, an obligation on the government to employ fair and just methods to initiate criminal proceedings. Fortunately, the Court did not foreclose the issue from legislative resolution. Accordingly, the following proposal is one method of remedying the harm that the *Williams* decision cavalierly disregarded.

VI. PROPOSED RULE

A. Proposed Rule

1. Consistent with the ethical obligations of the attorney for the government and in recognition of the rights afforded to an individual under the Fifth Amendment, the government must introduce material evidence in the government's possession or control that the attorney for the government is aware or should be aware negates an essential element in the criminal offense.

a. In the event that the grand jury finds probable cause exists to believe a crime has been committed, the government's attorney must sign an affidavit attesting to the fulfillment of the obligation to introduce evidence defined in section 2 of this provision.

b. Failure of the attorney for the government to sign an affidavit attesting to the fulfillment of the government's obligation to present evidence encompassed in section 2 of this provision will render the corresponding indictment procedurally defective and invalid.

(1) A criminal trial may not proceed upon an indictment adjudged to be procedurally defective and invalid by this enactment.

(2) If it is ascertained before trial or during trial, pursuant to 18 U.S.C. § 3500, a discovery order imposed by the court, or any other source, that the attorney for the government failed to fulfill the duty imposed upon the government in this provision, the corresponding indictment will be considered to have been based upon perjury, resulting in an invalid, procedurally defective indictment.

(i) An indictment procedurally defective and invalid will be dismissed without prejudice contemporaneously with a Rule 6 motion to dismiss the indictment.

(ii) A motion to dismiss the indictment will present a question of law to be determined by the trial judge.

2. Definitions

a. *Material evidence.* In the case of the government suppressing, withholding, or failing to present evidence in its possession or control to the grand jury, material evidence will be defined as real or testimonial evidence of which there exists a reasonable probability that, had the evidence been introduced, the grand jury's decision to indict on the criminal charge would have been different.

b. *Reasonable Probability.* Reasonable probability, in the context of material evidence, is to be understood to be a probability sufficient to undermine the confidence in the outcome.

c. *Evidence in the Government's Possession or Control.* For purposes of this section, evidence considered in the possession or control of the government is evidence assimilated by government personnel associated with the criminal investigation of the target or evidence which the attorney for the government is aware or should be aware exists.

B. *Explanation of the Proposed Rule*

The proposal imposing the obligation upon the government's attorney injects an element of fairness into the grand jury proceedings. Accordingly, it is narrowly tailored to that goal and is consistent with pre-*Williams* schools of thought concerning the prosecutorial function.¹⁴⁸ The Supreme Court defined the role of the government's attorney when it stated:

[The United States Attorney] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnest and vigor . . . But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one . . . His interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.¹⁴⁹

148. See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE—THE PROSECUTION FUNCTION § 3.6, 90-91; U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, tit. 9, ch. 11, § 9-11.233 (1988); *United States v. Berger*, 295 U.S. 78, 88 (1935); *Provenzano v. United States*, 440 F. Supp. 561 (S.D.N.Y. 1977); *Johnson v. Superior Ct. of Calif., Cty. of San Joaquin*, 113 Cal. Rptr. 740 (Cal. Ct. App. 1974).

149. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

The proposed rule gives effect and bite to the mandate of fairness that is presently recognized, yet unenforced.

Additionally, this proposal recognizes the significance of the indictment proceeding identified by the Supreme Court in *Vasquez*.¹⁵⁰ The grand jury determination of probable cause, represented by the corresponding indictment, defines the nature and magnitude of the criminal offense and the trial process. Suppression of exculpatory evidence that affects the grand jury's charging decision infects and distorts the entire criminal process.¹⁵¹ As such, this proposal is not motivated solely to vindicate an accused's fifth amendment right to a grand jury determination of probable cause, but also to eradicate an inequity inherent in the indictment process that weakens the foundation of the criminal trial.

Further, the proposed rule gives substantive effect to the fifth amendment guarantee that the assessment of probable cause be made by an investigative body "acting independently of either prosecuting attorney or judge."¹⁵² As previously discussed, presentation of only incriminating evidence and suppression of exculpatory evidence causes the grand jury to become an arm of the government, under whose control indictments are either rendered or rejected.¹⁵³ This destroys the independence of the grand jury's ability to accurately assess the presence of probable cause to believe a crime has been committed by the accused.¹⁵⁴ Accordingly, this suppression is violative of an individual's fifth amendment rights. Imposition of the obligation to make a fair and accurate presentation of the evidence is simply a statutory recognition of the rights of every individual under the Constitution.

Opponents to this proposal will argue that imposing the duty transforms the indictment process into an adversarial proceeding.¹⁵⁵ However, the reason the system relies so heavily on the prosecutor to make a fair and accurate presentation of the case is the fact that the grand jury process is not adversarial.¹⁵⁶ In the grand jury room, the prosecutor operates without the check of the judge or a trained legal adversary who would ensure fairness and alternative evidentiary showings.¹⁵⁷ Where there is no contrary viewpoint to mitigate partial presentations of evidence, there is no fairness or accuracy of

150. See *supra* notes 108-12 and accompanying text.

151. See *supra* notes 111-12 and accompanying text.

152. See *United States v. Dionisio*, 410 U.S. 1 (1972); *Stirone v. United States*, 361 U.S. 212 (1959); *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977).

153. See *supra* notes 54-55.

154. *Id.*

155. See *supra* note 35.

156. See *Johnson v. Superior Ct. of San Joaquin Cty.*, 539 P.2d 792, 796 (Cal. 1975).

157. *United States v. Seruba*, 604 F.2d 807, 817 (3d Cir. 1979).

result. Therefore, the criminal justice system is dependent on the prosecutor to further the best interests of society by moderating the indictment process in an impartial and disinterested manner.¹⁵⁸ The imposition of an obligation to present exculpatory evidence when it exists ensures that the prosecutor will not disregard what the criminal system demands.

This proposal is also a statutory affirmation of the duty presently recognized by the American Bar Association¹⁵⁹ and the United States Justice Department.¹⁶⁰ The standards proposed by these departments have not been implemented for the same reasons previous attempts to impose a duty were insufficient: failure to adequately define the scope of "exculpatory evidence" and failure to suggest a just and reasonable sanction upon discovery of a violation.¹⁶¹ Imposition of an obligation that defines the scope of the duty too broadly creates an impossible administrative burden upon the government and elongates the grand jury proceeding into something that represents a mini-trial.¹⁶² If the scope of the duty is defined too narrowly, any injustice

158. *Berger v. United States*, 295 U.S. at 88.

159. See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.6(b) (1980) ("[N]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.").

160. See U.S. JUSTICE DEPARTMENT, UNITED STATES ATTORNEY'S MANUAL § 9-11.334 (1978) (the prosecutor must present substantial evidence which directly negates the guilt of the accused to the grand jury).

161. Twenty states and the District of Columbia have also attempted to implement rules on prosecutorial duty of disclosure. A few states and the District of Columbia have recognized that a duty exists, but they have never defined the scope of the duty. See *Adams v. United States*, 466 A.2d 439, 445 (D.C. 1983) (implying that the dismissal of an indictment may be appropriate if a prosecutor withholds exculpatory evidence in "bad faith"); *State v. Wendell*, 235 N.W.2d 702, 712 (Iowa 1975) (reasoning that dismissal of the indictment is appropriate only if actual prejudice results from suppression of exculpatory evidence); *Hylar v. Sheriff, Clark County*, 571 P.2d 114, 116 (Nev. 1977) (implying that NEV. REV. STAT. § 172.145 (1993), which requires grand jury to order production of exculpatory evidence, creates a prosecutorial duty to disclose). However, most states that impose a prosecutorial duty require the prosecutor to present to the grand jury evidence that would exonerate the accused or lead the grand jury to refuse to indict. See, e.g., *State v. Coconino County Super. Ct.*, 678 P.2d 1386, 1389 (Ariz. 1984); *State v. Adams*, 645 P.2d 308, 311 (Haw. 1982); N.M. STAT. ANN. § 31-6-11(B) (Michie 1993) (stating that a prosecutor "shall present evidence that directly negates the guilt of the target when he is aware of such evidence"). This very narrow scope of the duty however is very difficult to satisfy. See SARA S. BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE §6:03, 14 (1986). California is the most liberal in its realization of the scope of the duty as it requires the prosecutor to present evidence to the grand jury which "reasonably tend[s] to negate guilt." See text accompanying notes 37-48. However, California is the only jurisdiction to employ this liberal standard.

162. See *Arenella*, *supra* note 19, at 554. These dangers and the difficulty in implementing sufficient sanctions upon discovery of a violation prevent prior attempts from being successful. See, e.g., H.R. 94, 95th Cong., 1st Sess. § 3329(c) (1977) (stating that a comprehensive grand jury reform bill required prosecutors to "periodically advise the grand jury of the nature and existence of evidence, as not yet received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant"). The standard proposed in this bill is very

designed to be remedied by imposition of the rule will be eliminated, as any practical effect of the rule will be lost.¹⁶³

The definition of the prosecution's obligation and materiality is derived from previously uncontroverted principles of disclosure and governmental obligations associated with the context of trial. Primarily, the holdings of *Brady v. Maryland*¹⁶⁴ and *United States v. Bagley*¹⁶⁵ contribute to this proposal's formulation. *Brady* made it an element of due process and fairness to the accused that the government could not suppress evidence "material either to guilt or punishment."¹⁶⁶ Imposing this requirement upon the indictment proceeding is merely recognizing that the indictment process is an important and necessary part of the criminal trial.

The definition of materiality and reasonable probability is derived from *United States v. Bagley*. The *Bagley* test for materiality is typically applied to due process challenges for failure of the government to adhere to the constitutional mandates of discovery.¹⁶⁷ The test provides: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."¹⁶⁸ *Bagley* also provided the employed definition of "reasonable

broad, which may impose a harsh administrative burden on the government. Yet this proposal is silent about sanctions or remedies available upon a violation. S. 1449, 95th Cong, 1st Sess. § 3330(c)(d)3 (1977) would require a district court to dismiss an indictment if the prosecutor "has not presented to the grand jury all evidence in his or her possession which the attorney knows will tend to negate the guilt of the person indicted." Here, the sanction is clear but the bill does not adequately define the scope of the prosecutor's duty.

163. Arenella, *supra* note 19, at 554. See also *supra* note 19 and accompanying text.

164. 373 U.S. 83 (1963).

165. 473 U.S. 667 (1985).

166. *Brady*, 373 U.S. at 87. The Court stated that due process is violated when the prosecution suppresses exculpatory evidence material to either guilt or punishment. This due process violation occurs irrespective of the good or bad faith of the prosecutor. *Id.* In addition to granting relief to the accused, the Court's ruling was an effort to protect society. The Court stated, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* Applying the analysis to the issue of the grand jury and the presentation of exculpatory evidence, a duty imposed upon the prosecutor would not only benefit the innocent defendant, but also society's interest in the fair administration of justice.

167. *Bagley*, 473 U.S. at 669. The *Bagley* decision can be interpreted as an extension of the aforementioned *Brady* rule. The *Brady* Court held that the suppression of evidence favorable to the accused by the prosecution violates due process where the evidence is material to either guilt or punishment. See *supra* note 168. *Bagley* clarified this holding by defining the standard to be used when considering what evidence should be deemed material for *Brady* purposes.

168. *Bagley*, 473 U.S. at 682. The Court's definition is a compilation of two standards defined in earlier cases. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court provided a framework for evaluating the materiality of suppressed evidence or perjured testimony. It held that a conviction obtained with the use of false or suppressed evidence is invalid if there is any reasonable likelihood

probability."¹⁶⁹

The proposal's obligation and definitions resolve the problems which arose when previous attempts to impose the duty were made and at the same time avoids the dangers associated with an inadequate definition of exculpatory evidence. The ineptness of the prior attempts to impose a duty upon the government was due to insufficient definitions of scope and failure to provide just and reasonable sanctions upon discovery of a violation.¹⁷⁰ The scope of this proposal is clear: the prosecutor should disclose only evidence within the possession or control of interested government personnel that negates a prima facie element of the underlying criminal offense.¹⁷¹ Equally clear is the sanction implemented upon discovery of a violation: dismissal of the indictment without prejudice. This is a fair and reasonable remedy, for while it imposes a sanction upon the prosecutor that acts as a deterrent against future violations, it does not provide a windfall benefit to an accused who is factually guilty.¹⁷²

The obligation also incorporates the objective standard of determining prosecutorial failure expressed in *Provenzano*¹⁷³ and *Brady*.¹⁷⁴ The statute recognizes that the injustice upon the defendant due to the prosecutor's failure, in the sense that the accused is perhaps brought undeservedly to suffer the hardships of trial, is the same regardless of whether the prosecutor's suppression

that the contested evidence could have affected the judgment of the jury. *Agurs*, 427 U.S. at 103. Thus, evidence would be material unless failure to disclose it would be harmless beyond a reasonable doubt. *Bagley*, 473 U.S. at 680.

In a case resolving an issue of ineffective assistance of counsel, the Court held a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The holdings, and rationales of these two cases established the standard of materiality used by the *Bagley* Court and this note.

169. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The *Bagley* Court employed the definition of "reasonable probability" established in the *Strickland* decision. The *Strickland* decision defined this standard as a probability sufficient to undermine confidence in the outcome of trial. *Id.* (quoting *Strickland*, 466 U.S. at 694).

170. See *Arenella*, *supra* note 19, at 553-56; see also text accompanying notes 19-20.

171. See § 1 of *Proposed Rule*.

172. See § 1(b)(2)(i) of *Proposed Rule*.

173. See *supra* text accompanying note 62.

174. See *supra* note 67. The Court held that the suppression of evidence requested by and favorable to the accused is a violation of due process if the evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Court concluded that such a violation exists "irrespective of the good faith or bad faith of the prosecutor." *Id.* The *Brady* Court focused on the objective value of the evidence in question, rather than the subjective perception of the prosecutor. *Sarokin & Zuckerman*, *supra* note 74, at 1102.

was intentional or negligent.¹⁷⁵ Accordingly, the objective standard is utilized to protect the accused from unwarranted criminal allegations and to protect the system from wasting valuable judicial time in proceeding with unjustified criminal prosecutions.¹⁷⁶

The affidavit requirement of the proposal forces the prosecution to attest to a fair and accurate presentation of the evidence to the grand jury and implies that the prosecutor did not act to deprive the grand jury of its independence. This becomes material in the event the prosecutor fails to fulfill the duty. The affidavit requirement also lends credibility to the fairness of the grand jury process. To a certain extent, actual fairness rather than an appearance of fairness is achieved.¹⁷⁷ The affidavit requirement also provides the rationale for dismissal. By requiring the prosecutor to expressly aver to a fair and accurate presentation of evidence, a dismissal of the indictment can confidently be supported on grounds of prosecutorial misconduct rather than sufficiency or adequacy of the presented evidence. Accordingly, the *Costello* preclusion of a challenge to the sufficiency or adequacy of the evidence supporting the indictment is not violated.¹⁷⁸

If the prosecutor does not attest to the fair and accurate presentation of evidence, the indictment will be invalid. It will not be invalid, however, because there was not an accurate substantive finding of probable cause; that could arise by coincidence. The indictment will be invalid because the procedure the prosecutor used to convince the grand jury that probable cause existed was improper and unfair. Thus, due to the improper methods used to secure the indictment, there can be no legally recognizable basis for finding probable cause, though the coincidental finding of such may be accurate.

The conclusion that an indictment supported by an untruthful affidavit is invalid incorporates the rationale utilized by the Court in *Mooney v. Holohan*¹⁷⁹ concerning the knowing use of perjury during trial by the

175. "The handing up of an indictment will often have a devastating personal and professional impact [on an individual] that a later dismissal or acquittal can never undo." *United States v. Williams*, 112 S. Ct. 1735, 1750 (1992) (Stevens, J., dissenting) (quoting *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979)). See also *supra* note 21.

176. *United States v. Page*, 808 F.2d 723, 728 (10th Cir. 1987).

177. In *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979), the Third Circuit stated that unchecked prosecutorial discretion in the grand jury room gives the appearance of unfairness. As the potential for abuse is great and the consequences of an indictment so serious, the court recognized an obligation of the judiciary to scrutinize the conduct of the prosecutor. This proposal takes the idea one step further. By imposing an obligation upon the prosecutor to present exculpatory evidence, the indictment process will not only seem fair, but will actually be fair.

178. See *supra* note 3.

179. 294 U.S. 103 (1935).

prosecutor. The *Mooney* Court held that the "presentation of testimony known to be perjured is inconsistent with the rudimentary demands of justice" and therefore violates an accused's right of due process under the law.¹⁸⁰ Similarly, if the prosecutor avers that a fair and accurate presentation was made to the grand jury, and it is ascertained during trial that such a presentation was not made, a fraud is exacted upon the court, the grand jury, and the process. The result of this fraud will be dismissal of the indictment without prejudice, because a trial cannot proceed upon an indictment supported by perjury.¹⁸¹

This remedy also sanctions prosecutors who employ unfair and unethical tactics to secure an indictment. The impetus for the remedy of dismissal was found in the Third Circuit opinion of *United States v. Serubo*.¹⁸² In deciding the case, the Third Circuit gave due regard to the costs borne by the government and the public upon granting relief to a defendant whose grand jury indictment was infected by prosecutorial abuse.¹⁸³ However, the court determined that the costs of an indictment process fraught with continued unchecked prosecutorial misconduct outweighed the costs of an indictment procedure unaffected by bias or prejudice.¹⁸⁴ The court stated that dismissal of the indictment may be "virtually the only effective way to encourage compliance with these ethical standards [ABA Standards section 3.5-3.6] and to protect defendants from abuse of the grand jury process."¹⁸⁵

The dismissal remedy not only benefits society by assuring that members of the public scrutinized by the grand jury will receive a fair and impartial proceeding, but it also assures that an individual who is factually guilty will not

180. *Mooney*, 294 U.S. at 112. The Court further stated that the due process requirement cannot be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deception on the court. *Id.* Such a result ensues if the prosecutor supports the indictment with an untruthful affidavit.

181. See *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974) (holding that such an indictment must be dismissed without prejudice (citing *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935))). See *supra* notes 121-22 and accompanying text.

182. 604 F.2d 807 (3d Cir. 1979).

183. *Serubo*, 604 F.2d at 817. "We recognize that dismissal of an indictment may impose important costs upon the prosecution and the public. . . . But the costs of continued unchecked prosecutorial misconduct are also substantial." *Id.*

184. *Id.* The court stated that employing a grand jury procedure without a check on prosecutorial misconduct and abuse entails a negative cost to society. In addition to the public cost, there is a cost borne by the individual who will experience social and professional opprobrium that an acquittal or a dismissal cannot undo or resolve. *Id.*

185. *Id.*

receive a windfall benefit due to a prosecutorial or administrative error.¹⁸⁶ Nothing precludes the government from re-indicting an individual on the same charges contained in a prior indictment dismissed without prejudice. Thus, the prosecution will get another bite at the same apple, while the defendant will receive a fair and impartial determination of probable cause. The costs exacted by this remedy onto the members of society are minimal at best, as society will share in the rule's equitable results. At the same time, however, the costs placed upon the government are increased, as they will be forced to proceed with the inconvenience of a second indictment proceeding. This inconvenience contributes to the deterrent value inherent in the proposal.

Forcing the judge to make a contemporaneous ruling on a motion to dismiss the indictment resolves the catch-22 the defendant currently faces when making the motion during trial.¹⁸⁷ By not permitting the court to defer ruling on the motion to dismiss until the jury renders a verdict, there is no support for a conclusion that the prosecutor's conduct was harmless. The *Mechanik* decision, which introduced the harmless error review of indictment defects, held only that such a review will be employed when the indictment is challenged after a verdict is rendered.¹⁸⁸ Deferring on a motion to dismiss the indictment until the jury returns its verdict arose in the facts of *Mechanik* and was an implication of *Mechanik*, but was not mandated by the holding of *Mechanik*. Thus, *Mechanik's* rule of law is not undercut by this proposal.

The decision regarding prosecutorial failure to present exculpatory evidence to the grand jury will be determined by the trial judge. The issue is procedural and a question of law that is best adduced by the trial judge. This mitigates the danger of the injection of prejudice into the proceeding. Further, the issue is divorced from the merits of the case, as it is a procedural concern and not a factual one. Redress is then provided for unfair procedure, not the adequacy of the factual findings of the grand jury. Thus, the question falls outside the authority of the petit jury who is relegated solely to decide factual matters.

VII. CONCLUSION

The historically recognized purpose of the grand jury is to shield members

186. *United States v. Serubo*, 604 F.2d 807, 817-18 (3d Cir. 1979). The court thought that the prospect of cases lost by dismissals because of attorney misconduct would produce a sharp improvement in the fairness of the indictment proceeding.

187. *See supra* notes 84-96 and accompanying text. The defendant has to wait until trial to discover the grand jury transcripts to determine if the indictment was tainted. A motion to dismiss the indictment raised during trial will be deferred until the jury returns a verdict. However, after the verdict has been entered, the defendant's challenge is either moot or irrelevant.

188. *See supra* note 96 and accompanying text.

of society from malicious and oppressive government persecution.¹⁸⁹ In this regard, the grand jury can be seen as a screen that stands between the accuser and accused to filter out unfounded criminal allegations and proceedings. Related to this screening function, the grand jury also performs as an accusatory body that determines the presence of probable cause that an individual has committed a crime.¹⁹⁰ Generally, the grand jury can perform each of these roles without conflict. However, issues can arise where the grand jury must function as a screen or an accuser; for to function as both would leave the issue unresolved. Presentation of exculpatory evidence to the grand jury by the prosecutor is just such an issue.

Every individual scrutinized by the grand jury has a fifth amendment right to have that body independently and impartially assess the existence of probable cause.¹⁹¹ When the prosecuting attorney suppresses exculpatory evidence from the grand jury, the grand jury's ability to impartially and accurately judge the essential facts of the case is destroyed.¹⁹² This suppression causes the grand jury to operate merely as an extension of government rather than a barrier standing solidly between the government and the individual.¹⁹³ Accordingly, suppression of exculpatory evidence by the prosecutor abrogates an individual's fifth amendment right and dissolves the fairness of the indictment proceeding. Nevertheless, an obligation to present such evidence has yet to be imposed by the judiciary.

As the judicial branch of government has failed to act, the time is ripe for the legislature to step in and establish a rule to remedy this blatant inequity inherent in the grand jury proceeding. This Note has attempted to resolve the ambiguities leading to the reluctance of the courts and Congress to impose a duty to present exculpatory evidence. Further, it has introduced a procedure of implementation consistent with the existing body of law to ensure minimal disruption in the federal criminal system. Imposition of a duty to present exculpatory evidence will enhance the fairness of the indictment process without jeopardizing the effectiveness or efficiency of the traditional purposes of the grand jury. As such, imposition of the duty to present exculpatory evidence furthers an individual's interest in an accurate assessment of probable cause as well as society's interest in a fair and equitable criminal justice system.

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189. See *supra* note 11 and accompanying text.

190. See *supra* note 14 and accompanying text.

191. See *supra* notes 32, 42, 55 and accompanying text.

192. See *supra* note 42 and accompanying text.

193. See *supra* note 11 and accompanying text.

