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## GRAND JURY: A PROSECUTOR NEED NOT PRESENT EXCULPATORY EVIDENCE

American prosecutors must perform two often conflicting duties. They must obtain criminal convictions<sup>1</sup> yet provide fair treatment for persons suspected of crimes.<sup>2</sup> The tension between prosecutorial duties frequently arises when a prosecutor selectively presents evidence to a grand jury.<sup>3</sup> By controlling what a grand jury sees and hears, a skillful prosecutor can often ensure indictment of a prospective defendant.<sup>4</sup> A prosecutor's discretionary power raises the question whether a prosecutor has an ethical or legal obligation to divulge exculpatory evidence to a grand jury.<sup>5</sup>

An analysis of a prosecutor's duty to divulge must acknowledge the unique status of the grand jury in American jurisprudence.<sup>6</sup> According to tradition, grand juries originated with the English King Henry II's Assize of Clarendon in 1166.<sup>7</sup> Grand juries were originally revenue-

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<sup>1</sup> J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* xv (1980).

<sup>2</sup> See *United States v. Agurs*, 427 U.S. 97, 110-11 (1976); *Berger v. United States*, 295 U.S. 78, 88 (1935); A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-13 (1979) (public prosecutor must seek justice, not only convictions).

<sup>3</sup> See generally SECTION ON JUDICIAL ADMINISTRATION OF THE A.B.A., *FEDERAL GRAND JURY HANDBOOK* (1959?) [hereinafter cited as *GRAND JURY HANDBOOK*]; Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119 (1964) [hereinafter cited as Spain].

<sup>4</sup> Address by Chief Judge William J. Campbell, Conference of Metropolitan Chief District Judges of the Federal Judicial Center, *reprinted in* 55 F.R.D. 229, 253 (1972). See also 8 J. MOORE, *FEDERAL PRACTICE* ¶ 6.02(1)(b) (1976 & Supp. 1980) (grand jury primarily a law enforcement agency).

<sup>5</sup> Several nationally recognized prosecution standards direct prosecutors to divulge exculpatory information to grand juries. See A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: *THE PROSECUTION FUNCTION*, Standard 3.6(b) (Approved Draft 1971) (prosecutor should disclose to grand jury any evidence that he knows will tend to negate guilt); NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *NATIONAL PROSECUTION STANDARDS*, Standard 14.2(D) (1977) (prosecutor should disclose to grand jury any evidence tending to negate guilt or preclude finding of indictment).

The United States Attorney's Manual states that although neither statutory nor case law require a prosecutor to present exculpatory evidence to the grand jury, the Justice Department's internal policy requires disclosure under many circumstances. When a federal prosecutor is personally aware of substantial evidence directly negating the guilt of the accused, for example, the prosecutor must offer the information to the grand jury. U.S. DEP'T OF JUST., *UNITED STATES ATTORNEY'S MANUAL* § 9-11,334 (1977). See also SECTION OF CRIMINAL JUSTICE, A.B.A., *AMERICAN BAR ASSOCIATION POLICY ON THE GRAND JURY*, Principle 3 (1977) (no prosecutor shall knowingly fail to disclose to grand jury evidence that will substantially tend to negate guilt).

<sup>6</sup> See *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). The grand jury originated before the adoption of the Constitution. *Id.* Because of the grand jury's preconstitutional status, the grand jury is theoretically independent of any governmental branch. *Id.*

<sup>7</sup> 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 321 (1931); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 110 (4th ed. 1948).

producing devices and counters to the dominance of ecclesiastical courts.<sup>8</sup> Eventually, however, the grand jury evolved into a citizen's safeguard against the excesses of royal power.<sup>9</sup> In the United States, this protection appears in the fifth amendment, which requires that a grand jury's indictment or presentment initiate a federal criminal prosecution.<sup>10</sup> Many states also begin prosecution with a grand jury's indictment.<sup>11</sup>

The grand jury's primary role is to assess the State's evidence against a suspect to determine whether probable cause exists to place him on trial for a crime.<sup>12</sup> Grand juries traditionally conduct their proceedings in secret.<sup>13</sup> To establish probable cause sufficient to warrant indictment, the State need not prove a suspect's guilt by a preponderance of the evidence or demonstrate that his guilt is "more likely than not."<sup>14</sup>

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<sup>8</sup> See Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 704 (1972). At the time Henry II established grand juries, only litigants who could afford to pay for favorable decisions prevailed in court. *Id.* When he established grand juries, Henry directed both judicially imposed fines and bribery away from ecclesiastical courts and into his own courts and coffers. *Id.* Moreover, criminal prosecution by indictment or presentment prevented appeals to the Pope allowed by ecclesiastical courts. *Id.*

<sup>9</sup> The grand jury came to stand between a prosecutor and an accused and ensured that the prosecution did not bring charges based on ill will or unbelievable testimony. See Hale v. Henkel, 201 U.S. 43, 59 (1906); GRAND JURY HANDBOOK, note 3 *supra*, at 9.

<sup>10</sup> U.S. CONST. amend V. The fifth amendment provides in pertinent part that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . ." *Id.* The *Federal Rules of Criminal Procedure* construe "otherwise infamous crime" as any crime punishable by more than a year's imprisonment. FED. R. CRIM. P. 7(a). An indictment is a formal grand jury charge in response to a prosecutor's presentation of evidence. A presentment is similar to an indictment except that a grand jury prepares a presentment on its own initiative. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1015 n.b (5th ed. 1980) [hereinafter cited as KAMISAR].

<sup>11</sup> See, e.g., ARK CONST. amend 21, § 1; CONN. CONST. art. 1, § 8; IOWA CONST. art. 1, § 11; PA. CONST. art. 1, § 10; ALASKA R. CRIM. P. 7(a); ARIZ. R. CRIM. P. 12.7; COLO. R. CRIM. P. 7(a). Twenty states require that prosecution of all felonies be by indictment. KAMISAR, *supra* note 10, at 1016. See, e.g., KY. CONST. § 12; MISS. CONST. art. 3, § 27; N.H. REV. STAT. ANN. § 601.1 (1974). See also L. KATZ, L. LITWIN & R. BAMBERGER, JUSTICE IS THE CRIME 247-365 (1972) (comprehensive state by state summary of pretrial procedure) [hereinafter cited as JUSTICE IS THE CRIME]; Spain, *supra* note 3, at 126-42 (description of each state's criminal procedure); Note, *Prosecutor's Duty to Expose Exculpatory Evidence to the Grand Jury*, 27 CASE W. RES. L. REV. 580, 589 n.54 (1977) [hereinafter cited as *Prosecutor's Duty*].

<sup>12</sup> *Costello v. United States*, 350 U.S. 359, 362-63 (1956); *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, Circuit Justice).

<sup>13</sup> *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400 (1959); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 (1958).

<sup>14</sup> Proof by a preponderance of the evidence is not a standard that can be defined with quantitative precision. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring); *United States v. Texas Education Agency*, 467 F.2d 848, 864 (1972), *vacated on other grounds sub nom.* *Austin Ind. School Dist. v. United States*, 429 U.S. 990 (1976). A litigant carrying the burden of proving an assertion by a preponderance of the evidence must present evidence to the factfinder that has a greater degree of credibility than the evidence that the opposition presents. *Merchant's Fast Motor Lines v. Lane*, 259 F.2d 336, 339 n.2

The prosecutor need only convince a grand jury that a trial on the merits of the State's charge is reasonable.<sup>15</sup> As a practical matter, a prosecutor presents a charge for the grand jury's consideration only if his case appears strong enough to convince a trial jury of a suspect's guilt beyond a reasonable doubt.<sup>16</sup> An indictment that is unlikely to result in a defendant's conviction is usually not worth a prosecutor's effort.<sup>17</sup>

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(5th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959). The preponderance of evidence standard also requires that the factfinder conclude that the assertions of the litigant with the burden of proof are more probably true than false before the factfinder holds in the litigant's favor. *Porter v. American Export Lines, Inc.*, 387 F.2d 409, 411 (3rd Cir. 1968). The preponderance of evidence standard of proof is less rigorous than the "clear, unequivocal, and convincing" standard of evidence, *United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943), or the "beyond reasonable doubt" standard of evidence. *Jackson v. Virginia*, 443 U.S. 307, 314-15 (1979). *See also* E. CLEARY, MCCORMICK ON EVIDENCE § 339 (2d ed. 1972) (discussion of various definitions of preponderance of evidence standard). A standard requiring proof by a preponderance of the evidence is identical to a standard requiring litigant to prove a state of facts that is "more likely than not." *Jones v. United States*, 239 F. Supp. 474, 480-81 (E.D. La. 1965), *aff'd without opinion*, 358 F.2d 309 (5th Cir. 1966).

<sup>15</sup> The Supreme Court has held that probable cause to restrain a suspect exists when facts and circumstances in a case would lead a reasonably prudent man to believe that a suspect has committed an offense. *Carroll v. United States*, 267 U.S. 132, 161 (1925). The Court has not attempted to define probable cause more precisely since its *Carroll* opinion. *See United States v. Watson*, 423 U.S. 411, 431 n.4. (1976) (Powell, J., concurring). The Court has used the phrases "reasonable cause" and "probable cause" interchangeably. *Compare Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (reasonable cause) *with id.* at 557 (probable cause). *See also Brinegar v. United States*, 338 U.S. 160, 175 (1949) (probable cause a standard for prudent men, not legal technicians); *Montgomery v. Dennison*, 363 Pa. 255, \_\_\_ , 69 A.2d 520, 526 (1949) (probable cause for indictment when reasonable man considers circumstances probative).

A grand juror need only hear enough inculpatory evidence to establish probable cause for trial before deciding to indict a suspect. *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 607 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944). A grand jury member may choose to indict even if the grand juror is absent when the prosecutor presents exculpatory evidence. *United States v. Leverage Funding Systems, Inc.*, No. 79-1677 (9th Cir. Oct. 3, 1980). If grand jurors can return an indictment even if they were absent when the prosecutor presented exculpatory evidence, a requirement that the prosecutor present exculpatory evidence seems ill-founded.

<sup>16</sup> *See Keeny & Walsh, The American Bar Association's Grand Jury Principles: A Critique From a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 548 (1978) [hereinafter cited as Keeny & Walsh]. Almost universally in common-law jurisdictions, a court cannot find a defendant guilty of a crime unless a suspect's guilt is clear beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). All American courts must adhere to the reasonable doubt standard. *Id.* at 364. The reasonable doubt standard requires a factfinder to reach a subjective state of near certitude of a suspect's guilt before returning a guilty verdict. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The Supreme Court has consistently adhered to a reasonable doubt standard for criminal convictions. *See, e.g., Patterson v. New York*, 432 U.S. 197, 206 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975); *Davis v. United States*, 160 U.S. 469, 488 (1895); *Miles v. United States*, 103 U.S. 304, 312 (1880).

<sup>17</sup> *But see generally Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441 (indicted defendants unlikely to reach trial because of plea bargaining). A "plea bargain" occurs when a defend-

Because the grand jury is a non-adversarial forum which does not make final judgments concerning a suspect's guilt,<sup>18</sup> a suspect in most jurisdictions has no right to appear before a grand jury to present evidence on his own behalf.<sup>19</sup> Moreover, a suspect may not cross-examine grand jury witnesses.<sup>20</sup> Thus, the prosecutor controls the nature and amount of information placed before a grand jury.

In *Costello v. United States*,<sup>21</sup> the Supreme Court defined the scope of the prosecutor's control over evidence before a grand jury. The Court rejected petitioner Costello's argument that a court should dismiss an indictment when the grand jury that returns the indictment considers only hearsay testimony.<sup>22</sup> The *Costello* Court held instead that a grand jury indictment, regular on its face and returned by a legally constituted grand jury, justifies a trial on the merits.<sup>23</sup> The Court's rationale was simple. Traditionally, grand juries could bring indictments or presentments based exclusively on their personal knowledge of a suspect's criminal activity.<sup>24</sup> The fifth amendment carries the grand juries' historical in-

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ant agrees to plead guilty to a crime in return for the prosecutor's promise to prosecute the defendant for a lesser crime or to ask for a lighter sentence. *Blackledge v. Allison*, 431 U.S. 63, 69-71 (1977). The Supreme Court has formally approved plea bargaining. *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Prosecutors frequently conduct successful plea bargaining negotiations. 431 U.S. at 71. Given the prevalence of plea bargaining, the possibility always exists that an unscrupulous prosecutor might decline to present exculpatory evidence to a grand jury in the hope of extracting a guilty plea from an indicted suspect.

<sup>18</sup> *United States v. Washington*, 431 U.S. 181, 191 (1977) (dictum); *United States v. Calandra*, 414 U.S. 338, 343-44 (1974); *United States v. Leverage Funding Systems, Inc.*, No. 79-1677 (9th Cir. Oct. 3, 1980).

<sup>19</sup> *See, e.g.*, *United States v. Leverage Funding Systems, Inc.*, No. 79-1677 (9th Cir. Oct. 3, 1980) (suspect without right to appear before grand jury); *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979) (defendant without constitutional right to appear personally before grand jury); *United States v. Gardner*, 516 F.2d 334, 339 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975) (defendant without absolute right to appear before grand jury); *Sweeney v. Balkcom*, 358 F.2d 415, 417 (5th Cir. 1966) (almost universally, accused without right to appear before grand jury); *Jackson v. State*, 225 Ga. 790, \_\_\_, 171 S.E.2d 501, 503 (1969), *rev'd on other grounds*, 408 U.S. 238 (1971) (because no right of confrontation until trial, suspect without right to present defense to grand jury); *State v. Morgan*, 9 N.C. App. 624, \_\_\_, 177 S.E.2d 457, 459 (1970), *appeal dismissed*, 277 N.C. 458, 178 S.E.2d 225 (1971) (suspect without right, constitutional or otherwise, to appear before grand jury). *See also* 18 U.S.C. § 1504 (1976). A suspect may petition a federal grand jury for permission to appear before the grand jury, but a person may not send a written communication to the grand jury bearing on any matter under the grand jury's consideration. *Id.* *But see* GA. CODE ANN. § 89-9908 (1980) (right to grand jury hearing accorded to certain judges and county officials before indictment for malfeasance or misfeasance in office); GA. CODE ANN. § 40-1617 (1975) (provisions of GA. CODE ANN. § 89-9908 (1980) extended to state officials).

<sup>20</sup> *See, e.g.*, *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976); *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir. 1968), *cert. denied sub nom.* *Strang v. United States*, 395 U.S. 906 (1969).

<sup>21</sup> 350 U.S. 359 (1956).

<sup>22</sup> *Id.* at 363.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 362.

dependence into modern federal practice.<sup>25</sup> If grand juries can return indictments based on no apparent evidence without courts' interference, they may also return indictments based on evidence courts might consider inadequate.<sup>26</sup> By declining to set standards for the quality of evidence a grand jury may consider, the Court established a discouraging precedent for those who insist that a prosecutor must divulge exculpatory evidence to grand juries.<sup>27</sup> Since *Costello* suggests that an indictment is valid regardless of the amount of evidence that the grand jury considers, an indictment can hardly be invalid when a prosecutor omits exculpatory evidence from the grand jury's consideration.

Courts requiring divulgence of exculpatory evidence to grand juries circumvent the *Costello* holding on two grounds. A few state courts construe statutes to require divulgence.<sup>28</sup> Some federal courts require divulgence pursuant to their supervisory power to prevent prosecutorial

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 363.

<sup>27</sup> *Costello v. United States*, 350 U.S. 359 (1956), has either implicitly or explicitly controlled the decisions of several courts. *See, e.g.*, *United States v. Leverage Funding Systems, Inc.*, No. 79-1677 (9th Cir. Oct. 3, 1980) (prosecutor under no duty to offer evidence to grand jury that might negate suspect's guilt); *United States v. Lasky*, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Smith*, 595 F.2d 1176, 1181 (9th Cir. 1979); *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979); *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978) (grand jury need not be advised of all matters bearing on the credibility of potential witnesses); *United States v. Brown*, 574 F.2d 1274, 1276 (5th Cir.), *cert. denied*, 439 U.S. 1046 (1978) (Government under no duty to present to grand jury evidence bearing on credibility of witness); *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir. 1976) (prosecution not required to present grand jury with evidence that would tend to negate guilt); *United States v. Ruyle*, 524 F.2d 1133, 1136 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (defendant not entitled to challenge indictment on ground that information allegedly favorable to the defense was not presented to grand jury); *United States v. Gardner*, 516 F.2d 334, 338-39 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975) (Government need not produce evidence before grand jury the undermines credibility of government witnesses); *Jack v. United States*, 409 F.2d 522, 523-24 (9th Cir. 1969) (Government not required to undermine credibility of grand jury witnesses); *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968) (prosecutor need not present grand jury with evidence tending to undermine testimony of witnesses before grand jury); *United States v. Nelson*, 486 F. Supp. 464, 475 (W.D. Mich. 1980) (prosecution not obligated to present to grand jury information favorable to defendant); *United States v. DePalma*, 461 F. Supp. 778, 796 (S.D.N.Y. 1978) (prosecutor not obligated to inform grand jury of facts that might form basis for defense at trial); *United States v. Addonizio*, 313 F. Supp. 486, 495 (D.N.J. 1970), *aff'd on other grounds*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972) (prosecutor clearly not required to place all evidence in prosecution's possession before grand jury).

<sup>28</sup> *See Frink v. State*, 597 P.2d 154, 164-65 (Alaska 1979) (construing ALASKA R. CRIM. P. 6(q)); *Gieffels v. State*, 590 P.2d 55, 59 (Alaska 1979) (dictum construing ALASKA R. CRIM. P. 6(q)); *Johnson v. Superior Court*, 15 Cal.3d 248, 250, 539 P.2d 792, 793, 124 Cal. Rptr. 32, 33 (1975) (construing CAL. PENAL CODE § 939.7 (West 1970)); *State v. Herrera*, 93 N.M. 442, \_\_\_, 601 P.2d 75, 77 (1979) (construing § 31-6-10 N.M.S.A. (1978)) (opinion superseded by § 31-6-11(B), N.M.S.A. (1978) (Cum. Supp. 1979), requiring a prosecutor to divulge exculpatory evidence to a grand jury); *State v. Harwood*, 609 P.2d 1312, 1317 (Ore. 1980) (dictum construing O.R.S. § 132.390 (1977)).

misconduct,<sup>29</sup> even though the *Costello* opinion specifically refers to a federal indictment.<sup>30</sup> Among state courts, the California Supreme Court took the lead in construing statutes to require divulgence. In *Johnson v. Superior Court*,<sup>31</sup> the court construed a section of the California Penal Code which requires grand juries to order presentation of evidence they believe might exonerate a defendant.<sup>32</sup> The court interpreted the statute to impose an implied duty on a prosecutor to divulge exculpatory information despite the absence of a grand jury's request.<sup>33</sup> The *Johnson* opinion offered no legislative history to support the court's construction of the statute, but reasoned that grand juries cannot request exculpatory evidence when they are unaware that such evidence is available.<sup>34</sup> The court required prosecutorial divulgence to ensure that a grand jury's knowledge of exculpatory evidence at least equals that of the prosecutor.<sup>35</sup> Only a few states have followed California's lead,<sup>36</sup> although

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<sup>29</sup> See *United States v. Martin*, 480 F. Supp. 880, 886 (S.D. Tex. 1979) (indictment dismissed because prosecutor forced grand jury to act quickly but did not reveal prosecutor's motive behind rapid indictment); *United States v. Gold*, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979) (indictment dismissed because grand jury lost independence when prosecutor failed to divulge exculpatory evidence); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 622 (N.D. Ok. 1977) (indictment dismissed because prosecutor interfered with suspect's due process rights); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579, 589 (W.D. Tex. 1977) (indictment dismissed because prosecutor failed to present grand jury with exonerating interpretation of relevant law); *United States v. DeMarco*, 401 F. Supp. 505, 513 (C.D. Cal. 1975), *aff'd on other grounds*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977) (indictment dismissed when prosecutor failed to present grand jury with suspect's charge that Government motive for prosecution was suspect); *United States v. Gallo*, 394 F. Supp. 310, 315 (D. Conn. 1975) (indictment dismissed because prosecutor failed to present full transcript of earlier grand jury proceedings to later grand jury).

<sup>30</sup> 350 U.S. 359, 360 n.1. The Government accused *Costello* of violating § 145(b) of the Internal Revenue Code of 1939. 53 STAT. 63 (1939).

<sup>31</sup> 15 Cal.3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975). The *Johnson* opinion generated considerable commentary. See, e.g., Note, *District Attorney's Duty to Inform Grand Jury of Exculpatory Evidence*, 65 CAL. L. REV. 382 (1977) [hereinafter cited as *Duty to Inform*]; *Prosecutor's Duty*, *supra* note 11; Note, *District Attorney is Under an Implied Statutory Duty to Inform Grand Jury of Exculpatory Evidence*, 25 CATH. U.L. REV. 648 (1976); Note, *The Prosecutor's Duty to Present Exculpatory Evidence to an Indicting Grand Jury*, 75 MICH. L. REV. 1514 (1977) [hereinafter cited as *Indicting Grand Jury*]; Note, *Johnson v. Superior Court: The Future of the Grand Jury Indictment in California*, 3 PEPP. L. REV. 365 (1976).

<sup>32</sup> CAL. PENAL CODE § 939.7 (West 1970). A California grand jury need not hear evidence favorable to a defendant. *Id.* The grand jury must, however, weigh all the evidence submitted for its consideration. *Id.* A California grand jury must also order the prosecutor to produce any evidence that the grand jury believes may exculpate a defendant. *Id.*

<sup>33</sup> 15 Cal.3d at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Ironically, earlier California courts had used the statute relied on by *Johnson* to justify denial to suspects of an opportunity to testify before grand juries. See *Duty to Inform*, *supra* note 31, at 384 n.13.

<sup>36</sup> See note 28 *supra*.

several states have statutes with language similar to the California statute.<sup>37</sup>

The federal criminal justice system does not have a statute like the California rule that authorizes a grand jury to request exculpatory evidence. Federal courts that force a prosecutor to divulge exculpatory evidence to a grand jury justify their decisions as appropriate controls over prosecutorial misconduct.<sup>38</sup> The Second Circuit's decision in *United States v. Ciambrone*<sup>39</sup> is the only federal finding at the circuit level that suggests a prosecutor must divulge exculpatory information to a grand jury. In dicta, the *Ciambrone* court suggested that although a prosecutor is free to selectively present evidence to a grand jury, a prosecutor may not knowingly mislead a grand jury or engage in other tactics that prejudice a suspect.<sup>40</sup> To reach its conclusion, the court relied on a line of Second Circuit cases which culminated in *United States v. Estepa*.<sup>41</sup> The *Estepa* court held that a prosecutor may not present hearsay evidence to a grand jury when direct evidence is available, nor may a prosecutor mislead the grand jury into believing that hearsay testimony is actually eyewitness testimony.<sup>42</sup> Rather than give the *Estepa* rule constitutional standing, the Second Circuit justified its holding in *Estepa* as an extension of its supervisory power over the district courts.<sup>43</sup> The facts in the *Ciambrone* case, however, did not warrant dismissal of an indictment.<sup>44</sup> Nevertheless, the Second Circuit intimated that a court may exercise supervisory power in some circumstances to dismiss an indictment when a prosecutor withholds evidence from a grand jury.<sup>45</sup>

A few federal courts have agreed with the *Ciambrone* opinion and have actually dismissed indictments.<sup>46</sup> None of the courts that have dismissed indictments address the Supreme Court's holding in *Costello*

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<sup>37</sup> See *Indicting Grand Jury*, *supra* note 31, at 1537 n.111 (1977) (list of statutes with language similar to CAL. PENAL CODE § 939.7 (West 1970)).

<sup>38</sup> See note 29 *supra*.

<sup>39</sup> 601 F.2d 616 (2d Cir. 1979). See generally Note, *Prosecuting Attorney Generally Not Obligated to Discover and Present Evidence Favorable to the Defense*, 11 RUT.-CAM. L.J. 359 (1980).

<sup>40</sup> 601 F.2d at 623.

<sup>41</sup> 471 F.2d 1132 (2d Cir. 1972).

<sup>42</sup> *Id.* at 1136-37. Several cases foreshadowed the *Estepa* opinion. See, e.g., *United States v. Leibowitz*, 420 F.2d 39, 41-42 (2d Cir. 1969) (indictments subject to dismissal if obtained principally upon hearsay evidence presented to grand jury when direct testimony was available, and dismissal necessary to protect integrity of judicial process); *United States v. Malofsky*, 388 F.2d 288, 289 (2d Cir.) (per curiam), *cert. denied*, 390 U.S. 1017 (1968) (prosecutor should not present excessive hearsay evidence to grand jury); *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967) (hearsay evidence should only be presented to grand jury when direct testimony unfeasible).

<sup>43</sup> 471 F.2d at 1136-37.

<sup>44</sup> 601 F.2d at 623.

<sup>45</sup> *Id.*

<sup>46</sup> See note 29 *supra*.



that a court should not dismiss a facially valid indictment because the grand jury heard inadequate evidence.<sup>47</sup> Each opinion justifies its interference with the grand jury's decision to indict by reasoning that because a prosecutor failed to present exculpatory evidence to a grand jury, the grand jury could not independently assess a suspect's alleged guilt.<sup>48</sup> As the *Costello* Court recognized, however, a grand jury can indict on little or no evidence.<sup>49</sup> Given the *Costello* ruling, a court that dismisses a validly returned indictment is more guilty of interfering with the independence of a grand jury than a prosecutor who presents a slanted case to the grand jury.<sup>50</sup>

The Supreme Court's opinion in *Gerstein v. Pugh*<sup>51</sup> provides another troublesome precedent for courts that require divulgence of exculpatory evidence to grand juries. The *Gerstein* Court held that the Constitution does not require the determination of probable cause for prosecution in an adversarial setting.<sup>52</sup> The Court reasoned that an informal proceeding was reliable enough to satisfy fourth amendment protections because a probable cause determination does not require the resolution of conflicting evidence that a reasonable doubt or preponderance standard demands.<sup>53</sup> Since a grand jury can adequately determine probable cause without careful examination of conflicting evidence, a requirement that a prosecutor present exculpatory evidence to a grand jury is inconsistent with *Gerstein*.

Even if courts accept the premise that they can dismiss indictments due to a prosecutor's failure to present exculpatory evidence, defense counsel must surmount several obstacles to gain dismissal. Counsel must initially identify evidence that the prosecutor presented to the grand jury. Although the states do not uniformly require recording,<sup>54</sup> the

<sup>47</sup> 350 U.S. at 363. See note 29 *supra*.

<sup>48</sup> See note 29 *supra*.

<sup>49</sup> 350 U.S. at 363 (1956).

<sup>50</sup> Cf. *Bracy v. United States*, 435 U.S. 1301, 1302-03 (Rehnquist, Circuit Justice, 1978) (facially valid grand jury indictment not subject to dismissal even if based on perjured testimony). See text accompanying notes 21-29 & 46-49 *supra*.

<sup>51</sup> 420 U.S. 103 (1975). The *Gerstein* Court considered whether a person held for trial under a prosecutor's information could constitutionally demand a judicial determination of probable cause before pretrial incarceration. *Id.* at 105.

<sup>52</sup> *Id.* at 123. The Court held that although a judicial probable cause determination was necessary, an adversarial proceeding was not necessary. *Id.* at 126.

<sup>53</sup> *Id.* at 121.

<sup>54</sup> Compare OKLA. STAT. ANN. tit. 22 § 340 (West 1969) (as amended 1974) (court reporter required to record grand jury proceedings); OR. REV. STAT. § 135.855(c) (1977) (grand jury transcripts not generally subject to disclosure but statements made by defendant should be disclosed); OHIO R. CRIM. P. 6(E) (grand jury transcript may be made, but defendant only allowed access by court order) with, ILL. S. Ct. Rule 412, ILL. ANN. STAT. ch. 110A, § 412 (iii) (Smith-Hurd) (as amended 1976) (State must provide certain records of grand jury proceedings to defendant who requests records) as construed by *People v. Holman*, 19 Ill. App. 3d 544, 546-47, 311 N.E.2d 696, 698 (1974) (ILL. REV. STAT. ch. 110A, § 412 does not require state to record all grand jury proceedings).

federal government must record all federal grand jury proceedings.<sup>55</sup> Assuming a record of grand jury proceedings exists, defense counsel must overcome a tradition of grand jury secrecy<sup>56</sup> and demonstrate to a court "particularized need" for access to the material.<sup>57</sup>

If defense counsel can convince the court that the defendant has a reasonable need for the grand jury transcript, counsel must then identify exculpatory evidence in the prosecutor's possession that the prosecutor failed to present to the grand jury. Rule 16 of the Federal Rules of Criminal Procedure requires that the Government, upon defendant's request, permit a defendant to inspect or copy documents or other tangible items within government control.<sup>58</sup> The Government must allow a defendant access to any item that is material to the defendant's preparation for trial or that the Government intends to use in its case-in-chief.<sup>59</sup> The same requirement applies to results of scientific or medical tests within the Government's control.<sup>60</sup> Although Rule 16 does not require disclosure of government lists of prospective witnesses<sup>61</sup> or grand jury transcripts,<sup>62</sup> the rule provides defense counsel with a limited opportunity to search for exculpatory evidence that a prosecutor arguably should have presented to a grand jury.

Defense counsel who wishes to use the discovery provisions of Rule 16 must contend with restrictions the Jencks Act imposes on his investigation.<sup>63</sup> Under the Act's provisions, a statement by a prosecution

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<sup>55</sup> FED. R. CRIM. P. 6(e)(1).

<sup>56</sup> See note 13 *supra*. See also, Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331, 333 (1955). Grand juries proceed in secret to prevent unprosecuted criminal from intimidating grand jury witnesses and to protect the innocent from public suspicion. *Id.*

<sup>57</sup> Dennis v. United States, 384 U.S. 855, 870 (1966) (defense counsel required to show particularized need for access to grand jury transcripts); United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958) (grand jury secrecy suspended only on showing of particularized need by defendant); FED. R. CRIM. P. 16(a)(3). See also FED. R. CRIM. P. 6(e) (discovery of grand jury proceedings permissible at court's discretion).

<sup>58</sup> FED. R. CRIM. P. 16(a)(1)(C).

<sup>59</sup> *Id.*

<sup>60</sup> FED. R. CRIM. P. 16(a)(1)(D).

<sup>61</sup> See United States v. Chaplinski, 579 F.2d 373, 375 (5th Cir. 1978) (*per curiam*), *cert. denied*, 439 U.S. 1050 (1979); United States v. Pelton, 578 F.2d 701, 708 (8th Cir. 1978), *cert. denied*, 439 U.S. 964 (1979). The granting of the defense's request for a list of adverse witnesses is a matter of judicial discretion. 579 F.2d at 708.

<sup>62</sup> FED. R. CRIM. P. 16(a)(3). See note 57 *supra*.

<sup>63</sup> 18 U.S.C. § 3500 (1976). Congress passed the Jencks Act in response to the Supreme Court's opinion in *Jencks v. United States*, 353 U.S. 657, 668 (1957) (defendant entitled to inspect all written F.B.I. reports bearing on testimony by government witnesses at trial). See S. REP. NO. 981, 85th Cong., 1st Sess. (1957), *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS, 1861, 1862 [cited hereinafter as SENATE REPORT]. Congress wished to ensure that courts would not construe *Jencks* to allow a defendant to broadly search government files for impeachment evidence. SENATE REPORT, *supra*, at 1862. Specifically, Congress intended that the Jencks Act allow only disclosure of a witness's statements to the Government or the grand jury that related to the witness's trial testimony. *Id.* Because the relevance of a witness's pretrial statements to the witness's trial testimony becomes apparent only after

witness to a government agent is not subject to discovery until the witness testifies on direct examination at trial.<sup>64</sup> The Act also prevents pretrial discovery of statements by a government witness before a grand jury.<sup>65</sup> After the witness testifies, a defendant may move to force the Government to produce all the witness's statements to the Government that relate to the testimony.<sup>66</sup> Disclosure of exculpatory evidence at this stage is probably too late for a defendant who would attack an indictment because the prosecutor did not present evidence to the grand jury. A trial court that has already begun a trial on the merits is unlikely to dismiss the indictment and end the trial when defense counsel can easily present the purportedly exculpatory evidence to the trier of fact.<sup>67</sup> Moreover, considerations of judicial economy might prevent a court from dismissing an indictment when a prosecutor could return to the grand jury and secure a new indictment despite the presentation of additional exculpatory evidence.<sup>68</sup>

The Supreme Court's opinion in *Brady v. Maryland*<sup>69</sup> establishes a rule for states which substantially conforms to the narrow requirements that Rule 16 of the Federal Rules of Criminal Procedure imposes on the United States.<sup>70</sup> The *Brady* rule requires that a prosecutor divulge exculpatory evidence to a defendant when the defendant requests specific material.<sup>71</sup> Evidence subject to *Brady* disclosure must be favorable to a defendant and material to a defendant's guilt or punishment.<sup>72</sup> The Court

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the testimony occurs, Congress restricted disclosure of a government witness's pretrial statements until after the witness's direct testimony at trial. *Id.* at 1863. Some states have promulgated provisions that essentially mirror the Jencks Act. *See, e.g.*, KAN. STAT. ANN. § 22-3213 (1974); N.C. GEN. STAT. § 15A-904(a) (1978); KY. R. CRIM. P. 7.26; N.D. R. CRIM. P. 16(h); WYO. R. CRIM. P. 18(c).

<sup>64</sup> 18 U.S.C. § 3500(a) (1976).

<sup>65</sup> *Id.* § 3500(e)(3).

<sup>66</sup> *Id.* § 3500(b). *See* note 63 *supra*.

<sup>67</sup> *See, e.g.*, *United States v. Brown*, 574 F.2d 1274, 1277 (5th Cir. 1978) (defendant constitutionally protected by opportunity to present full case at trial on merits); *Lorraine v. United States*, 396 F.2d 335, 339 (9th Cir. 1968) (defendant's constitutional rights fully protected when permitted to expose all facts bearing on guilt or innocence at trial on merits).

<sup>68</sup> A prosecutor can seek a new indictment after dismissal of an earlier indictment for procedural irregularities. *See Hill v. Texas*, 316 U.S. 400, 406 (1942) (defendant's conviction reversed due to defective prosecution procedure but defendant subject to reindictment conforming to constitutional requirements). *See also Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (approval of *Hill v. Texas* position on reindictment); *State v. Gieffels*, 554 P.2d 460, 461 (Alaska 1976) (reindictment allowed after dismissal of indictment due to prosecutor's failure to present exculpatory evidence to grand jury); *State v. Bussiere*, 118 N.H. 659, 392 A.2d 151, 155 (1978) (reindictment allowed after defectively drafted indictment dismissed).

<sup>69</sup> 373 U.S. 83 (1963).

<sup>70</sup> *Id.* at 87.

<sup>71</sup> *Id.* The Court based its holding on broad due process grounds, establishing a rule that applies to the federal government as well as the states. *See United States v. Agurs*, 427 U.S. 97, 107 (1976) (extension of *Brady* rule applies to federal as well as state trials); *United States v. Friedman*, 593 F.2d 109, 120 (9th Cir. 1979).

<sup>72</sup> 373 U.S. at 87.

in *United States v. Agurs*<sup>73</sup> widened the *Brady* rule to include cases in which the defendant makes only a general request for *Brady* material or no request at all for exculpatory evidence in a prosecutor's possession.<sup>74</sup> Neither *Agurs* nor *Brady* provides complete assurance that a defendant will discover all exculpatory material in a prosecutor's file. The *Brady* opinion requires divulgence only of material specifically described by the defendant.<sup>75</sup> Thus, *Brady* precludes discovery of evidence the defense is unaware exists. The prosecutor need release only evidence which is obviously exculpatory to satisfy the *Agurs* ruling.<sup>76</sup> Whether the evidence discovered under *Brady* or *Agurs* must be divulged before trial remains unresolved.<sup>77</sup> Divulgence during trial is less valuable than

<sup>73</sup> 427 U.S. 97 (1976).

<sup>74</sup> *Id.* at 110-11.

<sup>75</sup> 373 U.S. at 87.

<sup>76</sup> 427 U.S. at 112.

<sup>77</sup> Some courts have held that a prosecutor need not release exculpatory information before trial. *See, e.g.,* *United States v. McCord*, 509 F.2d 891, 893-94 (7th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975) (no due process violation when Government failed to comply with pretrial discovery order); *Williams v. Wolff*, 473 F.2d 1049, 1051 (8th Cir. 1973) (due process not violated when Government failed to deliver autopsy report before trial); *State v. Folkens*, 281 N.W.2d 1, 7 (Iowa 1979); *Commonwealth v. Sullivan*, 472 Pa. 129, \_\_\_\_ , 371 A.2d 468, 484 (1977); *Jones v. State*, 568 P.2d 837, 853 (Wyo. 1977) (WYO. R. CRIM. P. 18(c) construed).

Other courts have required a prosecutor to divulge exculpatory evidence to a defendant at an appropriate time, either before or during trial. *See, e.g.,* *United States v. Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979); *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969); *People v. Bottom*, 76 Misc. 2d 525, \_\_\_\_ , 351 N.Y.S.2d 328, 333-34 (Sup. Ct. 1974) (due process violated when evidence turned over too late for defendant's use at trial).

Courts that require a prosecutor to divulge exculpatory evidence to a defendant before trial often direct the prosecutor to offer the evidence whenever divulgence might further a fair trial. *See, e.g.,* *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir. 1979); *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968). A standard that requires pretrial divulgence to provide a fair trial gives only limited assistance to a defendant who wishes to challenge a grand jury indictment. Pretrial divulgence of exculpatory evidence may be unnecessary to further a fair trial yet critical to a defendant's claim that the prosecutor failed to reveal exculpatory evidence to an indicting grand jury.

A few courts insist that a prosecutor surrender exculpatory evidence to a defendant at the earliest possible moment. *See, e.g.,* *United States v. Mitchell*, 372 F. Supp. 1239, 1257 (S.D.N.Y. 1973), *appeal dismissed sub nom. Stans v. Gagliardi*, 485 F.2d 1290 (2d Cir. 1973) (Government obligated to disclose exculpatory evidence regardless of chronological boundaries); *State v. Sahlie*, 90 S.D. 682, \_\_\_\_ , 245 N.W.2d 476, 478-79 (1976) (prosecutor must release exculpatory evidence to defendant long enough before trial to allow defendant's inspection). *Cf. A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL*, § 2.1(c) (Approved Draft 1970) (prosecutor should disclose material and information to defense that tends to negate guilt of accused) [hereinafter cited as *DISCOVERY AND PROCEDURE*]; *DISCOVERY AND PROCEDURE*, *supra* § 2.2(a) (prosecutor must perform obligations under § 2.1 as soon as possible after charges filed against accused). *See generally* *JUSTICE IS THE CRIME*, *supra* note 11, at 247-363 (1972) (state by state summary of pretrial discovery rules); *Annot.*, 7 A.L.R.3d 8, 123-29 (1966) (right of accused to prosecutor's evidence in state courts).

pretrial discovery to defense counsel seeking to quash an indictment. Once a trial has begun, a court may be reluctant to forego the opportunity to make a final resolution of the charges.

Defense counsel must overcome another obstacle in arguing for divulgence of exculpatory evidence to the grand jury. Counsel must define for the court what the prosecutor should consider as exculpatory evidence. Courts have yet to develop a reliable standard.<sup>78</sup> The *Agurs* Court held that a prosecutor must divulge exculpatory evidence if the evidence raises a reasonable doubt of defendant's guilt that does not exist without the evidence.<sup>79</sup> According to the *Agurs* opinion, only con-

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<sup>78</sup> In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court described three circumstances in which a court might require a prosecutor to divulge exculpatory information to a defendant. The standard of materiality that the *Agurs* Court imposed for determining exculpatory evidence varies according to the situation. When a prosecutor knows that a prosecution witness has committed perjury at trial, the prosecutor must disclose evidence of the perjury to the defendant if a reasonable likelihood exists that disclosure would have affected the judgment of the factfinder. *Id.* at 103; *United States v. Hedgeman*, 564 F.2d 763, 766 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978) (new trial denied because disclosure would probably not have affected jury's judgment). A prosecutor's disclosure of exculpatory evidence due to perjury at trial has little relevance to a defendant who wishes to attack a grand jury indictment instead of a criminal conviction. Disclosure of exculpatory evidence due to a trial witness's perjury, however, may indicate that the prosecutor failed to contradict the witness's perjured testimony to the grand jury, and thus provide grounds for an attack on the underlying indictment. A prosecutor must prevent perjured testimony from materially tainting indictments. *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979); *United States v. Smith*, 552 F.2d 257, 261 (8th Cir. 1977); *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974).

The second situation described by the *Agurs* Court is a refusal by the prosecutor to reveal evidence specifically requested by a defendant. 427 U.S. at 104-06. The standard of materiality to determine whether requested evidence should be disclosed is, as in the case of perjured testimony, whether the undisclosed evidence might affect the outcome of the trial. *Id.* See also *United States v. Weidman*, 572 F.2d 1199, 1205 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978) (new trial denied when undisclosed evidence unlikely to affect outcome). Disclosure of evidence that a defendant specifically requests for trial might assist a defendant's attack on a grand jury indictment. A defendant might claim that the prosecutor should have presented the evidence to the grand jury. Nevertheless, evidence that might be material to the outcome of a trial might not be material to the outcome of a grand jury deliberation. A grand jury may decide to indict even if a suspect does not appear guilty by the preponderance of evidence or reasonable doubt evidentiary standard used in trials. See note 15 *supra*. Thus, by requiring a showing that evidence requested by the defense might influence the outcome of the trial, the standard of materiality that the *Agurs* Court applies to evidence that the defendant requests limits the defense's opportunity to colorably challenge the indictment.

In the absence of perjury at trial or a specific defense request for evidence, a prosecutor need only divulge exculpatory information to the defense if the evidence creates a reasonable doubt in defendant's favor. *United States v. Agurs*, 427 U.S. 97, 112 (1976); *United States v. Hockridge*, 573 F.2d 752, 760 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978). In gaining access to information that raises a reasonable doubt of defendant's guilt, defense counsel might make a strong case that the prosecutor should have presented the evidence to the grand jury. Defense counsel, however, might never learn of evidence that falls short of raising a reasonable doubt at trial but that the prosecutor should have presented the grand jury regardless.

<sup>79</sup> 427 U.S. at 112.

sideration of the entire trial record can determine what evidence might raise a doubt in a defendant's favor.<sup>80</sup> Unlike a reviewing court, a prosecutor who approaches a grand jury cannot rely on a trial record. A prosecutor cannot always guess what evidence might convince a grand jury that probable cause does not exist to prosecute a crime. Evidence which, in retrospect, might have swayed a grand jury can easily be ignored by a prosecutor sincerely convinced of a suspect's guilt.<sup>81</sup> Courts that insist on disclosure of exculpatory evidence provide little guidance by directing a prosecutor to disclose evidence which tends to negate guilt<sup>82</sup> or to present evidence that gives a grand jury an opportunity to independently evaluate a suspect's conduct.<sup>83</sup> Similarly, a directive by a court that a prosecutor must present only evidence that is clearly exculpatory does not help a prosecutor identify such evidence.<sup>84</sup> As investigation and prosecution proceed, evidence may assume a significance that the prosecutor did not initially perceive.

A defendant seeking divulgence of exculpatory evidence to a grand jury faces a final hurdle even if defense counsel can present a workable standard for evidence that a prosecutor should reveal. Courts are reluctant to add to criminal procedure another time-consuming level of pretrial review.<sup>85</sup> If indictments can be dismissed based upon a prosecutor's failure to divulge, competent defense counsel will rarely fail to move for dismissal. In addition, defense counsel will more frequently attempt discovery of material in a prosecutor's possession before trial and more pretrial hearings will result. Moreover, prosecutors in states that allow a prosecutor to initiate prosecution either by information or indictment may proceed by information and submit the State's case to a probable cause hearing by a magistrate.<sup>86</sup> A suspect has due process rights

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<sup>80</sup> *Id.*

<sup>81</sup> See *United States v. Mandel*, 415 F. Supp. 1033, 1040 (D. Md. 1976) (recognizing prosecutor's integral part in presenting case to grand jury); Keeny & Walsh, *supra* note 16, at 548. See also text accompanying note 16 *supra*.

<sup>82</sup> *United States v. Provenzano*, 440 F. Supp. 561, 565 (S.D.N.Y. 1977). See also *United States v. Martin*, 480 F. Supp. 880, 886 (S.D. Tex. 1979); *United States v. Gold*, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979).

<sup>83</sup> See *Dennis v. United States*, 384 U.S. 855, 875 (1966) (judgment of what material might be helpful to defense most properly made by defense advocate). See also *Xydas v. United States*, 445 F.2d 660, 667 (D.C. Cir.), *cert. denied*, 404 U.S. 826 (1971). In *Xydas* the trial court failed to find exculpatory evidence for disclosure under *Brady* upon examination of the grand jury record. The appellate court, however, found that the record did contain evidence in the defendant's favor. *Id.* A prosecutor, therefore, can fail to recognize exculpatory evidence as easily as a presumably impartial trial judge.

<sup>84</sup> *United States v. Mandel*, 415 F. Supp. 1033, 1042 (D. Md. 1976); *State v. Bell*, 60 Haw. 241, \_\_\_ , 589 P.2d 517, 521 (1978).

<sup>85</sup> See *Costello v. United States*, 350 U.S. 359, 363 (1956); *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977) (court will not allow a hearing after each indictment).

<sup>86</sup> Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 812 n.24 (1972) (listing of all state statutes that allow prosecutor to proceed either by indictment or information) [hereinafter cited as Dash]; *Prosecutor's Duty*, *supra* note 11, at 589 n.54

in an adversarial setting at a post-information hearing which are not applicable at a grand jury hearing.<sup>87</sup> Nevertheless, a suspect does not have access to all exculpatory evidence a prosecutor might possess. In a state that allows prosecution either by indictment or information, a rule requiring divulgence of exculpatory evidence to a grand jury has little use if a similar rule does not also apply to preliminary hearings to determine probable cause.

The grand jury remains a living institution in American jurisprudence. The Supreme Court's opinion in *Costello v. United States*<sup>88</sup> protects the grand jury's discretion to indict under most circumstances.<sup>89</sup> So long as *Costello* remains a controlling opinion, a prosecutor can have no legally enforceable duty to divulge exculpatory evidence to a grand jury.<sup>90</sup> A prosecutor need only convince a grand jury to indict. He need not also convince a court that a grand jury's indictment was fair. Given the current state of the law, any contrary conclusion short of a Supreme Court decision or statutory authority is neither legally nor pragmatically binding.

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(1977) (listing of state statutes or constitutions that allow prosecutor to proceed either by indictment or information).

<sup>87</sup> *Johnson v. Superior Court*, 15 Cal.3d 248, 256-57, 539 P.2d 792, 797, 124 Cal. Rptr. 32, 37 (1975) (Mosk, J., concurring). See also *Dash*, *supra* note 86, at 807-18 (1972) (exhaustive discussion of implications of system allowing prosecution by either indictment or information).

<sup>88</sup> 350 U.S. 359 (1956).

<sup>89</sup> *Id.* at 363.

<sup>90</sup> See text accompanying notes 21-27 & 46-50 *supra*.