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Right To Counsel In Grand Jury Proceedings

which focuses on the rights of the defendant rather than on the trial judge's discretion. The Supreme Court of California has taken one of the oldest common law writs and dressed it in new attire. It remains to be seen whether the attire will become fashionable.

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RIGHT TO COUNSEL IN GRAND JURY PROCEEDINGS

The grand jury, being an extension of the court, has as its function the inquiry into all offenses within its jurisdiction.[1] Traditionally the investigation is conducted in secret and consists of an examination of witnesses by a prosecuting attorney.[2] The witness does not have a right to have counsel present with him in the grand jury room,[3] but in some jurisdictions the procedure is to allow consultation with counsel outside the confines of the room.[4]

The recent decision of the Court of Appeals of New York in *People v. Ianniello*[5] raises questions concerning the existence and scope of a grand jury witness' right to consult with counsel outside the grand jury room. The defendant was summoned before the grand jury as a witness in connection with an investigation of a bribery conspiracy involving police and officials of the New York State Liquor Authority. At the outset he refused to be sworn on the grounds that he was a defendant in a pending misdemeanor prosecution. The Assistant District Attorney informed the defendant that he was being called

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[1]*See* Note, *The Grand Jury—Its Investigatory Powers and Limitation,* 37 MINN. L. REV. 586 (1953).

[2]*See* Meshbesher, *Right to Counsel Before Grand Jury,* 41 F.R.D. 189 (1967).

[3]United States v. Scully, 225 F.2d 113 (2d Cir. 1955), *cert. denied,* 350 U.S. 897 (1955); *In re* Black, 47 F.2d 542 (2d Cir. 1931); United States v. Levine, 127 F. Supp. 651 (D. Mass. 1955); United States v. Blanton, 77 F. Supp. 812 (E.D. Mo. 1948); *see* Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964) (dissenting opinion); *cf.* Anonymous v. Baker, 360 U.S. 287 (1959); *In re* Groban, 352 U.S. 330 (1957); Anonymous v. Arkwright, 5 App. Div. 2d 790, 170 N.Y.S.2d 535 (1958).

[4]United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967), *cert. denied,* 390 U.S. 1025 (1968); United States v. Kane, 243 F. Supp. 746 (S.D.N.Y. 1965). *See* WASH. REV. CODE § 10.28.075 (Supp. 1967) allowing counsel inside the grand jury room:

> During any time that a witness appears before a grand jury, he shall be entitled to the presence of an attorney to advise him: *Provided,* That said attorney shall only advise such witness concerning his right to answer or not answer any questions asked of such witness and shall not engage in the proceedings in any other manner.

[5]21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462, *cert. denied,* 89 S. Ct. 90 (1968).

solely in the role of a witness in the investigation of the bribery conspiracy. Later he was told that the grand jury had voted to confer immunity upon him.[6] With these assurances the defendant consented to be sworn. When questioned about certain prior conversations with an individual under investigation, the defendant answered that he did not recall such conversations. Pressed by the Assistant District Attorney to affirm or deny that the conversation had taken place, the defendant asked to be allowed to leave the grand jury room to see his attorney concerning the propriety of the question. This request was denied and, after the defendant persisted, the prosecutor suggested they go into open court and make an application. This course was not pursued, possibly because the defendant did not understand the prosecutor's suggestion to go into open court.[7] Instead, at the prosecutor's

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[6]The immunity which the Assistant District Attorney purported to offer the witness was based upon N.Y. PENAL LAW § 2447 (McKinney 1967). This section is now N.Y. CODE CRIM. PROC. § 619-c (McKinney Supp. 1968). According to the opinion of the Appellate Division of the Supreme Court of New York the record did not show that the grand jury had voted to grant the defendant immunity or that the conditions precedent to such a grant had been fulfilled. Actually the defendant had not been granted immunity, regardless of the Assistant District Attorney's assurances. People v. Ianniello, 27 App. Div. 2d 504, 280 N.Y.S.2d 852, 853 (1967). For the purposes of this comment, however, the absence of immunity is immaterial because a grand jury witness can be prosecuted for contempt committed in answering a question (or in failing to answer it) without valid grounds whether or not immunity has been conferred. People v. De Feo, 284 App. Div. 622, 131 N.Y.S.2d 806 (1954), *rev'd on other grounds*, 308 N.Y. 595, 127 N.E.2d 592 (1955).

[7]There is evidence from the transcript of the colloquy that the witness did not understand the Assistant District Attorney's suggestion to go into open court. The court of appeals did not seem concerned with whether or not he did understand and did not address itself to the question. The colloquy went as follows:

> Q. Does that enable you to be able to deny ever having such a conversation with Benny Cohen? A. Could I excuse myself to see my attorney for a minute?
>
> By Mr. Scotti:
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> Q. Your attorney doesn't know the answer. You are the one who knows. A. I want to ask him if it's a proper question.
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> Q. I'm telling you, as legal advisor to this grand jury, it's a proper question. A. May I ask the foreman of the grand jury if I may excuse myself for a minute, please?
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> Q. Mr. Ianiello, we are not going to consent to the practice of your excusing yourself to confer ostensibly with your attorney in order to find out what kind of an answer you should make. You are the one that is legally obligated to give testimony and not your attorney.
>
> Now, are you refusing to answer the question? A. I'm not refusing.
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> Q. After you answer the question you can confer—A. I'd like to confer with my attorney because I think it's an improper question.
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> Q. Why? A. I don't know.
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> Q. Why? Why is it improper? You said you think it's improper. A. I

wouldn't need an attorney outside if I knew why. I think it's an improper question.

Q. Why do you think it's improper, why? A. I don't know why.

Q. Because it's a very very serious matter. It involves your knowledge of payoffs, your knowledge of the fact that you were receiving information, confidential information from certain members of the Police Department, is that the reason why it bothers you? A. Mr. Scotti—

Q. You are on the spot, is that the reason? Is that the reason why you hesitate because an answer to that question, an affirmative answer, would mean to this grand jury that you are admitting that you do have information from the police and that you do business with the police? Is that what you are worried about? Is that what you are— A. Mr. Scotti, you are drawing conclusions. You made your statements, you might as well indict me. You have all the evidence.

Q. Why don't you want to answer the question? A. There is no use to go any further unless I consult my attorney.

The Witness: Mr. Foreman, do I have your permission to leave this room and consult my attorney?

Mr. Scotti: Shall we go to court for a direction.

The Witness: *Go to court. I don't understand the question.*

Mr. Scotti: We will go in open court, then, and make an application.

You don't understand the question.

Mr. Reporter, read the question.

The Witness: I didn't—

Mr. Scotti: Now, he said he doesn't understand the question.

The Witness: I didn't say—I said, "Will you please repeat the question. Don't jump conclusions.

Mr. Scotti: Read the question. Mr. Reporter, will you be good enough to read what the witness said a little while ago.

(Whereupon, the reporter read as follows:

"Question: Why don't you want to answer the question?

Answer: There is no use to go any further unless I consult my attorney.

The Witness: Mr. Foreman, do I have your permission to leave this room and consult my attorney?

Mr. Scotti: Shall we go to court for a direction?

The Witness: Go to court. I don't understand the question.

Mr. Scotti: We will go in open court, then, and make an application.")

Q. Now, has your memory been refreshed that you said you didn't understand the question? A. Yes, sir.

Q. We accept your apology. A. Thank you.

Q. Now, are you willing to answer the question?

The Witness: Mr. Foreman, may I please leave the room to consult with my attorney as to the significance of the question?

The Foreman: I can't give you permission to do so without consent of Mr. Scotti.

Mr. Scotti: I advise the grand jury that this is a proper question and that there is no legal question involved.

Now, Mr. Foreman, I ask that you direct this witness to answer the question.

The Foreman: I so direct you to answer.

A. I don't recall the conversation.

request, the grand jury foreman directed the witness to answer. He thereupon repeated that he did not recall the conversations. The witness was then indicted for contempt on the basis of the evasive testimony.[8]

The Supreme Court of New York dismissed the indictment, stating that the defendant, while testifying before the grand jury, was denied the right to counsel when he was refused permission to leave the grand jury room and discuss the propriety of a question with his counsel. The appellate division of the supreme court affirmed on other grounds without reaching the issue of right of counsel.[9] The New York court of appeals reversed the decision and the indictment was reinstated. The court reasoned that although a witness at a grand jury proceeding has a right to consult his lawyer concerning questions of "legal rights," he has no right to consult counsel as to "matters of strategy." The court said the phrase "legal rights" embraces such things as the right of asserting or waiving the privilege against self-incrimination, the right to refuse to answer questions having no bearing on the subject of the investigation, and the right to refuse to answer a question involving a testimonial privilege enjoyed by the witness and to which he may be subject, for example, between attorney and client, doctor and patient, or husband and wife.[10] However, there was no indication by the court as to what the phrase "matters of strategy" encompasses. The court went on to say that if the witness' request for counsel is denied and he feels he has a colorable claim he must continue in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a ruling. There, the presiding judge can rule on questions of pertinency after argument of counsel and decide whether the witness must answer the question.

The issue of right to counsel before a grand jury was first considered in 1931 in *In re Black*[11] where the Court of Appeals for the Second Circuit denied there was any right to counsel inside the grand jury room. The court emphasized that a witness should not be "furnished with facilities for evading issues or concealing true facts."[12] The

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Petitioner's Brief for Certiorari at 8-9. (Emphasis added). As of the time of this writing the Supreme Court had not yet passed on this petition.

[8]The court reasoned that the defendant's answer was so evasive as to amount to no testimony at all. 21 N.Y.2d 418, 235 N.E.2d at 442, 288 N.Y.S.2d at 466; *accord*, People v. De Feo, 284 App. Div. 622, 131 N.Y.S.2d 806 (1954), *rev'd on other grounds*, 308 N.Y 595, 127 N.E.2d 592 (1955).

[9]27 App. Div. 2d 504, 280 N.Y.S.2d 852 (1967). The appellate division found that the defendant was, in fact, never really granted immunity. See note 6 *supra*.

[10]21 N.Y.2d 418, 235 N.E.2d at 443, 288 N.Y.S.2d at 468-69.

[11]47 F.2d 542 (2d Cir. 1931).

[12]*Id.* at 543.

court noted that the grand jury, as an investigatory body seeking to feret out crime and criminals, requires the most ample power of investigation. It pointed out that for any needed protection a witness must rely upon his privilege against self-incrimination to be invoked when the occasion arises.[13] *Black* presented a blueprint for courts in dealing with the question of right to counsel before a grand jury, and the case was followed in many instances.[14]

The United States Supreme Court decided the question of a right to counsel under the due process clause of the fourteenth amendment in *In re Groban*.[15] There, several witnesses refused to answer questions at a secret investigation conducted by a fire marshall[16] on the grounds that they were denied the immediate presence of counsel. The Court, noting that a grand jury witness cannot be represented by counsel, denied any violation of the due process clause and held that there was no right to the presence of counsel. Although *Black* was not directly cited, the Court adopted almost the same language in stressing that a witness' protection is his privilege against self-incrimination.[17]

In 1958 a New York state court, in a case[18] involving a fact situation similar to *Groban,* upheld a contempt conviction where the witness had based his refusal to testify on the ground that his counsel was excluded from the grand jury room. The court stated that it was not an abuse of discretion to exclude the attorney from the room.[19]

As a result of the recent landmark decisions of the United States Supreme Court[20] concerning the sixth amendment right to counsel,

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[13]*Id.* at 544.

[14]*In re* Groban, 352 U.S. 330, 333 (1957); United States v. Kane, 243 F. Supp. 746, 753 (S.D.N.Y. 1965); United States v. Blanton, 77 F. Supp. 812, 816-17 (E.D. Mo. 1948); Gordon v. Gerstein, 189 So. 2d 873, 875 (Fla. 1966); Dinnen v. State, 168 So. 2d 703, 704-05 (Fla. Dist. Ct. App. 1964).

[15]352 U.S. 330 (1957).

[16]The investigation was authorized by Ohio statute, OHIO REV. CODE ANN. § 3737.08 (Baldwin 1964).

[17]"When such charges are made in a criminal proceeding, he then may defend the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination." 352 U.S. at 333.

[18]Anonymous v. Arkwright, 5 App. Div. 2d 790, 170 N.Y.S.2d 535 (1958).

[19]*Id.* at 538. *Groban* and *Arkwright* involved secret interrogations provided by statute and which incorporated much of the same procedure as a grand jury. The same underlying principles applied to both these cases and the *Black* case. All three were concerned with the right to counsel within the room where the proceedings were being conducted.

[20]*See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963). In *Gideon* the Supreme Court held that the sixth amendment to the Constitution, which provides that

the argument has been renewed to extend this right to grand jury proceedings.[21] Thus far, the cases have all held that there is no constitutional right to counsel *in* the grand jury room.[22] However, until now the courts have not been called upon to adjudicate the question of a witness' right to consult with counsel *outside* of the grand jury room. This is an important link which is missing in the development of case law concerning the rights of a grand jury witness to counsel.

Although the point has not been judicially passed upon, the procedure for the district courts in the Southern District of New York has been to allow the witness to consult with counsel outside the grand jury room,[23] and *United States v. Leighton*[24] seems implicitly to recognize this procedure has the status of a right. Here the defendant was indicted for bribery after testifying before the grand jury. He moved to vacate the indictment on the ground that the exclusion of counsel from the grand jury proceedings had violated his sixth amendment right to counsel. The court held the right was not violated but noted that the grand jury had specifically advised the defendant that he had a right to consult with counsel outside the grand jury room at any time he chose.[25] Although the right to counsel outside the grand jury room was not the issue before the court, the fact that the court placed great emphasis on defendant's freedom of access to his attorney indicates that, in the absence of such access, the court might well have found a violaion of the sixth amendment. Further indication of the significance of defendant's access to counsel outside the grand jury room is the fact that the court, in determining

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in all criminal prosecutions the accused shall enjoy the right to assistance of counsel, was made obligatory on the states by the fourteenth amendment. *Escobedo* reversed a murder conviction where the defendant had been denied counsel in pre-trial interrogation and was not advised of his constitutional right against self-incrimination. *Miranda* requires giving a suspect who is in custody the now famous four warnings: 1) the accused has the right to remain silent; 2) he has the right to the presence of his attorney; 3) if he has no attorney, one will be obtained for him if he so desires; 4) anything said can be used against him.

[21]*See* Directory Services, Inc. v. United States, 353 F.2d 299, 301 (8th Cir. 1965); Sheridan v. Garrison, 273 F. Supp. 673, 682 (E.D. La. 1967); United States v. Kane, 243 F. Supp. 746, 753-54 (S.D.N.Y. 1965).

[22]Directory Services, Inc. v. United States, 353 F.2d 299 (8th Cir. 1965); Sheridan v. Garrison, 273 F. Supp. 673 (E.D. La. 1967); United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967); United States v. Kane, 243 F. Supp. 746 (S.D.N.Y. 1965); United States v. Grunewald, 164 F. Supp. 640 (S.D.N.Y. 1958).

[23]United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967); United States v. Kane, 243 F. Supp. 746 (S.D.N.Y. 1965); United States v. Grunewald, 164 F. Supp. 640 (S.D.N.Y. 1958).

[24]265 F. Supp. 27 (S.D.N.Y. 1967).

[25]*Id.* at 36-37.

the issue of right to counsel inside the grand jury room, did not rely on *Black* or *Groban* for authority. In fact, it ignored them completely and based its decision upon an independent analysis of the facts of the case and of defendant's rights under the sixth amendment.

In denying the right to counsel within the grand jury room, *Black* reasoned that a witness should not be "furnished with facilities for evading issues or concealing true facts."[26] Underlying this reasoning was the court's emphasis that a witness' only protection was his right against self-incrimination.[27] Subsequent courts which followed the *Black* rule[28] have also relied upon the protection of the fifth amendment to the exclusion of the sixth amendment. Such a philosophy is antagonistic towards the right to counsel. In light of the recent Supreme Court decisions which appear to say that there is a direct correlation between the sixth amendment right to counsel and the fifth amendment privilege against self-incrimination,[29] it is hard to reconcile a contemporary adoption of this attitude.

Yet *Ianniello,* the principal case, seems to adopt precisely this position. It recognizes the difficulty of maintaining that a witness is not entitled to the advice of his lawyer, yet it refuses to declare an absolute right to counsel. The court notes that a witness should be entitled to consult with counsel where his "legal rights" are concerned but not where "matters of strategy" are involved. The problem is that at times there may be a very fine distinction between legal rights and strategy, as for example, when the question arises as to the proper time to invoke the privilege against self-incrimination. Invoking the privilege is a legal right but strategy may be involved in its execution or waiver.

The grand jury witness faced with a question requiring an answer which may be damaging has several choices of action. First (if not granted immunity), he may answer the question, braving the possibility that his testimony will be used as evidence against him at a later trial.[30] Second, he may exercise his right to invoke his privilege against self-incrimination.[31] This exercise, however, is not without its

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[26]47 F.2d at 543.

[27]*Id.* at 544.

[28]*See generally* cases cited note 14 *supra.*

[29]*See* note 20 *supra.*

[30]Under New York law it does not appear that mere testimony will constitute a waiver of immunity or privilege against self-incrimination. *See* N.Y. CODE CRIM. PROC. § 619-e (McKinney Supp. 1968).

[31]This assumes the witness is aware of his right, for a witness testifying before a grand jury need not be advised of his constiutional right against self-incrimina-

pitfalls. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself. His judgment alone does not establish the hazard of incrimination. It is for the court to decide whether his silence is justified.[32] A reluctant witness whom the court determines has made an unwarranted refusal to answer may quite possibly be faced with a contempt indictment. Thus, in pursuing this course the witness must ascertain his right against self-incrimination at his peril and without the benefit of counsel.[33]

Third, the witness may request a consultation with counsel. This would appear to be the best course of action for a witness who is not certain of his rights. However, under *Ianniello* this becomes a question for the prosecutor and the grand jury foreman to decide. If it is determined that the request falls within the boundary of "legal rights," the witness may enjoy the benefit of counsel. But a seasoned prosecutor might refuse the request in the hopes of obtaining important testimony. Under *Ianniello,* if the witness still feels he has a valid claim to the advice of the counsel, he should continue to refuse to answer, thereby forcing the prosecutor to seek a ruling in open court. However, this procedure could cause hardships. If a witness did not know he had a right to continue to refuse to answer and force the matter into open court, he might think, as the defendant in *Ianniello* apparently did, that the only alternative to making the incriminating statement is to give an evasive answer.

The procedure noted in the *Leighton* case, which allows the witness to consult with his attorney outside the grand jury room at his own discretion, avoids the problems which *Ianniello* raises. By drawing a distinction between questions of "legal rights" and "matters of strategy," *Ianniello* puts a grand jury witness who is ignorant of grand jury procedures into a position where his own determination of strategy may subject him to a charge of criminal contempt. Although professing to protect a witness' "legal rights," the court by limiting his sixth amendment right to counsel has also hampered an effective implementation of the fifth amendment right against self-incrimination.

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tion. United States v. DiMichele, 375 F.2d 959 (3d Cir. 1967); *See* United States v. Orta, 253 F.2d 312 (5th Cir. 1958); United States v. Ponti, 257 F. Supp. 925 (E.D. Pa. 1966).

[32]Hoffman v. United States, 341 U.S. 479, 486 (1951); Rogers v. United States, 340 U.S. 367, 374 (1951); Glotzbach v. Klavans, 196 F. Supp. 685, 688 (E.D. Va. 1961). *But see* United States v. Licavoli, 102 F. Supp. 607, 609 (N.D. Ohio 1952).

[33]"[W]hen a witness is deprived of the advice of counsel he may be completely unaware that his conduct has crossed the obscure boundary and become contemptuous." *In re* Groban, 352 U.S. 330, 343-44 (1957) (dissenting opinion).