

5-1-1972

## Criminal Procedure—Right to Counsel in Investigative Grand Jury Proceedings: Washington Criminal Investigatory Act of 1971—R.C.W. §§ 10.27.120-.140 (1971)

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### Recommended Citation

anon, Recent Developments, *Criminal Procedure—Right to Counsel in Investigative Grand Jury Proceedings: Washington Criminal Investigatory Act of 1971—R.C.W. §§ 10.27.120-.140 (1971)*, 47 Wash. L. & Rev. 511 (1972).

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**CRIMINAL PROCEDURE—RIGHT TO COUNSEL IN INVESTIGATIVE GRAND JURY PROCEEDINGS: WASHINGTON CRIMINAL INVESTIGATORY ACT OF 1971—R.C.W. §§ 10.27.120–.140 (1971).**

The right of a grand jury witness to the presence and limited assistance of counsel while testifying before an investigative grand jury was established in Washington by the Criminal Investigatory Act of 1971.<sup>1</sup> The Act provides that a witness may be accompanied and advised by counsel until immunity is granted.<sup>2</sup> After a grant of immunity, counsel is excluded from the proceedings but may be consulted outside the grand jury room.<sup>3</sup>

The purpose of the statute is to protect the rights of the witness who is testifying before a grand jury. A grand jury witness is confronted with the jury's extraordinary investigative powers<sup>4</sup> which are unchecked by normal procedural safeguards;<sup>5</sup> his only protection is the privilege against self-incrimination.<sup>6</sup> Without counsel in this setting,

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1. WASH. REV. CODE § 10.27.120–.140 (1971). WASH. REV. CODE § 10.28.075 (1967) allowed witness' counsel to be present during grand jury proceedings, but in no way delineated or limited the scope of the attorney's function during the proceedings.

2. WASH. REV. CODE § 10.27.120 (1971) provides:

Any individual called to testify before a grand jury or special inquiry judge, whether as a witness or principal, if not represented by an attorney appearing with the witness before the grand jury or special inquiry judge, must be told of his privilege against self-incrimination. Such an individual has a right to representation by an attorney to advise him as to his rights, obligations and duties before the grand jury or special inquiry judge, and must be informed of this right. The attorney may be present during all proceedings attended by his client unless immunity has been granted pursuant to section 13 of this 1971 act. After immunity has been granted, such an individual may leave the grand jury room to confer with his attorney.

3. *Id.*

4. The grand jury can typically subpoena a witness, compel testimony through a grant of immunity and enforce compliance with orders to testify through the use of the contempt power. In addition, grand jury proceedings are secret and *ex parte*. See notes 22, 23, 26, 48 and 49, and accompanying text, *infra*.

5. See, e.g., *United States v. Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955) where the court observed:

Such a body [the grand jury] is not charged with the duty of deciding innocence or guilt and, for this reason, its proceedings have never been conducted with assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal.

See text accompanying notes 40-42, *infra*.

6. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Court held that persons appearing before a grand jury are entitled to the privilege against self-incrimination. The scope of the privilege is summarized in Note, *Compulsory Immunity Legislation: Title II of the Organized Crime Control Act of 1970*, 1971 U. ILL. L. F. 91, 93.

the witness' rights, and particularly his privilege against self-incrimination,<sup>7</sup> can easily be abused.

The Criminal Investigatory Act's provision for counsel appears justified when one considers the witness' delicate position and recent extensions of the right to counsel at other stages of the criminal process.<sup>8</sup> Washington's statute, however, is a significant departure from grand jury protections provided in other jurisdictions because it provides for the presence of counsel as a matter of right.<sup>9</sup> This note examines the policy basis for Washington's statute and the effect this additional protection for the witness may have on the investigative efficiency of the grand jury.

## I. THE TRADITIONAL GRAND JURY AND THE EXCLUSION OF COUNSEL

Challenges to grand jury indictments on the ground that a witness or the accused was denied the presence and assistance of counsel have

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7. The balance between the requirement for information and policy against self-incrimination generally weighs in favor of the privilege. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) states the policy behind the fifth amendment privilege against self-incrimination which is essentially to force "the government seeking to punish an individual [to] produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth."

8. Recent decisions indicate that extension of the right of counsel to a witness appearing before an investigative grand jury might be required under the fifth, sixth, and fourteenth amendments. See *Coleman v. Alabama*, 399 U.S. 1 (1970) (right to counsel at preliminary hearing); *Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel at probation revocation hearing); *Wade v. United States*, 388 U.S. 218 (1967) (right to counsel at a lineup); *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to counsel during custodial interrogation); and *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on appeal). Several articles have advocated this extension of counsel to the grand jury witness as a matter of constitutional right. See Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 Mo. L. REV. 193 (1971) [hereinafter cited as Steele]; Meshbesh, *Right of Counsel Before a Grand Jury*, 41 F.R.D. 189 (1966); Comment, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97 (1967).

9. Courts in all jurisdictions have been reluctant to extend to a grand jury witness the right of the presence and assistance of counsel. See, e.g., *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir. 1968); *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 (1971). But see *Sheridan v. Garrison*, 273 F. Supp. 673 (E.D. La. 1967), *rev'd on other grounds*, 415 F.2d 699 (5th Cir. 1969).

Grand jury statutes also generally exclude counsel. See, e.g., FED. R. CRIM. P. 6(d); CAL. PENAL CODE § 939 (West 1970); N.Y. CODE CRIM. PROC. § 190.25(3) (McKinney 1971); PA. STAT. ANN. tit. 19, §209 (Supp. 1971). But see MICH. STAT. ANN. §28.959(5) (Supp. 1971) (giving a witness the right to counsel after immunity is granted); UTAH CODE ANN. §77-19-3 (1969) (giving the grand jury witness the right to counsel).

generally been dismissed as inconsistent with historical concepts of the grand jury.<sup>10</sup> The tendency has been to treat the grand jury as sacrosanct because of its long history and constitutional prerogatives.<sup>11</sup> It is therefore necessary to briefly examine the history of the grand jury to determine why witness' counsel has never been provided for in grand jury proceedings.

The grand jury has been a basic element of the Anglo-American criminal process since 1166<sup>12</sup> and theoretically served as the citizens' voice in the enforcement of criminal laws.<sup>13</sup> The grand jury, consisting of from 12 to 23 freeholders selected from within the jurisdiction of the summoning court, performed two separate functions, one protective and the other investigative.<sup>14</sup> As protector, the grand jury

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10. Steele, *supra* note 8, at 207. See also *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439 (1968), cert. denied, 393 U.S. 827 (1968); *People v. Robinson*, 66 Misc. 2d 639, 323 N.Y.S.2d 573 (1971); *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 (1971); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968); *United States v. Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965).

11. Reliance on traditional concepts of the grand jury is facilitated by a marked lack of information about the institution. Though the grand jury has existed since 1166, its procedures and powers have never been comprehensively defined. This is largely due to the grand jury's origin in common law, a development influenced by extra-legal factors, and a lack of statutory clarification. Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586, 587 (1953).

Perhaps the most pervasive factor in keeping witness' counsel out of grand jury proceedings has been the Supreme Court's frequent analogies to the traditional lack of counsel in grand jury proceedings while deciding cases concerning the right to counsel in administrative and other non-judicial hearings. In *Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969) (concerning a witness' right to counsel in a state administrative investigation), the Court stated in *dictum*:

We do not mean to say that the same analysis applies to every body which has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees [the right to counsel] alleged by appellant to be applicable to the Commission. As this Court noted in *Hannah*, "The grand jury merely investigates and reports. It does not try." Moreover, "[t]he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history."

See also *Hannah v. Larche*, 363 U.S. 420 (1960); *Anonymous v. Baker*, 360 U.S. 287 (1959); *In re Groban*, 352 U.S. 330 (1957).

To date, the Supreme Court has not examined the issue of witness' right to counsel in the context of the modern investigative grand jury.

12. R. YOUNGER, *THE PEOPLES PANEL 1* (1963) describes in detail the history of the grand jury from its origin in England at the Assize of Claredon in 1166. For an abbreviated general treatment of the history of the grand jury see L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 137-46 (1947); Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119 (1964).

13. R. YOUNGER, *supra* note 12, at 245-46.

14. Though the objectives of the two basic functions of the grand jury are totally inconsistent with each other, neither courts nor statutes have differentiated in the treatment of the two functions. See, e.g., FED. R. CRIM. P. 6, which governs the

was supposed to stand between the accused and the accuser.<sup>15</sup> If the evidence presented was insufficient to establish probable cause, the grand jurors no-billed the accused, thus preventing hasty or malicious prosecution.<sup>16</sup> This protective function of the grand jury was incorporated by the fifth amendment which guarantees criminal defendants in federal court the right to an indictment for all serious crimes.<sup>17</sup> As investigator, the grand jury inquired independently into crimes committed in its jurisdiction<sup>18</sup> and issued indictments on the finding of probable cause.<sup>19</sup>

Although the grand jury has performed these two different and inconsistent functions, the justifications given by courts for excluding counsel have been identical for both protective and investigative grand juries. The first justification has been that the grand jury has always been considered the protector of the accused. A witness' or an accused's rights were presumed to be adequately protected by the presence of an independent group of citizens who were charged with pro-

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Special (investigative) Grand Jury proceedings instituted under the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3331-34 (1970), as well as traditional protective grand juries under FED. R. CRIM. P. 7.

15. The scope of this note does not include an examination of the protective grand jury and the issue of right to counsel in that context. References to the protective grand jury will merely summarize arguments made in their behalf, and are not meant to imply that a witness is adequately protected in such proceedings.

16. *Wood v. Georgia*, 370 U.S. 375, 395 (1962).

17. U.S. CONST. amend. V provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." *Hurtado v. California*, 110 U.S. 516 (1884) upheld California's shift from indictment to information by reasoning that a flexible interpretation of due process in the fourteenth amendment did not require prosecution by indictment. Though *Hurtado* has been subsequently upheld (*e.g.*, *Gaines v. Washington*, 277 U.S. 81 (1928)), the foundation of the decision was seriously weakened by recent decisions. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding the fourteenth amendment guarantees the sixth amendment right of trial by jury to a state defendant charged with a serious crime).

Today 24 states require that prosecutions for all or most felonies be initiated by indictment; in 26 states non-capital cases may be prosecuted by either information or indictment at the option of the prosecutor. Most of these states use the information, which is generally a written accusation made by a public prosecutor without the intervention of a grand jury, as the principal means of initiating prosecutions. For a summary of the pertinent statutory provisions see Steele, *supra* note 8, at 193, 194.

18. *Hale v. Henkel*, 201 U.S. 43 (1906) is the classic case expounding the investigative function of the grand jury. *See also* Blakely, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, reprinted in THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 80 (1967).

19. The investigative function of the grand jury has remained as an important aspect of the investigation of organized crime. *See, e.g.*, Organized Crime Control Act of 1970, 18 U.S.C. §§ 3331-34 (1970); WASH. REV. CODE §§10.27.120-140 (1971).

tecting him.<sup>20</sup> Second, the function of the grand jury was merely to determine whether a trial was necessary.<sup>21</sup> If a witness' rights were abused, the witness could be exonerated at a later trial. Finally, courts feared that the presence of counsel would interfere with grand jury secrecy,<sup>22</sup> disrupt the *ex parte* nature of grand jury proceedings<sup>23</sup> and thus seriously impair the investigative efficiency of the grand jury.

Although the exclusion of counsel may have been justified in the context of the historical or theoretical grand jury, the contemporary grand jury investigation raises a number of new questions.

## II. THE MODERN INVESTIGATIVE GRAND JURY

The modern investigative grand jury typically functions as the investigative arm of the prosecutor:<sup>24</sup> the prosecutor usually decides

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20. See, e.g., *Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969); *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir. 1968); *United States v. Cleary*, 265 F.2d 459, 460-461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959); *United States v. Kane*, 243 F. Supp. 746, 753 (S.D.N.Y. 1965).

21. See, e.g., *Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969); *Hannah v. Larche*, 363 U.S. 420, 449 (1960); *In re Groban*, 352 U.S. 330, 333 (1957); *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir. 1968).

22. *United States v. Procter and Gamble Co.*, 356 U.S. 677, 682 (1958) (speaks of the "indispensable secrecy of grand jury proceeding"); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400 (1959). *United States v. Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954) summarized the purposes of grand jury secrecy as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt.

23. Only evidence for the prosecution is heard; an accused has no right to appear, nor to present evidence or witnesses. *In re Black*, 47 F.2d 542, 544 (2d Cir. 1931); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968). If witness' counsel were permitted to play an active role in the proceedings, the grand jury stage could turn into a "mini-trial."

24. See generally *Steele*, *supra* note 8, at 200; *Blakely*, *supra* note 18, at 80, 84 (1967).

*Dession, From Indictment to Information, Implications of the Shift*, 42 YALE L.J. 163, 189 (1932) comments on the value of the grand jury to the prosecutor as follows:

To the prosecution . . . a grand jury affords an early, secret, and *ex parte* hearing, where unwilling or timid witnesses may be subpoenaed and questioned before or after the lodging of a specific charge against anyone, and under the circumstances most favorable to disclosure. Barring an occasional "leak," no premature disclosure of the state's case is entailed. Persons called before such a body have the vulnerable status of mere witnesses. They are unattended by counsel. The value of such a "deposition mill" is constantly attested by federal prosecutors. . . .

which cases will be investigated;<sup>25</sup> he subpoenas witnesses in the name of the grand jury;<sup>26</sup> he organizes the daily work of the grand jury and presents and questions witnesses before the grand jurors;<sup>27</sup> and he acts as the grand jury's primary legal advisor.<sup>28</sup> With this much influence, a prosecutor is usually able to get the grand jury to adopt any position with respect to a proceeding.<sup>29</sup> It is therefore difficult for one to picture the grand jury as the "independent protector" of the witness or the accused.<sup>30</sup>

Another feature of the modern investigative grand jury is the inquisitorial focus of the jurors.<sup>31</sup> The investigative grand jury is convened to investigate and to indict; the protective function is secondary and probably operates only to prevent blatant abuse of the grand jury

25. *United States v. Steel*, 238 F.Supp. 580, 582 (S.D.N.Y. 1965). As a practical matter, the prosecutor will have determined beforehand what cases the grand jury will investigate, but typically the grand jurors are empowered to also inquire into any offense of which they have knowledge. *See, e.g.*, WASH. REV. CODE § 10.27.100 (1971):

The grand jurors shall inquire into . . . all . . . indictable offenses within the county which are presented to them by a public attorney or otherwise come to their knowledge.

26. *See, e.g.*, WASH. REV. CODE § 10.27.140 (1971); CAL. PENAL CODE § 939.2 (West 1970); N.Y. CODE CRIM. PROC. § 190.50(2) (McKinney 1971).

27. *See, e.g.*, WASH. REV. CODE § 10.27.070 (1971); CAL. PENAL CODE § 935 (West 1970); ILL. ANN. STAT. ch. 38, § 112-4(a) (Smith-Hurd 1970); MICH. STAT. ANN. § 628.63 (1947); N.Y. CODE CRIM. PROC. § 190.55 (McKinney 1971).

28. The grand jurors can also go to the court for advice. In addition, many jurisdictions allow the state attorney general to participate in lieu of the prosecutor upon the request of the grand jury. *See, e.g.*, WASH. REV. CODE § 10.20.070 (1970); CAL. PENAL CODE §§ 935, 936 (West 1970). *Cf.* CAL. PENAL CODE §§ 926, 936 (West 1970) and NEV. REV. STAT. § 172.205 (1967) which both provide for the hiring of experts, investigators, and special counsel upon the request of the grand jury.

29. Ploscowe and Spiero, *The Prosecuting Attorney's Office and the Control of Organized Crime*, in II MANUAL FOR PROSECUTING ATTORNEYS 315 (Ploscowe ed. 1956). The authors assert: "It is a very poor prosecutor who cannot bring a grand jury to adopt any position with respect to the proceeding that he wishes to take." *Id.* at 318. This, of course, is a generalization which depends on the individuals making up a grand jury. A grand jury can still exercise a certain degree of independence, but the ability to exercise this independence is minimized by the control of and the dependence on the prosecuting attorney.

30. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154 (1965).

31. *Id.* at 154-155. The author is especially cynical of the grand juror's fairmindedness as either protector or investigator. He observes:

Realistically, the most demanding task faced by the conscientious prosecutor in a grand jury room is that of making a defendant's rights understandable to a grand jury bent on indicting without sufficient evidence but upon great provocation.

On the grand juror's fervor to indict even without evidence of criminal activity:

The insistence is upon action, on getting things done. If a man has behaved badly he should be punished—not just for violating the law, but for *misbehaving*. Personal standards of conduct supplant those established by the legislature and each grand juror looks for a way to suppress what is unacceptable to him.

*Id.* at 155.

system by the prosecutor. Even if the grand jurors wanted to assert their independence, they must normally rely on the advice of the prosecutor, who is the very person the grand jurors are charged to restrain.<sup>32</sup>

The witness is in an exceedingly delicate position when testifying before an investigative grand jury.<sup>33</sup> Confrontation with the prosecutor places the lay witness not represented by counsel at a distinct disadvantage. The prosecutor can ask leading and manipulative questions which will place the witness and potential defendant in the poorest possible light.<sup>34</sup> The witness' only protection is his privilege against self-incrimination, yet warnings concerning this basic right have not been required.<sup>35</sup> The witness must determine for himself the incriminating nature of questions and answers<sup>36</sup> and he must avoid waiving his privilege against self-incrimination.<sup>37</sup> It is generally recognized that these are not easy decisions for even the most sophisticated attorney.<sup>38</sup>

The lack of procedural safeguards in grand jury proceedings further exacerbates the witness' dilemma.<sup>39</sup> In addition to the absence of

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32. See Antell, *supra* note 30, at 154.

33. See *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964); *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 443, *cert. denied*, 393 U.S. 827 (1968); *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764,777 (1971).

34. Y. KAMISAR, *CRIMINAL JUSTICE IN OUR TIME—EQUAL JUSTICE IN THE GATEHOUSES AND MANSIONS OF AMERICAN CRIMINAL PROCEDURE* 13 (1965). The author distinguishes between the right to tell one's story in his own way and one's ability to deal with a trained adversary who asks questions. He emphasizes that it is difficult for the witness to deal adequately with leading questions.

35. Even though a witness may be indicted on his own testimony, several courts have ruled that the grand jury witness is not entitled to be informed of his privilege against self-incrimination. *United States v. Luxemburg*, 374 F.2d 241 (6th Cir. 1967); *United States v. Cleary*, 265 F.2d 459 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959); *United States v. Scully*, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955); *People v. Robinson*, 66 Misc. 2d 639, 323 N.Y.S.2d 573 (1971). *But see United States v. Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967) (warning of possible self-incrimination plus consultation with attorney outside grand jury room is all the protection constitutionally necessary).

36. In *Hoffman v. United States*, 341 U.S. 479, 486 (1951), the Court explained the privilege against self-incrimination. Not only is the witness privileged not to answer questions which directly incriminate him, he also is privileged not to answer questions which would "furnish a link in the chain of evidence needed to prosecute."

37. The Supreme Court has posited:

Thus, if the witness himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make full disclosure.

*Rogers v. United States*, 340 U.S. 367, 373 (1951). See also C. McCORMICK, *LAW OF EVIDENCE* 273 (1954).

38. *Rogers v. United States*, 340 U.S. 367, 378 (1951) (Black, J., dissenting).

39. See note 5, *supra*.

counsel, the scope of the grand jury's inquiry is generally not limited as it would be at trial;<sup>40</sup> there is frequently no requirement that an indictment be based on evidence which would be admissible at trial;<sup>41</sup> and because of the *ex parte* proceedings, the witness has neither the right to confront those who might implicate him, nor the right to testify in his own behalf.<sup>42</sup>

Even though the witness is not protected by normal procedural safeguards, he is forced to make decisions when testifying before the grand jury which will be legally binding on him.<sup>43</sup> If he answers incriminating questions, he will certainly be indicted and his incriminating testimony can be used to impeach his later testimony at trial.<sup>44</sup> By answering incriminating questions, the witness may be deemed to have waived his privilege against self-incrimination.<sup>45</sup> If he refuses to testify, or invokes his privilege against self-incrimination, the grand jury is free to draw conclusions.<sup>46</sup> If the witness does not testify truthfully, he can be prosecuted for perjury.<sup>47</sup> If he refuses to testify after a grant of immunity, he is subject to punishment for civil contempt<sup>48</sup> or indictment for criminal contempt.<sup>49</sup>

40. See, e.g., *Blair v. United States*, 250 U.S. 273, 283 (1919). But see *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 443, cert. denied, 393 U.S. 827 (1968) where the court referred to a witness' "right to refuse to answer questions having no bearing on the subject of the investigation."

A grand jury subpoena *duces tecum* is subject to attack where the requirements are unreasonably broad. See *People v. Allen*, 410 Ill. 508, 103 N.E.2d 92, 94 (1952).

41. See, e.g., *Costello v. United States*, 350 U.S. 359, 363-64 (1956) (upholding an indictment based solely on hearsay evidence). See also *Laughlin v. United States*, 385 F.2d 287 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *People v. Myers*, 46 Ill. 2d 270, 263 N.E.2d 113 (1970); *State v. Ferrante*, 111 N.J. Super. 299, 268 A.2d 301 (1970); *State v. Parks*, 437 P.2d 642 (Alaska 1968). But see *United States v. Tane*, 329 F.2d 848, 853 (2d Cir. 1964); CAL. PENAL CODE 939.6(b) (West 1970) which provides that an indictment must be based on admissible evidence, but is not void because inadmissible evidence was received by the grand jury.

42. See note 23, *supra*.

43. See *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 445, cert. denied, 393 U.S. 827 (1968).

44. *Jones v. United States*, 342 F.2d 863, 868 (D.C. Cir. 1964). See also *Harris v. New York*, 401 U.S. 222 (1971) (holding prior inconsistent statements made to the police without Miranda warnings were admissible in evidence for the purpose of impeaching the defendant's credibility).

45. See note 37, *supra*.

46. See note 44 and accompanying text, *supra*.

47. See WASH. REV. CODE §10.27.130 (1971).

48. *Id.* See also *Shillitani v. United States*, 384 U.S. 364 (1966) (courts have power to enforce compliance with their lawful orders through civil contempt).

The threat of civil contempt is not so great in jurisdictions such as Washington where grand jury terms seldom extend beyond six months. However, the terms of federal grand juries under the Organized Crime Control Act of 1970 can extend over a period of years.

49. See, e.g., *Harris v. United States*, 382 U.S. 162 (1965).

The prosecutor's control of grand jury proceedings, the lack of procedural safeguards for the witness, plus the legally binding nature of a witness' testimony have eroded prior justifications for the exclusion of counsel. These same factors prompted the inclusion of counsel in grand jury proceedings by the Washington legislature.<sup>50</sup>

### III. WASHINGTON'S PROVISION FOR WITNESS' COUNSEL AND ITS ANTICIPATED IMPACT ON GRAND JURY INVESTIGATIONS

The Criminal Investigatory Act eases the dilemma of the investigative grand jury witness by providing for the presence and assistance of counsel.<sup>51</sup> The Act states that a witness called before an investigative grand jury has a right to representation by an attorney and that the witness must be informed of that right.<sup>52</sup> Counsel is allowed to be present during all proceedings attended by his client until immunity is granted by the supervising court.<sup>53</sup> After a grant of immunity, the attorney is excluded from the grand jury room.<sup>54</sup> The attorney's role in the grand jury proceedings is strictly limited to advising his client con-

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50. The inclusion of this provision for counsel in the Criminal Investigatory Act was facilitated by the narrow focus of the Act. No consideration was required for the traditional protective function of the grand jury. Rather, the legislature sought only to provide the mechanism of the grand jury to assist in the investigation of organized crime and municipal corruption. WASH. REV. CODE § 10.27.010 (1971).

Two alternative provisions for witness' counsel were considered by the Washington legislature. The first provision, similar to WASH. REV. CODE § 10.28.075 (1967), would have allowed counsel not only to be present and to advise the witness, but also to question his client concerning testimony elicited before the grand jury. The second alternative would have excluded counsel from all proceedings, but would have allowed consultation with an attorney outside the grand jury room. Wash. Senate Judiciary Comm., Suggested Changes to H.B. 175 (on file with the Washington Judicial Council, University of Washington School of Law, Seattle, Wash.).

51. Cf. N.Y. CODE CRIM. PROC. § 190.40 (McKinney 1971) under which the witness receives immunity unless he expressly waives it in writing or unless he gives evidence not responsive to any inquiry with the knowledge that it is not responsive. New York repealed the provision in 1953 but re-enacted it in 1971.

New York and most federal jurisdictions allow the witness to consult with his attorney outside the grand jury room. *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439 (1968), recognizes explicitly the right of a grand jury witness to consult with his attorney outside the grand jury room concerning the witness' legal rights. At the federal level, though FED. R. CRIM. P. 6 does not provide for witness' consultation with counsel, the practice has been informally recognized in some federal jurisdictions. *See, e.g., United States v. Capaldo*, 402 F.2d 821 (2d Cir. 1968); *United States v. Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967).

52. WASH. REV. CODE §10.27.120 (1971).

53. *Id.*

54. *Id.*

cerning his right to answer or not to answer questions and the form of the answer.<sup>55</sup>

These provisions give substance to the witness' privilege against self-incrimination. By being present during questioning, counsel will hear the exact questions posed in a particular context and will be better able to protect and advise his client.<sup>56</sup> The advice of counsel will enable the grand jury witness to make informed decisions concerning his testimony.

The impact of the Act on the *ex parte* nature of the proceedings will be minimized by the fact that the attorney's participation in the proceeding is strictly limited to advising his client.<sup>57</sup> This precludes the possibility of a "mini-trial" and will not impair expeditious investigation.

The secrecy of the grand jury proceeding could be compromised by a single attorney who represents all the participants in an organized crime.<sup>58</sup> The attorney might hear all of the testimony, see the direction of the investigation and advise his clients accordingly, thereby avoiding incrimination of the group.<sup>59</sup> A related problem arises when the attorney who represents a group of conspirators is hired and controlled by the head of the conspiracy. An unscrupulous attorney in this position could potentially control the testimony of participants in the conspiracy to serve the interests of his employer. This practice would be especially damaging to an investigation where a member of the conspiracy was willing to testify and would have testified but for the presence of the attorney.

Similar breaches of secrecy and control and subornation of witnesses have always been present in grand jury investigations. Witnesses will normally relate the substance of the questions and their tes-

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55. *Id.* §10.27.080 (1971) provides in part:

The attorney advising the witness shall only advise such witness concerning his right to answer or not answer any questions and the form of his answer and shall not otherwise engage in the proceedings.

56. *But cf.* United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967); People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439 (1968), which held that a witness' rights were adequately protected where the witness was allowed to consult with his attorney outside the grand jury room.

57. WASH. REV. CODE §10.27.080 (1971).

58. *See* note 23, *supra*, for the reasons for grand jury secrecy.

59. Enker and Elsen, *Counsel for the Suspect: Messiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 74 n.84 (1964) allude to this potential adverse effect of the presence of witness' counsel.

timony to their attorneys,<sup>60</sup> and leaders of conspiracies have surely exerted much control over their co-conspirators in the past.<sup>61</sup> However, with counsel present, the potential for abuse in these two areas is significantly increased.<sup>62</sup>

Three possible remedies or deterrents exist to mitigate the loss of the investigative efficiency of the grand jury. First, when the witness refuses to testify on the grounds of self-incrimination and is granted immunity by the court, counsel is excluded from the grand jury proceedings.<sup>63</sup> This will eliminate any immediate control the attorney may have been exercising over the witness, and will allow the witness to testify freely within the secret proceedings. Second, if the witness refuses to testify after a grant of immunity or when he cannot claim his privilege against self-incrimination, the investigation can continue after imposition of the contempt power, either civil or criminal. Civil contempt gives the court the power summarily to enforce compliance with its order to testify by having the witness imprisoned.<sup>64</sup> The imprisonment continues until the witness testifies as ordered, but in no case can the imprisonment extend beyond the term of the grand jury.<sup>65</sup> Criminal contempt is similarly utilized where the witness fails to conform with the order of the court, but the witness can be imprisoned for a definite period exceeding the term of the grand jury if he is later found guilty of the charge of contempt at trial.<sup>66</sup> Finally, the

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60. Meshbesh, *Right to Counsel Before a Grand Jury*, 41 F.R.D. 189, 206-07 (1966) questions how much secrecy is preserved by excluding witness' counsel.

61. See, e.g., Blakely, *supra* note 18, at 83, quoting the testimony of former Attorney General Nicholas deB. Katzenbach who had stated that numerous prosecutions had been abandoned because key witnesses had refused to testify for fear of being murdered.

62. *But see* Preliminary Report submitted by the 1971 King County Grand Jury (on file at the Office of the King County Prosecutor, Seattle, Wash.) which demonstrates that an investigation conducted under the Criminal Investigatory Act can be both productive and expeditious. A total of 34 indictments involving 54 individuals were presented by the grand jury. One indictment involved an alleged organized crime of 19 past and present public officials and law enforcement officers.

63. WASH. REV. CODE §10.27.120 (1971).

64. See Hilts, *The Increasing Use of the Power of Contempt*, 32 MONT. L. REV. 183, 186 (1971) where the author comments:

It is commonly felt that a court must be able to coerce enforcement of its decrees and orders to further the administration of justice. The usual justification for the use of summary punishment is that the contemnor "... holds the keys to his freedom in his willingness to comply with the court's directive."

65. *Shillitani v. United States*, 384 U.S. 364 (1966) (holding sentence for civil contempt was improper where it extended beyond the end of the grand jury's term).

66. See, e.g., *Harris v. United States*, 382 U.S. 162 (1965).

possibility of a perjury prosecution should help ensure that testimony will be truthful.<sup>67</sup> Today, however, the possibility of perjury prosecution is unlikely, and if prosecution materializes the likelihood of conviction is not high.<sup>68</sup> When witness' counsel is present and does suborn the witness, the chances for successful perjury prosecution become even less.

The Act does give adequate protection to the grand jury witness, but this protection is achieved at the cost of potential adverse effects in the investigation of organized crime. Existing remedies and deterrents will only serve to minimize this impairment of investigative efficiency.<sup>69</sup>

## CONCLUSION

Proper evaluation of the right to counsel in investigative grand jury proceedings can only be made when the grand jury is examined in its modern context. Control by the prosecutor and the inquisitorial focus of the grand jurors have eliminated the protections once afforded a witness in a hearing by a group of citizens independently determining probable cause. In this modern context, Washington's provision for witness' counsel is sound.

The fact that the grand jury proceedings are not technically determinative of guilt or innocence is of little consolation to the witness whose grand jury testimony is legally binding upon him. The witness can potentially incriminate himself, waive his privilege against self-incrimination, commit perjury or be charged with civil or criminal contempt. Additional costs of a grand jury indictment to an individual must also be recognized. Arrest, loss of job, and humiliation are significant disabilities which the individual incurs before he is proven

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67. Blakely, *supra* note 18, at 88.

68. 1956-65 ATTY. GEN. ANN. REP. 288, reports that during the ten year period from 1956 through 1965, 227 defendants were charged with perjury. Of those charged with perjury, only 52.7 percent were found guilty as compared to 78.7 percent of the defendants in all other criminal cases.

The court in *State v. Wallis*, 50 Wn.2d 350, 311 P.2d 659, 660 (1957) observed that "[p]erjury requires a higher measure of proof than any other crime known to the law, treason alone, excepted."

69. One way to strengthen the investigative efficiency of the grand jury would be to facilitate perjury prosecution. See Blakely, *supra* note 18, at 88.

guilty. The stigma of a grand jury indictment will accompany an individual even though he is later exonerated at trial.<sup>70</sup>

The compromise adopted by some jurisdictions which allow the witness to consult his attorney while testifying outside the grand jury room does not adequately or fairly protect the witness.<sup>71</sup> The grand jury secrecy that is saved by this procedure is insignificant and is more than offset by the danger to the witness of a mistake in judgment or of a breakdown in communications between the witness and the attorney.

With the inclusion of counsel in Washington grand jury proceedings, there will undoubtedly be some impairment of efficiency in the investigation of organized crime through breaches of secrecy and the stifling of testimony or the subornation of witnesses. These impairments will be minimized by excluding counsel after a grant of immunity. Also, the threat of the contempt power will encourage reluctant witnesses to testify.

The preservation of the investigative efficiency which could potentially be lost by the inclusion of counsel should not be achieved by sacrificing the rights of the grand jury witness.<sup>72</sup> As a matter of fairness, if not constitutional right, the witness should be provided with the right to representation by counsel in investigative grand jury proceedings.

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70. The problem presented in this basic proposition was recognized in *State v. Parks*, 437 P.2d 642, 646 (Alaska 1968) (Rabinowitz, J., concurring) (upholding indictment based solely on hearsay).

71. See note 51, *supra*.

72. An alternative approach to protecting the rights of the grand jury witness is to confer automatic immunity. See note 51, *supra*.