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# THE FADING MYTH OF GRAND JURY SECRECY

By RICHARD CALKINS\*

In the past decade there has emerged an entirely new evaluation of the doctrine of grand jury secrecy. The recent United States Supreme Court decision of *Dennis v. United States*<sup>1</sup> strongly suggests that this once inviolable doctrine is no longer to be sterily applied without giving consideration to counterbalancing factors of both public and private interests. It will, therefore, be the intent of this article to analyze the path taken by the doctrine of grand jury secrecy, culminating in the *Dennis* decision, as a basis for prognosticating its future direction.

## HISTORICAL BACKGROUND OF GRAND JURY SECRECY

A cursory analysis of the historical background of grand jury secrecy indicates that its purpose was not to protect witnesses appearing before it, but to shield the accused from the abuses of the Crown.

At the inception of the grand jury, in 1166, there was no secrecy surrounding its deliberations; its activities were open to the public, and it functioned solely in the interest of the Crown.<sup>2</sup> The Grand Assize, as the grand jury was then called, was invoked to augment the power of the Crown by acting as a public prosecutor for the purpose of ferreting out specific crimes. By 1368 a wholly distinct body emerged, called *le graunde inquest*, which lodged all criminal charges against defendants whether or not private accusers came forward. The Grand Assize, by this time, had gone through a period of diminishing importance. Significantly, *le graunde inquest* adopted the cus-

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<sup>1</sup> 384 U.S. 855 (1966).

<sup>2</sup> The Assize of Clarendon issued by Henry II in 1166 is given by many authorities as the precursor to the modern day grand jury. However, other commentators suggest that it was not until 1368, toward the end of the reign of Edward III, that the modern practice of returning a panel of twenty-four men called "*le graunde inquest*" was established, and that this latter body was the real forerunner to our present grand jury. It should also be noted that similar accusing bodies may have been utilized by the Athenians before the Christian era, by the Saxons who settled in England in the Fifth and Seventh centuries, and by the Scandanavians in the Eighth century. For a discussion of this historical background, see I HOLDSWORTH, A HISTORY OF ENGLISH LAW, 312-27 (3d ed. 1922); STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 184-86, 250-58 (1883); EDWARDS, THE GRAND JURY 26 (1906).

tom of hearing witnesses in private, thereby establishing some independence of action from the Crown.<sup>3</sup>

However, the true independence of the grand jury and the institution of grand jury secrecy as a viable doctrine received its first real impetus in 1681 as a result of the *Earl of Shaftesbury Trial*.<sup>4</sup> In that case, the King's counsel had insisted that the grand jury hear in open court testimonial evidence of certain treason charges that had been lodged by the Crown against the Earl of Shaftesbury. Following the hearing, the jurors demanded and were granted the right to interview the witnesses in private chambers. Although the Crown had expected full acquiescence, the indictment ultimately returned by the jury had the word *ignoramus* written across it. The jurors gave only their consciences as the reason for declining to indict. The case was thereafter celebrated as a bulwark against the oppression and despotism of the Crown.<sup>5</sup>

This procedure of receiving testimony in private, outside the presence of the prosecution and defendant alike, remained a common practice for a considerable period of time.<sup>6</sup> As fear of coercion from governmental influences subsided, however, a prosecutor for the Crown or state was permitted to be present during the taking of testimony in order that he might draw the form of the indictment desired by the jury. Gradually, in the late nineteenth and early twentieth centuries, there evolved greater freedom in the use of grand jury proceedings by the state, and today it is a commonly accepted right of the state.

The present day reasons for grand jury secrecy bear little

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<sup>3</sup> See EDWARDS, *op. cit.* note 2, *supra*, at 27. See also KUH, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1103 (1955).

<sup>4</sup> 8 How. St. Tr. 759, 771-74 (1681). For a discussion of this case, see EDWARDS, *op. cit.* note 2, *supra*, at 29, and 8 WIGMORE, EVIDENCE §2360, (3d ed. 1940).

<sup>5</sup> A second case that same year, Trial of Stephen College at Oxford for High Treason, 8 How. St. Tr. 549, 550 (1681) is also cited for the Assertive independent action taken by the grand jury in withstanding the strongest possible pressure from the Crown. The presiding judge compelled the grand jury to hear witnesses in court. The grand jury then demanded that they be permitted to examine the witnesses in private, which the court allowed. After considering the matter for several hours, they ignored the bill, refused to return an indictment, and informed the court that they had given their verdict according to their consciences and would stand by it.

<sup>6</sup> *E.g.*, People v. Klaw, 53 Misc. 158, 104 N.Y. Supp. 482 (N.Y.C. Gen. Sess. 1907). If a grand juror disclosed to any person indicted for a felony the evidence that was given before the grand jury, he was thereby made an accessory to the crime; and, in the days of Blackstone, such a juror was guilty of high misprison and liable to fine and imprisonment. See Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940); Goodman v. United States, 108 F.2d 516 (9th Cir. 1939). Even today in Texas and Missouri violation of grand jury secrecy is a misdemeanor. MO. REV. STAT. §3924 (1939). Addison v. State, 85 Tex. Crim. 181, 211 S.W. 225 (1919); Miss. v. State 61 Tex. Crim. 241, 135 S.W. 1173 (1911).

similarity to the underlying factors which first motivated grand juries to proceed in secret. What was once considered a protection from the abuses of the prosecution, now has become a vehicle for shielding witnesses from the defendant. Courts normally advance five reasons in support of the need for grand jury secrecy:

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 the 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 was no probability of guilt.<sup>7</sup>

For purposes of this article, it will be assumed that the indictment has been returned, the grand jury has been dismissed, and the accused is in custody. Thus, reasons 1, 2 and 5 can have no application; that is, the accused has already been prevented from escaping (reason 1), the grand jury has been dismissed and therefore needs no further protection from interference with its deliberations (reason 2), and the innocent accused is no longer a party in interest and thus his good name is not at stake (reason 5).<sup>8</sup>

#### THE NEED FOR CONTINUED SECRECY

It is the thesis of this article that once the grand jury has been dismissed and the accused apprehended, there can be no

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<sup>7</sup> See *United States v. Amazon Ind. Chem. Corp.* 55 F. 2d 254 (D.C. Md.) 1931). Cf. *United States Industries Inc. v. United States District Court*, 345 F. 2d 18 (9th Cir. 1965), *cert. denied* 382 U.S. 814 (1965); and 8 WIGMORE, EVIDENCE §2360 (McNaughton rev. 1961).

<sup>8</sup> The argument that grand jury secrecy protects the innocent accused is wholly fallacious. In nearly all jurisdictions a grand jury hearing is preceded by a preliminary hearing which is public in nature. At this hearing much, if not all of the evidence which is presented to the grand jury, is heard in open court. Thus, the accused is readily identified long before his case is submitted to the grand jury. Furthermore, if the accused is unable to afford bail he could spend a period of time in jail awaiting the grand jury's deliberations, which further indicts him with the indelible mark of a criminal. To such a person grand jury secrecy is meaningless.

further need for secrecy. Courts have frequently given lip service to this proposition<sup>9</sup> and some states by statute have so limited the period of secrecy.<sup>10</sup> However, the argument is still raised that secrecy should be maintained in order to assure that witnesses will come forward and testify on behalf of the prosecution. It is further argued that the danger of reprisal against such witnesses, or the subornation of their testimony at trial, are greatly augmented if the accused has knowledge of their grand jury testimony.<sup>11</sup>

Any analysis of these reasons demonstrates their theoretical rather than practical basis. First, any witness appearing before the grand jury is under a misapprehension if he thinks that the testimony he gives will be kept secret and not fall into the hands of the defendant.<sup>12</sup> Quite clearly, the damaging testimony he gives, if it becomes a basis for a subsequent indictment, must be repeated in open court at the trial. Therefore, any incriminatory testimony before the grand jury will ultimately be made public when repeated at the trial. The secrecy of the grand jury proceedings is therefore wholly ineffective to allay the witness' fear of reprisal, since he well knows that he will be asked to repeat his incriminatory testimony at the trial. Disclosing his grand jury testimony can in no way augment those fears. Dean Wigmore states:

"If he tells the truth and the truth is the same as he testified be-

<sup>9</sup> *E.g.* *Beatrice Foods Co. v. United States*, 312 F.2d 29, 39 (8th Cir. 1963); *United States v. Zborowski*, 271 F.2d 661 (2d Cir. 1959); *Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933); *State ex rel. Brown v. Dewell*, 123 Fla. 785, 167 So. 687 (1936); *Turk v. Martin*, 232 Ky. 479, 23 S.W. 2d 937 (1930); *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186, 187 (1959).

<sup>10</sup> Four states now provide by statute that after the indictment is returned a defendant upon demand must be provided with a copy of the grand jury minutes in advance of trial. *See* CAL. PEN. CODE §938.1; IOWA CODE §772.4 (1962); KY. CRIM. CODE §110 (Baldwin 1953); MINN. STAT. ANN. §628.04 (1947).

<sup>11</sup> *The Supreme Court in Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) states:

"Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness."

*See also* *Minton v. State*, 113 So.2d 361 (Fla. 1959); *United States v. General Motors Corp.*, 15 F.R.D. 486, 488 (D.Del. 1954).

<sup>12</sup> The rule of secrecy concerning matters transpiring in the grand jury room is designed primarily as an aid and a protection to the grand jury, not the witnesses appearing before it. *E.g.* *United States v. Amazon Ind. Chem. Corp.*, 55 F. 2d 254, 261 (D.Md. 1931). A witness is not a confidential informant; he must consider his testimony subject to all the obligations of oath required in any judicial proceeding. *See* *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 406-07 (1959) (*dissenting opinion*); *State ex rel. Brown v. Dewell*, 123 Fla. 785, 167 So. 687 (1936); *People v. Goldberg*, 302 Ill. 559, 135 N.E. 84 (1922); *State of Iowa v. McPherson*, 114 Iowa 492, 87 N.W. 421 (1901); *State v. Benner*, 64 Me. 267 (1874); *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960); *Gordon v. Commonwealth*, 92 Pa. 216 (1879).

fore the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce."<sup>13</sup>

Second, a policy of continued grand jury secrecy will not constitute a deterrent to a defendant who is bent on tampering with or suborning witnesses at his trial.<sup>14</sup> Once he has knowledge of the names of the witnesses who will testify against him, some of which he can obtain at the preliminary hearing and the remainder at the time the witness list is turned over to him before trial, he has all the information he needs to realize his unlawful objective.<sup>15</sup> The state, however, fortified with the grand jury transcript, is fully armed to ferret out such unlawful conduct and punish it.<sup>16</sup>

The abuses inherent in refusing disclosure can be serious.<sup>17</sup> A person, assured that his grand jury testimony will remain forever inviolate, could testify to one thing before the grand jury and to something entirely different before the petit jury. And, unless the subsequent testimony ran counter to that which the prosecution wished to establish, there would be no way for the defendant to submit the contradiction to the jury.<sup>18</sup> It is the

<sup>13</sup> 8 WIGMORE, *op. cit.* note 4, *supra*, §2362 at 736. See also *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960).

<sup>14</sup> See *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959).

<sup>15</sup> The court in *Murphy v. State*, 124 Wis. 635, 653, 102 N.W. 1087, 1093 (1905), stated:

"[T]he danger of subornation . . . is quite effectually disregarded in modern criminal law, which approves the right and procedure by which the accused, in fairness, is informed before the trial of the witnesses the state relies upon to establish the case."

The rules in all American jurisdictions concerning the disclosure of witnesses' names prior to trial are set forth and analyzed in 6 WIGMORE, *op. cit.* note 4 *supra*, §§1850-55.

<sup>16</sup> See *United States v. Ben Grunstein & Co.*, 137 F. Supp. 197 (D.N.J. 1955).

<sup>17</sup> The Sixth Circuit in *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940), recognized the evils and abuses of strict secrecy:

"It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of 'the citizen against the unfounded accusation, whether it comes from the government or be prompted by partisan passion, or private enmity' . . . which it was primarily designed to provide, may become an engine of oppression and a mockery of justice."

<sup>18</sup> See *United States v. Worcester*, 190 F. Supp. 548, 559 (D. Mass. 1960); *State ex rel. Brown v. Dewell*, 123 Fla. 785, 167 So. 687 (1936); *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960).

policy of the law that the truth be ascertained; the state has no interest in convicting an accused on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. If inconsistencies or conflicts in the testimony of a witness arise, it is unquestionably in the interest of the state as well as of the defendant that such be disclosed and justice assured.<sup>19</sup>

### PRE-DENNIS CASE LAW

Although the reasons for continued grand jury secrecy after the defendant is apprehended and the jury dismissed are no longer apparent, courts, both federal and state, have, with almost a religious fervor, adhered to the myth of "secrecy."<sup>20</sup> Courts have traditionally resisted disclosure to a defendant, not only at the pre-trial stage, but also after the witness has testified, and even after the prosecution has first used those minutes for purposes of refreshing a witness' recollection. Some consideration, therefore, should be given to the pre-*Dennis* case law in these three areas in order to better understand the changes which *Dennis* has initiated.

#### 1. Pre-Trial Discovery of Grand Jury Minutes

Judge Learned Hand, as early as 1923, eloquently delineated the reasons for denying all pre-trial discovery to a defendant in a criminal case, when he stated in *United States v. Garsson*:

"I am no more disposed to grant it than I was in 1909. *U.S. v. Violon* (C.C. 173 Fed. 501). It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see."<sup>21</sup>

As thus partially outlined by Judge Hand, three reasons have

<sup>19</sup> See *Commonwealth v. Mead*, 78 Mass. (12 Gray) 167 (1858); *State v. Morgan*, note 18, *supra*. The court, in *Gordan v. United States*, 299 F.2d 117, 118 (D.C., Cir. 1962), stated: "Whatever invasion of the historic sanctity of grand jury proceedings such examination may cause, if any, seems to us outweighed by the additional certainty this procedure will lend to the process of verifying as credible the uncorroborated testimony of a sole witness for the government." See also *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>20</sup> Many states of the Union no longer require an indictment for initiating criminal prosecutions, but instead permit the state's attorney to proceed directly by way of a criminal information. England, on a plea of economy, abolished its grand jury system in its entirety in 1933, thus illustrating not only the inutility of the doctrine of grand jury secrecy, but of the grand jury itself. Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 UN. OF ILL. LAW FORUM, 423 (1966).

<sup>21</sup> 291 Fed. 646, 649 (S.D.N.Y. 1923).

been advanced by courts for withholding the disclosure of grand jury testimony prior to trial: (1) disclosure would give the mute defendant an unfair advantage over the prosecution, which alone would be required to expose its entire case prior to trial; (2) disclosure would enable the defendant to procure perjured testimony in order to set up a false defense; and, (3) disclosure would encourage the defendant to bribe or intimidate prosecution witnesses in order to induce a reluctance to testify.<sup>22</sup>

Though the Hand thesis has been universally accepted by both federal and state courts, there has emerged in the last decade several well-reasoned opinions recognizing the need for pre-trial discovery of grand jury minutes.<sup>23</sup> These jurisdictions begin with the proposition that because such evidence is pertinent to the defense for purposes of impeachment, the defendant should be entitled to the grand jury minutes at some time during the trial. Withholding those minutes until after the witness testifies means that there will be repeated delays during the trial while counsel examines those minutes to determine their impeachment value.<sup>24</sup> Pre-trial disclosure, on the other hand, af-

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<sup>22</sup> These arguments, upon careful examination, bear little weight. First, only the most naive practitioner would suggest that the indigent and the ignorant, who comprise the greater portion of the defendants tried in our courts today, could ever have an advantage over the state, with its massive investigative machinery, criminal experts and laboratories and other investigative mediums. All too frequently, little or no investigation is available to such a defendant and he is required to stand trial with only the barest of legal assistance. It is rare indeed that the prosecution is surprised by the defense, but the element of surprise is always a factor with which an indigent defendant must learn to live.

Second, in response to the argument that discovery would lead to a perjured defense, the words of Mr. Justice Brennan are apropos: "[H]ow can we be so positive criminal discovery will produce perjured defenses when we have in this country virtually shut the door to all such discovery?" Brennan, *Remarks on Discovery*, 33 F.R.D. 47, 62 (1963). See also STEWART, *FEDERAL RULES OF CRIMINAL PROCEDURE*, 155 (1945). In fact, pretrial discovery of grand jury minutes would have exactly the opposite effect. It would reduce the likelihood that a witness' testimony at the trial would be perjured since both the state and the defendant would know the content of those proceedings. "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law . . . to allow the accused to produce any witnesses at all." Justice Brennan, *Remarks on Discovery*, 33 F.R.D. 47, 63 (1963).

Finally, the defendant who will resort to intimidation or other means to silence state witnesses will do so regardless of whether he knows the content of their grand jury testimony. As noted above, listing state witnesses prior to trial enables a defendant to gain access to their names and addresses, which is all such a defendant needs to know to perpetrate his wrong.

<sup>23</sup> See *Turk v. Martin*, 232 Ky. 479, 23 S.W. 2d 937 (1930); *State ex rel. Clagett v. James*, 327 S.W. 2d 278 (Mo. 1959); *Shelby v. Sixth Judicial District Ct.*, 414 P.2d 942 (Nev. 1966); *State v. Farmer*, 45 N.J. 520, 213 A.2d 249 (1965); *State v. Moffa*, 64 N.J. Super. 69, 165 A. 2d 219 (1960); *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959); Cf. *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927).

<sup>24</sup> See *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959).



fords a timely and unfettered opportunity to prepare for cross-examination and impeachment, thereby facilitating the orderly and efficient handling of witnesses.<sup>25</sup>

Unquestionably, the abolition of the grand jury system in England in 1933<sup>26</sup>, and the growing use of the information rather than the indictment in this country, demonstrate the fallacy of many of the arguments expressed by those opposing pre-trial disclosure.<sup>27</sup> Under the present English system, a defendant obtains full discovery of the testimonial evidence to be used by the prosecution prior to trial; and, for the most part, the prosecution is limited at the trial to the evidence disclosed at the preliminary hearing. Similarly, in those states which have adopted the information, at least partial disclosure of the prosecution's case is made at the preliminary hearing. Furthermore, four states have in fact provided by statute that after the indictment is returned a defendant, upon demand, must be provided with a copy of the grand jury minutes in advance of trial.<sup>28</sup>

## 2. *Disclosure of Grand Jury Minutes after a Witness Has Testified*

Once a witness has testified, there would seem to be no reason whatever for withholding his grand jury minutes. There can be little concern that the witness will be intimidated or subjected to reprisals if his grand jury minutes are disclosed at that time, for the injury to the defendant has already been consummated in the form of the witness' trial testimony. Furthermore, disclosure will simply affirm that the same damaging evidence was given before the grand jury, unless inconsistencies exist, in which case it is in the interests of justice that they be disclosed. Furthermore, there can be no possible basis for subornation since the witness has already testified.

Yet, in spite of these self-evident facts, few courts, prior to

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<sup>25</sup> See *State ex rel. Clagett v. James*, 327 S.W. 2d 278 (Mo. 1959); *State v. Moffa*, 64 N.J. Super. 69, 165 A.2d 219 (1960).

<sup>26</sup> The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, §1. The abolition was effected on a plea of economy. On the merits, the reform in the procedure of the preliminary examination and the separation of the functions of the police and the justice of the peace had made the grand jury less essential. The argument for retention, that the grand jury might be a protection of accused persons against oppression, did not convince the English. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* (1947). See also Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. C. & P. S. 3, 20 (1938); Seltzer, *Pre-Trial Discovery of Grand Jury Testimony in Criminal Cases*, 66 DICK. L. REV. 379 (1962).

<sup>27</sup> In Kansas and Wyoming, for example, the grand jury is seldom employed. In the former it is employed only by a petition signed by taxpayers and addressed to the court. KAN. GEN. STAT. ANN. §62-901 (1949). In the latter, it is employed only upon order of a district court. WYO. STAT. ANN. § 7-92 (1957).

<sup>28</sup> See note 10 *supra*.

the *Dennis* decision, have gone so far as to breach this now vapid doctrine of secrecy. This is true even though the federal law<sup>29</sup> and the law of most states<sup>30</sup> have long given to the trial judge the discretionary power to grant disclosure for purposes of impeachment, refreshment of recollection, or discrediting a witness. However, prior to 1966, only a handful of courts were willing to exercise this power.<sup>31</sup>

<sup>29</sup> Rule 6(e) of the Federal Rules of Criminal Procedure provides in part:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter or stenographer . . . may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>30</sup> Numerous state statutes provide that a court may require disclosure of testimony of a witness examined before the grand jury in order to ascertain whether it is consistent with that given by the witness before the court or to resolve a charge of perjury. See ALA. CODE tit. 14 §272 (1959); ALASKA COMP. LAWS ANN. §66-8-35 (1949); ARIZ. R. CRIM. P. 106(b), 107; ARK. STAT. ANN. §43-930 (1947); CAL. PEN. CODE §938.1; FLA. STAT. §905.27 (1963); IDAHO CODE ANN. §19-1112 (1948); IND. ANN. STAT. §§9-816, 9-817 (1956); IOWA CODE §771.24 (1962); KAN. GEN. STAT. ANN. §§62-923, 62-925 (1949); KY. CRIM. CODE §§110, 113 (Baldwin 1953); MICH. COMP. LAWS §767.19 (1948); MINN. STAT. ANN. §628.04 (1947); MO. REV. STAT. §3922 (1959); MONT. REV. CODES ANN. §94-6325 (1949); NEV. REV. STAT. §172.330 (1959); N.M. STAT. ANN. §41-5-30 (1953); N.Y. CODE CRIM. PROC. §259; ORE. REV. STAT. §132.220 (1959); P.R. LAWS ANN. tit. 34, §554 (1956); S.D. CODE §34.1226 (1939); TENN. CODE ANN. §40-1612 (1955); UTAH CODE ANN. §77-19-10 (1953); WIS. STAT. ANN. §255.21 (1957).

The court stated in *State v. Thomas*, 99 Mo. 235, 259, 12 S.W.643, 650 (1889): "The evil sought to be remedied by this legislation was the immunity which witnesses might enjoy, under the old rule, from prosecution for perjury for swearing falsely before the grand jury, and from the discredit which would follow upon the deliverance on trial in open court of evidence different from that delivered under oath before the grand jury. In other words, to remove, as far as was consistent with public policy, the temptation to false swearing before the grand jury." See also *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960). Most of these statutes were first enacted during a period when grand jury minutes were not regularly kept, and thus only the grand juror's testimony was available for purposes of impeachment. Courts construing these provisions have permitted grand jury minutes to be disclosed when kept, in lieu of a grand juror's testimony, because they are more reliable. See *State v. Morgan*, *supra*. *Contra*, *State v. Krause*, 260 Wis. 313, 50 N.W. 2d 439 (1951). See also *State v. McPherson*, 114 Iowa 492, 87 N.W. 421 (1901). See also UNIFORM RULES OF EVIDENCE, 35, 44 (1953); MODEL CODE OF EVIDENCE RULE 229 (1942); ALI, CODE OF CRIMINAL PROCEDURE §§ 144-45 (1930).

<sup>31</sup> See *State ex. rel. Claget v. James*, 327 S.W. 2d 278 (Mo. 1959); *Palmentere v. Campbell*, 205 F. Supp. 261 (D. Mo. 1962); *State v. Moffa*, 176 A. 2d 1 (N.J. 1961); *State v. Clement*, 190 A. 2d 867 (N.J. 1963); *State v. Cronin*, 206 A. 2d 914 (N.J. 1965); *State v. Farmer*, 213 A. 2d 249 (N.J. 1965); *In Re Sellers*, 32 F.R.D. 473 (Ill. 1962); *People v. Johnson*, 31 Ill. 2d 602 (1964); *United States v. Scott Paper Company*, 254 F. Supp. 759 (W.D. Mich. 1966). See also *State v. Tate*, 221 A. 2d 12 (N.S. 1966).

The leading pre-*Dennis* decision in the federal field was *Pittsburgh Plate Glass Company v. United States*.<sup>32</sup> In that case the United States Supreme Court held that a trial judge, under Rule 6(e) of the Federal Rules of Criminal Procedure,<sup>33</sup> has discretionary power to permit disclosure when a "particularized need" exists, such as to "impeach a witness, to refresh his recollection, to test his credibility and the like."<sup>34</sup> The petitioners in *Pittsburgh Plate Glass* were convicted on a single-count indictment charging a conspiracy to fix the price of plain plate-glass mirrors sold in interstate commerce. After a key government witness, who had also been named as a co-conspirator, had testified, the defense moved, as a matter of right, for the production of his grand jury minutes relating to the same general subject matter as his trial testimony.

In affirming the conviction, the court noted that petitioner's claim of *right* to the grand jury minutes of the witness ran counter to a long-established policy of secrecy, older than the Nation itself.<sup>35</sup> The court added, however, that if the defense could show a "particularized need," then the reasons for secrecy may be outweighed and disclosure appropriate.<sup>36</sup>

Even a cursory examination of the *Pittsburgh Plate Glass* case demonstrates its weaknesses. Petitioners specifically sought the testimony of the witness in question for the purpose of impeaching that witness, an instance which the court had earlier characterized as a showing of "particularized need." The strong dissent of four Justices points out that the underlying reasons for secrecy were dissipated when the witness testified, so that

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<sup>32</sup> 360 U.S. 395 (1959).

<sup>33</sup> 18 U.S.C. Rule 6(e).

<sup>34</sup> 360 U.S. at 399.

<sup>35</sup> *Id.* The Court further stated: "The reasons therefor are manifold . . . and are compelling when viewed in the light of the history and *modus operandi* of the grand jury. Its establishment in the Constitution 'as the sole method for preferring charges in serious criminal cases' indeed 'shows the high place it [holds] as an instrument of justice.' *Costello v. United States*, 350 U.S. 359, 362 (1956). Ever since this action by the Fathers, the American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' *Id.* Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *Id.*, at 362, 363. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. And this 'go slow' sign would continue as realistically at the time of trial as theretofore." *Id.* at 399-400.

<sup>36</sup> *Id.* at 400.

continued secrecy became an end in itself.<sup>37</sup> Certainly, disclosure at this stage of the proceedings would not have enabled the defendants to escape or to tamper with witnesses who had already testified against them. Similarly, protection of an innocent accused who had not been indicted had no bearing on the case. Disclosure of the witness' grand jury testimony was hardly likely to result in any greater embarrassment than his trial testimony, which had proven to be highly damaging. Furthermore, such disclosure, which would have been limited to matters already testified to on direct examination, would not have induced a reluctance in others to testify before grand juries.<sup>38</sup>

Apart from the unsatisfactory results of the case, the majority left unanswered the question of what constituted a "particularized need" and how this could be shown. It is clear that under the *Pittsburgh Plate Glass* rule a request for grand jury minutes for purposes of impeachment, in itself, did not constitute a showing of "particularized need." On the other hand, the majority recognized, and the dissent agreed, that a defendant was not required to show inconsistencies between the trial and grand jury testimony,<sup>39</sup> "for the defense will rarely be able to lay a foundation for obtaining grand jury testimony by showing it is inconsistent with trial testimony unless it can inspect the grand jury testimony. . . ."<sup>40</sup> The waters between these two extremes, however, were left uncharted and courts floundered in their attempts to determine what constituted a "particularized need."

In spite of the Court's admonition, a significant number of federal courts as well as state courts have denied disclosure where the defendant was unable to show the existence of inconsistencies between the grand jury and trial testimony of a witness.<sup>41</sup> The Second Circuit, on the other hand, has adopted a rule requiring an *in camera* inspection by the trial judge. Upon the request of a defendant, after a witness has testified, the trial

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<sup>37</sup> *Id.* at 403. See also *People v. Johnson*, 31 Ill. 2d 602, 203 N.E. 2d 399 (1964); and *State v. Morgan*, 67 N.M. 287, 354 P. 2d 1002 (1960).

<sup>38</sup> *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 406 (1959).

<sup>39</sup> *Id.* at 400-01.

<sup>40</sup> *Id.* at 408. See *United States v. Giampa*, 209 F. 2d 83 (2d Cir. 1961); *United States v. Zborowski*, 271 F.2d 661, 666 (2d Cir. 1959); *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959) (*dissenting opinion*) rev'd 364 U.S. 631 (1961).

<sup>41</sup> See, e.g., *Powell v. United States*, 352 F.2d 705 (D.C. Cir. 1965); *United States v. Boyance*, 329 F.2d 372 (3d Cir. 1964); *Hance v. United States*, 299 F.2d 389 (8th Cir. 1962); *Brilliant v. United States*, 297 F.2d 385 (8th Cir. 1962); *Berry v. United States*, 295 F. 2d 192, 194-96 (8th Cir. 1961), *cert. denied*, 368 U.S. 955 (1962); *Bary v. United States*, 292 F. 2d 53 (10th Cir. 1961); *United States v. Magin*, 280 F. 2d 74 (7th Cir. 1960); *Travis v. United States*, 269 F. 2d 928 (10th Cir. 1959). See also *Herzog v. United States*, 226 F. 2d 561 (9th Cir. 1955), *aff'd en banc*, 235 F. 2d 664, *cert. denied*, 352 U.S. 844 (1956).

judge must examine *in camera* the grand jury testimony of the witness for inconsistencies, and if such inconsistencies exist, the testimony of the witness must be made available to defense counsel.<sup>42</sup> Under this rule, secrecy is maintained until inconsistencies are found to exist by the trial judge.<sup>43</sup>

A number of arguments have been raised against the Second Circuit rule. First, the trial judge should not be required to make a determination as to the impeachment value of grand jury testimony, a function which can be performed only by an adversary to the proceedings — defense counsel.<sup>44</sup> Justice Brennan, in his *Pittsburgh Plate Glass* dissent, noted that “only the defense is adequately equipped to determine the effective use” which can be made of grand jury minutes for purposes of discrediting a government witness:<sup>45</sup>

“For grand jury testimony is often lengthy and involved, and it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness. See *United States v. Springelet*, 258 F.2d 338.”<sup>46</sup>

Second, a serious burden is placed on the judge to require him to examine the grand jury minutes of each government witness that testifies, which will unduly lengthen the trial time of the case.<sup>47</sup> And, third, every defendant would be encouraged to embark on a “fishing expedition” with the hope that the court’s *in camera* inspection might turn up impeachment evidence. Clearly, a defendant could not lose by requiring such an inspection.

A few courts, contrary to the *in camera* rule of the Second

<sup>42</sup> *E.g.*, *United States v. Bell*, 351 F. 2d 868 (6th Cir. 1965); *United States v. Giampa*, 290 F. 2d 83 (2d Cir. 1961); *United States v. Hernandez*, 282 F. 2d 71 (2d Cir. 1960); *United States v. McKeever*, 271 F. 2d 669 (2d Cir. 1959); *United States v. Spangelet*, 258 F. 2d 338 (2d Cir. 1958); *United States v. Alper*, 156 F. 2d 222 (2d Cir. 1946); *Cf. Simmons v. United States*, 308 F. 2d 324 (D.C. Cir. 1962). See also *United States v. Conduto*, 284 F. 2d 464 (7th Cir.), *cert. denied*, 365 U.S. 881 (1961); and *United States v. Micele*, 327 F. 2d 222 (7th Cir. 1964), which held that where the witnesses are key prosecution witnesses an *in camera* inspection is required.

<sup>43</sup> Both the states of New York and New Mexico have adopted rules similar to that of the Second Circuit. See *State v. Morgan*, 67 N.M. 287, 354 P. 2d 1002 (1960); *People v. Dales*, 309 N.Y. 97, 127 N.E. 2d 829 (1955); *People v. Boniello*, 303 N.Y. 619, 101 N.E. 2d 488 (1951); and *People v. Schainuck*, 286 N.Y. 161, 165-66, 36 N.E. 2d 94, 96 (1941).

<sup>44</sup> See *Berry v. United States*, 295 F. 2d 192 (8th Cir. 1961), *cert. denied*, 368 U.S. 955 (1962); *Bary v. United States*, 292 F. 2d 53 (10th Cir. 1961); *Minton v. State*, 113 So. 2d 361 (Fla. 1959). As pointed out in these cases, this procedure makes the judge a fact finder for the defense, and he would be acting as “associate counsel” in a manner contrary to the spirit and purpose of his judicial role. See also *Herzog v. United States*, 226 F. 2d 561 (9th Cir. 1955), *aff’d en banc*, 235 F. 2d 664, *cert. denied*, 352 U.S. 844 (1956); *United States v. Alper*, 156 F. 2d 222 (2d Cir. 1946).

<sup>45</sup> 360 U.S. at 409.

<sup>46</sup> *Id.* at 409-10.

<sup>47</sup> *Herzog v. United States*, 226 F. 2d 561 (9th Cir. 1955); *Jackson v. United States*, 297 F. 2d 195 (D.C. Cir. 1961).

Circuit, have taken the position that, if the witness testifying is a key prosecution witness upon whose credibility the prosecution's case depends, the trial court should allow disclosure without a prior *in camera* inspection for inconsistencies.<sup>48</sup> Justice Schaefer, of the Illinois Supreme Court, in *People v. Johnson*,<sup>49</sup> went so far as to totally reject the "particularized need" rationale of the *Pittsburgh Plate Glass* rule, holding, instead, that once a witness testifies at the trial the need for secrecy has ended insofar as his grand jury testimony is concerned. In noting that none of the reasons for secrecy could apply in such a case, he concluded:

"Finally, it is in no sense unfair to a witness who testifies at the trial to reveal his previous testimony. 'If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce. If, on the other hand, he now testifies falsely, or if he testifies truly but formerly falsely, he is in no way a person who ought to have any privilege.' 8 Wigmore on Evidence, 3d ed., sec. 2362."<sup>50</sup>

### 3. *Disclosure of Grand Jury Minutes after the Prosecution Has Used Them in Its Case in Chief*

Courts have so completely lost sight of the reasons underlying the doctrine of grand jury secrecy that they have even refused disclosure when the prosecution itself has lifted the veil of secrecy and used the grand jury minutes to refresh one of its witnesses. Thus, not only has the witness testified, which in itself eliminates all need for secrecy, but also the very minutes which the court has refused to turn over were used by the prosecution in the first instance to further its case in chief. The court in *National Dairy Products Corp. v. United States*,<sup>51</sup> stated:

"It is fundamental that grand jury proceedings are cloaked with a veil of secrecy. 'Grand jury testimony is ordinarily confidential.' . . . This 'indispensable secrecy of grand jury proceedings,' . . . may be disregarded only when there is a compelling necessity — when the need outweighs any countervailing policy."<sup>52</sup>

In that case the government on some twenty-five occasions used the grand jury minutes to refresh the recollection of its witnesses. Every motion of defense counsel to examine the minutes so used and any other minutes covering the same disclosed testimony were uniformly denied.

<sup>48</sup> See *Gordan v. United States*, 299 F. 2d 117 (D.C. Cir. 1962); *Simmons v. United States*, 308 F. 2d 324 (D.C. Cir. 1962); *De Binder v. United States*, 292 F. 2d 737 (D.C. Cir. 1961). See also, *Atwell v. United States*, 162 Fed. 97 (4th Cir. 1908).

<sup>49</sup> 31 Ill. 2d 602, 203 N.E. 2d 399 (1964).

<sup>50</sup> 31 Ill. 2d at 606, 203 N.E. 2d at 401. See also *State v. DiModica*, 40 N.J. 404, 192 A. 2d 825 (1963).

<sup>51</sup> 350 F. 2d 321 (8th Cir. 1965), vacated 384 U.S. 883 (1966).

<sup>52</sup> *Id.* at 331.

Similarly, the Supreme Court in *United States v. Socony-Vacuum Oil Co.*,<sup>53</sup> held that it is not an abuse of discretion for a trial judge to refuse disclosure of grand jury minutes even when they have first been used to refresh the recollection of government witnesses. The Court noted, however, that the grand jury testimony used was either cumulative or dealt only with the minutiae of the conspiracy. "Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted."<sup>54</sup>

To adopt a procedure that permits the prosecution alone to have unlimited use of grand jury minutes for purposes of impeaching or refreshing the recollection of its witnesses is to abide by a rule that leads to grave abuse. In this situation, no reason whatever can be advanced for maintaining continued secrecy, since the prosecution itself is initiating partial disclosure, presumably to adduce testimony that is most damaging to the defendant. Such disclosure should constitute a waiver by the prosecution of any right to continued secrecy, for what can be left to protect except evidence that will contradict or place in proper perspective the damaging evidence already elicited?

Four notable jurists have rejected the rationale of the Supreme Court in *Socony-Vacuum*. Judge Learned Hand in *United States v. Cotter* stated:

"It is indeed true that the prosecution having used the former testimony, the defendants were entitled to put in such other parts as threw light upon it . . . . The party must be allowed an inspection for himself; not of the whole minutes of course, but the whole evidence of the witness. This does not invade the secrecy of the grand jury; it is not an inspection of the minutes preparatory to trial and in invitum, which is in no circumstances permissible. . . . But when the prosecution chooses to open them, the time for secrecy has passed, fair dealing requires that the other side shall inspect them freely."<sup>55</sup>

Similarly, Justice Cardozo, in *People v. Miller* stated:

"We think the minutes to the extent demanded should have been offered for inspection. . . . The district attorney might have refrained, if he had pleased, from asking the witness anything about her previous testimony. He was not at liberty, after exhibiting so much of it as was helpful to the people, to deprive the defendant of the privilege of exhibiting the residue."<sup>56</sup>

Both Justice Schaefer of the Illinois Supreme Court,<sup>57</sup> and Justice Brennan of the United States Supreme Court have expressed

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<sup>53</sup> 310 U.S. 150, 231-37 (1940).

<sup>54</sup> *Id.* at 235.

<sup>55</sup> 60 F. 2d 689, 692 (2d Cir. 1932), *cert. denied*, 287 U.S. 666 (1932).

<sup>56</sup> 257 N.Y. 54, 177 N.E. 306, 307 (1931).

<sup>57</sup> *People v. Johnson*, 31 Ill. 2d 602, 203 N.E. 2d 399 (1964).

the same view. The latter stated in his dissent in the *Pittsburgh Plate Glass* case, that "of course, when the Government uses grand jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony in those minutes."<sup>58</sup>

Using the above reasoning, a number of federal and state courts have recognized the *right* of a defendant to examine those portions of the grand jury minutes utilized by the government in the prosecution of its case, whether for purposes of impeachment or refreshment.<sup>59</sup> To adopt the *Socony-Vacuum* or *National Dairy* rule is to perpetuate a rule of secrecy which makes the rule an end in itself, unsupported by reason, logic, or necessity. Secrecy under such a rule becomes an instrument only of the prosecution, to be used or abused as it sees fit, rather than a policy for the protection of the grand jury.

### THE DENNIS DECISION

The emergence of *Dennis v. United States*<sup>60</sup> marks a new era in the federal courts' approach to the doctrine of grand jury secrecy. The Supreme Court for the first time has taken a pragmatic approach to the scope and intended purposes of the doctrine. Instead of beginning with the proposition that grand jury minutes are sacrosanct, the veil of which "may be disregarded only when there is a compelling necessity,"<sup>61</sup> the Court found that there is a "growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice."<sup>62</sup> The Court further stated:

"In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a

<sup>58</sup> 360 U.S. at 404.

<sup>59</sup> See e.g., *United States v. Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961); *Continental Baking Co. v. United States*, 281 F. 2d 137, 146-47 (6th Cir. 1960); *United States v. H.J.K. Theatre Corp.*, 236 F. 2d 502 (2d Cir. 1956); *United States v. Weinberg*, 226 F. 2d 161 (3d Cir. 1955); *United States v. Bertucci*, 333 F. 2d 292 (3d Cir. 1964); *United States v. Smith*, 335 F. 2d 898 (7th Cir. 1964); *People v. Johnson*, 31 Ill. 2d 602, 203 N.E. 2d 399 (1964); *State v. Morgan*, 67 N.M. 287, 354 P. 2d 1002 (1960); *People v. Miller*, 257 N.Y. 54, 177 N.E. 306 (1931); *People v. Stevenson*, 103 Cal. App. 82, 284 Pac. 487 (1930); *People v. Kraus*, 377 Ill. 539, 37 N.E. 2d 182 (1941); *State v. Archibald*, 204 Iowa 406, 215 N.W. 258 (1927); *Turk v. Martin*, 232 Ky. 479, 23 S.W. 2d 937 (1930); *State v. Mucci*, 25 N.J. 423, 136 A. 2d 761 (1957). But see *Lennon v. United States*, 20 F. 2d 490 (8th Cir. 1927); *State v. Rhoads*, 81 Ohio St. 397, 91 N.E. 186 (1910); *State v. Magers*, 36 Ore. 38, 58 Pac. 892 (1899); *State v. Paschall*, 182 Wash. 304, 47 P. 2d 15 (1935).

<sup>60</sup> 384 U.S. 855 (1966).

<sup>61</sup> *National Dairy Products Corp. v. United States*, 350 F. 2d 321, 331 (8th Cir. 1965), *vacated* 384 U.S. 883 (1966).

<sup>62</sup> 384 U.S. at 870. The realization that the disclosure of relevant evidence promotes rather than impedes justice is reflected also in the so-called Jencks Act. 18 U.S.C. § 3500 (1958). The Court noted that this act makes available to the defense a trial witness' pre-trial statements insofar as they relate to his trial testimony.



storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."<sup>63</sup>

In the *Dennis* case the defendants moved for the production of the grand jury minutes of four government witnesses. In the alternative they sought an *in camera* inspection by the trial judge of those minutes, to be followed by production to petitioners in the event the judge found inconsistencies between the trial testimony and that given to the grand jury. The trial judge denied the motions on the ground that a "particularized need" had not been first shown.<sup>64</sup>

In reversing the conviction and ordering a new trial, the Court first confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure "to direct disclosure of grand jury testimony 'preliminarily to or in connection with a judicial proceeding.'"<sup>65</sup> In this connection, it cited with approval a large body of case law and law review articles advocating the liberalization of disclosure in criminal cases analogous to that found in the civil practice.<sup>66</sup> Of significance, is the fact that the cited authorities uniformly advocate a more liberalized pre-trial discovery in criminal cases, including the disclosure of grand jury minutes at that stage.

The Court recognized and the government conceded that the importance of preserving the secrecy of the grand jury minutes was minimal — the witnesses had already testified at the trial.<sup>67</sup> It further found that the showing of need made by the defen-

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<sup>63</sup> 384 U.S. at 873.

<sup>64</sup> *Id.* at 868.

<sup>65</sup> *Id.* at 869-70.

<sup>66</sup> The Court cited the Amendments to Rule 16 of the Federal Rules of Criminal Procedure, approved by the Court of February 28, 1966, which authorized discovery and inspection of a defendant's own statements, the results of various tests, and the recorded testimony of the defendant before the grand jury. It also cited a number of cases anticipating this broadening of criminal discovery. See *Cicenia v. Lagay*, 357 U.S. 504, 511 (1958); *United States v. Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965); *United States v. Williams*, 37 F.R.D. 24 (S.D. N.Y. 1965); *United States v. Willis*, 33 F.R.D. 510 (S.D. N.Y. 1963); *United States v. Peace*, 16 F.R.D. 423 (S.D. N.Y. 1954); *State v. Johnson*, 28 N.J. 133, 145 A. 2d 313 (1958), *cert. denied*, 368 U.S. 933 (1961); *People ex rel. Lemon v. Supreme Court of State of New York*, 245 N.Y. 24, 156 N.E. 84 (1927).

The Court also cites a number of law comments including Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279; Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Note, *Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 1051-1063 (1961). See also, Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962); and Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965).

An evaluation of these cited authorities leads to the conclusion that the Court favors a more liberalized approach to the disclosure of grand jury minutes at both the trial and pre-trial stages.

<sup>67</sup> 384 U.S. at 869.

dants went far beyond the minimum required under Rule 6(e). Although the Court does not so state, any one of the factors it weighed should have been sufficient to demonstrate a need for disclosure. The Court considered:

1. The long passage of time between the events in question and the trial fifteen years later made the grand jury minutes a valuable assay as to the truth, which the passage of time could have easily obscured.

2. The motions in question involved the testimony of four key government witnesses, without whose testimony the charge could not have been proven.

3. The testimony of the four witnesses, largely uncorroborated, concerned conversations and oral statements made at meetings. The Court noted that "[w]here the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements."<sup>68</sup>

4. The witnesses were not disinterested, but because of their connections with the defendants they had reason to be hostile.

5. One of the witnesses on cross-examination admitted that he had in earlier statements been mistaken about significant dates.

The Court specifically considered and rejected the Second Circuit *in camera* inspection rule. It is not the function of a judge to examine the minutes for inconsistencies.<sup>69</sup>

"Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with the trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' . . . Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."<sup>70</sup>

The impact of the *Dennis* decision goes far beyond its immediate holding for, it is the Court's first pronouncement of its intention to give careful consideration to the liberalization of

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<sup>68</sup> *Id.* at 872-73.

<sup>69</sup> *Id.* at 874. The only purpose served in the court examining the minutes is to determine whether anything in the grand jury minutes should be kept confidential for security reasons, for example, or because those minutes are far afield of the trial.

<sup>70</sup> *Id.* at 874-75.

disclosure in criminal cases. The change may not be as great or as sudden as many would like to see,<sup>71</sup> but it will be a constant change. The effects are already being felt in the federal courts.

In a number of post-*Dennis* cases defendants have moved for pre-trial disclosure of the grand jury minutes of government witnesses.<sup>72</sup> In *United States v. Cabot*,<sup>73</sup> a mandamus action brought by the government against the district court for the Southern District of Florida,<sup>74</sup> defense counsel moved for the production of grand jury minutes, in advance of trial, of (1) prospective government witnesses, (2) employees of the defendant corporations alleged to have committed criminal acts in violation of the antitrust laws, and, (3) certain co-conspirators. The need for this pre-trial disclosure was based on the fact that confusion, uncertainty and prejudice would be engendered if disclosure were delayed until after the witnesses were on the stand or had testified on direct examination. The trial judge, expressing concern over the possible delay and confusion which would arise if disclosure were not made until trial, stated:

"A fair trial means that the facts and issues are to be approached openly and honestly. In order to sift the wheat from the chaff in this case, maximum pre-trial discovery and a clarifying organization of the thousands of documents is essential. Without there will be no trial; there will be one long confused shuffling of words and papers. Difficult and complex trials call for liberal use of judge's discretion in managing the trial."<sup>75</sup>

An order was entered directing pre-trial disclosure of the grand jury testimony of the individual defendants, all officers, directors, agents and employees (but not former employees) of the corporate defendants, and the disclosure of prospective government witnesses the day before they were to be called. The order was based on (1) the court's inherent power to manage the trial of a difficult case so as to achieve a fair and expeditious result, (2) Rule 6(e), Federal Rules of Criminal Procedure, (3) Rule 16(a) (3), Federal Rules of Criminal Procedure, and (4) the

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<sup>71</sup> *E.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963). See also *Calkins, Criminal Justice for the Indigent*, 42 U. DETROIT L.J. 305 (1965), *Traynor, Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); *Everett, Discovery in Criminal Cases — In Search of a Standard*, 1964 DUKE L.J. 477.

<sup>72</sup> See *United States v. Cabot*, No. 24147 (5th Cir. 1967); *United States v. Hughes*, No. 24101 (5th Cir. 1967); *United States v. Aeroquip Corp.*, No. 41312 (E.D. Mich. 1966); *United States v. Socony Mobil Oil Co.*, No. K.C. Ct. 873 (D. Kan. 1966).

<sup>73</sup> No. 24147 (5th Cir. 1967).

<sup>74</sup> *United States v. Venn*, Crim. No. 65-535 (S.D. Fla. 1966).

<sup>75</sup> Answer to the Petition for Writ of Mandamus and Brief in Support Thereof, p. 9, No. 24147 (5th Cir. 1967).

law relating to grand jury disclosure as set forth by the Supreme Court in the *Dennis* decision.<sup>76</sup>

The court thus found four avenues for permitting the disclosure requested. The court's order thereby puts into effect the invitation of the Supreme Court in *Dennis* wherein it suggested that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."<sup>77</sup>

#### CONCLUSION

The *Dennis* decision marks a new era, not only in disclosure of grand jury minutes, but also in pre-trial discovery in criminal cases generally. It is a decision which has properly laid to rest a myth which has long supplied the prosecution with a decisive weapon in its arsenal, particularly in the protracted case. The next few years will definitely show just how far the Court will go in assuring "that the doors that may lead to truth have been unlocked."<sup>78</sup>

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<sup>76</sup> Rule 16, Federal Rules of Criminal Procedure, provides:

"(a) . . . Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury."

<sup>77</sup> 384 U.S. at 870.

<sup>78</sup> *Id.* at 873.