

THE PROSECUTOR'S UNNECESSARY USE OF HEARSAY EVIDENCE BEFORE THE GRAND JURY

The prosecutor's presentation of hearsay evidence¹ to the grand jury has initiated controversy among courts² and commentators.³ Proponents of the use of hearsay evidence at the grand jury assert that compliance with the hearsay rule would unduly hamper the indictment process and that the grand jury, because it is composed of lay-persons, is ill-equipped to apply such a rule.⁴ Moreover, proponents contend that judicial review of the evidence presented to the grand jury would constitute a preliminary mini-trial and create unnecessary delay and expense.⁵ Finally, proponents assert that the Supreme Court, in *Cos-*

1. For purposes of this Note, the term "hearsay evidence" does not include evidence that would qualify as a hearsay exception at trial. Hearsay evidence is defined by Professor McCormick as: "Testimony in court, or written evidence, of a statement made out-of-court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." C. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 246, at 584 (Cleary ed. 1972). See also FED. R. EVID. 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence, to prove the truth of the matter asserted."

Hearsay that does not qualify as an exception is incompetent evidence. The competence doctrine excludes evidence at trial because of its questionable reliability. Hearsay evidence is considered unreliable because: the declarant is not under oath when he made the statement; the trier of fact is unable to observe the declarant's demeanor in order to shed light on his credibility; and the declarant cannot undergo cross-examination. For further discussion about the hearsay rule and its exceptions, see C. MCCORMICK, *supra*, §§ 244-327.

2. See *infra* notes 42-103 and accompanying text. See also 37 A.L.R. 3d 612 (1971).

3. See *infra* notes 104-119 and accompanying text; *The Grand Jury Reform Act of 1978: Hearings on S.3405 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 154 (1978) (statement of Professor Leroy D. Clark, New York University School of Law) [hereinafter cited as *1978 Senate Hearings*]; *id.* at 147 (statement of Richard E. Gerstein, Chairman, Comm. on Grand Jury, Criminal Justice Section, American Bar Association); *id.* at 105 (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice); *id.* at 162 (statement of Professor Melvin Lewis, John Marshall Law School); J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED PRETRIAL RIGHTS 488-90 (1972); Arenella, *Reforming The Federal Grand Jury and The State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 496-99 (1980); Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 25-29 (1972).

4. See 37 A.L.R. 3d 612, 614 (1971); Note, *The Grand Jury: Powers, Procedures and Problems*, 9 COLUM. J.L. & SOC. PROB. 681, 727-29 (1973).

5. See *infra* note 49 and accompanying text. See also *United States v. Dionisio*, 410 U.S. 1, 17 (1973) ("[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"); *Gelbard v. United States*, 408 U.S. 41, 70 (1972)

tello v. United States,⁶ conclusively resolved the issue in favor of allowing the prosecutor to present hearsay evidence to the grand jury.⁷

Critics, on the other hand, assert that the prosecutor's use of hearsay evidence limits the grand jury's ability to perform its historical function as an independent buffer between the government and the accused by distorting the grand jury's perception of the evidence.⁸ Critics particularly abhor prosecutorial use of the hearsay testimony of a single witness, usually a police officer, who testifies from his recollection of what eyewitnesses have told him.⁹ Opponents contend that the presentation of "polished" testimony by "professional" witnesses¹⁰ severely limits the grand jury's ability to judge the credibility of the declarant and to evaluate the strength of the state's case.¹¹ This practice, the critics fear,

(White, J., concurring) (evidentiary rules would instigate suppression hearings which would result in protracted interruption of grand jury proceedings). One commentator asserted:

[W]hen hearsay is admitted, it does not follow that a grand jury's effectiveness will be diluted [H]earsay, by its very nature, may be translated into competent evidence by the time of trial if the originator or primary source of the hearsay testifies in court. . . . [A] rule [to quash indictments based on hearsay] would demand either the presence of a judge or master at the grand jury proceeding, or a pretrial hearsay hearing. The former is certainly undesirable; it would alter the traditional structure of the grand jury, seriously cripple its investigative function, and place an additionally heavy burden on judicial time.

Note, *Validity of Indictment Based Solely on Hearsay Questioned When Direct Testimony is Readily Available*, 43 N.Y.U. L. REV. 578, 581-83 (1978).

6. 350 U.S. 359 (1956).

7. See *infra* notes 42-54. See generally J. COOK, *supra* note 3, at 488-89, 490 n.12.

8. The purpose of the grand jury is to determine whether there is probable cause that a crime has been committed by the accused. Probable cause is a "minimum standard" for the grand jury to screen out weak cases prior to trial. See Note, *The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examinations*, 1963 WASH. U.L.Q. 102, 103.

9. The prosecutor sometimes presents "second-hand" testimony rather than direct evidence, even when the latter is available. See 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 6.03[2], at 6-62 (1982) (using government agents is clearly more convenient for the prosecutor); Arenella, *supra* note 3, at 497 (criticizes the use of second-hand testimony by prosecutors). See also *United States v. Malofsky*, 388 F.2d 288 (2d Cir.) (government withheld testimony of narcotics agent with first-hand information), *cert. denied*, 390 U.S. 1017 (1968); *United States v. Payton*, 363 F.2d 996 (2d Cir.) (failure of prosecutor to present eyewitness testimony and to inform jury of hearsay nature of testimony), *cert. denied*, 385 U.S. 993 (1966); *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964) (same), *cert. denied sub nom. Cinquegrano v. United States*, 379 U.S. 960 (1965). See generally *United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969) (draft evasion; no government trial witnesses at grand jury); *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966) (bribery; second-hand witness summarizes affidavits), *cert. dismissed*, 389 U.S. 80 (1967).

10. See Note, *supra* note 4, at 728. See also 8 J. MOORE, *supra* note 9, ¶ 6.03[2], at 6-62.

11. See C. WHITEBREAD, CRIMINAL PROCEDURE § 19.06, at 390 (1980) (grand jury cannot accurately judge sufficiency of evidence of crime if evidence not admissible at trial is used). See also Arenella, *supra* note 3, at 497 n.178; Note, *supra* note 4, at 728.

permits the prosecutor to hamper or even to nullify the grand jury's screening function,¹² and deprives the defendant of a "meaningful" grand jury transcript¹³ to use for impeachment¹⁴ purposes at trial.¹⁵

Although most courts permit prosecutorial presentation of hearsay evidence to grand juries,¹⁶ some jurisdictions have restricted this gen-

12. See *infra* notes 60-66 and accompanying text. See, e.g., *United States v. Arcuri*, 282 F. Supp. 347 (E.D.N.Y.), *aff'd*, 405 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969). In *Arcuri*, the district court criticized the deliberate use of government agents as witnesses and concluded that because "[a]ll cases are presented in an equally homogenized form," the grand jury "is unable to adequately serve its function as a screening agency." *Id.* at 349. See also *Arenella*, *supra* note 3, at 495.

One commentator suggested that the grand jury, by basing its decision on incompetent evidence, is acting beyond the scope of its authority:

If the rules of evidence regulate the proof on the basis of which conviction at the trial must rest, and if the purpose of the grand jury proceeding . . . is to predict the probability of such a conviction, then a prediction which does not take into account those rules of evidence is not a prediction at all, but an independent determination of probable guilt.

Note, *supra* note 8, at 123.

13. The term "meaningful transcript" refers to a transcript that will be of some use to a defendant at trial. Frequently, the defense will attempt to impeach the state's witnesses with prior inconsistent statements found in the transcript. McCormick explains that "[t]he theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements." C. McCORMICK, *supra* note 1, § 34, at 68.

For a discussion criticizing the use of hearsay before the grand jury because such use undermines the defendant's criminal discovery rights, see 8 J. MOORE, *supra* note 9, ¶ 6.03[2], at 6-62; Note, *supra* note 5, at 582.

14. Statements made by a witness at the grand jury constitute pretrial statements. If at trial the witness' testimony is inconsistent with a pretrial statement, then the statement may be admitted as evidence to impeach his memory or sincerity. See E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 43 (1980).

15. See *Dennis v. United States*, 384 U.S. 855 (1966) (severely limits court's discretionary power to deny disclosure of grand jury transcript); Jencks Act of 1959, 18 U.S.C. § 3500 (1976) (after government witness testifies on direct examination, defendant may make motion and court shall order government to produce any statement made by witness; amended in 1970 to include statements at grand jury); FED. R. CRIM. P. 16(a) (gives defendant right to discover his testimony at grand jury); Note, *supra* note 5, at 582 (prosecutor's use of hearsay evidence at grand jury may render discovery right illusory). See generally C. McCORMICK, *supra* note 1, § 97, at 209-11. But see C. WHITEBREAD, *supra* note 11, § 19.05, at 384 & n.63 (some jurisdictions do not require grand jury proceedings to be transcribed).

An additional consequence of permitting hearsay evidence, rather than live testimony, at the grand jury is that the threat of prosecution of the witness for perjury based on his grand jury testimony is no longer available. Perjury is the judicial safeguard against false testimony. The witness who is relaying hearsay testimony, however, is not subject to charges of perjury because he is merely transmitting what an out-of-court declarant told him. The declarant is not liable for perjury because he was not speaking under oath.

16. See *infra* notes 42-54 and accompanying text.

eral rule.¹⁷ In addition, several state legislatures have attempted to diminish the use of hearsay in state grand jury proceedings.¹⁸ Moreover, several congressional subcommittees have considered reformation of the federal grand jury to limit the use of hearsay.¹⁹

This Note argues that the presentation of hearsay evidence to the grand jury detrimentally affects the grand jury's ability to discharge its historically delegated responsibilities.²⁰ The Note proposes as a solution legislative action restricting the situations in which the prosecutor may present hearsay evidence to the grand jury. This proposal imposes duties on the prosecutors, judges, and grand jurors.²¹

I. EVOLUTION OF THE GRAND JURY SYSTEM

In the seventeenth century the centralized English government created the grand jury²² as a means for interjecting the insight of local lay persons into the process of apprehending criminals.²³ The grand jury's primary function as an independent entity was to investigate and pres-

17. See *infra* notes 55-84 and accompanying text.

18. See *infra* notes 90-103 and accompanying text.

19. See *infra* notes 110-19 and accompanying text.

20. See *infra* notes 120-23 and accompanying text.

Some critics believe that prosecutors have totally stripped the grand jury of its historical screening function, thus reducing the grand jury to a rubber stamp. These critics believe that the grand jury's utility is beyond salvation. Therefore, they advocate abolition of the grand jury. Such a proposal, however, is beyond the scope of this Note. For an in depth discussion on abolition of the grand jury, see Calkins, *Abolition of Grand Jury Indictments in Illinois*, 1966 U. ILL. L.F. 423; Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229 (1972); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

The Administration of Justice Act of 1933 abolished the grand jury in England. See Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. & CRIMINOLOGY 3 (1938).

21. See *infra* notes 128-46 and accompanying text.

22. The grand jury originated in England at the time of the Assize of Clarendon in 1164. See 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 321 (1922); A. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND & WALES, 1750-1950*, at 93 (1980); L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 137-42 (1947); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON-LAW* 111 (5th ed. 1956); F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 641-49 (2d ed. 1899).

23. Note, *Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961). See also T. PLUNCKNETT, *supra* note 22, at 112 (explains why England instituted grand jury system):

A great deal of information of value to the King could be obtained by compelling the inhabitants of a small community to answer questions, to inform against evil-doers, to disclose mysterious crimes, and tell of their suspicions. . . . [T]he inquiry into crime and criminals was . . . a matter of deep concern to the Crown, not merely as a matter of public policy but also as a course of revenue, for criminal jurisdiction with its fines and forfeitures was always lucrative.

Id. See generally *United States v. Smyth*, 104 F. Supp. 283 (N.D. Cal. 1952); Orfield, *The Federal*

ent to the government persons suspected of criminal activity. The grand jurors were permitted to base their opinions on personal knowledge or on information received from others.²⁴

The English grand jury also served as a “bulwark of individual freedom.”²⁵ Thus, they were required to be “[t]horoughly persuaded of the truth of an indictment” based upon the available evidence.²⁶ To issue a true bill of indictment, the grand jurors were required to have grounds to suspect that the defendant probably had committed the crime. This function surfaced in the notorious case of the *Earl of Shaftesbury’s Trial*,²⁷ when the English government demanded an indictment against the Earl. The grand jury, finding no probable suspicion that the Earl had committed a crime, refused to return a true bill.²⁸ The English grand jury thus assumed a reputation as guardian of the citizens against malicious prosecutions by the crown.²⁹

The framers of the United States Constitution recognized the significance of the grand jury when they drafted the fifth amendment.³⁰

Grand Jury, 22 F.R.D. 343 (1958); Note, *Fourth Amendment Protection For a Grand Jury Witness*, 10 AM. CRIM. L. REV. 701 (1972).

24. See W. HOLDSWORTH, *supra* note 22, at 321. See also *Hale v. Henkel*, 201 U.S. 43, 65-66 (1906) (“grand jury may not indict upon current rumors or unverified reports, . . . [b]ut may act upon knowledge acquired either from their own observations or upon the evidence of witnesses . . .”).

25. See Note, *supra* note 23, at 590.

26. 4 W. BLACKSTONE, COMMENTARIES *303.

27. 8 State Trials 759 (1681).

28. *Id.* at 775. In this case, the Crown sought to indict the Earl for commission of high treason against the King and the English government. The grand jury, despite tremendous pressure from the government, *id.* at 775-826, returned a finding of Ignoramus, which meant that they did not find probable cause to believe that the Earl had committed a crime.

29. See, e.g., *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (grand jury protects against “hasty, malicious and oppressive persecution”); *Ex parte Bain*, 121 U.S. 1, 11 (1887) (grand jury provides barrier against oppressive prosecutions).

30. The fifth amendment provides in part: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury.” U.S. CONST. amend. V. See *Ex parte Bain*, 121 U.S. 1, 12 (1887); L. CLARK, THE GRAND JURY 13-20 (1934); M. FRANKEL, THE GRAND JURY 11-17 (1977); Note, *supra* note 23, at 591. See also COALITION TO END GRAND JURY ABUSE, SO YOU’RE GOING TO BE A GRAND JUROR?, reprinted in *Grand Jury Reform: Hearing on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 484 (1977) [hereinafter cited as *Grand Jury Reform*]:

There was no mystery behind the grand jury’s inclusion in the Bill of Rights. The people who won our independence were well aware that a government could manipulate the criminal law to punish its critics—and they were determined to prevent that kind of oppression from rearing its head in their new nation. Making a person stand trial, they realized, was in itself a penalty of sorts, an emotionally and financially draining ordeal

Moreover, the United States Supreme Court has frequently acknowledged the grand jury's importance, and recognized that the American grand jury possesses substantially the same powers as its English prototype.³¹ Unlike the English grand jury, however, which retained substantial independence from the crown, the American grand jury is dominated by the prosecutor.³² This disparity is primarily attributable to the differing roles of the government's attorney in each system.³³

At common law, the attorney for the crown performed the sole task

that even an eventual verdict of not guilty could never erase. No citizen should suffer this experience, the authors of the Bill of Rights felt, unless an *independent* panel of citizens, the grand jury, decided that the evidence warranted bringing an accused to trial. A free people, after all, could not allow the government to decide whom to bring to trial. The danger that politically motivated or overzealous prosecutors would subject the innocent to trial on trumped-up charges or whitewash the crimes of the guilty was just too great.

Id. at 448 (emphasis in original).

31. See, e.g., *Blair v. United States*, 250 U.S. 273, 282 (1919) (fifth amendment recognizes grand jury as being possessed of same powers as British); *United States v. Smyth*, 104 F. Supp. 283, 290 (N.D. Cal. 1952) (United States Constitution preserved grand jury with all its powers and inherent character).

One commentator agreed that the American grand jury began as a duplicate of the English grand jury, but recognized that it has since undergone transformation:

As an individual institution, the grand jury probably has not changed a great deal since it was first brought here from England. However, the other governmental bodies with which it must work have undergone radical transformation. Colonial America knew nothing of massive urban areas, of organized police departments, or of the labyrinth of state and federal criminal laws. Thus, while the grand jury has not changed significantly its environment is very different. Few grand juries sitting in a highly populated urban area are likely from their experience and the knowledge of their members to have probable cause to believe that a crime has been committed and that accused committed it, therefore, 'presentments' in the traditional sense are unlikely.

C. DOYLE, *THE FEDERAL GRAND JURY* (1976) (unpublished study by the Library of Congress), reprinted in *Federal Grand Jury: Hearings on H.J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 671 (1976) [hereinafter cited as *1976 House Hearings*]. See generally *1978 Senate Hearings*, *supra* note 3, at 1118-45.

32. See J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 11-36 (1980); 1 J. WIGMORE, *WIGMORE ON EVIDENCE* § 4, at 22-23 (1940). See also Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157, 160-61 (1974) ("[w]hile the grand jury in England was able to maintain considerable independence from government prosecutors, the grand jury today is much more dependent on the prosecutor . . . [because] the grand jury normally hears only those cases presented by the prosecutor and only the prosecution's side of those cases"); Note, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 764 (1960) (prosecutor's role in collecting information and presenting it to grand jurors renders the modern grand jury a passive instrument).

33. See *infra* notes 34-38 and accompanying text.

of representing the government.³⁴ In United States jurisprudence, however, the prosecutor performs a bifurcated task.³⁵ On the one hand, he must prosecute the government's case to the fullest extent to ensure that the guilty shall not escape punishment.³⁶ Accordingly, he investigates charges, selects the cases to be prosecuted, and presents evidence to the grand jury.³⁷ Simultaneously, however, the prosecutor must act as an impartial legal advisor to the grand jury.³⁸

Despite its dependence on the prosecutor, the American grand jury performs the crucial task of screening evidence and deciding whether to indict.³⁹ Although the grand jury's screening function safeguards society from wasteful litigation, it also protects defendants from incurring the aggravation, expense, and public humiliation of a trial before the state establishes probable cause.⁴⁰

34. See Note, *supra* note 32, at 765 n.24 (attorney for Crown not allowed into grand jury proceeding because he had no duty to advise or aid grand jury).

35. See *Berger v. United States*, 295 U.S. 78 (1935). In *Berger*, the Court, recognizing society's twofold objective for the prosecutor, asserted that this objective is based on the premise that while the guilty should not escape punishment, the innocent should not suffer. *Id.* at 88. See also *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 325 (1977); J. JACOBY, *supra* note 32, at XV.

36. See L. CLARK, *supra* note 30, at 141-42.

37. See *Hale v. Henkel*, 201 U.S. 43, 65 (1906) (prosecutor has "discretion with respect to the cases he will call to the grand jury's attention. the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings"); GAO, COMPTROLLER GEN. REP. TO CONGRESS 3 (1980) (prosecutors "advise jurors on points of law, coordinate appearances of witnesses and presentation of evidence, and question most witnesses").

38. See ABA FEDERAL GRAND JURY HANDBOOK 16 (1959) (prosecutor should be constant legal advisor); Note, *supra* note 32, at 765 (prosecutor advises and conducts grand jury in an orderly fashion).

39. See *Stirone v. United States*, 361 U.S. 212, 218 (1960); *Hale v. Henkel*, 201 U.S. 43, 65 (1906); *United States v. Farrington*, 5 F. 343, 345 (N.D.N.Y. 1881).

The grand jury performs two tasks. Not only does it investigate suspected criminal ability, but it formally charges a defendant when it finds probable cause to believe that he committed a crime. This Note does not consider the grand jury in its investigative role. Instead, it focuses on the grand jury's accusatorial role, which entails a review of the evidence by the grand jury to determine whether probable cause that a crime has been committed exists. See ABA FEDERAL GRAND JURY HANDBOOK, *supra* note 38, at 9-11 (discussion of grand jury's accusatorial function). For a general discussion of the grand jury's two-pronged function, see Keeney & Walsh, *The American Bar Association's Grand Jury Principles: A Critique From a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 550-53 (1978).

40. The proponents of the use of hearsay at the grand jury assert that any injustice committed at the grand jury level is inconsequential because the defendant will be able to rectify the situation at trial. *But see In re Fried*, 161 F.2d 453 (2d Cir.), *cert. denied*, 331 U.S. 858, *cert. dismissed*, 332 U.S. 806 (1947), in which Judge Frank stated: "[This] is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. . . . Prosecutors have an immense discretion in institut-

II. HEARSAY EVIDENCE AT GRAND JURY: *COSTELLO* *V. UNITED STATES*

Because grand jurors base their decision to indict on the evidence presented, the quality of this evidence is crucial. Hearsay evidence is generally inadmissible at trial because of its inherent unreliability.⁴¹ Regardless of the unacceptability of hearsay evidence at the trial level, however, the Supreme Court, in *Costello v. United States*,⁴² held that an indictment based solely on hearsay evidence did not violate the fifth amendment.⁴³ Furthermore, the Court declined to use its supervisory powers⁴⁴ to prohibit grand juries from returning such indictments.⁴⁵

In *Costello*, defendant was suspected of tax evasion. The state conducted an extensive investigation, which resulted in the presentation of 144 witnesses and 368 exhibits at trial. The prosecutor, however, presented a summary of that evidence to the grand jury through testimony of three government agents, none of whom had personally witnessed the transactions on which they based their testimony.⁴⁶ *Costello* was indicted and subsequently convicted at an error-free trial.⁴⁷ On appeal, defendant claimed that the indictment, which was based solely on hearsay evidence, violated his constitutional rights. The Supreme Court rejected this argument, holding that the fifth amendment required only that an indictment be returned by a legally constituted and unbiased grand jury.⁴⁸ In addition, the Court expressed the concern

ing criminal proceedings which may lastingly besmirch reputations." *Id.* at 458-59. See also L. ORFIELD, *supra* note 22, at 145; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172 (1960). See generally Note, *supra* note 5, at 579-80 (screening function can protect "society from wasteful litigation based on insubstantial evidence" and persons from "vexation, cost, and notoriety of a needless public prosecution"); Note, *supra* note 32, at 762 (indictment can cause accused loss of employment, lessening of community respect, and expensive, time-consuming legal battle).

41. See *supra* note 1.

42. 350 U.S. 359 (1956).

43. *Id.* at 361-62. In *Costello*, the Supreme Court restricted fifth amendment constitutional challenges at the grand jury level to two narrow situations. First, a defendant may contest his indictment if the grand jury was illegally constituted. In this type of case, a particular group of citizens have been intentionally excluded from the grand jury system. See *Rose v. Mitchell*, 443 U.S. 545 (1979) (blacks); *Castaneda v. Partida*, 430 U.S. 482 (1977) (Mexican-Americans). The second situation is when the defendant proves that the grand jury was biased. See *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (discussed *infra* note 48).

44. The court's supervisory powers are discussed *infra* notes 56-57 and accompanying text.

45. 350 U.S. at 362-63.

46. *Id.* at 360.

47. *Id.*

48. *Id.* at 361-63. See *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). In *Samango*,

that if a defendant were permitted to challenge an indictment based on the alleged incompetency of the evidence presented, defendants would routinely insist on a preliminary trial to judge the evidence at the indictment stage.⁴⁹

Costello is particularly noteworthy because of its unique factual situation. In *Costello*, the witnesses testifying before the grand jury were Internal Revenue agents who summarized facts compiled by their subordinates pertaining to defendant's net-worth.⁵⁰ The credibility of the Internal Revenue employees who compiled the information, however, was not in controversy at trial.⁵¹

Nevertheless, in many criminal prosecutions, the credibility of the government's witnesses is a major issue at trial. Narcotics prosecutions, for example, often evolve from an informant's tip. The informant, whose credibility is frequently attacked at trial, is typically a narcotics user or an accomplice of the defendant. In such cases, if the prosecutor only presents the grand jury with oral testimony of a police officer who has previously spoken with the informant, then the grand jury is precluded from judging the true quality of the state's case. If, in contrast, the grand jurors were permitted to hear the testimony directly from the informant, then they might reach a different conclusion based upon

the Ninth Circuit focused on *Costello*'s fifth amendment requirement that the grand jury be unbiased, and affirmed the district court's dismissal of the indictment. *Id.* at 885. The prosecutor in *Samango* expressed to the grand jury his dissatisfaction with the witness, who subsequently became the defendant, and who was under a nonprosecution agreement, immediately preceding the testimony of the witness. Furthermore, during his testimony, the witness requested to speak with his attorney. In response, the prosecutor, in a mocking fashion, asked the witness if he intended deliberately to prolong the proceedings. The appellate court noted its reluctance "to encroach on the constitutionally-based independence of the prosecutor and grand jury," but affirmed the district court's dismissal of the indictment. *Id.* at 881. The court ruled that the prosecutor had improperly influenced the grand jury's perception of the witness, thereby causing grand jury bias. *Id.* at 882. The court labelled the prosecutor's abuse of his control over the grand jury proceedings as "arbitrary and capricious and violative of due process." *Id.* at 881.

See also United States v. Sears, Roebuck & Co., 518 F. Supp. 179 (C.D. Cal. 1981) (court found that prosecutor's hostile conduct undermined grand jury's ability to make a fair appraisal of evidence; indictment dismissed). *But see* United States v. Georgalis, 631 F.2d 1199 (5th Cir. 1980) (defendant must demonstrate specifically "biased" grand jury—general showing not sufficient).

49. 350 U.S. at 363.

50. *Id.* at 360. In a net-worth prosecution the primary function of witnesses is not to add facts relating to the actual commission of the crime, but to identify accounting and financial documents. Given this role, the witness' credibility is rarely in question. One commentator proposed that the *Costello* Court could have based its decision on the narrow factual situation of a net-worth prosecution. 8 J. MOORE, *supra* note 9, ¶ 6.03[2], at 6-62.

51. 350 U.S. at 360.

considerations of the informant's dubious credibility.⁵²

Federal and state courts refuse to confine *Costello* to postconviction challenges to indictments based entirely on hearsay evidence by witnesses whose duty is to synthesize voluminous records and whose credibility is not at issue in the case.⁵³ Instead, courts interpret *Costello* to deny any challenge to the competency or adequacy of the evidence presented to the grand jury.⁵⁴

52. Therefore, *Costello* should be confined to cases in which the credibility of the declarant is not in question.

53. See *supra* note 46 and accompanying text; *infra* note 54. But see *United States v. Gramolini*, 301 F. Supp. 39, 42 (D.R.I. 1969):

In the twelve years since the decision in *Costello*, the breadth of that rationale has considerably been narrowed by decisions of the lower federal courts. . . . [T]he deliberate use of hearsay testimony alone . . . is a questionable practice which so seriously depreciates the function of the grand jury as a fact investigator and determiner of probable cause as to suggest a watering down of the grand jury contemplated by the Fifth Amendment [W]here the evidence is not voluminous and where first-hand evidence is readily and conveniently available . . . hearsay evidence cannot be the sole evidence presented to the grand jury. At the same time, however, I recognize that in certain kinds of cases, where voluminous evidence must be presented, as for example in *Costello*, hearsay must be used.

Id.

54. See, e.g., *United States v. Rogers*, 652 F.2d 972, 975 (10th Cir. 1981); *United States v. Myers*, 635 F.2d 932, 941 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States v. Fife*, 573 F.2d 369, 371-72 (6th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *United States v. Neff*, 525 F.2d 361, 363 (8th Cir. 1975); *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *United States v. Harrington*, 490 F.2d 487, 489 (2d Cir. 1973); *United States v. Duham Concrete Prods., Inc.*, 475 F.2d 1241, 1248 (5th Cir.), *cert. denied*, 414 U.S. 832 (1973); *United States v. Marshall*, 471 F.2d 1051, 1053 (D.C. Cir. 1972); *United States v. Akin*, 464 F.2d 7, 18 (8th Cir. 1972); *United States v. Kenny*, 462 F.2d 1205, 1213 (3d Cir. 1972); *United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972); *United States v. Gower*, 447 F.2d 187, 191 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Reyes v. United States*, 417 F.2d 705, 708 (7th Cir. 1971); *Jack v. United States*, 409 F.2d 522, 523 (9th Cir. 1969); *United States v. Ricciardi*, 357 F.2d 91, 98 (2d Cir. 1965); *Williams v. United States*, 344 F.2d 264, 266 (8th Cir. 1965); *United States v. Keig*, 334 F.2d 823, 828-29 (7th Cir. 1964); *United States v. Tane*, 329 F.2d 848, 853 (2d Cir. 1964); *United States v. Labate*, 270 F.2d 122, 124 (3d Cir. 1959); *Ford v. United States*, 233 F.2d 56, 60 (5th Cir. 1956); *J. Cook*, *supra* note 3, at 490; *Arenella*, *supra* note 3, at 493; *Boudin*, *supra* note 3, at 26; Note, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432, 456 (1972); Note, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 174 (1967); Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 WASH. & LEE L. REV. 110, 113-14 (1981) [hereinafter cited as Note, *Grand Jury*]. See also *United States v. Riccobene*, 451 F.2d 586 (3d Cir. 1971).

The Supreme Court has supplemented the *Costello* doctrine. In *Lawn v. United States*, 355 U.S. 339 (1958), for example, the Court refused to consider the charge that evidence violating defendant's fifth amendment right against self-incrimination had been admitted to the grand jury. The Court ruled that *Costello* precluded judicial review of the evidence presented to the grand jury. *Id.* at 349-50. In *United States v. Blue*, 384 U.S. 251 (1966), defendant claimed that the indictment violated his fifth amendment right not to be compelled to testify against himself and

III. CIRCUMVENTION OF THE *COSTELLO* HOLDING

A. *The Prosecutorial Misconduct Doctrine*

Although *Costello* foreclosed constitutional challenges to the quality of the evidence presented to the grand jury, some courts have circumvented the decision⁵⁵ by applying a doctrine of "prosecutorial misconduct."⁵⁶ The prosecutorial misconduct doctrine represents an exercise

the Court again refused to review evidence presented to the grand jury. *Id.* at 255. In *Blue*, defendant simultaneously was defending himself in the tax court for tax evasion and in the criminal court for criminal tax fraud. He was compelled to testify in the civil suit and subsequently such testimony was the basis for his indictment. The Court suppressed the testimony at the criminal trial, but refused to dismiss the indictment. *Id.* at 252.

In 1974, the Court refused to dismiss an indictment when the grand jury received evidence violative of defendant's fourth amendment right against illegal search and seizure. *United States v. Calandra*, 414 U.S. 338 (1974). In *Calandra*, the Court relied on *Costello's* hypothesis that permitting defendants to challenge the evidence upon which they were indicted would "delay and disrupt" grand jury proceedings. *Id.* at 349.

Calandra, however, questions whether the exclusionary rule should be extended to grand jury proceedings. Courts invoke the exclusionary rule at trial to deter police misconduct. In contrast, *Costello* concerned the applicability of the hearsay rule to grand jury proceedings. Hearsay is excluded at trial because of its inherent unreliability.

Finally, in *Bracy v. United States*, 435 U.S. 1301 (1978), Justice Rehnquist, relying on *Costello*, refused to stay the circuit court's judgment or to dismiss the indictment based on perjured testimony, and thereby affirmed the conviction. Rehnquist reasoned that inadmissible evidence, such as perjured testimony, at the trial level threatens the integrity of the judicial system. He asserted, however, that such evidence posed no such threat at the grand jury level. *Id.* at 1302-03 (Rehnquist, Circuit Justice).

See generally 8 J. MOORE, *supra* note 9, ¶ 6.03, at 6-63 to -64; C. WHITEBREAD, *supra* note 11, at § 19.06(9).

55. *See, e.g.*, *United States v. Lawson*, 502 F. Supp. 158, 169 (D. Md. 1980). In *Lawson*, the court recognized that by invoking the prosecutorial misconduct doctrine, federal courts were correcting grand jury abuses while simultaneously evading *Costello's* proscription of direct examination of the quality of evidence presented to the grand jury. *See also* Boudin, *supra* note 3, at 26. Boudin believes that *Costello* is plainly bad law and therefore advocates the prosecutorial misconduct doctrine to circumvent *Costello*.

56. The prosecutorial misconduct doctrine is a nebulous concept that some courts invoke when they believe that the prosecutor, in order to obtain an indictment, has flagrantly abused his role as presenter of the evidence to the grand jury. The Ninth Circuit attempted to define the doctrine in *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977):

On occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers. . . . [T]he courts' goal has been . . . "to protect the integrity of the judicial process," . . . particularly the function of the grand jury, from unfair or improper prosecutorial conduct.

Id. at 1309.

Courts have invoked the prosecutorial misconduct doctrine in two other evidentiary situations involving the grand jury. For example, in *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), a

of the court's supervisory powers, which are found not in a specific constitutional provision, but rather in the court's inherent duty to protect the integrity of the judicial system.⁵⁷

Using the prosecutorial misconduct doctrine, courts shift their focus from the quality of the evidence tendered to the grand jury, to the conduct of the prosecutor presenting the evidence.⁵⁸ According to the doctrine, courts consider whether the prosecutor acted imprudently in

co-conspirator testified before the grand jury about the time of conception of the conspiracy. Prior to trial he told the prosecutor that he had perjured himself. Although the prosecutor informed the defense counsel about the perjured testimony he failed to inform the court or the grand jury. *Id.* at 784. The perjured statement was material because the conspiracy statute had been amended to impose a lesser penalty. The court, reversing the conviction, asserted that the prosecutor's failure to inform the court and grand jury resulted in a distortion of the case and a breach of duty to the court and the grand jury by the prosecutor. *Id.* at 785-87. *Basurto*, however, was severely limited by *Bracy v. United States*, 435 U.S. 1301 (1978) (Rehnquist, Circuit Justice) (perjured testimony at grand jury not violative of fifth amendment). See 8 J. MOORE, *supra* note 9, ¶ 6.04[2], at 6-83.

Courts have also applied the prosecutorial misconduct doctrine to cases in which the prosecutor's failure to present exculpatory evidence misleads the grand jury. Although the prosecutor has no explicit duty to present exculpatory evidence before the grand jury, courts have found that the prosecutor's failure to present such evidence distorts the case to the extent that the grand jury cannot perform as an independent and informed body. See, e.g., *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979) (dictum); *United States v. Lawson*, 502 F. Supp. 158, 172 (D. Md. 1980); *United States v. Martin*, 480 F. Supp. 880, 886 (S.D. Tex. 1979); *United States v. Gold*, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579, 589 (W.D. Tex. 1977); *United States v. DeMarco*, 401 F. Supp. 505, 513 (C.D. Cal. 1975), *aff'd*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977); *United States v. Gallo*, 394 F. Supp. 310, 315 (D. Conn. 1975); Note, *The Prosecutor's Duty to Present Exculpatory Evidence to an Indicting Grand Jury*, 75 MICH. L. REV. 1514, 1514-38 (1977); Note, *Grand Jury*, *supra* note 54, at 114-15.

57. See *United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979) (exertion of supervisory powers appropriate remedy to correct flagrant or persistent abuse). One commentator explained the underlying rationale of supervisory powers:

[T]he supervisory power possesses a significant potential for reconciling the conflicting desires of the federal judiciary to improve standards for the protection of individual rights while exercising the self-restraint appropriate to constitutional adjudication and to the delicate balances of the federal system. . . . The unique contribution of the supervisory power doctrine to resolution of this conflict is that it enables the Court to raise the standards of fairness in the administration of federal justice in advance of the relatively slow pace acceptable in the constitutional area.

Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666 (1963). See also Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1, 17 (1980) (no "consistent" standard for application of doctrine).

The Supreme Court has encouraged lower courts to exercise their supervisory powers when there is a threat to "the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). In *Ballard*, the Court used its supervisory power to reverse a conviction that was founded on an indictment by a grand jury that intentionally excluded females. *Id.* at 193. See also *supra* note 56.

58. See, e.g., *United States v. Samango*, 607 F.2d 877, 880 n.6, 885 (9th Cir. 1979) (indictment dismissed because of prosecutor's conduct at grand jury); *United States v. Chanen*, 549 F.2d 1306,

presenting hearsay evidence to the grand jury. The doctrine, however, often serves as a facade behind which courts perform the review that *Costello* sought to curtail.⁵⁹

B. United States v. Estepa

The Second Circuit is the only federal appellate court that has voiced its dissatisfaction with *Costello*'s allowance of the unqualified presentation of hearsay evidence by the prosecutor to the grand jury. From 1966 through 1972 the court grappled with the propriety of prosecutorial use of hearsay when eyewitness testimony was readily available. Though the court repeatedly warned prosecutors against the practice, it refused to invoke the drastic measure of quashing an indictment and reversing the subsequent conviction.⁶⁰

1309 n.3 (9th Cir.) (issue not quantity or quality of evidence, but conduct of prosecutor), *cert. denied*, 434 U.S. 825 (1977).

59. See Arenella, *supra* note 3, at 540 (“[S]ome federal courts have cautiously begun to supervise the prosecutor’s evidentiary presentation to the grand jury [T]hey have used a . . . prosecutorial misconduct doctrine to circumvent *Costello*’s prohibition against directly evaluating the sufficiency of the evidence. . . .”).

60. Judge Friendly, in his dissenting opinion in *United States v. Payton*, 363 F.2d 996, 999-1001 (2d Cir. 1966), voiced the first outcry in the Second Circuit against *Costello*. In *Payton*, the defendant who was appealing his conviction on drug related charges, claimed that the prosecutor’s presentation of hearsay evidence to the grand jury deprived him of due process. The prosecutor had presented the evidence to the grand jury through a narcotics agent who had no personal knowledge of the drug transaction or conversations between defendant and the undercover agent. Furthermore, the prosecutor did not explicitly inform the grand jury of the hearsay nature of the agent’s testimony. *Id.* at 998. Nevertheless, the Second Circuit refused the appeal, citing *Costello*. *Id.* at 998-99. In his dissent, Judge Friendly argued that the use of hearsay before the grand jury makes a “mockery” of the fifth amendment’s protection. *Id.* at 999 (Friendly, J., dissenting).

In *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), the Second Circuit, in dictum, expressed its displeasure with use of hearsay at the grand jury. In *Umans*, the defendant was convicted of various crimes connected with bribing an Internal Revenue agent. *Id.* at 727. On appeal, defendant questioned the sufficiency of the evidence presented to the grand jury. Interestingly, none of the government’s trial witnesses had appeared before the grand jury. Instead, Internal Revenue agents had summarized to the grand jury the contents of affidavits of the witnesses who later appeared at trial. *Id.* at 730. Although the Second Circuit reluctantly adhered to the *Costello* rule, it asserted in dictum:

[W]e think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge.

Id.

In 1968, the District Court for the Eastern District of New York espoused a unique interpreta-

Finally, in 1972, the Second Circuit applied the prosecutorial misconduct doctrine to quash a defendant's indictment in *United States v. Estepa*.⁶¹ In *Estepa*, police conducted an undercover narcotics investigation that resulted in criminal charges against defendant. The prosecutor failed to present to the grand jury any of the agents involved in the investigation. The sole witness was a policeman who had extremely limited personal knowledge of the investigation but had read the undercover agents' reports.⁶² The prosecutor's questions and the policeman's answers gave the grand jury the mistaken impression that the

tion of *Costello*. In *United States v. Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968), defendant, who was found guilty of passing counterfeit money, moved to set aside the verdict because the only witness presented to the grand jury had no personal knowledge of the events and therefore the evidence for indictment was insufficient. The court admonished the use of hearsay at the grand jury and noted that the *Costello* Court did not intend to encourage such use. Instead, the court interpreted *Costello* to preclude failures of indictments for the inadvertent or necessary use of hearsay. *Id.* at 349. Criticizing the use of hearsay, the court stated:

[Hearsay] habituates the grand jury to rely upon 'evidence' which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examinations nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its functions as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically, a prima facie case may have been made out. It is, moreover, unlikely to demand additional evidence.

Id. Nevertheless, the court decided not to reverse the indictment in *Arcuri* because the United States Attorney had informed the court that his office discontinued the use of hearsay when witnesses are available and because the defendant had not been prejudiced by the use of the hearsay. *Id.* at 350. The Second Circuit affirmed the district court's decision in *United States v. Arcuri*, 405 F.2d 691 (2d Cir. 1968) (majority opinion authored by Judge Friendly), *cert. denied*, 395 U.S. 913 (1969). See Boudin, *supra* note 3, at 28-29 (*Arcuri* constitutes a "more enlightened supervisory approach").

In 1969, the Second Circuit again encountered a case involving the unnecessary use of hearsay at the grand jury, and again, reluctantly refused to reverse the indictment. In *United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969), defendant challenged his conviction for Selective Service violations, arguing that it was premised on an indictment rendered by a grand jury that heard only hearsay testimony despite the availability of eyewitness testimony. The court stated that dismissal of an underlying indictment, and hence the subsequent conviction, should only be considered when the grand jury is misled into thinking that the hearsay testimony is eyewitness testimony, and if the defendant can show that there is a high probability that the grand jury would not have indicted if it had been presented with eyewitness rather than hearsay testimony. *Id.* at 42. The rationale underlying the two exceptions is that courts should dismiss indictments only when required to do so to protect the integrity of the judicial process. *Id.*

61. 471 F.2d 1132 (2d Cir. 1972). For a discussion of *Estepa*, see 8 J. MOORE, *supra* note 9, ¶ 6.04[3]; Note, *supra* note 4, at 728 n.284.

62. 471 F.2d at 1134-35.

policeman had been closely involved in the investigation.⁶³

Although the Second Circuit noted its concern about opening another avenue for attacking convictions on grounds unrelated to the merits,⁶⁴ it believed that the prosecutor's deceptive use of hearsay in this case so impaired the grand jury's perception of the evidence that dismissal of the indictment was necessary in order to protect the integrity of the judicial system.⁶⁵ The court stated that the prosecutor's presentation of hearsay evidence is unacceptable in either of two situations: first, it is unacceptable if the prosecutor deceives the grand jurors about the quality of the evidence presented; second, it is unacceptable if there exists a high probability that the grand jurors would not have indicted had they heard eyewitness rather than hearsay testimony.⁶⁶

The Second Circuit's drastic effort to deter prosecutors from unnecessarily presenting hearsay to the grand jury, however, has had an insignificant impact on prosecutorial practices.⁶⁷ Prosecutors in the Second Circuit avoid *Estepa's* consequences simply by informing the grand jury that the evidence presented is hearsay.⁶⁸ Consequently, the

63. *Id.* at 1135 & n.4.

64. *Id.* at 1137.

65. *Id.*

66. *Id.*

67. See Arenella, *supra* note 3, at 544-45:

Estepa . . . attempted to fashion a rule consistent with *Costello* that would trigger judicial intervention only when the prosecutor egregiously impairs the grand jury's ability to screen guilt. Far from signalling a new judicial willingness to require the prosecutor to present the government's best evidence to the grand jury, *Estepa* merely expressed the court's pique with federal prosecutors who continued to violate the minimal obligations placed on them The ironic result is a rule that accomplishes little but is nonetheless inconsistent with *Costello*.

68. See *United States v. Artuso*, 618 F.2d 192, 197 n.23 (2d Cir.) (dismissal in *Estepa* because of failure to heed repeated warnings), *cert. denied*, 449 U.S. 861 (1980); *United States v. James*, 609 F.2d 36, 49 (2d Cir. 1979) (distinguished from *Estepa* because prosecutor told grand jury that evidence was hearsay), *cert. denied*, 445 U.S. 905 (1980); *United States v. Brown*, 602 F.2d 1073, 1076-78 (2d Cir.) (reinstated indictment because district court abused discretionary supervisory powers), *cert. denied*, 444 U.S. 952 (1979); *United States v. Vila*, 599 F.2d 21, 25 (2d Cir.) (no proof of deception), *cert. denied*, 444 U.S. 837 (1979); *United States v. Schlesinger*, 598 F.2d 722, 726 (2d Cir.) (*Estepa* not applicable when the only evidence presented to second grand jury was record of testimony from first grand jury summarized by prosecutor), *cert. denied*, 444 U.S. 880 (1979); *United States v. Broward*, 594 F.2d 345, 351 (2d Cir.) (refused to apply *Estepa* because defendant failed to show prejudice), *cert. denied*, 442 U.S. 941 (1979); *United States v. Fields*, 592 F.2d 638, 647-48 (2d Cir. 1978) (refused to apply *Estepa* to a one-time incident of government misconduct), *cert. denied*, 442 U.S. 917 (1979); *United States v. Marchand*, 564 F.2d 983, 1001 n.29 (2d Cir. 1977) (neither prong of *Estepa* test met), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Mase*, 556 F.2d 671, 676 (2d Cir. 1977) (indictment not prejudiced by lack of preindictment hearing), *cert. denied*, 435 U.S. 916 (1978); *United States v. Ramirez*, 482 F.2d 807, 811-12 (2d Cir.) (no

Second Circuit has had few opportunities to apply the *Estepa* holding to reverse an indictment.⁶⁹

C. Reaction to *Estepa*

Other circuits have given *Estepa* a mixed reception.⁷⁰ The Fifth and Third Circuits, although expressly supporting *Estepa*, have not actually applied it to dismiss an indictment. In *United States v. Cruz*,⁷¹ the Fifth Circuit restricted *Estepa* by interpreting it to require dismissal only when the hearsay evidence misled the grand jury and a high probability existed that the grand jury would not have returned the indictment had it heard eyewitness rather than hearsay testimony.⁷² Subsequently, the Third Circuit, in *United States v. Wander*,⁷³ adopted the Fifth Circuit's interpretation of *Estepa*.⁷⁴

deception), *cert. denied*, 414 U.S. 1070 (1973); *United States v. Ferretti*, 508 F. Supp. 913, 917 (E.D. Pa. 1981) (failed to fulfill *Estepa* test); *United States v. Gordon*, 493 F. Supp. 814, 817 (N.D.N.Y. 1980) (no deception), *aff'd*, 655 F.2d 478 (2d Cir. 1981); *United States v. Olin Corp.*, 465 F. Supp. 1120, 1135-36 (W.D.N.Y. 1979) (failed to fulfill *Estepa* test); *United States v. Reilly*, 456 F. Supp. 211, 216 n.2 (E.D. Pa. 1978) (*Estepa* merely guideline for court's discretion), *aff'd mem.*, 601 F.2d 577 (3d Cir. 1979).

But see United States v. Jacobs, 547 F.2d 772, 773 (2d Cir. 1976) (*Estepa* applied because inconsistent practice of prosecutors in circuit, but court's holding a one-time sanction to encourage uniformity), *cert. denied*, 436 U.S. 31 (1978); *United States v. Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975) (*Estepa* applied to dismiss indictment); *United States v. Gallo*, 394 F. Supp. 310, 314-15 (D. Conn. 1975) (motion to dismiss indictment granted, *inter alia*, because prosecutor should have informed grand jury of availability of live testimony).

See also 8 J. MOORE, *supra* note 9, ¶ 6.04[3], at 6-84. Moore argues that *Estepa* has had an insignificant impact on prosecutorial practices because prosecutors have learned to inform grand juries of the hearsay quality of the evidence.

69. *See supra* note 68.

70. *See* 8 J. MOORE, *supra* note 9, ¶ 6.04[3], at 6-83 & n.34.

71. 478 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973).

72. *Id.* at 410. In *Cruz*, the Fifth Circuit also noted that the "best evidence" rule espoused by the Second Circuit is merely a guideline for courts exercising their discretion to protect citizens from possible prosecutorial manipulation of grand jury proceedings. *Id.* at 411. *See also United States v. Georgalis*, 631 F.2d 1199, 1206 (5th Cir. 1980) (dismiss indictment only when defendant demonstrates biased or illegally constituted grand jury); *United States v. McInnis*, 601 F.2d 1319, 1328 (5th Cir. 1979) (dismiss indictment only if prosecutor's conduct abrogates constitutional right); *United States v. Cathey*, 591 F.2d 268, 272 & n.5 (5th Cir. 1979) (dismiss indictment only if grand jury integrity impaired).

73. 601 F.2d 1251 (3d Cir. 1979).

74. *Id.* at 1260. In *Wander*, defendant was convicted for violations of the Travel Act. The underlying indictment was based on testimony of an FBI agent and a transcript of testimony from the first grand jury proceedings. The Third Circuit ruled that the prosecutor's reading of a transcript from a prior grand jury to the indicting grand jury does not amount to grand jury abuse or deception; therefore, *Estepa* was inapplicable. *Id.*

But see United States v. Serubo, 604 F.2d 807 (3d Cir. 1979). In *Serubo*, the court remanded the

The First and Tenth Circuits have acknowledged the actions taken by the *Estepa* court as the requisite response for a court that finds intentional prosecutorial distortion of evidence presented to the grand jury.⁷⁵ These circuits, however, by distinguishing factually the cases before them, have refrained from commenting on whether they would apply the *Estepa* holding given similar factual situations.⁷⁶

In *United States v. Chanen*,⁷⁷ the Ninth Circuit disapproved of *Estepa*'s broad interpretation of judicial supervisory powers and cautioned that expansive application of supervisory powers could subvert the separation of powers doctrine.⁷⁸ The lower court in *Chanen* dismissed the indictment and asserted that the prosecutor should have presented live testimony.⁷⁹ In reversing the dismissal, the Ninth Circuit reprimanded the district court for exceeding its authority by interfering with a standard prosecutorial decision concerning what evidence to present to the grand jury and how to present it.⁸⁰

Similarly, the Sixth Circuit refused to apply *Estepa* in *United States*

case to the lower court to determine if the prosecutorial improprieties that plagued the first grand jury were transmitted to the indicting grand jury. The court noted that the prosecutor is "virtually immune from public scrutiny" and that he should not be allowed to abuse his special relationship with the grand jury. Therefore, if the abuses from the first grand jury were transmitted to the indicting grand jury, then the indictment must be dismissed. *Id.* at 816-17.

75. *See infra* note 76.

76. *See* *United States v. Rogers*, 652 F.2d 972, 975 (10th Cir. 1981) (no dismissal unless grand jury intentionally misled or deceived); *United States v. Hubbard*, 603 F.2d 137, 141 (10th Cir. 1979) (only apply *Estepa* when grand jury intentionally misled or deceived); *United States v. Oliver*, 570 F.2d 397, 402 (1st Cir. 1978) (grand jury not misinformed about quality of evidence; therefore, *Estepa* inapplicable).

77. 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). *Accord* *United States v. Samango*, 607 F.2d 877, 880 n.6 (9th Cir. 1979). *See also* *United States v. Vargas-Rios*, 607 F.2d 831, 835 (9th Cir. 1979) (indictment not dismissed because government agent made inadvertent innocent misstatement); *United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978) (supervisory powers often discussed but seldom invoked); *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977) (only dismiss indictment in cases of flagrant abuse); *United States v. Acosta*, 526 F.2d 670, 674 (5th Cir. 1976) (defendant entitled to "take advantage of any error" that prejudices him, but must be adversely affected); *United States v. McCord*, 509 F.2d 334, 349 (D.C. Cir. 1974) (dismissal warranted only when serious prosecutorial misconduct pollutes criminal process); *United States v. Thompson*, 493 F.2d 305, 308-09 (9th Cir. 1974) (prejudice must be shown); *United States v. Fox*, 425 F.2d 996, 1001 (9th Cir. 1970) (decision to quash indictment discretionary).

78. 549 F.2d at 1313. *See generally* Note, *supra* note 4, at 704-05.

79. 549 F.2d at 1308. In *Chanen*, the prosecutor presented live testimony to the first indicting grand jury. The jury was discharged before voting on the indictment. At the second grand jury, the indictment of which was challenged, the prosecutor simply read the transcript from the first grand jury to the second grand jury. *Id.*

80. *Id.* at 1312-13.

v. Barone.⁸¹ In *Barone*, the prosecutor presented ten eyewitnesses to the first grand jury, which refused to indict. At the second grand jury, which did indict defendant, the prosecutor presented only a single narcotics agent who had no personal knowledge of the crime. In addition, the prosecutor failed to inform the grand jury about the proceedings at the first grand jury.⁸² In rejecting the claim of prosecutorial impropriety, the Sixth Circuit indicated that it would not follow the Second Circuit's position because of the strong historical policy considerations voiced in *Costello*.⁸³

Thus, the other circuits have refused to follow the Second Circuit's attempt to limit the use of hearsay testimony at the grand jury. After the Supreme Court's decision in *Costello*, the debate over the quality of the evidence considered by the grand jury was thought to be entirely foreclosed. The Second Circuit's exercise of its supervisory powers to dismiss an indictment based solely on hearsay, however, has caused the debate to resurface. Nevertheless, the sporadic assertion of supervisory powers by courts has not noticeably deterred prosecutors from presenting hearsay to grand juries.⁸⁴

IV. STATE EFFORTS TO LIMIT HEARSAY AT THE GRAND JURY

In *Hurtado v. California*,⁸⁵ the Supreme Court decided that the fifth amendment's grand jury provision is not applicable to the states. Nevertheless, the federal grand jury system has served as a model for the creation of state grand juries.⁸⁶ Although some state constitutions have provisions enabling their legislatures to abolish the grand jury,⁸⁷ pres-

81. 584 F.2d 118, 125 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). *See also* United States v. Fife, 573 F.2d 369, 372 (6th Cir. 1976) (distinguished *Estepa* because no witnesses appeared before grand jury, therefore grand jury not misled), *cert. denied sub nom.* Klein v. United States, 430 U.S. 933 (1977).

But see United States v. Luna, 525 F.2d 4, 8 (6th Cir. 1975) (notwithstanding prejudice, dismissal required if perjured testimony introduced), *cert. denied*, 424 U.S. 965 (1976).

82. 584 F.2d at 122-23.

83. *Id.* at 125.

84. *See supra* notes 67-69 and accompanying text. As Arenella asserted: "[T]he prosecutorial misconduct doctrine is at best a stopgap measure. It can mitigate the worst excesses generated by *Costello*." Arenella, *supra* note 3, at 558.

85. 110 U.S. 516 (1884).

86. *See* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, SURVEY OF STATE GRAND JURY PRACTICES (1978), reprinted in 1978 Senate Hearings, *supra* note 3, at 926, 927 app. [hereinafter cited as *Survey*].

87. *Id.* at 927 app. n.2.

ently every state has retained the grand jury as a method for initiating criminal prosecutions.⁸⁸

The prosecutorial use of hearsay evidence at the grand jury is also common at the state level.⁸⁹ Some states, however, have enacted statutes to remedy the perceived problem.⁹⁰ These statutes are either advisory or mandatory in form. An advisory statute provides guidelines for grand jurors to follow in weighing the evidence. In contrast, a mandatory statute dictates the legal standard of evidence that must be met in order to preserve the indictment.

State advisory statutes fall into three categories, the first being permissive.⁹¹ The Louisiana statute, for example, states that grand juries "should" receive only legal evidence.⁹² The commentary to the section defines "should" as a middle ground between the mandatory "shall" and the discretionary "may."⁹³

Advisory statutes in the second category appear to be mandatory, but specifically prohibit dismissal of indictments upon violation.⁹⁴ For example, the California statute commands that "[t]he grand jury shall receive none but evidence that would be admissible over objection at the trial."⁹⁵ If the grand jury receives inadmissible evidence, however, California courts may not dismiss the indictment "where sufficient competent evidence to support the indictment was received by the grand jury."⁹⁶

88. *Id.* at 927 app.

89. *Id.* at 969 app. n.54.

90. *See infra* notes 91-103 and accompanying text.

91. *See* E. CRAWFORD, THE CONSTRUCTION OF STATUTES 261-62 (1940).

92. LA. CODE CRIM. PROC. ANN. art. 442, comments a-d (West 1967). *See also* State v. Bullis, 93 Idaho 749, 472 P.2d 315 (1970) (record must clearly show inadmissible evidence; court will not speculate that grand jury heard hearsay); 4 IDAHO CODE 19-1105 (1947) (grand jury *can* receive none but legal evidence).

93. LA. CODE CRIM. PROC. ANN. art. 442, comment d (West 1967).

94. *See* F. DWARRIS, STATUTES AND RULES OF CONSTRUCTION 220-25 (1885).

95. CAL. PENAL CODE § 939.6(b) (Deering 1971).

96. *Id.* California courts have become more liberal in permitting the presentation of inadmissible evidence to the grand jury. *Compare* People v. Fujita, 43 Cal. App. 3d 454, 117 Cal. Rptr. 757 (1974) (presentation of inadmissible evidence to the grand jury does not itself invalidate indictment), *cert. denied*, 421 U.S. 964 (1975) and People v. Backus, 23 Cal. 3d 360, 590 P.2d 837, 52 Cal. Rptr. 710 (1979) (dismissed only when hearsay evidence compromises independence of grand jury) *with* Dong Haw v. Superior Court, 81 Cal. App. 2d 153, 183 P.2d 725 (1947) (indictment based on hearsay dismissed because no legal evidence to support, so grand jury acted in excess of its authority). *See also* N.D. CENT. CODE § 29-10.1-26(2) (1981) (provides that grand jury "shall" receive only evidence that would be admissible over objection at trial; but if violated, indictment will not be dismissed if grand jury received sufficient competent evidence to support indictment);

The third category of advisory statutes includes those that are phrased as commands but are interpreted by state courts as directives.⁹⁷ The New Mexico statute, for example, provides that the evidence presented to the grand jury must be such as would be legally admissible at trial.⁹⁸ In *Maldonado v. State*,⁹⁹ however, the Supreme Court of New Mexico held that in the interest of judicial economy and grand jury secrecy the statute must be interpreted as advisory rather than mandatory.¹⁰⁰

There are two types of mandatory state statutes.¹⁰¹ The first, adopted by the New York, Utah, and South Dakota legislatures, consists of a

ARK. STAT. ANN. § 43-918 (1947) (provides grand jury shall receive only legal evidence); 1981 KY. REV. STAT. & R. SERV. 5.08 (Baldwin) (legislature deleted the word "competent" from statute, saying grand jury shall indict on what it believes to be sufficient evidence; however, no judicial review of evidence presented). *But see* McDonald v. State, 155 Ark. 142, 244 S.W. 20 (1922) (construing Arkansas statute as directive rather than mandatory).

97. See E. CRAWFORD, *supra* note 91, at 261-62; F. DWARRIS, *supra* note 94, at 220-25.

98. N.M. STAT. ANN. § 31-6-11(A) (1978). This statute was amended following the *Maldonado* decision, discussed *infra* notes 99-100.

99. 93 N.M. 670, 604 P.2d 363 (1979). In *Maldonado*, defendant was convicted of criminal trespass. He appealed claiming that the evidence violated N.M. STAT. ANN. § 31-6-11(A) (1978). The court of appeals rejected the appeal, asserting that New Mexico courts have no authority to review the sufficiency of the evidence.

100. 93 N.M. at 671, 604 P.2d at 364. The New Mexico Supreme Court ruled that: "statutes such as 31-6-11(A), governing the kind, character, and degree of evidence . . . produced before a grand jury . . . are *directory* and for the *guidance* of the grand jury." *Id.* The court, however, noted that this ruling does not give prosecutors "unbridled discretion" to use inadmissible evidence. The court declared that prosecutors "*must* abide by the letter and spirit of our laws, and this precludes their use of inadmissible evidence." *Id.* Nevertheless, the court believed that judicial review of the evidence would unduly impede judicial economy and grand jury secrecy. *Id.*

Consequently, in 1981, the New Mexico Legislature amended 31-6-11(A) by deleting the "legally admissible" evidence requirement and adding a provision that precludes judicial review of sufficiency and competency of the evidence before the grand jury, absent a showing of bad faith on the part of the prosecutor. N.M. STAT. ANN. § 31-6-11(A) (Cum. Supp. 1982).

But see Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981). In *Buzbee*, the court interpreted the 1981 amended statute as precluding judicial review of the evidence, but noted that the legislature failed to amend N.M. STAT. ANN. § 31-6-6-6 (1978). That statutory provision requires that grand jurors take an oath to base an indictment only on "legal evidence." 96 N.M. at 706, 634 P.2d at 1258.

The Nevada courts have reached similar results. NEV. REV. STAT. § 172.135(2) (1967) provides that the "grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." Compare *Shelby v. Sixth Judicial Dist. Court*, 82 Nev. 213, 418 P.2d 132 (1966) (statute permits defendants to challenge indictment based on sufficiency of evidence) with *Franklin v. State*, 89 Nev. 382, 513 P.2d 1252 (1973) (court refused to dismiss indictment saying that an accused is entitled to "fair but not perfect consideration" before the grand jury).

101. See *Survey*, *supra* note 86, at 967 app. *infra* notes 102-03.

blanket proclamation that standard rules of evidence shall be applied in grand jury proceedings.¹⁰² The second approach, used only by Alaska, explicitly prohibits the presentation of hearsay evidence to the grand jury, but includes enumerated exceptions.¹⁰³

V. THE RESPONSE OF THE AMERICAN BAR ASSOCIATION

Over a decade ago, the American Bar Association's Grand Jury Committee recommended the inclusion of a provision in the grand jury reform proposal that would limit, but not abolish, the use of hearsay

102. N.Y. CRIM. PROC. LAW § 190.30 (Consol. 1979) (governing rules of evidence with respect to criminal proceedings applicable to grand jury). See *People v. Jackson*, 18 N.Y.2d 516, 223 N.E.2d 790, 277 N.Y.S.2d 263 (1966) (reversed conviction due to incompetent hearsay at grand jury); S.D. CODIFIED LAWS ANN. § 23A-5-15 (1979) (rules of evidence shall apply to grand jury). See also UTAH CODE ANN. § 77-11-3 (Supp. 1981). See generally *State v. Anderson*, 612 P.2d 778, 783-84 & 786 n.33 (Utah 1980). In *Anderson*, the court compared the use of hearsay at preliminary hearings and grand juries. The court ruled that hearsay evidence impaired the ability of the preliminary hearing to eliminate improvident prosecutions and concluded that it should not be used. Colorado has no statutory provision governing the quality of evidence at the grand jury. One Colorado court, however, has denounced the use of hearsay evidence at preliminary hearings. See *McDonald v. District Court*, 195 Col. 159, 576 P.2d 169 (1978).

For an in depth discussion of the New York statute, see Note, *supra* note 8, at 113-14.

103. ALASKA R. CRIM. P. 6(r): "Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record."

An early Alaska case, *Taggard v. State*, 500 P.2d 238 (Alaska 1972), held that the prosecutor who presents hearsay evidence to the grand jury must also give a detailed account of the original declarant's activity. *Id.* at 243. Subsequently, in *State v. Johnson*, 525 P.2d 532 (Alaska 1974), the court upheld the use of hearsay because the witness's testimony provided the grand jury with sufficient evidence to judge the reliability and credibility of the absent declarant. Additionally, the court found that the declarant was legitimately inaccessible because his father was dying in another state. *Id.* at 536.

The Alaska Supreme Court, however, limited the breadth of the "compelling justification" exception of Rule 6(r) in *State v. Gieffels*, 554 P.2d 460 (Alaska 1976). In *Gieffels*, the court ruled that the "mere expense of transportation for absent witnesses" is not a compelling justification. *Id.* at 465. *Gieffels* was reaffirmed in *Adams v. State*, 598 P.2d 503 (Alaska 1979). In *Adams*, the court reversed the conviction because the prosecutor introduced a hearsay report of a doctor rather than bringing him in to court to testify. The court reiterated that cost is not a sufficient justification for using hearsay. *Id.* at 508.

More recently, in *Putnam v. State*, 629 P.2d 35 (Alaska 1980), the Alaska Supreme Court retreated from its strict enforcement of Rule 6(r). In *Putnam*, the court refused to reverse the conviction even though unjustified hearsay testimony was presented to the grand jury because the court was convinced that the defendant was not prejudiced. *Id.* at 40. In *Giacomazzi v. State*, 633 P.2d 218 (Alaska 1981), the court rejected a defendant's appeal based on the prosecutor's violation of Rule 6(r) because the other evidence presented to the grand jury supported the indictment. The trend in the Alaska court appears to be emasculating the mandatory language of Rule 6(r).

evidence in a federal grand jury inquiry.¹⁰⁴ The provision is unique in requiring that the prosecutor subjectively¹⁰⁵ believe that the evidence he seeks to introduce before the grand jury would be admissible at trial.¹⁰⁶ The alleged prosecutorial manipulation of grand juries through usurpation of their evidentiary screening function inspired the ABA's movement for grand jury reform. Accordingly, the ABA Grand Jury Committee placed the burden of deciding which evidence complied with the proposed standard on the prosecutor rather than on the court or the grand jury.¹⁰⁷ The provision, however, fails to provide

104. AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.6(a) (Approved Draft 1971). The commentary explains:

The need to use a summary of available evidence may arise in cases involving voluminous records or where an absent witness has given a written statement but is unavailable and circumstances justify prompt grand jury action. Similarly, where the victim of a criminal act is seriously injured and cannot attend, someone to whom the relevant facts have been related should be permitted to testify before the grand jury. A third illustrative situation is where the safety of an important witness reasonably warrants that his or her identity remain secret and recorded statements of the witness be presented to the grand jury.

Id. at § 3.6 commentary. *But see* Arenella, *supra* note 3, at 580-81 app. Professor Arenella was a member of the ABA Grand Jury Committee and the chairperson of the ABA subcommittee which drafted the proposed evidentiary reforms for the grand jury. In 1979, Arenella drafted a provision to supercede § 3.6(a) and in 1980 the Grand Jury Committee approved his draft. The proposal stated: "[T]he prosecutor should not present the grand jury with hearsay evidence which would not be admissible at trial absent some compelling justification for its use." *Id.* at 580 app. Arenella provided three illustrations of "compelling justifications," which merely codified the commentary of § 3.6(a). *Id.* at 580-81 app.

The Arenella proposal encompassed one important addition to the 1971 ABA draft: a provision for judicial review. *Id.* at 581-82 app. Nevertheless, Arenella's provision is extremely narrow. The defendant must voice his objection to the indictment within 30 days of entering his plea. Not only must the defendant prove that inadmissible evidence was presented, but also he must show "strong grounds . . . that the grand jury would not have indicted [him] . . . had the inadmissible evidence not been entered." Furthermore, the indictment is not reviewable after a defendant's conviction. *Id.* See generally Keeny & Walsh, *The American Bar Association's Grand Jury Principles: A Critique From a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 559-62 (1978) (critique favoring ABA principles).

105. See 1978 Senate Hearings, *supra* note 3, at 147 (statement of Richard Gerstein, Chairman, ABA Criminal Justice Section). Mr. Gerstein asserts that the subjective standard is a "deliberate" reaction to "concerns expressed by the Justice Department and other prosecutors as to the workability" of a limitation on evidence at the grand jury. *But see id.* at 105-06 (statement by Justice Department). The Justice Department believes that any imposition of evidentiary rules would only cause extensive litigation.

106. See Holderman, *supra* note 57, at 4 (ABA standard is "benchmark" for prosecutors).

107. See 1978 Senate Hearings, *supra* note 3, at 162 (statement of Professor Melvin Lewis, John Marshall Law School); Arenella, *supra* note 3, at 580 app..

expressly for judicial review of the prosecutor's decision.¹⁰⁸

The ABA's present position on the use of inadmissible evidence at the grand jury is uncertain. In 1981, a minority of ABA delegates voiced strong opposition to the inclusion of such a provision in the grand jury reform proposal. Consequently, the Governing Council of the Criminal Justice Section of the ABA deleted the provision. In January 1982 the ABA House of Delegates unanimously approved the abridged grand jury proposal without questioning the deletion.¹⁰⁹

VI. ACTION BY CONGRESSIONAL SUBCOMMITTEES

Subcommittees of both houses of Congress¹¹⁰ have discussed reforms that would restrict the use of hearsay at the grand jury. During the Ninety-fourth Congress, for example, the House of Representatives Subcommittee on Immigration, Citizenship & International Law¹¹¹ considered two identical bills requiring the grand jury to indict only on the basis of competent and admissible evidence.¹¹² These bills, however, limited the court's power to dismiss indictments based on incompetent or inadmissible evidence only to those situations in which, absent the incompetent or inadmissible evidence, the grand jury did not receive sufficient evidence to warrant the indictment.¹¹³

Similarly, during the Nineth-Fifth Congress, the same subcommittee considered two distinct proposals to impose increased responsibility on the impanelling judge.¹¹⁴ The first required that the judges give the grand jury "adequate and reasonable notice" of the requirement that indictments be based on legally sufficient evidence.¹¹⁵ The second bill was comparable to the first but required, additionally, that the judge give such notice in writing and that he believe that the grand jury rea-

108. The provisions in the ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1, 7-4, 7-13 (1980), which require attorneys to act in good faith, arguably provide sufficient supervision.

109. See Vilkin, *ABA Passes Amended Model Grand Jury Law*, Nat'l L. J., February 15, 1982, at 3, col. 1.

110. See *infra* notes 111-19 and accompanying text. These proposals, however, have never moved beyond the subcommittee stage. In the 97th Congress two grand jury reform bills were considered, S.988 and H.R. 4272. Neither proposed to restrict the use of hearsay evidence.

111. This is a subcommittee of the House Committee on the Judiciary.

112. See H.R. 11660 and H.R. 6006, 94th Cong., 2d Sess. (1976), *reprinted in 1976 House Hearings, supra* note 31, at 564, 584.

113. *Id.*

114. See *infra* notes 115-17 and accompanying text.

115. See H.R. 2620, 95th Cong., 1st Sess. (1977), *reprinted in Grand Jury Reform, supra* note 30, at 1020, 1025-26.

sonably understood the notice.¹¹⁶ Both bills provided for dismissal of the indictment, either pretrial or postconviction, if the impanelling judge failed to give the requisite notice to the grand jury.¹¹⁷

In the Senate proposal, however, the prosecutor could present hearsay evidence, and the grand jury could base an indictment on such evidence, if the prosecutor demonstrated good cause to the impanelling judge to do so.¹¹⁸ The Senate bill limited dismissal of indictments to cases in which the permissible evidence, without consideration of prohibited hearsay, failed to establish probable cause. Thus, the Senate proposal would regard any violations of the evidentiary restrictions as harmless if the minimum standard of probable cause was met.¹¹⁹

VII. ANALYSIS

The grand jury is, in theory, an independent reviewer of evidence which protects citizens against unfounded charges by serving as a check on the prosecutor's decision to press charges.¹²⁰ *Costello*¹²¹ and its progeny,¹²² however, have severely restricted the grand jury's ability to perform this valuable check. By allowing the prosecutor to present hearsay testimony, these decisions give the prosecutor an opportunity to distort the strength of the state's case.¹²³

Although some federal courts have attempted to circumvent *Costello*'s ban on reviewing the quality of the evidence presented to the grand jury by invoking the prosecutorial misconduct doctrine,¹²⁴ these courts constitute the exception rather than the rule.¹²⁵ On the whole, the federal courts have indicated that they are either unwilling or un-

116. See H.R. 3726, 95th Cong., 1st Sess. (1977), reprinted in *Grand Jury Reform*, *supra* note 30, at 1079-80.

117. *Id.* at 1081; H.R. 2620, 95th Cong., 1st Sess. (1977), reprinted in *Grand Jury Reform*, *supra* note 30, at 1027.

118. See S.3405, 95th Cong., 2d Sess. (1978), reprinted in *1978 Senate Hearings*, *supra* note 3, at 24-25 app.

119. *Id.*

120. See *1976 House Hearings*, *supra* note 31, at 379; L. CLARK, *supra* note 30, at 108-11; M. FRANKEL, *supra* note 30, at 117-21; *supra* note 40.

121. *Costello v. United States*, 350 U.S. 359 (1956). See *supra* notes 42-49 and accompanying text.

122. See *supra* note 54.

123. See *supra* notes 10-12 and accompanying text.

124. See *supra* notes 55-69 and accompanying text.

125. See *supra* notes 70-84 and accompanying text.

able to correct the problems precipitated by *Costello*.¹²⁶ In addition, judicial interpretations of state statutes as advisory instead of mandatory have blunted legislative efforts to circumvent *Costello*.¹²⁷

Thus, federal legislative action provides the only effective method of curtailing the impact of *Costello*.¹²⁸ State legislative action has demonstrated that a legislative solution must be thorough and precise in order to avoid judicial interpretation diminishing its effect.¹²⁹ This requires not only that the legislature impose specific obligations on the grand jurors, the impanelling judge, the prosecutor, and the reviewing court, but also that it impose strict penalties for violations.

The legislature should compel the grand jurors to disregard hearsay evidence in making their indictment decisions.¹³⁰ As lay persons, the grand jurors can perform this task only if the impanelling judge instructs them not to consider hearsay evidence.¹³¹ The impanelling judge should administer the instruction after the grand jury is sworn in

126. *Id.*

127. See *supra* notes 85-103 and accompanying text.

128. An alternative to a legislative solution is a judicial resolution of the problem. In *Hawkins v. Superior Court*, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978), defendant argued that his prosecution by grand jury indictment rather than by preliminary hearing denied him equal protection of the law guaranteed by article 1, section 7 of the California Constitution. This argument stemmed from the lesser procedural rights guaranteed to a defendant during the indictment procedure. The California Supreme Court agreed with defendant and resolved that defendant was entitled to a postindictment preliminary hearing to rectify the disparate procedural rights.

The California approach has been considered and rejected by one federal court. *United States v. Shober*, 489 F. Supp. 393 (E.D. Pa. 1979). In *Shober*, the district court distinguished *Hawkins* because it was a state case. Whereas California law permits the prosecutor to choose to proceed either by grand jury or by preliminary hearing, the federal constitution mandates that felony prosecutions proceed by way of the grand jury. In the federal system, a defendant is entitled to a preliminary examination no later than 10 days from his initial appearance if he is in custody and 20 days if he is not in custody. See FED. R. CRIM. P. 5(c). If the defendant is indicted prior to the date of the preliminary examination, however, the right to the preliminary examination is automatically waived. *Id.* at 5.1(a). For the sake of efficiency, jurisdictions customarily indict prior to the date of the preliminary hearing. In *Shober*, the court refused to elevate the incidental procedural benefits provided during the preliminary hearing to the status of constitutional safeguards. Therefore, the court held the equal protection argument advanced in *Hawkins* inapplicable to the federal grand jury system. Nevertheless, Senator Eilberg advocated the California solution that provides for a postindictment preliminary hearing. See 1978 Senate Hearings, *supra* note 3, at 9.

129. See *supra* notes 90-103 and accompanying text.

130. See H.R. 11660, reprinted in 1976 House Hearings, *supra* note 31, at 564; H.R. 6006, reprinted in 1976 House Hearings, *supra* note 31, at 584.

131. See 1978 Senate Hearings, *supra* note 3, at 1633 app.; M. FRANKEL, *supra* note 30, at 121-22; Note, *supra* note 4, at 727-29. The grand jurors, however, may consider hearsay evidence if the impanelling judge has decided that such evidence is an exception to the hearsay prohibition. See *infra* note 136.

but before any evidence is presented. In addition, the judge should provide the grand jurors with a written copy of his oral instructions.¹³² The judge should not allow the grand jury to hear evidence until he believes that every grand juror comprehends the hearsay instructions.¹³³

Moreover, the legislature should prohibit the prosecutor from presenting evidence which he knows or should know is hearsay.¹³⁴ If the prosecutor believes that he must present hearsay evidence, he should petition the impanelling judge prior to introducing such evidence to the grand jury.¹³⁵ His petition should demonstrate that an overwhelming necessity compels the use of hearsay evidence in this particular situation.¹³⁶ The impanelling judge should use his discretion to determine what constitutes an "overwhelming necessity."¹³⁷ Considerations of expense alone, however, should never satisfy the statutory mandate.¹³⁸ On appeal, the reviewing judge should uphold the decision of the impanelling judge unless the court finds that it was clearly

132. It is particularly important that the grand jurors receive a written copy of the instructions. A grand juror cannot reasonably be expected to remember the judge's instruction over the course of the grand jury proceedings. Therefore, a written copy will permit a grand juror to refresh his recollection of the instructions during the proceedings.

Equally important is the initial oral explanation, which will circumvent the possibility that grand jurors will not read or understand the written instructions.

133. See *1978 Senate Hearings, supra* note 3, at 1569 app. (statement of Doris Peterson, Center for Constitutional Rights).

134. See *1978 Senate Hearings, supra* note 3, at 1092-93, 1096 app.; L. CLARK, *supra* note 30, at 111-12; Arenella, *supra* note 3, at 580 app. . But see AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 104, at § 3.6(a) (subjective standard).

A report by the New York State Assembly, however, shows that a New York practice that prohibits the prosecutor from introducing hearsay evidence has proved ineffective. In a study of 100 cases in which the prosecutor violated the prohibition, not one court imposed sanctions. See *1978 Senate Hearings, supra* note 3, at 1165 app.

135. It is important that the prosecutor not introduce the evidence until the judge has granted him permission to do so. Although improperly introduced evidence may technically be retracted, an impression has already been implanted in the minds of the grand jurors.

136. For examples of situations that could potentially qualify as exceptions, see AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 104, at 89 (voluminous records, severely injured victim, safety of witness); Arenella, *supra* note 2, at 580-81 (ABA exceptions, plus: reports by professionals, witnesses attesting to minor facts).

137. See *1978 Senate Hearings, supra* note 3, at 5; L. CLARK, *supra* note 30, at 141-42.

138. See *State v. Gieffels*, 554 P.2d 460, 465 (Alaska 1976) (discussed *supra* note 103). *Contra 1978 Senate Hearings, supra* note 3, at 1097 app. (statement of New Jersey Attorney General). For example, presenting live testimony will always be more costly than reading a written statement. If cost is permitted to be a factor to be considered in allowing the use of hearsay, then prosecutors will routinely circumvent the prohibition.

erroneous.¹³⁹

The legislature also should provide that if the impanelling judge determines that the evidence may be presented, then the prosecutor must advise the grand jury of the evidence's hearsay quality before he introduces it.¹⁴⁰ After the prosecutor presents the hearsay evidence, any grand juror may request that the prosecutor present the original declarant.¹⁴¹ The prosecutor must either comply with the grand juror's request or retract the evidence. In retracting the evidence, the prosecutor must notify the impanelling judge in writing and explain his failure to comply.¹⁴²

Finally, the legislature should allow the reviewing court to dismiss the indictment¹⁴³ if, on a pretrial motion, the court finds that any one of the actors failed to comply with any of the above provisions. The dismissal should be without prejudice¹⁴⁴ and should be independent of the quality or quantity of the other evidence considered.¹⁴⁵

If a defendant was either convicted at trial or if he pleaded guilty or nolo contendere, the statute should no longer permit him to challenge the indictment. The rationale for imposing more stringent controls on the grand jury's screening function is to protect an innocent person from being unnecessarily stigmatized by an indictment founded on weak evidence.¹⁴⁶ This rationale, however, ceases to exist once the defendant is found guilty.

139. In order to avoid collateral attacks on the indictment because of the "overwhelming necessity" exception, the impanelling judge's decision should be conclusively presumed correct so long as any evidence that was before him supported his conclusion.

140. Because grand jury proceedings often extend over a considerable period of time, a warning at the outset of the proceeding might be forgotten by the grand jurors. To enable the grand jurors to competently distinguish between hearsay and other evidence, the prosecutor must reinforce the hearsay quality of the evidence each time he presents it.

141. See *1978 Senate Hearings*, *supra* note 3, at 1097 app.; Arenella, *supra* note 3, at 581 app..

142. Notice of conflict should be on the record for the reviewing court.

143. See *1978 Senate Hearings*, *supra* note 3, at 1635-36 app.; M. FRANKEL, *supra* note 30, at 122.

144. A defendant whose conviction or indictment has been reversed should be subject to re-indictment. If an indictment is dismissed because one of the judicial actors violated his statutory duty, the defendant should not receive a windfall by being absolved from prosecution. See *Hill v. Texas*, 316 U.S. 400, 406 (1942).

145. See *1978 Senate Hearings*, *supra* note 3, at 1202 app. (report by New York State Assembly). *Contra 1978 Senate Hearings*, *supra* note 3, at 1097-98 app.; H.R. 11660, reprinted in *1976 House Hearings*, *supra* note 31, at 564; H.R. 6006, reprinted in *1976 House Hearings*, *supra* note 31, at 584; *Contra Arenella*, *supra* note 3, at 582 app..

146. See *supra* note 40.

CONCLUSION

Courts' expansive reading of *Costello* produces inequitable results.¹⁴⁷ Courts¹⁴⁸ and state legislatures¹⁴⁹ have attempted unsuccessfully to curtail *Costello*'s effect. Several prominent national forums have also recognized the need for reform.¹⁵⁰ Congress, however, must curtail the unfair results generated by the *Costello* decision. Congress must rectify the problem by imposing mandatory duties on the grand jurors, the impanelling judge, the prosecutor, and the reviewing court.

Beverly A. Patterson

147. *See supra* notes 8-15 and accompanying text.

148. *See supra* notes 55-84 and accompanying text.

149. *See supra* notes 85-103 and accompanying text.

150. *See supra* notes 104-19 and accompanying text.