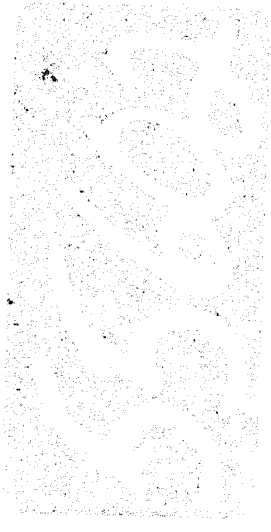
NEW JERSEY
GRAND JURY MANUAL



NEW JERSEY

GRAND JURY MANUAL FOR PROSECUTORS: CRIMINAL JUSTICE STANDARDS

Prepared by:
Office of the Attorney General,
Division of Criminal Justice
and the
County Prosecutors Association of New Jersey

May 7, 1977

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PREFACE

In recent years, the grand jury system has been the source of much concern and criticism. Public scrutiny has focused upon the ability of the grand jury to prevent unwarranted prosecutions. It has been charged that the grand jury is merely the rubber stamp of the prosecutor who allegedly is able to mold the results of its inquiries.

The charge that prosecutors abuse their powers in grand jury proceedings is unsubstantiated in this State. In point of fact, instances of prosecutorial misconduct are rare in New Jersey. Nevertheless, we believe that a comprehensive compilation of grand jury procedures presently utilized throughout the State will benefit law enforcement officers and ensure public confidence in our criminal justice system.

Toward this end, the Attorney General of New Jersey and the County Prosecutors Association commissioned a task force consisting of county prosecutors and members of the Division of Criminal Justice to prepare a Grand Jury Manual for the use of State and local law enforcement agencies. We emphasize that our efforts were designed to select the best procedures presently in force as opposed to merely weeding out the worst.

The Manual, in its completed form, extensively sets forth recommended practices for prosecuting attorneys in presenting cases to grand juries. It

provides for uniformity of prosecutorial conduct in every grand jury in New Jersey. It also constitutes a valuable orientation document for use of newly appointed Deputy Attorneys General and Assistant Prosecutors.

As noted, the Manual, the first of its kind, codifies the best practices presently utilized by State and local prosecutors in presenting matters to grand juries. Specifically, the Manual addresses such important areas as grand jury orientation, the role of the prosecutor in grand jury proceedings, the rights and duties of witnesses appearing before the grand jury, standards for determing whether immunity should be employed as an investigative tool, guidelines for dissemination of information to the media, preparation of cases prior to presentation to the grand jury and post-indictment procedures. The textual portion of the Manual has been supplemented with an extensive appendix consisting of model forms for use during the investigative phase of the grand jury function. The Manual was completed only after numerous meetings of the task force. Research for the Manual encompassed a survey of practices utilized by federal and local prosecutors throughout the country. This research conclusively revealed that the prosecutors of New Jersey have been more solicitous of the rights of defendants and witnesses in grand jury proceedings than any other jurisdiction in the country. The

the State and Federal Constitutions. Therefore, use of the procedures set forth in the Manual will enhance the ability of grand juries to protect citizens against unwarranted prosecutions and to ferret out criminal conduct in New Jersey.

The Manual was prepared under the direction of Deputy Attorney General Alfred J. Luciani, Special Assistant to Robert J. Del Tufo, Director, Division of Criminal Justice. Assisting in the preparation were Deputy Attorneys General David S. Baime and John DeCicco, as well as Monmouth County Prosecutor James M. Coleman, Jr.; First Assistant Prosecutors Neil S. Cooper from Hunterdon County, Joseph A. Falcone from Passaic County and Everett Denning from Ocean County; Assistant Prosecutors Joyce E. Munkacsi from Middlesex County; Michael A. Noto, Steven E. Rosenfeld, and Peter N. Gilbreth from Essex County; Philip J. Maiorca from Somerset County; John E. Adams, Jr. from Mercer County; Jeffrey S. Blitz and Peter Bruso from Atlantic County; James A. Waldron from Cape May County; Peter McCord from Union County, and Paul E. Latterman from Burlington County. Final editing and publishing of this work was the responsibility of Deputy Attorney General Clinton E. Cronin, Chief, Prosecutors Supervisory Section, Division of Criminal Justice.

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Dated: May 7, 1977

GRAND JURY ORIENTATION

The responsibility for indoctrinating a newly constituted grand jury, the members of which have little or no knowledge or understanding of how they are supposed to function, rests with the Prosecutor.

Accordingly, on the day the grand jurors are sworn in, they should be addressed by the Prosecutor who will be presenting most of the cases to them. At this time, the jurors should be given a brief outline of the criminal justice system. They should be informed that, in most cases, the first step in a criminal prosecution is the filing of a complaint in a municipal court in which a defendant is charged with the commission of a specific crime. The complaint is usually signed by either the alleged victim or a police officer. The succeeding steps after the filing of a complaint should be detailed, tracing a case through the municipal court, the Prosecutor's office, the grand jury and the trial court.

It should be explained how cases will be submitted to them, how they will receive testimony, deliberate and act. They should be advised that, in presenting a case, it is not the practice, nor is it necessary for the Prosecutor to bring before them all the available witnesses, provided the testimony of those witnesses who are produced provides sufficient legal evidence to establish a prima facie case upon

which an indictment may be based, i.e., evidence which if unexplained or uncontradicted, would carry the case to a trial jury and justify the conviction of the accused. However, it should be emphasized that the grand jury, as an independent body, has the right to request that additional witnesses or other evidence be produced before them.

It would be advisable to suggest to them that, if a juror has personal knowledge of the facts of a case or is acquainted with a complaining witness, victim or defendant, that fact should be called to the attention of the Foreman. The juror should consider disqualifying himself or herself from deliberating and voting in the matter.

Cases to be presented to a grand jury for its first two or three sessions should be screened so as to exclude matters involving major crimes or cases of a complex nature.

The terms "Indictment," "No Bill" and "No Bill-Remand" should be defined for them, and the legal and practical significance of each clarified.

The respective duties of the Foreman, Deputy Foreman and Clerk of the Grand Jury should be outlined, particularly those duties referred to in Rule 3:6. Thus, it should be stated that the Foreman, and in his or her absence the Deputy Foreman, presides over the daily sessions, administers the oaths, moderates discussions, and endorses all indictments and presentments. It should also be stated that it is

the duty of the Clerk of the Grand Jury to make and keep the minutes of the proceedings as well as to record the vote of each juror, by name, on each considered matter.

They should be advised that, in accordance with R. 3:6-6(a), the Prosecuting Attorney, the Clerk of the Grand Jury, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. No person other than the jurors, the Clerk and the Prosecuting Attorney may be present while the grand jury is deliberating. The grand jury, however, may request either the Prosecuting Attorney or the Clerk, or both to leave the jury room during its deliberations.

Finally, the role of the Prosecutor in relation to the grand jury should be set forth. The grand jury should be informed that it is the responsibility of the Prosecutor presenting a case to examine witnesses and to introduce other evidence. Further, the Prosecutor is to advise members of the grand jury as to the admissibility of evidence and the propriety of specific questions which they may wish to ask witnesses. Often grand jurors are tempted, particularly in marginal cases, to ask experienced police officers what their opinion is with respect to the guilt or innocence of a putative defendant. Grand jurors should be instructed not to ask "opinion"

questions with respect to laymen witnesses. Finally, the Prosecutor should note that, when necessary, it is incumbent upon him to explain and relate the testimony with reference to applicable statutes and legal principles.

THE ROLE OF THE PROSECUTOR

A prosecutor's duty before the grand jury is to present the evidence and explain the law, thereby assisting the grand jury in accomplishing its purpose which, simply stated is:

1) to ensure that persons will be brought to trial only if a reasonable basis for the charge exists; and

2) to ensure that those brought to trial will be adequately informed of the charges against them.

In a typical situation, a complaint which has been forwarded to the grand jury (realistically the Prosecutor's Office) after the probable cause hearing should be initially reviewed by an assistant prosecutor to determine if additional investigation is necessary or whether, in the particular case, administrative action or some other alternative to prosecution is appropriate. After having thoroughly reviewed the entire file and determining that the matter should be presented to the grand jury, the assistant proecutor must decide which witnesses are to be called before the grand jury. The witnesses will testify to matters the assistant prosecutor thinks necessary for a proper understanding of the charge made and also will present sufficent evidence to sustain the charge. As a paractical matter, the number of witnesses is controlled in part by the time available and the number of cases that must be heard

by the grand jury on a given day. This is not to say that a particularly complex case should be inadequately presented because of the lack of time. Time must be made to accommodate those cases where extended testimony is necessary in order to give the grand jury a full understanding of the charge and the defendant's involvement or lack of it in the crime. A survey of New Jersey prosecutors indicates that almost without exception, Prosecutor's Offices in this State are committed to placing experienced and capable lawyers in charge of the grand jury. This experience is put to good use in deciding the quantity of testimony that is necessary for the grand jury's knowing evaluation of a case, the context of the examination of witnesses and the charges ultimately included in the indictment. Of course, it is within the sphere of the authority of the grand jury to call for additional witnesses that they may wish to hear in a particular case. Toward that end, the prosecutor should remind them of that prerogative. The prosecutor may also make the determination that the potential defendant or target should, at least, be offered the opportunity to testify in his own behalf. This situation may arise in a number of circumstances, among them being the neighbor-type dispute, domestic or inter-family quarrel, or those instances where there is a suspicion that the complainant possibly has improper motives for signing the complaint. The target himself may initiate a request to be heard by

the grand jury; the prosecutor may grant such a request if the ends of justice require it, or to assure a full presentation of the matter to the grand jury. Whether the defendant chooses to testify or not, the prosecutor presenting the case may have, or receive from the target, evidence that would tend to exculpate the target. It is axiomatic that if reliable, exculpatory evidence exists, the prosecution is not likely to sustain its burden of proof before a petit jury, and therefore submission of such evidence to the grand jury would be warranted. However, care must be taken not to present a "trial" of the issue before the grand jury, and certainly not to create an adversary hearing of any variety. It is therefore recommended that, in the ordinary case, evidence offered by the defense (other than through the testimony of the target of the investigation) be submitted to the grand jury only when there is a clear indication that the target would be exonerated thereby.

In presenting the typical criminal complaint to a grand jury, it is necessary at the outset that the prosecutor say a few words about the complaint. He should set the scene for the grand jurors by spelling out the charge or charges including the elements where it would assist the jurors in considering the facts and the witnesses to be called. In more complex cases, a brief explanation of the testimony that is anticipated may be of assistance. While in no way

expressing an opinion nor urging a point of view, a prosecutor should prepare the grand jurors with the factual background necessary for what they are about to hear thereby making the testimony meaningful. In examining the witnesses before the grand jury, it is imperative that questions be concisely and simply stated to elicit answers that are relevant and clearly within the understanding of the grand jurors. It would be well to remember that grand jurors have varied educational backgrounds, comprise many occupational levels, and range in age from 18 to 70. They bring to their duties their life experiences, also their pre-conceived ideas of the criminal justice system, often gleaned from television and other public media. Also it should be kept in mind that while the prosecutor examining the witness has had the benefit of reading all the reports in the case, perhaps more than once, the grand jurors are hearing the testimony for the first time and performing the difficult task of placing the testimony that they are hearing into the overall framework of the case. It is in this area that the experienced prosecutor can, while maintaining an objective stance, be of immeasurable assistance to the grand jury in fulfilling its function. Witnesses' examination should be brief, with concentration on the elements that must be shown to establish a prima facie case. Leading questions are often necessary, and entirely proper to assure that the witness keeps to relevant issues, and to handle expeditiously matters

presented to the grand jury.

Occasionally, it will be necessary to "cross-examine" a witness. Normally, such an approach is necessary (1) when there is an obvious inconsistency between the witness's testimony before the grand jury and his prior statements;(2) when the witness's story is "unlikely"; (3) when there is a conflict in testimony between witnesses; (4) when the witness appears evasive or hostile; or (5) when there appears to be a strong probability that the witness is not being truthful. It is the prosecutor's duty to elicit the truth from the witnesses appearing before the grand jury; probing examination is therefore essential when it is suspected that a witness is being less than honest or forthright.

After the prosecutor has concluded his examination of the witness, the grand jurors should be questioned to determine if they have any questions to put to the witness. From our survey of Prosecutor's Offices throughout the State, there appear to be two methods of dealing with grand jurors' questions. Both methods are acceptable. As a matter of practice the prosecutor should consider the merits of both and make his decision accordingly. The first method is to permit the grand jury to ask questions directly of the witness. Utilizing this procedure requires that the prosecutor be on his guard to cut off an improper question, i.e. "Have you ever arrested this man before, Officer"; "does the defendant have a prior

record?" In short, there is no prior determination by counsel as to propriety and relevance. If an improper question is asked and answered before the assistant prosecutor can interrupt, the only thing to be done is to instruct the grand jury on the record to disregard the answer and not to consider it in their deliberation.

The second method requires that the witness leave the jury room,and have the prosecutor and other grand jurors screen the questions before being asked of the witness to avoid improper query, and more importantly, improper responses. Aside from the obvious improper question which could place inadmissible or unnecessary information before the grand jury, direct questioning by the grand jury is a problem for several other reasons: (1) There is always the possibility that irrelevant or improper inquiries could harm an investigation or prosecution; (2) The time consumed by irrelevant and repetitious questions could interfere with the work of the grand jury. It is the responsibility of the prosecutor to help the jury discipline itself to limit questioning of witnesses to pertinent matters.

After all the witnesses have been examined and have left the grand jury room, the assistant prosecutor may fairly and impartially summarize the evidence and explain the testimony with reference to the law of the case. For instance, if the charge is armed robbery and there has been testimony that the

weapon employed was a toy gun, it is absolutely necessary that the grand jurors be given a brief and simple explanation that the law permits a charge of armed robbery even though the gun was not in fact operable, nor capable of inflicting injury. Similarly, it may be necessary to read the statute on robbery to put the testimony regarding the fear that the victim felt (or lack of it) in the proper perspective. Although over a period of months grand jurors gain some slight expertise in the law and a superficial knowledge of the applicable criminal statutes, they are still lay people who have little or no training in the law, or in how the law relates to the facts presented to them. It is the prosecutor's obligation to explain these matters to them with simplicity and clarity. In complex cases a draft indictment may be prepared beforehand and used as an aid in relating the testimony to each of the possible charges. Of course, the Assignment Judge is available to the Grand Jury for instruction independent of the prosecutor and the grand jury should be reminded of that from time to time. However, as a practical matter, it is generally not feasible to transport the grand jury to the court after they have heard evidence in each case. Therefore, it is incumbent upon the assistant prosecutor to gain the grand jury's collective confidence in his judgement, honesty, good faith and fairness. Adequate preparation by the prosecutor is an absolute necessity to achieving this

desired rapport.

The prosecutor's role before the grand jury is not easily defined. "[T]here is no impropriety in the prosecutor assisting in the invesitgation and examination of witnesses;in advising the grand jury as to the admissibility of evidence and the proper mode of procedure and in explaining the testimony with reference to the law of the case... "[H]e may not [however] participate in its deliberations, or express his views on questions of fact, or comment on the weight or sufficiency of the evidence, or in any way attempt to influence or direct the grand jury in its findings... [that is, toward the return of an indictment]."State v. Hart, 139 N.J. Super. 565, 567-568 (App. Div. 1976).

While the broad pronouncements quoted above appear to apply without variation, there are numerous situations in which additional information within the knowledge of the prosecutor should be brought to the attention fo the grand jury to assure that justice is done. The following is a partial list of those situations:

a. The prosecutor's reasonable doubt that the accused is in fact guilty;

b. The extent of harm caused by the offense;

c. The disproportion of the authorized punishment in relation to the particular offense or the offender;

d. Possible improper motives of a complainant;

e. The prolonged non-enforcement of a statute, with community acquiescence;

f. The reluctance of the victim to testify;

g. Cooperation of the accused in the apprehension or conviction of others;

h. Availability and likelihood of prosecution by another jurisdiction.

(Attorney General's Formal Opinion: F.O. No. 11-1976)

In short, a prosecutor may recommend a "no bill" in those instances where justice requires. In some cases, substantial justice will best be achieved by a remand of the matter to the Municipal Court; the prosecutor should be prepared to discuss the possible penalties and consequences of such a remand in the event of a "no bill". There is no doubt of the impropriety of a prosecutor who influences the grand jury to indict when there is a lack of evidence to support such indictment. State v. Hart, supra;* State v. Ferrante, 111 N.J. Super. 229, 304-306 (App. Div. 1970). However it is equally clear that, in the rare

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* "Contrary to the practice in some states, N.J. rules permit the prosecutor not only to be present before the grand jury to question witnesses, but also during deliberations to advise as to the law and its application to the facts in the case. R. 3:6-6(a). Although he should not attempt to influence or direct the grand jury in its findings, nevertheless he is not expected to limit his participation to an innocuous presentation. There is no legal bar to the use of vigorous and skillful questioning which will elicit and compel truthful responses from reluctant witnesses. See, e.g., United States v. Rintelen, 235 F. 787,791 (S.D.N.Y. 1916.); State v. Schamberg, - N.J. Super. - (App. Div. 1977).

case when a grand jury votes not to indict and the prosecutor is convinced that a real and obvious miscarriage of justice has thereby occurred, the prosecutor should not hesitate to seek to re-present the matter to another grand jury. In short, the prosecutor must be guided by the dictates of justice, with recognition of the deference given his position by the jurors and the influence his comments might have. Cf. State v. Farrell, 61 N.J. 99 (1972).

In Schamberg the court distinguished the Hart decision based upon the fact that the prosecutor did not make comment to induce the grand jury to indict, but rather used it as a means of urging the witness to tell the truth by confronting him with the possibility that his testimony as given was perjured.

GRAND JURY WITNESSES

The responsibilities of the prosecuting attorney to particular witnesses vary greatly depending upon the status of the witness subpoenaed to or appearing before a grand jury. In order to catalogue the duties of the prosecutor, it is necessary to distinguish between the different classes of witnesses likely to be encountered.

Non-target (non public employee)

A non-target witness is one who is not identified or reasonably identifiable by prosecutor as an object of the grand jury inquiry or investigation. The prosecutor's good faith determination as to the "status" of a particular witness will prevail, and the burden is on the witness to demonstrate that the inquiry was a "ruse" to induce the witness "to unwittingly give evidence against himself." State v. Cattaneo, 123 N.J. Super. 167, 172 (App. Div. 1973), certif. den. 63 N.J. 324 (1973). See also State v. Vinegra, 134 N.J. Super. 432 (App. Div. 1975), appeal pending.

It is not necessary to advise a non-target witness of his Fifth Amendment privilege against self-incrimination if he is called to testify before a grand jury conducting a "general investigation." "Where the inquiry is in fact a general investigation not aimed at the witness and the witness fails to

claim the privilege, his testimony can be used against him and can even be the basis of an indictment." State v. Fary, 19 N.J. 431 (1955). Thus, the witness need not be advised of his privilege when he is summoned to give testimony before a grand jury if there is only the mere possibility that he may later be indicted. State v. Fary, supra; United States v. Luxemberg, 374 F.2d 241 (6 Cir. 1967).

This general rule does not, however, preclude a witness from claiming his Fifth Amendment privilege against self-incrimination. This privilege extends to all witnesses, whether or not they are targets of the investigation. State v. DeCola, 33 N.J. 335 (1960). The privilege may not, however, be claimed prior to the oath being administered and a question being asked. Vineland v. Maretti, 93 (N.J.Eq. 513, 521 (Ch. 1922). Moreover, the witness must be prepared to demonstrate a factual basis to the court to justify his claim of privilege. If the question is answered by the witness without claim of privilege, he waives his Fifth Amendment rights. State v. Toscano, 13 N.J. 418, 423 (1953). In short, a non-target witness called before a grand jury need not be warned of his Fifth Amendment right against self-incrimination, and any testimony elicited from him may later be used against him.

A non-target witness may only refuse to answer a question which, in fact, will incriminate him. Rule 24 of the New Jersey Rules of Evidence defines

incrimination:

> Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime of this State or another state or the United States, or (b) the circumstances which with other circumstances would be a basis of a reasonable inference of the commission of such crime, or (c) is a clue to the discovery of a matter within clauses (a) or (b) above; provided, a matter will not be held to incriminate, if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution ...

Thus, a question is incriminating if the response reveals the commission of an element of a crime, furnishes new evidence that the witness committed a crime, or creates an inference that the witness has committed a crime. The right against self-incrimination extends not only to answers which within themselves would support a conviction under a criminal statute, but also to those answers which would furnish a link in the chain of evidence necessary to prosecute one under a criminal statute. Malloy v. Hogan, 378 U.S. 1 (1964).

When a non-target witness, claiming his Fifth Amendment privilege, refuses to answer a question, the prosecuting attorney may properly challenge whether the witness may validly claim this privilege. This determination must be made by the court, usually the assignment judge, before whom the witness can be brought. The assignment judge cannot accept merely the witness's statement that the requested answer will

tend to incriminate him. In re Boiardo, 34 N.J. 599 (1961). See also In the Matter of Carl "Pappy" Ippolito, 145 N.J. Super. 262 (App. Div. 1976). Rather the witness must support his invocation of the privilege by a statement indicating the nature or area of the criminal exposure which he fears. It is necessary for him to pinpoint the area to the extent necessary to support his claim of privilege to the satisfaction of the court. The witness must show sufficient facts to the assignment judge to indicate a legitimate basis for his fear of criminal prosecution. State v. DeCola, 33 N.J. 335 (1960); In re Boyd, 36 N.J. 285 (1962).[1] If, in making this disclosure, factual incriminating material is elicited, the witness is protected against the use of such evidence and its fruits. In re Boyd, supra. If a witness is a "target" he need show no more than that fact in order to support his Fifth Amendment claim. In re Addonizio, 53 N.J. 107 (1968).

The assignment judge is usually the final arbiter of the applicability of the Fifth Amendment privilege. He must determine whether the witness has a reasonable basis on which to "apprehend the peril." The danger must be real and appreciable, rather than of an imaginary and unsubstantial character, having

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[1] Federal courts have held that a spurious assertion of a claimed apprehension is punishable as perjury. Carlson v. United States, 209 F.2d 209, 214 (1 Cir. 1954).

reference to some extraordinary and barely possible contingency. In re Pillo, 11 N.J. 8 (1953). In making this determination, the court must consider all the facts and circumstances of the case.

> In determining whether a matter is incriminating ... and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors should be taken into consideration. Rules of Evidence 24.

In order for the court to find that a witness has no basis for an assertion of the Fifth Amendment privilege, it must be clear from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot have a tendency to incriminate. Malloy v. Hogan, supra. If the court determines that there is no basis for the claim it will order the witness to return to the grand jury and answer the questions put to him by the prosecutor. If, in a later proceeding, it is revealed that the privilege was improperly denied, the testimony elicited may not be used against the witness. State v. DeCola, supra. If the court finds that the witness has a basis for his claim of privilege, the witness does not have to answer the questions unless his testimony has been legally compelled, that is the witness has been immunized against the use or derivative use of his testimony in a subsequent criminal prosecution against him.

2 Generally such applications should be held in camera.

Target (non public employee) Witnesses

The latitude afforded the questioning of a "non-target" witness, as discussed above, does not apply to a witness who is the target of a grand jury's investigation. Even if the State makes the allegation that the proceedings are a general investigation, the "target" witness must be warned if the facts and circumstances show that in truth the witness is a target for indictment. State v. Vinegra, supra; State v. Cattaneo, supra; State v. Sibilia, 88 N.J. Super. 546 (Cty. Ct. 1965). A witness becomes a target of the investigation when he is called in order to obtain evidence to fix a criminal charge; he must then be given the appropriate warnings. State v. Sarcone, 96. N.J. Super. 501 (Law Div. 1967); State v. Fary, supra. It is not necessary for a witness to have had formal charges filed against him in order for him to be considered such a target. It is only necessary that an intent to indict him at the time of questioning is present. However, if a witness is subsequently indicted after he has testified before a grand jury, not having been given warnings, the burden is on the witness to show that "there was a ruse by which it was sought to induce him unwittingly to give evidence against himself." State v. Fary, supra; State v. Grundy, 136 N.J.L. 96, 98 (Sup Ct. 1947). Any doubt is resolved in favor of the validity of the indictment, that is, the indicted witness is treated as merely an ordinary witness who has waived the

privilege by not claiming it. State v. Fary, supra.

It should be noted, however, that the State's ability to call a "target" witness before a grand jury has been regulated to assure maximum protection to the individual. State v. Sarcone, supra. In Sarcone, a trial court held that the appearance of a "prospective defendant" before a grand jury, absent the warnings and a subsequent waiver, mandates a dismissal of a resulting indictment. But see State v. Vinegra, supra. It does, however, appear that a target witness may be called before the grand jury for the purpose of having him claim his privilege. Almost all of the federal circuit courts, as well as most of the state courts, hold that a prospective defendant may properly be subpoenaed to testify before a grand jury, placing the obligation upon the target, having been duly warned, to claim privilege. See 1 Crim.Jus.Quar. at 49. (1972). Although our Supreme Court has not conclusively ruled on the issue, it has inferentially upheld the holding in Sarcone [In re Addonizio, 53 N.J. 107 (1968)], and it is at present specifically considering the issue in State v. Vinegra.

It would appear that a target may be summoned before a grand jury, and after proper advisements may claim privilege or may elect to testify before the grand jury; in the latter situation, it is necessary to obtain a waiver of immunity from that witness after advising him that he is a target, has the right to remain silent and the right to advice of an attorney.

Again, it is noteworthy that a witness who has been subpoenaed to testify before a grand jury, who has not been given the appropriate warnings and who has not signed a waiver of immunity, he has the burden of proof in establishing that he was, in fact, a target when he testified. State v. Cattaneo, supra; State v. Grundy, supra. Nevertheless, in view of the present status of the law, it is recommended that procedures outlined below be followed when any witness is subpoenaed to appear before a grand jury when it is evident that the inquiry has centered upon him and it appears that the investigation will result in formal charges being lodged against him:

The "target" witness should be advised:

(1) that he is the "target" of the investigation;

(2) that the investigation pertains to [relate a specific description of the factual matters involved];

(3) that the target witness has the right to consult with an attorney;

(4) that the target witness has the right to refuse to answer any question on the grounds that it may tend to incriminate him personally; and

(5) that, should he answer any questions or make any statements, his responses or statements may be used against him in a court of law.

The "target" witness should respond to each inquiry separately, and finally be asked if he understands that to which he has been advised. See State v. Fary, supra; State v. Sarcone, supra.

A target (at least in those cases where no complaint has been lodged) should be advised as outlined above "on the record" but generally outside the presence of the grand jury. It is further recommended that these advisements be given in the presence of counsel (if the witness has an attorney) and that counsel's presence be noted on the record. Further, it is recommended that, whenever practicable, the target be questioned as to his understanding of the advisements on the record. In addition (or in the alternative when both procedures cannot be followed), a written waiver in the form appended should be executed by the target.

It is not recommended that "target warnings" be repeated in the presence of the grand jury, in as much as such a procedure might be considered a communication of the prosecutor's view of what the result of the grand jury investigation should be. Moreover, there appears no reason for such advisements to be repeated in the presence of the grand jury. In short, the target witness has been provided with the alternative courses of action open to him, and he must elect either to waive or claim the privilege against

self-incrimination.[3]

Upon a "target" witness claiming the Fifth Amendment privilege, the factual basis for the claim may not be sought by the prosecuting attorney.

Cross Complainant Witnesses:

In those situations in which potential grand jury witnesses are the subject of cross-complaints arising from the same factual transaction, such persons should be advised of the existence of the criminal complaint and provided, as a courtesy, advisements similar to those given a target. It is recommended that a witness who is the subject of a cross-complaint should be advised of his right to the advice of counsel, that he is the subject of a criminal complaint arising from the same factual transaction to which he is to testify, a description of the nature of the charges lodged against him, and that the witness therefore could incriminate himself by providing testimony to the grand jury. As in the case of target warnings, it is recommended that, whenever practicable, these warnings be given on the record, outside of the presence of the grand jury.

Cross-complaint situations are generally

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[3] This recommendation is in no way intended to preclude a prosecutor from reviewing the circumstances surrounding the appearance of the target witness to assure the grand jury that the target is voluntarily appearing with a full understanding of the circumstances of the investigation.

sensitive in nature, involving as they do claims of wrongdoing by both the "victim" and the "culprit." Unfortunately, neither the prosecuting attorney nor the grand jury can always identify the offender before all the facts are presented, and therefore all "witnesses" should be encouraged to testify. At the same time, given the fact that a criminal complaint has been lodged against the "witness," he should not generally be "compelled" to testify. This recommendation should be followed strictly in those situations involving a cross-complaint against a police officer. In short, in as much as the prosecuting attorney has the authority by virtue of N.J.S.A. 2A:81-17.2(a) (1), et seq. to compel the testimony of a public officer without court supervision, care should be taken that neither de facto nor statutory immunity results from the grand jury's inquiry.

Public employees (non-target)

Every public officer and employee[4] has the obligation to cooperate and to testify in any investigation pertaining to his public office or

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[4] The definition of "public employee" is of broad scope. "For the purposes of this act the term 'public employee' shall mean any person who occupies any office, position or employment in the government of the State of New Jersey, or the several counties and municipalities thereof, or any political subdivision of the State, or a school district, or any special district, or any authority, commission, board, or any branch or agency of the public service. This term shall include, but shall not be limited to, elected and appointed persons." N.J.S.A. 2A:81-17.2(a).

employment. However, this obligation cannot circumvent the Fifth Amendment protection against self-incrimination.

In the case of a non-target public employee, no warnings need be given prior to appearance before or questioning by a grand jury. If a non-target public employee declines, without claim of privilege, to appear or to testify, he is to be handled as any other witness, that is by contempt process pursuant to R. 1:10-1, et seq. Moreover, the public officer or employee is subject to removal from office for his failure, without justification, to cooperate in the investigation. N.J.S.A. 2A:81-17.2(a)(1) et seq.

In order to seek removal for failure to appear or failure to testify, it is necessary that the public employee be advised of the consequences of his decision. See Kugler v. Tiller, 127 N.J. Super. 468 (App.Div. 1974) and discussion infra. In those situations in which the public officer appears but declines to testify, he should be advised on the record of his obligation to testify and the consequences of his refusal. In those situations in which the public employee declines to appear after having been subpoenaed, he should be arrested on a bench warrant duly issued and apart from all other advisements upon his being presented to the court, he should be advised of the consequences of his refusal to appear. If the public employee immediately alters his position and appears to testify, removal

proceedings could be foregone. Cf. Hyland v. Smollok, 137 N.J. Super. 456 (App.Div. 1975).

In those situations in which a non-target public employee appears and claims the Fifth Amendment privilege, his public office does not alter his status vis-a-vis the prosecutor's right to challenge the basis for claiming privilege. See discussion on non-target witness, supra.

If the claim of privilege is upheld, the prosecutor must decide (as in the case of a target public employee) whether to "compel" the testimony of the public officer under threat of removal from office. If the prosecutor elects to "compel" the testimony of the public officer, the testimony given will be protected from use or derivative use against that officer in any subsequent criminal prosecution; in effect, the public officer will have been granted use plus fruits immunity.

If the public officer, "compelled" to testify pursuant to N.J.S.A. 2A:81-17.2(a)(1), et seq., persists in his refusal to testify, having been properly warned of the consequences of his refusal, he may be subject to removal from office. N.J.S.A. 2A:81-17.2(a)(3). If the public officer, while testifying admits the commission of a crime relating to his public position, he is likewise subject to removal. Id. (See appendix for applicable forms).

Public employee-target witness

The public employee-target witness situation presents the most complex situation, involving as it does the absolute right of a target to claim privilege and the conflicting obligation of the public officer to cooperate.

The public officer-target should be considered a target first, thereby being warned as described in the "target witness" section. If a waiver of immunity cannot be secured (and after following the procedures for immunity considerations outlined infra), the testimony of the public employee-target can be compelled pursuant to N.J.S.A. 2A:81-17.2(a)(1), et seq., provided the "target-public employee" witness has claimed the Fifth Amendment privilege. The result of such action, that is compelling the public officer to testify, eliminates him as a "target" of the investigation, and immunizes him against the use and derivative use of his testimony. N.J.S.A. 2A:81-17.2(a)(2). Since there is no court supervision, and since the prosecuting attorney need do no more than to ask questions to grant this "immunity," it is absolutely necessary that each prosecutor understand the nature of the statutory provision (N.J.S.A. 2A:81-17.2(a)(1), et seq.) and the consequences of his actions.

By recent amendment, the Public Employees Immunity Law reduced the risks of mistake. Now, in order for immunity to result, the public officer must

first claim the privilege against self-incrimination, thereby putting the prosecutor on notice that the provisions of the Act may come into play. If the prosecutor persists in asking questions after claim of privilege and responsive answers are given, use plus fruits immunity will result.

The key event in the public employee situation is the officer's claim of privilege. Upon that occurrence (assuming the privilege claim is valid), the prosecutor must elect to immunize the witness or to break off questioning. If the prosecuting attorney elects to continue the inquiry, he must advise the public officer as follows:

1. That he is a public officer or employee within the meaning of N.J.S.A. 2A:81-17.2(a) et seq.;
2. That pursuant to that Act, he has the duty to appear and to testify upon matters directly related to the conduct of his public position;
3. That if he fails to appear and to testify, he is subject to removal from office pursuant to that Act;
4. That if he does give testimony pursuant to this inquiry, neither that testimony nor anything derived from that testimony can be used against him in a subsequent criminal prosecution except for perjury or false swearing.

5. That if he declines to provide testimony, in addition to any action the court may take in the nature of contempt, he is subject to removal from office for his refusal to provide testimony pertaining to the conduct of his office; and;

6. That if he admits the commission of a misdemeanor or high misdemeanor relating to his public employment, office or position, he is subject to removal from office.

As in the case of target warnings, these advisements should be placed on the record (although there is no reason that this particular proceeding cannot occur in the grand jury). The public officer should be questioned as to his understanding of the advisements and his opportunity to consult with counsel as well. See generally Hyland v. Ranone, 141 N.J. Super. 48 (App.Div. 1976); Hyland v. Smollok, supra; Kugler v. Tiller, supra, and forms appended.

Refusal to Answer Non-Incriminatory Questions or to Respond After Testimony Has Been Compelled

After a witness has unsuccessfully claimed his privilege before the assignment judge he must, upon the urging of the grand jury, answer the questions or face a contempt charge. Likewise, a witness whose testimony has been legally compelled must respond to interrogation or be faced with contempt, assuming this course of action is sanctioned by the grand jury.[5]

There are two different ways that the matter of contempt can be approached. The court offended (usually the assignment judge) can bring summary contempt proceedings pursuant to Rule 1:10-2, or the offense can be treated as a common law crime punishable under N.J.S.A. 2A:85-1.

> A contempt, in the court's discretion, may be prosecuted summarily, i.e., without indictment and without trial by jury as provided in R.R. 4:87-1 to 4, or as a crime under N.J.S.A. 2A:85-1. In re Buehrer, 50 N.J. 501, 522 (1967).

If the matter is heard in a summary manner, as should be preferred, there is some question as to procedure to be utilized. The issue is whether the contempt is one considered to be in the presence of the court (R. 1:10-1) or whether the contempt action must be pressed by notice and order to show cause. See R. 1:10-2.

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[5] It is recommended that in all instances in which a contempt citation is to be sought, the grand jury should affirmatively commission the prosecutor to pursue that particular action against the witness.

The court in In re Schwartz, 133 N.J.L. 79, 84-85 (Sup. Ct 1945), determined that the grand jury is an arm of the court, that proceedings before it are to be considered as proceedings in court, and that contempts in the presence of the grand jury are to be treated as taking place in the presence of the court. This ruling was overruled by In re Schwartz, 134 N.J.S. 267 (E. & A. 1946), where the court, determining that there was no contempt in that there was no violation of a court order, determined that the contempt, the refusal to answer questions before the grand jury, if it existed, would have been for the disobeyance of a court order and would not have been contempt in the actual presence of the court.

Ignoring the decision of the Court of Errors and Appeals, the State Supreme Court in State v. Haines, 18 N.J. 557 (1955), addressing the issue of whether the grand jury is part of the court, quoted, attributing it to the Court of Errors and Appeals, the language in 133 N.J.L. that contempt in the presence of the grand jury is to be treated as taking place in the presence of the court. See also In re Caruba, 139 N.J.Eq. 404 (1947), aff'd 140 N.J.Eq. 563 (1947). Other cases have, however, cast the foregoing conclusions in doubt. For example, in Swanson v. Swanson, 8 N.J. 169 (1951), the court stated that where the contempt is in facie curiae but depends on proof from persons other than the judge himself, the proceedings for contempt should be by an order to show

cause. In In re Finkelstein, 112 N.J. Super. 534 (Ch.Div. 1970), while the court determined that contempt at a court ordered deposition might be contempt in facie curiae, but it held that where the proof of of the contempt would depend on those attending the deposition, an order to show cause procedure should be followed. See In re Tiene, 17 N.J. 170 (1954) (contempt proceeding for failure to obey court issued subpoena instituted by order to show cause).

The latter view is consistent with the apparent position of the federal courts. In Harris v. United States, 382 U.S. 162 (1965), the court held that prosecutions for contempt for refusing to answer questions before the grand jury were to be prosecutions upon notice and with an opporuntity to defend. Cf. U.S. v. Wilson, 421 U.S. 309 (1975). Thus it is recommended that, in those situations in which time is not of the essence, summary contempt be pressed by notice and order to show cause.[6]

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[6] 1. The judge whose order was allegedly breached may not hear the charge unless the witness consents.
2. The contempt process may be instituted only by the court lest a litigant turn it to private gain.
3. Defendant shall be informed plainly whether the proceeding is penal as distinguished from one civil in nature, that is punishment imposed until the party complies with the court's directive.
4. A penal charge may not be tried with a civil complaint unless consented to by the party.
5. A conviction is reviewable upon appeal both upon the law and the facts,
6. There is a presumption of innocence.
7. Charges must be proven beyond a reasonable doubt. In re Buehrer, supra; Rule 1:10.

In those situations having time pressures, it is suggested that the witness be brought before the court directly, that the witness be requested by the court to comply with its previous directive, and that the witness's intention be solicited by the court. In developing a record for contempt, it would be most desirable (in addition to the court reporter and the unresponsive answers of the witness being presented to the court) that the court actually conduct the same inquiry in its presence.

CONSIDERATION TO WITNESSES

The judgments which attend possible grants of immunity and other possible consideration to witnesses are often among the most sensitive and difficult a prosecutor is called upon to make. Great care must be exercised to ensure that rightfully culpable defendants do not escape prosecution and, quite frankly, that third parties are not unjustly accused by an actual or potential defendant who seeks personal exoneration at any cost.

On the other hand, immunity - as a matter of prosecutorial discretion as well as statutory mandate - is a concept of long standing in our jurisprudence and is an important concomitant to Fifth Amendment privileges in the context of the social interest in proper and thorough law enforcement efforts. In short, the concept of immunity provides to the prosecutor a mechanism to obtain evidence that otherwise would not be obtained:

> "The Fifth Amendment privilege is an exception to the longstanding principle that the public has a right to every man's evidence, a principle which is particularly applicable to grand jury proceedings... on occasion, however, immunity provisions have for a considerable period of time filled the need of achieving a further balance - some say implementing the balance - between the individual's right not to provide information incriminatory of himself and society's need for his information to pursue its criminal investigation of the criminal activity of others. The practice of immunity against the use of compelled

> incriminatory testimony has an unquestioned tradition in English legal history. Certain offenses, such as bribery, are of such a character that the only persons possessing helpful knowledge thereof are oftentimes those who themselves are implicated in the offense. If the investigation of crime is not frustrated in such circumstances, there must be a means of both securing the citizen's privilege against compulsory self-incrimination and obtaining the necessary information.[7]

Ideally, of course, our citizenry should be uniformly forthright and willing to come forward at all times with relevant information, a situation which would of course obviate the need to immunize. Practically speaking, such is obviously not the case. And, as stated above, the nature of many crimes, including the consensual conspiratorial character of criminal conduct in the official corruption and organized crime areas, requires the use of immunity as an investigative tool to identify factually the criminal event and to reach the key participants:

> "One might wish that our society were so structured that the investigation of crime could rely solely upon the wholly voluntary cooperation of citizens. But it is not and has never been. If the grand jury is to perform its historic function of investigating crime and returning only well founded indictments, it must have available to it compulsory process and the testimony

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[7] Statement of former U.S. Attorney General Edward H. Levi before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, and International Law, on Grand Jury Reform, June 10, 1976.

> of witnesses who sometimes are themselves involved in the matters under inquiry. Increasing the rights of witnesses to refuse to comply with a grand jury inquiry, whatever the merits of the suggestion, would seriously hamper the grand jury in its investigative efforts."[8]

Likewise, apart from statutory immunity, other forms of favorable consideration to a witness may also be required in the context of a grand jury inquiry. The sensitivity of all such decisions, as well as their effect on any potential, prosecution is apparent.For that reason, standards governing the procedure to be followed and the criteria utilized in reaching these decisions are required.

Procedure

Appended is a memorandum which, once adapted to a particular prosecutor's office, shall be utilized in situations involving immunity or other sustantial concessions to a witness in a grand jury context.

I.

With respect to immunity or other substantial concession to a witness, the obtaining of all approvals shown on the face of the memorandum, including the prosecutor or his designee, constitutes

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[8] Statement of former U.S. Attorney General Edward H. Levy before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, and International Law, on Grand Jury Reform, June 10, 1976

a prerequisite to the grant of use plus fruits immunity (both in informal and in the formal statutory situations), de facto transactional immunity, civil considerations or other substantial concessions to a witness for testimony in a grand jury or investigative contest. In addition, the procedure shall be pursued prior to seeking the testimony of a public official pursuant to N.J.S.A. 2A:81-17.2(a), et seq., and thus possibly invoking the statutory immunity there conferred. Attached to the memorandum, as noted upon its face, should be a supplemental memorandum giving a brief background of the case listing the names of known and potential defendants and discussing the factors referred to in the section of this Manual dealing with the criteria to be utilized in weighing a decision to grant concessions to a witness.

II.

With respect to an investigative or field attorney's interview of witnesses without prejudice, an informal understanding with the witness that an interview will be conditioned on an agreement by the prosecutor that nothing the witness says or leads therefore shall be used against him may be made after obtaining oral approval from their immediate superior. No such agreement should be made by investigators or detectives without the approval of the appropriate assistant prosecutor. Such agreements which shall be as clear and precise as possible in their terms,

shall be promptly reduced to writing in the form of a memorandum from the attorney to the section or bureau chief, and a copy of the memorandum shall be included in the case file. Further, such agreements will always be entered into with extreme caution, and within the prosecutor's discretion, only in situations where it appears to the attorney, from the information available to him, that the witness has valuable information which cannot be obtained from other sources, and where the object of the interview is to obtain facts concerning potential defendants other than the witness himself. In cases of extreme sensitivity or significance, before entering such agreements, the section or bureau chief shall obtain written approval from the prosecutor or his designee in the manner outlined above for other concessions to witnesses.

Criteria for Granting Consideration to a Witness

Granting leniency to an individual in return for his cooperation is a most delicate and complicated matter. The objectives and interests of thorough and diligent law enforcement must always be considered in the contest of dealing fairly and justly with actual or potential defendants.

Although the circumstances of each situation differ widely, it is, has been and should be the general policy of the State's prosecutors to give up the least possible consideration in obtaining the

cooperation of witnesses. If a witness will testify truthfully with no immunity at all, he should receive none. The question we must always answer is how much, if anything, are we giving up when we immunize such a potential witness and how does it balance against what we can anticipate obtaining in return from the witness Also to be considered is the effect of any considertion upon the individual as a witness before a jury. Ultimately, a "bargain" should be struck only after all of its implications have been fully assessed.

To understand how immunity can be used in a limited fashion in order to develop an investigation to a point where final judments can be made, it is necessary to discuss the nature of the following forms of agreement between prosecutor and witness: (1) an informal understanding that an interview will be conditioned on an aaggreement by the prosecutor that nothing said in the course of the interview will be used against the witness; (2) a formal grant of "use plus fruits" immunity by court order; and (3) a commitment by the State that in addition to "use plus fruits" immunity, some degree of leniency will be shown to the witness in connection with the disposition of a criminal or civil action against the witness, or that the witness will be totally insulated from criminal prosecution for the entirety of the criminal episode ("transactional immunity").

The first two categories involve no commitment by the State other than that the witness's information itself and any leads derived therefrom will not be used against him. Such immunity is not a bar to the prosecution of the witness in the event that evidence, derived from sources independent of the witness's statements, is developed. The drawback involved, from a prosecutorial standpoint, in using limited immunity is that if and when the witness is subsequently prosecuted, the State must prove that its evidence was derived from an independent source. In re Petition to Compel Testimony of Tuso, 140 N.J. Super. 500 (App.Div. 1976), certif. granted 71 N.J. 328 (1976); Kastigar v. United States, 406 U.S. 441 (1972), 32 L.Ed. 2d 212, rehearing den. 408 U.S. 931 (1972); Zicarelli v. N.J. State Commission of Investigation, 406 U.S.472, 32 L.Ed 2234 (1972). Additionally, when using use plus fruits immunity, we must avoid compelling the witness to testify before a grand jury which might later indict him for an offense other than perjury or false swearing. Tuso, supra. If proper care is taken in the course of the investigation in anticipation of a subsequent taint hearing, the result of a grant of use plus fruits immunity can be nothing more than the inconvenience of an additional proceeding at the time of trial. The most difficult situation from a judgment standpoint occurs in negotiating some other form of consideration to a potential witness. The alternatives range from

an agreement to accept a guilty plea to a reduced charge with no recommendation as to sentencing, to an agreement to dismiss all pending criminal cases and not to institute a civil action against the witness.

It is impossible to set forth a precise formula by which the decision to negotiate immunity is made, but there are certain factors which should be weighed when considering any form of immunity.

1. Can the information be obtained from any source other than a witness who wants to negotiate immunity? It should be understood here that the proper policy is never to negotiate any form of actual leniency until the information being offered has been received and evaluated. If a potential witness refuses to disclose his information before such negotiations take place, an attempt should be made to compel his testimony through statutory forms of immunity or drop efforts to deal with him.

It should again be stressed that use plus fruits immunity (N.J.S.A. 2A:81-17) should be used cautiously and sparingly, even though from a purely legal standpoint prosecution of the individual would not necessarily be foreclosed. There is no question but that legal difficulties will present themselves (proving independent basis) if prosecution of the witness is pressed, and practical difficulties in the believability of the witness in prosecutions against others.

2. How useful is the information for purposes of ciriminal prosecution? From time to time law enforcement agencies make various kinds of deals with informants to obtain intelligence type information. Such negotiations are not the development of admissible evidence which can be corroborated in the context of a grand jury inquiry.

3. What is the likelihood that the witness can successfully be prosecuted? When no case at all exists against the witness, imunity sacrifices only a vague possibility that one might be developed. If there is little chance of a successful prosecution, or if the case against the witness is relatively minor in nature, the State gives up less than it would if the potential prosecution of the potential witness is solid and significant.

4. What is the relative significance of the witness as a potential defendant? Such a witness must be considered in the broadest possible context of his background, power and influence as well as the severity of the offenses committed and the extent of the potential witness's participation and responsibility for them.

5. What is the relative significance of the potential defendant against whom the witness offers to testify? Again, this kind of a judgment should not be made in the narrow confines of the case itself. The defendant's importance must be measured by the seeriousness of the social harm which will result

from not prosecuting him, thereby leaving him free to exercise his power and influence.

6. What is the value of the testimony of the witness to the case? Where the testimony forms the core evidence upon which the prosecution is based, it is of greater value than testimony which is corroborative or merely cumulative.

7. What impact will immunity - particularly the terms of transactional immunity and consideration in the civil sense - have on the credibility of the witness at trial? The more the State has given up to obtain the testimony, the more likely it is that the witness will not be believed. All judgments on consideration should be made with the realization that any negotiations and the final results thereof must be disclosed. In each case there comes a point at which the terms of the immunity agreement are so favorable to the witness or outrageous to the jury that a jury will not accept the testimony.

8. What impact will immunity - again, particularly the terms of any transactional immunity and civil consideration - have on the prosecutor's personal credibility and that of his office? A prosecutor has an affirmative duty to engage in conduct which will assure the public that his office is being run in a fair and responsible manner. In weighing the relative significance of potential witnesses and targets of investigations, we must avoid even the appearance of making judgments on the basis of personal or political motives.

Statutory Immunity - Procedure

Inasmuch as use plus derivative use immunity is provided as a prosecutorial tool pursuant to N.J.S.A. 2A:81-17.3, the statutory procedure is recommended for all situations in which "immunity" is either part or all of the consideration given a particular witness.

The Statute specifies that a petition, approved by the Attorney General may be presented to the court for an order compelling the testimony of a particular witness. The petition must set forth the justification for the prosecutor's determination that the witness's testimony ought to be compelled; that is, the witness has knowledge of particularized crimes. (See form of petition, appended).

A prerequisite to the court's compelling the witness's testimony, and as a consequence granting use plus fruits immunity, is the requirement that the witness claim his privilege against self-incrimination (preferably under oath in response to questions before the grand jury). The fact of the witness's claim of privilege and the specific questions to which that claim was asserted should be part of the petition in support of the prosecutor's application.

The petition being in proper form, and approved by the Attorney General, the court generally may not question the decision of the prosecutor to immunize the witness, and therefore must sign the order. (Form appended). In only one instance, In re Tuso, 140 N.J. Super. 500 (App.Div 1976), appeal pending, has the

court denied the prosecutor's application to compel testimony. Tuso denied the prosecutor's application to compel the testimony of an individual who was already under indictment for the same transaction in which his testimony was sought.[9]

(See Forms which are reproduced in Appendix - Part I, pp.1a - 9a)

[9] Inasmuch as the procedures utilized in Tuso are under review, the precautions which would entitle a prosecutor to attempt such a procedure will be added as a supplement upon the State Supreme Court deciding the issues involved.

THE GRAND JURY SUBPOENA

The Grand Jury is a law enforcement body that is charged with various investigatory and accusatory duties. Likewise, the County Prosecutor, as the Chief law enforcement officer within his respective county is charged with the duties, among others, to detect and prosecute violators of the law.[10] Since the Constitution of the State of New Jersey requires that no person shall be held to answer for a criminal offense unless indicted by a Grand Jury,[11] the County Prosecutor and the Grand Jury must jointly discharge their responsibilities to the end that justice is done, i.e. to assure that all indictments or presentments are supported by sufficient evidence.[12] Toward that end, the Grand Jury and its legal counsel, the County Prosecutor, have been provided with legal process, that is the grand jury subpoena.

The Issuance of the Grand Jury Supoena:

The Grand Jury, traditionally and historically, has authority to issue subpoenas to gather evidence and the Prosecutor, to assist the Grand Jury, may

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[10] State v. Winne, 12 N.J. 152 (1953)

[11] N.J. Const. Art. 1, par. 8

[12] State v. Ferrante, 111 N.J. Super. 99 (app.Div. 1970)

issue the Grand Jury's subpoena for evidence gathering purposes.[13] This power to issue the Grand Jury's subpoenas is limited to the Prosecutor and his Assistant Prosecutors. County Detectives or Investigators or Police Officers have no such authority, unless delegated by the Prosecutor. County Investigators or police officers are not to be given blank subpoenas or the authority to issue the same based on their own discretion. In sum, police officers have no authority to issue their own subpoenas except as provided by R. 7:3-3. More importantly, the decision to issue a subpoena, especially a subpoena duces tecum, has legal ramifications that fall within the realm of a prosecutor. As a general proposal, all County Prosecutors should direct that the service of all subpoenas be authorized by a prosecutor. Once the subpoena is authorized by a prosecutor it can be served by the police officer or anyone else eighteen (18) years old or older.

Form of the Subpoena:

The subpoena ad testificandum shall identify the grand jury, the title of the action and shall command the person to whom it is directed to attend and give testimony at the time and place specified therein without prepayment of any witness fee. Generally, the subpoena should specify the name of the defendant

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[13] In re Addonizio, 53 N.J. 107 (1969)

or subject under investigation. However, when secrecy so requires it, the subpoena ad testificandum need not identify the subject matter of the testimony sought or identify the cause to which it pertains.[14]

The subpoena duces tecum should follow the same form as the subpoena ad testificandum except the former must indicate, with some degree of specificity, a description of the records sought.[15] The Courts have given wide latitude in compelling production of records covering many years, regardless of statute of limitations.[16] However the subpoena must be limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome. (See form in Appendix).

Notice Requirements:

The New Jersey Rules of Court do not specify any notice requirements for service of the subpoena. In theory, a subpoena can be served, compelling testimony or production of evidence immediately at the Grand Jury. However the courts do apply the subjective test of reasonableness depending on the nature of the testimony or records sought.[17] In an emergent situation

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[14] In re Application of Waterfront Comm., 32 N.J. 323 (1960)

[15] In re Addonizio, supra.

[16] In re Addonizio, supra.

[17] In re Addonizio, supra.

the Court may well deny a motion to quash a subpoena ad testificandum requiring a witness to testify at Grand Jury with one (1) day notice. However in dealing with the subpoena duces tecum for large quantities of records, the return date of the subpoena should be sufficiently in the future as to give the witness a reasonable time to comply.[18] All subpoenas, whether it be a subpoena ad testificandum or subpoena duces tecum, must be made returnable for a day in which the Grand Jury is actually sitting.

Standards for Issuance of the Subpoena:

The Grand Jury has the duty not only to investigate violations of the law, but also the duty to investigate conditions of public interest even though no violation of a penal statute is, in fact involved.[19] In order to satisfay this duty, the Grand Jury may investigate and subpoena evidence based upon anonymous charges, rumors or hearsay even though such an investigation will entail a "fishing expedition."[20]

The Subpoena Duces Tecum: What can be subpoenaed:

Generally the subpoena duces tecum is directed to three (3) areas: Municipal records, corporate records and personal papers.

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[18] State v. Asherman, 91 N.J. Super. 159 (1966)

[19] In re Addonizio, supra.

[20] Blair v. U.S., 250 U.S. 273 (1918); In re Addonizio, supra.

1. Muncipal Records: All municipal records including records of municipal agencies, zoning boards, school boards and the like are subject to subpoena restricted only by the test of reasonableness. These records may be subpoenaed on rumor or suspicion alone, and probably on the ground that the Grand Jury desires to inquire whether the public agency is operating properly. These records can be subpoenaed even though the municipal official to whom the records pertain is the target of the investigation.

2. Corporate Records: Generally, all records of any corporation, including any utility company whether it be a public corporation or closed corporation can be subpoenaed, restricted only by the Fourth Amendment test of reasonableness, even if the corporate official, or the corporation itself, is the target of the investigation.[21] This broad power of process is based on the premise that only natural persons can resist the subpoena of papers and records on the grounds of self-incrimination. This rule would apply to subpoenas directed to a corporation in which the target of the investigation is, in effect, the sole owner of the corporation.[22]

3. Personal Records of Target and Non-Target Witnesses: As a general rule, all individuals and the evidence possessed by them are

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21 Hale v. Henkel, 201 U.S. 43 (1905)

22 State v. Asherman, supra.

subject to the Grand Jury subpoena unless such testimony or evidence to be produced is protected by the Fourth or Fifth Amendment, or unless otherwise protected by statute or Court Rule.[23]

In dealing more specifically with the subpoena of testimony or documentary evidence from a target witness, such subpoena would likely be subject to a motion to quash because of the Fifth Amendment protection afforded to the target-witness. In other words, a valid subpoena to obtain personal papers or documents in the possession of a defendant or a target-witness probably could not withstand a claim of Fifth Amendment privilege,[24] since the target would be obligated to respond by personal and affirmative action.[25] However, a non target-witness can be compelled to produce his personal records pursuant to a Grand Jury subpoena provided that such records are not personally incriminatory or otherwise not protected by statutory privilege.

4. Personal Papers or Records of a Defendant or Target-Witness that are in the Possession or Another Person: Pursuant to the Fifth Amendment protection, a defendant or target-witness cannot be compelled to testify or produce evidence that would incriminate him. However, once the constitutionally

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23 U.S. v. DIONISIO, 410 U.S. 1 (1974); see N.J. Rules of Evidence, Rules 23-40

24 In re Addonizio, supra.

25 Andresen v. Maryland, 423 U.S. 1045, 46 L.Ed 2d 634 (1876)

protected evidence is transferred by the defendant or target-witness to another person, these records can be subpoenaed from that other person unless otherwise protected by a statutory privilege.[26] For example, a defendant's incriminatory financial records in his possession are not subject to a subpoena. A search warrant would be needed to obtain these records. However, if the defendant transfers those records or the information contained therein to his bank or broker, the records and the information contained therein can be subpoenaed from that bank or broker.[27]

Subpoena of non-testimonial evidence:

The Grand Jury subpoena can be used to compel a person to appear at the Grand Jury for the purpose of obtaining his fingerprints, voice prints, handwriting exemplars and other types of non-testimonial evidence. Such evidence has been regarded as non-testimonial in nature, and therefore not protected by the Fifth Amendment. Likewise, provided that the inquiry is reasonable, the subpoenaed material is not protected by the Fourth Amendment since the subpoena is not a seizure within the scope of the Fourth Amendment.[28]

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[26] In re Addonizio, supra.; United States v. Miller, 423 U.S. 926, 46 L.Ed. 2d 252 (1976)

[27] Id.; see also Andresen v. Maryland, supra.

[28] U.S. v. Dionisio, supra; U.S. v. Mara, 410 U.S. 19 (1971)

Voluntary Compliance with a Grand Jury Subpeona in lieu of Actual Appearance at the Grand Jury:

The issuance of the Grand Jury subpoena serves the sole purpose of obtaining evidence for the Grand Jury's consideration. Once a subpoena duces tecum is issued, the subpoenaed witness is required to physically appear at the Grand Jury and deliver the requested material. However, especially relating to subpoenas served upon business entities and public agencies, the subpoenaed party often prefers to deliver the subpoenaed material directly to the investigator at time of service, in lieu of actual appearance at the Grand Jury. Such pre-grand jury compliance is permissible.

Use of the "Office Subpoena ad Testificandum":

A prosecutor has no subpoena power to compel a witness to appear at the prosecutor's office to elicit testimony.[29] It appears to be improper for a prosecutor's office to issue what is commonly known as an "office subpoena" commanding a witness to appear at the prosecutor's office or place other than the grand jury room for the purpose of obtaining his testimony.[30] However, the prosecutor's office should not be discouraged from requesting a witness to appear at the

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[29] State v. Eisenstein, 16 N.J. Super. 8, 13 (App. Div. 1951), aff'd 9 N.J. 347 (1952).

[30] ABA Standards, Section 76 (1970).

prosecutor's office for an interview in lieu of a grand jury appearance. Nor should the foregoing discourage a prosecutor from pre-grand jury interviews with prospective witnesses. In short, a grand jury subpoena should be issued only when that prosecutor has a good faith belief that the particular witness could be of some assistance to the grand jury's inquiry.

THE SUBPOENA OF OUT OF STATE WITNESSES

Occasionally cases arise in which a vital state's witness resides outside the State of New Jersey.

If Grand Jury testimony is required from such a witness, two (2) procedures may be utilized. Firstly, a subpoena should be mailed to the non-resident witness directing his appearance at the Grand Jury session. However, the mailing of a subpoena to a witness who is residing in another state is nothing more than a request for that witness to voluntarily return to the State of New Jersey to testify. No sanction can be imposed upon that witness for failure to appear. If the witness declines to honor the subpoena, the prosecutor may, of course, resort to utilization of the Uniform Act to secure the attendance of a witness from without a State in criminal proceedings.

Pursuant to N.J.S. 2A:81-20, The Uniform Witness Act provides:

> 1. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the

court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and $5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the Court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

Pursuant to this Act, if a material witness, who is presently residing in another state, refuses to return to New Jersey to testify, he can be compelled to do so, provided that that sister state is a signatory of the Uniform Act.[31]

Procedure: Once the decision is made to compel the appearance of an out-of-state resident, the Assistant Prosecutor must prepare a petition outlining

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[31] The Uniform Act to secure witnesses has been adopted in 48 states as well as in the District of Coilumbia, Puerto Rico, Panama Canal Zone and the Virgin Islands. Only Alabama and Georgia have declined to adopt the Uniform Act.

the nature of testimony sought from the witness with a showing of the materiality of this testimony. A certification must also be prepared and signed by the Judge. This certification is simply a determination made by the Court from the petition that the out-of-state resident is a material witness in a pending Grand Jury matter. Once the court signs the certication, a certificate must be obtained from the County Clerk stating that the Judge signing the certification is a Judge of a court of general jurisdiction and entitled to try indictments.

The three (3) documents, that is, the petition, the Court certification and the affidavit of the County Clerk should be forwarded to the prosecuting authority of the county in the State where the witness is to be found, along with the appropriate fee as specified by Statute. An order to show cause will be issued by the court of that foreign jurisdiction compelling the witness to appear before that court for a hearing. At that hearing, if the court finds that the testimony to be sought is material, the court will order that witness to return to New Jersey to testify.

(See Forms which are reporduced in Appendix - Part II, pp. 10a - 26a)

PRESS GUIDELINES

Freedom of the press and the right to a fair trial are fundamental, but sometimes are in collision. It is incumbent upon a prosecutor not only to maintain the rights of individuals involved in the criminal process of the State, but to also fully inform the public concerning the operation of law enforcement agencies and the dispensation of criminal justice. In the course of a criminal proceeding, however, an effort to satisfy both duties must give rise to a dilemma: The release of certain information may tend to impair a defendant's ability to receive a fair trial, while withholding of that same information may seemingly deny to the public its "right to know," and to some extent the full satisfaction of its First Amendment free speech and free press rights. The guidelines set forth below are intended to assure a fair accommodation of both interests and to satisfactorily resolve most free speech/fair trial problems which may confront a prosecutor. These guidelines are based in part on a Statement of Principles and Guidelines for the Reporting of Criminal Procedures, as adopted by the New Jersey Supreme Court in March, 1972.

1. The following information should be made available for the use of the press upon the return of an indictment:

(a) Background information concerning the defendant such as his name, age, residence, occupation, marital status and so forth.

(b) The text of the indictment or complaint.

(c) Identification of the investigating and arresting agency and personnel and the length of the investigation.

(d) Circumstances immediately surrounding the arrest, including but not limited to the time and place of arrest; resistance, if any; pursuit; possession, nature and use of weapons and ammunition by the suspect and police.

(e) Circumstances surrounding bail, whether it was set,whether it was posted and the amount.

2. Publication of the following items of information may jeopardize a defendant's right to a fair trial and shound not, therefore, be released to the press:

(a) Statements regarding the existence, nonexistence or progress of an investigation. Obviously, this policy should be flexible and the public should, in certain instances, be given such information. However, as noted at page 66 the prosecutor should establish internal controls in his office to ensure that decisions with respect to the release of such information are to be made by him or his designee.

(b) Opinions concerning a defendant's guilt or innocence.

(c) Admissions, confessions or statements attributable to the defendant, or his refusal to provide the same.

(d) The defendant's record of prior arrests and/or convictions.

(e) References to the use of certain investigative procedures such as fingerprints; polygraph, ballistics or laboratory tests; wiretaps or electronic surveillance. No information should be released concerning a defendant's refusal to participate in any such tests.

(f) Statements concerning the credibility or anticipated testimony of prospective witnesses.

(g) Opinions concerning evidence or argument in the case whether or not is is anticipated that such evidence or argument will be used at trial.

(h) The possibility of a plea of guilty to the charged offense or to a lesser offense, or other disposition.

3. Where publication of the identity of the victim would be embarrassing or demeaning to that person, it is recommended that such information not be released. (The rationale here, of course, has nothing to do with

the possible impairment of a fair trial, but arises out of consideration for victims of certain crimes, such as rape or other sexual offenses.)

4. During the course of an ongoing grand jury investigation, no information concerning the grand jury proceedings should be released to the press. R. 3:6-7 requires that all grand jury proceedings remain secret. All persons other than witnesses are required to take an oath of secrecy as a condition to their admission to a grand jury session. Four basic reasons have been set forth as grounds for this requirement of secrecy: (1) to prevent the escape of persons under investigation (2) to prevent tampering with witnesses (3) to insure deliberative freedom for the grand jury (4) to protect the reputation of an accused who is ultimately not indicted. State v. Clement, 40 N.J. 139 (1963).

5. Photographing a Defendant

The photographing of suspects or defendants when they are in public places should be neither encouraged nor discouraged. In no event should an accused be photographed in a posed position. Photographing of a defendant in places where the general public has no right of free access should not be permitted (i.e. inside the police station, lock-up or jail).

If it is deemed necessary to place a defendant or suspect under physical restraint, such as handcuffs,

these restraints need not be removed or concealed from view simply because photographs may be taken. (The New Jersey Supreme Court has suggested that prior to conviction, except at the time of arrest, the press should not publish any photographs of a defendant in handcuffs or under restraint. Guidelines with Regard to Photographing of Court Proceedings, approved by the Supreme Court September 5, 1968.)

6. Photographing evidence

(a) Displayed evidence. To the extent that the above guidelines permit the release of a verbal description of a given item of demonstrative evidence, then the display of that evidence for the purpose of photographing by the press is also permitted. Since the manner in which such evidence is displayed could tend to prejudice a defendant, it is recommended that this practice be employed on a very limited basis and be confined to those situations where there is a public interest to be served. When a display is made, the utmost care should be taken so that it is not done in a way that would tend to be prejudicial to the defendant. In no event should the defendant be photographed in the presence of displayed evidence.

(b) Crime scene. It is recommended that representatives of the press be kept out of restricted crime scene areas to the same extent

that members of the general public are so restricted. If a press photographer is in an area which is not restricted to the public he should be neither encouraged nor discouraged from taking photographs. In no event should evidence be displayed at a crime scene for the purpose of photographing by the press.

Each office should establish internal controls governing release of information to the media. As a general rule, all releases of information to the media should be made by, or approved in advance, by the County Proseuctor or his designee, unless a particular release is permitted by someone else by specific office policy.

CASE PREPARATION

I. Introduction

When a criminal complaint or investigation is referred to the Prosecutor, he must decide its future course in the criminal process. It is essential in this screening process that the Prosecutor have all information relevant to determining the proper course to be followed.

Certain cases may be susceptible to disposition prior to grand jury presentation by early plea negotiation, referral to municipal courts, or by resort to pretrial intervention programs. Many of the matters referred to the Prosecutor will, however, be presented to the grand jury for its determination as to whether or not an indictment should be returned. Therefore, it is most important that the Prosecutor employ appropriate procedures to ensure that he has a complete file prior to presentation of the matter to the grand jury.

In many Prosecutor's Offices, Detectives or Investigators are assigned the task of "working the case up for grand jury," and they therefore have the responsibility for the completeness of the file. After the case is "worked up" by an Investigator or Detective, it should be reviewed by an Assistant Prosecutor for a determination as to whether the matter is "ready" for grand jury presentation. In short, it is the responsibility of the Prosecutor in

every case to assure an investigative file is complete.

The materials discussed in this segment of the manual deal with the suggested preparation of files for grand jury presentation.

II. Checklist of materials which generally should be in an investigative file prior to grand jury presentation:

1. Complaint
2. Police reports (including incident, arrest and investigative reports)
3. Witnesses' statements
4. Rap sheets (State and Federal)
5. Certified or exemplified copies of conviction
6. Scientific reports
   (a) Firearms, drugs, or other laboratory reports
   (b) Handwriting reports
   (c) Fingerprint reports
7. Search warrants, affidavits and inventory returns
8. Business records or official certifications
9. Medical reports
10. Photographs or other types of demonstrative evidence and an indication of the witnesses necessary to identify same
11. Statements made by the defendant and police reports concerning the circumstances surrounding the making of those statements

12. Reports and documents (photographs, transcripts, etc.) concerning any pretrial identification made of the defendant

13. Evidence report (a complete inventory including the location of all evidence and the persons involved in the chain of evidence)

14. A list of potential witnesses including their date of birth, sex, residence, business, and telephone numbers

15. A summary of the case prepared by a Prosecutor's Office Detective or Investigator

16. Preliminary hearing transcript

17. Legal analysis by reviewing assistant prosecutor

18. Correspondence section (kept in chronological order).

III. Suggested procedures for preparation of grand jury files.

1. A check list should be kept in or on the file.

2. The grand jury investigator should check with the local police departments and other agencies to make sure he has all reports and witnesses' statements. (This procedure should be continually updated. It may include having the actual police file brought down to the prosecutor's office for examination and comparison with the items on file in the prosecutor's office.) It is suggested that a case transmittal form, such as the UCP-D9, used in Union County, be utilized to ensure that the necessary items in each case are forwarded to the prosceutor's office by the local police department for grand jury presentation. (See form number 3.)

3. The files should be properly docketed with notations as to the bail, plea, defense counsel's name, and other items including whether there are other codefendants or additional charges pending against the defendant. One file should contain all items involved in a single case. Therefore, it there are codefendants involved in a transaction, their files or matters should be included in the same file. If there are juveniles charged as codefendants, both the adult and juvenile files should be cross-referenced to reflect this. All charges which may be the subject of the mandatory joinder rule under State v. Gregory, 65 N.J. 510 (1975), should also be handled in one case file.

In reviewing the file, the assistant prosecutor should make a complete legal analysis of the operative facts and the relevant statutes, and determine the charges which should be included in the grand jury presentation. The grand jury investigator should prepare a list of witnesses, as well as other documents or exhibits that should be presented to the grand jury.

Whenever possible, the assistant prosecutor presenting the matter to the grand jury should speak personally with witnesses prior to their testimony, and review with them their previous statements and reports.

The following are forms that can be utilized to prepare the case files for presentation to the grand jury:

Form 1: Investigation check list

Form 2: Request to local police for transmittal of their investigative file to the Prosecutor's Office

Form 3: Transmittal from the local police of their investigative file

Form 4: Request for State rap sheet

Form 5: Request for Federal rap sheet

Form 6: Request for hospital records

Form 7: Request for examination of evidence

Form 8: Request for certified copy of motor vehicle registration

Form 9: Evidence inventory report

Form 10: Request for exemplified copy of conviction

Form 11: Witness list for grand jury

Form 12: Prosecutor's Case Review and Plea Form

(See Forms which are reproduced in Appendix - Part III, pp. 27a(1) - 40a)

As a general rule, presentation of inadmissable or even illegally obtained evidence procured in violation of an individual's constitutional rights before a grand jury does not serve to vitiate the resulting indictment.[32] In most jurisdictions, including New Jersey, the grand jury is not limited to receiving evidence admissible at trial.[33]

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32 See e.g., United States v. Calandra, 414 U.S. 343 (1974); United States v. Blue, 384 U.S. 251 (1966); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1966); Holt v. United States, 218 U.S. (1910). One line of cases, however, has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See e.g., Goldberg v. United States, 472, F.2d 513, 516 (2 Cir. 1973); Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964); United States v. Tane, 329 F.2d848(2 Cir. 1964); United States v. Lawn, 115 F.Supp. 674 (S.D.N.Y. 1953), appeal dismissed sub nom United States v. Roth, 208 F.2d467 (2 Cir. 1953). For example, the court in Goldberg v. United States, supra, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of Bruton v. United States, 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. Goldberg v. United States, supra at 516.

33 See e.g., State v. Chandler, 98 N.J. Super. 241 (Cty.Ct. 1967); see also State v. Ferrante, 111 N.J. Super. 99 (App.Div. 1970); State v. Garrison, 130 N.J.L. 350 (S.Ct. 1943); State v. Donovan, 129 N.J.L. 478 (S.Ct. 1943); State v. Ellenstein, 121 N.J.L. 304 (Sup.Ct. 1938); State v. Dayton, 23 N.J.L. 49 (S. Ct. 1850)

And for the most part, the competency of evidence presented to the grand jury may not be the subject of judicial inquiry.[34]

The reason for the rule is obvious. Traditionally, the grand jury "has been accorded wide latitude to inquire into violations of [the] criminal law."[35] It is a grand inquest, a body with powers of investigation, the scope of whose inquiries is not to be be limited... by doubts whether any particular individual will be found properly subject to an accusation of crime."[36] It has been recognized that "the grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."[37] Significantly, the grand jury is not "an officious meddler,"[38] for its investigatory function "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find out if a crime has been committed[39]

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[34] State v. Chandler, supra.

[35] United States v. Calandra, supra at 341.

[36] Blair v. United States, 250 U.S. 273, 282 (1919).

[37] Branzburg v. Hayes, 408 U.S. 665 (1972).

[38] In re Addonizio, 53 N.J. 107, 124 (1968).

[39] United States v. Stone, 429 F.2d 138, 140 (2 Cir. 1970).

"Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[40]

One caveat is plainly in order. The policy prohibiting dismissal of an indictment by virtue of the introduction of inadmissible evidence does not apply to what has been characterized as "grand jury misconduct." Our courts have held that "in order to promote the purity of the administration of justice and for greater security of the citizen,"[41] an indictment may be quashed by virtue of misconductby the grand jury. Misconduct occurs when the grand jury "indifferently and openly without having some evidence,"[42] brings charges against an individual by returning an indictment. However, an indictment will not be dismissed as long as some legal evidence was presented which supports the charges.[43]

What has been said thus far should not be construed as a blanket endorsement of a policy permitting prosecutors to utilize incompetent and inadmissible evidence in grand jury proceedings. While it is true that reception of inadmissible evidence by the grand jury does not serve to vitiate a resulting indictment, it is a far different thing to suggest that prosecutors are not subject to any restraints in this regard.

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40 Branzburg v. Hayes, supra at 701.

41 State v. Dayton, supra at 88.

42 State v. Donovan, supra at 479.

43 State v. Smith, supra at 343.

The American Bar Association Project on Standards for Criminal Justice has provided:

> A prosecutor should present to the grand jury only evidence which he believes would be admissible at trial. However, in appropriate cases the prosecutor may preent witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial.[44]

In the accompanying commentary, the Bar Association noted that "as a general principle, the use of secondary evidence before a grand jury should be avoided unless there are cogent reasons justifying" such a practice. For example, 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 not available at the tiem and circumstances justify prompt grand jury action." So too, the Bar Association advocates the use of hearsay evidence "where the victim of a criminal act is seriously injured and therefore is unavailable... ." Another example set forth in the commentary is "where the safety of an important witness reasonably warrants that his identify remain covert." In such a case, the witness's statements, if sufficiently detailed, can be presented to the grand jury.

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[44] American Bar Association Standards for Criminal Justice, Standards Relating to The Prosecution and Defense Function (Approved Draft, 1971).

The American Law Institute has adopted a similar approach in its Model Code of Pre-Arraignment Procedure.[45] Under the Code, prosecutors may present "secondary" evidence only where the opposite course would impose an unreasonable burden on one of the parties or on a witness.

In a similar vein, the California Penal Code provides that "the grand jury shall receive none but evidence that would be admissible over objection at the trial of the criminal action..."[46] However, the mere fact that "evidence which would have excluded at trial was received by the grand jury does not render the indictment void" where sufficient competent proofs were also presented. Other jurisdictions have adopted similar statutes and rules.[47]

It is recommended that prosecutors should, as a general rule, seek to present only admissible evidence to the grand jury. Incompetent and also illegal evidence should not be presented to the grand jury. So too, as a general rule, evidentiary privileges should be honored and not violated at the grand jury proceedings. Where a privilege is personal to a defendant or the target of an investigation and that individual has the right to claim the privilege, it can be assumed that the individual will exercise the privilege. In

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45 Model Code of Pre-Arraignment Procedure, S330.4(4), S330.5.(Tentative Draft No. 5 1972)

46 Cal. Pen. Code 939.6(b).

47 See e.g., Alaska Rules of Criminal Procedure, Rule 6(r); Nev. Rev. Stat. S172.135(2).

In all other instances where privilege is not personal consideration should be given to the nature of the privilege, the individual who has a right to exercise it and other surrounding circumstances.

Failure to observe evidentiary controls results in unnecessary trials and permits improper rummaging into the personal lives of witnesses. Further, a wrongful indictment is "no laughing matter," for it indelibly stains the reputation of the accused. Nevertheless, the nature of the grand jury process also suggests that some exceptions be made to the policy requiring that only admissible evidence be presented to the grand jury. For example, investigative grand juries must often sift through all available clues to determine whether a crime has been committed. It would be unwise to restrict the scope of the grand juries' inquires by requiring that only competent, admissible evidence be received. So too, expert reports may often be presented to the grand jury in the interest of economy. Ordinarily where an expert would merely testify as to the contents of his report, his presence before the grand jury would not be needed. It seems only fair, however, that the prosecution clearly inform the grand jury of the availability of better or firsthand evidence so that it can, if it wishes, request presentation of such proofs.

POST-INDICTMENT PROCEDURE

Upon the return of a "True Bill" by the grand jury, the indictment must be presented in open court to the Assignment Judge or to any other judge authorized by R. 3:6-8(a) to receive indictments. Such action must be taken in the presence of at least twelve members of the grand jury.

The indictment itself, and all related papers, must be entitled in the Superior Court. The indictment is sufficient if it consists simply of a written statement of the essential facts constituting the offense charged, a citation to the specific statute or statutes allegedly violated, and concludes with the words "against the peace of this State, the government and dignity of the same." Each indictment must be signed by the prosecuting attorney and endorsed as a true bill by the foreman (or, in his absence, by the deputy foreman). R. 3:7-3.

If, at the time the indictment is presented, a defendant named therein is not yet under bail, the county clerk must issue a warrant unless requested by the prosecutor to issue a summons instead. R. 3:7-8. In order to ensure that the State Bureau of Identification is able to maintain a complete record concerning all persons charged with indictable offenses, it is recommended that all indicted defendants who are

not yet under bail be processed, that is photographed and fingerprinted.[48] If prior agreement for processing with a defendant or counsel exists, a summons may be used for sake of convenience.

[48] Upon the arrest of a person for an indictable offense, all law enforcement officers are required to fingerprint that person and forward copies of those prints along with the photographs, other identifying data and a history of the charged offense to the State Bureau of Identification N.J.S. 53:1-15.

APPENDIX

PART I

GRAND JURY WITNESSES

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE

MEMORANDUM

TO: Robert J. Del Tufo, Director
Division of Criminal Justice

FROM: (The Deputy Attorney General handling the case)

SUBJECT: STATUTORY IMMUNITY (N.J.S.A. 2A:81-17.3 ( )

PUBLIC OFFICER IMMUNITY (N.J.S.A. 2A:81-17.1a ( )

INFORMAL IMMUNITY OR AGREEMENT ( )

CIVIL CONSIDERATION ( )

OTHER CONCESSIONS ( )

ATTACHED IS A SUPPLEMENTAL MEMORANDUM CONTAINING A DESCRIPTION OF THE CRIMINAL CHARGES INVOLVED, AND THE REASONS UPON WHICH APPROVAL OF THE IMMUNITY GRANT IS SOUGHT AND MAY BE JUSTIFIED.

(SIGNATURE OF ASSISTANT PROSECUTOR IN CHARGE OF CASE)

REVIEWED AND APPROVED AS TO BOTH FORM AND SUBSTANCE ON THE DATES HEREINAFTER SET FORTH:

ASSISTANT PROSECUTOR IN CHARGE OF SECTION, UNIT OR BUREAU _____

FIRST ASSISTANT PROSECUTOR _____

COUNTY PROSECUTOR _____

IN STATUTORY GRANTS UNDER 17.3:

DIRECTOR, DIVISION OF CRIMINAL JUSTICE _____

ATTORNEY GENERAL _____

SUPERIOR COURT OF NEW JERSEY
COUNTY
STATE GRAND JURY NUMBER____

STATE OF NEW JERSEY)
v.) PETITION TO COMPEL TESTIMONY
JOHN DOE) UNDER N.J.S.A. 2A:81-17.3

(1) I, William F. Hyland, am the Attorney General of New Jersey.

(2) There is presently pending before the State Grand Jury an investigation involving a violation of the following New Jersey Statutes: N.J.S. 2A:119-2 (larceny), N.J.S. 2A:89-2 (arson), N.J.S. 2A:85-1 (misconduct in office), N.J.S. 2A:94-1 (burglary), N.J.S. 2A:105-3 (extortion), N.J.S. 2A:139-1 (receiving stolen property), and N.J.S. 2A:98-1 and -2 (conspiracy).

(3) The conduct which is being investigated by the Grand Jury occurred during the calendar year , principally within the County of . The conduct involved an organized criminal operation in the County of and the involvement of a public official in that activity.

(4) The Grand Jury, in its investigation, has learned that JOHN DOE, of , has direct and personal knowledge about and in connection with the aforesaid activities.

(5) On , 197 , the said JOHN DOE was served with a subpoena to testify before the State Grand Jury. On , 197 , the said JOHN DOE did appear before the State Grand Jury, at , New Jersey, and did refuse to answer questions propounded to him concern-

ing his knowledge of the illegal activities in County and other areas of the State of New Jersey.

(6) The questions which the said JOHN DOE refused to answer before the State Grand Jury on _____, 197 , on the grounds that the questions might tend to incriminate him are as follows:

(set out fully each question which the witness refused to answer on such grounds)

WHEREFORE, I, WILLIAM F. HYLAND, Attorney General of New Jersey, do herewith petition the court pursuant to N.J.S. 2A:81-17.3 to order JOHN DOE to answer any and all questions propounded to him in the Grand Jury concerning illegal activities in County and other areas of the State of New Jersey.

DATED: _____

_____

William F. Hyland
Attorney General of New Jersey

CONTINUED

1 OF 2

SUPERIOR COURT OF NEW JERSEY
COUNTY OF _____

STATE OF NEW JERSEY)
)
v.) ORDER
)
JOHN DOE

William F. Hyland, Attorney General of New Jersey, , Deputy Attorney General, appearing, having on this date made written and oral applications for an order compelling John Doe to answer questions and to testify before the duly constituted State Grand Jury, pursuant to N.J.S. 2A:81-17.3; and

The said John Doe, on , 197 , having declined to answer questions in the said State Grand Jury on the grounds that his answers might tend to incriminate him, the Grand Jury then and there inquiring, inter alia, into possible violations of N.J.S. 2A:119-2, N.J.S. 2A:89-2 N.J.S. 2A:85-1, N.J.S. 2A:94-1, N.J.S. 2A:105-3, N.J.S. 2A:139-1, and N.J.S. 2A:98-1 and -2,

IT IS on this day of , 197 ,

ORDERED that the said John Doe appear on the day of , 197 , at , Trenton, New Jersey, before the said Grand Jury and contained in the written

application filed herewith, and to testify and produce evidence in response to all other questions propounded to him concerning the inquiry before the said State Grand Jury.

It is further ORDERED by the court that in accordance with the provisions of N.J.S. 2A:81-17.3, testimony given or evidence produced by the said John Doe or any information directly or indirectly derived from such testimony or evidence, shall not be used against the said John Doe in any proceeding or prosecution for a crime or offense concerning which the said John Doe gave answers or produced evidence pursuant to the order of this court.

_____
Judge of the Superior Court

(Public Employee)

WAIVER OF IMMUNITY

I, _____, a public employee by virtue of my position as _____, hereby acknowledge that I have been advised of the scope of the present Grand Jury investigation. I understand that the investigation concerns:

_____

_____

I have also been advised that this investigation relates to the conduct of my office, position or employment, and that my refusal to testify will subject me to removal from my public office, position or employment. I have been advised and know that I have a right to consult an attorney for advice before giving any testimony or making any statement.

With a full understanding of my rights and without any promises or representations being made to me or any express or implied coercion by statute or otherwise of any kind whatsoever being exerted against me, I am willing to testify before the _____ Grand Jury. I hereby waive all immunity from prosecution for any offense which shall be disclosed or indicated by my testimony or statement, now or in the future, before the Grand Jury, I understand that any testimony that I give may be transcribed and introduced in evidence against me in any subsequent criminal proceeding. I further waive all rights and privileges I may have pursuant to N.J.S. 2A:81-17.2a1 or otherwise, to prevent my testimony before the Grand Jury being used against me in any subsequent criminal proceeding.

This waiver of immunity shall remain in full force and effect during the life of these Grand Jury proceedings.

_____

Dated: _____

Witness: _____

WAIVER OF IMMUNITY (Target Witness)

I, _____, hereby acknowledge that I have been advised of the scope of the present Grand Jury investigation. It is my understanding that the investigation concerns:

_____

_____

I have also been advised and I understand that I may refuse to testify or make any statements that tend to incriminate me, and that any testimony I give or statements that I make can be transcribed and introduced into evidence against me in any subsequent criminal proceeding. I have been advised and understand that I have the right to consult an attorney for advice before giving any testimony or making any statement.

With full understanding of my rights, without any promises or representations having been made to me, and without any express or implied coercion by any means having been exerted against me, I knowingly, understandingly, and voluntarily waive immunity from prosecution for any offense which may be disclosed or indicated by my testimony or statement. I hereby waive any right which I might have to prevent the use of the testimony which I shall give before this Grand Jury in any court of law and in any criminal proceeding now or in the future.

_____

Dated: _____

Witness: _____

I, _____, residing at _____, state and represent to the Office of the Attorney General, State of New Jersey, the following:

1. I am aware that a Grand Jury investigation is presently being conducted and have been advised of and understand the subject matter of that investigation. I am also aware that I am a target or possible target of that investigation.

2. I have not been subpoenaed to appear before the Grand Jury which is investigating the aforesaid matter, nor has there been any other pressure or means by which I have been forced, coerced or compelled to appear before the aforesaid Grand Jury in order to testify.

3. I recognize and am aware that under both federal and State law, I have an absolute right not to appear and testify before the aforesaid Grand Jury.

4. I recognize that under New Jersey Laws of 1970, Chapter 72, Section 2, effective May 21, 1970 (N.J.S.2A: 81-17.2a1, et seq.), I could be compelled to testify in the aforesaid Grand Jury proceeding. Under that law, if I refused to testify, I could be penalized by the forfeiture of my public office. Nevertheless, I certify that I am not appearing or testifying before the aforesaid Grand Jury under the compulsion of this law nor is my appearance before the Grand Jury at the peril of forfeiture of my public office. With the knowledge of the above statute and its provisions, I do hereby waive any application of the said statute including any provision that I receive immunity in any form by reason of said statute.

5. I have been advised and am aware that should I appear and testify before the aforesaid Grand Jury, that I may, at any time, terminate my testimony and leave the Grand Jury Room, this without giving or stating any reason or asserting any rights which I may have under federal or State law.

6. I am represented by an attorney whose name and address is _____. I have consulted with my attorney, have had adequate time within which to confer with him and am satisfied with his legal services and advice.

7. Both my attorney and I hereby request and ask that I be permitted to appear and testify before the aforesaid Grand Jury. I understand that should I appear before the Grand Jury, my appearance would be for the sole purpose of answering questions propounded by a Deputy Attorney General and that I will be fully questioned about all facts which the Deputy Attorney General deems relevant to the Grand Jury investigation of which I am a target or possible target. I recognize that should I appear and testify before the aforesaid Grand Jury that my testimony may, in a future proceeding, be used for or against me, and that I will receive no immunity or any kind by reason of such testimony.

8. I represent and certify that my request to appear before the aforesaid Grand Jury is not as the result of any threat, promise or representation by any member of the Attorney General's Office, the New Jersey State Police, or any other entity or person, but that it is for the purpose and motivated solely in order to testify before the Grand Jury in order to more fully apprise the Grand Jury of the facts about which I will be questioned by a Deputy Attorney General.

_____

Witnessed by:

_____

APPENDIX

PART II

THE GRAND JURY SUBPOENA

FILE NO.

STATE OF NEW JERSEY)
) SS.
COUNTY OF _____)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____ COUNTY

CRIMINAL ACTION
SUBPOENA

TO: _____

You are hereby commanded to appear before the _____ County Grand Jury sitting in the Grand Jury Room at the Court House in _____, New Jersey, on _____, 197 , at o'clock in the noon to testify on the part of the State in the case of State v. _____.

and you are ordered to appear without prepayment of a witness fee. Failure to appear will subject you to the penalties as provided by law.

_____ _____

CLERK

_____ COUNTY PROSECUTOR

Dated:

FILE NO.

STATE OF NEW JERSEY)
) SS.
COUNTY OF _____)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____ COUNTY

CRIMINAL ACTION
SUBPOENA DUCES TECUM

TO: _____

You are hereby commanded to appear before the _____ County Grand Jury sitting in the Grand Jury Room at the Court House in _____, New Jersey, on _____, 197 , at _____ o'clock in the noon to give evidence before the said Grand Jury in the case of State v. _____ and you are ordered to appear without prepayment of witness fees and bring with you the following records:

_____

_____

Failure to appear and produce the said records will subject you to the penalties as provided by law.

_____ _____

_____ COUNTY PROSECUTOR CLERK

Dated:

(Optional: You may be excused from actually appearing at the Grand Jury if you make arrangements to produce the subpoenaed documents in advance of the above date.)

_____, 197___

District Attorney's Office
_____County
_____
_____

Re: State of New Jersey v. _____
(Material Witness - _____
Present address: _____

Gentlemen:

Pursuant to the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" (McKinney's Crim. Code §618-a), enclosed please find certified and exemplified copies of Petition signed by me, and Certificate adjudging the named person to be a material witness, signed by the Honorable _____, Judge of the Superior Court, Law Division, Criminal, _____County, New Jersey. Also enclosed please find a set of plain copies of Affidavit and Certificate.

Also enclosed is Check No._____, dated _____ in the amount of $_____, payable to _____ covering mileage at the rate of ten cents per mile from _____, _____, to _____, New Jersey, and return, plus the required payment of $5.00 per day for ____ days attendance.

The witness is required to be at the _____, _____, New Jersey, on _____, 197_. On the aforesaid dates, he should be told to contact _____ _____, whose office is on the ____ floor of the _____ building (telephone _____).

I have taken the liberty of drafting an Order to Show Cause and Order to be presented to your Court, copies of which are also enclosed.

Very truly yours,

_____
Assistant Prosecutor
_____County

Encs.

(Name and address of
Prosecutor)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____ COUNTY

THE STATE OF NEW JERSEY)
)
v.) PETITION
) IN ACCORDANCE WITH
JOHN DOE,) N.J.S. 2A:81-18, et seq.
)
Defendant(s))

STATE OF NEW JERSEY)
) SS
COUNTY OF _____)

_____, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. I am an Assistant Prosecutor of the County of _____, State of New Jersey, and as such am familiar with the facts and matters herein set forth.

2. There is now pending before the Grand Jury of _____ County a criminal prosecution by the State of New Jersey against John Doe, who stands accused and charged with having committed the following criminal offenses against the laws of the State of New Jersey, to wit:

3. Jane Jones, now residing at _____ _____, _____, is a necessary and material witness for the State of New Jersey by means of the following:

(She was the victim of the aforementioned offenses - see attached copy of written statement given by Jane Jones on _____, to the _____ Police Department, attached hereto and made part hereof) and her presence is required at the Grand Jury proceedings regarding the aforementioned matter on the _____ day of _____, 197_, at _____ M., at _____, in _____, New Jersey, for purposes of giving testimony.

4. On _____, I telephoned Jane Jones in _____, and requested that she voluntarily appear before the _____ County Grand Jury to give testimony in the case of State v. John Doe. She refused and told me that she would refuse to voluntarily return to the State of New Jersey to testify at the Grand Jury proceedings.

5. Since Jane Jones will not appear voluntarily it is therefore necessary that the Prosecutor of _____ County obtain from the _____ County Court a certificate under the seal of the Court, certifying the facts herein set forth in order that the State of New Jersey may obtain a summons to be issued by a competent court of the State of _____, requiring the appearance of the said Jane Jones as a witness in the jurisdiction of the _____ County Court under the provisions of N.J.S. 2A:81-18, et. seq.

6. If the said Jane Jones comes into the State of New Jersey in obedience to a summons directing her to attend and testify at said Grand Jury proceeding, the laws of the State of New Jersey and of any other state through which said witness may be required to pass by the ordinary course of travel to attend said proceeding, gives her protection from arrest or the service of process, civil or criminal, in connection with matters which arose before her entrance into said state, pursuant to said summons.

WHEREFORE, it is requested for and on behalf of the State of New Jersey that Your Honor certify to the above and foregoing by the issuance of a certificate thereto under the seal of the Superior Court of New Jersey, Law Division (Criminal), for

the County of _____, for the purposes of being presented to a Judge or a court of record in the State of _____ in a proceeding to compel the attendance of said Jane Jones as a witness at said Grand Jury proceeding to compel the attendance of said Jane Jones as a witness at said Grand Jury proceeding for the time and date set forth and pursuant to law.

_____

Assistant Prosecutor
County of _____

Sworn and subscribed to
before me this day
of , 197 .

_____

Notary Public of New Jersey

(Name and address of
Prosecutor)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION -- CRIMINAL
_____ COUNTY

THE STATE OF NEW JERSEY)	
)	
v.)	CERTIFICATE OF JUDGE
)	ADJUDGING (NAMED PERSON)
JOHN DOE,)	TO BE A MATERIAL WITNESS
Defendant(s))	UNDER N.J.S. 2A:81-18,et seq.

I, _____, Judge of the Superior Court of New Jersey, Law Division, (Criminal), a court of record, do hereby certify:

1. There is now pending before the Grand Jury of _____ County a criminal prosecution by the State of New Jersey against John Doe, who stands accused and charged with having committed the following criminal offenses against the laws of the State of New Jersey, to wit:

2. Jane Jones, now residing at _____ _____, _____, is a necessary and material witness for the State of New Jersey by means of the following:

(Repeat information contained in petition)

and that the presence of the said Jane Jones, personally, at said Grand Jury proceedings, at _____ _____, New Jersey, for the purpose of giving testimony therein will be required on _____ _____,197____, and that the presence of the said Jane Jones cannot be voluntarily insured.

3. That if the said Janes Jones comes into the State of New Jersey in obedience to a summons

directing her to attend and testify at said Grand Jury proceedings, the laws of the State of New Jersey and of any other state through which said witness may be required to pass by the ordinary course of travel to attend said proceedings, gives her protection from arrest or the service of process, civil or criminal, in connection with matters which arose before her entrance into said state, pursuant to said summons.

4. That this certificate is made for the purpose of being presented to a judge of a court of record of the County of _____, State of _____, where said Jane Jones now is, upon proceedings to compel said Jane Jones to attend and testify at said Grand Jury proceedings in the County of _____, State of New Jersey, upon the dates and days herein above set forth.

WITNESS, The Honorable _____, Judge of said court, at _____, New Jersey, this _____ day of _____, 197____.

_____
J.S.C.

STATE OF NEW JERSEY)
: SS
COUNTY OF _____)

I, _____, Clerk of the _____ Court, State of New Jersey, do certify that the Honorable _____, by whom the foregoing certification was made, and whose name is thereto subscribed, was, at the time of making thereof, and still is a Judge of the _____ Court of New Jersey, a court of general jurisdiction, duly commissioned to try indictments found in the Superior Court of New Jersey, County of _____, Law Division, Criminal, to all whose acts, as such, full faith and credit are and ought to be given, as well in Court of Judicature as elsewhere.

IN ADMITTANCE THEREOF, I have hereunto set my hand and affixed the seal of the said Court this _____ day of _____, 197_,

_____

Clerk of the _____
County Court

_____ COUNTY OF _____
CRIMINAL DIVISION

_____ COUNTY
DOCKET NO.

IN THE MATTER OF	:	
JANE JONES, A MATERIAL WITNESS	:	PETITION FOR ISSUANCE OF ORDER TO SHOW CAUSE
. . . . .	:	
STATE OF NEW JERSEY	:	
V.	:	
JOHN DOE,	:	
DEFENDANT	:	

The undersigned, _____ an Assistant District Attorney for _____ County, respectfully petitions the Court as follows:

1. Petitioner is in receipt of an exemplified Petition and Certificate of a judge of a court of record of the State of New Jersey adjudicating one Jane Jones as a material witness in a criminal prosecution by the State of New Jersey against John Doe now pending before the Grand Jury of _____ County, in the State of New Jersey, under the

"Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" in accordance with (cite Foreign Jurisdiction's Uniform Act).

2. Said Petition and Certificate of a judge of record of New Jersey are attached hereto.

3. In accordance with the provisions of the Uniform Act, above cited, your petitioner seeks an Order to Show Cause directing the witness Jane Jones to appear before a Judge of the _____ County of _____, Criminal Division,_____ County, to show cause why an order should not be entered directing her to appear as a material witness before the Grand Jury of _____ County, New Jersey, at _____, _____, New Jersey, on _____, 197__, to give testimony in the criminal prosecution by the State of New Jersey against John Doe now pending before said Grand Jury.

_____
Assistant District Attorney
_____County,_____

Dated:_____, 197 .

COURT OF _____
CRIMINAL DIVISION
_____ COUNTY
DOCKET NO.

IN THE MATTER OF :
JANE JONES, A MATERIAL :
WITNESS :
. . . . . :
STATE OF NEW JERSEY :
v. :
JOHN DOE, :
DEFENDANT. :

ORDER TO SHOW CAUSE

MATERIAL WITNESS
JANE JONES
[address]

This matter being brought on before the Court by _____, Assistant District Attorney of _____ County, and whereas it appears that a Petition and Certification naming Jane Jones as a material witness in a criminal prosecution pending before the Grand Jury of _____ County, in the State of New Jersey, has been filed with this Court, and good cause being shown;

IT IS, therefore, on this _____ day of _____, 197__, at _____ o'clock in the

_____ noon, before the Honorable _____,
Judge of the _____ Court of _____,
Criminal Division, _____, County, at
_____, County of _____,
State of _____, why an order should not be
signed by the said Judge of the said Court ordering
the said Jane Jones to appear as a material witness
before the Grand Jury of _____ County,
New Jersey, at _____,
_____, New Jersey, on
_____, 197___ , to give
testimony in the criminal prosecution by the State
of New Jersey against John Doe now pending before
said Grand Jury.

_____
Judge,
_____ Court of _____
_____ County

_____ COURT OF _____

_____ COUNTY

DOCKET NO _____

IN THE MATTER OF JANE JONES,
A MATERIAL WITNESS IN A
CRIMINAL PROCEEDING (STATE
OF NEW JERSEY v. JOHN DOE,
DEFENDANT)

This matter having been presented to the Court by _____, the District Attorney for _____ County, State of _____, in the presence of Jane Jones, the material witness named in the certificate (copy attached) signed by the Honorable _____, Judge of the _____ Court of _____ County, New Jersey, a court of record, requesting that Jane Jones be ordered to appear as a necessary and material witness before the _____ County Grand Jury in the criminal prosecution for _____ by the State of New Jersey against John Doe, and good cause being shown,

IT IS, therefore on this _____ day of _____, 197_,

ORDERED, pursuant to the provisions of the "Uniform Act to Secure the Attendance of Witnesses From Within or Without a State in Criminal Proceedings" (cite Foreign Jurisdiction's Uniform Act) and N.J.S. 2A:81-18, et seq. that said Jane Jones appear and testify before the _____ County, New Jersey Grand Jury, at _____, _____, New Jersey, on the _____ day(s) of _____, 197_, at ____ o'clock in the ____ noon, in the criminal prosecution pending before said Grand Jury by the State of New Jersey against John Doe, and it is.

FURTHER ORDERED that Check No. _____, dated _____, 197_, made payable to Jane Jones, in the sum of $____, be delivered to the said Jane Jones, for mileage at the rate of 10 cents per mile from _____, _____ to _____, New Jersey, and return, plus the required payment of $5.00 per day for _____ days attendance.

_____
JUDGE _____ COURT
OF _____

COMPELLING ATTENDANCE OF OUT-OF-STATE WITNESS- N.J.S. 2A:81-18, et seq.

CHECK LIST

1. Obtain full address of witness. Be sure name of witness is listed in Discovery material.

2. Arrange with court for case to be set down preemptorily.

3. Contact Prosecutor or District Attorney in jurisdiction in which witness resides.

4. Prepare necessary pleadings both for the New Jersey and foreign jurisdiction. (If books and records, etc., are required, this fact must be stated clearly in pleadings.)

5. Draw certified check for mileage (both ways) and statutory payment of $5.00 per day for the witness.

6. After the local judge has signed certification, have county clerk certify and exemplify copies of petition and certification and if there is an indictment, have that made part of the package.

7. File original petition and certification with local county clerk.

8. Mail 6 copies of all documents (certified package) to Prosecutor or District Attorney in foreign jurisdiction. (Advise him by telephone prior to your mailing of documents).

9. Be sure to inquire of District Attorney or Prosecutor in foreign jurisdiction whether he will handle the matter for you on the return date of the order to show cause in the foreign jurisdiction.

10. Make arrangements for transportation of witness, if necessary.

11. Make arrangements for hotel accomodations and for feeding of witness while witness is in this State.

UNIFORM ACT TO COMPEL THE ATTENDANCE OF WITNESSES

The summons of out-of-state witnesses authorized by this act in states which have become signatories to the Uniform Act is equivalent to both the subpoena ad testificandum and subpoena duces tecum. Matter of Subpoena duces tecum Served on Custodian of Records of Institutional Management Corp., 137 N.J. Super 208 (App. Div. 1975). However, there was one exception, i.e., Illinois, where it was held that the act did not authorize the issuance of a subpoena duces tecum. In Re Grothe, 59 Ill. App. 2d. 1 (1965). However, the Illinois Legislature thereafter amended the Illinois statute, so that even that State now provides for the subpoenaing of records. At present only Alabama and Georgia are not signatories. The District of Columbia, Panama Canal Zone, Puerto Rico and the Virgin Islands are all signatories. With regard to the Uniform Act as a subpoena duces tecum, see In Re Saperstein, 30 N.J. Super. 373 (App. Div. 1954), Pet. for Cert.Den., 15 N.J. 613, certiorari denied, Saperstein v. New York, 75 S. Ct. 110, 348 U.S. 874; and Appl. of Waterfront Comm., 39 N.J. Super. 33 (1956); Matter of State Grand Jury Investigation into Corruption in Lindenwold, 136 N.J. Super 163 (1975); and In Re Bick, 372 N.Y.S. 2d 447 (N.Y. Sup. 1975).

With very slight modification, the forms attached can serve to bring in before the grand jury or a criminal trial court the business records or other evidence needed by the grand jury or trial jury in this State. The jurisdictional prerequisite is that a "criminal proceeding" exists. This proceeding may be a grand jury investigation or a criminal trial. Naturally, this act does not lend itself to a disorderly persons offense.

The judge in the foreign jurisdiction must be able to find from the petition and certification that:

1. The certifying court is a "court of record" in the State where the petition originated.

2. That a criminal proceeding exists.

3. That the witness does indeed have material and necessary information.

4. That the witness will be protected from civil and criminal process while traveling from the State of his residence to the State requesting his presence.

5. That the fees both as to mileage (round trip) and attendance ($5.00 per day) proscribed by the Uniform Act have been paid in advance.

The constitutionality of the Uniform Act has been established in such cases as People v. Cavanaugh, 69 Cal. 2d 262, 444 P. 2d 110 (1968), cert.den. 89 S. Ct. 42, Rehearing Denied 89 S. Ct. 2139 (1969).

It should be noted that the Uniform Act may be employed by the defense as well as the prosecution. State v. Smith, 87 N.J. Super. 98 (1965). Where the defense employs the act, it is its responsibility, not the prosecution's, to handle the entire proceedings under the act.

APPENDIX

PART III

CASE PREPARATION

Form 1

INVESTIGATION CHECK LIST

STATE VS. _____

	YES	NO
Has form letter been forwarded to Police Department requesting submission of all particulars?		
Are all names, addresses & telephone numbers of all witnesses in the file?		
Have all witnesses been interviewed?		
Are all statements of witnesses, defendant in file?		
Is defendant out on bail?		
Is name of Bondsman in file?		
Has defendant been processed through Sheriff's Office		
Is Criminal Record in the file?		
Is chain of custody of the evidence established?		
Have the correct charges been made?		
Is photograph of defendant in file?		
Will other photographs help case?		
Will sketch help case?		
Copy of applicable statutes attached?		
Are all police reports in file?		
Have all police witnesses submitted statements?		
Will all exhibits be available for trial?		
Have you examined the Statute Law in this case?		
Will the use of scientific device, laboratory or special expert aid the case?		
Have all sources of information been explored?		
Have you obtained personal data of defendant, such as age, occupation, place of employment, place of residence, family, etc.?		
Would a polygraph test be advisable?		
Can all witnesses identify the defendant?		
Has scene of crime been visited by the investigating officers?		
Is it necessary to interrogate more witnesses?		
Have you examined all elements of the case, such as WHO, WHAT, WHEN, WHERE, HOW, WHY?		
Has any alibi of defendant been checked?		
Are hospital and doctors reports in file?		
Can you draw any conclusion from the physical or circumstantial evidence?		
In larceny cases, do you have the true full name of owner, full description and values of stolen property?		
Are you satisfied that the case has been fully investigated for trial?		
If the case is not fully investigated for trial, have you advised the prosecuting attorney?		

PLEASE DO.

REMARKS: _____

_____

Investigator

Use reverse side if additional space is needed to answer any questions.

Form 2

Re: State vs._____

Dear Officer:

A complaint has been received by this office in the above matter.

Will you kindly forward your police report, statements and any other information you may have pertaining to this case to this office.

Very truly yours,

County Prosecutor

Form 3

REPORT OF A CRIMINAL INVESTIGATION

TO: _____ DATE:
County Prosecutor of _____ County

FROM: _____, _____
Police Department

State v. _____ _____
Crime

Complainant: _____

Address: _____

Date of Crime: _____ _____
Place

SUMMARY OF FACTS

[Where statement of witness or item of evidence is enclosed precede witness's name or item by symbol (*)]

POLICE WITNESSES
(Give full name, rank and shield number) Report Filed (Yes or No)

Form 3 - continued

OTHER WITNESSES (Give full name and address)	STATEMENT GIVEN (Yes or No)	(Oral or Written)

EVIDENCE

(Articles preceded by symbol (*) are submitted herewith).

Photographs? Photographer?

Maps or Sketch? By Whom?

Weapons?
(If guns, give make, serial number and caliber)

Physical evidence? (List articles, giving description, serial number, value, etc.).

Articles not submitted herewith are in whose custody?

Give names of police officers who handled evidence from scene of crime or place where found to Police Property Clerk:

REMARKS

SUBMITTED BY: _____
Name and Rank

Form 3 - continued

REVIEWED AND APPROVED BY: _____

_____

Receipt of items preceded by symbol (*) acknowledged this _____ day of _____, 197____.

_____ COUNTY PROSECUTOR

By: _____
Title

SUBMIT POLICE REPORTS OF INVESTIGATION, STATEMENTS OF WITNESSES, MAPS AND PHOTOGRAPHS TOGETHER WITH THIS FORM.

Form 4

OFFICE OF THE COUNTY PROSECUTOR
DETECTIVE BUREAU
_____ COUNTY COURT HOUSE
_____ N. J.

State Bureau of Identification
Division of State Police
Trenton, New Jersey

Re: State v.
Complaint #

Gentlemen:

Please check your files to ascertain if there is a record of the following defendant:

Name: Alias:

Last Address: P.O.B.

Date of Birth:

Description:

Social Security #:
S.B.I. #:
F.B.I. #:

Please forward abstract of Criminal Record to the attention of the undersigned if on file. Thank you for your assistance in this matter.

Very truly yours,

_____
Chief of County Detectives

By: _____

County

Form 5

OFFICE OF THE COUNTY PROSECUTOR
DETECTIVE BUREAU, _____ COUNTY
COURT HOUSE
_____ NEW JERSEY

ORI NAME

Hon.
Director
Federal Bureau of Investigation
U. S. Department of Justice

Re: State v.
Complaint #

Dear Director:

Please check your files to ascertain if there is a record of the following defendant:

NAME:

LAST ADDRESS:

DATE OF BIRTH:

DESCRIPTION:

SOCIAL SECURITY #:

N.J.S.B.I. #:

Please forward abstract of criminal record to the undersigned, if on file. Thank you for your assistance in this matter.

Very truly yours,

_____
Chief of County Detectives

By: _____
County

UCDS FORM 1

Form 6

INFORMATION REQUESTED FOR PROSECUTOR'S OFFICE

_____ County Prosecutor's Office

File No._____ Date_____

The information requested and listed below is of a confidential nature, and is to be used only in the preparation of criminal cases for _____ County Grand Jury action and Court trials. Please print or type.

NAME OF PATIENT_____
ADDRESS_____
STATE vs._____ CRIME_____
NAME OF HOSPITAL_____
DATE OF ADMITTANCE_____ TIME OF ADMITTANCE_____
HOW PATIENT WAS BROUGHT IN_____
FULL NAME OF ADMITTING DOCTOR_____
FULL NAME OF TREATING DOCTOR_____
DIAGNOSIS OF INJURIES_____
_____
_____
SPECIFIC TREATMENT ADMINISTERED_____
_____
_____
DATE OF DEATH_____ or DATE OF DISCHARGE_____
TIME OF DEATH_____ PRONOUNCED DEAD BY DOCTOR_____
BODY RELEASED TO_____
REMARKS_____
_____

Record given by:

_____
Historian of Records

Return to:

_____ County Prosecutor's Office
_____ County Court House
_____ New Jersey

Form 7

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE

COLONEL Clinton Pagano
SUPERINTENDENT

RECORDS AND IDENTIFICATION SECTION
POST OFFICE BOX 68
WEST TRENTON, NEW JERSEY 08625

REQUEST FOR EXAMINATION OF EVIDENCE

Crime _____ In County of _____ Lab. No. _____

Victim _____ Suspect _____

Submitting Agency _____

Forward Replies to _____

Invest. by _____ Delivered by _____
SIGNATURE OF PERSON DELIVERING EVIDENCE

Brief History of Case:

Examination Requested:

List of Specimens:

S.B.I. 76 (Rev. 7-71)

Form 8

Mrs. Kathryn Filidore
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey

Re: STATE v. _____
Our Case _____

Dear Mrs. Filidore:

Please forward a certified copy of an application for registration for the above-named subject for a _____.

Please cover the period of _____.

Thank you in advance for your cooperation.

Very truly yours,

Chief of County Detectives

By: _____
County _____

Form 9

_____ COUNTY PROSECUTOR'S OFFICE, _____, NEW JERSEY

I N V E N T O R Y O F E V I D E N C E

Submitted: _____ Title: _____ Date: _____

State vs: _____

Pros File No.: _____ Date of offense: _____ Municipality _____

Indictment No.: _____ Charge: _____

Item No.	Quantity	DESCRIPTION OF ARTICLES (Model, Serial #, Identifying marks, value & condition if available)

Received by: _____ Agency: _____

Storage Location: _____

(For evidence custodian only)

Received by:
(Signature: _____ Date: _____

Dept/Agency: _____

P O S T-T R I A L I N F O R M A T I O N

Trial dates: _____ Judge: _____

Trial Prosecutor: _____ Defense Atty: _____

Verdict(s): _____

Remarks: _____
(Disposition of other evidence not listed herein, etc.) This form will be used for disposition of all evidence, & returned to Evidence Custodian)

Form 10

OFFICE OF THE COUNTY PROSECUTOR
DETECTIVE BUREAU
_____ COUNTY
COURT HOUSE
_____ NEW JERSEY

Re:

Dear Sir:

The above subject is presently awaiting disposition of a criminal charge.

To properly present this charge at trial it is necessary that we have an exemplified copy of the defendant's conviction for

Please find enclosed voucher to be filled out by you to cover the cost for this service.

Respectfully yours,

_____
CHIEF OF COUNTY DETECTIVES

BY: _____
County

Enc.

Form 11

PROSECUTOR'S OFFICE

WITNESS LIST FOR GRAND JURY

STATE vs. _____

FILE NO. _____ DATE: _____

CHARGE: _____

_____

NAME	ADDRESS
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Subpoenaes and Notices
sent to above witnesses on:

Date: _____

By: _____

_____
Detective Assigned

Form 12

REMOVE FROM FILE BEFORE GIVING DISCOVERY

PROSECUTOR'S CASE REVIEW AND PLEA FORM

Defendants Names & D.O.B.'s: Offenses

Municipality

Docket No. Ind. No.

Prior Criminal History: (Include: any arrests, juvenile record, pending cases and criminal conviction of each defendant.)

Complainant Municipality Detectives Assigned & Date

Early Case Review: A/P Date

__Complaint

__Rap Sheets

__Arrest or Incident Report

__Detective Reports

__Lab Reports

__Official Certifications

__Handwriting Report

__Witnesses Statements

__Fingerprint Report

__Search Warrants, Affidavits & Return Inventories

__ Statement of Deft.

__ Line-up or I.D. Procedure, Photos Documents

__Weapons - Test-fired

__Firearms Incident Report

__Medical Report

__Physical Evidence

__Photo of Defendant

__Photographs

__Bank Transcripts-Check Cases

Additional Witnesses needed and/or Statements:

Other Investigation Needed:

Further Investigation:

Assigned to Det._____ Date:_____

Recommendations of Processing:

____Grand Jury Charges ____Dismissal Reason Downgrade Charges & Reason

Plea Bargaining:

Other Comments:

Case is ready for Trial:_____ Date:_____

Signature of Assistant Prosecutor:_____

END