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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON PEKRUL, Appellant/Petitioner, v. PAUL K. CHARLTON, Appellee/Respondent.	)	Case No 06-16032

MEMORANDUM IN SUPPORT OF
APPELLANT'S INFORMAL BRIEF

COMES the Appellant in the above-entitled action, Gordon Pekrul, and would show the Court the following in support of Appellant's Informal Brief.

2. FACTS OF THE CASE

Appellant Gordon Pekrul (hereinafter, "Pekrul") sent a letter to Appellee Paul K. Charlton, the United States Attorney for the District of Arizona (hereinafter, "the U.S. Attorney"), requesting certain information concerning the prosecution of state judges in Arizona and further requesting that Pekrul be allowed to inform the federal grand jury of the massive judicial corruption in the Arizona state court system.

The U.S. Attorney's reply was as follows:

> Thank you for the letter you sent to our office regarding your son. Please be advised however, that our office does not have jurisdiction over this matter. I advise you to work with your son's lawyer.

I.e., the U.S. Attorney's reply was total nonsense (unsigned with the "name" "DUTY ATTORNEY").

Pekrul then sued the U.S. Attorney in federal district court over the requests that the U.S. Attorney so airily (and incorrectly) brushed aside.

7. ARGUMENT

Issue 1: Appellant Gordon Pekrul has a right to the district court's reason for its decision.

There is probably nothing that causes a litigant to lose respect for the courts more quickly than to be treated as someone "beneath notice" by a judge who "cannot be bothered with the affairs of peasants, Plucknett, *Concise History of the Common Law*, p. 310 (1956), to the extent he refuses to provide any reasoning whatsoever for his decision.

> MR. KATZ: May I ask the reasons, your Honor?
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> THE COURT: Just because I said it, Counsel.
>
> I could stop right here and have no trouble concluding that the judge committed misconduct. It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system—a motion, an opportunity for the other side to respond, a statement of reasons for the decision, reliance on legal

> authority. These niceties of orderly procedure are not designed merely to ensure fairness to the litigants and a correct application of the law, though they surely serve those purposes as well. More fundamentally, they lend legitimacy to the judicial process by ensuring that judicial action is—and is seen to be—based on law, not the judge's caprice.
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> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (9th Cir. 2005) (dissent).
>
> Findings on the record inform the parties and other interested persons of the grounds of the ruling, add discipline to the process of judicial decision-making and enable appellate courts properly to perform their reviewing function. If the district court not only fails to make "essential findings on the record," but also expresses nothing in the way of legal reasoning, if it simply announces a result, it may frustrate these objectives. We say "may" because there are cases in which the facts are so certain, and the legal consequences so apparent, that little guesswork is needed to determine the grounds for the ruling. This is not such a case.
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> *United States of America v. Christopher Williams*, 951 F.2d 1287 (D.C. Cir. 1991).

Nor is this the case here.

> If we knew the district court's legal reasoning in this case, we might have little difficulty in ascertaining the pertinent but unstated findings underlying it, as did the *Caballero* court. If we knew what facts the district court considered "essential" to its ruling (Rule 12(e)), we might be able to piece together the unstated legal grounds for its decision. But we have neither essential findings nor legal reasoning. As Chief Justice Hughes wrote, "it is always desirable that an appellate court should be adequately advised of the basis of the determination of the court below . . . ." *Public Service Comm'n v. Wisconsin Tel. Co.*, 289 U.S. 67, 69-70, 53 S.Ct. 514, 77 L.Ed. 1036 (1933).
>
> *Id.*

Here all *this* Court has to go on are the arguments of the U.S. Attorney, which are both evasive and fatally flawed.

Issue 2: Appellant Gordon Pekrul has a right to petition his government for the redress of grievances. That government includes the federal grand jury.

The obvious questions here are:

a. Does a citizen have a right to petition his government for the redress of grievances?

b. Is the federal grand jury, supposedly operating independently of the prosecuting attorney and the judge, part of that government?

The right to petition extends to *all* departments of the Government. *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609, 612 (1972).

The First Amendment includes a criminal complaint brought against a state or federal agent. *United States v. Hylton*, 710 F.2d 1106 (5th Cir. 1983).

The loss of First Amendment freedom, for even minimal periods of time, unquestionably constitutes irreparable harm. *Elrod v. Burns*, 96 S.Ct. 2673, 2690 (1976).

Issue 3: Appellant Gordon Pekrul has a right to inform a federal grand jury of violations of federal criminal law.

> It is the duty and right . . . of every citizen to assist in prosecuting, and in securing the punishment of any breach of the peace of the United States.
>
> *In re Quarles*, 15 S.Ct. 959, 960-961 (1894).
>
> The United States appeals from an order of the United States District Court for the District of Nebraska, ordering the United States Attorney of that district to present to the grand jury allegations of wrongdoing on the part of an FBI agent and an Assistant United States Attorney lodged by Larry A. Wood, a private citizen and previously acquitted defendant. Alternatively, the court ordered that Wood be permitted to personally appear before the grand jury to present his allegations. We affirm the district court.
>
> *In re Application of Larry A. Wood to Appear Before Grand Jury*, 833 F.2d 113 (8th Cir. 1987).
>
> On December 27, 1985, the district court, after hearing the matter at length, issued an order in which it held that the matter should be re-presented to the grand jury, but that neither Wood nor his attorney need be present at the grand jury session if two conditions obtained: (1) if the accusation was presented fairly, and (2) the decision as to what investigation, if any, was done, including what witnesses, if any, would be called to testify, was made by the grand jury and not by the government attorneys.
>
> *Id.*

Note that the decision as to whether or not to investigate in supposed to be made by the grand jury *and not by the government attorneys*.

> The United States argues that a court "may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of the [executive or the grand jury itself] unless there is a clear basis in fact and law for doing so." *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977); *United*

States v. (Under Seal), 714 F.2d 347 (4th Cir.), *cert. dismissed*, 464 U.S. 978, 78 L.Ed.2d 354 (1983). We believe this to be a correct statement of the law. The question thus becomes whether there was a clear basis in fact and law for the district court's decision in this case. We believe that there was, primarily for the reasons stated by the district court in its December 23, 1985, opinion.

We come then to the second issue and that is, whether, as an enforcement mechanism, the district court erred in holding that if the U.S. Attorney failed to comply with the order to resubmit the matter to the grand jury, the application of Wood to appear before the grand jury would be granted. We think not. The general rule is, of course, that an individual cannot bring accusations before a grand jury unless invited to do so by the prosecutor or the grand jury. A well-recognized exception to this rule is that the court in its supervisory power can authorize an individual to appear before a grand jury if it feels that the circumstances require. Mr. Justice Field announced the rule in his charge to a federal grand jury in 1872:

> You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by a private enmity, and seek merely the gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public offense by the accused, he can be held to bail to answer to the action of the grand jury.

Charge to Grand Jury, 2 SAWY. 667, 30 F.Cas. 992 (C.C.D.Cal. 1872) (No. 18,255) (emphasis added); *see also In re New Haven Grand Jury*, 604 F.Supp. 453, 457, 460-61, n. 8-11 (D. Conn. 1985). Certainly, this alternative is significantly less intrusive on the powers of the prosecutor than an order requiring the representation to be made. Moreover, the order is not violative of the general rule that the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case. *See United States v. Nixon*, 418 U.S. 683, 94 S.Ct.

> 3090, 41 L.Ed.2d 1039 (1974). Here, the court order does not require the United States Attorney to prosecute or, for that matter, to represent the matter to the grand jury. It simply states that, unless he does, Larry Wood may appear before the grand jury and do so. Thereafter, the prosecutor is free to prosecute or not, as his judgment dictates. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).
>
> *Id.*

Note the words, "Thereafter, the prosecutor is free to prosecute or not, as his judgment dictates." Again, there is a difference in meaning between the words *investigate* and *prosecute*.

Pekrul is very aware of the corruption in the Arizona state court system and has to wonder if the U.S. Attorney is *aware* of the corruption in the Arizona state court system and is actively taking steps to *conceal* evidence of those crimes from the grand jury itself.

> The grand jury has powers reaching far beyond those of the IRS. The justification for these powers is the singlemindedness of the grand jury's function in accusing individuals of criminal acts. "It is critical that the offenses be crimes, because the only justification, if any, for the grand jury's massive intrusions upon freedom and privacy is the importance society has attached to detecting criminal activity and bringing to justice those responsible."
>
> *In re Grand Jury. J. R. Simplot Co.*, No. 76-1893 (9th Cir. 5/02/1977).

Issue 4: Government lawyers have no right to block the right to inform a federal grand jury of violations of federal criminal law.

Judicial rhetoric concerning the federal grand jury makes reassuring reading.

Grand jurors bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecution attorney or law-enforcement officer ferreting out crime. *In Re Groban's Petition*, 77 S.Ct. 510, 520 (1957) (dissent).

Scope of inquiries…not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. *Blair v. United States*, 39 S.Ct. 468, 471 (1919).

The public has a right to every man's evidence. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 94 (2nd Cir. 1993) (citing *Branzburg v. Hayes*, 92 S.Ct. 2646, 2660 (1972)).

It is common practice for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them. *In re Hale*, 139 F. 496, 498 (C. Ct. S. D. N. Y. 1905) quoting *Frisbie v. United States*, 15 S.Ct. 586 (1895).

What is left unaddressed in *all* judicial decisions is this: what is to be done about the U.S. Attorneys, such as Appellee Paul K. Charlton, who routinely *block* access to victims of federal criminal offenses to their fellow citizens on the federal grand jury?

The grand jury was not meant to be the private tool of the prosecutor. *United States v. Fisher*, 455 F.2d 1101, 1105 (2nd Cir. 1972).

The grand jury's independence was ". . . so undermined that it could not make an informed and unbiased determination of probable cause." *United States v. Estacio*, 64 F.3d 477, 481 (9th Cir 1995).

Constitutional restraints prohibit prosecutors from engaging in conduct that undercuts the independence of the grand jury. *United States v. Zielezinski*, 740 F.2d 727, 730 (9th Cir. 1984).

The obvious question here is, what independence? How can a grand jury be "independent" from a government lawyer who *controls* and *restricts* its flow of information?

Was the truth of how today's grand jury is used as the "private tool of the prosecutor" described by a United States Senator?

The grand jury is "a spear in the hands of ambitious prosecutors anxious to silence dissent or to climb to greater political heights over the backs of hapless defendants caught up in the system. Abourezk, *The Inquisition Revisited*, 7 Barrister 19 (1980).

Compare the behavior of the U.S. Attorney in this instance with that of the U.S. Attorney in *United States District Court for the Eastern District of Washington v. Sandlin*, 12 F.3d 861 (9th Cir. 1993), in which the U.S. Attorney actually *allowed* a citizen's complaint (a lawyer) to go to the federal grand jury which was then *allowed* to make an investigation.

The question that eventually needs to be addressed is this: is the U.S. Attorney part of a "cover-up" indictable under 18 U.S.C. §§ 2, 3, 4 and 1503?

Title 18 U.S.C. § 4, requires proof of four elements: (1) that the crime, has been committed by someone other than the defendant; (2) that the defendant had actual knowledge of that fact; (3) that the defendant failed to notify authorities of the offense; and (4) that the defendant took an affirmative step to conceal the crime. *See United States v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984).

> What is required to establish a case under this section was recently expounded by this court in *Hiram v. United States*, 9 Cir., 354 F.2d 4, 6. In that case one Randolph Hiram, an uncle of Edmund Hiram, was indicted as an accessory after the fact to bank robbery committed by Edmund Hiram. This court said: "Under 18 U.S.C. § 3 the government is required to prove three essential elements to establish the offense charged in the indictment: First, that Edmund committed the bank robbery; second, that appellant had actual knowledge of Edmund's participation in that robbery; and third, that with such knowledge, appellant in some way assisted Edmund in order to hinder or prevent his apprehension, trial or punishment."
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> *Paul Santo Orlando v. United States*, 377 F.2d 667 (9th Cir. 1967).

The principles for 18 U.S.C. § 3 to 18 U.S.C. § 241 and 242 are the same.

> Both Harris and Holmes were convicted of attempted possession of cocaine through the aiding and abetting statute, 18 U.S.C. § 2. "[T]he essential elements of aiding and abetting are (1) an act by the defendant that contributes to the commission of the crime, and (2) an intention to aid in the commission of the crime." *Davis*, 306 F.3d at 412. Accordingly, the Court must determine whether any rational finder of fact could determine that these elements have been satisfied. *See Gibbs*, 182 F.3d at 419-20.
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> *United States v. Harris*, No. 03-6207 (6th Cir. 02/08/2005).

Same principle.

> **18 U.S.C. Sec. 1503. Influencing or injuring officer or juror generally**
>
> **(a)** Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection.

Notice the words "corruptly" and "influences, obstructs, or impedes" . . . "the due administration of justice."

The U.S. Attorney's reasoning in the lower court was, at best, disingenuous.

> At the outset, as a general rule, the pursuit of criminal law enforcement via the grand jury process is within the discretion of the United States Attorney to perform a discretionary act. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1366 (9th Cir. 1975); *Ross v. United States Attorney's Office*, 511 F.2d 524, 525 (9th Cir. 1975).
>
> Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, p. 1, lines 24-28.

Note the words, "as a general rule."

Note also the words, "discretionary act." Is it a "discretionary act" to

deliberately *conceal* evidence of violations of federal criminal law from the members of the grand jury or is it a *felony*?

United States v. General Dynamics Corp. concerned a federal judge *halting* a federal criminal prosecution, not the U.S. Attorney *blocking* an investigation.

Neither did *Ross v. United States Attorney's Office* address the deliberate withholding of evidence from the federal grand jury. The case *Ross* refers to, *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2nd Cir. 1973), has no bearing on this case for two reasons:

a. Most of the case refers to a decision to *prosecute*, as opposed to *investigate*.

b. *Inmates* requested the court to compel federal and state officials to investigate. Nowhere was there a request to have the *grand jury* investigate. *Cf. In re Grand Jury Application*, 617 F.Supp. 199 (S.D.N.Y. 1985).

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.
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> *Cohens v. Virginia*, 19 U.S. 257, 290 (6 Wheat. 264, 399-400) (1821).

Frankly, there is the issue that no federal court has had the fortitude to address head on:

> [5] It is extremely important for you to realize that under the United States Constitution, the grand jury is independent of the United States Attorney and is not an arm or agent of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime. There has been some criticism of the institution of the Grand Jury for supposedly acting as a mere rubber stamp, approving prosecutions that are brought before it by governmental representatives. However, as a practical matter, you must work closely with the government attorneys. The United States Attorney and his Assistant United States Attorneys will provide you with important service in helping you to find your way when confronted with complex legal problems. It is entirely proper that you should receive this assistance. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith in matters presented by the government attorneys.
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> *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005).

HAWKINS, Circuit Judge, with whom Circuit Judges PREGERSON, WARDLAW, W. FLETCHER, and BERZON join, Dissenting:

> The majority tells us that a constitutionally created institution, designed precisely to filter prosecutorial desire through citizen judgment, must give way to the unbridled exercise of prosecutorial discretion. The majority arrives at this remarkable conclusion by relying principally upon British history and the use of the grand jury in England prior to King George.
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> *Id.* (footnote omitted).
>
> A consideration of applicable law and the full record of these proceedings yields the inescapable conclusion that neither a grand

> jury target nor a private complainant has a right to communicate directly, in writing or otherwise, with a federal grand jury without the approval of a prosecutor or judge. There is no constitutional, statutory, or common law right to communicate directly with a federal grand jury without the participation of a prosecutor or judge, and attempts to transmit written communications directly to a grand jury may constitute a crime.
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> *In Re New Haven Grand Jury*, 604 F.Supp. 453 (D. Conn. 1985) (footnote omitted).
>
> Indeed, the initiation by a private party of written communications with a grand jury, with the exception of a request for an opportunity to appear, may constitute a crime. See 18 U.S.C. § 1504. The statute on jury tampering by written communications is instructive because "[t]he purpose of 18 U.S.C. [] § 1504 was to prevent anyone from attempting to bring pressure upon or [to] intimidate a grand juror by a written communication with that intent." *United States v. Smyth*, 104 F.Supp. 283, 299 (N.D. Cal. 1952). The statute prohibits written communications addressed to the grand jury as a body and intended to be seen by all of the jurors, as well as those addressed to an individual juror. See *Duke v. United States*, *supra*, 90 F.2d at 841 (target of a grand jury investigation convicted under predecessor statute to 18 U.S.C. § 1504 for transmitting a letter to grand jury foreman with purpose of "get[ting] before the grand jury [his] contentions and unsworn statements").
>
> *Id.* (footnotes omitted).
>
> It is true, of course, that a federal grand jury cannot be compelled to follow a course of action desired by either the prosecutor or by the court, and it is the grand jury that determines whether there is probable cause to believe that an offense has been committed.
>
> *Id.*

How can a grand jury determine whether an offense has been committed if it

is not *allowed* access to the evidence or the witnesses?

Whether this Court grants Appellant Gordon Pekrul the relief he requests or not, Appellant Gordon Pekrul moves this Court to answer the questions posed in the foregoing paragraph in a *published opinion*.

Respectfully submitted,

Dated: July __ , 2006

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