

A federal grand jury that was investigating drug trafficking in the jurisdiction subpoenaed a witness to testify. The prosecutor advised the witness that he had a Fifth Amendment privilege not to testify if he so chose. The witness asked that his attorney be allowed to advise him inside the grand jury room, but the prosecutor refused to allow the attorney inside. After speaking with his attorney outside the grand jury room, the witness decided to testify. During his testimony, he made self-incriminating statements.

The witness was subsequently indicted for drug crimes. The indictment was based on the witness's grand jury testimony and on evidence seized in an unconstitutional search of the witness's home.

The witness has moved to dismiss the indictment.

Should the court dismiss the indictment?

- A. No, because the witness had no right to counsel inside the grand jury room and the illegally seized evidence did not affect the validity of the indictment.
- B. No, because the witness waived his constitutional rights by testifying.
- C. Yes, because the indictment was based upon illegally seized evidence.
- D. Yes, because the witness was denied his constitutional right to advice of counsel.

Explanation:

Rights & privileges that may be invoked at grand jury proceedings

Constitutional rights	Privilege against self-incrimination (Fifth Amendment)
	Equal protection (Fifth/Fourteenth Amendment)
	Congressmen's privilege not to be questioned about legislative activities (speech or debate clause)
Privileges	Attorney-client privilege
	Spousal privilege
	Marital communications privilege
	Psychotherapist-patient privilege

An indictment is a written statement by a grand jury that formally charges a person with a crime after a finding of probable cause. But since a grand jury only has the investigatory power to indict (not the judicial power to convict), a witness may only invoke certain constitutional rights during grand jury proceedings.

A witness may **consult with an attorney outside** the grand jury room (as seen here). But since a witness has **no Sixth Amendment right to have counsel inside the grand jury room**, the prosecutor had the right to refuse the witness's request to have his attorney inside. Therefore, the witness's self-incriminating testimony before the grand jury did not violate the Sixth Amendment, and the subsequent indictment should not be dismissed on this basis (**Choice D**).

The indictment was also based on evidence seized during an unconstitutional Fourth Amendment search of the witness's home. Pursuant to the exclusionary rule, illegally seized evidence should be suppressed at trial to discourage unconstitutional police conduct. However, the **exclusionary rule does not apply to grand jury proceedings** since the grand jury is an investigatory body—not a judicial one. Therefore, the illegally seized evidence does not affect the validity of the indictment, and it should not be dismissed (**Choice C**).

(Choice B) Though the witness waived his Fifth Amendment privilege against self-incrimination by testifying, he did not waive his Fourth or Sixth Amendment rights because they do not apply during grand jury proceedings. And since witnesses can only waive rights they possess, this is not a basis to deny the motion.

Educational objective:

Since grand jury proceedings are investigatory in nature, only certain constitutional protections apply. A grand jury witness can consult with an attorney outside the grand jury room but has no Sixth Amendment right to counsel inside that room. And the exclusionary rule does not apply to grand jury proceedings.

References

U.S. Const. amend. VI (right to counsel).

United States v. Mandujano, 425 U.S. 564, 581 (1976) (finding that a witness has no right to counsel inside the grand jury room).

U.S. Const. amend. IV (prohibition against unreasonable searches and seizures).

United States v. Calandra, 414 U.S. 338, 351–52 (1974) (holding that the exclusionary rule does not apply to grand jury proceedings).

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