THE GRAND JURY

by

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The Grand Jury:
A Brief Overview

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ORIGIN

The existence and operation of a grand jury is mandated by the New York State Constitution [N.Y. Const., Art. I, §6]. That mandate prohibits the prosecution of any citizen for an "infamous crime" unless he or she has been indicted by a grand jury.

The New York State Court of Appeals has observed that:

> "[t]he Grand Jury was created as an investigative and accusatory body made up of laymen from the general population and given the functions of assessing the sufficiency of the prosecutor's case, thus insulating the innocent from governmental excesses." People v. Pelchat, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 83 (1984).

STATUTORY AUTHORITY

The rules pertaining to grand jury procedure and practice are set forth in Article 190 of the New York State Criminal Procedure Law.

The grand jury is a body consisting of not less than sixteen (16) nor more than twenty-three (23) individuals whose functions are to hear and examine evidence concerning offenses, misconduct, nonfeasance and neglect in public office, and then to take the appropriate action as prescribed in CPL §190.60 [CPL §190.05]. The grand jury must be impaneled by a superior court and it functions as "part of such court." Id.

The actions authorized by statute are as follows:

(1) Return an indictment.

(2) Direct the prosecution to file a prosecutor's information with a local court.

(3) Direct the prosecutor to file a request for removal to Family Court.

(4) Dismiss the charge.

(5) Submit a grand jury report.

The grand jurors must be sworn in by the court. The court is obliged to provide all grand jurors with a copy of Criminal Procedure Law Article 190. In addition, the court may provide oral or written instructions concerning the appropriate discharge of the grand jurors' responsibilities [CPL §190.20(4), (5)].

Grand jury proceedings are secret and there is a statutory limitation on who may appear before a grand jury [CPL §190.25(3), (4)]. A witness is free to disclose his or her grand jury testimony. A court order is required for any other form of disclosure [CPL §§ 190.25(4)(a), 210.30(2), (3)].

The grand jury are the exclusive judge of any facts presented before it. The grand jury receives legal advice from the court and the District Attorney and may not receive any legal advice from any other source [CPL §190.25(5), (6)].

At least sixteen (16) members of the grand jury must be present at all times. Any affirmative official action must be predicated upon the concurrence of at least twelve (12) grand jurors [CPL §190.25(1)].

Practice Comment: What recourse does counsel for a target have when a prosecutor refuses to charge a grand jury with instructions concerning a complete defense as opposed to a mitigating defense?

Under those circumstances, counsel should consider approaching the grand jury judge and seeking judicial intervention to ensure that the appropriate instructions are delivered to the grand jury. Attached is a redacted instruction actually delivered to a grand jury based upon counsel's application to the impaneling superior court judge and the motion for judicial intervention [Exhibit A].

RULES OF EVIDENCE

Subject to certain exceptions prescribed by statute, the Rules of Evidence set forth in Article 60 of the Criminal Procedure Law apply to a grand jury proceeding [CPL §190.30(1)]. The exceptions set forth in §190.30 are as follows:

> (1) A certified report from a competent expert regarding an examination, comparison or test performed by that witness.
> (2) An electronic transmission of such an expert report provided that a transmittal memorandum is completed by the person sending the report and the individual who receives the report, and both file a certification of authenticity. The report itself must be filed with the court within twenty (20) days after arraignment.
>
> (3) A written or oral statement under oath regarding the following may be received in evidence; however, if there had been a previous adversarial examination of such witness at a felony hearing,

then that transcript must be admitted as well as the electronic transmissions, the same memorandums must be prepared and filed with the court and service must be made on defense counsel within twenty (20) days after arraignment if the statement is within the following categories. Those categories are:

(a) Ownership, the amount of damages and the defendant's lack of right to damage any property;

(b) Ownership of any property as defined under the Penal Law, including a car and the defendant's lack of a superior right to possession;

(c) The individual's ownership of a vehicle and the absence of any consent for the defendant to utilize the vehicle;

(d) The individual's qualification as a dealer and appraiser and his expert opinion as to value and the basis for that opinion;

(e) The witness' identity as an ostensible maker of a written instrument and its falsity within the meaning of Penal Law §170.00;

(f) The witness' ownership of a credit card or debit card and the defendant's lack of a superior right to utilize or possess it;

(g) Additional documents may be admitted into evidence during a grand jury presentment. They are:

(i) A certified copy of a sex offender registration form;

(ii) A videotape of a child or special witness secured pursuant to CPL §190.32 may be admitted;

(iii) A business record may be received in evidence regarding an individual's subscription to and charges for utilizing communication equipment, including telephone and internet;

(1) A financial transaction and a person's ownership in any account;

(2) Any such business record must also be authenticated by a statement under oath describing a list of the records and attesting that the individual making the certification is a duly authorized custodian who also attests that the records were made in the regular course of business and that it was the regular course of such business to make such records at the time of the recorded act. However, no records shall be so admitted where a record custodian was examined at a felony hearing unless a transcript of the hearing testimony is also admitted. Furthermore, the statute requires that any business entry not specifically authorized by statute should be redacted and

> kept from consideration by the grand jury.

Despite the above, the grand jury is fully empowered to cause any person to be called as a witness before it [CPL §190.30(5)]. The statute empowers the District Attorney to rule upon the competency and admissibility of evidence and also to instruct the grand jury regarding the legal effect or evaluation of such evidence [CPL §190.30(6), (7)].

Defense counsel should bear in mind that the corroboration of an accomplice, of unsworn testimony and of a defendant's statement is required for the sufficiency of evidence before the grand jury [CPL §§ 60.20, 60.22, 60.50, 70.10(1), 190.65(1)].

Grand Jury Subpoena

A "subpoena" is compulsory process directing an individual or entity to attend and appear as a witness at a designated time before a grand jury. The compulsory process may be in the form of a "subpoena duces tecum" that requires the witness to appear and "produce specified physical evidence" [CPL §610.10].

The prosecutor may subpoena a witness to testify whenever it is believed the potential witness possesses "relevant information or knowledge" [CPL §190.50(2)]. The grand jury itself is empowered to call a witness and it may direct the prosecutor to issue and serve a subpoena upon the witness. The prosecutor must comply unless prior to the return date of any such subpoena, it obtains court permission to vacate the subpoena [CPL §190.50(3)].

The prosecutor is empowered to insist that any witness subpoenaed by the grand jury sign a waiver of immunity before being sworn [CPL §190.50(4)].

A defendant or target may ask the grand jury "either orally or in writing" to cause a designated person to be called as a witness. Thereafter, the grand jury may request that such a subpoena be issued subject to the limitation set forth above [CPL §190.50(6)].

A subpoenaed individual or entity may move to quash, establish conditions or modify a grand jury subpoena [CPL §190.50(7)]. Any papers or proceedings regarding the motion must be kept secret and not disclosed unless the subpoenaed witness and prosecutor waive the secrecy requirement. However, the court may publish any decision it makes in connection with such a motion, provided that the subpoenaed individual or entity is not identified [Id.].

Privileges

CPL §60.10 provides that unless otherwise prescribed by statute, the rules of evidence applicable to a civil proceeding applies as well to a criminal action.

You should note that the following statutory privileges apply to a grand jury proceeding: the spousal privilege [CPLR §4502]; the attorney/client privilege [CPLR §4503]; the medical privilege, which also applies to a dentist, podiatrist, chiropractor and nurse [CPLR §4504]; the clerical privilege [CPLR §4505]; the psychologist privilege [CPLR §4507]; the social worker privilege [CPLR §4508]; and rape crisis counselor [CPLR §4510].

The procedure on seeking disclosure of rape counseling information is set forth at CPL §60.76. See, People v. Thurston, 209 A.D.2d 976, 619 N.Y.S.2d 465 (4th Dept. 1994).

The Fourth Department has recognized the existence of a parent/child privilege. See, Matter of A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978).

The news journalist privilege is set forth in Civil Rights Law §79-(h).

Practice Comment: Counsel should provide the witness with a card which properly asserts the privilege. Attached are sample cards.

GRAND JURY WITNESS IMMUNITY

Unless the grand jury witness has waived immunity or injected non-responsive matter, he or she receives full transactional immunity as defined in CPL §50.10(1) [see, CPL §190.35].

The immunity grant encompasses testimony and the production of physical evidence [CPL §50.10(3)].

The immunity grant for a grand jury witness is automatic, unlike in other proceedings where an initial invocation of the privilege against self-incrimination must be made [CPL §§ 50.20, 194.40(2)].

Despite the above, immunity does not necessarily encompass all records or tangible evidence production.

PRODUCTION OF ENTERPRISE MATERIAL

CPL §190.40(2)(c) provides that immunity does not apply to books, papers, records or other "physical evidence" of an "enterprise," the production of which is required via subpoena duces tecum and when the witness does not possess a privilege against self-incrimination regarding the production of the material.

The statute references the definition of an "enterprise" as set forth in Penal Law §175.00(1).

That definition includes any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

The statutes goes on to provide that any "further evidence" provided by the witness entitles the witness to immunity except where he or she has signed a waiver or where the evidence presented is not responsive to a proper inquiry and is gratuitously given or volunteered by the witness with knowledge it is not responsive [CPL §190.40(2)].

It appears that this statutory subdivision is predicated upon the collective entity rule under which records generated by a particular entity do not enjoy the Fifth Amendment privilege and the custodian of such records may not invoke his or her own personal privilege against self-incrimination to resist production of materials that he or she holds in a representative capacity.

Obviously, where a witness is no longer affiliated with the entity and consequently cannot possess its materials in a representative capacity, the privilege may be asserted. This would especially be the case in the event that the former employee had purloined or stolen the materials ultimately encompassed by the subpoena duces tecum. See, In Re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 191 F.3d 173 (2d Cir. 1999).

Under the New York State statute, it appears that even when the non-immunized record production occurs, the witness could conceivably claim that he or she was immunized in the event that any testimony identifying and/or authenticating the records was elicited in the grand jury. CPL §190.40 specifically applies to a witness who does not possess a privilege "against self-incrimination with respect to the production of such evidence" [CPL §190.40(2)(c)]. Counsel can argue that the act of producing physical evidence is separate from the witness' oral testimony which identifies and authenticates that evidence.

Under United States Supreme Court decisions, the act of producing records may implicate the Fifth Amendment and at least one decision indicated that the act of production itself may not be used against the custodian who produces the material. See, United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000); Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284 (1988); United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237 (1984).

Counsel's attention is invited to In Re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003, 4 N.Y.3d 665, 797 N.Y.S.2d 790 (2005). That case involved an Attorney General's subpoena duces tecum issued to a small law firm for records pertaining to its personal injury practice. After the subpoena was served, the law firm partners moved to quash or modify its scope citing their privilege against self-incrimination, their rights against unreasonable

searches and seizures and the attorney/client privilege. Having lost in County Court and in the Appellate Division, the appellants appealed as a matter of right to the New York State Court of Appeals.

On appeal, the Court of Appeals followed the federal law on the topic, holding that the collective entity doctrine precluded the applicability of the Fifth Amendment privilege both for the entity and for the custodian of records. Interestingly, the Court indicated that had the entity been a "family partnership or association," then perhaps the Fifth Amendment privilege would apply. The Court also endorsed the practice of preparing and presenting a privilege log so that the reviewing court might make an appropriate determination based upon an *in camera* review.

TARGET WITNESS

An individual who is charged or under investigation may be accompanied into the grand jury room provided that he or she signs a waiver of immunity [CPL §190.52(1)]. The attorney may be retained or, if the target is indigent, assigned counsel may be appointed by the court which impaneled the grand jury [Id.]. Although the attorney may physically be present with the witness, all he or she may do is advise the witness. The attorney is precluded from any other involvement in the proceedings [CPL §190.52(2)].

The superior court is empowered to remove the attorney in the same manner as it has regarding an attorney in an open courtroom [CPL §190.52(3)].

GRAND JURY REPORTS

The issuance and an appeal from a grand jury report are governed by CPL §§ 190.85 and 190.90.

Although rarely encountered in criminal practice, a familiarity should be gleaned by the practitioner. This is especially the case if counsel represents any "public servant." That broad term virtually includes anyone employed within the State of New York by any government entity. See, Penal Law §10.00(15).

A grand jury report may address the following:

(1) A recommendation of removal or disciplinary action against a public servant based upon misconduct, nonfeasance or neglect in public office;

(2) An exoneration of a public servant based upon a grand jury's determination that there has not been any misconduct, nonfeasance or neglect provided that the public servant has requested the submission of such a report;

(3) Proposing a recommendation for legislative, executive or administrative action in the public interest.

Under the statute, the proposed report is submitted to the court which impaneled the grand jury. That court is obliged to examine the report and the grand jury minutes and is empowered to accept and file the document as a public record only if it is based upon sufficient evidence and, in the event it recommends disciplinary action, the public servant affected was given the opportunity to testify before the grand jury. When a report either constitutes a finding of no misconduct or if it relates to legislative recommendations, it may be filed publicly provided it is "not critical of an identified or identifiable person" [CPL §190.85(2)].

With regard to a report recommending disciplinary action, it must be sealed for at least thirty-one (31) days after the report is served upon each public servant named therein. If an appeal is taken, it must be sealed until thirty-one (31) days after the action of the Appellate Division.

The public servant is afforded an opportunity to provide an answer to the report which must be filed within twenty (20) days after service of the report [CPL §190.85(3)].

The report may remain sealed during the pendency of any criminal action if the unsealing of same might result in prejudice to that criminal proceeding [CPL §190.85(4)].

Both sides are afforded an appeal pursuant to CPL §190.90. The appeal is to the Appellate Division and there will be no other court review of its determination [CPL §190.90(5)].

The Fourth Department has held that when the public servant has voluntarily resigned prior to a grand jury report being made public, that then it must remain sealed. In Re Seneca County Special Grand Jury of January 2007, 60 A.D.3d 1446, 875 N.Y.S.2d 738 (2009).

I RESPECTFULLY DECLINE TO ANSWER THAT QUESTION AS TO DO SO WOULD VIOLATE CONFIDENTIAL COMMUNICATIONS BETWEEN MYSELF AND MY SPOUSE.	**UPON THE ADVICE OF COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THAT QUESTION AS TO DO SO WOULD VIOLATE THE ATTORNEY/CLIENT PRIVILEGE AND THE JOINT DEFENSE PRIVILEGE.**
UPON THE ADVICE OF COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THAT QUESTION AS TO DO SO WOULD VIOLATE CONFIDENTIAL COMMUNICATIONS BETWEEN ME AND MY ATTORNEY.	**I RESPECTFULLY DECLINE TO ANSWER THAT QUESTION AS TO DO SO WOULD VIOLATE THE ATTORNEY WORK PRODUCT PRIVILEGE.**

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Factual Mistake

Even in the event that you do not find that Mr. [redacted]'s conduct was justified under Article 35 of the Penal Law, you may consider whether he mistakenly believed that his conduct was justified.

In the event that you find that he mistakenly believed that his conduct was justified, then you may return a no-bill.

You may also consider whether he mistakenly believed that his conduct was necessary and that he did not formulate the requisite intent for the offenses of Assault in the First Degree and Assault in the Second Degree. P.L. §§ 15.20(1)(a), (c); 120.05(1); 120.10(1).

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Justification

The law provides that conduct which would otherwise constitute an offense is justifiable and not criminal when it falls within Article 35 of the Penal Law.

You have heard some evidence that the female bartender, [redacted], was duly authorized by management to be in charge of the [redacted] Bar on the evening in question. You have also heard some evidence that Ms. [redacted] asked her boyfriend, [redacted], to approach the group which included Mr. [redacted] and Mr. [redacted] and to ask them to leave the bar.

You have also heard some evidence that Mr. [redacted] approached the group and asked them to leave. There is evidence that immediately thereafter Mr. [redacted] was attacked by Mr. [redacted] and Mr. [redacted].

I instruct you that the law provides that an individual may use deadly physical force against another when he or she reasonably believes that another individual is committing or attempting to commit a burglary and when the person reasonably believes the use of force is necessary to prevent or terminate the commission or attempted commission of such burglary.

A person commits a burglary when he enters or remains unlawfully in a building which intent to commit a crime therein.

Although an individual might enter a building legally, he or she remains unlawfully when he or she defies a lawful order to leave personally communicated by either the owner of the building or an authorized individual.

You may consider the actions of Mr. [redacted] and Mr. [redacted] as constituting an intention to remain unlawfully to commit an assault or menacing.

Assault is committed where an individual intends to cause physical injury to another person, he causes such injury. An attempted assault is when an individual, with intent to commit a crime, engages in conduct which tends to affect the commission of such a crime.

Menacing occurs when an individual, by physical menace, places another in fear of physical injury or serious physical injury [P.L. §120.15].

Accordingly, if you find that Mr. [redacted] reasonably believed that Mr. [redacted] and Mr. [redacted] were committing or attempting to commit a burglary and that Mr. [redacted] reasonably believed that the force he used was necessary to terminate the commission or attempted commission of such burglary, then you should return a no-bill.

However, under Article 35, if you find that any of the following circumstances existed, then you may not consider Mr. [redacted] to have been justified.

(1) If you determine that Mr. [redacted] was the initial aggressor, his conduct was not justified under Article 35;

(2) If you find that Mr. [redacted]'s intent was to cause physical injury by provoking a fight, then Mr. [redacted]'s conduct is not excused under Article 35.

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

[redacted],

Defendant.

NOTICE OF MOTION

Pre-Indictment No. [redacted]

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Joseph M. LaTona, Esq., sworn to on the 3rd day of July, 2008, the defendant, [redacted], will move this Court, at a term to be held at the Niagara County Courthouse located at 175 Hawley Street, Lockport, New York, on July 9, 2008 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for orders granting the following relief:

(1) An order pursuant to CPL §190.25(6) ruling that various evidentiary matters be presented to the grand jury;

(2) An order pursuant to CPL §190.30(6) directing that certain legal instructions be given to the grand jury;

(3) Such other and further relief as the Court deems proper.

DATED: July 3, 2008
Buffalo, New York

Respectfully submitted,

JOSEPH M. LaTONA, ESQ.
Attorney for Defendant,
[redacted]
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(716) 842-0416
sandyw@tomburton.com

TO: MICHAEL J. VIOLANTE, ESQ.
Niagara County District Attorney
175 Hawley Street
Lockport, New York 14094
Attn: [redacted], ESQ.
Assistant District Attorney

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

[redacted],

Defendant.

AFFIDAVIT

Pre-Indictment No. [redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

JOSEPH M. LaTONA, being duly sworn, deposes and says:

1. I am the attorney retained to represent the defendant, [redacted], in all pre-indictment proceedings.

2. Mr. [redacted] is currently charged by way of two felony complaints currently pending in the Town of Lewiston Court. Mr. [redacted] is charged with First and Second Degree Assault upon [redacted] and [redacted].

3. The [redacted] matter is currently scheduled for presentation to a grand jury on July 10, 2008.

4. The alleged assaults were committed on November 25, 2007 at a bar located in the Village of Lewiston. Deponent's investigation reveals several witnesses who have stated that the complainants were present in the bar, acted obnoxiously and created a problem with the bartender and other patrons. The bartender, [redacted], is Mr. [redacted]'s girlfriend and she asked Mr. [redacted] to approach the complainants and ask them to leave [Exhibit A]. Thereafter, Mr. [redacted] approached the complainants and asked them to leave.

At the time, he had a beer bottle in his hand. Several witnesses confirm the fact that at that point, Mr. [redacted] was attacked by the complaining witnesses and he punched at them in self-defense [Exhibit B]. The bottle in Mr. [redacted]'s hand broke and the two complaining witnesses suffered facial lacerations.

5. In discussing this case with Ms. [redacted] of the District Attorney's Office, deponent disclosed the information that his investigation had revealed. Ms. [redacted] promised deponent that she would present the grand jury testimony of any witness identified by deponent to her.

6. In reliance upon that representation, deponent wrote Ms. [redacted] on June 13, 2008 and disclosed the name of these witnesses [Exhibit C].

7. In addition, deponent's investigation has revealed that one of the complaining witnesses has been convicted of petit larceny. In addition, deponent ascertained that Mr. [redacted] pled guilty to attempted criminal possession of stolen property in the Town of Niagara Court on January 8, 2004.

8. Deponent has been advised by Ms. [redacted] that the complaining witnesses' request for the payment of medical expenses by the Crime Compensation Board has been denied as no court or grand jury has determined that there is probable cause to believe that Mr. [redacted] assaulted them. Also, deponent's investigation has revealed that the complaining witnesses have engaged civil counsel in order to sue Mr. [redacted]. Accordingly, each of the complaining witnesses has a financial stake in procuring the indictment of Mr. [redacted]. Deponent has written to Ms. [redacted] to request that the grand jurors be apprised of the financial stake which the complainants have in the outcome [Exhibit D].

9. Deponent has also indicated to Ms. [redacted] that, in his legal opinion, Mr. [redacted]'s use of force was justified to terminate the commission of a burglary by the complaining witnesses pursuant to Penal Law §§ 35.15(2)(c) and 35.20(3).

10. Deponent has been advised that the District Attorney's Office does not intend to elicit evidence concerning the complainants' prior larceny-related convictions or their financial stake in the outcome of this case.

11. Deponent seeks a court order directing the District Attorney to do what it refuses to do voluntarily.

Complainants' Prior Criminal History

12. The Court of Appeals has expressly recognized the relevance and admissibility of evidence which indicates that a witness has previously acted to advance his or her own self-interest above societal interests. People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849. The Sandoval court recognized that a conviction for larceny or another form of dishonesty is relevant to a witness' credibility.

13. Among the crucial issues before the grand jury, pursuant to Penal Law Article 35, is who was the initial aggressor. The credibility of Mr. [redacted] and the other civilian witnesses will be pitted against the complaining witnesses.

14. The grand jury should be given the appropriate tools to determine credibility. Put another way, the District Attorney's Office should not be permitted to conceal from the grand jury this relevant evidence concerning credibility.

15. Accordingly, deponent requests that the Court direct the prosecution to elicit evidence as to each of the complainants having been convicted of possessing stolen

property or larceny. Also, their financial interest in procuring Mr. [redacted]'s indictment should be made known to the grand jury.

Legal Instruction

16. While deponent does not contend that the grand jury should be instructed that as a matter of law Mr. [redacted]'s conduct is excused pursuant to Article 35. However, the grand jury, as the body which will find the facts, should be given the appropriate legal guidance with which to determine whether or not Article 35 applies. CPL §190.30(5) provides that the grand jury is the exclusive judge of the facts. In order for it to appropriately adjudicate the facts, the appropriate legal advice must be given to them. See, CPL §190.30(6).

17. It is respectfully submitted that any evidence and legal instructions which could arguably support a complete defense, as opposed to a mitigating defense, should be presented to a grand jury. See, People v. Lancaster, 69 N.Y.2d 50, 511 N.Y.S.2d 559; People v. Pelschot, 62 N.Y.2d 97, 476 N.Y.S.2d 79; People v. Valles, 62 N.Y.2d 36, 476 N.Y. 50.

WHEREFORE, deponent respectfully requests that this Court issue the requested relief.

JOSEPH M. LaTONA

Sworn to before me this
_____ day of July, 2008.

Notary Public

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594 N.Y.S.2d 101
156 Misc.2d 621
The PEOPLE of the State of New York,
v.
Ralph SMAYS, Defendant.
Supreme Court, New York County,
Criminal Term, Part 56.
Jan. 6, 1993.

Page 103

Robert Baum, The Legal Aid Soc., for defendant.

Robert Morgenthau, Dist. Atty., for the People.

[156 Misc.2d 622] HAROLD J. ROTHWAX, Justice:

The defendant herein moves to dismiss the indictment on the ground that the grand jury proceeding was defective in that it failed to conform to the requirements of Article 190 of the Criminal Procedure Law to the extent that the integrity of the proceeding was impaired and the defendant prejudiced. [CPL 210.20[1][c]; 210.35[5]] Specifically, the defendant argues that the assistant district attorney interfered with his right to the advice of counsel while testifying before the grand jury under a waiver of immunity. [CPL 190.52]

The defendant has been indicted for the crime of possessing a controlled substance with intent to sell. A police officer testified that he observed the defendant receive money from an unidentified woman and then drop a vial of crack cocaine, which the woman picked up from the ground. The officer further testified that he arrested the defendant within five minutes, finding four dollars and three vials of crack in his possession.

THE DEFENDANT'S TESTIMONY

The defendant, accompanied by counsel [CPL 190.52], testified before the grand jury under a waiver of immunity [CPL 190.50[5][b]]. The defendant denied that he had sold cocaine, but testified that he possessed three vials of crack for his own use. The defendant testified that he received the vials from "three guys" whom the defendant knew. When asked to name the three men, the defendant inquired whether he could speak to his lawyer. He was permitted to do so. [1] He then replied that "these people ain't really involved [in] what I am here [for] now." When the question was repeated, the defendant answered without further consulting his attorney. Presumably in an attempt to establish that the defendant possessed intent to sell cocaine, the assistant district attorney asked the defendant how he obtained money. The defendant testified that he received welfare, had saved some three hundred dollars while in a program of work release from State prison where he had been until three months beforehand, and also received money from his family. At one point in the defendant's testimony, the assistant district attorney inquired whether the money the defendant spent to go to movies was "welfare money". The assistant district attorney reviewed the defendant's prior record of four felony and seven misdemeanor convictions in detail; including four robberies, one invalid use of a credit card, a fare beat, a trespass, and criminal possession of controlled[156 Misc.2d 623] substances. The assistant district attorney repeatedly emphasized the robbery convictions. The assistant

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district attorney then asked the defendant to "tell the grand jury what happened" on the occasion of his arrest for criminal possession of marijuana. The defendant explained that he was arrested when he took a bag of marijuana out of his pocket to give to a friend whom he owed money. The assistant district attorney finally asked the defendant to tell the grand jury what he had been arrested for on the occasion in 1990 when the defendant pled guilty to criminal possession of a controlled substance. The defendant replied that he did not remember. The assistant district attorney then asked whether the defendant had been arrested for criminal sale of a narcotic drug. The defendant repeated that he did not remember. [2] The assistant district attorney then remarked: "Just let the record reflect that the defendant has stated 'I don't remember' as, at the instruction of his, his defense attorney." The assistant district attorney then pointed out that of the four felonies and seven misdemeanors for which the defendant had been convicted, several were for "drug related activities." The defendant generally replied in response to these questions, that he pled guilty to those crimes because he committed them. The defendant volunteered that he did not stay in one place long because "[t]hey lock you up for anything." This prompted the assistant district attorney to ask whether defendant had "ever been locked up for a crime that [he] did not commit." [3] The defendant's answer was somewhat incoherent. He stated: "I have been locked up for crimes, but for this one, I have never been locked up." The assistant district attorney began another question, which he interrupted with an admonition to the defense attorney to "please not talk to your client while I am asking him a question." The assistant district attorney continued to question the defendant about his guilt on all other occasions when he was arrested, save the occasion at issue. Then the following ensued:

Q. Sir, you live in the Bronx; is that correct, sir?

A. Yes, sir, I live in the Bronx.

Q. And after you leave Forty second street, you were going to go uptown to Harlem; is that correct?

A. I was going to go to Harlem.

Q. Which is also where, which is where John, Prince Champ--I don't know, and Cool-Aid [the men from whom the defendant testified he had obtained the crack] live?

[156 Misc.2d 624] A. No, I was going where they was at.

Q. Where were you going, sir?

A. I was going to the park.

Q. What park, sir?

A. Moores Park.

Q. And why were you going to that park, sir?

A. To go there and sit down, watch the kids run around and enjoy myself there. That is where I go for peace and quiet.

Q. Did you ever buy crack there?

A. No, sir.

Q. Where do you buy crack?

A. I don't even know if they sell crack there now.

Q. Where do you buy crack?

A. Where do I buy my cracks at?

Q. Yes.

A. Forty-second street.

Assistant district attorney: "Please let the record reflect that the defense attorney is instructing her client as to what answer he should provide. And Miss [defense counsel], now, I instruct you now that you are not to provide your client with answers and you are not

testifying, Miss [defense counsel]. Your client is testifying.

Miss [defense counsel], do you understand that? Would you please indicate on the record, Miss [defense counsel], whether or not you understand my instruction?

A. I wanted to speak to her, sir.

Q. Do you wish to further consult with your attorney?

A. At this moment, no sir.

The questioning about the places and persons from whom the defendant obtained crack continued. Then the following occurred:

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Q. Sir, when you purchase crack cocaine, isn't it a fact that it often happens that you will give them money and that they in turn will drop that cocaine to the ground, and that you will pick it up?

A. No, sir. As a matter of fact, I don't know. I don't remember no crack falling on the floor. I don't remember nothing fall on the floor because when I buy something, they gave it to me right in my hand. And that is uptown and downtown.

[156 Misc.2d 625] Q. Is that your answer, sir? Or is that the defense attorney's answer.

A. That is my answer, sir.

After the defendant testified, the assistant district attorney recalled the officer who had initially testified. The assistant district attorney paraphrased the defendant's testimony and asked the officer: "is that accurate testimony?". The officer replied that the defendant's testimony was not accurate.

THE LAW

CPL 190.52 provides, in pertinent part, that "Any person who appears as a witness and has signed a waiver of immunity in a grand jury proceeding, has a right to an attorney as provided in this section. * * * [2] The attorney for such witness may be present with the witness in the grand jury room. The attorney may advise the witness, but may not otherwise take any part in the proceeding." The statute represents a balance between concern for fairness to the potential defendant before the grand jury and concern that the presence of counsel for the defendant would interfere improperly with the grand jury's proceedings. This balance was achieved by limiting the role of counsel to being present with the witness to advise the witness, but otherwise to not participate in the proceedings. Such advice as counsel gives the witness before the grand jury may not interfere improperly with the proceedings of the grand jury. [See Matter of People v. Riley, 98 Misc.2d 454, 456-457, 414 N.Y.S.2d 441 [Sup.Ct. Queens Co. 1979]].

The role of counsel under the statute has been defined as "to give an opinion, counsel or make recommendations." [Id. at p. 458, 414 N.Y.S.2d 441] As noted by another court, in this context "[e]ffective legal counsel implicitly guarantees a witness the full benefit of a lawyer's advice." [Matter of Lief v. Hynes, 98 Misc.2d 817, 825, 414 N.Y.S.2d 855 [Sup.Ct. Queens Co. 1979]] The Court of Appeals, in a decision rendered prior to enactment of the statute but no less pertinent to these proceedings, noted that given the investigatory as opposed to accusatory, purpose of a grand jury presentation, a witness has no right to be represented by counsel as an advocate before the grand jury. Counsel has a more limited role in this context, as advisor of the witness in regard to decisions the witness is called upon to make concerning the witness' legal rights in the grand jury. [156 Misc.2d 626] [People v. Ianniello, 21 N.Y.2d 418, 424, 288 N.Y.S.2d 462, 235 N.E.2d 439] The Court identified three legal rights of a witness which may be critically affected before the grand jury, and as to which the witness should be entitled to consult with counsel: the decision whether to assert the privilege against self incrimination; the decision whether to

answer a question that has no apparent bearing on the subject of the investigation; and the decision whether to invoke a testimonial privilege, such as the attorney-client privilege. These are legal matters that are likely to be raised by the questions the client will be called upon to answer during the grand jury proceeding. There are other matters about which a witness before the grand jury may properly consult with the counsel prior to the client's testifying, such as the meaning of perjury or contempt, and the scope of an anticipated waiver or grant of immunity. And there are matters which counsel may resolve at the outset of the client's appearance before the grand jury, by instructing the client to inquire of the grand jury whether, for example, there exist any eavesdropping warrants from which the questions are derived. [People v. Einhorn, 35 N.Y.2d 948, 365 N.Y.S.2d 171, 324 N.E.2d 551] Without adopting an immutable rule, the first category of decisions generally will be the subject of counsel's advice to a witness before

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the grand jury. [See, e.g.,Matter of Lief v. Hynes, supra, 98 Misc.2d at p. 825, 414 N.Y.S.2d 855 [counsel's primary role under the statute is to protect the defendant who waives immunity from the danger of self incrimination]; People v. Scott, 124 Misc.2d 357, 476 N.Y.S.2d 999 [Suff.Co.Ct.1984] [counsel should advise the witness as to the scope of the intended waiver of immunity]; People v. Coppola, 123 Misc.2d 31, 35-36, 472 N.Y.S.2d 558 [Sup.Ct. Queens Co. 1984]; Maness v. Meyers, 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574]

It is obvious that counsel is not present in the grand jury to give the witness strategic advice as to how to answer the prosecutor's questions. [People v. Ianniello, supra, 21 N.Y.2d at p. 426, 288 N.Y.S.2d 462, 235 N.E.2d 439] "A witness has no right or duty to speak falsely before a Grand Jury and this knowledge is easily within the scope of the average layman. He does not need the advice of counsel by his side to know when to tell the truth." [Matter of Lief v. Hynes, supra, 98 Misc.2d at p. 826, 414 N.Y.S.2d 855]

The role of counsel before the grand jury in protecting against prejudicial conduct by the prosecutor, is necessarily limited by the statute which inhibits counsel from taking any role in the proceeding beyond giving advice to the client. "Unlike a trial, where defense counsel can raise objections, the defendant before the Grand Jury is not in a position to [156 Misc.2d 627] object, and, under these circumstances, nor is his attorney. [See, CPL 190.52[2]; ... People v. Davis, 119 Misc.2d 1013, 465 N.Y.S.2d 404 [Sup.Ct. Queens Co. 1983].] Thus, it is the prosecutor who must initially determine the propriety of a particular line of questioning ..." [People v. Rosa, 145 Misc.2d 423, 425, 546 N.Y.S.2d 803 [Sup.Ct.N.Y.Co.1989]; and see People v. Davis, supra, 119 Misc.2d at p. 1020, 465 N.Y.S.2d 404] Nor is it appropriate for counsel to advise the witness in such manner that the advice may be heard by the grand jurors and have a direct effect upon their deliberations. [Matter of People v. Riley, supra 98 Misc.2d at pp. 456-457, 414 N.Y.S.2d 441]

When the prosecutor does engage in abuse of the defendant before the grand jury, or otherwise oversteps the bounds of propriety by asking questions improper in form or in their connotation to the grand jury, or calling for irrelevant, privileged or otherwise improperly prejudicial answers, counsel must seek the assistance of the court supervising the grand jury proceeding. [People v. Davis, supra, 119 Misc.2d at p. 1020, 465 N.Y.S.2d 404]; and see People v. Ianniello, supra, 21 N.Y.2d at p. 425, 288 N.Y.S.2d 462, 235 N.E.2d 439]] Counsel for the witness, through the medium of the witness, may force the prosecutor to take the matter into open court for a ruling, either by advising the witness to refuse to answer further questions until a ruling is obtained as to the propriety of the questions [People v. Ianniello, supra at p. 425, 288 N.Y.S.2d 462, 235 N.E.2d 439], or by advising the witness to request of the foreperson that the witness be allowed to seek a court decision on the propriety of the

proceedings. [See, People v. Doe, 95 Misc.2d 175, 177, 406 N.Y.S.2d 650 [Sup.Ct. Albany Co. 1978] "The Grand Jury has the duty to protect a witness from an overzealous prosecutor to prevent a manipulated perjury entrapment. At any time that the witness feels he is subject to such manipulation he may complain to the foreman, and his attorney, and seek a court decision on the alleged infringement."] It may be that the mere request will make the prosecutor aware of the impropriety, and that the prosecutor will then desist. Where the controversy is limited to a particular area, the prosecutor, or the foreperson at the prosecutor's request, may defer seeking a judicial ruling and proceed to a noncontroversial line of questioning, in the interests of efficiency.

Even though the witness has counsel present in the grand jury room, the presence of counsel for the witness does not relieve the prosecutor of the duty of fairness to the witness. Because the statute explicitly limits counsel's role within the grand jury to advising the witness, "the witness is placed in the unenviable position of being at the prosecutor's mercy." [156 Misc.2d 628] [People v. Davis, supra, 119 Misc.2d

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at p. 1020, 465 N.Y.S.2d 404] A prospective defendant should not be abused as a witness before the grand jury. [Id.]

The prosecutor is not merely an advocate before the grand jury, but has an obligation to ensure that the proceedings are conducted fairly. [See, e.g., People v. Pelchat, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 464 N.E.2d 447; CPL 190.25[6]] The prosecutor must not improperly influence the grand jury's consideration of the evidence by engaging in colloquy with a witness' counsel before the grand jury. [See, e.g., People v. De Jesus, 42 N.Y.2d 519, 523-524, 399 N.Y.S.2d 196, 369 N.E.2d 752] Nor should the prosecutor run the risk of improperly influencing the grand jury's evaluation of the witness' testimony by suggesting before the grand jury that counsel is coaching the witness to testify untruthfully. [See, e.g., People v. Jones, 181 A.D.2d 463, 464, 581 N.Y.S.2d 19 [1st Dept.1992]; People v. Rivera, 116 A.D.2d 371, 374, 501 N.Y.S.2d 817 [1st Dept.1986]]

THE GRAND JURY PROCEEDINGS

The court does not find, on this record, apart from the assistant district attorney's characterization of communications between counsel and client within the grand jury as "providing answers", that the defendant sought improper assistance from his attorney. On each occasion when the assistant district attorney noted the consultation on the record, it appears to have been proper. However, defendant's counsel failed to seek the assistance of the court where appropriate, and failed to advise the defendant to decline to answer those questions that may have been immaterial to the investigation, or have called for privileged answers.

On the first occasion when the defendant sought his counsel's advice, he was asked to name the men from whom he obtained the cocaine found in his possession. The defendant reasonably may have asked his counsel whether this question was within the scope of the grand jury inquiry as he understood it at the time he waived his privilege against self incrimination [See, e.g., People v. Scott, supra, 124 Misc.2d 357, 476 N.Y.S.2d 999; People v. Coppola, supra, 123 Misc.2d 31, 472 N.Y.S.2d 558] In any event, the defendant was properly allowed to consult with counsel and thereafter answered the question.

The second occasion when counsel apparently consulted with the defendant, followed the question whether the defendant had been arrested for criminal sale of a controlled substance prior to his pleading guilty to criminal possession of a controlled substance. This was an improper question, insofar [156 Misc.2d 629] as witness may be properly impeached only on the basis of bad acts or convictions, and not upon the unsubstantiated allegations of an arrest.

[People v. Gottlieb, 130 A.D.2d 202, 207, 132 A.D.2d 498, 517 N.Y.S.2d 978 [1st Dept.1987]] Counsel could have properly advised the defendant not to answer the question until a ruling could be obtained from the supervising judge.

The third occasion, when the assistant district attorney admonished counsel not to speak with the defendant while the assistant was asking a question, also involved an improper question, which was whether the defendant had ever been jailed for a crime that he did not commit. This question was simply immaterial to the grand jury's investigation into the defendant's alleged possession of a vial of cocaine with intent to sell. Again, counsel could have properly advised the defendant not to answer the question until a ruling could be obtained from the supervising judge as to whether it was a proper question about matters material to the investigation.

The fourth occasion, when the assistant district attorney stated that counsel was "instructing her client as to what answer he should provide", involved a question that counsel may well have believed was beyond the scope of the intended waiver of immunity. [People v. Coppola, supra, 123 Misc.2d 31, 472 N.Y.S.2d 558; People v. Scott, supra, 124 Misc.2d 357, 476 N.Y.S.2d 999] The question concerned where the defendant bought crack cocaine, and was not limited in time. Since the

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defendant had testified that he used crack for more than five years, this was a question of considerable scope and potentially subjected the defendant to prosecution for the possession of controlled substances on many occasions. The defendant may have been well advised to invoke the privilege against self incrimination as to that question in particular; to object to the scope of the question; or to challenge the relevance of the question to the investigation. It should be noted that in response to the assistant district attorney's remark, the defendant stated that he had initiated the consultation.

The fifth occasion appears to have been a gratuitous characterization, in the form of a question, that the defense counsel had provided the defendant with the answer to the previous question. At best, the defendant was entitled not to answer the question whether his counsel had told him what to say, on the grounds of attorney-client privilege. The question clearly called for the defendant to reveal the substance of his communication with counsel in the grand jury room.

[156 Misc.2d 630] The assistant district attorney's conduct undermined the integrity of the grand jury proceeding to the defendant's prejudice. The proper procedure for the assistant district attorney to follow where he believed that the witness' counsel was giving the witness strategic advice in answering the assistant's questions, was to request that the foreperson call a recess in the proceeding and to seek a directive from the supervising judge to the attorney to limit her advice to legal matters affecting the defendant's rights as a witness. By characterizing counsel's communication with the defendant as instruction on how to testify, the assistant district attorney may well have influenced improperly the grand jury's evaluation of the defendant's credibility. This combined with other prejudicial conduct such as inquiring into the defendant's use of his welfare payments [See, People v. Moore, 26 A.D.2d 902, 274 N.Y.S.2d 518 [4th Dept.1966]]; the use of the defendant's criminal history, particularly the emphasis upon and details of the controlled substance offenses [People v. Gunther, 175 A.D.2d 262, 264, 572 N.Y.S.2d 374 [2d Dept.1991]] and the use of a criminal sale charge of which the defendant was not convicted [People v. Gottlieb, supra 130 A.D.2d at p. 207, 132 A.D.2d 498, 517 N.Y.S.2d 978], was so great as to lead the grand jury to conclude that the defendant had a disposition to commit crimes, despite the assistant's limiting instruction [see, People v. Rosa, supra, 145 Misc.2d 423, 546 N.Y.S.2d 803]; and asking the police officer on rebuttal whether the defendant's testimony

was truthful [People v. McRoy, 121 A.D.2d 566, 568, 503 N.Y.S.2d 158 [2d Dept.1986]; see People v. Ciaccio, 47 N.Y.2d 431, 438-439, 418 N.Y.S.2d 371, 391 N.E.2d 1347]], sufficiently impaired the integrity of the proceedings to require re-presentation before another grand jury.

The indictment is dismissed with leave to re-present.

BASIC STATE GRAND JURY
PRACTICE IN NEW YORK

I. WHAT IS THE GRAND JURY?

A. New York State (not Feds!)

1. Composition

2. Quorum and voting requirements

3. State-sanctioned lawlessness?

a. "reasonable cause" standard

b. The GJ may legally nullify

c. The GJ will sometimes ignore "reasonable cause" standard

4. Read C.P.L. 190: (as the grand jurors are supposed to do)

a. Extended .15

b. Secrecy .25(4)

c. Legal advisor .25(6)

d. Rules of evidence .30

B. New York uniquely provides a major advantage to defendants

a. 190.52: attorney present to advise, not participate

b. 190.52(4) proffer witnesses

II. DEFENDANT'S RIGHT TO TESTIFY BEFORE THE GRAND JURY

A. Triggered by felony complaint vs. silent indictment

B. Statutory right, not absolute

1. Counsel should explain basic procedure

2. Defendant should be meaningfully advised

C. 190.50 NOTICE (read C.P.L. 190.50)

1. Prosecution usually serves at arraignment

2. In writing, time and place, reasonable (under facts/circs)

3. Nature and scope of proceedings

D. Reciprocal 190.50 notice

1. Reciprocal 190.50 notice must be served in writing (routinely?)

2. "Will testify", not "reserves the right"; can withdraw

3. Contact information

4. Effective prior to filing of indictment

5. Silent indictments: line-ups, take-outs, targets

E. Defendant's ineffective counsel remedies

F. 5 day rule

III. POST-NOTICE PROCEDURE:

A. Read C.P.L. 180.80

B. 180.80 interplay with 190.50 = high-speed practice

C. Timing of GJ presentation: 6 days or release

1. Corrections fails to produce is not "good cause"

2. Hurricane is "good cause"

3. Defendant may want to waive 180.80 time

4. Preliminary hearings are always available to ADA

D. "Out" Defendants: notice issues

IV 190.50 NOTICE TACTICS

A. Tactical Use of 190.50 Notice

1. Discovery
2. Slows things down
3. Focus DA on plea, reduction
4. Is it ethical to serve reciprocal 190.50 notice purely tactically?

B. Preparing defense case

1. Discover People's case (i.e. talk to ADA)
2. Investigation and 180.80 waiver
3. Possible requests to DA/GJ:
    a. disclose Brady
    b. present certain evidence
    c. give requested instruction
    d. call witness (note immunity waiver issues)
    e. submit lessers: but see Peo v. Valles
4. Preparing D to testify: Three Step Method
    a. this is who I am (including rap sheet)
    b. this is how I got arrested for something I didn't do
    c. end this nightmare -- please don't indict me

V. WHERE DO I GO? WHAT DO I DO? WHAT HAPPENS IN THE GJ?

A. The mechanics when your client testifies in New York County

1. Scheduling issues

2. Production issues

3. Waiver ceremony

B. Defendant makes a statement to the grand jury

1. Statement is restricted to relevant, admissible information

2. Should be uninterrupted

3. Subject to cross examination

4. Jurors proffer their questions to the ADA

5. Defendant may ask the grand jurors to call witnesses, etc.

C Results: No True Bill, No Action, True Bill, GJ Information

V. PROSECUTORIAL ERROR AND MISCONDUCT IN THE GRAND JURY

A. ADA's are prone to error when a defendant testifies

1. ADA may be new, inexperienced in grand jury

2. ADA's role and training as advocate clashes with "protective" role

3. No judge is present to control ADA, but…

4. YOU are present

B. The tensions in the ADA's competing roles manifests itself in errors

1. faulty, absent instructions

2. inadmissible evidence: hearsay, testifying, materiality

3. process defects to get a timely indictment

4. mistreats defendant and defense counsel

5. anything misleading, unfair, non-neutral, adversarial

6. all variants on prosecutorial manipulation of the grand jury process that usurp the grand jury's fact finding function

a. failure to present exculpatory evidence

b. interference with the defense, defendant's testimony

c. interfere with grand juror's investigatory role

i. failure to respond to questions

ii. suggestions of lateness

iii failure to provide readbacks

iv. faulty marshalling

d. interferes with d's witnesses

i. discourages the gj from hearing them

ii. refuses to advise gj of witness

e. fails to present exculpatory evidence/witness

C. Species of error: the type you don't see (addressed in motion practice)

1. faulty instructions
2. hearsay (eg, value in a larceny)
3. bolstering
4. unsworn witnesses (e.g. the ada)

D. Species of error: the type you may see in the grand jury

1. Sandoval, Molineaux

2. pre/post arrest silence

3. irrelevant, inflammatory: “the police here for security”

4. adversarial: improper cross

5. argumentative: “how could you have possibly known that?”

6. interruptive: “Please restrict your testimony to...

7. repetitive: “Let me get this straight...”

8. abusive: “So basically what you’ve done is use drugs your whole life and live like a parasite...”

9. badgering

10. assuming facts not in evidence: “at what point did you pull out the knife?”

11. imputations of lying

12. skepticism, sarcasm (ada’s non-neutral opinion): “Do you really expect us to believe you just found the drugs lying in a gutter”

13. anything misleading

14. Etc., etc., anything that shows that the “unbridled” DA has not been “scrupulous” in <u>protecting</u> the defendant

E. The absence of a judge changes the dynamic of dealing with prosecutor error

1. What remedies are available in the absence of judicial oversight?

2. What is the role of defense counsel when confronted with prosecutor error?

3. How do preservation issues differ from the trial context?

F. The defendant’s rights and remedies:

1. The right to a fair proceeding conforming to the law:

a. rules of evidence

b. proper instructioin

c. even-handed non-adversarial presentation

2. Brady

a. limited duty on DA

b. counsel tries to shift the burden

c. counsel presents evidence herself

d. records and exhibits

3. Remedy: dismissal of indictment, but the standard for this is very high

G. Attorney's Role in the Grand Jury when the ADA commits error

1. "Do nothing strategy"

a. Let error happen and raise in motion to dismiss

b. Client is doing pretty good all by himself

c. By pass/waiver problems?

2. "Do something strategy"

a. statute: advise but not participate

b. People v. Ralph Smays, 594 N.Y.S. 2d 101(Sup. 1993), 156 Misc. 2d 621: take this case with you to educate ADA

3. DA's interpretation of CPL 190.52

a. Defense attorney can't say or do anything:

b. Can advise her client only if asked by the defendant

c. Defense attorney may not speak in the grand jury room

d. Defense attorney may not say "Objection"

4. Defense Response – According to P. v. Smays

i. Defense role in grand jury is active

ii. Defense may stop the proceedings

iii Defense may consult with client within the grand jury

iv Defense may make a record and seek rulings from the supervising judge

VI. SO SHOULD MY GUY TESTIFY OR NOT?

A. CLASSIC PRESUMPTIVE GRAND JURY CASES

1. Credible Alibi

2. Agency/facilitation and "User/not seller" cases

3. Nullification

B. CAREFUL CONSIDERATION

1. Any "what happened" case (and see 4. below)

2. Temporary Lawful Possession

3. Constructive possession (gun in car, etc)

4. The defendant tells a good story

C. DON'T DO IT

1. Defendant intends to lie (that's called perjury)

2. Defendant is guilty and no nullification

3. ID case, no alibi

4. Standing issues, plea bargain issues

VII. WHO CAN I CALL FOR HELP?

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SELECT CASE LAW FOR GRAND JURY PRACTICE

DEFENDANT'S RIGHT TO TESTIFY

Contrary to the further contention of defendant, we conclude that he was not denied effective assistance of counsel based on defense counsel's failure to assert the right of defendant to testify before the grand jury. HN5"In contrast to a defendant's right to testify at trial, a defendant's right to testify before the grand jury is a limited statutory right" (People v Lasher, 74 AD3d 1474, 1475, 902 N.Y.S.2d 262, lv denied 15 NY3d 894, 938 N.E.2d 1017, 912 N.Y.S.2d 582), and the "failure of defense counsel to facilitate defendant's testimony before the grand jury does not, per se, amount to the denial of effective assistance of [***3] counsel"

People v Bibbes, 98 A.D.3d 1267, 1270 (N.Y. App. Div. 4th Dep't 2012)

Notwithstanding the defendant's claim that he told his attorney of his desire to testify before the grand jury, there is no evidence in the record that either he or his attorney served the required written notice on the District [*1103] Attorney (see CPL 190.50 [5] [a]). Consequently, the defendant's motion to dismiss the indictment on the ground that he was not accorded an opportunity to appear and testify before the grand jury was properly denied (see CPL 210.20 [1] [c]; 210.35 [4]; 190.50 [5] [a]; People v Smith, 18 AD3d 888, 796 NYS2d 655 [2005]; People v Rogers, 228 AD2d 623, 645 NYS2d 497 [1996]). Moreover, even if defense counsel failed to act on the defendant's desire to testify before the grand jury, any failure on the part of counsel to so act would not, under the circumstances of this case, amount to the denial of the effective assistance [***3] of counsel (see People v Simmons, 10 NY3d 946, 949, 893 NE2d 130, 862 NYS2d 852 [2008]; People v Wiggins, 89 NY2d 872, 873, 675 NE2d 845, 653 NYS2d 91 [1996]; People v Lasher, 74 AD3d 1474, 902 NYS2d 262 [2010]; People v Beecham, 74 AD3d 1216, 904 NYS2d 727 [2010]; People v Williams, 301 AD2d 669, 670, 754 NYS2d 338 [2003]).

People v Griffith, 76 A.D.3d 1102, 1103 (N.Y. App. Div. 2d Dep't 2010)

PROSECUTORIAL MISCONDUCT

By pleading guilty, the defendant forfeited his present contentions regarding prosecutorial misconduct and the sufficiency of the evidence before the grand jury (see People v Hansen, 95 NY2d 227, 233, 738 N.E.2d 773, 715 N.Y.S.2d 369; People v Wager, 34 AD3d 505, 506, 823 N.Y.S.2d 522).

People v Devodier, 2013 N.Y. App. Div. LEXIS 340 (N.Y. App. Div. 2d Dep't Jan. 23, 2013)

Defendant's allegations of prosecutorial misconduct do not demonstrate a "'flagrant and pervasive pattern' of misconduct" warranting reversal (People v Hunt, 39 AD3d 961, 964, 833 N.Y.S.2d 731 [2007], lv denied 9 NY3d 845, 872 N.E.2d 884 [2007], quoting People v McCombs, 18 AD3d 888, 890, 795 N.Y.S.2d 108 [2005]).

People v Mccray, 2013 N.Y. App. Div. LEXIS 250 (N.Y. App. Div. 3d Dep't Jan. 17, 2013)

Dismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury'" (People v Sheltray, 244 AD2d 854, 855, 665 N.Y.S.2d 224

People v Fisher, 101 A.D.3d 1786 (N.Y. App. Div. 4th Dep't 2012)

ARTICULATED STANDARD FOR DISMISSING INDICTMENT

N.Y. Crim. Proc. Law § 210.35(5) provides that a Grand Jury proceeding is defective when the integrity thereof is impaired and prejudice to the defendant may result. The exceptional remedy of dismissal is thus warranted only where a defect in the indictment created a possibility of prejudice. Although this statutory test is very precise and very high, it does not require actual prejudice.

Dismissal of indictments under N.Y. Crim. Proc. Law § 210.35(5) should be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias. Certainly, not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment. Likewise, isolated instances of misconduct will not necessarily impair the integrity of the Grand Jury proceedings or lead to the possibility of prejudice.

People v. Huston, 88 N.Y.2d 400 (N.Y. 1996)

For the reasons that follow, we agree with defendant that the presentation before the grand jury was so fundamentally flawed that reversal of defendant's conviction is required and that the indictment be dismissed with leave to re-present to another grand jury. Obviously, we recognize that HN1defects in a grand jury presentation are rarely grounds for reversal, especially where there has been a trial on [*3] the merits that resulted in defendant's conviction. However, such action is warranted "where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (People v Huston, 88 NY2d 400, 409, 668 N.E.2d 1362, 646 N.Y.S.2d 69 [1996]; see People v Revette, 48 AD3d 886, 886-887, 851 N.Y.S.2d 299 [2008]; People v Samuels, 12 AD3d 695, 697, 785 N.Y.S.2d 485 [2004]). Here, there can be no doubt that the errors committed before the grand jury had a significant and decisive impact on its resolution of the key factual issue raised during this presentation — defendant's identification as the perpetrator of this robbery.

(Facts: the principle error was inadmissible hearsay as to the identity of the perpetrator)

People v. Gordon, 2012 N.Y. App. Div. LEXIS 9075, 2-3 (N.Y. App. Div. 3d Dep't Dec. 27, 2012)

Pursuant to CPL 210.35(5), dismissal of an indictment is appropriate where the grand jury proceeding fails to conform to the requirements of CPL art. 190 to such degree that the integrity thereof is impaired and prejudice to the defendant may result. CPL 210.35(5), 210.20(1)(c). Dismissal on these grounds is an "exceptional remedy" that should be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury. Thus, it is the result of the grand jury proceeding--not of the entire criminal proceeding--that is relevant in determining whether prejudice may result. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment.

People v Wisdom, 98 A.D.3d 241, 247 (N.Y. App. Div. 2d Dep't 2012)

PRESERVING THE RECORD/ BYPASS-WAIVER

The contention of defendant that the indictment should be dismissed because he appeared before the grand jury in shackles is not preserved for our review because defendant did not object to appearing before the grand jury in that manner or request cautionary instructions with respect to that appearance (see generally People v Winfield, 267 AD2d 486, 487, 700 NYS2d 843 [1999], lv denied 94 NY2d 927, 729 NE2d 1165, 708 NYS.2d 366, 95 N.Y.2d 806, 733 N.E.2d 247, 711

N.Y.S.2d 175 [2000]; People v Fields, 262 AD2d 793, 794-795, 692 NYS2d 241 [1999], lv denied 93 NY2d 1017, 719 NE2d 937, 697 NYS2d 576 [1999]).

People v. Abron, 37 A.D.3d 1163 (N.Y. App. Div. 4th Dep't 2007)

The defendant, in effect, acquiesced to appearing before the Grand Jury while in [**844] restraints and [***2] failed to request an instruction regarding the restraints. Accordingly, the defendant's claim that dismissal of the indictment is required as he was unfairly prejudiced by his appearance before the Grand Jury is without merit (see, People v Rouse, 79 NY2d 934; People v Young, 185 AD2d 369).

People v. Winfield, 267 A.D.2d 486, 487 (N.Y. App. Div. 2d Dep't 1999)

180.80 CASES

People v. Evans, 79 NY2d 407 (1992). (People v. David, People v. Davis, People v. Oquendo).

People v. Ward, 193 A.D.2d 433 (N.Y. App. Div. 1st Dep't 1993).

ROLE OF COUNSEL IN THE GRAND JURY

People v. Smays, 594 N.Y.S.2d 101 (Sup. 1993).

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