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The Ethics of a One-Sided Grand Jury Presentation

By Joel Cohen

No statute or case law legally compels a balanced presentation—as if the prosecutor had a dual personality or had mixed emotions over whether she really wants the grand jury to indict. He virtually always, if not always, wants to indict. The recent Rochester grand jury investigation by New York's Attorney General that resulted in a no true bill against seven police officers regarding the death of Daniel Prude raises the issue squarely, which Joel Cohen explores in this edition of his Ethics and Criminal Practice column.

As a local state court judge in North Carolina, before becoming a U.S. Senator, the late Sam Ervin was empaneling a jury for a case he was about to try. Reportedly, a potential juror approached the bench to ask that he be excused from jury duty, saying he was hard of hearing in one ear. Judge Ervin excused the juror, but asked him to remain at the courthouse: "I'm selecting a grand jury this afternoon, and they only hear one side of the story anyway."

It's hard to know if the story is apocryphal. Either way, though, the gist is absolutely true. As not only the cognoscenti know, a grand jury presentation is only a charging proceeding—it's not about whether the target is guilty, not guilty or even innocent. It's only about whether there is sufficient evidence to bring the accused to trial. So when I asked the prolific Pace Law Professor Bennett Gershman, author of "Prosecutorial Misconduct," whether he had written on "the ethics of a one sided grand jury presentation," he simply quipped: "Isn't that an oxymoron?"

Everyone who has ever presented a case to a grand jury, however fair and balanced she might be as a prosecutor, knows this: There is simply no *legal* obligation to present evidence when seeking an indictment in a down the middle fashion. No *legal* obligation to present the accused's theory of the case. Yes, there is some state legal authority out there that instructs prosecutors, if they know of it, through a communication from defense counsel or otherwise, to present exculpatory evidence. But no statute or case law legally compels a balanced presentation—as if the prosecutor had a dual personality or had mixed emotions over whether she really wants the grand jury to indict. He virtually always, if not always, wants to indict, that's why he's presenting the case!

The recent Rochester grand jury investigation by New York's Attorney General that resulted in a no true bill against seven police officers regarding the death of Daniel Prude raises the issue squarely. Prude was running through the street half undressed in freezing cold temperature, screaming that he had COVID. The police handcuffed him and, when he began spitting, put a mesh hood over his face,

pushing him face down on the pavement. He stopped breathing after two minutes, was resuscitated and died a week later.

In the grand jury presentation, the Attorney General's office called an expert who is a proponent of "Excited Delirium Syndrome" that potentially laid the cause of death at the feet of other factors that included the extreme cold and Prude's earlier ingestion of a PCP. The medical examiner also concluded Prude suffered from the Syndrome.

A lawyer for Prude's family complained that the reason for the non-indictment was basically that the Attorney General didn't really want it—why else would she have presented the expert who, as counsel noted when I spoke with him some weeks ago, presented the police officers' best defense. *Law & Crime*, March 3, 2021.

Although the Attorney General was free to present the exculpatory theory, was she "obligated" to do so? One can say, "Yes, *fairness* would dictate letting the grand jury know everything, warts and all." This notwithstanding Senator Ervin's statement to the juror about the reality of grand jury practice, both then (some 50 years ago) and still now. After all, guilt or non-guilt is for a petit jury to decide!

New York Rule of Professional Conduct 3.8, titled "Special Responsibilities of Prosecutors and Other Government Lawyers," says merely that a prosecutor "shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor … knows or it is obvious that the charge is not supported by probable cause," cf. ABA Model Rules 3.8. No requirement that exculpatory evidence be presented—certainly if not requested by defense counsel.

But, one wonders, how many prosecutors or even prosecution offices have actually looked at the somewhat expanded requirements of the ABA Criminal Justice Standards for the Prosecution Function, at 3-4.6(e): A "prosecutor with personal knowledge of evidence that directly negates the guilt of a subject … should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target … to testify …, or present other non-frivolous evidence claimed to be exculpatory."

As a purely ethical matter, this seems consistent with Department of Justice policy. According to the Justice Department manual:

"In *United States v. Williams*, 112 S. Ct. 1735 (1992), the Supreme Court held that the federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence … It is the policy of the Department of Justice, … that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment … While a failure to follow the Department's policy should not result in dismissal of an indictment, *appellate courts may refer violations of the policy to the Office of Professional Responsibility for review*." DOJ Manual 9-11.233."

In *Williams*, the district court dismissed an indictment over the prosecution's failure to present "substantial exculpatory evidence" to the grand jury. The circuit court affirmed and the Supreme Court reversed. In reinstating the indictment, it ruled that to do otherwise would transform the grand

jury from an accusatory body into an adjudicatory body. See Gershman, "Prosecutorial Misconduct," 2:32. Note, despite the Justice Department policy, a failure to make anything near a balanced presentation will not result in the dismissal of an indictment!

New York's rules are not quite so clear. In *People v. Valles*, 62 N.Y.2d 36 (1984), the Court of Appeals required that the prosecutor instruct the jury on the defense of justification. Two years later, when a defendant argued that the grand jury should have been instructed on the defense of mental defect, the Court of Appeals quickly distinguished its earlier holding: "While generally the prosecutor is required to instruct the Grand Jury on the law with respect to the matters before it … , we have held that he need not instruct the Grand Jury as to every

conceivable defense suggested by the evidence, but ordinarily need instruct only as to those "complete" defenses which the evidence will support." *People v. Lancaster*, 69 N.Y.2d 20 (1986).

As a purely philosophical matter, should a prosecutor present the defense's theory in what is basically an ex parte proceeding? Maybe so, in an ideal world. Still, as is well known, the grand jury does not decide the truth of charges, only whether there is probable cause to believe them to be true. "[R]equiring disclosure might place an unimaginable burden on a prosecutor in deciding what is or is not exculpatory and necessitate adversary proceedings in the grand jury room." Gershman, 2:32, citing *Bracy v. U.S.*, 435 U.S. 1301 (1978); *U.S. v. Mandel*, 415 F. Supp. 1033 (D. Md. 1976). So, separating legal and ethical obligations, there is no legal duty on prosecutors to disclose exculpatory evidence to a grand jury. Let alone any obligation to make a balanced presentation, whatever that might actually be. That is, as long as the prosecutor believes that the proposed criminal charge is "supported by probable cause," even if there is a viable defense.

Needless to say, as a practical matter the best way to ensure that the defense side of the story is presented to the grand jury (in New York) is for the defendant to testify under a waiver of immunity. He does have an absolute right under the Criminal Procedure Law to testify if he has been arrested and the case is being presented to the grand jury or if he learns about the grand jury and asks to appear (if, and only if, he executes a waiver of immunity). There are, of course, great risks in taking that course of action—a subject way beyond the scope of this article. And, importantly, it is not clear under New York law that even if the target or defendant testifies that the prosecutor would be obligated to instruct the jury on the legal significance of what his testimony communicates.

The alternative, of course, especially if there is a serious question about guilt is a meaningful sit down with an open minded prosecutor—there are some. That might lead her to talk to witnesses who might encourage her to make a balanced presentation. Then again, those exculpatory witnesses, if believed, might encourage her to tell the grand jury to simply go home—done. Still, if a defense lawyer isn't in place or in contact with the prosecutor, the prosecutor is oftentimes unlikely to learn "the other side of the story." And even if she does learn it, the law actually doesn't require the prosecutor to deviate from what Senator Ervin was talking about.

Finally, whereas the Justice Department does have a central body in Main Justice (the Office of Professional Responsibility (OPR)) that investigates and disciplines its prosecutors around the country, based on referrals from judges, adversaries or others for ethics violations—oftentimes matters involving exculpatory material—nothing like that currently exists in New York state. What about that?

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