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RELIEVING THE TENSION: NEW MEXICO'S DEPARTURE FROM THE FEDERAL POSITION THAT THERE IS NO REQUIREMENT TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

Brett Eaton*

I. INTRODUCTION

The modern grand jury is the result of two polar predecessors in purpose. Originally, the grand jury was established to ensure that people accused of crimes would be brought to trial.¹ Over time, this purpose shifted to a protector of the citizens who were accused of crimes.² These dual purposes are both present in the modern understanding of the grand jury.

The conflicting purposes of the grand jury have made it difficult for courts to resolve disputes resulting from grand jury proceedings. In addition to the internal tension in the grand jury, there is also a tension that the grand jury is supposed to be independent of the branches of government.³

New Mexico has deviated from the federal view of what an independent grand jury means. The grand jury is independent of other branches of government in both the U.S. Constitution and New Mexico constitution. Because the grand jury is independent, the federal approach is that the courts should not get involved in overseeing grand jury proceedings.⁴ However, the New Mexico approach allows the courts and legislature to get involved in order to ensure that the grand jury stays independent.⁵ In fact, a recent decision by the New Mexico Supreme Court created a procedure to enforce a law enacted by the state legislature that allows a tar-

* University of New Mexico, Class of 2012. The author thanks Professor Elizabeth Rapaport and Melissa Eaton for their valuable advice and support.

1. See GEORGE J. EDWARDS, JR., *THE GRAND JURY* 7 (G.T. Bisel Co. 1973) (1906).

2. See *id.* at 27.

3. See *United States v. Williams*, 504 U.S. 36, 49 (1992).

4. See *id.* at 49.

5. See *Jones v. Murdoch*, 2009-NMSC-002, ¶ 25, 200 P.3d 523, 532.

get to present exculpatory evidence to the grand jury through the prosecutor.⁶

Jones v. Murdoch established a pre-indictment procedure to resolve disputes between targets and prosecutors under section 31-6-11(B).⁷ Jones, the target of an investigation, offered an argumentative letter to the prosecutor, referencing items of potentially exculpatory evidence.⁸ The prosecutor refused to present some of the evidence which the prosecutor believed was not exculpatory under section 31-6-11(B).⁹ As a result, Jones sought relief from the New Mexico Supreme Court.¹⁰ In response to Jones, the Supreme Court of New Mexico established a pre-indictment procedure for targets and prosecutors to follow.¹¹ Under this procedure, the target must write a non-argumentative letter stating the evidence that he believes to be exculpatory and what he wants introduced to the grand jury.¹² In addition, the target must write a cover letter explaining why the evidence is relevant.¹³ Both letters go to the prosecutor.¹⁴ If the prosecutor feels that some of the evidence is not exculpatory or admissible before the grand jury, he will write a letter describing his position.¹⁵ This letter, as well as both of the target's letters, are sent to the magistrate judge for a decision.¹⁶

The pre-indictment procedure is significant for New Mexico because it runs counter to the federal view of the court's relationship to the grand jury. The U.S. Supreme Court has held that prosecutors have no obligation to present exculpatory evidence.¹⁷ In reaching their decision, the Supreme Court relied on the understanding that the court has no supervisory power over the grand jury.¹⁸ Contrary to the U.S. Supreme Court's holding, the New Mexico Supreme Court used their supervisory power to create a mechanism that implements the legislature's intent of providing more information to the grand jury under section 31-6-11(B).¹⁹ This article will look at the reasoning behind the New Mexico Supreme

6. See *Murdoch*, 2009-NMSC-002, 200 P.3d 523.

7. *Id.* ¶ 10, 200 P.3d at 528.

8. *Id.* ¶ 3 200 P.3d at 526.

9. *Id.*

10. *Id.*

11. *Id.* ¶ 10, 200 P.3d at 528.

12. *Id.* ¶ 33, 200 P.3d at 535.

13. *Id.* ¶ 35, 200 P.3d at 535.

14. *Id.*

15. *Id.*

16. *Id.* ¶ 36, 200 P.3d at 536.

17. *United States v. Williams*, 504 U.S. 36, 47 (1992).

18. *Id.*

19. N.M. STAT. ANN. 1978, § 31-6-11(B) (2003).

Court's decision to establish a pre-indictment process for the introduction of exculpatory evidence, how this reasoning differed from the U.S. Supreme Court's reasoning in *Williams*, and its implications on the grand jury process of New Mexico.

Part II of this note discusses the background of the grand jury system and how it has evolved to its present state. Part III discusses the federal courts' understanding of the grand jury. A survey of Supreme Court and circuit cases over the years is examined to see the deference the court has given the grand jury. These cases lead up to the Supreme Court case of *United States v. Williams*. This part concludes by looking at the Court's reasoning behind the rule set forth in *Williams*, which does not require prosecutors to present exculpatory evidence.

Part IV looks at how the New Mexico courts have viewed the grand jury. Similarly to Part III, this part looks at cases from New Mexico courts dealing with the grand jury. It also looks at the law which allows targets to alert the grand jury to exculpatory evidence. This part ends with an in-depth look at the factual background to the *Jones* case, as well as the reasoning of the court.

Part V provides analyses of the different approaches the *Williams* Court and *Jones* court took to reach their decisions. It looks at the supervisory powers of the courts, the historical understanding of the grand juries and the role legislative action took in the courts' reasoning. Finally this part looks at the importance of a pre-indictment remedy and procedure.

Part VI concludes this article by discussing the implications of the new pre-indictment procedure on grand jury practice in New Mexico.

II. GRAND JURY BACKGROUND

The U.S. grand jury system derived from the English grand jury, which history dates back over 900 years.

A. Grand Jury History

There is uncertainty about the origins of the modern-day grand jury.²⁰ However, it was in 1368 A.D. that the "graunde inquest," an entity similar to the modern-day grand jury, was established to "inquire of and present offences for the county at large."²¹ Yet, the graunde inquest was not the first body organized to accuse. Rather, the graunde inquest was a

20. *Id.*

21. EDWARDS, *supra* note 1, at 2.

spin-off of a type of accusing jury established by the Assize of Clarendon in 1166.²² Under the Assize of Clarendon,

it was enacted “that inquiry be made in each county and in each hundred, by twelve lawful men of the hundred and four lawful men of every township—who are sworn to say truly whether in their hundred or township there is any man accused of being or notorious as a robber, or a murderer or a thief . . . since the king began to reign.”²³

This statute turned crimes into offenses against the crown and allowed them to be tried in the king’s itinerant courts.²⁴

The accusing jury’s function changed periodically from 1166 until the fourteenth century, when the *graunde inquest* emerged.²⁵ The *graunde inquest* was initially an arm of the government, used to reveal all crime and criminals, where the members of the inquest were required to inform the court with the rationale for their verdicts and the evidentiary reasons for their conclusion.²⁶ Thus, the main purpose of this original form of the grand jury, the *graunde inquest*, was to ensure individuals suspected of criminal conduct would be reported and tried.²⁷ However, over time the *graunde inquest* began to change into an independent power to act as a buffer between the crown and the people.²⁸

The independence of the grand jury is the result of rules being established which no longer required the jurors to inform the court about the evidence used, new-found secrecy of jury meetings, and an oath of secrecy.²⁹ The oath of secrecy “contained no reservation in favor of the government.”³⁰ With the grand jury free from court control, and acting in secrecy, it could protect the citizens of the country from the unjust actions of the government.³¹ From this fractured past and foundation of contradictory purposes, it is easy to see the two polar views of the grand jury as first, the “conservator of [man’s] liberties, and the noblest check upon mal-

22. SARA SUN BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW AND PRACTICE* § 1:01 (1986).

23. EDWARDS, *supra* note 1, at 7 (quoting Lesser’s Historical Jury System 138).

24. *Id.*

25. BEALE & BRYSON, *supra* note 22, § 1:02. For information on the transformation and numerous roles that the accusing jury took on in its transformation to the *graunde inquest* see EDWARDS, *supra* note 1, at 7–25.

26. *Id.* at 27.

27. See BEALE & BRYSON, *supra* note 22, § 1:02.

28. EDWARDS, *supra* note 1, at 27.

29. *Id.* at 28.

30. *Id.*

31. See *id.*

ice and oppression of individuals and states,” and second, “purely mischievous and a relic of barbarism.”³²

B. Grand Jury Today

The grand jury system, which was adopted through the Fifth Amendment by the federal government, was based on the English version.³³ The purpose of the grand jury is to “‘provide a fair method for instituting criminal proceedings against persons believed to have committed crimes.’”³⁴ The grand jury performs two distinct functions: to investigate and to indict.³⁵ Under the investigating role, the grand jury looks into whether a crime has been committed.³⁶ Under the indictment role, the grand jury determines, once an accusation has been made, if there is sufficient evidence to support going to trial.³⁷ As a result, the grand jury is referred to as “both a shield and a sword,” because the investigative power is an offensive tool for the government to discover criminal activity, and the indictment power protects citizens from unfounded charges.³⁸ Under the investigatory power, the grand jury “‘can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.’”³⁹ In doing so, the grand jury should “‘inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.’”⁴⁰

While the Fifth Amendment requires an indictment by a grand jury to prosecute someone federally,⁴¹ that requirement is not extended to the states.⁴² Rather, each state is left to decide what role, if any, a grand jury will play in state prosecutions.⁴³ In *Hurtado v. California*, the Supreme Court chose not to use the Fourteenth Amendment to incorporate the grand jury doctrine of the Fifth Amendment.⁴⁴ Without a federal constitutional requirement, “many states have abolished the grand jury alto-

32. *Id.* at 1 (internal quotation marks omitted) (citations omitted).

33. OFFICE OF LEGAL EDUCATION, U.S. DEP’T OF JUSTICE, FEDERAL GRAND JURY PRACTICE 1 (2008).

34. *Id.* (quoting *Costello v. United States*, 350 U.S. 359, 362 (1956)).

35. BEALE & BRYSON, *supra* note 22, § 1:07.

36. *Id.*

37. *Id.*

38. *Id.* at 30.

39. *United States v. R. Enterprises*, 498 U.S. 292, 297 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950)).

40. *Id.*

41. FEDERAL GRAND JURY PRACTICE, *supra* note 33, at 8.

42. BEALE & BRYSON, *supra* note 22, § 1:05.

43. *See Hurtado v. California*, 110 U.S. 516, 521 (1884).

44. *Id.*

gether in favor of other methods or pre-trial trial screening.”⁴⁵ Each state can independently define the role of the prosecutor, court and grand jury through their constitution and statutes.⁴⁶

C. *New Mexico Grand Jury*

Unlike federal requirements, New Mexico does not limit prosecutions to those initiated by a grand jury indictment.⁴⁷ When a grand jury is convened, it is done by an order of a judge and requires at least twelve people.⁴⁸ However, unlike the federal system, a person can face prosecution after a prosecutor presents an information.⁴⁹ Unlike the federal grand jury system, the New Mexico legislature has provided a rule which allows “the target or his counsel [to] alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.”⁵⁰

III. FEDERAL VIEW OF THE GRAND JURY

In *United States v. Williams*, the U.S. Supreme Court established that there was no duty on the prosecutor to provide exculpatory evidence to the grand jury.⁵¹ The Court held that it lacked the supervisory power to address whether exculpatory evidence could be presented to the grand jury.⁵² Leading up to the *Williams* decision, the Court addressed many issues involving the grand jury system and a court’s relationship to the grand jury.

A. *Supreme Court Cases Leading Up to Williams*

In *Costello v. United States*, the Court answered the question of whether an indictment could be based on hearsay.⁵³ The result of *Costello* was that an indictment was “valid even if it is based exclusively on hear-

45. R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 363 (2000).

46. See BEALE & BRYSON, *supra* note 22, § 9:32.

47. See N.M. CONST. art. II, § 14.

48. *Id.*

49. *Id.*

50. N.M. STAT. ANN. 1978, § 31-6-11(B) (2003).

51. 504 U.S. 36 (1992).

52. *Id.*

53. 350 U.S. 359 (1956).

say evidence.”⁵⁴ The defendant in *Costello* was indicted for willfully attempting to evade payment of income taxes.⁵⁵ The defendant claimed his Fifth Amendment right was violated because the testimony before the grand jury was based on hearsay evidence.⁵⁶ In response, the Court chose to limit the burden on the grand jury by stating, “neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act.”⁵⁷ In addition to no constitutional limitations, the Court said that historically grand juries were “not hampered by rigid procedural or evidential [sic] rules.”⁵⁸

The Court continued its practice of not burdening or delaying the work of the grand jury by refusing to review the evidence considered by the grand jury in *United States v. Calandra*.⁵⁹ *Calandra* dealt with the question of whether a grand jury witness could refuse to answer questions “based on evidence obtained from an unlawful search and seizure.”⁶⁰ Federal agents had obtained a warrant to search the defendant’s place of business to look for specific items related to bookmaking and wagering.⁶¹ However, the agents went beyond the scope of their warrant when they seized other property on the premises, which was the basis of defendant’s appeal.⁶²

In beginning its analysis, the Court first pointed out some historical qualities of grand juries, including their broad power to inquire into criminal violations, secret deliberations, power to compel testimony, and that no judge presides over or monitors the proceedings.⁶³ The Court believed that “[w]hen the grand jury is performing its investigatory function . . . society’s interest is best served by a thorough and extensive investigation.”⁶⁴ As a result the Court concluded that in order to perform these functions, the grand jury would need to look at all available evidence.⁶⁵ As in *Costello v. United States*, an indictment is not made invalid by the character of the evidence and is not subject to challenge or review.⁶⁶ This is because the grand jury does not “finally adjudicate guilt or

54. BEALE & BRYSON, *supra* note 22, § 10:06.

55. *Costello*, 350 U.S. at 359.

56. *Id.* at 361.

57. *Id.* at 362.

58. *Id.*

59. *See* 414 U.S. 338 (1974).

60. *Calandra*, 414 U.S. at 339.

61. *Id.* at 340.

62. *Id.*

63. *Id.* at 343.

64. *Id.* at 344 (quoting *Wood v. Georgia*, 370 U.S. 375, 392 (1962)).

65. *Id.*

66. *Id.* at 344–45.

innocence,” and as a result, has “traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.”⁶⁷ The Court was concerned with any “holding that would saddle a grand jury with minitrials and preliminary showings,” which would result in the grand jury work being impeded or delayed.⁶⁸

B. Circuit Court Cases Leading Up to *Williams*

In *United States v. Basurto*, the Ninth Circuit addressed the issue of consequences to a prosecutor who knows grand jury testimony, and the subsequent grand jury indictment, was based in part on perjured testimony.⁶⁹ Basurto, along with fourteen others, was charged with conspiring to import and distribute marijuana.⁷⁰ A co-conspirator, William Barron, was one of two grand jury witnesses to testify about Basurto’s involvement.⁷¹ Before the trial, Barron informed the prosecuting attorney that all of his grand jury testimony about Basurto was untrue.⁷²

In its analysis, the court discussed concern that over the years there has been an increase in the power of the prosecutor over the grand jury and a coinciding decrease in the grand jury’s independence.⁷³ The court held that “the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.”⁷⁴ Notwithstanding this holding, the increase in judicial involvement in grand jury proceedings under the *Basurto* decision has generally not been followed.⁷⁵

In a related issue, the court in *United States v. Gray* addressed the effect of introducing exculpatory evidence to a grand jury.⁷⁶ When the case was heard, the federal courts were turning “a more discerning eye towards the evidentiary basis of a grand jury’s indictment,” including dismissing cases where prosecutors were aware of, but failed to present exculpatory evidence to the grand jury.⁷⁷ However, in *Gray* the prosecutor was not aware of the exculpatory evidence, which had the prosecutor

67. *Id.* at 349.

68. *Id.* at 350.

69. 497 F.2d 781 (9th Cir. 1974).

70. *Id.* at 784.

71. *Id.*

72. *Id.*

73. *Id.* at 785.

74. *Id.*

75. BEALE & BRYSON, *supra* note 22, § 10:06.

76. 502 F. Supp. 150 (D.C. Cir. 1980).

77. *Id.* at 152.

been aware it would have been a prerequisite for dismissal.⁷⁸ The court stated that the “prosecutor is not obligated to sift through all the evidence to find statements or documents that might be exculpatory.”⁷⁹ As a result, the court held that the defendant could seek relief at trial by presenting the exculpatory evidence that the prosecutor failed to present.⁸⁰

A few years later, in *United States v. Page*, the Tenth Circuit took up the question of a prosecutor’s requirement to present exculpatory evidence.⁸¹ In its analysis, the Tenth Circuit looked at the two major views in the federal courts dealing with the issue at the time.⁸² The first view was that there was no duty for the prosecutor to present exculpatory evidence to the grand jury.⁸³ This was the rule in the Sixth, Eighth, and Ninth Circuits, its reasoning being that the grand jury did not judge guilt or innocence, but merely probable cause.⁸⁴ The alternative view was that the grand jury should hear all relevant information, including exculpatory evidence that clearly negates guilt.⁸⁵

The Second, Seventh, and Tenth Circuits adopted the rule that the grand jury should hear all exculpatory evidence.⁸⁶ However, this rule does not require the prosecutor to “ferret out and present every bit of potentially exculpatory evidence,” but to present substantially exculpatory evidence discovered through the course of investigation.⁸⁷ The court believed that applying this rule would promote judicial economy.⁸⁸ The economy would result from the grand jury having more information to properly exclude cases from going to trial that could not pass a probable cause standard, or the much higher standard of reasonable doubt which trials require.⁸⁹ While the court placed a higher standard for prosecutors to present evidence which clearly negates guilt, it believed that in this

78. *Id.*

79. *Id.* (quoting *United States v. Ollin Corp.*, 465 F. Supp. 1120, 1128-29 (W.D.N.Y. 1979)).

80. *Id.* at 153.

81. 808 F.2d 723, 727 (10th Cir.1987).

82. *Id.*

83. *Id.*

84. *See id.*; *United States v. Adamo*, 742 F.2d 927, 937-38 (6th Cir. 1984); *United States v. Sears Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983); *United States v. Civella*, 666 F.2d 1122, 1127 (8th Cir. 1981).

85. *Page*, 800 F.2d at 727.

86. *See id.*; *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983); *United States v. Ciambrone*, 601 F.2d 616, 622-23 (2d Cir. 1979).

87. *Page*, 808 F.2d at 728.

88. *Id.*

89. *Id.*

case there was no violation because the evidence was not clearly exculpatory.⁹⁰

C. *United States v. Williams*

In 1992, the U.S. Supreme Court ended the conflicting positions among the circuits when it held in *United States v. Williams* that courts have no authority to impose a duty on the prosecuting attorney to present exculpatory evidence before a grand jury.⁹¹

Williams arose out of a controversy in the Tenth Circuit, where the Court of Appeals applied the *Page* ruling, which requires “that substantial exculpatory evidence discovered during the course of an investigation be revealed to the grand jury.”⁹² The Supreme Court did not address the issue of disclosing exculpatory evidence to the grand jury as a question of duty imposed by the Fifth Amendment, but instead looked at the court’s supervisory power over the grand jury.⁹³ The Supreme Court had previously ruled that courts’

supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those “few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.”⁹⁴

However, the Supreme Court held that this supervisory power is narrow, available only to provide courts the ability to enforce legally compelled standards, but not to prescribe them in the first place.⁹⁵

According to the Court, the inability of the courts to prescribe rules for the grand jury is due to the historical independence of the grand jury system.⁹⁶ The theory behind the grand jury was that it should not work for any branch of government, but be a buffer or referee between the people and government.⁹⁷ When the grand jury system was adopted by the United States from the previous English system, it was not mentioned in the Constitution until the Bill of Rights.⁹⁸ As a result, it is not “textually assigned” to any branches of the government mentioned in the first three

90. *Id.*

91. 504 U.S. 36, 55 (1992).

92. *Id.* at 44 n.4 (quoting *United States v. Page*, 808 F.2d 723 (1981)).

93. *Id.* at 45.

94. *Id.* at 46 (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986)).

95. *Id.* at 46-47.

96. *Id.* at 47.

97. *Id.*

98. *Id.*

Articles.⁹⁹ Even though there are connections with the judicial branch, any relationship between the grand jury and the judiciary has traditionally been at “arm’s length.”¹⁰⁰ According to the Court, the Fifth Amendment presupposes that the grand jury is independent of “either prosecuting attorney or judge.”¹⁰¹

Because of the separate nature of the grand jury, the Supreme Court has been “reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.”¹⁰² The Court is concerned with disrupting the traditional nature of the grand jury as a body of laymen, unfettered by technical rules.¹⁰³ As a result, the Court does not engage in “judicial reshaping of the grand jury institution” or altering “the traditional relationships between the prosecutor, the constituting court, and the grand jury itself.”¹⁰⁴

The Supreme Court believed that “requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury’s historical role, transforming it from an accusatory to an adjudicatory body.”¹⁰⁵ Historically, it had been sufficient for the grand jury to hear only the prosecutor’s side for the purpose of determining whether an indictment or accusation was appropriate.¹⁰⁶ This had been done not by looking at how the charge could be denied, but by looking at what foundation the prosecutor could establish for the charge.¹⁰⁷ As a result, throughout the history of grand juries, it has been thought that the target never had the right to testify or have exculpatory evidence presented before a grand jury.¹⁰⁸

The Supreme Court kept with its view of history by ruling that an obligation on the part of the prosecutor to present exculpatory evidence would be incompatible with the grand jury system.¹⁰⁹ The grand jury itself has no obligation to hear any evidence, including exculpatory evidence, and as a result, the Court saw no reason why the prosecution should be obligated to provide it.¹¹⁰ Based on the historical roles and relationship

99. *Id.*

100. *Id.*

101. *Id.* at 49.

102. *Id.* at 49–50.

103. *Id.* at 50 (quoting *Costello v. United States*, 350 U.S. 359, 364 (1956)) (internal quotation marks omitted).

104. *Id.*

105. *Id.* at 51.

106. *Id.* at 51–52.

107. *Id.* at 52.

108. *Id.*

109. *Id.*

110. *Id.* at 53.

between the court and the grand jury, the Supreme Court, in an attempt to follow tradition, held that courts have no power to prescribe a duty on the prosecutor to present exculpatory evidence.¹¹¹

IV. NEW MEXICO VIEW OF THE GRAND JURY

New Mexico has a different view than the federal government regarding the independence and role of the grand jury. The New Mexico Supreme Court has found that it has some supervisory power over the grand jury, and that the legislature has plenary power to make laws that affect the grand jury.¹¹² In recent years, the laws have reflected a desire to provide more protection for targets, and more information to the grand jury.¹¹³ This view is reflected in the progression of cases dealing with the grand jury.

A. Cases Leading Up to *Jones v. Murdoch*

In *State v. Herrera* the New Mexico Court of Appeals addressed the issue of dismissal where a prosecutor knowingly withheld exculpatory evidence from the grand jury, some of which was deemed clearly exculpatory.¹¹⁴ Previously, New Mexico courts assumed that a prosecutor denied a defendant due process when he withheld exculpatory evidence.¹¹⁵

Abiding by precedent, the Court of Appeals held that when exculpatory evidence is knowingly withheld, it is a violation of due process.¹¹⁶ The court said that the grand jury has a duty to protect citizens from unfounded accusations, and that when a prosecutor knowingly chooses to leave out evidence which could negate the guilt of a target, the grand jury loses its independence in making a probable cause claim and becomes a tool of the prosecution.¹¹⁷ Instead, according to the court the prosecutor should be seeking justice, not indictment, and the presentation of any potentially exculpatory evidence should be viewed objectively.¹¹⁸

Two years after *Herrera*, the New Mexico Supreme Court had an opportunity to address the issue of prosecutors withholding potentially

111. *Id.* at 55.

112. *Jones v. Murdoch*, 2009-NMSC-002, ¶ 25, 200 P.3d 523, 532.

113. *See* N.M. R. CRIM. P. 5-302A; *see also* N.M. STAT. ANN. 1978, § 31-6-11 (2003).

114. 93 N.M. 442, 434–44, 601 P.2d 75, 76–77 (Ct. App. 1979), *overruled in part by* *Buzbee v. Donnelly*, 96 N.M. 692 (1981).

115. *Id.* at 444, 601 P.2d at 77.

116. *Id.*

117. *Id.*

118. *Id.* at 444–45, 601 P.2d at 77–78.

exculpatory evidence from a grand jury.¹¹⁹ In *Buzbee v. Donnelly*, the court looked at the grand jury proceedings of targets alleged to have participated in a prison riot.¹²⁰ Unlike the situation in *Herrera*, there was a question about whether the evidence, which was withheld by the prosecutor, was truly exculpatory.¹²¹

Previously, New Mexico had a requirement that, “[a]ll evidence must be such as would be legally admissible upon trial,” for the prosecutor to be able to present it to the grand jury.¹²² However, at the time of the case the rule had changed, and the new requirement was based on prosecutorial bad faith.¹²³ The court said that rules of admissibility would apply to the admittance of exculpatory evidence as well.¹²⁴ Thus, the court determined that some of the withheld exculpatory evidence would not have been admissible and was properly withheld by the prosecutor.¹²⁵ In addition to having a requirement that the evidence be admissible at trial, the court also limited the admission of evidence that must be directly exculpatory, not just circumstantially exculpatory.¹²⁶ Direct evidence in general, according to the court, was “evidence which, if believed, proves the existence of the fact without inference or presumption.”¹²⁷ This limitation on what type of exculpatory evidence was based on the legislature using the term “directly” negating guilt.¹²⁸

The New Mexico Supreme Court believed these rules and their application did not violate a target’s due process rights.¹²⁹ The court was further concerned that “opening up indictments for challenge would halt the orderly progress of investigations, would cause extended litigation on unimportant issues and would frustrate the public’s interest in the fair and expeditious administration of the criminal laws.”¹³⁰ As a result, the New Mexico Supreme Court overruled the Court of Appeals’ *Herrera* decision.¹³¹

119. *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981).

120. *Id.* at 694, 634 P.2d at 1246.

121. *Id.* at 695, 634 P.2d at 1247.

122. *Id.* at 698, 634 P.2d at 1250 (quoting N.M. STAT. ANN. 1978 § 31-6-11(B) (2003)).

123. *Id.*

124. *Id.* at 699, 634 P.2d at 1251.

125. *Id.*

126. *Id.* at 701, 634 P.2d at 1254.

127. *Id.* at 700, 634 P.2d at 1252.

128. *Id.* at 701, 634 P.2d at 1254.

129. *Id.* at 707, 634 P.2d at 1259.

130. *Id.* at 706, 634 P.2d at 1258.

131. *Id.* at 706, 634 P.2d at 1258.

A few years later, the New Mexico Court of Appeals drew from the *Buzbee* holding when they ruled on a claim by Steve Hewitt that the state failed to provide exculpatory evidence to the grand jury.¹³² In *State v. Hewitt*, the defendant provided a letter addressed to the grand jury that mentioned the available pieces of exculpatory evidence but did not provide the evidence at the time.¹³³ After receiving the letter, the grand jury made the decision that they did not want to see the evidence mentioned in the letter.¹³⁴ As a result of this denial, the defendant filed a motion to quash the indictment because the state failed to present exculpatory evidence to the grand jury.¹³⁵

The court ruled that a three-prong test must be satisfied to dismiss an indictment for failure by the state to provide exculpatory evidence.¹³⁶ This test requires:

First, defendant must establish demonstrable prejudice resulting from the acts or omissions of the prosecutor. Second, the evidence which is claimed to be exculpatory must constitute evidence directly negating the guilt of defendant, as opposed to evidence which indirectly negates defendant's guilt. Third, the evidence aimed to be exculpatory must be evidence which would be legally admissible at trial.¹³⁷

Using the test, the court ruled that it was an error for the trial court to dismiss the indictment.¹³⁸ The evidence provided by Hewitt did not satisfy the three-prong test.¹³⁹ One of the pieces of evidence was a polygraph examination that the court thought did not directly negate guilt because it did not specifically address some of the defendant's charges.¹⁴⁰ The court also put the burden on the defendant attempting to quash the indictment to prove that the three prongs were met.¹⁴¹ This burden is difficult to meet because the prosecutor is given wide discretion in determining what evidence is provided, and the grand jury ultimately has the decision of what evidence they will see.¹⁴²

132. *State v. Hewitt*, 108 N.M. 179, 182, 769 P.2d 92, 95 (Ct. App. 1988).

133. *Id.* at 181, 769 P.2d at 94.

134. *Id.* at 182, 769 P.2d at 95.

135. *Id.*

136. *Id.*

137. *Id.* (citation omitted).

138. *Id.* at 184, 769 P.2d at 97.

139. *Id.*

140. *Id.* at 183, 769 P.2d at 96.

141. *Id.*

142. *Id.*

Ten years later, in *State v. Lucero*, the New Mexico Supreme Court applied the three-prong test to uphold a murder conviction that was appealed partly on a claim to dismiss the indictment for failure to provide exculpatory evidence.¹⁴³ The defendant claimed that the state erred by not providing eyewitness testimony that would have identified someone else as the shooter.¹⁴⁴ While applying the test, the court took a limited view of when an indictment could be dismissed. An indictment can be dismissed when “the prosecutor has clearly abused the grand jury process,”¹⁴⁵ with the understanding that the “prosecutor ‘is invested with wide discretion as to the selection and presentation of evidence.’”¹⁴⁶ Ultimately, the court found the defendant failed the first prong of the test by not “showing a substantial probability of a different outcome.”¹⁴⁷

B. Change in the Law

In 2003, the New Mexico Legislature changed the language of section 31-6-11(B)¹⁴⁸ to provide the grand jury with more information.¹⁴⁹ Under the new language, defendants are allowed to alert the grand jury of exculpatory evidence by notifying the prosecutor.¹⁵⁰ With this newly created relationship between the target and the prosecutor, it was foreseeable that disputes would arise as to what evidence would be deemed exculpatory.¹⁵¹ This was the issue that the New Mexico Supreme Court took up in *Jones v. Murdoch*.¹⁵²

143. 1998-NMSC-044, 972 P.2d 1143.

144. *Id.* ¶ 16, 972 P.2d at 1147.

145. *Id.* ¶ 17, 972 P.2d at 1147 (quoting *Buzbee v. Donnelly*, 96 N.M. 692, 696–97, 634 P.2d 1244, 1248–49 (1981)).

146. *Id.* ¶ 19, 972 P.2d at 1148 (quoting *State v. Hewitt*, 108 N.M. 179, 183, 769 P.2d 92, 96).

147. *Id.*

148. N.M. STAT. ANN. 1978 § 31-6-11(B) (2003). The statute reads:

It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.

149. See *Jones v. Murdoch*, 2009-NMSC-002, ¶ 42, 200 P.3d 523, 537 (2009).

150. N.M. STAT. ANN. 1978 § 31-6-11(B).

151. *Murdoch*, 2009-NMSC-002, ¶ 28, 200 P.3d at 533.

152. 2009-NMSC-002, 200 P.3d 523 (2009).

C. Jones v. Murdoch

In *Jones v. Murdoch*, the New Mexico Supreme Court established a new pre-indictment procedure to handle controversies that arise when a prosecutor chooses not to alert the grand jury of evidence that the target feels is exculpatory.

1. Facts of the Case

On April 17, 2007, James Bort Jones (Jones) approached Clemente Moreno (Moreno), a man who was trespassing at the apartment building that Mr. Jones owned.¹⁵³ Mr. Jones had previously asked Mr. Moreno to leave the premises, in part because he knew that Mr. Moreno was a drug dealer.¹⁵⁴ Mr. Jones believed that Mr. Moreno was going to strike him when he was asked to leave, so “[f]earing for his safety, Mr. Jones struck Mr. Moreno in the face with an open hand.”¹⁵⁵ After he struck Mr. Moreno, Mr. Jones left in his truck to go to the courthouse to get eviction papers for Moreno’s girlfriend.¹⁵⁶ Upon returning to the apartment building, Mr. Jones was arrested.¹⁵⁷ Mr. Moreno told police that Mr. Jones pointed a gun at him and struck him in the face while telling him to get off of the property.¹⁵⁸

Jimmy Michael Griego, an employee of Jones’, witnessed the confrontation.¹⁵⁹ He first told police that he saw Jones slap Moreno in the face without a gun present.¹⁶⁰ However, in a later statement, he told police that Jones had put something in his laundry basket, and in a third statement, he told police he had seen a gun when Jones and Moreno were arguing.¹⁶¹ Mr. Griego later admitted that he hid Jones’ knife and gun.¹⁶² Maria Benavidez told police that she had moved the gun from the laun-

153. Amended Emergency Petition for Peremptory Writ of Mandamus at 1, *In re Grand Jury Presentation Concerning James Bort Jones*, 2009-NMSC-002, 200 P.3d 523 (2009) (No 30,977), 2008 WL 6487132 at *2 [hereinafter Amended Emergency Petition for Peremptory Writ of Mandamus].

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Response to Amended Emergency Petition for Peremptory Writ of Mandamus at 2, *In re Grand Jury Presentation Concerning James Bort Jones*, 2009-NMSC-002, 200 P.3d 523 (2009) (No 30,977), 2008 WL 6487133 at *2 [hereinafter Response to Amended Emergency Petition for Peremptory Writ of Mandamus].

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

dry basket to an outside trashcan, where police later found a Kimber semiautomatic handgun.¹⁶³

More witnesses came forward reporting what they saw. Isaac Gallegos heard Jones say to Moreno, “I will kill you!” and that Jones could have Moreno “whacked.”¹⁶⁴ Cynthia Fuentes, who also witnessed the argument, told police she saw Jones point the gun at Moreno and slap him, but was unsure if he used the gun to hit Moreno.¹⁶⁵ When police searched Jones’ truck, they found a Kimber magazine and ammunition.¹⁶⁶

On December 4, 2007, Mr. Jones hand delivered a written memorandum to the District Attorney’s office in an attempt to alert the grand jury foreperson of exculpatory evidence.¹⁶⁷ Jones was charged with aggravated battery with a deadly weapon, aggravated battery, aggravated assault, and tampering with evidence.¹⁶⁸ Jones wanted to present evidence to rebut the allegation that a gun was used to commit battery against the victim.¹⁶⁹ Jones presented witness testimony, that included from Ms. Fuentes and Mr. Gallegos who both said the gun was not used. He also provided evidence of Moreno’s past efforts to subvert the criminal justice system by bribing his girlfriend to avoid her testifying.¹⁷⁰

The district attorney was reluctant to let the grand jury look at the evidence contained in Mr. Jones’ memorandum because she believed it contained “improper summaries of the anticipated evidence, irrelevant evidence, and improper instructions on the law.”¹⁷¹ In fact, Mr. Jones’ defense counsel filed a Petition for a Peremptory Writ of Mandamus to compel the disclosure of this potentially exculpatory evidence because the district attorney refused to present Jones’ letter to the grand jury.¹⁷²

163. *Id.*

164. *Id.* at 2.

165. *Id.*

166. *Id.*

167. Amended Emergency Petition for Peremptory Writ of Mandamus, *supra* note 153, at 1.

168. *Id.*

169. *Id.* 1–2.

170. *Id.*

171. Response to Amended Emergency Petition for Peremptory Writ of Mandamus, *supra* note 158, at 3.

172. Amended Emergency Petition for Peremptory Writ of Mandamus, *supra* note 153, at 2.

2. Procedural History

At issue in Jones' and the District Attorney's dispute was what evidence would be appropriate under NMSA section 31-6-11(B).¹⁷³ After Jones initially filed his petition for Peremptory Writ of Mandamus, a hearing was set before the supreme court on March 12, 2008.¹⁷⁴ However, Mr. Jones had first filed for a writ of mandamus to compel the prosecutor to give his letter to the grand jury.¹⁷⁵ During the first oral arguments before the supreme court, Jones changed his request from a writ of mandamus to compel the prosecutor, to a writ of superintending control to compel the grand jury judge to resolve the dispute.¹⁷⁶ After the hearing, the supreme court said it would "treat the petition for a writ of mandamus as a writ for superintending control," and ordered the parties to address five issues:

1. The intent and interpretation of the 2003 amendments to Section 31-6-11(B).
2. What, if any, enforcement mechanisms are appropriate to carry out the legislative intent?
3. What remedies are available for a violation of Section 31-6-11(B)?
4. What standard should be applied by the courts in determining whether a remedy for violation is appropriate?
5. Whether review for a violation should occur pre-indictment or post-indictment?¹⁷⁷

173. See N.M. STAT. ANN. 1978, § 31-6-11(B) (2003) ("It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.").

174. Brief for Petitioner in Support of Petition for a Writ of Superintending Control at 1, *In re Grand Jury Presentation Concerning James Bort Jones*, 2009-NMSC-002, 200 P.3d 523 (2009) (No 30,977), 2008 WL 648135 at * 1 [hereinafter Brief for Petitioner in Support of Petition for a Writ of Superintending Control].

175. *Jones v. Murdoch*, 2009-NMSC-002, ¶ 3, 200 P.3d 523, 526 (2009).

176. *Id.*

177. Brief for Petitioner in Support of Petition for a Writ of Superintending Control, *supra* note 174, at 3.

3. The New Mexico Supreme Court's Ruling

After concluding that a live controversy existed,¹⁷⁸ the New Mexico Supreme Court focused its opinion on the procedural question, not a substantive one.¹⁷⁹ The attorney general, who provided an amicus curiae brief, claimed “that this Court lacks the authority to exercise superintending control over the grand jury because it is an independent institution separate and apart from the judiciary.”¹⁸⁰ The court responded by noting that it is incorrect to think that judicial action addressing a dispute between a target and the prosecutor would undermine the independence of the grand jury.¹⁸¹ The court would not require the grand jury to consider the evidence, but only be “alerted to its existence” if it met the requirements of the statute.¹⁸²

The New Mexico Supreme Court further answered the attorney general's concern with judicial involvement by noting that the relationship between the court and the grand jury is an interdependent relationship.¹⁸³ “The grand jury is an arm of the court,”¹⁸⁴ and as an arm, the “[c]ourts have a particular responsibility to prevent unfairness in Grand Jury proceedings.”¹⁸⁵ The attorney general based his belief that the court should have no supervisory control over the grand jury on *United States v. Williams*, a decision decided by the U.S. Supreme Court.¹⁸⁶

The New Mexico Supreme Court distinguished *Williams* on two grounds. First, *Williams* dealt with a post-indictment inquiry into the propriety of the government failing to provide significantly exculpatory evidence, which would require overturning an indictment.¹⁸⁷ However, *Jones* dealt with a pre-indictment scenario requiring no second guessing of how the grand jury would have acted.¹⁸⁸ The second distinguishing factor was the absence of a guiding statute in *Williams*, while there was one in

178. *Murdoch*, 2009-NMSC-002, ¶¶ 6-8, 200 P.3d at 526-27. There was a question about whether or not Jones withdrew the letter. The court found that Jones was willing to redraft the letter, but was not completely withdrawing it. *Id.* ¶7, 200 P.3d at 527. The court also believed that there would be a dispute between Jones and the prosecutor about what evidence would be allowed to go to the grand jury. *Id.*

179. *Id.* ¶ 9, 200 P.3d at 527.

180. *Id.* ¶ 10, 200 P.3d at 528.

181. *Id.* ¶ 11, 200 P.3d at 528.

182. *Id.*

183. *Id.* ¶ 13, 200 P.3d at 528.

184. *Id.* (quoting *People v. Sears*, 49 Ill. 2d 14, 273 N.E.2d 380, 388 (1971)).

185. *Id.* (quoting *People v. Ianniello*, 235 N.E.2d 439, 443 (N.Y. 1968)).

186. *Id.* ¶ 14, 200 P.3d at 529.

187. *Id.* ¶ 15, 200 P.3d at 529.

188. *Id.*

Jones.¹⁸⁹ In *Williams*, the Court eluded to the power of the Court to “dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.”¹⁹⁰ The New Mexico Supreme Court used section 31-6-11(B) to uphold the integrity of the grand jury function by allowing the target to alert the prosecutor to exculpatory evidence.¹⁹¹ As a result, the New Mexico Supreme Court found that *Williams* actually supported the U.S. Supreme Court’s position of supervisory control over the grand jury.¹⁹²

The attorney general believed that the court did not need to get involved because the target had other remedies already available to correct any mistake that could arise from his evidence not being presented to the grand jury.¹⁹³ These included the target’s ability to file a motion to dismiss the indictment for prosecutorial bad faith, to obtain an interlocutory appeal if that motion is denied, or the target could file “a direct appeal at the conclusion of the criminal proceeding if ultimately convicted.”¹⁹⁴ The New Mexico Supreme Court found that these remedies were inadequate for two reasons.¹⁹⁵ First, each remedy occurred post-indictment and therefore could not “remedy the harm flowing from an unjustified indictment itself.”¹⁹⁶ When a person is indicted, they are irreparably injured by the stigma which accompanies the indictment, including potential employment concerns, stain in the public eye, economic loss, and lost opportunity for education.¹⁹⁷ In addition to the general stain of an indictment, the target would face a procedural disadvantage as an indicted defendant.¹⁹⁸ The target turned defendant would face a higher burden to gain relief.¹⁹⁹ He would need to challenge the sufficiency of the evidence by showing bad faith on the part of the prosecutor.²⁰⁰

A target is more likely to gain relief when a pre-indictment procedure is in place. A pre-indictment remedy “is not dependent on establish-

189. *Id.* ¶ 16, 200 P.3d at 529.

190. *Id.* ¶ 16, 200 P.3d at 530 (quoting *United States v. Williams*, 504 U.S. 36, 46 (1992)).

191. *Id.* ¶ 16, 200 P.3d at 530.

192. *Murdoch*, 2009-NMSC-002, ¶ 16, 200 P.3d at 530.

193. *Id.* ¶ 17, 200 P.3d at 530.

194. *Id.*

195. *Id.*

196. *Id.* ¶ 18, 200 P.3d at 530.

197. *See id.*

198. *Id.* ¶ 19, 200 P.3d at 531.

199. *Id.*

200. *Id.*

ing prosecutorial motive but instead focuses on whether the evidence the target wants before the grand jury meets the appropriate evidentiary standard.”²⁰¹ Through a pre-indictment procedure the court would not have to give deference to the grand jury decision like it would in a post-indictment fight, thereby helping protect the target from adverse effects of an improper indictment.²⁰² As a result, the court rejected the argument that there were other available remedies for the target.²⁰³

The attorney general also questioned whether the legislature has the power to affect and control the workings of the grand jury by enacting Section 31-6-11(B).²⁰⁴ The court said that the “heart of this case involves the statutorily-created right of the target to alert the grand jury to exculpatory evidence.”²⁰⁵ The statute does not compel the grand jury to hear the target’s evidence, but instead requires the grand jury to be made aware of the evidence by using the prosecutor as a conduit to its introduction.²⁰⁶ This statute simply provides more opportunity for the grand jury to exercise its independence by being presented with all pertinent evidence, while retaining the ability to choose not to hear it.²⁰⁷ The legislature exercised its plenary power in providing a way for the grand jury to operate more effectively, by establishing guidelines for the introduction of exculpatory evidence presented by the target.²⁰⁸

Even though the legislature provided guidelines for the introduction of evidence, they did not provide a mechanism for resolving disputes arising under section 31-6-11(B).²⁰⁹ The attorney general, in applying a plain language analysis, viewed the absence of the mechanism as a limitation on the court’s ability to establish one.²¹⁰ The target, along with New Mexico Criminal Defense Lawyers Association (NMCDLA), which also provided an amicus curiae brief, looked at the statute by considering the totality of the 2003 amendment to the statute.²¹¹ According to the NMCDLA it did not make sense to refuse to give the target a manner of recourse when a prosecutor chooses not to notify the grand jury of exculpatory evidence.²¹² In support of this position, the court looked at

201. *Id.* ¶ 20, 200 P.3d at 531.

202. *Id.*

203. *Id.*

204. *Id.* ¶ 21, 200 P.3d at 531.

205. *Id.* ¶ 24, 200 P.3d at 532.

206. *Id.*

207. *Id.* ¶ 25, 200 P.3d at 532.

208. *Id.* ¶ 22, 200 P.3d at 531.

209. *Id.* ¶ 26, 200 P.3d at 532.

210. *Id.*

211. *Id.*

212. *Id.*

the 2003 amendment's added words to the statute.²¹³ An addition to the introductory clause stated that the target should give the evidence to the prosecutor at least twenty-four hours before the grand jury hearing; this the court viewed as the legislature's intent to provide the prosecutor with time to screen the evidence.²¹⁴ The court believed that the legislature could easily foresee a prosecutor unwilling to present potentially exculpatory evidence to the grand jury that the target was using and relying on to avoid an unwarranted indictment.²¹⁵ Also, according to the court the legislature intended to provide the grand jury access to more information from the target, which goes against any concept of the prosecutor having "unbridled discretion during the screening process."²¹⁶

Given the legislature's 2003 amendments, it would be unreasonable to assume that the legislature wanted to provide the target a greater opportunity to provide evidence to the grand jury, while at the same time give a prosecutor unlimited discretion to decide not to provide the target's exculpatory evidence.²¹⁷ The court held that the purpose of the statute, along with the time provided to identify evidentiary disputes between the target and the prosecutor, reflected the legislature's anticipation of the grand jury judge to take part in resolving disputes.²¹⁸ However, because there was the potential of putting strain on grand jury judges, now having to oversee pre-grand jury evidentiary fights, the New Mexico Supreme Court interpreted the legislature's silence in the statute on this issue as an opportunity to provide a procedural framework for pre-indictment disputes.²¹⁹

As a result, the court established a new procedure to address section 31-6-11(B) so that prosecutors would not be able to circumvent the law.²²⁰ Before establishing the procedure, the court looked at the other ways states provided for their courts to address conflicts over exculpatory evidence presented to the grand jury.²²¹ The court believed that providing the pre-indictment mechanism to address evidentiary issues would improve the reliability of the grand jury system as well as decrease the number of post-indictment requests for relief.²²²

213. *Id.* ¶ 27, 200 P.3d at 533.

214. *Id.*

215. *Id.* ¶ 28, 200 P.3d at 533.

216. *Id.*

217. *Id.*

218. *Id.* ¶ 29, 200 P.3d at 533.

219. *Id.*

220. *Id.* ¶ 30, 200 P.3d at 534.

221. *Id.* ¶ 31, 200 P.3d at 534.

222. *Murdoch*, 2009-NMSC-002, ¶ 32, 200 P.3d at 534.

4. Pre-Indictment Procedure

The court provided new procedures for the target, the prosecutor, and the grand jury judge to resolve conflicts of what evidence should be presented to the grand jury. The court first acknowledged that Section 31-6-11(B) only “provides that the target may alert the grand jury to the existence of exculpatory evidence by notifying the prosecutor.”²²³ The evidence that the target wants the grand jury to consider would have to comply with the standards set out in section 31-6-11.²²⁴ Under subsection (A) of the statute, the evidence would have to be, “lawful, competent and relevant.”²²⁵ In addition, under subsection (B), the evidence would have to “disprove or reduce an accusation or . . . make an indictment unjustified.”²²⁶

The prosecutor plays an essential part in getting qualified exculpatory evidence from the target to the grand jury. In doing so, the prosecutor needs “to be fair and impartial at all times during the grand jury proceedings,”²²⁷ following his duty to “protect both the public’s interest and the rights of the accused.”²²⁸ A prosecutor may feel that the evidence presented by the target does not meet the statutory requirements, or may simply choose not to present it. Either way, clear procedure needs to be in place so that the prosecutor can be a fair and just participant in the grand jury process.

Similar to the first letter presented by the target in *Jones*, often times the evidence is inappropriate for the grand jury, and cannot be forwarded to it.²²⁹ The court said that letters from targets intended for the grand jury should “focus on simply providing the grand jury with a factual and nonargumentative description of the nature of any tangible evidence and the substance of the potential testimony of any suggested witnesses.”²³⁰

Along with the letter containing the basic factual evidence, the target should include a separate cover letter or memorandum.²³¹ This cover letter would not be sent to the grand jury, but would be for the benefit of

223. *Id.* ¶ 33, 200 P.3d at 535.

224. *Id.*

225. N.M. STAT. ANN. 1978, § 31-6-11(A) (2003).

226. *Id.* §31-6-11(B).

227. *Murdoch*, 2009-NMSC-002, ¶ 33, 200 P.3d at 535 (quoting N.M. STAT. ANN. 1978, § 31-6-7(D) (2003)).

228. *Id.* (quoting *State v. Cruz*, 99 N.M. 690, 692 (1983)).

229. *Id.* ¶ 34, 200 P.3d at 535.

230. *Id.*

231. *Id.* ¶ 35, 200 P.3d at 535.

the prosecutor and judge, to convey contextual information as well as an argument for the propriety of the evidence.²³²

If the prosecutor chooses not to forward the information after considering both the letter and cover letter, he is required to file a motion with the grand jury judge, as well as notify the target.²³³ “In the motion filed with the grand jury judge, the prosecutor should provide the grand jury judge with the target’s letter submitting the proposed evidence, and the prosecutor’s motion should state why the prosecutor believes the grand jury should not be alerted to the existence of the target-offered evidence.”²³⁴ Notification to the target by the prosecutor is necessary because of the secret nature of the grand jury proceedings.²³⁵ The target has no way of knowing whether his evidence was presented to the grand jury until after the grand jury has indicted him. At that point, the only remedies available to the target would be those which the court has already viewed as inadequate.

The grand jury judge has the power to rule on the admissibility of the evidence and on whether the grand jury should be made aware of the evidence. This is done by applying the standards set out in section 31-6-11,²³⁶ with the understanding that the legislature intended to give the grand jury access to more evidence.²³⁷ As a result, when the arguments are relatively balanced, the judge should rule in favor of disclosing the evidence to the grand jury.²³⁸ Because of the intent of the legislature to provide access to evidence, the burden rests on the prosecutor to show why the evidence should not be presented to the grand jury.²³⁹ Using his discretion, the grand jury judge should timely act to provide direction to both sides, as well as preserve the record.²⁴⁰

However, the grand jury judge does not have the power to ensure the prosecutor “questions the witness in the manner proposed by the target or otherwise elicits the evidence in the way that the target intended.”²⁴¹ The grand jury still has the power to decline to hear such evidence.²⁴² It would also be impractical for a judge to try to control the flow of the presentation and examination of evidence in a grand jury

232. *Id.*

233. *Id.*

234. *Id.* ¶ 36, 200 P.3d at 536.

235. *Id.*

236. N.M. STAT. ANN. 1978, § 31-6-11(B) (2003).

237. *See Murdoch*, 2009-NMSC-002, ¶ 39, 200 P.3d at 536.

238. *Id.*

239. *Id.*

240. *Id.* ¶ 36, 200 P.3d at 536.

241. *Id.* ¶ 37, 200 P.3d at 536.

242. *Id.*

hearing, since so much depends on the way witnesses answer questions, and on questions asked by grand jury members.²⁴³ Lastly, judicial interference in deciding how a prosecutor should present information would “usurp[] the prosecutor’s rightful role before the grand jury.”²⁴⁴

The prosecutor could proceed in a way that would essentially nullify the target’s evidence. The court recognized that “an overzealous prosecutor could call a witness as requested by the target but then intentionally question the witness in a manner intended to keep the witness from providing the grand jury with information that the target wanted before the grand jury.”²⁴⁵ The only remedy for the target at that point would be to wait for the indictment and review the record of the grand jury transcript.²⁴⁶ The target would still be left at the procedural disadvantage of needing to prove prosecutorial bad faith.²⁴⁷

However, the existence of the pre-indictment procedure involving the grand jury judge offers protection for a target against a prosecutor who is unwilling to alert the grand jury of exculpatory evidence.²⁴⁸ The pre-indictment procedure allows the grand jury judge to enforce section 31-6-11(B) by holding a hearing or by placing an order regarding the admissibility of the evidence based on the parties’ motions.²⁴⁹ The procedure also provides a target protection when a prosecutor is still reluctant to offer the evidence after a ruling by the grand jury judge, by providing the target the record of the ruling on the evidence in the pre-indictment hearing, which could aid the target in establishing prosecutorial bad faith in a post-indictment hearing.²⁵⁰

5. Conclusion of *Jones*

The New Mexico Supreme Court, in *Jones*, was focused on establishing a more efficient and equitable grand jury in line with the legislative intent of Section 31-6-11(B). The grand jury judge provides a check on improper evidence being admitted by the target, while at the same time providing a check on the prosecutor’s screening function.²⁵¹ Having a

243. *Id.*

244. *Id.*

245. *Id.* ¶ 38, 200 P.3d at 536.

246. *Id.*

247. *Id.*

248. *See id.* ¶ 39, 200 P.3d at 536.

249. *Id.* ¶ 36, 200 P.3d at 536.

250. *Id.* ¶ 39, 200 P.3d at 536.

251. *Id.* ¶ 42, 200 P.3d at 537.

pre-indictment process limits the need for post-indictment hearings and helps protect targets from the negative effects of being indicted.²⁵²

V. ANALYSIS

The new rule established by the New Mexico Supreme Court in *Jones* settled the issue of presenting potentially exculpatory evidence to a grand jury when there is a dispute about its admissibility under section 31-6-11(B). While it may not substantially affect New Mexico grand jury practice, the ruling provides a mechanism of relief for targets when a prosecutor is unwilling to present exculpatory evidence. By creating this new procedure, the New Mexico Supreme Court went against the federal view of the historical relationship between the court, legislature, and grand jury.

The new procedure established by *Jones* also protects the historical tension of the grand jury. The modern grand jury is the product of two distinct bodies with opposing purposes converging together. The tension has been whether the role of the grand jury should be to investigate and indict, or to screen and protect. Each of the opposing powers serves society by ensuring that justice is carried out. The New Mexico approach to the proper function of the grand jury, unlike the federal, alleviates the tension between each of the grand jury's roles, allowing both purposes to work for the benefit of society.

A. Supervisory Control

Unlike the federal courts, the New Mexico Supreme Court believes that courts can exercise supervisory power over the grand jury. The U.S. Supreme Court, in *Williams*, stressed the independent nature of grand juries, denying the grand jury's connection to the court,²⁵³ while the New Mexico Supreme Court views the grand jury as an "appendage of the court."²⁵⁴

The federal position incorrectly views the relationship between the courts and grand juries as two independent spheres. This limits federal courts' power over grand juries to only the most extreme cases of misconduct. The Court is not to prescribe any new rules or limitations on the grand jury, which leaves the grand jury unencumbered by technical rules as it carries out its duty to bring charges against the rightfully accused.²⁵⁵

252. *Id.*

253. *See* *United States v. Williams*, 504 U.S. 36 (1992).

254. *Id.* ¶ 13, 200 P.3d at 528.

255. *Costello v. United States*, 350 U.S. 359, 362 (1956).

Controlled by this view, the Supreme Court was afraid to reshape the idea of the grand jury by requiring the prosecutor to disclose exculpatory information.

Conversely, the New Mexico view of the relationship between the court and grand jury is one of interdependence. The grand jury in New Mexico is not independent once it is summoned, but is always connected to the court. The court is the body that calls the grand jury, and once it is called, it is not left uncontrolled to act according to its own will. Instead, the court has a supervisory duty over the grand jury to ensure that it, and its process, is not abused or “used for purposes of oppression and injustice.”²⁵⁶

The New Mexico Supreme Court was careful to point out that the ruling in *Jones* would not undermine the independence of the grand jury. The result of requiring a pre-indictment procedure to determine the appropriateness of disclosing exculpatory evidence offered by the target to the grand jury does not put any obligation on the grand jury.²⁵⁷ The grand jury is still free to refuse to hear or consider the evidence.²⁵⁸ The only imposition is that which the court places on a prosecutor who is reluctant to disclose exculpatory evidence to the grand jury.²⁵⁹ This new mechanism provides more information to the grand jury, and allows it to fully fulfill its historical roles of accusing and protecting.

B. Historical Limitation

In *Williams*, the U.S. Supreme Court’s focus was on a limited historical scope of the grand jury. The Court viewed the role of the federal grand jury to assess whether there is a basis for bringing criminal charges.²⁶⁰ In order to assess the basis for bringing charges, only the prosecutor’s presentation of evidence is required. This one-sided presentation of evidence to the grand jury is viewed to be completely independent from the influence of the federal judiciary.

The federal grand jury system has been perceived as an “important instrument of effective law enforcement.”²⁶¹ The grand jury can use its power to subpoena witnesses, look at evidence which would be inadmissible in trial, and coerce testimony of witnesses, all as a “convenient tool

256. *Murdoch*, 2009-NMSC-002, ¶ 13, 200 P.3d at 529 (quoting *In re Nat’l Window Glass Workers*, 287 F. 219, 225 (N.D. Ohio 1922)).

257. *Id.* ¶¶ 11–12, 200 P.3d at 528.

258. *Id.* ¶ 12, 200 P.3d at 528.

259. *See id.* ¶ 11, 200 P.3d at 528.

260. *United States v. Williams*, 504 U.S. 36, 51 (1992).

261. *United States v. Calandra*, 414 U.S. 338, 344 (1974).

for the prosecutor.”²⁶² Justice Scalia’s majority opinion focused on preserving this power in *Williams*, when it was established that the grand jury did not need exculpatory evidence disclosed because its duty is simply to charge.²⁶³

Justice Scalia was concerned with imposing an obligation on the prosecutor to present exculpatory evidence for the target to the grand jury, which he thought was not in line with the historical purpose of a grand jury.²⁶⁴ This was based on the view that “the grand jury’s function [is] not ‘to enquire . . . upon what foundation [the charge may be] denied,’ or otherwise to try the suspect’s defenses, but only to examine ‘upon what foundation [the charge] is made’ by the prosecutor.”²⁶⁵ Thus, according to the Court, targets to an investigation are not allowed to tender their own defenses to the grand jury.²⁶⁶ An exculpatory rule was viewed to allow the target to “circumnavigate the system by delivering his exculpatory evidence to the prosecutor,” who would then be required to present it to the grand jury.²⁶⁷ However, the grand jury has been able to choose when they have heard enough evidence, and has been under no obligation to hear exculpatory evidence in the past.²⁶⁸ As a result, the court did not want to “convert a non-existent duty of the grand jury itself into an obligation of the prosecutor.”²⁶⁹

The U.S. Supreme Court limited the grand jury to a role of a charging body, neglecting an essential historical purpose of the grand jury. Throughout history, the purpose of the grand jury has been confused by dual roles.²⁷⁰ Historically, the “the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action.”²⁷¹ Yet contrary to this well-recognized fact of grand jury history, the Court used a lopsided view of history, focusing only on the power to accuse, at the cost of the power to protect.²⁷² It is easy to see that with two contrary functions, it could be difficult to determine whether laws should reflect the power and purpose

262. JUDY MEAD, *THE GRAND JURIES: AN AMERICAN INQUISITION* 1–3 (1977).

263. *Williams*, 504 U.S. at 51–52.

264. *Id.* at 51.

265. *Id.* at 51–52 (quoting *Respublica v. Shaffer*, 1 U.S. 236, 1 Dall. 236, 1 L. Ed. 116 (O. T. Phila. 1788)).

266. *Id.* at 53.

267. *Id.* at 52.

268. *Id.* at 53.

269. *Id.*

270. See EDWARDS, *supra* note 1, at 7, 28.

271. *United States v. Calandra*, 414 U.S. 338, 342–43 (1974).

272. See Cassidy, *supra* note 45, at 366.

to accuse and ferret out crimes, or to focus on the purpose of the grand jury to “protect innocent persons from accusations not supported by probable cause.”²⁷³ The federal courts have eased this burden by eliminating one of the functions, the latter, from the discussion.

The *Williams* decision elevated the accusatorial role of the grand jury at the expense of its “core screening function,” when the Court ruled that courts have no authority to impose a duty on the prosecutor to present exculpatory evidence.²⁷⁴

C. Legislative Plenary Power and State Statute

Even though the federal courts have decided that there is no requirement to present exculpatory evidence, about one-quarter of states have either a statute or judicial decision which requires prosecutors to present exculpatory evidence to the grand jury.²⁷⁵ These rules limit the excessive power of prosecutors, increase the likelihood that the innocent will be exonerated and “strengthen the grand jury’s ability to screen out weak cases.”²⁷⁶ New Mexico is one of the states that established a prosecutorial duty to present exculpatory evidence to the grand jury.²⁷⁷

New Mexico’s statutory acknowledgement that the grand jury should be made aware of exculpatory evidence was one of two distinguishing factors between the ruling in *Williams*, and the New Mexico Supreme Court ruling in *Jones v. Murdoch*. The *Williams* Court had no federal statute requiring that exculpatory evidence be presented to the grand jury and relied solely on the supervisory power of the court to impose such a rule.²⁷⁸

Even though the federal courts cannot exercise their supervisory control over the grand jury, *Williams* implies they could have done so if acting “based on an existing statute or court rule.”²⁷⁹ Thus, the New Mexico Supreme Court determined that the *Williams* decision supported their view of imposing the duty on prosecutors to present exculpatory evidence because there was a clear rule established by the state legislature.²⁸⁰ Even

273. *Id.* at 362.

274. *Id.* at 372.

275. See SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:17 (2d ed. 1997) (current through 2011) [hereinafter BEALE ET AL. 2d ed.].

276. *Id.*

277. See N.M. STAT. ANN. 1978, § 31-6-11(B) (2003).

278. See *Jones v. Murdoch*, 2009-NMSC-002, ¶ 16, 200 P.3d 523, 529 (2009).

279. *Id.* ¶ 16, 200 P.3d. at 530.

280. *Id.*

though New Mexico grand juries are viewed as independent bodies at common law, they are still subject to the legislature's plenary power.²⁸¹

The New Mexico Legislature's plenary power allowed it to create a rule that permits a target to present exculpatory evidence to the grand jury. The New Mexico Supreme Court's decision stands in contrast to the federal view of the legislature's relationship to the grand jury. The federal view is that the grand jury is not assigned to any branch of government because of its place in the Bill of Rights.²⁸² Similarly, the New Mexico grand jury is not textually assigned to any branch in the New Mexico Constitution. However, the New Mexico Supreme Court found that the legislature could establish a rule about exculpatory evidence, because the state constitution is silent on the matter, and the legislature, as the voice of the people, is in the best position to act.²⁸³ Further, the New Mexico Supreme Court stated that the common law view of grand jury independence did not preclude "the Legislature from enacting statutes to improve the grand jury system."²⁸⁴

The New Mexico Legislature has tried to make the grand jury system more fair and independent by attempting to give it "greater access to pertinent evidence."²⁸⁵ Other New Mexico laws emphasize that both the prosecutor and the grand jurors must "conduct themselves in a fair and impartial manner at all times during grand jury proceedings."²⁸⁶ Furthermore, in 2003, the legislature passed a law which established that the target may alert the grand jury of exculpatory evidence through the prosecutor.²⁸⁷

The law created by the legislature increases the independence of the grand jury and protects its historical purpose. It provides the "grand jury greater access to pertinent evidence" by hearing exculpatory evidence that could have previously been withheld by the prosecutor.²⁸⁸ Because the requirement rests on the prosecutor, the legislative imposition really falls on prosecutors, not the grand jury. While the prosecutor is required to alert the grand jury to the evidence, the grand jury is still free to refuse

281. *See id.* ¶ 22, 200 P.3d at 531. ("The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue." (quoting *State ex rel. Clark v. Johnson*, 120 N.M. 562, 575, 904 P.2d 11, 24 (1995))).

282. *See United States v. Williams*, 504 U.S. 36, 47 (1992).

283. *Murdoch*, 2009-NMSC-002, ¶ 22, 200 P.3d at 531.

284. *Id.* ¶ 25, 200 P.3d at 532.

285. *Id.*

286. N.M. STAT. ANN. 1978, § 31-6-7(D) (2003).

287. *See id.*

288. *Murdoch*, 2009-NMSC-002, ¶ 25, 200 P.3d at 532.

to hear it.²⁸⁹ The value of requiring the prosecutor to alert the grand jury to exculpatory evidence is that it provides a meaningful buffer between the agenda of the prosecuting office and the workings of the grand jury. When the grand jury knows exculpatory evidence exists, the grand jury ceases being the puppet of the prosecutor and becomes engaged in both of their historical roles: accuser and protector.

While the New Mexico Supreme Court has tried to be cautious in applying any rules to the grand jury,²⁹⁰ it said that the heart of *Jones v. Murdoch* was “the statutorily-created right of the target to alert the grand jury to exculpatory evidence.”²⁹¹ In line with the reasoning of *Williams*, the court saw a clear rule established by the legislature, meant to increase the independent functioning of the grand jury. Section 31-6-11(B) provides the grand jury with the choice of hearing or denying exculpatory evidence, a power they would not have if the prosecutor did not make them aware of the evidence.²⁹² Thus, the statute establishes that the prosecutor is the conduit that the target uses to alert the grand jury. This type of rule was rejected by the U.S. Supreme Court, which feared that the grand jury’s historical role could be injured.²⁹³ On the contrary, the New Mexico Supreme Court found that the legislature could utilize their plenary power to create rules to protect the dual roles and independence of the grand jury. When the legislature was silent on the process to enforce the presentation of exculpatory evidence, the New Mexico Supreme Court recognized that it was in the best position to provide a pre-indictment procedural framework.²⁹⁴

D. Importance of Pre-Indictment Remedy

The second distinguishing factor between *Williams* and *Jones* is that *Williams* dealt with a post-indictment decision whereas *Jones* established a pre-indictment procedure.

The Supreme Court, in *Williams*, was reluctant to interfere with an independent grand jury’s finding of probable cause.²⁹⁵ The Supreme Court believed they were in no position to second-guess the basis of a grand jury’s decision. Grand juries are free to hear evidence offered by the prosecution and free to refuse what they feel is unnecessary. The Court did not want to impede on this power by overturning a grand jury’s

289. *See id.* ¶ 37, 200 P.3d at 536.

290. *See Buzbee v. Donnelly*, 96 N.M. 692, 696–97, 634 P.2d 1244, 1248–49 (1981).

291. *Murdoch*, 2009-NMSC-002, ¶ 24, 200 P.3d at 532.

292. *See id.*

293. *See United States v. Williams*, 504 U.S. 36, 50 (1992).

294. *Murdoch*, 2009-NMSC-002, ¶ 29, 200 P.3d at 533.

295. *See United States v. Williams*, 504 U.S. 36 (1992).

indictment simply because the prosecutor chose not to offer exculpatory evidence.

The New Mexico Supreme Court faced a very different question in *Jones* because the grand jury had not yet acted to indict or dismiss. No evidence had been presented, nor had witnesses been called. Instead, the New Mexico Supreme Court was trying to decide what mechanism should be in place when a conflict arises between the target and the prosecutor about the presentation of exculpatory evidence.

The pre-indictment procedure affects this interaction between the target and the prosecutor. When a dispute arises between the target and prosecutor over whether exculpatory evidence should be presented to the grand jury, the matter is resolved by a magistrate judge. However, the magistrate judge's ruling places no obligation on the grand jury to hear any evidence, only on the prosecutor to apprise the grand jury of the evidence.²⁹⁶ The grand jury is still free to refuse any evidence it wishes. As a result, the pre-indictment procedure helps protect the grand jury's independence. Moreover, the grand jury is no longer restricted to hear only what the prosecutor wants it to hear. Instead, it is made aware of more information, which it can accept to hear so as to carry out its duty to properly decide if a target should be indicted.

The target is greatly benefitted by having a pre-indictment procedure as an aid to the grand jury's screening function. One of the grand jury's purposes is to reject cases without merit. This is done in secrecy to protect the interests of the target. Harm beyond being formally charged results when a person is indicted. Charged people are subject to economic losses, emotional stress, social stigma, and possible lost educational and employment opportunities.²⁹⁷ The process adopted in *Jones* would allow targets a mode of remedy before such consequences attach.

E. Policy Implications

The view of the U.S. Supreme Court is in opposition to administrative views on how a grand jury should be run.²⁹⁸ The Department of Justice disagrees with the *Williams* opinion and requires prosecutors to disclose evidence that negates the target's guilt.²⁹⁹ Even though this is a

296. *See id.* ¶ 37, 200 P.3d at 536.

297. *Id.* ¶ 18, 200 P.3d at 530–31.

298. *See* FEDERAL GRAND JURY PRACTICE, *supra* note 33, at 137 (“[T]he Supreme Court held that the Fifth Amendment does not require a prosecutor to present exculpatory evidence to the grand jury.” (citing *Williams*, 504 U.S. at 52–54)).

299. *Id.* at 137 (stating that under the Department of Justice policy “prosecutors must disclose to the grand jury ‘substantial evidence,’ known to the prosecutor, if that evidence negates the guilt of the subject of the investigation”).

Department of Justice policy, the obligation on federal prosecutors to present exculpatory evidence is not required by either the U.S. Constitution or any federal statute, and courts have not followed the Department of Justice's policy.³⁰⁰

The position of the Department of Justice better protects the historical roles of the grand jury. The prosecutor's role is not to merely convict but to ensure that "justice is done."³⁰¹ Unlike the U.S. Supreme Court, the Department of Justice believes that the prosecutor's role of seeking justice is aided by providing the grand jury with exculpatory evidence.³⁰² The production of exculpatory evidence to the grand jury allows the jurors to properly weigh matters and ensure that "the guilty shall not escape nor the innocent suffer."³⁰³

The New Mexico view better protects the interests of justice. The dual roles of the grand jury serve the single purpose of reaching justice. When one of the roles of the grand jury is taken away, justice cannot be served. The New Mexico laws and procedure set forth in *Jones* protect the dual nature of the grand jury by focusing on providing it with the proper evidence to make an informed, just decision.³⁰⁴ The goal is to justly indict individuals. With proper checks up front, post-indictment issues should decrease, resulting in a more efficient and fair judicial system.³⁰⁵

VI. CONCLUSION

The procedure established in *Jones* provides pre-indictment protection for targets by allowing them to present exculpatory evidence to the grand jury. However, this procedure will not affect most grand jury cases. The need for the pre-indictment procedure arises only when a target offers potentially exculpatory evidence and the prosecutor refuses to present it. Additionally, a ruling by the magistrate in favor of the target will only occur if the evidence is "lawful, competent and relevant . . . that would disprove or reduce a charge or accusation or that would make an indictment unjustified."³⁰⁶ Even though the pre-indictment procedure will be applicable in select cases, its presence protects the few individuals who will need it.

300. BEALE ET AL. 2d ed., *supra* note 275, § 9:27.

301. FEDERAL GRAND JURY PRACTICE, *supra* note 33, at 18.

302. *See id.* at 639.

303. FEDERAL GRAND JURY PRACTICE, *supra* note 33, at 18.

304. *See* N.M. R. CRIM. P. 5-302A (which put the *Jones* decision into rules).

305. *See Jones v. Murdoch*, 2009-NMSC-002, ¶ 32, 200 P.3d 523, 534 (2009).

306. N.M. STAT. ANN. 1978, § 31-6-11(B) (2003).

New Mexico's legislative and judicial approach to involvement in the grand jury process is different than that taken by the U.S. Congress and Supreme Court. Protecting the independence of the grand jury in New Mexico does not mean that the legislature and the courts should turn a blind eye, deferring to a historical view of grand juries working unbridled by rules. Instead, both the New Mexico Legislature and the state's courts are active in creating and upholding procedures to ensure that the tension of the grand jury continues, so that the grand jury may continue to work as both a sword and a shield.