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# LET'S GET RID OF *STATE V. ULIBARRIS* NO-PREJUDICE RULE FOR JUDICIAL REVIEW OF GRAND JURY PROCEEDINGS

Walker Boyd\*

## INTRODUCTION

New Mexico courts divide challenges to grand jury proceedings into two categories: (1) “challenges to the quality or sufficiency of the evidence before the grand jury” and (2) “structural challenges involving the manner in which the grand jury process has been conducted[.]”<sup>1</sup> This article analyzes New Mexico courts’ unique approach to so-called “structural” challenges to the grand jury and recent rulemaking activity by the Supreme Court that expands court oversight of grand jury proceedings.

Part I.A describes the origins of the statutory scheme governing grand jury proceedings in New Mexico. Part I.B explains decisions interpreting New Mexico’s grand jury statutes, beginning with *State v. Chance*,<sup>2</sup> which narrowly circumscribed judicial review of grand jury proceedings. Part I.C describes (1) amendments to the statute governing challenges to the sufficiency or quality of evidence supporting the grand jury’s decision to indict, and (2) recent decisions interpreting these amendments.

Part II.A discusses the origin of the “no prejudice” or “per se prejudice” rule governing so-called “structural” challenges to an indictment. Part II.B criticizes the rule and points out that it gives rise to unfair results: indictments based on sufficient evidence are subject to dismissal for (even minor) rule violations, while judicial review of the evidentiary sufficiency of an indictment is only available in cases of prosecutorial bad faith. Part II.C notes that this rule and the New Mexico Supreme Court’s recent expansion of judicial review using its rulemaking authority has left the law in this area in a state of flux.

Part III argues that New Mexico courts should adopt a context-sensitive prejudice requirement in grand jury proceedings. Such an approach would allow courts to weigh the seriousness of a violation against the strength of the evidence inculcating the target, thereby avoiding the unfairness of the current approach.

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1. *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 12.

2. *State v. Chance*, 1923-NMSC-042, 221 P. 183.

## I. A SUMMARY OF STATUTORY AND COMMON LAW RULES GOVERNING CHALLENGES TO GRAND JURY PROCEEDINGS IN NEW MEXICO

Both the United States and New Mexico Constitutions give criminal defendants the right to indictment by a grand jury for all serious criminal offenses.<sup>3</sup> The New Mexico Supreme Court has explained that the grand jury is “a pre-constitutional institution, given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of the government.”<sup>4</sup> The U.S. Supreme Court has interpreted the constitutionalization of the grand jury as an individual right held by the accused as “presuppos[ing] an investigative body acting independently of either prosecuting attorney or judge, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.”<sup>5</sup>

### A. The Kearny Code and the 1854 enactment

The Kearny Code of 1846 contains eight sections relating to grand jury practice. These sections set out the procedure for calling, qualifying, and impaneling a grand jury,<sup>6</sup> provide that the court clerk is to “issue subpoenas for, and the sheriff shall summon all witnesses who are required by the grand jury[;]”<sup>7</sup> require the court to swear a foreman of the grand jury;<sup>8</sup> require the circuit attorney to “attend on the grand jury, and conduct all investigations, and prepare all indictments directed by the foreman[;]”<sup>9</sup> require the court to hold witnesses who “fail or refuse to appear before the grand jury” to be held in contempt;<sup>10</sup> and impose a duty of secrecy on grand jurors.<sup>11</sup>

The Kearny Code left many aspects of grand jury practice unstated, thus ceding important aspects of grand jury practice to existing common law rules, and leaving the grand jury’s intrinsic value as a body that provides “a *neutral* determination of probable cause” unstated.<sup>12</sup> While the Code required grand jury foremen be sworn,<sup>13</sup> it did not set out the words of the oath.<sup>14</sup> The Code did not impose any duty on grand jurors to investigate crimes within its jurisdiction or

3. U.S. CONST. amend. V.; N.M. CONST. art. II, § 14. Unlike the United States Constitution, the New Mexico Constitution permits the State to initiate criminal proceedings by information. *See id.*

4. *Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 11, 634 P.2d 1244.

5. *United States v. Dionisio*, 410 U.S. 1, 16–17 (1973) (footnote, internal quotation marks and citation omitted).

N.M. TERR. LAWS, Kearny Code, Jurors, §§ 1–3 (1846).

7. *Id.* § 4.

8. *Id.* § 5.

9. *Id.* § 6.

10. *Id.* § 7.

11. *Id.* § 8.

12. *Herrera v. Sanchez*, 2014-NMSC-018 ¶ 14, 328 P.3d 1176 (citing *State v. Lopez*, 2013-NMSC-047, ¶ 2, 314 P.3d 236) (emphasis added).

13. N.M. TERR. LAWS, Kearny Code, Jurors, §§ 5 (1846).

14. *See* GEORGE J. EDWARDS JR., *THE GRAND JURY: AN ESSAY*, 43 (Philadelphia: George T. Bisel Co., 1906) (describing oaths of grand jurors at common law).

exercise an independent judgment; made no mention of the kind or quantum of evidence the grand jury must consider in deciding whether there is cause to indict; and did not provide how many jurors must concur in order to return a true bill after deliberations.

In 1854, the territorial legislature adopted an act that filled in many of the gaps left to the common law by the Kearny Code.<sup>15</sup> The act sets out verbatim an oath to be administered to the foreman and members of the grand jury,<sup>16</sup> a standard for the grand jury to use in determining whether to return a true bill,<sup>17</sup> and what kind of evidence the jury may properly consider in deciding whether to indict.<sup>18</sup>

The 1854 act also allowed the target of a grand jury proceeding to lodge a challenge to the grand jury.<sup>19</sup> The first section of the scheme provided that “[a] person held to answer a charge for a public offense may challenge the panel of the grand jury, or an individual grand juror.”<sup>20</sup> The 1854 Act narrowly limits challenges to the entire panel to the manner that the panel was drawn from the district’s jury wheel.<sup>21</sup> Challenges to individual grand jurors were similarly limited to whether the juror is a minor, an alien, insane, a prosecutor on the charge against the target, a witness, or otherwise biased against the target.<sup>22</sup>

#### **B. *State v. Chance* limits judicial review of grand jury proceedings to that permitted by statute, and no more**

In *State v. Chance*,<sup>23</sup> the New Mexico Supreme Court had its first occasion to determine the extent of a grand jury target’s right to challenge an indictment based on alleged defects in grand jury proceedings under New Mexico law. The facts in *Chance* were as follows. The defendant was indicted (and ultimately convicted) on charges of embezzlement.<sup>24</sup> The defendant moved the district court to dismiss the indictment against him, alleging that “the only evidence submitted to the grand jury in its consideration of the charge . . . was a former indictment returned by a former grand jury charging him with the same offense[.]”<sup>25</sup> The defendant argued that the indictment should be dismissed because the evidence presented to the grand jury violated substantive provisions of New Mexico’s grand jury statutes: (1) that the grand jury “can receive no other evidence than . . . [s]uch as given by witnesses, produced and sworn before them[,] . . . [or b]y legal documentary evidence”; (2) that the grand jury must consider “legal evidence and the best evidence in degree,” and may not consider “hearsay or secondary evidence”; and (3) that the grand jury may

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15. Act of February 7, 1854, in Laws 1853–54, P. 62 [hereinafter 1854 Act].

16. 1854 Act, *supra* note 15, ch. 2, §§ 25–26.

17. 1854 Act, *supra* note 15, ch. 2, § 2.

18. 1854 Act, *supra* note 15, ch. 2, § 5.

19. 1854 Act, *supra* note 15, ch. 1, §§ 17–20.

20. 1854 Act, *supra* note 15, ch. 1, § 17.–

21. 1854 Act, *supra* note 15, ch. 1, § 18.

22. 1854 Act, *supra* note 15, ch. 1, § 19.

23. 1923-NMSC-042, 221 P. 183.

24. *Id.* ¶ 1.

25. *Id.* ¶ 2.

indict only when “all the evidence taken together is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.”<sup>26</sup>

*Chance* framed the issue as

whether or not the trial court had the power to inquire into the question of whether or not there was any competent evidence whatever submitted to the grand jury as a basis upon which it returned the indictment in question. To otherwise express the matter, it is whether or not the finding of the grand jury was conclusive upon the court.<sup>27</sup>

The Court noted that “the courts are hopelessly in conflict” on the question of whether the trial court may inquire into the sufficiency or quality of the evidence upon which the grand jury’s decision to indict was made.<sup>28</sup> The court concluded that the better rule was to preclude judicial review of the grand jury’s decision to indict “unless there is some clear statutory authority to do so[.]”<sup>29</sup> The Court based its conclusion on three rationales: (1) the long-established rule that grand jury proceedings are to be conducted in secret, (2) the grand jury’s status as a “tribunal with inquisitorial powers,” and (3) a policy concern that judicial review of the substance of the grand jury’s decision to indict would undermine the speedy and efficient administration of the criminal justice system.<sup>30</sup> The Court held that the statutes governing the kind and quantity of evidence to be considered by the grand jury were in essence hortatory: they ought to be followed, but the foregoing rationales outweighed any benefit to be gained from allowing district courts to enforce them.<sup>31</sup>

Justice Bott’s dissent took issue with the majority’s understanding of the common law, arguing that at common law the exercise of superintending control over the grand jury by the district court in order to ensure its decision to indict was based on sufficient evidence in quantity and kind was well established before the founding of the United States.<sup>32</sup> Justice Bott’s historical argument is too lengthy to summarize here, but it is worth noting that the dissent sets out many of the same policy arguments that underlie the New Mexico Supreme Court’s justification for allowing “structural” challenges to the manner in which the grand jury proceedings are conducted: that the constitutional right to an indictment by grand jury implies a

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26. *Id.* ¶ 3 (quoting 1915 N.M. STAT. §§ 3128–29, 3131). The sections of the 1915 Statutes quoted by the court in *Chance* are substantially the same as the substantive provisions of the 1854 Act. Compare 1915 N.M. STAT. § 3128, with 1854 Act, *supra* note 15, ch. 2, § 5; 1915 N.M. STAT. § 3129, with 1854 Act, *supra* note 15, ch. 2, § 6; 1915 N.M. STAT. § 3131, with 1854 Act, *supra* note 15, ch. 2, § 8.

27. 1923-NMSC-042, ¶ 4.

28. *Id.* ¶ 8.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* ¶¶ 18–31 (Bott, J., dissenting).

modicum of due process for the accused,<sup>33</sup> and that the rule of secrecy over grand jury proceedings is designed to protect the grand jury from outside influence.<sup>34</sup>

### C. The Legislature's Expansion of Judicial Review and Current State of the Law Governing Statutory Challenges to Indictments

In 1981, the legislature modified the statutory provision governing the types of evidence to be considered by the grand jury (compiled in 1978 NMSA at Section 31-6-11) to expressly contemplate judicial review of “[t]he sufficiency or competency of the evidence upon which an indictment is returned[,]” with the caveat that judicial review would be allowed only where there is “a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.”<sup>35</sup> In *Buzbee v. Donnelly*,<sup>36</sup> the New Mexico Supreme Court analyzed the 1981 amendment in light of *United States v. Costello*,<sup>37</sup> a 1956 U.S. Supreme Court case that addressed whether a criminal defendant has the right to challenge an indictment based on hearsay evidence. In *Costello*, the U.S. Supreme Court rejected the defendant’s effort to subject the sufficiency of the evidence supporting his indictment to judicial review for much the same reasons set out by the *Chance* majority: that such a rule would run contrary to the historical understanding of the grand jury’s role in the criminal justice system and undermine the efficient administration of criminal justice by delaying the speedy adjudication of criminal cases on their merits at a trial before a petit jury.<sup>38</sup> The *Buzbee* court noted that the legislature’s 1981 amendment to Section 31-6-11(A) permitting judicial review only in instances of prosecutorial bad faith or in the case of improperly convened or biased grand juries left the statutory standard of judicial review in much the same place as the federal common law standard under *Costello*, which held that due process requires only that a grand jury be properly convened and unbiased in order to require a trial on the merits.<sup>39</sup>

But *Buzbee* left many of the questions raised by the 1981 amendments to Section 31-6-11 unanswered. While judicial review of the sufficiency of the evidence in support of an indictment was only available upon a showing of prosecutorial bad faith, the *Buzbee* court did not discuss the standard for making such a showing. Nor did the court discuss what judicial review of the “sufficiency” of the evidence before the grand jury entails. Is it more like a preliminary hearing, where the rules of evidence apply?<sup>40</sup> Or is it more deferential, considering whether all of the evidence presented to the grand jury, regardless of its admissibility at trial, would justify the decision to indict?

The legislature again amended Section 31-6-11 in 2003 so that only the evidence’s sufficiency, and not its competency, may be subject to judicial review

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33. Compare *id.* ¶¶ 37–38 (Bott, J., dissenting), with *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14.

34. Compare *Chance*, 1923-NMSC-042, ¶ 38 (Bott, J., dissenting), with *De Leon v. Hartley*, 2014-NMSC-005, ¶ 8.

35. Act of Apr. 8, 1981, ch. 238, § 1, 1981 N.M. Laws 1262.

36. 1981-NMSC-097, 634 P.2d 1244.

37. 350 U.S. 359 (1956).

38. *Id.* at 363–64.

39. *Buzbee*, 1981-NMSC-097, ¶¶ 23, 30.

40. See generally Rule 5-302 NMRA.

upon a showing of prosecutorial bad faith.<sup>41</sup> The New Mexico Court of Appeals had occasion to review the effect of the 2003 amendments and the state of judicial review under Section 31-6-11(A) in *State v. Romero*.<sup>42</sup> *Romero* involved an interlocutory appeal of a district court's denial of the defendants' motion to dismiss the indictment.<sup>43</sup> The defendants argued that the district court erred in denying their motion to dismiss in part because the grand jury's decision to indict was based on hearsay not admissible under the Rules of Evidence.<sup>44</sup> The Court of Appeals rejected this argument for two reasons. First, the court noted that Section 31-6-11(A)'s requirement that "[e]vidence before the grand jury upon which it may find an indictment is that which is lawful, competent and relevant" is largely identical to the wording of the 1854 Act which *Chance* held to be "merely directory."<sup>45</sup> The court went on to state in dicta that even if the defendants had demonstrated prosecutorial bad faith, the indictments would still not be subject to dismissal under Section 31-6-11:

We recognize that in a back-handed way the 1981 and 2003 versions of Section 31-6-11(A) do impliedly authorize limited review—but only when the defendant has made a showing of prosecutorial bad faith. The 2003 version, by declaring in the second sentence that the Rules of Evidence do not apply and by omitting any reference in the final sentence to the competency of the evidence, suggests to us a legislative intent to limit, not to expand judicial review, as compared to the 1981 version which authorized review of both the sufficiency and the competency of the evidence upon preliminary showing of prosecutorial bad faith. As we read the 2003 version, even where prosecutorial bad faith has been established, judicial review of the evidence is limited to the sufficiency of the evidence.<sup>46</sup>

The Court of Appeals has recently examined the "bad faith" showing required for judicial review under Section 31-6-11(A) in *State v. Deignan*.<sup>47</sup> In *Deignan*, the defendant moved to dismiss his indictment because the prosecuting attorney had used leading questions to summarize the testimony of a witness and to suggest the existence of probable cause to charge the crimes set out in the indictment.<sup>48</sup> The district court denied the defendant's motion, reasoning that the defendant had failed to demonstrate the existence of prosecutorial bad faith, a necessary prerequisite to judicial review under Section 31-6-11(A).<sup>49</sup>

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41. See An Act Relating to Grand Juries, ch. 363, § 5, 2003 N.M. Laws.

42. 2006-NMCA-105, 142 P.3d 362.

43. *Id.* ¶ 1.

44. *Id.* ¶ 2. The defendants also argued that the prosecutor violated his duty under Section 31-6-11(B) to present exculpatory evidence to the grand jury. *Id.*

45. *Id.* ¶¶ 4, 6.

46. *Id.* ¶ 7 (citation omitted).

47. 2016-NMCA-065, 377 P.3d 471.

48. *Id.* ¶¶ 2–3.

49. *Id.* ¶ 4.

On appeal, the defendant argued that “the district court erred in finding that the prosecutor’s leading questions did not amount to bad faith because no reasonable prosecutor would have asked leading questions that suggested the existence of probable cause when the evidence did not support such a finding.”<sup>50</sup> The court disagreed, noting that

a fair reading of Section 31-6-11(A) is that not every indictment based on insufficient evidence is the result of prosecutorial bad faith; the purpose of the statute is to restrict sufficiency of the evidence review (and the delay that such a review entails) to circumstances where an indictment results from intentional misconduct on the part of the prosecutor, not simply negligence or even recklessness. We think the best way to give effect to this purpose is by giving the phrase “bad faith” its ordinary meaning: “[d]ishonesty of belief, purpose, or motive[.]” Black’s Law Dictionary 166 (10th ed. 2014). Reading the phrase “bad faith” in Section 31-6-11(A) to imply an objective assessment of a prosecutor’s conduct would render the statute’s distinction between indictments based on insufficient evidence and prosecutorial bad faith superfluous because no reasonable prosecutor would seek an indictment based on insufficient evidence.<sup>51</sup>

Following *Romero* and *Deignan*, judicial review of an indictment under Section 31-6-11(A) became quite narrow. Under *Deignan*, the defendant must demonstrate prosecutorial bad faith as a matter of fact. Absent flagrant prosecutorial misconduct, it is very difficult indeed for a defendant to persuade a district court to find that a prosecutor acted in subjective bad faith. And even if the defendant succeeds in making such a showing, an indictment will only be subject to dismissal if it is based on no evidence at all.

#### **D. Uncertainty in the Current State of the Law Governing Judicial Review of Indictments in New Mexico**

The New Mexico Supreme Court in 2013 promulgated a rule that appears to overrule much of the precedent interpreting Section 31-6-11(A). Current Rule 5-302A(F)(2) NMRA states that

[t]he weight of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury, but the grand jury proceedings, the indictment, and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court.

This rule contradicts the rule recently announced by the Court of Appeals in *Romero* that Section 31-6-11(A)’s provision requiring the grand jury to consider

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50. *Id.* ¶ 6.

51. *Id.* (citation omitted).

only “lawful, competent and relevant” is “directory” and not subject to judicial review.<sup>52</sup> Since the Supreme Court has previously characterized the legislature’s authority in grand jury proceedings as “plenary,” it appears that Section 31-6-11(A) controls and Rule 5-302A is invalid.<sup>53</sup> However, it is possible that the Court will uphold Rule 5-302A as a valid exercise of its constitutional authority to control procedure in district courts.<sup>54</sup> Although there is yet to be a reported or unreported New Mexico case discussing the implications of Rule 5-302A, the New Mexico Court of Appeals has certified<sup>55</sup> an appeal to the New Mexico Supreme Court in which the validity of Rule 5-302A has been raised.<sup>56</sup>

## II. STRUCTURAL CHALLENGES TO GRAND JURY PROCEEDINGS AND THE COURT OF APPEALS’ REJECTION OF A PREJUDICE REQUIREMENT IN *STATE V. ULIBARRI*

As previously noted,<sup>57</sup> the New Mexico Supreme Court has recognized a type of judicial review for grand jury proceedings distinct from the narrowly-circumscribed review set out in Section 31-6-11(A). The New Mexico Supreme Court has said that “a different standard applies” when a defendant alleges that “grand jury proceedings have been conducted in violation of the laws governing the grand jury process.”<sup>58</sup> The Court has rationalized this type of challenge as necessary to protect “the structural protections of the grand jury statutes and procedural rules . . . [and] preserve the target’s rights and the integrity of the grand jury process.”<sup>59</sup>

The important difference between statutory review under Part 31-6-11(A) and a structural challenge is the grand jury target’s burden of proof. As Part I.C demonstrates, statutory review under Section 31-6-11(A) requires the defendant to demonstrate actual bad faith by the prosecuting attorney *and* that an indictment is based on insufficient evidence. But when a defendant mounts a structural challenge to an indictment, the defendant need only demonstrate a violation of the statutes or procedural rules governing the grand jury process, and is not required to show that the violation caused prejudice – i.e., had any material effect on the grand jury’s decision to indict.<sup>60</sup>

The rationale for exempting the defendant from such a burden is that “the structural protections of the grand jury statutes preserve the integrity of the grand jury system and because, as a practical matter, evaluating actual prejudice would

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52. See *State v. Romero*, 2006-NMCA-105, ¶ 5, 142 P.3d 362.

53. See *Jones v. Murdoch*, 2009-NMSC-002, ¶¶ 22–23, 200 P.3d 523 (“We disagree with the notion that the Legislature’s power to legislate in matters affecting the grand jury is limited in nature.”).

54. See N.M. CONST. art. VI, § 3.

55. See N.M.S.A. 1978, § 34-5-14(C) (1972) (providing for Supreme Court appellate jurisdiction over matters involving “(1) a significant question of law under the constitution of New Mexico or the United States; or (2) an issue of substantial public interest that should be determined by the supreme court.”).

56. See *State v. Martinez*, No. 34,466, 2016 WL 3958606 (N.M. Ct. App. June 16, 2016)

57. See *supra*, notes 1–4.

58. *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14.

59. *Id.* ¶ 17.

60. *Id.*

require a speculative inquiry and impose a difficult burden on the target and the courts.”<sup>61</sup>

**A. *State v. Ulibarri* and the Origin of the “No Prejudice” Rule Governing Structural Challenges**

The origin of the current “no prejudice” rule governing structural challenges to grand jury proceedings is *State v. Ulibarri*.<sup>62</sup> In that case, the prosecuting attorney assisting the grand jury

did not provide the grand jury a detailed listing of the elements of each crime. Instead, the district attorney seems to have read only the “Crimes Charged” portion of the indictment documents before presenting the testimony of one of the investigating officers. Although it is not clear from the transcript, the grand jury was apparently then released to deliberate, eventually returning “true bills” on both [d]efendants.<sup>63</sup>

The Court of Appeals noted four relevant requirements in the statutes and court rules governing grand jury proceedings: (1) NMSA 1978, Section 31-6-8 (1983) requiring that “[a]ll proceedings in the grand jury room, with the exception of the deliberations of the grand jury, shall be reported verbatim”; (2) NMSA 1978, Section 31-6-10 (1979) requiring that the grand jury “must be satisfied from the lawful evidence before it that an offense against the laws has been committed and that there is probable cause to accuse by indictment the person named” before it returns a true bill; (3) the New Mexico Supreme Court’s uniform jury instruction for grand jury proceedings, UJI 14-8001, which provides that “[t]he district attorney will advise you of the essential elements of any offense which is to be considered” and that the grand jury “must carefully consider these elements prior to returning an indictment”; and (4) Rule 5-506(B) NMRA, which requires a sound recording of all testimony “and any explanation of instructions of the prosecutor and any comments made by the prosecutor[.]”<sup>64</sup>

The *Ulibarri* court read *Chance* and its progeny as announcing “general reluctance to burden the grand jury with litigious interference with its proceedings given that the State is required to prove its allegations against the defendant beyond a reasonable doubt at trial.”<sup>65</sup> The court reasoned that when a challenge implicates the evidence presented to the grand jury, challenges would only be allowed where there was “clear statutory authority to do so”—in other words, only upon a showing of insufficient evidence and prosecutorial bad faith.<sup>66</sup> However, the court noted a different line of cases allowing challenges to grand jury proceedings that did not fit

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61. *Id.*

62. 1999-NMCA-142, 994 P.2d 1164.

63. *Id.* ¶ 2.

64. *Id.* ¶ 8.

65. *Id.* ¶ 12.

66. *Id.* (quoting *State v. Chance*, 1923-NMSC-042, ¶ 8, 221 P. 183).

into this rubric.<sup>67</sup> In particular, the court noted that in *Baird v. State*,<sup>68</sup> *Davis v. Traub*,<sup>69</sup> and *State v. Hill*,<sup>70</sup> judicial review for alleged violations of grand jury rules was allowed based on the State's violation of NMSA 1978, Section 31-6-4(C) (2003), which permits only "district attorney and the attorney general and their staffs, interpreters, court reporters, security officers, the witness and an attorney for the target" to be present when the grand jury takes witness testimony.<sup>71</sup> According to the *Ulibarri* court, these cases stand for the proposition that when a grand jury rule "go[es] to the very heart of the grand jury system[.]" then a court may require "exacting compliance with the letter and spirit of the law[.]" and dismiss an indictment obtained from a grand jury conducted in violation of the rule irrespective of whether the violation influenced the jury's decision or there is probable cause to indict.<sup>72</sup> The court held that notifying the grand jury of the elements of the crimes charged was a requirement implicit in the verbatim recording requirement set out in Section 31-6-8,<sup>73</sup> and that the State's failure to properly instruct the grand jury in this case undermined the recording requirement's function as "a check on prosecutorial abuses." The court further stated that Section 31-6-8 requires the prosecution to provide record evidence that the jury has been explicitly advised of the elements of the crimes it is charged with considering.<sup>74</sup>

#### B. A Critique of *Ulibarri*'s "No Prejudice" Rule

*Ulibarri*'s analysis of whether a defendant should be required to demonstrate prejudice in the context of "structural errors" falls short in three respects. First, the court does not explain why other rules are insufficient to protect the institutional integrity of the grand jury. As the *Ulibarri* court itself noted, the grand jury's role as a check on prosecutorial overreach stems from its ability to return "no bills" against targets the State wishes the grand jury to indict, either because there is insufficient evidence or because the State's desire to seek an indictment stems from "malice, hatred or ill will."<sup>75</sup> When the grand jury returns a no bill, the State is forbidden from seeking another indictment from the same jury or from "another grand jury on the same evidence."<sup>76</sup> And as discussed above, Section 31-6-11(A) allows the defendant to obtain dismissal of an indictment based on insufficient evidence when there is a showing of prosecutorial bad faith. The *Ulibarri* court provides no explanation for why these rules are insufficient checks on the State's power in grand jury proceedings, especially in light of the countervailing policy preference that criminal accusations be tried on their merits before a petit jury.

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67. *Id.* ¶ 13.

68. 1977-NMSC-067, 568 P.2d 193.

69. 1977-NMSC-049, 565 P.2d 1015.

70. 1975-NMCA-093, 539 P.2d 236.

71. *Ulibarri*, 1999-NMCA-142, ¶ 13.

72. *Id.* ¶ 15.

73. *Id.*

74. *Id.* ¶ 16.

75. *Id.* ¶ 10 (internal quotation marks and citation omitted).

76. N.M.S.A. 1978, § 31-6-11.1 (1979).

The second, related problem with *Ulibarri*'s reasoning is that it appears to apply the traditional prejudice analysis that it purports to reject. The problem is made clear in *Ulibarri*'s discussion of *State v. Bigler*,<sup>77</sup> which the State cited in support of its argument that the defendants in *Ulibarri* should be required to show that the alleged violations of the recording requirement affected the grand jury's decision to indict.

In *Bigler*, mechanical problems with a tape recorder caused a little more than one minute of a witness's testimony before the grand jury to be lost.<sup>78</sup> The *Bigler* court rejected the defendant's challenge to the indictment, distinguishing *Baird, Hill, and Traub* as concerning the presence of unauthorized persons in violation of NMSA 1978, Section 31-6-4 (2003), a requirement that "goes to the very heart of the grand jury system."<sup>79</sup> The *Bigler* court instead found that the

presence of unauthorized person in the grand jury proceeding [i]s the violation of a substantial right which is guaranteed by the Bill of Rights and is not a mere failure of the grand jury to observe technical requirements and formalities. Failure to comply with the statutory recording requirement in this case falls within those technical requirements and formalities.<sup>80</sup>

In *Ulibarri*, the State argued that *Bigler* had ruled as a matter of law that violating the recording requirement in Section 31-6-8 did not violate the structural safeguards on the grand jury process.<sup>81</sup> If the State's argument was valid, the *Ulibarri* court would be required to overrule *Bigler* in order to reach its holding. This is because the recording requirement is the only statutory provision the *Ulibarri* court identifies as requiring the State to read to the grand jury the elements of the crimes charged in the indictment.<sup>82</sup> But the court instead distinguished *Bigler* as concerning a "technical" violation of the recording requirement that was minor in nature.<sup>83</sup> The court went on to note that

[t]he missing testimony [in *Bigler*] was clearly de minimis in the context of the entire material presented to the grand jury. . . . It would be unreasonable to presume prejudice as a means of protecting this purpose when the vast majority of the testimony was available. In [*Bigler*], we decided that the apparently inadvertent loss of 0.2% of the testimony did not go to the heart of the grand jury system. . . . We doubt *Bigler* would have taken the same approach if a material percentage of the testimony had been missing, or if all the testimony of the one witness were lost.<sup>84</sup>

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77. *Ulibarri*, 1999-NMCA-142, ¶ 18 (discussing *State v. Bigler*, 1982-NMCA-136, 652 P.2d 754).

78. *Bigler*, 1982-NMCA-136, ¶ 1.

79. *Id.* ¶¶ 7-9.

80. *Id.* ¶ 11 (citing *Davis v. Traub*, 1977-NMSC-049, 565 P.2d 1015 (per curiam)).

81. See *Ulibarri*, 1999-NMCA-142, ¶ 18.

82. See *id.* ¶¶ 15-16.

83. *Id.* ¶ 18.

84. *Id.*

According to *Ulibarri*, whether there has been “structural error” in a grand jury proceeding depends on whether the rule at issue is important or merely “technical” or “insubstantial” without any heed to the facts of a given case.<sup>85</sup> But while purportedly rejecting a more traditional prejudice requirement, the court in *Ulibarri* appears to adopt just such a requirement in the discussion above. Thus, *Ulibarri* itself undermines the court’s assertion that structural error (and thus a presumption of prejudice) depends on the importance of the rule in question in relation to grand jury proceedings in general. Instead, the importance of a violation in a particular case—whether it is *de minimis* or something more—clearly has some significance to the inquiry.

The third flaw in *Ulibarri* is that it makes no mention of the requirement that the grand jury find “that an offense against the laws has been committed and that there is probable cause to accuse by indictment the person named” before returning a true bill.<sup>86</sup> This requirement seems to be the one most directly implicated by the State’s failure to provide the grand jury with the elements of the crimes charged in an indictment: without knowing the elements of the crime, how can the grand jury plausibly conclude that there is probable cause that the target committed the crime?

What are the implications of *Ulibarri*’s failure to discuss this requirement?<sup>87</sup> As discussed in Part I.C, *supra*, the legislature has directly spoken on the matter in Section 31-6-11(A): a challenge to the sufficiency of the evidence underlying the grand jury’s indictment decision is permitted only upon a showing of prosecutorial bad faith. This requirement directly contradicts *Ulibarri* and its predecessors’ “no prejudice” approach to structural error. The upshot of *Ulibarri*’s failure to directly engage with Section 31-6-11(A) is an unresolved separation of powers issue. As the New Mexico Supreme Court noted in *Jones v. Murdoch*, the legislature’s plenary authority extends to the grand jury, allowing it to preempt the common law.<sup>88</sup> By requiring the dismissal of indictments for violations of procedural rules adopted by the Supreme Court pursuant to its supervisory authority over procedure in district courts, *Ulibarri* appears to conflict with *Jones*’ plenary characterization of the Legislature’s authority in this area.

Aside from the constitutional separation-of-powers concerns mentioned above, *Ulibarri* also gives rise to inconsistent and unfair results. An example illustrates this issue. Say two targets are both charged with the same crime in separate grand jury proceedings. In one proceeding there is sufficient evidence presented to make a conclusion of probable cause to indict, but the prosecutor incorrectly reads the elements of the crime charged. In the other, there is insufficient evidence to charge but the prosecutor correctly reads the elements of the crime charged. Assuming both prosecutors acted in good faith, only the indictment supported by sufficient evidence is subject to dismissal under *Ulibarri*. This is a natural result of

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85. *Id.* ¶¶ 17–18.

86. N.M.S.A. 1978, § 31-6-10 (1979).

87. Admittedly, the court makes passing mention of the issue in its discussion of whether to apply its ruling only to future cases. *See Ulibarri*, 1999-NMCA-145, ¶ 23. But this discussion only relates to the relative costs and benefits of applying the new rule to the case at hand instead of to future or pending cases. *Id.*

88. *See Jones*, 2009-NMSC-002, ¶¶ 21-25.

*Ulibarri*'s failure to engage with Section 31-6-11(A) or to require a finding of prejudice where a prosecutor fails to read the elements of the crimes charged.

The possible inconsistencies to which *Ulibarri*'s "no prejudice" rule gives rise are not theoretical. In *Deignan*, the State's sole witness before the grand jury was a police detective who related various hearsay statements by the alleged victim, A.G.<sup>89</sup> The alleged victim told the detective that the defendant had "touched seven-year-old A.G.'s genital area over her clothing, grabbed A.G. by the hips to prevent her from leaving, and asked A.G. to touch his penis."<sup>90</sup> Yet the grand jury returned a true bill on an indictment charging the defendant with "criminal sexual contact of the *unclothed* intimate parts of a minor[.]"<sup>91</sup> The Court of Appeals upheld the district court's denial of defendant's motion to dismiss that charge because the prosecutor properly read the elements of the offense.<sup>92</sup> But the Court required certain other charges that were likely supported by sufficient evidence—such as third-degree criminal sexual contact—to be dismissed based on the prosecutor's failure to correctly read the elements of those offenses to the grand jury.<sup>93</sup>

The purpose behind the New Mexico Supreme Court's structural error jurisprudence is to "safeguard the grand jury's ability to perform its constitutional function" of providing a "neutral determination of probable cause" and "to protect innocent citizens from hasty, malicious, or arbitrary prosecutions."<sup>94</sup> Yet *Deignan* shows that *Ulibarri*'s "no-prejudice" approach is a clumsy tool for achieving these admirable goals. Under *Ulibarri*, an innocent man may be required to face prosecution, while a guilty man may walk free, all depending on the prosecutor's violation of a rule governing grand jury proceedings. Even ignoring the sometimes lengthy interlocutory appellate review that can follow, *Ulibarri*'s no-prejudice rule undermines "the public's interest in the fair and expeditious administration of the criminal laws."<sup>95</sup>

### III. REFOCUSING THE PREJUDICE INQUIRY IN STRUCTURAL CHALLENGES TO THE INTEGRITY OF A GRAND JURY PROCEEDING

I argue in the following paragraphs that despite its adoption of the muddled reasoning in *Ulibarri*,<sup>96</sup> the New Mexico Supreme Court's approach to its most recent grand jury case, *Herrera v. Sanchez*,<sup>97</sup> demonstrates that traditional notions of prejudice may continue to play a role in judicial review of grand jury proceedings. I conclude by arguing that the Court should recognize and build on this approach in future cases in order to remedy the inconsistencies in *Ulibarri*'s "no-prejudice" rule.

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89. See *State v. Deignan*, 2016-NMCA-065, ¶¶ 1–2, 377 P.3d 471.

90. *Id.* ¶ 1.

91. *Id.* ¶ 1.

92. See *id.* ¶ 12 n.3 (noting the defendant's concession that the prosecutor had properly read the charges for second-degree criminal sexual contact of a minor (CSCM) in violation of N.M.S.A. 1978, Section 30-9-13(A) (2003)); *id.* ¶ 13 (requiring dismissal of a third-degree CSCM charge).

93. *Id.* ¶ 13.

94. *Herrera v. Sanchez*, 2014-NMSC-018, ¶¶ 14–15, 328 P.3d 1176.

95. *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

96. See *State v. Ulibarri*, 2000-NMSC-007, 997 P.2d 818.

97. 2014-NMSC-018.

In *Herrera*, the petitioner was the target of a grand jury investigation into her husband's death, initially ruled a suicide but later determined to be a homicide.<sup>98</sup> Pursuant to her right under Section 31-6-11(C) to require the prosecutor to present exculpatory evidence to the grand jury,<sup>99</sup> the petitioner sought to require the prosecutor to present to the grand jury evidence that the petitioner shot her husband in self-defense.<sup>100</sup> The State opposed petitioner's request, and obtained an order from the district court ruling irrelevant certain hearsay statements she made to a friend about an "escape plan" she would follow "in the event that she felt it was too dangerous to stay in her home with [her husband]."<sup>101</sup> The petitioner testified before the grand jury about her husband's death, stating that "there's a lot that you need to know to make . . . a good decision here today."<sup>102</sup> The petitioner explained that prior to her husband's death, he had threatened her with a gun and that

[the petitioner] was "absolutely sure" he was going to shoot her, but then he put the gun in his own mouth. [The petitioner's husband] placed the gun in [her] hands, saying she "was going to do it," and she pulled the trigger.<sup>103</sup>

The prosecutor cross-examined the petitioner, questioning her about prior statements she had made that her husband had shot himself, and asking her why she had never reported her husband's prior acts of violence against her to law enforcement.<sup>104</sup> The prosecutor then allowed grand jurors to ask the petitioner questions.<sup>105</sup> One of the grand jurors asked the petitioner whether she "ever [told] anyone else" about her husband's abusive behavior.<sup>106</sup> The petitioner began to tell the grand juror about telling her friend about her "escape plan," but the prosecutor cut off the petitioner's testimony and told the grand jury that "the information that [petitioner is] providing you . . . is not relevant to this proceeding at the moment."<sup>107</sup> In addition to cutting off the petitioner's response to the grand juror's question, the prosecuting attorney responded to the petitioner's earlier statement about the grand jury making a "good decision" by saying that

She told you to—to come to the correct conclusion. She was directly appealing to you to consider the consequences of your verdict. That is absolutely inappropriate. Please do not let anything she said to you about, you know, implying what the right decision is

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98. *Id.* ¶¶ 2–3.

99. *See generally* Jones v. Murdoch, 2009-NMSC-002, 200 P.3d 523 (setting out procedure for alerting the grand jury of exculpatory evidence).

100. *Herrera*, 2014-NMSC-018, ¶ 3.

101. *Id.* ¶¶ 3–4.

102. *Id.* ¶ 6.

103. *Id.*

104. *Id.* ¶ 7.

105. *Id.* ¶ 8.

106. *Id.*

107. *Id.*

influence your decisions. She was improperly seeking your sympathy.<sup>108</sup>

The grand jury returned a true bill on a second-degree murder charge, and the petitioner filed a motion to dismiss in the district court, arguing that the prosecutor “did not act in a fair and impartial manner,” as required under NMSA 1978, Section 31-6-7(D) (2003).<sup>109</sup> The district court denied the motion, and the petitioner appealed that decision by filing a petition for a writ of superintending control in the New Mexico Supreme Court.<sup>110</sup>

The Court granted the writ and ordered the district court to dismiss the indictment without prejudice. First, the Court noted that the district court’s exclusion of petitioner’s hearsay statement to her friend prior to the murder only operated to limit the scope of the prosecutor’s duty under Section 31-6-11(C) to present exculpatory evidence; it did not “purport to limit [the p]etitioner’s own testimony before the grand jury, which she had a statutory right to present, or to preclude the grand jury from inquiring about domestic abuse on its own initiative.”<sup>111</sup> The Court further held that “[b]y preventing [the p]etitioner from answering a direct, relevant question from a grand juror, the prosecuting attorney interfered with the grand jury’s statutory duty to make an independent inquiry into the evidence supporting a determination of probable cause” under Section 31-6-11(B).<sup>112</sup> Further, the Court held that the prosecutor had no authority to “unilaterally withhold evidence or witnesses requested by the grand jury.”<sup>113</sup>

The Court also held that the prosecuting attorney committed additional structural error by violating her statutory duty of impartiality when she told the grand jury that petitioner’s testimony was “absolutely inappropriate” and “suggesting that [the petitioner’s] testimony should be disregarded.”<sup>114</sup> While the Court acknowledged that the prosecuting attorney had correctly read the Supreme Court’s form grand jury instructions to the grand jury, the Court noted that by

adding [a] narrative to our Uniform Jury Instructions, the prosecuting attorney presented the equivalent of a closing argument regarding how the grand jurors should interpret the instructions as they relate to the [p]etitioner. And in doing so, the prosecuting attorney stepped out of her role as a neutral aide to the grand jury, compromising the grand jury’s independent evaluation of [the p]etitioner’s testimony and determination of probable cause.<sup>115</sup>

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108. *Id.* ¶ 9.

109. *Id.* ¶ 11.

110. *Id.*

111. *Id.* ¶ 23 (citation omitted).

112. *Id.* ¶ 24.

113. *Id.* ¶ 25.

114. *Id.* ¶ 27. *See* N.M.S.A. 1978, § 31-6-7(D) (2003) (“A prosecuting attorney attending a grand jury and all grand jurors shall conduct themselves in a fair and impartial manner at all times during grand jury proceedings.”).

115. *Herrera*, 2014-NMSC-018, ¶ 30.

This discussion can be read in two ways. First, it could be read to suggest that any expression of opinion or suggestive statements to the grand jury violates the prosecutor's duty of impartiality and requires dismissal of any indictment that issues. But this reading is implausible: by statute, the prosecutor's role as an assistant to the grand jury includes the examination of witnesses and the preparation of "indictments, reports and other undertakings of the grand jury."<sup>116</sup> As the Court of Appeals noted in *State v. Deignan*, reading *Herrera* to hold that there is structural error whenever the prosecuting attorney acts in a way that could be read to suggest a finding of probable cause to indict would turn the prosecutor's routine duties into tasks that are fraught with the potential for structural error: a searching cross examination of a witness or "simply drafting an indictment and handing it to the foreman would compromise the grand jury's independence because such could be argued to suggest that the grand jury should charge the crimes listed in the indictment."<sup>117</sup>

The second plausible reading is that while *Herrera* acknowledges *Ulibarri*'s "no prejudice" structural error rule,<sup>118</sup> it is clear from the discussion above that its holding is intimately tied to the facts of the case. Given the trust that naturally develops between the grand jury and the prosecuting attorney over time, it is difficult to ignore the effect of the prosecutor's statements that the grand jury should disregard exculpatory evidence that it is obliged to consider by statute. And since the petitioner had acknowledged shooting her husband, her credibility as a witness was the central issue in the grand jury's deliberations. By stopping the petitioner from offering her prior consistent statements to the grand jury, the prosecutor prevented the grand jury from making an independent assessment of the petitioner's credibility, likely influencing the outcome of its charging decision.

This is not to say that *Herrera* can be read to silently adopt a requirement that the target of a grand jury investigation demonstrate that an alleged structural error is the but for cause of the grand jury's decision to return a true bill. But as the New Mexico Supreme Court recognized in *Herrera*, a structural challenge to an indictment is essentially an attempt to vindicate the target's right to procedural due process implied by the New Mexico Constitution's provision of the right to an indictment by grand jury for all "capital, felonious, or infamous crime[s]."<sup>119</sup> And in this context, it makes sense to view errors not in isolation but with a view to their likely effect on proceedings. As I explain in the following paragraphs, the court should recognize its *de facto* approach to prejudice in grand jury proceedings by adopting a "prejudice-lite" approach: the defendant need not show that absent the alleged error, the grand jury would not have returned a true bill. But a mere violation of a rule should not, standing alone, suffice to require dismissal of an indictment: instead, the defendant should be required to show that the grand jury's decision had an effect on the grand jury's deliberations.

The rules governing ineffective assistance of counsel claims under the Sixth Amendment provide a useful analogy. A successful claim that a criminal defendant's right to the assistance of counsel under the Sixth Amendment has been violated

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116. N.M.S.A. 1978, § 31-6-7(A) (2003).

117. *State v. Deignan*, 2016-NMCA-065, ¶ 10, 377 P.3d 471, 474.

118. See, e.g., *Herrera*, 2014-NMSC-018, ¶ 17.

119. *Id.* ¶ 14.

consists of two elements: (1) objectively unreasonable conduct by the attorney, and (2) prejudice.<sup>120</sup> But “prejudice” in this context does not require a showing that an alleged error “more likely than not altered the outcome in [a] case.”<sup>121</sup> Instead, the defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>122</sup> This standard requires a showing of a “probability sufficient to undermine confidence in the outcome” of the case.<sup>123</sup>

Wholesale importation of *Strickland*’s ineffective assistance of counsel rule into the grand jury context may not be appropriate, especially *Strickland*’s presumption of effective assistance.<sup>124</sup> But a fact-specific approach to the evaluation of error in the grand jury context has clear merit. A clever attorney can make an argument that any statute and rule governing grand jury proceedings is “structural” and therefore subject to judicial review outside the scope of the grounds set out by Section 31-6-11(A). Introducing even a minimal “reasonable likelihood” standard allows a reviewing court to turn away such challenges when the claimed rule violation does not have any practical effect on the outcome of the grand jury’s decision to indict.

Second, a more context-sensitive approach allows courts to avoid the perverse results that *Ulibarri*’s “no prejudice” rule can lead to. If a prosecuting attorney fails to properly advise the grand jury of the elements of the offense charged, considering the violation in light of the facts in a given case enables a district court to assess whether it had any effect on the grand jury’s decision to return a true bill. If there is sufficient evidence to charge the defendant and there is no suggestion of prosecutorial misconduct or that the violation influenced the grand jury’s assessment of a material fact, then a court may excuse the error.

It could be argued that such an approach would burden district courts by requiring them to engage in extensive fact-finding as to the likely effect of every alleged error in grand jury proceedings. But the current system already requires district courts to review the transcripts of grand jury proceedings in order to determine whether a rule has been violated. And the current “no prejudice” approach has its own administrative downsides. If a district court erroneously denies a motion to dismiss an indictment because of structural error, serious delays and expenditures of court resources on interlocutory review may follow. Such an expenditure of resources is of dubious value when there is sufficient evidence to support a finding of probable cause and there is no reasonable likelihood that an error affected the grand jury’s charging decision. As I have argued in this article, *Herrera* suggests that prejudice is relevant to determining whether a structural error has occurred, even though it continues to express nominal adherence to *Ulibarri*’s “no prejudice” rule. The New Mexico Supreme Court should dispense with labels and announce a rule that protects the grand jury’s independence, pays heed to context, and serves our societal preference that criminal cases be decided on their merits.

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120. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

121. *Id.* at 693.

122. *Id.* at 694.

123. *Id.*

124. *See id.* at 694–95.

### CONCLUSION

The Legislature has strictly limited judicial review of the evidentiary sufficiency of an indictment to situations where prosecutorial bad faith is demonstrated. New Mexico courts' "no prejudice" rule for structural errors is in tension with the limited scope of judicial review contemplated by statute. This tension is further exacerbated by the Supreme Court's recent use of its rulemaking authority to expand judicial review to both the competency and legality of evidence before the grand jury. Regardless of how the Court ultimately rules on the separation of powers issues created by this recent development, a fact-sensitive approach to violations of the rules governing grand jury proceedings eases the tension between statutory judicial review and review for "structural error" by reducing the likelihood of unfair results and encouraging the efficient adjudication of criminal cases on their merits.