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CONSTITUTIONAL FRANKENSTEIN: THE GRAND JURY WITHOUT CHECKS

Nicholas Chiado*

In April of 2018, the New Mexico Supreme Court heard State v. Martinez. In that case, the defendants sought to quash their indictment, as the grand jury had been presented with unlawfully obtained evidence. Reversing the district court, the New Mexico Supreme Court held that judicial review of the grand jury indictment was not available, as there was no evidence of prosecutorial misconduct.

This Case Note analyzes Martinez and summarizes the likely implications of the holding in the case. Background information to the relevant statute is included, along with past appellate interpretations of the statute. The holding of Martinez is analyzed on its own, and through the lens of a parallel method of challenging grand jury proceedings, most recently explained in Herrera v. Sanchez.

The holding of Martinez will make it more difficult to successfully challenge grand jury proceedings under the applicable statute. Parties will instead avail themselves of the “structural integrity” challenge in the future, and since there are not clear lines on what is and is not an acceptable challenge under this model, it is likely to increase the workload of district and appellate courts. This Case Note argues that the New Mexico Supreme Court should harmonize these two methods of challenging grand jury proceedings, given that the grand jury is a Constitutionally-protected body.

INTRODUCTION

What kind of evidence can be presented to a grand jury? Are there any limits on the type of evidence that a grand jury can see? New Mexico law makes clear that the rules of evidence do not apply to grand jury proceedings, so evidence that would otherwise be found to be hearsay can be presented, for example. But what about evidence that is obtained through unlawful means? Many would instinctively believe that this sort of evidence is inappropriate to present to a grand jury. And if this sort of evidence were to be presented, a defendant could certainly challenge this, right?

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Under New Mexico law, a showing of prosecutorial bad faith is required to trigger judicial review of grand jury proceedings.¹ The state legislature provided that “[t]he sufficiency 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.”² It is clear that prosecutorial bad faith is needed to trigger judicial review, but what constitutes bad faith? The statute does not include a definition of “bad faith” in this context. The closest statutory language pertaining to prosecutorial bad faith in the grand jury process is located in another section pertaining to the grand jury. This section includes instructions for assisting the grand jury, and subsection (D) states that “prosecuting attorney[s] attending a grand jury . . . shall conduct themselves in a fair and impartial manner at all times during grand jury proceedings.”³

Most recently, in April of 2018, the New Mexico Supreme Court had an opportunity to explore prosecutorial bad faith in *State v. Martinez*.⁴ In the case, the court examined alleged prosecutorial misconduct on the part of the district attorney and deputy district attorney, as they were alleged to have falsified subpoenas that ultimately led to the acquisition of evidence that was presented to a grand jury.⁵ The grand jury then prepared an indictment against both defendants, based on the evidence procured through the use of the subpoenas.⁶ In its analysis, the court distinguished bad faith in the acquisition of evidence from bad faith in the presentation of evidence to a grand jury.⁷ According to the New Mexico Supreme Court, alleged prosecutorial bad faith in the presentation of evidence to the grand jury is reviewable, but alleged bad faith in the acquisition of evidence is not to be reviewed.⁸ Further, the court affirmed its holding in a related disciplinary action that the conduct of the district attorney’s office did not rise to the level of “bad faith.”⁹ The court cited longstanding precedent prohibiting judicial review in these sorts of circumstances and reiterated its concern that this type of post-indictment review of evidence could create a “mini-trial” and take power from the jury and instead vest it with a judge.¹⁰ Additionally, the court cited a concern for judicial delay, were it to allow for more broad judicial review in future cases.¹¹

Prior to *State v. Martinez*, the supreme court heard a similar matter in *Herrera v. Sanchez*, which involved an evidentiary challenge to the grand jury.¹² In that matter, the supreme court held that the district attorney’s actions had warranted judicial review, and ordered the district court to dismiss the indictment.¹³ But rather

1. See N.M. STAT. ANN. § 31-6-11 (2000 & Supp. 2016).

2. § 31-6-11(A).

3. N.M. STAT. ANN. § 31-6-7(D) (2000 & Supp. 2016).

4. *State v. Martinez*, 2018-NMSC-031, 420 P.3d 568.

5. *Id.* ¶¶ 1, 6.

6. *Id.* ¶ 6.

7. *Id.* ¶ 30.

8. *Id.*

9. *Id.* (quoting *In re Chavez*, 2017-NMSC-012, ¶ 24, 390 P.3d 965).

10. *Id.* ¶¶ 23–4.

11. See *id.* ¶ 38.

12. *Herrera v. Sanchez*, 2014-NMSC-018, 328 P.3d 1176.

13. *Id.* ¶ 32.

than emphasize prosecutorial bad faith, the court instead focused on the “structural protections of the grand jury statutes” to justify its decision.¹⁴ This is the most recent decision in a parallel line of challenges to grand jury proceedings, which calls for a “different standard [to] appl[y]” when a party alleges that “grand jury proceedings have been conducted in violation of the laws governing the grand jury process.”¹⁵ When challenging the proceedings of a grand jury under this form, a defendant need not show “actual prejudice,” as prejudice is assumed due to the fact that “structural protections of the grand jury statutes preserve the integrity of the grand jury system.”¹⁶ The court in *Martinez* chose not to apply this structural-protections analysis, as the test does not apply to “evidence presented to the grand jury.”¹⁷ Indeed, the court in *Martinez* noted a longstanding distinction between judicial review of evidentiary issues and judicial review for alleged attacks on the structural integrity of the grand jury.¹⁸

The effects of *Herrera* and *Martinez* have served to maintain two potential methods of analysis for the judiciary moving forward when confronted with challenges to grand jury proceedings. By keeping both philosophies active, the path forward is muddled for parties facing potentially questionable grand jury proceedings. This Case Note seeks to address this uncertainty. Ultimately, this Note will highlight that these two philosophies, if they both remain in place, will create problems for the judiciary. This Note argues that a distinction between “bad faith” in the presentation and in the acquisition of evidence is splitting hairs that need not be split and will prove to be difficult to apply. Additionally, this Note will argue that the New Mexico Supreme Court should create one clear method for challenging grand jury proceedings, regardless of whether the challenge is based in evidence or predicated on a different issue. Such an approach would ensure uniformity in the result of a party challenging grand jury proceedings.

Part I of this Note examines the background of the grand jury system in New Mexico through the history of statutes pertaining to challenges to grand jury proceedings in New Mexico. Particular attention is paid to the appellate courts’ interpretations of these statutes. The Note also discusses the rationale for the grand jury along with a brief examination of relevant supreme court opinions pertaining to grand juries.

Part II focuses on the opinion in *State v. Martinez*. This Note provides a brief recitation of the facts and the supreme court’s holding. Specifically, the Note focuses on the supreme court’s examination of “bad faith” and whether judicial review is warranted. Particular attention is paid to the supreme court’s historic treatment of prosecutorial bad faith. In *Martinez*, the court distinguished between prosecutorial bad faith in the presentation and acquisition of evidence, and this Note will show that this is the first time this distinction was referenced in New Mexico case law. Part III explores *Herrera v. Sanchez* and the “structural integrity” analysis

14. *Id.* ¶ 17.

15. *Id.* ¶ 14.

16. *Id.* ¶ 17.

17. *State v. Martinez*, 2018-NMSC-031, ¶ 29, 420 P.3d 568.

18. *Id.* ¶ 27.

contained within. The Case Note examines the different burden placed on defendants under this test compared to allegations of prosecutorial bad faith.

Part IV provides an analysis of the holding in *Martinez*, exploring how the supreme court justified its decision to reverse the district court. Part V discusses the implications of *Martinez*. Through its holding, the supreme court has created a more difficult path for defendants to prevail on challenges under Section 31-6-11, and simultaneously kept the alternate method for challenging grand jury proceedings alive and well. Through *Martinez*, the supreme court created uncertainty for both prosecutors and defendants moving forward. And uncertainty within the grand jury system could lead to an erosion of public trust and taint public perception of criminal trials. This Note ultimately recommends that uniformity be created between the two methods of challenging grand jury proceedings; specifically, by harmonizing the philosophies or creating an objective standard. One standard for challenging evidentiary issues, along with a completely different standard for challenging other matters before a grand jury is not optimal, and the New Mexico Supreme Court has the authority to rectify this problem.

I. BACKGROUND

The Fifth Amendment to the United States Constitution guarantees the right to a grand jury for all people charged with capital or serious crimes.¹⁹ Similarly, the Constitution of New Mexico protects the right of all persons to a grand jury for all capital and felony crimes.²⁰ This concept is enshrined in each “Bill of Rights” section of the two Constitutions. Structurally, the inclusion of this concept in the Bill of Rights section leads to an inference that the primary rationale for this a grand jury is to protect individuals from an overreaching government.²¹ The New Mexico Supreme Court has stated that “[t]he grand jury is not, and should not be, the tool of the prosecuting authority to manipulate at will.”²² As to its purpose, the United States Supreme Court stated that the purpose of the grand jury is “only to accuse, not to convict. . . . [I]ts indictment merely puts the accused to trial.”²³ Further, the grand jury has been identified “as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused.”²⁴

The grand jury occupies a unique area, as it is not directly part of the judiciary, but is somewhat apart and separate in key ways.²⁵ It exists in this state so as to further protect its autonomy and integrity.²⁶ The first New Mexico statutes regarding evidence and the grand jury were enacted in the mid-nineteenth century,

19. U.S. CONST. amend V.

20. N.M. CONST. art. II, § 14.

21. See *State v. Ulibarri*, 1999-NMCA-142, ¶ 10, 994 P.2d 1164 (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)).

22. *Davis v. Traub*, 1977-NMSC-049, ¶ 5, 565 P.2d 1015.

23. *Cassell v. Texas*, 339 U.S. 282, 302 (1950).

24. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

25. *Ulibarri*, 1999-NMCA-049, ¶ 11.

26. *Id.*

prior to New Mexico gaining statehood.²⁷ Included in these provisions was the direction that “[t]he grand jury can receive none but legal evidence and the best evidence in degree, to the exclusion of hear[say] or secondary evidence.”²⁸ The 1923 case *State v. Chance* provided the New Mexico Supreme Court with one of its first opportunities to explore evidentiary issues pertaining to the grand jury.²⁹ In *Chance*, the supreme court held that the broad evidentiary provisions were “directory,” and that without “clear statutory authority . . . the courts are *without power to review* its action to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent evidence upon which to return an indictment.”³⁰ *Chance* acknowledged a “great contrariety of opinion among the courts upon this subject.”³¹ *Chance* remains precedent law in New Mexico, as it has never been overruled.³²

The dissent in *Chance* is worth discussion. In dissent, Justice Botts argued that the grand jury was not entirely independent of the judiciary, and a view of the grand jury along these lines “contradicts every theory of the English and American judicial system of which we have been so proud.”³³ Further, Justice Botts stated that the majority’s view (that the grand jury is a judicial tribunal “absolutely independent of control or supervision by the court with which it sits”), renders the grand jury “a sword for the destruction of our liberties instead of a shield for their protection.”³⁴ Justice Botts concluded by pointing out the humiliating nature of an indictment and that the grand jury should be free to make accusations after reviewing competent evidence.³⁵ Ultimately, when this competency is violated, the constitutional rights of the indicted are violated.³⁶ Justice Botts feared that under the majority’s view, the grand jury “will be above and more powerful than the court or the Constitution,” and compared it to Frankenstein’s monster.³⁷

The grand jury statutes examined in *Chance* remained unaltered from their inception until 1969, when the New Mexico Legislature added provisions, including the instruction that “[a]ll evidence must be such as would be legally admissible upon trial.”³⁸ After this requirement was added to the statute, the New Mexico appellate courts both continued, nevertheless, to affirm the holding in *Chance*.³⁹ In the 1979 case *State v. Stevens*, the court of appeals reversed the district court after it had dismissed an indictment on the basis of inadmissible trial evidence.⁴⁰ The district

27. See *Of the Powers and Duties of Grand Jurys*, ch. 2, 1853 N.M. Laws 3d Leg. Assemb. 66.

28. *Id.* § 6.

29. *State v. Chance*, 1923-NMSC-042, 221 P. 183 (discussing state-court decisions pertaining to evidentiary challenges to grand jury proceedings).

30. *Id.* ¶ 8 (emphasis added).

31. *Id.* ¶ 4.

32. *State v. Martinez*, 2018-NMSC-031, ¶ 17, 420 P.3d 568.

33. *Chance*, 1923-NMSC-042, ¶ 13 (Botts, J., dissenting).

34. *Id.* ¶¶ 13, 14.

35. *Id.* ¶¶ 14, 33.

36. *Id.* ¶ 33.

37. *Id.* ¶ 37.

38. Act of Apr. 5, 1969, ch. 276, § 11 1969 N.M. Laws 1394, 1399–1400.

39. See *State v. Paul*, 1971-NMCA-040, ¶ 11, 485 P.2d 375; *State v. Ergenbright*, 1973-NMSC-024, ¶ 4, 506 P.2d 1209 (affirming the holding in *Paul* that there was no provision for judicial review of the evidence presented to a grand jury).

40. *State v. Stevens*, 1979-NMCA-058, ¶ 4, 601 P.2d 67.

court made this determination based on the language of the 1969 amendment.⁴¹ The court of appeals held that, despite the language of the statutory amendment, the holding of *Chance* was still good law and precluded any notion of judicial review pertaining to evidence before the grand jury.⁴²

The Legislature amended Section 31-6-11 again in 1979, adding language requiring the prosecutor to submit evidence that would “negate the guilt” of the defendant.⁴³ The statute was again amended in 1981, and the language mandating that evidence be “legally admissible upon trial” was removed.⁴⁴ New language was added, calling for “[t]he sufficiency [or] competency 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.”⁴⁵ This was the first time the statute included language pertaining to prosecutorial bad faith. In *Buzbee v. Donnelly*, the supreme court reviewed the recent changes and again affirmed that, under *Chance*, there is a very limited role for judicial review of evidence before a grand jury.⁴⁶ However, *Buzbee* did not specify what standards should apply in analyzing prosecutorial bad faith. The *Buzbee* Court, citing federal precedent, also held that post-indictment judicial review of evidentiary issues would lead to inefficiency, as it would create a sort of mini-trial within the actual proceedings.⁴⁷

In 1985, the court of appeals heard the case of *State v. Eder*.⁴⁸ In that case, the defendants, a husband and wife, were indicted on charges of larceny and conspiracy to commit larceny.⁴⁹ The indictments were procured after the grand jury was presented with the results of subpoenas that were issued without authorization from the grand jury.⁵⁰ The defendants moved to quash the indictments due to these unlawful subpoenas.⁵¹ The district court granted their motion, holding that the prosecutor had acted in bad faith in issuing the subpoenas.⁵² On appeal, the court of appeals reversed the district court and held that, “[w]hen inadmissible evidence is presented to the grand jury, the proper remedy is suppression at trial.”⁵³ The court’s holding focused on prejudice, reasoning that dismissal is not warranted without a showing of prejudice to the defendant.⁵⁴ Further, the court stated that in the matter, there was no evidence or a finding that the grand jury process had been subverted.⁵⁵ Therefore, the court held that dismissal was inappropriate.⁵⁶

41. *Id.* ¶ 2.

42. *Id.* ¶ 4.

43. N.M. STAT. ANN. § 31-6-11(B) (1979).

44. N.M. STAT. ANN. § 31-6-11(B) (1981).

45. N.M. STAT. ANN. § 31-6-11(B) (1981) (emphasis added).

46. *Buzbee v. Donnelly*, 1981-NMSC-097, ¶¶ 82–83, 634 P.2d 1244.

47. *Id.* ¶ 23 (citing *Costello v. United States*, 350 U.S. 359, 363).

48. *State v. Eder*, 1985-NMCA-076, 704 P.2d 465.

49. *Id.* ¶¶ 2–3.

50. *Id.* ¶ 3.

51. *See id.* ¶ 1.

52. *Id.* ¶ 4.

53. *Id.* ¶ 9 (citing *Buzbee v. Donnelly*, 1981-NMSC-097, 634 P.2d 1244).

54. *Id.*

55. *Id.*

56. *Id.*

In 2003, New Mexico amended its “Evidence before [a] grand jury” statute. The language of the statute remains the same today.⁵⁷ Section A reads, in part: “[t]he sufficiency 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.”⁵⁸ Also included in Section A is the requirement that evidence to be considered by the grand jury be “lawful, competent and relevant.” However, the Rules of Evidence are not applicable to grand jury proceedings.⁵⁹

After the current amendment to the statute took effect, the court of appeals considered the case of *State v. Romero*.⁶⁰ In that case, the defendants moved to quash an indictment on the grounds that the grand jury was presented with inadmissible hearsay.⁶¹ In *Romero*, the court of appeals again confirmed the holding of *Chance*, stating that the language of the statute is “directory” and to be used as “guidance” for the grand jury. The court held further that there was no statutory authorization for judicial review of the evidence before a grand jury.⁶² The court also held that the language of the amendment should be read as a legislative “intent to limit, not to expand judicial review, as compared to the 1981 version.”⁶³ Further, the court noted that the defendants did not argue that the prosecutor had acted in bad faith, and that this is a required element for Section 31-6-11(A).⁶⁴

II. STATE V. MARTINEZ

In the Spring of 2013, authorities suspected Isaac Martinez and Carla Casias of armed robbery.⁶⁵ The Deputy District Attorney sought permission to issue subpoenas *duces tecum* for purposes of investigating the couple.⁶⁶ Eleven subpoenas for phone subscriber information were ultimately issued in connection with the investigation, largely for the purpose of collecting phone call and text message records.⁶⁷ Law enforcement then used the information gained through the subpoenas to obtain search warrants for the purpose of collecting additional information.⁶⁸ The additional information gained, including geographical location information for the phone of Martinez at the time of crime, allowed for the issuance of an arrest warrant for Martinez.⁶⁹ A grand jury then indicted the two defendants for armed robbery, and an arrest warrant was issued for Casias.⁷⁰ After months of pretrial proceedings, the defendants moved to quash the indictment or, alternatively, to suppress all evidence

57. See N.M. STAT. ANN. § 31-6-11 (2000 & Supp. 2016).

58. § 31-6-11(A).

59. *Id.*

60. *State v. Romero*, 2006-NMCA-105, 142 P.3d 362.

61. *Id.* ¶¶ 1–2.

62. *Id.* ¶ 5.

63. *Id.* ¶ 7.

64. *Id.* ¶ 8.

65. *In re Chavez*, 2017-NMSC-012, ¶ 4, 390 P.3d 965; *State v. Martinez*, 2018-NMSC-031, ¶ 2, 420 P.3d 568.

66. *In re Chavez*, 2017-NMSC-012, ¶ 4.

67. *Id.*; *Martinez*, 2018-NMSC-031, ¶ 3.

68. *Martinez*, 2018-NMSC-031, ¶ 5.

69. *Id.*

70. *Id.* ¶ 6.

gained through the subpoenas.⁷¹ The district court granted their motion and quashed the indictment, reasoning that the subpoenas were unlawful and that presenting evidence gained through their use would taint the grand jury proceeding.⁷²

The State then appealed to the New Mexico Court of Appeals.⁷³ The court of appeals, citing a conflict between precedent law regarding evidentiary review and a recently promulgated amendment to the Rules of Criminal Procedure, certified the appeal to the New Mexico Supreme Court.⁷⁴

The New Mexico Supreme Court, in a disciplinary action brought against the deputy district attorney and the supervising attorney, held that the attorneys violated the “legal rights” of Martinez and Casias by issuing the subpoenas in question.⁷⁵ The court held that these subpoenas were unlawful, as they were issued without any pending court or grand jury proceeding.⁷⁶ The court held that the language of Rule 5-511(A)(1)(b) NMRA requires that all “subpoenas be issued only in connection with existing judicial actions.”⁷⁷ Further, the court cited the New Mexico Court of Appeals opinion, *State v. Eder*, which determined that unauthorized subpoenas were “prosecutorial misconduct.”⁷⁸ In *Eder*, the court of appeals reasoned that the use of unauthorized subpoenas was “coercive and intimidating,” and that the end result was an act of deception committed on the witness.⁷⁹ It noted that pre-indictment subpoenas are not necessarily unlawful,⁸⁰ but rather, that the problem with these indictments were that they were not issued “in connection with an authorizing proceeding.”⁸¹ Ultimately, the court held that while the Respondents in the matter issued unlawful subpoenas, their conduct did not rise to the level of “bad faith,” as the Respondents did not exhibit an “intent to deceive.”⁸²

In *Martinez*, the supreme court affirmed its holding in *Matter of Chavez*, reiterating that “it is unlawful for a court or an officer of the court to issue any subpoena in the absence of a pending judicial action.”⁸³ The court then discussed precedent case law,⁸⁴ and noted the longstanding tradition in New Mexico of precluding judicial review of the legal admissibility of evidence to be considered by

71. *Id.*

72. *Id.*

73. *Id.* ¶ 7.

74. *Id.* Rule 5-302A NMRA had been amended in May 2010 to provide, in part, that “the grand jury proceedings, the indictment, and the lawfulness, competency and relevancy of the evidence shall be reviewable by the district court.” The *Martinez* Court held that this provision was inconsistent with precedence and deleted that language from the Rule.

75. *In re Chavez*, 2017-NMSC-012, ¶¶ 20–21, 390 P.3d 965.

76. *Id.* ¶ 2.

77. *Id.* ¶ 11.

78. *Id.*

79. *Id.* (quoting *State v. Eder*, 1985-NMCA-076, ¶ 5, 704 P.2d 465).

80. *Id.* ¶ 18 (noting, as an example, that some subpoenas issued pursuant to NMSA 1978, Section 31-6-12(A) can be lawful).

81. *Id.* ¶¶ 18–19.

82. *Id.* ¶ 24.

83. *State v. Martinez*, 2018-NMSC-031, ¶ 13, 420 P.3d 568 (quoting *In re Chavez*, 2017-NMSC-012, ¶ 2).

84. *See supra* Part I.

a grand jury.⁸⁵ Further, the court reiterated its distinction between legal challenges to the admissibility of evidence to be presented to a grand jury, and “structural challenges” to the grand jury.⁸⁶ Structural challenges allege attacks on the “structural protections that safeguard the grand jury’s ability to perform its constitutional function.”⁸⁷ And while alleged issues with the admissibility of evidence are generally ineligible for judicial review, alleged attacks on the structural integrity of the grand jury proceeding can be reviewed by a district court.⁸⁸ The court reiterated the position spelled out in *State v. Romero*,⁸⁹ which held that the language of Section 31-6-11(A)⁹⁰ is just “directory and for the guidance of the grand jury.”⁹¹ The court affirmed its earlier holding that New Mexico courts can only review evidentiary issues pertaining to the grand jury on issues of sufficiency and can only do so when there has been “prosecutorial bad faith.”⁹²

Additionally, the *Martinez* Court emphasized that the present case did not involve a challenge to the sufficiency of the evidence, and that therefore, the court did not need to inquire into the good or bad faith of the prosecutor.⁹³ Further, the court introduced a distinction between types of bad faith: according to the court, bad faith can be found in either the *acquisition* or the *presentation* of evidence.⁹⁴ The court held that the language of the statute calls for judicial review of the sufficiency of the evidence presented to a grand jury if it appears that there was bad faith in the presentation of evidence to a jury.⁹⁵ Regarding alleged bad faith in the acquisition of evidence, the court held that this sort of issue can only be raised once the parties have moved to trial, at which point the defendant can move to suppress the evidence.⁹⁶ This was the first time that the supreme court has made this sort of distinction between types of prosecutorial bad faith. The supreme court did not address the district court’s finding that the grand jury proceedings would be tainted if prosecutors were allowed to present grand juries with unlawfully obtained evidence.

III. HERRERA V. SANCHEZ

On July 1, 2012, Marc Herrera died at his home from a gunshot to his head.⁹⁷ Months later, the assistant district attorney pursued a grand jury investigation into the wife of Mr. Herrera.⁹⁸ As part of the grand jury proceeding, Ms. Herrera

85. *Id.* ¶¶ 15–32.

86. *Id.* ¶ 27.

87. *Id.* (quoting *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176).

88. *Id.* ¶ 27.

89. *State v. Romero*, 2006-NMCA-105, 142 P.3d 362.

90. N.M. STAT. ANN. § 31-6-11(A) (2000 & Supp. 2016) (“The sufficiency 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.”).

91. *Martinez*, 2018-NMSC-031, ¶ 26 (quoting *Romero*, 2006-NMCA-105, ¶ 5).

92. *Id.*

93. *Id.* ¶ 30.

94. *Id.*

95. *Id.*

96. *Id.* ¶ 31.

97. *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 2, 328 P.3d 1176.

98. *Id.* ¶¶ 2–3.

requested that she be allowed to present evidence that she argued was exculpatory.⁹⁹ New Mexico statute 31-6-11 allows for a potential defendant to request potentially exculpatory evidence to be presented to a grand jury.¹⁰⁰ Ms. Herrera sought to introduce testimony from a friend that she deemed exculpatory.¹⁰¹ The prosecutor was successful in convincing the judge to redact a large portion of the testimony, prior to the grand jury receiving the information.¹⁰² Ms. Herrera then testified before the grand jury.¹⁰³ During her testimony, the deputy district attorney interrupted her after a member of the grand jury asked her a question.¹⁰⁴ Following her testimony, the deputy district attorney spoke before the grand jury and instructed it on how to evaluate witness testimony.¹⁰⁵

Ms. Herrera challenged the indictment before the district court and argued for dismissal based on the conduct of the prosecution.¹⁰⁶ Ms. Herrera argued that the prosecutor had attacked the structural integrity of the grand jury by “over[riding] the independence of the grand jury.”¹⁰⁷ After the district court denied her motion, Ms. Herrera sought a writ of mandamus from the supreme court.¹⁰⁸

On review, the supreme court granted Ms. Herrera’s request and ordered the district court to dismiss the indictment.¹⁰⁹ Specifically, the court held that the actions of the district attorney, in preventing Ms. Herrera from responding to a question from a juror, were an attack on the structural integrity of the grand jury, as the independence of the grand jury was called into question.¹¹⁰ The court reasoned that “[t]he grand jury’s ability to obtain evidence beyond that presented by the State is critical to the structural integrity of our grand jury system.”¹¹¹

IV. ANALYSIS

The court employed multiple rationales to justify its holding in *Martinez*. First, the supreme court referenced a distinction between prosecutorial bad faith in the acquisition of evidence and in the presentation of evidence.¹¹² This was the first time that the court made this distinction before. The statute in question does not make such a distinction. Instead, it provides that “an indictment . . . shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney.”¹¹³ The court’s holding will serve to make it more difficult for a party to challenge under Section 31-6-11(A), as this is an additional barrier to cross in order to be successful.

99. *Id.* ¶ 3.

100. N.M. STAT. ANN. § 31-6-11(B) (2000 & Supp. 2016)).

101. *Herrera*, 2014-NMSC-018, ¶ 3.

102. *Id.* ¶ 4.

103. *Id.* ¶ 6.

104. *Id.* ¶ 8.

105. *Id.* ¶ 9.

106. *Id.* ¶ 11.

107. *Id.*

108. *Id.*

109. *Id.* ¶ 32.

110. *Id.* ¶¶ 18, 24.

111. *Id.* ¶ 26.

112. *State v. Martinez*, 2018-NMSC-031, ¶ 30, 420 P.3d 568.

113. N.M. STAT. ANN. § 31-6-11(A) (2000 & Supp. 2016).

Second, the court relied on its reasoning in *Matter of Chavez*, holding that prosecutorial bad faith was not present based on the subjective intent of the district attorney, even though it acknowledged that the subpoenas were issued unlawfully.¹¹⁴ The court reached this holding even while acknowledging the earlier holding in *State v. Eder*, which stated that unauthorized subpoenas amounted to prosecutorial misconduct and coercion.¹¹⁵ Further, in *Eder*, the court of appeals in *Eder* reasoned that unauthorized subpoenas objectively served to deceive witnesses.¹¹⁶ Rather than resorting to a subjective analysis of the state of mind of the prosecutor as the court did in *Martinez* and in *Matter of Chavez*, it seems that a simpler method would be to objectively review the effect of the unauthorized subpoena or subpoenas. This could be achieved through a simple review of whether prosecutorial misconduct had occurred and would better conform to the wording of the statute, which does not call for an analysis of whether the prosecutor intended to act in bad faith. The state of mind of the prosecutor should not be a factor in determining whether there was bad faith. An objective approach would create more certainty for parties to grand jury proceedings in the future, as the parties would not have to be concerned with additional hearings into the intention and mindset of the prosecutor and could instead focus on the evidentiary matter at issue. Further, this sort of analysis would increase judicial efficiency, since lower courts could rely on objective measures rather than hear arguments about the state of mind and intentions of the prosecutor. Under an objective approach, additional hearings would not be as likely. As such, courts would operate in a more efficient manner, likely disposing of cases and better maintaining their caseloads.

Third, the court stated in its holding that “[t]his case also does not involve a challenge to the sufficiency of the evidence as a whole to support the indictment.” Because of this, the court stated that there was not a need to explore bad faith, as the statute only calls for review of the sufficiency of the evidence when bad faith has been shown. The court did not explain why the matter did not pertain to sufficiency. Instead, the court left it to the reader to assume that the sufficiency of the evidence was not called into question. It is fair to assume that a defendant in a scenario like *Martinez* would argue that illegally-obtained evidence is not sufficient to support the indictment, and that a determination of bad faith would then be necessary.

Fourth, the court stated that the New Mexico Legislature has not given the judiciary the authority to review evidentiary challenges to grand jury proceedings.¹¹⁷ It is for the reader to infer that the judiciary is powerless to act without express legislative permission. Yet, in the very same opinion, the court referenced *Herrera* and its “structural integrity” analysis, which is itself a judicially-created mode of analysis. Clearly, the court does have the ability to fashion court rules. Yet, in *Martinez*, the court chose to cite longstanding precedent as validation for its holding.

In *Martinez*, the court seemed to go to great lengths to reach its holding. The consequence of the opinion is that, moving forward, it will be extremely difficult

114. *Martinez*, 2018-NMSC-031, ¶ 13; *In re Chavez*, 2017-NMSC-012, ¶ 24, 390 P.3d 965.

115. *In re Chavez*, 2017-NMSC-012, ¶ 11; *State v. Eder*, 1985-NMCA-076, ¶ 5, 704 P.2d 465.

116. *Eder*, 1985-NMCA-076, ¶ 5.

117. *Martinez*, 2018-NMSC-031, ¶ 36.

for a defendant to successfully challenge the proceedings of a grand jury under Section 31-6-11.

V. IMPLICATIONS

State v. Martinez raises several issues and is in conflict with *Herrera v. Sanchez*. As noted above, the *Martinez* court distinguished between prosecutorial bad faith in the acquisition and presentation of evidence before a grand jury. Moving forward, it will be even more difficult to mount a successful challenge under Section 31-6-11(A). Additionally, the court's use of a subjective analysis to determine that prosecutorial bad faith was not present in the case is not called for by the statute, and could likely lead to judicial inefficiency, as courts hearing challenges under Section 31-6-11(A) may need to wait for a related disciplinary hearing before ruling on the defendant's motion. The *Martinez* Court was not clear as to whether an inquiry into the mindset of a prosecutor in matters like this will be required in the future, and this could lead to uncertainty for parties in future cases. A subsequent opinion from the New Mexico Supreme Court could address both of these issues and retain the viability of Section 31-6-11(A) for defendants' use in future cases.

In addition to addressing judicial-efficiency concerns and providing parties more certainty, allowing for a party to challenge the evidence presented to a grand jury is in line with broader due process protections afforded to citizens facing inquisitorial grand jury proceedings. Section 18 of Article II of the New Mexico Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law . . ." ¹¹⁸ Precluding the ability to challenge unlawfully obtained evidence before a grand jury conflicts with the right to not be deprived of property without due process of law, as defendants expend time and, often, money in proceeding to trial where they can then move to suppress the unlawfully obtained evidence. Even if a defendant is successful at this stage, time and resources have already been spent. This could be particularly appalling if this were the only evidence available to the prosecution, as the case would then be dismissed. Instead, a party to a grand jury proceeding should be able to make full use of their right to due process of law and properly challenge evidentiary issues if they arise.

Further, in citing *Herrera*, the *Martinez* Court upheld its reasoning as good law and confirmed its applicability in future cases. By maintaining two methods by which challenges to the grand jury proceedings can be initiated, the court created uncertainty for future parties. In theory, the defendants in *Martinez* could have fashioned a different argument, challenging the unauthorized subpoenas for their effect on the structural integrity of the grand jury, as unlawful subpoenas that only serve to coerce and deceive are sure to affect the ability of the grand jury's ability to operate independently. The defendants in *Martinez* did not challenge the grand jury proceedings on these grounds,¹¹⁹ but it is likely that a defendant in a similar situation will raise this challenge in the future. Perhaps an argument related to structural integrity could have led to a different outcome for the defendants at the supreme court. It is troubling that there is potential for different outcomes based on the method

118. N.M. CONST. art. 2, § 18.

119. See generally Defendants-Appellees' Supplemental Brief, *State v. Martinez*, 2018-NMSC-031, 420 P.3d 568 (No. S-1-SC-35757).

of challenging the proceedings. This sort of uncertainty does not facilitate judicial efficiency, and the court should seek to reduce uncertainty in the law. Further, the constitutionally-protected right to a grand jury should not depend on the method of challenge.

Additionally, the structural integrity challenge does not require the defendant to show prejudice as a result of prosecutorial misconduct or bad faith. This is a less-exacting standard than the statutory language of Section 31-6-11(A), where “prejudice to the defendant is dispositive.”¹²⁰ Wise defendants seeking to quash indictments will likely frame their challenges under the *Herrera* structure, which makes it easier for them to prevail. Indeed, with the further distinction between acquisition and presentation created by *Martinez*, the court has made it even more difficult for a party to succeed on a motion for review of grand jury proceedings.

In *Martinez*, the court quoted *Eder* for the proposition that “grand jury indictments should be left undisturbed unless a prosecutor has engaged in ‘deceitful or malicious overreaching which subverts the grand jury proceedings.’”¹²¹ In *Martinez*, the reader is left to infer that the unlawful subpoenas did not rise to the level or “deceitful or malicious overreach” that would have subverted the proceedings of the grand jury. However, court did not address the language in *Eder* stating that unlawful subpoenas are objectively deceitful. *Martinez* seems to establish that deceitful or malicious overreach has degrees. An analysis that depends on degree of deceitful overreach is inherently subjective and will only increase judicial inefficiency, as future battles will play out regarding the extent to which a grand jury was deceived. These battles will delay criminal trials. It is more desirable to instead adhere to a standard that all parties will understand—one that limits the ability of parties to argue about intent and degree of wrongdoing. Clarifying the structural integrity method of challenging grand jury proceedings could help create such a standard. The stated purpose for reviewing challenges to the structural integrity of the grand jury is to safeguard the grand jury’s ability to perform its constitutional function.¹²² The Constitution of New Mexico requires that in order to prosecute a person for a “capital, felonious or infamous crime,” the State must obtain a neutral determination of probable cause.¹²³ The *Martinez* Court listed multiple cases in which parties made structural-integrity challenges, including challenges pertaining to evidentiary issues, but the court did not give an express rationale for distinguishing these types of challenges.¹²⁴ As the grand jury has a constitutional duty to determine probable cause, it seems that any challenge to the proceedings of a grand jury could be construed as one that affects the grand jury’s ability to perform its function.

While *stare decisis* and an adherence to precedence have long guided our judicial system, parties deserve clarification on how to challenge grand jury proceedings. A uniform method of challenging grand jury proceedings should be established so that the current, dual approach method could be retired.

120. *Eder*, 1985-NMCA-076, ¶ 9.

121. *Martinez*, 2018-NMSC-031, ¶ 29 (quoting *Eder*, 1985-NMCA-076, ¶ 9).

122. *Id.* ¶ 27.

123. *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176 (quoting N.M. Const. art. II, § 14).

124. *Martinez*, 2018-NMSC-031, ¶¶ 27–28.

CONCLUSION

The holding of *Martinez* makes it more difficult for defendants to mount successful challenges grand jury proceedings under Section 31-6-11(A). Both *Martinez* and *Herrera*, and their respective philosophies, are good law in New Mexico. The coexistence of these two strains of thought leaves substantial uncertainty for parties to grand jury proceedings. It is in the best interest of prosecutors, criminal defense attorneys, potential defendants, and state judges that the New Mexico Supreme Court clarify and harmonize these conflicting philosophies. A clear means of challenging unlawful evidence is required by the citizens of New Mexico, lest the grand jury process warp into a monstrous proceeding beyond the bounds of the Constitution. A clearer means of challenging unlawful evidence will not infringe on the independence of the grand jury, as the statute calls for such a means. If anything, *Martinez* has endangered the independence of the grand jury, as prosecutors can now engage in misconduct and, so long as there is not a finding of bad faith, the case can proceed after the misconduct has unduly influenced the grand jury.