

FAX FILED
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By _____

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff

v.

No. CR-11-560
Judge Leslie C. Smith

MICHAEL MURPHY,

Defendant

MEMORANDUM RE: NEW MEXICO GRAND JURY LAW

COMES NOW the defendant, Michael Murphy, through his attorneys, The Law Offices of Michael L. Stout, and respectfully submits the following information concerning New Mexico grand jury law in order to help clarify issues before the Court.

I. INTRODUCTION.

Motions being filed to which this memorandum applies include:

- Motion to Dismiss Indictment (#1) (Improper Target Notice)
- Motion to Dismiss Indictment (#2) (Presentation of Non-Competent and Irrelevant Evidence)
- Motion to Dismiss Indictment (#3) (For Failure to Present Exculpatory Information)
- Motion to Dismiss Indictment (#4) (Due to Improper Jury Instructions)

Grand jury law in New Mexico has undergone significant reform in recent years, with new legislation, rule changes, and case law. This memorandum speaks to the resulting New Mexico grand jury law: the 2003 changes to the grand jury statute, the

New Mexico Supreme Court case of *Jones v. Murdoch*, and Rule 5-302A.

II. FACTUAL BACKGROUND.

Judge Murphy is charged by indictment with the bribery of Beverly Singleman, the bribery of Lisa Schultz, the criminal solicitation of a bribe to Lisa Schultz, and retaliation against a witness, Beverly Singleman.

The charges stem from a conversation over lunch about political contributions and political appointments, on September 13, 2007. Judge Murphy is alleged to have solicited a bribe from Beverly Singleman at the lunch, and later to have told Judge Lisa Schultz to do the same. He is also alleged to have traded votes “in his official capacity” on the judicial nominating commission contrary to law. The alleged retaliation arises from an alleged statement made to Lisa Schultz about Beverly Singleman. Judge Murphy claims that any advice given was standard political advice, not intended to elicit a bribe and is protected by the First Amendment.

III. 2003 GRAND JURY REFORM

In 2003, the New Mexico Legislature instituted major changes to the state's grand jury statutes. This included allowing a target's counsel to notify the grand jury of evidence; establishing an evidentiary standard of “lawful, competent, and relevant” evidence; and allowing for judicial review of the competency of evidence before the grand jury. NMSA 31-6-11 (2003). In the pages following is a comprehensive chart of changes made to New Mexico's grand jury statutes in 2003:

Reforms to Grand Jury Statutes

2002 Statute	2003 Amendments	<i>Effect of Change</i>
<p>§ 31-6-3. Challenge to grand jury. Grounds for challenge:</p> <p>"C. a member of the grand jury returning the indictment was a witness against a person indicted."</p>	<p>"C. ...a member of the grand jury returning the indictment was a witness <u>or is likely to become a witness</u>; or</p> <p>D. <u>a member of the grand jury returning the indictment was not qualified to serve due to a conflict of interest, bias, partiality or inability to follow the law.</u></p> <p>(New language)</p> <p><u>"At least 24 hours before grand jury proceedings begin, the target's attorney may submit proposed questions and exhibits to the district attorney or the attorney general.</u></p>	<p><i>Requires unbiased, impartial, conflict-free factfinders. Improves reliability of the process.</i></p> <p><i>Expands the judicial review of the grand jury process to include the lack of fairness of the grand jurors.</i></p> <p><i>Provides a procedure for the target to submit questions and exhibits. Makes process more thorough and more reliable. Rule 5-302A requires 48 hours.</i></p>
<p>§31-6-5. Return of Indictments.</p> <p>".. Upon application to the court by the state of the person named in the proposed indictment, the court may release a sealed no-bill for good cause shown."</p>	<p>".. Upon application of the court by the state for good cause shown, or upon request by the target, the court may release a sealed no-bill."</p>	<p><i>Makes release of a no-bill (exoneration) automatic if requested by the target, whereas the government must show cause for same.</i></p>

2002 Statute	2003 Amendments	<i>Effect of Change</i>
<p>§ 31-6-7. Assistance for grand jury; report.</p> <p>"D. A prosecuting attorney attending a grand jury shall conduct himself in a fair and impartial manner at all times when assisting a grand jury."</p>	<p>"A prosecuting attorney attending a grand jury <u>and all grand jurors shall conduct themselves</u> in a fair and impartial manner at all times during grand jury proceedings."</p>	<p><i>Requires grand jurors to conduct themselves fairly and impartially. Makes process more reliable.</i></p>
<p>§ 31-6-11. Evidence before grand jury.</p> <p>"A. Evidence before the grand jury upon which it may find an indictment is the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors."</p>	<p>"Evidence before the grand jury upon which it may find an indictment is <u>that which is lawful, competent and relevant</u>, including the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors. <u>The Rules of Evidence shall not apply to a grand jury proceeding.</u>"</p>	<p><i>Establishes "lawful, competent, and relevant" as the minimum measure of evidence.</i></p> <p><i>Previously (since 1981) there was no quality standard. Before 1981, the standard was that evidence must be admissible at trial.</i></p> <p><i>Though the evidence must meet the minimal standard, it need not necessarily meet the Rules of Evidence.</i></p>
<p>§31-6-11. Evidence before grand jury.</p> <p>"A. ...The sufficiency <u>or competency</u> of the evidence upon which an indictment is returned shall not be the subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury."</p>	<p>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"</p>	<p><i>Expands judicial review: The prohibition against review of "competency" of evidence is eliminated so that competency may now be reviewed.</i></p>

2002 Statute	2003 Amendments	Effect of Change
<p>§ 31-6-11. Evidence before grand jury.</p> <p>"B. ...when it has reason to believe that other competent evidence is available that may explain away or disprove a charge or accusation or would make an indictment unjustified, then, it should order the evidence produced...."</p>	<p>"B. ...when it has reason to believe that other <u>lawful</u>, competent <u>and relevant evidence</u> is available that <u>would disprove or reduce a charge</u> or accusation or would make an indictment unjustified, then it <u>shall</u> order the evidence produced. <u>At least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.</u>"</p>	<p><i>1. Requires grand jury to order production of evidence that would disprove or reduce a charge when it has reason to believe it is available.</i></p> <p><i>2. Gives target a mechanism for making grand jury aware of information that it is obligated to have produced.</i></p> <p><i>Thus, makes the process more reliable.</i></p> <p><i>Note: Rule 5-302(A) increases time to 48 hours.</i></p>
<p>§31-6-11. Evidence before grand jury. (Target notice)</p> <p>"B. ...the target shall be notified of his target status and be given an opportunity to testify, if he desires to do so,..."</p>	<p>(new language):</p> <p>"C. A district attorney shall use reasonable diligence to notify a person in writing that the person is a target of a grand jury investigation....the target of the grand jury investigation shall be notified in writing of the following information:</p> <p>(1) that he is the target of an investigation;</p> <p>(2) the nature of the alleged crime being investigated and</p>	<p><i>1. Requires several components of notice including notice of the specific charges being investigated.</i></p> <p><i>2. Requires minimum time to prepare.</i></p> <p><i>3. Affords right to counsel in connection with the grand jury investigation.</i></p>

2002 Statute	2003 Amendments	<i>Effect of Change</i>
	<p>the date of the alleged crime and any applicable statutory citations;</p> <p>(3) the target's right to testify no earlier than four days after receiving the target notice if he is in custody, unless for good cause presiding judge orders a different time period for the target or the target agrees to testify sooner;</p> <p>(4) the target's right to testify- no earlier than ten days after receiving a target notice if he's not in custody, unless for good cause the presiding judge orders a different time period of the target agrees to testify sooner;</p> <p>(5) the target's right to choose to remain silent;</p> <p>(6) the target's right to assistance of counsel during the grand jury investigation."</p>	
<p>§31-6-11. Evidence before grand jury. (Target notice)</p> <p>"B. ...a showing of reasonable diligence in notifying the target by the prosecutor is not required unless and until the target establishes actual and substantial prejudice as a result of an alleged failure by the prosecutor to exercise reasonable diligence in notifying the target of his target status before the grand jury."</p>	<p>"C ...Unless the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person, the target of a grand jury investigation shall be notified in writing of the following information:..."</p>	<p><i>Eliminates requirement of showing prejudice if lack of notice to target. Requires the target to receive notice <u>unless</u> the prosecutor has obtained prior approval of the grand jury judge to omit notice because of an exigency.</i></p>

2002 Statute	2003 Amendments	Effect of Change
<p>§31-6-11. Evidence before grand jury.</p> <p>"B. ...the prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target for he is aware of such evidence."</p>	<p>"B. It is the duty of the <u>grand jury</u> to weigh all the evidence submitted to it, and when it has reason to believe that other <u>lawful, competent and relevant</u> evidence is available that would disprove or reduce the charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced."</p>	<p><i>1. Expands evidence the grand jury is required to consider—from that which "directly negates guilt" to that "evidence...that would disprove or reduce the charge or accusation or that would make an indictment unjustified.."</i></p> <p><i>2. Ensures that the target's lawful, competent and relevant(LCR) evidence is considered by the grand jury.</i></p>

In sum, the changes in the 2003 Amendments:

1. Require the grand jurors to be un-biased, conflict-free, impartial and able to follow the law;
2. Require the grand jurors as well as the prosecuting attorney to conduct themselves in a **fair and impartial manner**;
3. Remove the prohibition against the **review of competency of evidence**;
4. Expand the amount of information required to be given to the target and **emphasize the target's rights to counsel, to testify, to remain silent and to have sufficient time to prepare**;
5. **Eliminate the requirement of showing prejudice** in situations where proper notice is not provided, and instead;
6. Require a finding by the grand jury judge by clear and convincing evidence before allowing no target notice;
7. Require that evidence presented be "**lawful, competent and relevant**";

8. Require that evidence presented on behalf of the target also be "**lawful, competent and relevant**";
9. Emphasize the opportunity of the target or counsel to provide "questions or exhibits" to be presented, and to alert the grand jury to other "evidence" which might disprove or reduce a charge or make an indictment unjustified;
10. Expand the standard for evidence required to be presented on behalf of the target from "evidence that directly negates the guilt of the target" to **evidence that would "disprove or reduce the charge or accusation or that would make an indictment unjustified"**.

IV. GRAND JURY ERROR.

Some errors at the grand jury are so called "structural errors" that involves the manner in which the grand jury process is conducted and that goes to the heart of the grand jury process. This includes unauthorized persons in the grand jury room, jury instructions, target notices, and incorrect or incomplete jury instructions. *Rogers v. State*, 94 N.M. 218, 608 P.2d 530 (N.M. Ct. App. 1980); *State v. Ulibarri*, 128 N.M. 546, 551-552 (N.M. Ct. App. 1999). When there has been a structural error in the grand jury proceedings, the indictment must be dismissed regardless of prejudice. Id.

The contention that the burden is upon the defendant to show that he was injured by the action of the grand jury is unsound, because in the nature of things it would be impossible to prove the fact if true before the jury trial and because the wrong complained of is the violation of a substantial right guaranteed by the Bill of Rights, and is not a mere failure of the grand jury to observe technical requirements and formalities.

Ulibarri, P 24.

V. SEMINAL CASE OF JONES V. MURDOCH.

The New Mexico Supreme Court issued a ground breaking decision in 2009 that interpreted part of the 2003 change to grand jury law. In *Jones v. Murdoch* the court wrote:

As New Mexico's grand jury statutes—including the Legislature's most recent enactment, NMSA 1978, Section 31-6-11(B) (1969, as amended through 2003)—recognize, fundamental to a reliable indictment is a fair presentation of the evidence upon which the State asks the grand jury to indict, and the withholding of potentially exculpatory evidence strikes at the very heart of the grand jury's assessment of probable cause to indict... [P]rosecutorial interference with the grand jury's fact-finding function also threatens the structural integrity of the grand jury process by undermining the grand jury's ability to accurately and independently assess the government's evidence of probable cause. Unless the grand jury is empowered to consider all lawful, relevant, and competent evidence bearing on the issue of probable cause, the grand jury cannot perform its historical role of determining whether those accused of wrongdoing by the government should suffer the burdens of a criminal prosecution.

Jones v. Murdoch, 2009-NMSC-002 P 2

The court went on to establish a procedural mechanism by which the prosecutor is required to present the target's proposed evidence to the grand jury unless they receive authorization from the court not to do so. P 33-39.

VI. SUPREME COURT RULE 5-302A.

Rule 5-302A memorializes many of the 2003 changes in the statute as well as issues discussed in the Jones case. The rule covers target notices, quality of evidence before the grand jury, instructions to the grand jury, and district court review of the grand jury.

The rule became effective in May 2010 and is the latest direction on grand jury proceedings in New Mexico.

A. Target Notice

Like the statute above, the court rule provides that the "prosecuting attorney assisting the grand jury shall notify the target of a grand jury investigation in writing that he or she is the target of an investigation." Rule 5-

302A(A)(1) NMRA. The rule requires a notice of a target's rights, information the target may use to defend against the charge in the notice. NMSA §31-6-11 (2003); NMRA 5-302A(A) These rights are: the target's right to testify; the target's right not to testify; the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury; and the target's right to the assistance of counsel during the grand jury investigation. Id.

B. Grand Jury Evidence

The rule requires that all evidence presented to the grand jury must be "lawful, competent, and relevant evidence." In addition, the prosecuting attorney shall alert the grand jury to all lawful, competent, and relevant evidence that disproves or reduces a charge or accusation or that makes an indictment unjustified and which is within the knowledge, possession, or control of the prosecuting attorney.

The target may alert the grand jury to evidence or defenses. The prosecuting attorney assisting the grand jury may only be relieved of the duty to alert the grand jury to the target's evidence or defenses by obtaining a court order prior to the grand jury proceeding. NMRA 5-302A(B).

C. Grand Jury Instructions

The prosecuting attorney who is assisting the grand jury shall provide the grand jurors with instructions setting forth the elements of each offense being investigated and the definitions of any defenses raised by the evidence.

The prosecuting attorney shall provide the grand jury with other

instructions which are necessary to the fair consideration by the grand jury of the issues presented. NMRA 5-302A(C)

D. Court Authority and Review of Grand Jury

The district court has supervisory authority over all grand jury proceedings. Failure to follow the procedures set forth in Rule 5-302A shall be reviewable in the district court. The 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. NMRA 5-302A(F).

E. Bad Faith

Only when a target-turned-defendant challenges the sufficiency of evidence underlying an indictment must there be some showing of bad faith on the part of the prosecutor. NMRA 5-302A(F). Otherwise, bad faith is not relevant to the district court's review. Id. An attorney act in bad faith when he or she acts in willful disregard to their obligations. *Sanchez v. Borrego*, 2004 NMCA 33 ¶ 16 , 135 N.M. 192. Only when a Target turned Defendant challenges the sufficiency of evidence underlying an indictment must there be some showing of bad faith on the part of the prosecutor. NMRA 5-302(A)(F). Otherwise bad faith is not relevant to the district court's review. Id.

VII. Summary.

The grand jury statutes and rules have joined to form substantive provisions that, if followed, make the grand jury process more reliable and fair. Without their enforcement the familiar adage of "indicting a ham sandwich" remains alive.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Michael L. Stout, hereby certify that a true and correct copy of the foregoing instrument was faxed to Special Prosecutor Matthew Chandler at 575-769-3198 on this 1 day of July, 2011.



Michael L. Stout