IN THE SUPREME COURT OF NEW MEXICO

IN RE GRAND JURY PRESENTATION
CONCERNING JAMES BORT JONES,
Petitioner,

vs. **No. 30,977**

ALBERT S. "PAT" MURDOCK,
District Court Judge,
Respondent Dist. Ct. No. CR-05-1337

and

SECOND JUDICIAL DISTRICT ATTORNEY'S OFFICE,
Real Party in Interest.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER OF THE NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION

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SUMMARY

The stage at which the government decides to accuse or not is important—even critical-–and must be treated as such. An indictment that turns out to be improvident is devastating to the person indicted, and completely wasteful of judicial and legal resources. When an indictment is unsupportable, it is damaging to the integrity of the system as a whole. For all the resources that our system invests in the grand jury, the Legislature wanted it to provide a more reliable result. The New Mexico Legislature was tired of New Mexico being a "ham sandwich" state, and thus enacted the 2003 Amendments to the Grand Jury Statute.

The Legislature intended to have a more reliable and more thorough procedure with more due process and a process closer to that provided by preliminary hearings which are conducted in many New Mexico counties. To do this the Legislature provided for information from the target to be submitted to the grand jury, and gave the grand jury the duty to order up and explore any evidence that tends to disprove, reduce or otherwise show a charge is unfounded. It also provided procedures such as review of competency, requiring impartial jurors and provided mechanisms for gathering evidence in order to effect its intent. The prosecutor aide to the grand jury must submit a target's submission to the grand jury, or obtain the permission of the grand jury judge to not do so. The grand jury judge would authorize withholding the information if the State showed that the target's submission was not lawful,

competent, and relevant. A violation of the procedures requires a dismissal without prejudice. Prejudice is not required to be shown. By this approach the entire system benefits and retains its integrity.

INTRODUCTION

"[T]he grand jury is one of the least respected institutions in American criminal justice today." Kevin K. Washburn, *Restoring the Grand Jury*, 76 Fordham L. Rev. 2333 (2008). The saying that a good prosecutor could "get a grand jury to indict a ham sandwich" is an over-used cliché. *See* Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 166 (1997) (noting that in the law school classroom, "the only thing said about the grand jury (typically) is that a clever prosecutor can get it to indict a ham sandwich"). The grand jury process is widely seen as meaningless. *See generally* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1170–71 (1960) (discussing the conclusion that the grand jury had come to be seen as "an inefficient 'rubber stamp' for the prosecutor"). "Despite its auspicious origins, the federal grand jury has become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions." Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence,* 3 Va. J. Soc. Pol'y & L. 67, 123 (1995); *see also* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination,* 109 Yale L.J. 1717, 1747 (2000) ("In criminal matters, grand juries often serve, at best, as little more than a rubber stamp for the prosecutor and, at worst, as an accomplice in the abuse of power.").

The New Mexico Legislature enacted the 2003 Amendments to the Grand Jury Statutes in order to make meaningful reform to grand jury procedures in New Mexico. It made comprehensive changes to the grand jury statutes in order to protect the due process rights of the accused, promote the function of the grand jury as an accusatory body, reduce the disparity between grand jury hearings and preliminary hearings, and promote judicial efficiency over prosecutorial expediency. It made the grand jury process more reliable by stating a quality standard for grand jury evidence, by expanding the scope of evidence received by the grand jury, by encouraging, and in some case requiring, consideration of defense and mitigation evidence, by encouraging the participation of the citizen who may be a target in the process and by allowing review of the competency of the evidence..

ANALYSIS

POINT I: THE LEGISLATURE INTENDED THE 2003 AMENDMENTS TO MAKE THE GRAND JURY PROCESS MORE MEANINGFUL AND MORE RELIABLE AND THE ENTIRE JUSTICE SYSTEM MORE FAIR AND MORE EFFICIENT BY ENSURING THAT THE GRAND JURY RECEIVES MORE RELIABLE FACTS.

The Legislature enacted the 2003 Amendments to the Grand Jury Statute in order to make meaningful reform of the way that grand juries function in New Mexico. It made comprehensive changes because the grand jury system was wasting judicial resources by reaching unreliable results—that is, too often indicting cases that proved to be unsupported. It also saw that the grand jury process was creating vast inequities in the rights of an accused based on geography, because many New Mexico

jurisdictions rely on a preliminary hearing process with a strong legal framework for evaluating probable cause in a proceeding in which the defense participates. Finally, the Legislature saw that the grand jury process in New Mexico was unfair—more of an ex-parte star chamber proceeding than a meaningful step toward getting a criminal prosecution off to a fair start.

The Legislature felt that the grand jury needed to hear reliable evidence, evidence that is "lawful, competent and relevant." In addition, the target of the investigation, her attorney, and the grand jury judge should play a larger role in the proceedings, and the prosecutor should play a role that is more helpful to the grand jurors.

A. Factual Backdrop Against Which The Legislature Undertook Reform.

In 2003 the New Mexico Legislature faced a grand jury system with several unfavorable effects. Among them:

1. The harm to the individual and to the system caused by unsupported indictments.

An indictment, though technically only a charge not yet proved, is ruinous to an individual, her reputation, her wealth, her freedom and her family. A wrongful indictment in itself—regardless of ultimate outcome—remains devastating. *See, e.g.,* Ann Davis, "Life in a Federal Prosecutor's Cross Hairs," *Wall Street Journal*, Mar. 17, 1998, at B1, B17; "Duke Lacrosse Grand Jurors Speak Out," ABC News, February 6, 2007. As Justice Kennedy noted in his plurality opinion for the United States

Supreme Court in *Gentile v. Nevada,* in the time period between indictment and trial, the accused may suffer ruinous consequences to his reputation and employment from which he may never recover even if acquitted. *Gentile v. Nevada*, 501 U.S. 1030 (1991).

When an indictment is unsupportable, it is damaging to the integrity of the system as a whole. Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1, 2 n.8 (2004). Unsupported indictments only hurt the criminal justice system. *Id.; see, e.g.*, Martin S. Himeles, "How to Indict a Ham Sandwich," *Washington Times*, Aug. 18, 1999, at A17.

The stage at which the government decides to accuse or not is important—even critical-–and must be treated as such. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 929 (2006).

2. The harm to the individual and the system caused by non-competent evidence and one-sided presentation of evidence.

Non-competent evidence was being presented to grand juries in New Mexico. Competent evidence that would counter or mitigate or explain the charge was routinely omitted from the grand jury process. Professor Niki Kuckes, explaining the need for grand jury reform, wrote that "the grand jury is not an independent institution in any meaningful sense" because it consists of part-time civilians who "virtually never hear from any voice of legal authority other than the prosecutor." Kuckes, 41 Am. Crim. L. Rev. at 29-30. Professor Angela Davis gave the grand jury

process little respect as a truth-finder because the prosecutor "handles the calling and questioning of witnesses" and "essentially control[s] the process." Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny,* 86 Iowa L. Rev. 393, 462 (2001).

This made the grand jury system unreliable and over-inclusive. William J. Campbell, former federal district judge in Chicago, has written: "[T]oday, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury." William J. Campbell, *Eliminate the Grand Jury*, 64 J. Crim. L. & Criminology 174, 180 (1973).

This procedure reinforced the perception or reality of a largely meaningless system. *See generally,* David L. Fine, *Comment, Federal Grand Jury Investigation of Political Dissidents*, 7 Harv. C.R.-C.L. L. Rev. 432, 498 (1972) ("the protective function has been trivialized and the investigator's function expanded to the point where the institution is almost precisely the opposite of what the Founding Fathers intended"). A charging process that is neither accurate nor reliable is damning to the criminal justice system as a whole.

3. The considerable resources spent on the perfunctory yet unreliable grand jury process and spent in the court system dealing with improvident or improper indictments.

New Mexico spends considerable resources on the grand juries in those counties that convene them. Grand jury service demands a great deal of time and energy from

the large number of citizens called to serve on grand juries. Prosecutors are required to make presentations to the grand jury. Police officers and other witnesses take time away from their duties to testify. Yet, for all of that expenditure, the process before 2003 added little value to the criminal justice system. R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 Geo. J. Legal Ethics 361, 365 (2000) (noting that "most legislators, as well as many practitioners and commentators, believe that the grand jury has lost its ability to act as a 'shield' by screening out unmeritorious charges").

When a grand jury indictment later proves improvident once a prosecutor and/or a defense counsel have themselves reviewed the whole of the evidence and the quality (admissibility) of the evidence, even further legal resources have been wasted. Michael Waldman, "Grand Jury: Ripe for Reform," *Criminal Justice,* American Bar Association, Vol. 16, No. 4, 5.

4. The inequities involved in geography, due to the fact that many New Mexico counties utilize a preliminary hearing process in which an accused has far more rights and participation than in a grand jury.

The Legislature was concerned in 2003 about the inequities of geography in New Mexico--many New Mexico counties utilize only a preliminary hearing process, not a grand jury. In a preliminary hearing process, an accused has many more rights including far more participation; the quality of the evidence required is that admissible at trial, and a judicial officer makes the determination of probable cause to charge.

Arnella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICHIGAN LAW R. 463, 569 (1980). Case law from the New Mexico appellate courts has, over time, reinforced and strengthened the rights of the accused in connection with a preliminary hearing, all the while making the process more reliable through adversarial testing.

The grand jury process in New Mexico is used almost exclusively in the more urban portions of the state. This results in an accused having more or fewer rights, depending geographically on where she lives.

Faced with these effects the legislature enacted amendments to the grand jury statutes which were intended to strengthen the process, make it more meaningful and to give a fairer evaluation of probable cause in a manner not the same as, but closer to the protections allowed by preliminary hearings.

B. The Reforms Enacted By The Legislature: Language.

As a result of the problems above, the legislature enacted the following changes to the statutes in 2003:

2002 Statute	2003 Amendments	*Effect of Change*
§ 31-6-3. Challenge to grand jury. Grounds for challenge:…. "C. a member of the grand jury returning the indictment was a witness against a person indicted."	…. "C. ..a member of the grand jury returning the indictment was a witness or is likely to become a witness; or D. 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.	*Requires unbiased, impartial, conflict-free fact-finders. Improves reliability of the process.* *Expands the judicial review of the grand jury process to include the lack of fairness of the grand jurors.*
§ 31-6-4. Time and place for hearing.	(New language)[1] "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."	*Provides a procedure for the target to submit questions and exhibits. Makes process more thorough and more reliable.*
§ 31-6-5. Return of Indictments. "…Upon application to the court by the state of the person named in the proposed indictment, the court	"…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."	*Makes release of a no-bill (exoneration) automatic if requested by the target, whereas the government must show cause for same.*

[1] Note that the new language is different from the language in question in this case concerning 31-6-11 (B). The "proposed questions and exhibits" mentioned in this provision are narrower than the "evidence" referred to in 31-6-11(B).

2002 Statute	2003 Amendments	*Effect of Change*
may release a sealed no-bill for good cause shown."		
§ 31-6-7. Assistance for grand jury; report. "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."	"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."	*Requires grand jurors to conduct themselves fairly and impartially. Makes process more reliable.*
§ 31-6-11. Evidence before grand jury. "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."	"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>."	*Establishes "lawful, competent, and relevant" as the minimum measure of evidence.* *Previously (since 1981) there was no quality standard. Before 1981, the standard was that evidence must be admissible at trial.* *Though the evidence must meet the minimal standard, it need not necessarily meet the Rules of Evidence.*
§ 31-6-11. Evidence before grand jury. "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	"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."	*Expands judicial review: The prohibition against review of "competency" of evidence is eliminated so that competency may now be reviewed.*

2002 Statute	**2003 Amendments**	*Effect of Change*
attorney assisting the grand jury."		
§ 31-6-11. Evidence before grand jury. "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...."	"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>	*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.* *2. Gives target a mechanism for making grand jury aware of information that it is obligated to have produced.* *Thus, makes the process more reliable.*
§ 31-6-11. Evidence before grand jury. (Target notice) "B. ...the target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, ..."	(new language): "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: (1) that he is the target of an investigation;	*1. Requires several components of notice including notice of the specific charges being investigated.* *2. Requires minimum time to prepare.* *3. Affords right to counsel in connection with the grand jury investigation.*

2002 Statute	**2003 Amendments**	*Effect of Change*
	(2) the nature of the alleged crime being investigated and the date of the alleged crime and any applicable statutory citations; (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; (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; (5) the target's right to choose to remain silent; (6) the target's right to assistance of counsel during the grand jury investigation."	
§ 31-6-11. Evidence before grand jury. (Target notice) "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	"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	*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.*

2002 Statute	**2003 Amendments**	*Effect of Change*
prosecutor to exercise reasonable diligence in notifying the target of his target status before the grand jury."	following information:..."	
§ 31-6-11. Evidence before grand jury. "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."	"B. It is the duty of the **grand jury** to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce the charge or accusation or that would make an indictment unjustified, then it **shall** order the evidence produced."	*1. Obligates the grand jury to weigh evidence and to order the production of other competent evidence that would disprove or reduce a charge or make an indictment unjustified.* *2. 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.."* *3. Changes standard from that known to prosecutor to that evidence the grand jury "has reason to believe" exists.* *4. Ensures that the target's lawful, competent and relevant(LCR) evidence is considered by the grand jury.*

C. The Reforms Enacted By The Legislature: Effect on Process.

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".

D. The Legislative Intent Behind The Reforms.

By the 2003 Amendments the Legislature clearly intended to improve the *quality* and *scope* of presentations to the grand jury. The *quality* of evidence required by the statutes is restricted to that which is lawful, competent and relevant. Evidence is lawful, competent, and relevant if it is the kind of evidence upon which a jury may properly rely.[2]

Significantly, the Legislature chose to have the same standard apply to evidence from any source. Evidence presented by the prosecutor must meet the lawful, competent, and relevant standard,[3] and any evidence to which the target alerts the grand jury must also meet this standard. And, if the grand jury has reason to believe evidence meeting this standard is

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[2] The Legislature also added that the Rules of Evidence do not apply to a grand jury proceeding, signaling that, while the Legislature intended the evidence to be competent and lawful in a court of law, it did not require that the grand jury worry about such things as the technical foundation for specialized types of testimony, such as lay or expert opinion testimony. This prevents the grand jury from being burdened with all of the technical provisions of those Rules, which have evolved to govern proceedings in an adversary trial setting, but would be difficult and cumbersome to apply the Rules in a technical sense in an *ex parte* proceeding. The exact scope of what is lawful, competent and relevant is not necessarily at issue in this appeal.

[3] The Legislature also removed the prohibition against an after-the-fact review of the competency of the evidence upon which the indictment was based, while keeping the prohibition on review of the *sufficiency* of the evidence. This is analogous to this Court not questioning a jury's verdict but ruling on the propriety of the evidence it received. Similarly a judge cannot review whether probable cause existed, but can judge the competency of the evidence presented.

available that disproves or reduces the charge, the grand jury is obligated to order the evidence produced.

Requiring all evidence presented to be lawful, competent and relevant was intended to ensure the reliability of grand jury factual determinations. Before the 2003 Amendments, not only was there no quality standard for evidence at a grand jury, but there was a specific prohibition against reviewing the "competency or sufficiency" of the evidence supporting an indictment, in the absence of a showing of prosecutorial bad faith. The 2003 amendments to Section 31-6-11(A) retained the restriction to sufficiency challenges, but eliminated the restriction to competency challenges. The Legislature intended to enforce the new lawful, competent and relevant standard it had enacted by allowing judicial review of the competency of the evidence after the 2003 Amendments. Thus, it is clear that the Legislature intended the grand jury to receive evidence which is reliable.

While restricting the quality of evidence, the Legislature expanded the scope of evidence received; it intended the grand jury to have more information including specifically more information from the target's point of view.

To that end the 2003 Amendments to 31-6-11(B) place a burden on the grand jury to order the production of evidence when it has "reason to believe" that other evidence is available which will "disprove *or* reduce the charge or accusation *or* would make an indictment unjustified". This is much broader than the former language which specified that a prosecutor need only inform the grand jury of evidence which "directly negates guilt." *See Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981)

(holding that the courts were bound to not dismiss indictments based on only one side of the evidence because old statute required the prosecutor to present only that defense evidence that the prosecutor knew about that "directly negates guilt"). Thus, the 2003 Amendments broaden the scope of evidence received as long as the evidence meets the standard of quality the Legislature has set

In expanding the scope of evidence the 2003 Amendments to Section 31-6-11(B) also provide a mechanism by which the target can alert the grand jury to the existence of such evidence, and provide the concomitant duty on the grand jury to explore that evidence. In addition to the "evidence" to which the target may alert the grand jury, the target or his counsel may also provide questions or exhibits to the district attorney to present to the grand jury. *See* § 31-6-4 NMSA 1978.

In addition to improving the quality and scope of the evidence, the 2003 Amendments require that the grand jurors themselves—the fact-finders who will review that evidence—must be impartial and unbiased and able to follow the law and fairly weigh the evidence. This signals, significantly, that the Legislature intended that the grand jury would be judiciously *weighing* evidence—that is, considering evidence from at least two points of view, and not being a rubber stamp for the prosecution. *See* Suzanne Roe Neely, *Note, Preserving Justice and Preventing Prejudice: Requiring Disclosure of Substantial Exculpatory Evidence to the Grand Jury*, 39 Am. Crim. L. Rev. 171, 171 (2002). This ensures that the grand jurors conduct themselves in a manner akin to judicial officers.

In the end the legislature intended to greatly improve the grand jury system by providing the grand jury with more information of better quality and by improving the process for gathering and reviewing the evidence. The Legislature's choice to require that the grand jury hear such evidence, and to permit judicial enforcement of its standards, promotes judicial efficiency and system-wide reliability over short-term prosecutorial expediency..

E. The Reforms Enacted By The Legislature Reduce The Disparity in Rights Between The Grand Jury And The Analogous Preliminary Hearing Process.

The 2003 Amendments take a large step toward reducing the disparity between the rights and remedies provided by preliminary hearings and those in a grand jury. Under the New Mexico Constitution (unlike the federal constitution), a charge is equally valid if it comes from a grand jury, or from a judicial officer after a preliminary hearing. *See generally* N.M. Const., Art. II, § 14 ("No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information…. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination."). The Legislature saw that in New Mexico there was an unequal application of law between the grand jury process and the preliminary hearing process.

New Mexico is faced with a unique dichotomy because its citizens receive more or fewer protections in the charging process based solely on their county of residence.

In many counties, because a grand jury is seldom convened, citizens accused of crime are afforded the relatively extensive state constitutional protections which accompany a preliminary hearing. In those cases, the citizen accused enjoys far more rights, including a much greater degree of participation. The courts also enforce those rights by remanding for a new and complete preliminary hearing if the process and procedure is not followed.

1. The Protections And Participation Required In A Preliminary Hearing.

New Mexico law and case law have provided a very robust set of legal protections and procedures to ensure the fairness and reliability of preliminary hearings. For example, a preliminary hearing is heard by a judicial officer. The Rules of Evidence apply, the proceedings are public, and the defendant's rights include the right to notice, to be present, to representation by counsel, to confrontation of witnesses, and to compulsory process. *See, e.g., State v. Gonzales*, 113 N.M. 221, 226, 824 P.2d 1023, 1028 (1992) (a "preliminary hearing is akin to a trial where the witness is under oath, the defendant is represented by counsel, and the defendant is given the opportunity to cross-examine the witness"); *State v. Massengill*, 99 N.M. 283, 284, 657 P.2d 139, 140 (Ct. App. 1983) (Rules of Evidence are applicable to preliminary hearings).

"A preliminary hearing is a critical stage of the criminal proceeding." *State v. Hamilton,* 104 N.M. 614, 616, 725 P.2d 590, 592 (Ct. App. 1986) (citing *State v. Vaughn*, 74 N.M. 365, 393 P.2d 711 (1964)). As such, the courts of New Mexico have insisted

that a citizen facing a preliminary hearing has the full, effective right to counsel, as well as the right to cross-examine the State's witnesses, and have the proceeding officially recorded. *Vaughn*, 74 N.M. 365, 393 P.2d 711 (citing *Williams v. Sanders*, 80 N.M. 619, 459 P.2d 145 (1969)).

New Mexico case law has required that the defense at preliminary hearings be allowed to fully participate, both in cross-examining the State's case, and in presenting its own case, requiring the judicial officer to make a *full examination* of all the evidence. See *State ex rel. Hanagan v. Armijo*, 72 N.M. 50, 53-54, 380 P.2d 196, 198-199 (1963), (the accused has a right to present a defense at preliminary hearing.)

In *Mascarenas v. State*, 80 N.M. 537, 540-41, 458 P.2d 789, 792-93 (1969), the Supreme Court held the state constitutional rights to confrontation and due process applied at a preliminary hearing and that a citizen accused has the right to review the state's witness' statements before confronting the witness. Denial of that right amounts to the denial of a preliminary examination and the court was without jurisdiction to proceed with the trial based upon an information." *Id.* at 538, 458 P.2d at 790 (citations omitted). Thus, the case was remanded after conviction by the Supreme Court to the magistrate court. The conviction by a jury beyond a reasonable doubt did not cure the violation.

2. The 2003 Amendments Reduce The Disparity Between Preliminary Hearing Jurisdictions And Grand Jury Jurisdictions.

The result of a grand jury indictment and a preliminary hearing bind-over order are constitutionally equivalent: each is the constitutional process required to screen charges. Yet, as the Legislature recognized in its efforts with the 2003 Amendments to the grand jury statute, those citizens facing a grand jury enjoy very few of the protections that they would enjoy if they were in a preliminary hearing county. *Compare State v. Salazar*, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970) (Defendant did not have a right to a preliminary hearing because he was indicted by a grand jury, and he had no right to appear before the grand jury, to cross-examine grand jury witnesses, or to a transcript of the grand jury proceedings) *with Mascarenas, Hanagan,* and *Vaughn, Massengill.*

By making the grand jury more like the judicial officer (requiring to be fair and unbiased), requiring more evidence from both sides, allowing more participation from the citizen who is the target and her counsel, and setting a minimum quality standard for the evidence before a grand jury, the 2003 Amendments bring the grand jury process closer to the standards of the preliminary hearing process.

F. The Legislature Felt Reform Was Necessary Because The Process Before 2003 Did Not Comport With State Constitutional Protections.

The Legislature enacted the comprehensive package of reforms in 2003 in part because the Legislature was concerned that the grand jury process as it was happening across New Mexico did not comport with the protections of the New Mexico Constitution. One obvious problem was that potential defendants in counties that

used the preliminary hearing process enjoyed vastly more procedural rights, constitutional protections, and participation than those in grand jury counties. Also, those in preliminary hearing counties enjoyed the fact that the quality of the evidence was reviewed by a judicial officer. Before the 2003 Amendments, an identical target in a grand jury county would not necessarily get notice, would not get to participate, would be forbidden in most cases to have the quality of the evidence reviewed by a judicial officer, and not have the right to have defense evidence put forth (unless it "directly negates guilt"). Consequently, citizens in non-preliminary hearing venues receive fewer protections as their cases are presented to secret grand juries without being afforded the constitutional protections which attach to preliminary hearings. The Legislature took steps to remedy this unequal application of the law.

The Legislature's actions helped address other New Mexico constitutional concerns, like due process, confrontation and compulsion of testimony. These concerns were raised due to a lack of evidentiary standards, lack of mechanism for defense participation, and outright restrictions on challenges to indictment present in the grand jury statute before 2003. The Legislature partially addressed those concerns by adding more safeguards and fairness to the grand jury system in New Mexico.

POINT II. HOW THE PROCESS MUST WORK TO EFFECTUATE THE LEGISLATURE'S 2003 AMENDMENTS.

The Legislature felt that unjust and unnecessary indictments resulted when non-competent evidence was presented, or when "lawful, competent and relevant

evidence" - provided by the target or her counsel - was not presented. The best way to implement the intent of the Legislature is to make sure every participant in the grand jury process carries out his or her role under the statute, as early in the process as possible. After a person has been wrongfully indicted is too late—the effect of an indictment is ruinous, and the resources of the grand jury, witnesses, and prosecution and defense have been wasted.

A. All Written Submissions From The Target Must Be Sent On To The Grand Jury, Unless They Are Not Lawful, Competent, or Relevant.

In order to meaningfully carry out the Legislative intent, there must be a mechanism that ensures that all of the lawful, competent and relevant evidence that tends to disprove, reduce or otherwise make an indictment unwarranted is indeed provided to the grand jury. All lawful, competent and relevant evidence provided by the target must be presented to the grand jury. As this Court has found in its briefing order, the prosecutor aide to the grand jury clearly plays a screening role; however, that role is restricted to screening evidence to ensure that it is lawful, competent, and relevant.

B. If the Prosecutor Aide Disputes that the Target's Submission Is Lawful, Competent, and Relevant She Must Obtain Permission From the Grand Jury Judge Withhold That Part Of The Submission To The Grand Jury.

The Legislature meant for the target's communication to be provided to the grand jury *unless* it can be confidently said that the evidence does not meet the lawful, competent and relevant standard.

The Legislative intent is best carried out by requiring the prosecutor aide to pass the target's submission on to the grand jury. If she believes the evidence should not be passed on to the grand jury, she must persuade the grand jury judge that evidence referred to by the target is not lawful, competent, or relevant, and thus should be withheld from the grand jury. Absent such a finding, the information must be provided to the grand jury. This is the only way to meaningfully effectuate the Legislature's intent.[4]

The Legislature intended that this evidence *must* be provided to the grand jury if it is lawful, competent, and relevant. The prosecutor may interrupt the flow of information only with a good legal basis, and thereby bears the burden to show the grand jury judge that the information is not lawful, competent, and relevant. This early review before evidence is withheld will result in less disruption of the process, and less wasting of resources, than later judicial review and remedy would provide. In short, this requires the presentation to be done right, the first time.

The way to enforce the Legislature's intent is to require the prosecutor aide to pass the target's written submission to the grand jury unless receiving an order from the grand jury judge authorizing the prosecutor to withhold some part of it. If the

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[4] Note that this procedure is similar to the target notice procedure in the statute, NMSA Section 31-6-11, where the State must show by clear and convincing evidence that the target notice should not be given. Without such a ruling from the grand jury judge the State must provide the notice.

prosecutor does not wish to pass on the target's written submission in whole or in part, then the prosecutor, after notifying target's counsel of the dispute, must request a ruling from the grand jury judge. Only if the grand jury judge is convinced that the written submission, or part thereof, is not lawful, not competent, and not relevant, may the target's submission (or relevant part thereof) be withheld from the grand jury.

This procedure is necessary in order to implement the intent of the Legislature. At every turn the statutes announce the intent to provide the grand jury with more and better evidence including submissions by the target. For example, Sub-section B of Section 31-6-11 provides for alerting the grand jury to defense evidence and imposes on the grand jury the duty to order production of such evidence. The amended statute not makes it "the *duty* of the grand jury to weight all evidence submitted to it…". It also imposes on the grand jury the *duty* to order production of any evidence that would disprove a charge or make an indictment unjustified ("…it shall order the evidence produced"). In same Sub-section, the Legislature provides for the target's counsel to alert the grand jury to the existence of evidence that would disprove, reduce, or make an indictment unjustified—thus again triggering the grand jury's duty to order production of the same. By these provisions the Legislature clearly stated the importance it places on the grand jury receiving more and better evidence. Only a neutral authority, the grand jury judge, could reasonable prevent the grand jury from reviewing the target's evidence. It would not fulfill the Legislature's

intent to allow the prosecutor aide to make an ex parte and un-reviewed decision as to whether the evidence submitted by the target should be withheld.

Thus, the information from the target is presumptively passed on to the grand jury. That presumption is overcome only in those rare cases in which the prosecutor takes the written submission from the target (the submission, like the letter in this case, that is designed to alert the grand jury to the mitigating evidence) to the grand jury judge. The grand jury judge is the only authority who can decide that a target's written submission may be withheld from the grand jury, and the grand jury judge can only so rule if convinced that the submission is not lawful, competent, or relevant.

C. The Necessary Enforcement Mechanisms: In Case Of A Dispute The Grand Jury Judge Decides.

The earlier in the process that any dispute about withholding of target evidence is resolved, the better. Any dispute should be resolved by the grand jury judge, who will (when the prosecutor wishes to withhold the submission) have the job of determining whether the evidence is lawful, competent, or relevant. The simplest and earliest mechanism which is reasonably possible is best. And, in this situation the simplest and earliest way to effect the Legislature's intent is to require the prosecutor to get the approval of the grand jury judge before he may withhold the target's submission from the grand jury, just as the prosecutor must get the grand jury judge's approval to withhold timely notice to the target, or excuse late notice to a witness. The grand jury judge would decide whether the State has shown that the evidence is

not lawful, competent and relevant after hearing briefly from the target's counsel and the prosecutor. (The target's counsel would naturally be in the best position to explain why the target's submission is competent, lawful and relevant to the matter, and the prosecutor aide to explain why it is not.)

This brief detour to get the approval from the grand jury judge for those rare cases in which the target's submission is not appropriate is the most efficient way to address the dispute. To wait until after indictment would be very inefficient—penny wise and pound foolish" in terms of time spent. It is not unlike the approval the prosecutor must obtain for other departures from procedure. For example, the prosecutor must go to the grand jury judge an obtain approval for withholding notice from the target. § 31-6-4 NMSA 1978 (2003). Also, the prosecutor must go to the grand jury judge for approval any time the prosecutor wishes to give a witness less than 36 hours notice, § 31-6-12 NMSA 1978 (1979), or to change the length of notice to the target, § 31-6-11(C)(3) NMSA 1978 (2003).

The grand judge is given numerous decisions to make early in the grand jury process. The grand jury judge has the duty to issue subpoenas (for either side) and issue orders compelling the production of relevant records and evidence. *Id.* The grand jury judge must find whether a target or a witness who wishes to assert the Fifth Amendment privilege has a valid claim. *Id.* The grand jury judge must determine if a lawyer or firm can represent multiple people involved in the grand jury, § 31-6-14; review for good cause the state's requests to unseal a no-bill, § 31-6-5; administer

oaths to the grand jurors, fore-person, and witnesses, § 31-6-6; charge the grand jury with its duties and "as to any special inquiry into violations of law it wishes to take," § 31-6-9. This added duty of a grand jury judge will not make any massive or watershed change in the judge's workload. Practically speaking, most of the time it will not be worth the prosecutor's time to resist presenting the target's submission and the target's evidence. In those few cases where a challenge is made, what is asked of the grand jury judge is not all that different from the duties already served by the grand jury judge.

D. The Remedy for Failure To Follow the Procedure Of Obtaining Grand Jury Judge Approval: Automatic Dismissal Without Prejudice.

If in district court it is learned that the prosecutor withheld the target's submission from the grand jury without first obtaining the approval of the grand jury judge, the remedy should be dismissal without prejudice. If a prosecutor aide received from the target appropriate written alert of evidence that was lawful, competent, and relevant, yet the prosecutor withheld it from the grand jury *and* failed to obtain the grand jury's judge approval for withholding it, the remedy required (to animate the Legislature's intent) is an automatic dismissal without prejudice, requiring the prosecution to do the grand jury examination over or proceed by preliminary hearing. Without this remedy, there simply will not be any meaningful enforcement mechanism to induce prosecutors to fulfill the Legislature's intent that the grand jury hear all submissions concerning lawful, competent and relevant evidence.

This procedural flaw is akin to the legal flaws in a grand jury such as lack of a record the grand jury was properly instructed, *State v. Ulibarri,* 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164 (dismissal of the indictments required because the record before the grand jury did not reflect that the jury had been instructed on the record as to the elements of the crimes that it needed to match against the evidence that it received); there were not the correct number of grand jurors, *State v. Garcia,* 61 N.M. 404, 301 P.2d 337 (1956) (indictment by a grand jury composed of more than 12 persons was void and ineffective); an unauthorized person in the grand jury room, *see Davis v. Traub,* 90 N.M. 498, 499-500, 565 P.2d 1015, 1016-17 (1977) (stating that the purpose of the rule prohibiting unauthorized persons before the grand jury is to protect the secrecy of the proceedings and prevent undue influence); or the prosecutor was not properly commissioned, *State v. Hill*, 88 N.M. 216; 539 P.2d 236 (Ct. App. 1975) (the presence and participation of a private prosecutor in a grand jury proceeding, employed on a fee basis, not by the State, but by the father-in-law of the deceased, was reversible error; prejudice was presumed).

This is the same remedy as the remedy that New Mexico's appellate courts have developed to enforce the procedural requirements of a preliminary hearing. Under New Mexico law, the enforcement mechanism for the failure to provide any of the procedural safeguards required in a preliminary hearing is that the indictment is dismissed without prejudice, and the State must do the procedure over. New Mexico courts have developed an automatic do-over as a remedy for preliminary hearing

procedural flaws. *See State ex rel. Hanagan v. Armijo*, 72 N.M. at 53-54, 380 P.2d at 198-199; *Mascarenas,* 80 N.M. at 538, 458 P.2d at 790. If a preliminary hearing proceeding lacked any of the essential ingredients (the unbiased judicial officer, counsel, the right to call witnesses, and review state witness statements), then the Courts have imposed, on their own initiative, the remedy of automatic dismissal without prejudice, and the State had to re-do the procedure, correctly. *See id.* In the preliminary hearing context, the New Mexico courts have recognized that the only way to effectively emphasize that the process be followed correctly is to require an automatic do-over. It makes sense for this Court to impose the same type of remedy for violation of the procedural protections in the grand jury process, particularly since the Legislature's 2003 Amendments to the grand jury process were made in part in order to reduce the disparity between the preliminary hearing process and grand jury process.

E. A Later District Court Review For Whether There Is Prejudice Does Not Effectuate The Legislative Intent.

The State will probably advocate that dismissal is appropriate only if the district court later determines there is prejudice. This remedy would not adequately effectuate the Legislative intent. The Legislature clearly felt that if target evidence is lawful, competent, and relevant, there is prejudice inherent in withholding it from the grand jury. That was the point of the 2003 Amendments. Moreover, the Legislature has clearly stated in the 2003 Amendments that it does not want the district court in the business of reviewing and re-weighing the grand jury evidence. The Legislature

specifically made it improper for the district court to review the sufficiency of the evidence for an indictment, while permitting only a review of the procedure and competency of evidence. If a district court is required to find prejudice from each procedural or evidentiary violation, it would necessarily be required to make a review of the sufficiency of the (remaining) evidence to determine whether there is prejudice, or not—exactly what the Legislature has said that it does not want.

The Court should not countenance a requirement to show prejudice for the failure of the State to follow the statutory evidence requirements, or the procedure of obtaining the permission from the grand jury judge for departing from the statutory requirements, any more than it requires a showing of prejudice when the grand jury is incorrectly instructed, or when the target does not receive notice, or when an unauthorized person was in the grand jury room. *E.g., State v. Ulibarri,* 1999-NMCA-142; *Garcia,* 61 N.M. 404, 301 P.2d 337 (1956); *Davis v. Traub,* 90 N.M. at 499-500, 565 P.2d at 1016-17; *Hill*, 88 N.M. 216; 539 P.2d 236.

Having the district court review for prejudice before dismissing (for the violation of withholding target submissions without judicial approval) would have the undesirable effect of encouraging the prosecutor aide to usurp the function of the grand jurors. That is, it would encourage a prosecutor aide to unilaterally decide to forgo review by a grand jury judge when she felt like withholding the submission would not be very prejudicial. Yet, the 2003 Amendments leave that determination for the grand jury, itself—whether the submission indicates that there is evidence that

is lawful, competent and relevant that mitigates, disproves or otherwise makes a charge unwarranted. A prosecutor knowing that her unilateral decision would only be reversed if the accused could later show prejudice might be inclined to "roll the dice," to relieve the grand jury from fulfilling its duties under the statute and hope that the district judge will later find no prejudice. The Legislature clearly intended the opposite—that if there is any minimal relevance to the submission, that the grand jury hear it, and weigh it according to its statutory duty.

F. Overview Of The Mechanics Of The Process Required For The 2003 Amendments To Be Meaningful.

The full process intended by the 2003 Amendments is as follows. A target is provided with target notice, unless the prosecutor aide goes to the grand jury judge and convinces the grand jury judge by clear and convincing evidence that such notice would be unreasonable because of the possibility of flight, obstruction or danger--one of the exceptions in Section 31-6-11(C). The notice alerts the grand jury target that she has a right to get counsel.

At least 24 hours before the grand jury proceedings begin, the target's counsel may submit proposed questions and exhibits to the prosecutor grand jury aide. § 31-6-4(D) NMSA 1978 (2003). Also, at least 24 hours before the proceedings begin, target or his counsel "may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury[,] in writing[,]

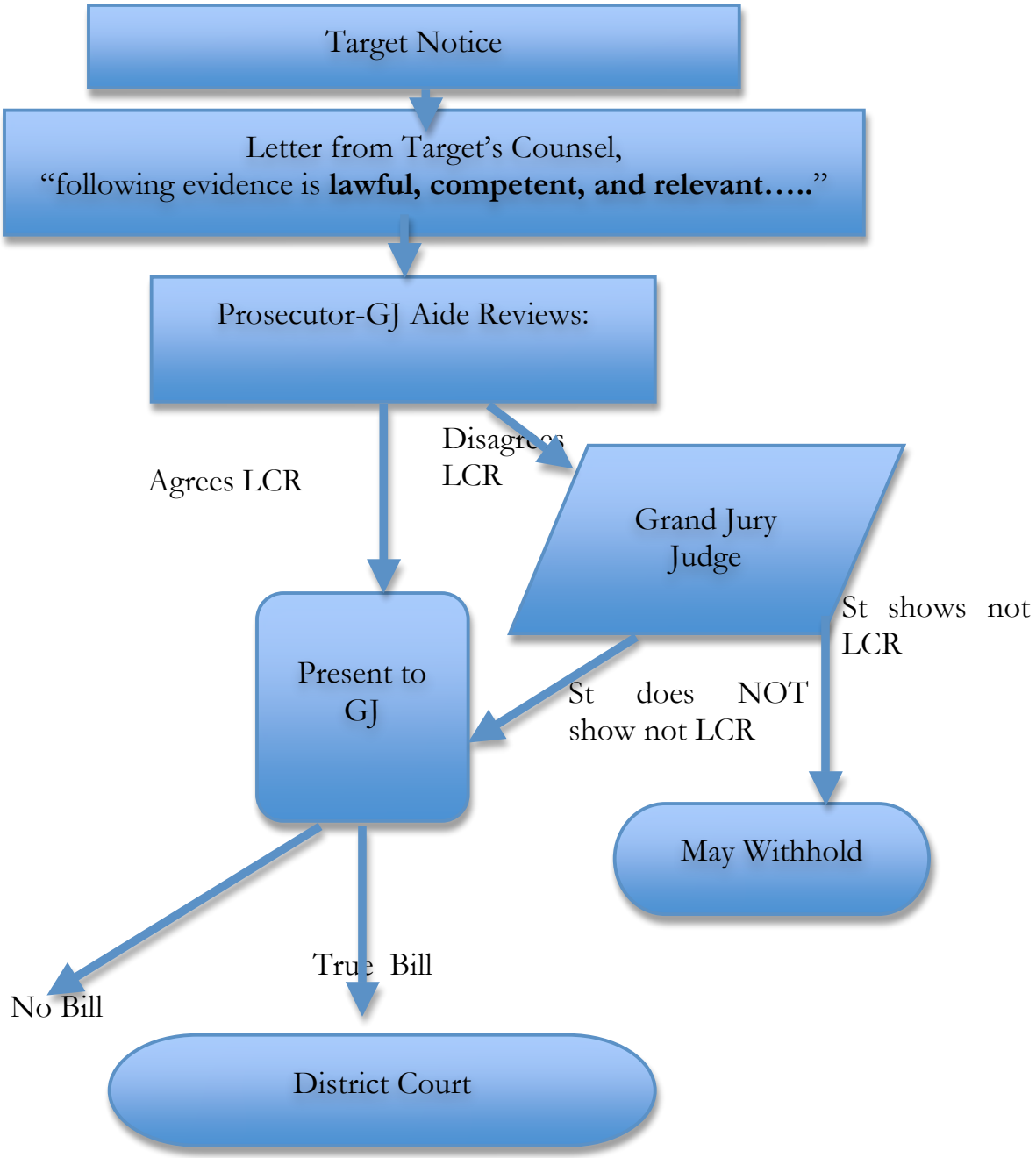
regarding the existence of the evidence." § 31-6-11(B) NMSA 1978 (2003). Note that what is given to the prosecutor are "proposed" questions and exhibits. In contrast, the written alert about evidence that might disprove, reduce, or make an indictment unjustified is not "proposed"—it is submitted "to alert the grand jury." *Compare* NMSA 1978, § 31-6-4(D) (2003) (proposed questions and exhibits) *with* NMSA 1978, § 31-6-11(B) (2003) (may alert in writing, triggering grand jury's duty to order production).

The prosecutor aide will submit the target's submission alerting the grand jury to evidence to the grand jury, *unless* the prosecutor feels that it is not lawful, competent, and relevant. In that case, he will take the submission to the grand jury judge, for permission to withhold the submission. The grand jury judge would not give such permission unless it were convinced, after hearing from target's counsel and arguments of the prosecutor, that the submission was indeed not competent, not relevant, or not lawful. Otherwise the submission must be provided to the grand jury. Once such an alert is submitted to the grand jury, the grand jury must "order the evidence produced" if it feels that this evidence might reduce, disprove or otherwise show that a charge is unwarranted. § 31-6-11(B) NMSA 1978 (2003).

If the prosecutor withholds target submissions without complying with this procedure, then the district court will automatically dismiss without prejudice, for the process to be done over, right.

Graphically, this process looks like this:

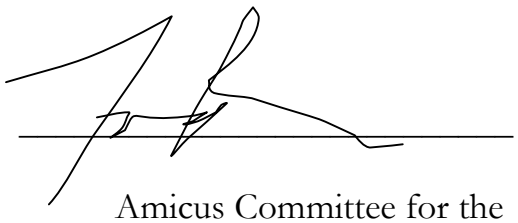
Grand Jury Process after 2003 Amendments



CONCLUSION

The New Mexico Legislature was tired of New Mexico being a "ham sandwich" state, and thus enacted the 2003 Amendments to the Grand Jury Statute. In order to make the Legislature's efforts have the effect the Legislature intended, it is important that the remedies and enforcement mechanisms the court supply ensure that each participant in the grand jury process fulfills its role as early in the process as possible. In the case of a target's submission of what the target's counsel says will alert the grand jury to lawful, competent and relevant evidence, that submission must be transmitted to the grand jury unless the prosecutor convinces the grand jury judge that it is not alerting the grand jury to lawful, competent and relevant evidence. Withholding target submissions from the grand jury without judicial approval should require dismissal without prejudice.

Respectfully submitted,



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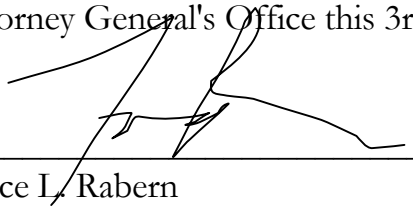
I hereby certify that a copy of this pleading was served by US Mail to the Appellate Attorney General's Office this 3rd day of June, 2008.



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