

MEMO

TO: Nancy Fraley, Fayette County PDO
FROM: Jason Parmer, PDS
DATE: 12-4-14
RE: Motion to quash indictment

Question presented: Is it proper for prosecutors to consistently lead witnesses during grand jury proceedings? Answer: It may not be proper, but it is also not a reason to dismiss an indictment unless there is evidence that prosecutors are intentionally misleading the grand jury to the point that it affects their charging decision. However, if the prosecutor exhibits a pattern of impermissible behavior during grand jury proceedings, a court may find the prosecutor in contempt of court or initiate disciplinary proceedings, depending on the facts.

In general, the legality of grand jury procedure cannot be challenged unless a defendant can establish “a *prima facie* case of willful, intentional fraud in obtaining the indictment.” Syllabus Points 2 and 3, *State ex rel. Pinson v. Maynard*, 181 W.Va. 662, 383 S.E.2d 844 (1989). A prosecutor before the grand jury performs a limited role. The circuit judge instructs the grand jury on the elements of the various crimes that are presented to it. The prosecutor presents witnesses to establish probable cause that a crime was committed. He is not permitted to express his view on the credibility of such witnesses or on the guilt of the accused. Before the grand jury begins its deliberations, the prosecutor must leave the grand jury room. *State ex rel. Knotts v. Watt*, 186 W. Va. 518, 522-23, 413 S.E.2d 173, 177-78 (1991).

In order for prosecutorial misconduct to justify the dismissal of an indictment, it must significantly infringe “on the grand jury’s ability to exercise independent judgment” and affect the grand jury’s charging decision. *Bank of Nova Scotia* at 259. The mere fact that a prosecutor presents unreliable or incompetent evidence is not sufficient to require a dismissal of an indictment. *Id.* at 261; *citing Costello v. United States*, 350 U.S. 359, 363 (1956). In order to

find prosecutorial misconduct during a grand jury proceeding, there must be evidence that prosecutors knowingly presented false or misleading testimony, or that the government caused witnesses to testify falsely. *Bank of Nova Scotia* at 261. If a grand jury investigation is ongoing, a court will consider the cumulative prejudicial effect of all alleged prosecutorial misconduct. *Id.* at 263. Rather than dismissing the indictment, courts usually prefer other ways to address prosecutorial misconduct, either by a contempt of court charge or an initiation of disciplinary proceedings. *Id.*

Also, harmless error analysis applies to grand jury proceedings. Syllabus Point 6, *State ex rel. Pinson v. Maynard*, 181 W.Va. 662, 383 S.E.2d 844 (1989), citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). Therefore, “dismissal of an indictment is appropriate only ‘if it is established that the violation substantially influenced the grand jury’s decision to indict,’ or if there is ‘grave doubt’ that the decision to indict was free from the substantial influence of such violations.” *Id.* Further, it is appropriate to dismiss an indictment only when “the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice.” *Bank of Nova Scotia* at 256-57; see *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (racial discrimination in the selection of grand jurors compelled dismissal of the indictment because it can be presumed that a discriminatorily selected grand jury would treat defendants unfairly); *Ballard v. United States*, 329 U.S. 187 (1946) (exclusion of women from grand jury justified dismissal of indictment). The nature of the violations in *Vasquez* and *Ballard* allow a presumption of prejudice, and do not require a harmless error analysis; however, these cases are the exception, not the rule. *Bank of Nova Scotia* at 257.

The grand jury is an institution separate from the courts, serving “as a kind of buffer or referee between the Government and the people.” *United States v. Williams*, 504 U.S. 36, 47 (1992). Because of the theoretical independence of the grand jury, the U.S. Supreme Court has been reluctant to invoke judicial supervisory power as a basis for prescribing modes of grand jury procedure. For example, indictments cannot be challenged “on the ground that there was inadequate or incompetent evidence before the grand jury.” *Williams* at 54 (1992), quoting *Costello* at 363-64. Further, “the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment,” and “a challenge to the reliability or competence of the evidence presented to the grand jury” will not be heard. *Williams* at 54, quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988). The reason for this is that a review of facially valid indictments runs “counter to the whole theory of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires it.” *Williams* at 54, quoting *Costello* at 364.

Williams cites many examples of traditional criminal procedural protections that do not apply in a grand jury proceeding. For example: the 5th Amendment Double Jeopardy Clause does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so; the Sixth Amendment right to counsel does not attach when a person is the subject of a grand jury investigation; the 5th Amendment right against self-incrimination does not bar the presentation of statements obtained in violation of the privilege; the 4th Amendment does not bar questions based upon physical evidence obtained by an illegal search or seizure; and the hearsay rule doesn’t apply in grand jury proceedings. *Williams* at 49-50. Technical rules such as hearsay “run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules.” *Id.* at 50, quoting *Costello*.