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New York Grand Juries: Rubber Stamp of ADA's Requests?

Dana Neacsu, Ph.D.[*]

As the saying goes, in North Carolina you can indict a ham sandwich for the murder of a pig. In New York, the saying would be slightly different. It would say that any decent assistant district attorney (ADA) can get a jury to indict a ham sandwich. However, such a feat would have to rely on help from New York's finest. The media usually cover those unfortunate incidents where police testimony had been questionable, even criminal.[1]] This Article goes in a different direction.

The perceived grand jury weakness expounded here is its lack of agency, or capability of seeking legal advice, as it did in its pre-1970 era.[2] This Article contents that because today legal advice is solely within the ADA's discretion all too often that advise is so cursorily presented that its sole effect is often to confuse rather than help jurors decipher the meaning of the law.

Additionally, because the grand jury's only source of legal information is only the office of the district attorney, this creates an upper-hand reliance and appearance of bias, though neither cases nor the existing literature seems to acknowledge it. Sometimes ADAs discharge their function perfunctorily and doing so they may inadvertently appear as attempting to manipulate jurors, who generally do not have specialized legal knowledge. For instance, prosecutors may refuse to answer a question which a juror finds clarifying, but the prosecutor may find it superfluous or obnoxious, especially if it pokes holes in their theory. Before answering it, the prosecutor may reformulate it in such a manner that it eventually appears irrelevant or repetitive and as such the answer becomes unnecessary. Such instances are possible because, as argued here, the institution of the grand jury has been recast by the New York legislator from an institution able to function independently of the prosecutor's office by deciding what legal advice needs and when it needs it, into an ADA appendix.

In other words, the grand jury institution, the stronghold guarantee of individual liberty,[3] the constitutional safeguard against arbitrary prosecution, is not perfect. But, this is not cause for despair. As this Article explains there are two easy ways to improve this situation. The ADA should read the law each time it charges the jury and hand out a copy of the statutory provisions to the jurors so they can follow up the technical explanation.

I. The Grand Jury Institution

The United States Constitution incorporated the existing common law institution of the grand jury into its Fifth Amendment. At the federal level, the institution is further governed by [Rule 6 of the Federal Rules of Criminal Procedure](#) and the United States Code Annotated Title 18, Crimes and Criminal Procedure.

Under federal law, the grand jury is the “body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor,”[4] which inquires into the existence of “possible” criminal conduct.[5] This institution is presumed to be “acting independently of either the prosecuting attorney or judge”[6] by acting as the “substantive safeguard against oppressive and arbitrary pro-

ceedings.”[7] As Robert Boyle explains, the grand jury is a constitutional safeguard against the public opprobrium and oppression associated with criminal proceedings.[8]

The grand jury is supposed to ensure that there is a legitimate basis for starting criminal proceedings both at the federal and state level. While more than half of the states have accepted the Supreme Court's “invitation”[9] to eliminate mandatory screening by the grand jury,[10] New York is not one of those states.

The New York State Constitution[11] recognized the existing common law institution exported from England and adopted it into the state's legislative heritage.[12] Like its federal law counterpart, New York law requires grand jury review of all serious criminal charges.[13] Thus, all New York-committed felonies have to receive a grand jury indictment before they can be prosecuted. Often, New York courts have settled any questions about the role of the grand jury in clear wording: “The primary function of the Grand Jury in our system is to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to criminal prosecution.”[14]

In order to achieve this function, New York statutes detail the process of selecting a grand jury, and its proceedings. For example, the grand jury comprises twenty-three people who act in secret and vote to approve or reject a felony indictment. Those twenty-three conscripted laypersons are designated as a specific grand jury panel by month, if they work half days, or by two-week terms, if they work full days, for the purpose of administrative convenience.

Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.[15]

Placed in front of a grand jury and in the company of a warden and a stenographer, prosecutors present an oral accusation—i.e., the indictment. Then they introduce the evidence and read the law to the jurors (charge them with the law applicable to the facts). Then witnesses are produced. For example, in “bust and buy” drug operations, the witnesses are the undercover and the arresting officers. Sometimes, the suspects present their own case, too. After all the evidence is given and the prosecutors further instruct the jury that the suspect is an interested party in the proceedings, the jury deliberates in secret. If twelve members of the jury find that there is sufficient evidence that the party “appears” to be guilty, they give a “true bill.” If not, the indictment is “thrown out.”[16] In 2004, the Court of Appeals upheld the rule that the formal vote of all 12 jurors is necessary to dismiss a charge.[17]

Under New York law “[t]he grand jury is the exclusive judge of the facts with respect to any matter before it.”[18] In doing so the jurors hear witnesses and felony suspects testifying before them and seek help from their legal advisor, so they can determine legally sufficient evidence before voting to or not to indict under New York Civil Practice Law & Rules (N.Y. C.P.L.R.) § 190.60(1).

The grand jury institution is thus crucial in our criminal justice system. Its functioning is prescribed by law, but those prescriptions are implemented by intermediaries. Under the law,

[t]he legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before

it, and such instructions must be recorded in the minutes.[19]

As it has become apparent from the above short description of N.Y. C.P.L.R. § 190.25,[20] the New York grand jury rules are quite detailed. The same level of specificity applies to rules about the procedure grand juries follow, especially in N.Y. C.P.L.R. § 190.25(4)(a).[21] Briefly, grand jury presentations are ex parte and secret, subject to only exceptions incident to special criminal statutes.[22] Moreover, because grand juries often indict on one-sided evidence (the police officers' testimony), what constitutes legal advice and how it is presented to jurors becomes the only objective means to counteract potential witness distortions.[23]

II. The New York Grand Jury—Proceedings And Operation

Under New York law, grand juries can receive legal advice if the court or the prosecutor finds it is necessary to give that advice. In other words, neither the court nor the prosecutor has a classic duty to give legal advice. It is within their discretion to do so. The language of the statute reads, “[w]here [the court or the prosecutor or both find it] necessary or appropriate [they] must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.”[24]

Once these institutions invest themselves with the “duty” to give advice, then by law, prosecutors are required to “instruct the grand jury concerning the law with respect to its duties.”[25] One would think that this situation is similar to that of a Good Samaritan whose help once started has to be completed for the rescue to be reasonable. For example, the United States Supreme Court has often held that “it is hornbook tort law that one who undertakes to [do something which induces public reliance] must perform his ‘good Samaritan’ task in a careful manner.”[26] This Article argues that the level of advice is inadequate and, in light of the ambiguous nature of judicial guidance, the standard may only deteriorate if left unaddressed. Indeed, the New York C.P.L.R. statute is unclear about how prosecutors discharge themselves of this “duty” in a manner other than instructing jurors to issue true bills of indictment. Nor does the legislative history bring clarity to this matter. The Senate bill S. 7276 and the Assembly bill A. 4561, which became N.Y. C.P.L.R. § 95.25 (1970) and then, renumbered, the current N.Y. C.P.L.R. § 190.25, do not give any indication as to what created the need for the legislative change.

A. The Grand Jury System Pre-1970

The 1960 statute, N.Y. C.P.L.R. § 255, gave voice to a different view about grand juries. It stated:

The grand jury may in any case ask the advice of any judge or the court, or of the district attorney of the county, or, if the matter or thing concerning which they desire advice relates to crimes against the elective franchise [...] of the attorney-general, or of any of his assistants, deputy assistants or attorneys, regularly or specially employed by him, who have taken the constitutional oath of office.

Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter...[27]

This empowering language dated from an earlier 1928 statute, which stated: “*Whenever required by the grand jury, it shall be the duty of the district attorney of the county [...] of giving them advice upon any legal matter.*”[28] Similarly, another statutory provision from 1928 stated: “*The grand jury may in any case ask the advice of any judge or the court, or of the district attorney of the county.*”[29] In other words, until the 1970 legislative change, New York regarded the grand jury as an institution with agency, and the prosecutor had a sub-

servient duty to serve the grand jury every time the grand jury so asked.

The 1970 legislative changes and the N.Y. C.P.L.R. § 95.25 codification reversed these roles. Unfortunately, the recorded legislative history does not offer any explanation for such a reversal of positions. But, the history behind the 1970 legislative amendment supports a reading of the statute favoring ADA control over the institution.

For instance, the 1970 procedural criminal law amendment came in the midst of a larger legislative overhaul under Governor Nelson Rockefeller. Then Attorney General Louis Lefkowitz fully explained this legislative sweeping change in his letter to the Governor, which stated that the Senate bill S.7276 was meant to repeal the Code of Criminal Procedure and enact a new Criminal Procedure Law.[30] Interpreting that sweeping legislative change, Professor Abraham Abramovsky and Jonathan I. Edelstein pointed out that this reform started a decade earlier with the work of the Temporary State Commission on Revision of the Penal Law and Criminal Code, which Governor Rockefeller appointed in 1961. One of its major procedural innovations supported a speedier trial and discovery, and implicitly increased prosecutorial control of the process.

Within this grandiose context, the grand jury provisions remained mostly ignored. There is very little legislative history and similarly little attention from commentators.[31] No one, at that time and since, including the Legal Aid Society,[32] and Bronx County,[33] addressed the troublesome conservative changes regarding the legal advice grand juries could since seek and receive.

The grand jury legislative revisions remain impenetrable because there is no pre-1970 case law questioning the grand jury's work, ability to function independently of the prosecutors' office or, in particular, suggesting abuse in its quest for legal advice. Searching for evidence of grand jury recklessness in seeking legal advice produced no results for the decades, starting on January 1, 1950 and ending on December 31, 1970. In fact, the judiciary seemed content with the grand jury as it then functioned. For instance, in *People v. Gelia*, the court stated:

The Grand Jury is an inquisitorial body (Code Criminal Procedure, § 245), whose duty it is to inquire into crimes and to present indictments as accusations thereof (Code Criminal Procedure, § 247), based on legal evidence (Code Criminal Procedure, §§ 248, 249). The Grand Jury must, necessarily, be allowed to make its own determination as to the competency and credibility of witnesses.

To determine otherwise would take us into the realm of speculation, resulting in a plethora of such applications. It would invade the province of the Grand Jury and curtail their power to 'diligently inquire and true presentment make' (Code Criminal Procedure, § 238). The Judge holding such hearings would be called upon to substitute his judgment for that of the Grand Jury and in cases where there was more than one witness, he might have to weigh the testimony of one witness against another and to determinate upon whose testimony he should rely without having seen any of the witnesses himself.

Unless we are prepared to say that a judge is to become a trier of the facts or of some of the facts, this application cannot be granted. It would undermine the Grand Jury system.[34]

Similarly, in *People v. Dumas*, the court appeared to support a strong grand jury institution. There, for example, Justice Lawrence presciently warned about the need for "thoroughness of the Grand Jury exploration of the matter." [35]

Thus, in light of a lack of case law expressing misgivings of the pre-1970 grand jury power to act as an independent pre-trial fact-finder, and in light of the meek record of existing legislative history explaining the intent of the 1970 legislation, it becomes apparent that the diminished grand jury independence was a collateral, perhaps unintended, result of the 1970 legislative overhaul. Moreover, this Article argues that the grand jury's role starts with its agency, or its ability to function independently of the prosecutor's office by deciding what and when it needs legal advice. The 1970 amendment changed that dominant position, and perhaps the time has come to address this devastating "collateral" result.

B. The Post-1970 Grand Jury System

For over four decades, the prosecutor's legal advice duty is triggered by its own discretion. "Where necessary or appropriate," the statute states.^[36] For this entire period, the judiciary's guidance has remained vague, despite its many attempts at clarifying this situation. When courts have chosen to offer guidance, they have plotted two courses of action: 1) they have delineated what prosecutors need not to do; and then 2) courts have given examples of how ADAs could discharge themselves of their grand-jury-advice-giving function, within the vague limits of what they need to do.

Regarding the first course, the judiciary held that prosecutors need not instruct the grand jurors with the same degree of carefulness and detail required at trial when instructing a petit jury. For example, in *People v. Calbud, Inc.*, the New York Court of Appeals held that "a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law."^[37] Similarly, in a more recent example, the court in *People v. Bethune* stated that

[while a prosecutor must provide sufficient guidance to grand jurors to enable them to intelligently carry out their critical constitutional mission, grand jury instructions are not held to the same rigorous standards as those given to petit jurors by trial judges [and in] the usual case, it is sufficient if the District Attorney provides the grand jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime ... Where a term has an obvious meaning, the People need not necessarily charge the grand jury in detail.^[38]

In other words the "standards for measuring the sufficiency of Grand Jury instructions" are "lesser" than for petit jury.^[39] Of course, "lesser" is not a precise qualifier, so absent further detail, any minimal attempt at giving advice is meant to suffice.

Courts do not seem troubled by this vagueness. For example, courts have stated that the prosecutors only need to give "enough information" to jurors so they can "intelligently" decide the matter: "We deem it sufficient if the District Attorney provides the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime."^[40]

Finally, the court in *People v. Dillon* held that prosecutors' reading the statute that criminalizes the suspect's behavior in itself qualified as "enough information" to enable the jurors to intelligently decide the matter.^[41] Interestingly, while noting that sufficiency, courts were also raising the problems a "mere reading" of the law created.^[42]

Normally the simple reading of the statutes under which an accused is sought to be charged would be a sufficient instruction on the law. However, in this instance the necessity for the grand jurors to find reasonable

grounds to believe the defendant intended to consummate the sale would not be apparent from a mere reading of the definition of “sell” and the statutory language of the substantive offense.[43]

The lack of uniformity in the standard of giving advice to a grand jury continues to persist. The implied judicial dissatisfaction with the vagueness of the standards has not reached the New York Court of Appeals.

C. Potential Solutions to Avoid a Perfunctory Discharge of Duty and Miscarriage of Justice

As argued here, and pointed out by the media,[44] the post-1970 system is fraught with problems which seem to be stemming from the grand jury's perceived inability to act independently. Certainly, new corrective legislation may be the most secure way to obtain the changes this Article believes are needed to improve the institution of the grand jury. However, there are two small ways to achieve some jury agency by limiting the ADAs' overpowering role: reading the text of the law each time a jury is “charged” and handing out a copy of the text just read to each juror. These two solutions may seem common sense suggestions, but because they do not happen on a daily basis, I find them necessary to advocate.

Oral presentations are usually hard to follow when the audience is not familiar with the topic. One way to avoid accidental misinformation is to provide the audience with a handout. Usually an outline of the presentation is enough to give the public the gist of the presentation. However, when it comes to charging a grand jury with the law they need to use to indict suspects, hard copies of the statutory provisions may be best suited to avoid accidental prosecutorial manipulation of the jurors, rather than ADA-edited charts and tables. Often prosecutors read the criminal law provisions pertaining to all the narcotics-related felonies governing the work of a narcotics grand jury at the beginning of their two week period, and then hand them a table which takes apart the statutory provisions and separate them into what constitutes basic elements for the trained eye. Each row is identified by the numeric penal identifier of the statute, according to the New York Penal Code, but not by the name of the felony. Then, forgetting the chart's deficiencies, ADAs present new cases talking to jurors about felonies as identified by their name “possession with intent to sell” or selling” or just “unlawful possession,” while the jurors are asked to consult the table and indict based on the felony's identification as N.Y. C.P.L.R. § 220.16, or N.Y. C.P.L.R. § 220.18. Although grand juries may be specialized, there are quite a few such felonies, and often, the jurors need to ask each other which row and column they are supposed to use while accepting any suggestion. Sometimes, even when asked to further explain the law, the prosecutorial expediency is such that the explanation consists of reminding jurors to use the tables handed out and match a row entry with a column entry. But I cannot stop wondering whether such terse explanations are benefiting our justice system in the long run or making it more susceptible to mistrust.

Perhaps, arbitrary prosecutions or the appearance of such prosecutions would be less frequent if the ADA would read the law every time they presented a case, and handed out copies of the statute used to indict, instead of putting the onus on the members of the grand jury to come forward and display their ignorance. It is human nature that very few people can admit ignorance in anything.

Furthermore, absent the copy of the law, jurors rely solely on the ADA's advice, described above as perfunctory and at times, inadvertently manipulative. It is not out of the realm of possibility for prosecutors to fail to explain the elements of the crime sufficiently so any jurors could intelligently understand and apply the law to the facts. For instance, all drug-related felonies under New York law are intentional crimes, and intent needs to be proven. A New York grand jury, thus, indicts for possession with intent to sell, on the testimony of the arresting officer about the quantity of the substance found on the premises where the suspect was arrested. But, whether one can assume intent from the quantity of the drugs found on the premises is a matter not evident in the statute. I believe that without a copy of the statute it becomes almost impossible for jurors to raise and argue

during grand jury deliberations that the same amount may warrant another scenario, that of a buyer and user, and not necessarily that of a co-dealer.[45]

III. Conclusion

Grand juries, it is said, especially those attached to special narcotics departments, find true bills in 99 out of 100 indictments.[46] Still the grand jury institution remains a corner stone of the New York criminal justice system, and a supposed safeguard of individual liberty.

This Article argued that this institution needs to be reformed. Some people may disagree, asserting that “[t]he Grand Jury grew up in England and here, not in the Balkans. It must not fall victim to unscholarly, knee-jerk micromanagement. The average Joe and Jane sitting on a grand jury know a raw deal when they see it.”[47] But such a blank statement may seem naïve, especially after one serves on grand jury.

Anybody with some knowledge about comparative criminal law may argue that our adversarial system of criminal justice and its procedural safeguards ensure the most protection of the defendant while inhibiting arbitrary prosecution. Certainly, if compared to any Balkan or former Soviet state, our system is superior.

Undoubtedly, there are many constitutional guarantees of individual rights in our system. But if we do not evaluate them as they are practiced on a daily basis (in *real life*), we take the risk that our system will soon mirror that of the Balkan states. Often their criminal justice looks good on paper, too.

[FN*] Dana Neacsu is a librarian at Columbia Law School Library, a lecturer-in-law at the Columbia Law School and a New York attorney. She would like to thank her colleague Patrick Flanagan for his invaluable comments and suggestions.

[FN1] John Marzulli et al., Cops Made Money by Fabricating Drug Charges Against Innocent People, Stephen Anderson Testifies, Daily News (N.Y.), Oct. 14, 2011, available at <http://www.nydailynews.com/news/crime/fabricated-drug-charges-innocent-people-meet-arrest-quotas-detective-testifies-article-1.963021>.

[FN2] Chris Barker, Cultural Studies: Theory and Practice 448 (2005).

[FN3] Lawrence N. Gray, Evidentiary Privileges 1 (2000).

[FN4] *Costello v. U.S.*, 1956-1 C.B. 639, 350 U.S. 359, 362, 76 S. Ct. 406, 100 L. Ed. 397, 56-1 U.S. Tax Cas. (CCH) P 9321, 48 A.F.T.R. (P-H) P 689 (1956).

[FN5] Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. Sch. L. Rev. 13 (2003/2004).

[FN6] *Stirone v. U. S.*, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252, 45 L.R.R.M. (BNA) 2367, 38 Lab. Cas. (CCH) P 66087 (1960).

[FN7] *Smith v. U.S.*, 360 U.S. 1, 9, 79 S. Ct. 991, 3 L. Ed. 2d 1041 (1959).

[FN8] Boyle, *supra* note 5, at 17.

[FN9] *Hurtado v. People of State of California*, 110 U.S. 516, 4 S. Ct. 292, 28 L. Ed. 232 (1884) (holding that the states could eliminate grand jury review).

[FN10] *Grand Jury Law and Practice* § 8:2 (Sara Sun Beale et al. eds., 1997).

[FN11] N.Y. Const. art. I, § 6.

[FN12] Lawrence N. Gray, *The Grand Jury as an Institution: Its Essential Character and Miscellaneous Supervision*, 65 N.Y. St. B.J. 38 (1993).

[FN13] *Grand Jury Law and Practice*, supra note 10, § 8:2.

[FN14] *People v. Calbud, Inc.*, 49 N.Y.2d 389, 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (1980).

[FN15] N.Y. C.P.L.R. § 190.25(1).

[FN16] Gray, supra note 12.

[FN17] *People v. Aarons*, 2 N.Y.3d 547, 548–49, 780 N.Y.S.2d 533, 813 N.E.2d 613 (2004).

[FN18] N.Y. C.P.L.R. § 190.25(5).

[FN19] N.Y. C.P.L.R. § 190.25(6).

[FN20] See the Article's appendix, *infra*.

[FN21] N.Y. C.P.L.R. § 190.25(4) (a).

Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony.

See the Article's appendix, *infra*, for the entire text of N.Y. C.P.L.R. § 190.25.

[FN22] See, e.g., N.Y. C.P.L.R. § 190.50.

[FN23] See Marzulli et al., supra note 1.

[FN24] N.Y. C.P.L.R. § 190.25(6).

[FN25] N.Y. C.P.L.R. § 190.50(6).

[FN26] *Indian Towing Co. v. U.S.*, 350 U.S. 61, 64–65, 76 S. Ct. 122, 100 L. Ed. 48, 1956 A.M.C. 27 (1955).

[FN27] N.Y. C.P.L.R. § 255(1)-(2) (emphasis added).

[FN28] N.Y. Sess. Laws, ch. 759 (1928) (emphasis added).

[FN29] N.Y. Sess. Laws, ch. 760 (1928) (emphasis added).

[FN30] On file with the author.

[FN31] Gregory D. Morril, [Prosecutorial Investigations Using Grand Jury Reports: Due Process and Political Accountability Concerns](#), 44 *Colum. J.L. & Soc. Prob.* 483, 500 (2010) (containing some insularly mention about the ability of grand juries to issue reports criticizing public officials, and hailing it as progressive).

[FN32] See letter from N.Y. C.P.L.R. § 95.25 (1970) (bill jacket on file with the author).

[FN33] On file with the author.

[FN34] *People v. Gelia*, 19 Misc. 2d 1056, 1059, 192 N.Y.S.2d 43, 46 (County Ct. 1959).

[FN35] *People v. Dumas*, 51 Misc. 2d 929, 274 N.Y.S.2d 764 (Sup 1966).

[FN36] N.Y. C.P.L.R. § 190.25(6).

[FN37] *Calbud, Inc.*, 49 N.Y.2d at 394–95.

[FN38] *People v. Bethune*, 65 A.D.3d 749, 508, 884 N.Y.S.2d 503 (3d Dep't 2009) (slip op.).

[FN39] *People v. Dillon*, 87 N.Y.2d 885, 887, 639 N.Y.S.2d 1007, 663 N.E.2d 319 (1995).

[FN40] *Dillon*, 87 N.Y.2d at 887.

[FN41] *Dillon*, 87 N.Y.2d at 887.

[FN42] *Dillon*, 87 N.Y.2d at 887.

[FN43] *People v. Lawson*, 84 Misc. 2d 24, 25, 374 N.Y.S.2d 270 (Sup 1975).

[FN44] Marzulli et al., *supra* note 1.

[FN45] See, e.g., *People v. Hunter*, 73 A.D.3d 1279, 902 N.Y.S.2d 678 (3d Dep't 2010) (applying N.Y. C.P.L.R. § 220.16); *Harris v. Alexander*, 548 F.3d 200 (2d Cir. 2008) (applying N.Y. C.P.L.R. § 220.16).

[FN46] See, e.g., Andrew D. Leipold, [Why Grand Juries Do Not \(And Cannot\) Protect the Accused](#), 80 *Cornell L. Rev.* 260, 275–276 (1995) (discussing the high percentage of federal grand jury indictments).

[FN47] Gray, *supra* note 12.

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