Offering Defense Witnesses to New York Grand Juries

By: Mark M. Baker [1]

Your client has just been held for the action of the Grand Jury. Although you have a valid defense, you do not want your client to testify for fear of creating a body of statements for future impeachment at trial in the event an indictment is returned. Under New York rules, however, you have another remedy if you have a material witness available. This articles addresses that option and the ramifications in the event the prosecutor is uncooperative.

The Statute

CPL §190.50(6), provides:

> A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.

In turn, should the grand jury elect to hear the witness, CPL §190.50(3) provides that, barring the prosecutor's obtaining a court order to the contrary "in the public interest," "the grand jury... may direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction..." Thus, as long as the testimony of a proposed defense is admissible and exculpatory, a prosecutor lacks any discretion not to bring the witness's availability to the grand jury's attention. Consequently,

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a later motion to dismiss, pursuant to CPL §210.35(5), must be granted even though only the possibility of prejudice is shown.

Relevant Decisional Law

In People v. Hill,[1] the defendant claimed a violation of his CPL §190.50(6) rights. The People responded that the grand jury had been given the opportunity but declined. In reality, although apprising it of the proposed witnesses, the prosecutor had refused the grand jury's request to identify the nature of the anticipated testimony. Unaware they were alibi witnesses, the grand jury understandably voted not to call the listed persons.

Rejecting the People's claim of statutory compliance, the motion court found that the defendant had made a legitimate application and that such had to be, but was not, scrupulously honored. Rather, when the grand jury asked the District Attorney what the witnesses would testify about, the District Attorney, well aware they were alibi witnesses, refused to provide that information.

In fact, the defendant's letter specified the name and address of all the witnesses and provided a brief synopsis of each individual's anticipated testimony. The letter indicated that it was the defendant's belief that the witnesses possessed relevant and exculpatory information and that, if given the opportunity to testify, they would state that he had not committed the crime.

The court ruled that once that defense letter was received, "the prosecutor had a statutory duty to notify the grand jury of defendant's request and to allow the grand jury to exercise its discretion in determining whether it wished to hear from those witnesses."[2]

Hence, "the failure of the district attorney to inform the grand jury of the defense request to call certain witness warrants a dismissal of an indictment even though the evidence and the charge on the law are sufficient..." [3]

Accordingly, by merely notifying the grand jury of the defendant's request, while declining to respond to the grand jury's expressed desire for further information about the nature of the witnesses, the prosecutor failed to satisfy the statute:

> while the prosecutor conveyed to the grand jury, the defendant's request to have certain witnesses called on his behalf, the assistant district attorney's response when asked by the grand jury for more information regarding those witnesses was clearly erroneous in light of the facts surrounding this case and therefore impaired the integrity of the grand jury proceedings to the extent that the assistant district attorney's response had the possibility of resulting in prejudice to the defendant.[4]

The Fourth Department thereafter affirmed for the reasons stated in the decision at County Court. The Appellate Division further advised, however, that "the prosecutor's inaccurate and misleading answer to the grand jury's legitimate inquiry impeded the grand jury's investigation, thereby substantially undermining the integrity of the proceeding and, at a minimum, potentially prejudicing defendant."[5]

The Court of Appeals subsequently affirmed the order of the Appellate Division.[6] On the issue of prejudice, the high Court added that "[t]his ruling was correct, considering that at the pretrial stage of the proceeding, it would not be possible to predict that the prejudice could or would be cured at trial or by guilty plea."[7] The Court thus "agree[d] with the lower courts that, under the circumstances of this case, the prosecutor gave an inaccurate and misleading answer to the grand jury's legitimate inquiry, thus substantially

undermining the integrity of the proceeding and potentially prejudicing defendant."[8]

Earlier in People v. Butterfield,[9] the Third Department had taken an equally strict view of CPL §190.50(6), notwithstanding a later conviction. There, the District Attorney, maintaining that the defendant's written request had been untimely, simply declined to bring it to the grand jury's attention. The motion court denied the defendant's motion to dismiss and he was convicted after trial.

On appeal, the Appellate Division found otherwise. Reversing the conviction and dismissing the indictment, the Third Department stated:

> That the Grand Jury in this case may have, in the exercise of its discretion, chosen not to call defendant's brother has no bearing upon whether his right to have the Grand Jury consider his request was denied. Likewise, that the Grand Jury may have still voted to indict defendant even had it chosen to hear the testimony of his brother is of no moment. Indeed, County Court, previously addressing this same issue (upon what it found to have been a timely request), held that a prosecutor's failure to inform the Grand Jury of the defense request rendered the Grand Jury proceedings flawed and invalidated the resulting indictment...[10]

The Butterfield court concluded that "[o]ur finding that defendant was improperly denied a statutory right afforded to him under CPL article 190 leads inexorably to the conclusion that the integrity of the proceeding was impaired. As noted, such was the conclusion of County Court in an unrelated matter."[11]

In People v. Andino,[12] the District Attorney had likewise refused to apprise the grand jury of the defendant's request that it call two particular witnesses. Dismissing the resulting indictment, the court determined that "[t]he failure on the part of the prosecutor to communicate defendant's request to the Grand Jury violates the plain language of the

statute.[13] According to the Andino court, "[a] prosecutor 'does not have the right to usurp the Grand Jury's discretion in determining which witnesses should be heard.'....Thus, the prosecutor's failure to inform the Grand Jury of defendant's request concerning proposed witnesses wrongfully deprived the Grand Jury of its discretionary right to hear from those witnesses. "[14]

In People v. Ali,[15] upon dismissing the indictment, the court noted that "[t]he People's position in this matter is entirely incorrect. The People have a duty to communicate to the grand jury the defendant's request, and to then allow the grand jury to use *its* discretion in deciding whether to hear from the witnesses...[I]t is not the People's responsibility to determine if the Grand Jurors should hear from them. The People must simply alert the grand jury to the defendant's request."[16] Moreover, just recently, in People v. Freeman,[17] the motion court rejected the People's claim that they were relieved of their obligations under §190.50(6) because the defendant, having testified in the grand jury, could have asked the grand jury himself to hear from his proposed witness.

Finally, it should be noted that, in response to a CPL §190.50(6) application, the People may not complain that there is no prosecutorial requirement to present exculpatory witnesses. That contention relates solely to the lack of obligations by the People to present inadmissible, albeit exculpating evidence to the Grand Jury[18] or to give instructions on mitigating, as opposed to wholly exculpating, defenses.[19] It is completely unrelated to a New York prosecutor's unmistakable obligation to notify the grand jury of the availability of a relevant witness, when requested to do so pursuant to CPL §190.50(6), thereby leaving it to

the grand jurors, not the prosecutor, to determine what, if anything, they wish to do with that testimony. To be sure, the evidence being proposed by the Defendant must be exculpatory,[20] and, pursuant to CPL §190.50(4), the prosecutor may demand that any such witness whom the Grand Jury elects to hear be required to waive statutory transactional immunity.

Conclusion

The mandates of CPL §190.50(6) are to be strictly followed. Consequently, a New York state prosecutor lacks discretion to refuse to inform the grand jury of a materially exculpating defense witness whose availability has been called to the prosecutor's attention. Barring a court order to the contrary, only the Grand Jury is vested with the discretion to determine whether or not the witness will appear. If this rule is violated, a motion to dismiss, based on a defective grand jury proceeding, will be granted, given the mere potential of prejudice to the accused.

1. 19 Misc.3d 1113(A), 2004 WL 5562666 (Co. Ct. Onon. Co. 2004).

2. *Id.,* at * 5, citing, *inter alia* People v. Andino, 183 Misc.2d 290, 292, 702 N.Y.S.2d 778 (Sup. Co. Bx. Co. 2000) and People v. Montagnino, 171 Misc.2d 626, 655 N.Y.S.2d 255 (Co. Ct. St. Law. Co. 1997).

3. 2004 WL 5562666, at *5, citing, *inter alia*, People v. Montagnino, [*supra*]; People v. Andino, [*supra*]; and People v. Butterfield, 267 A.D.2d 870, 702 N.Y.S.2d 140 (3rd Dept. 1999).

4. 2004 WL 5562666, at *7.

5. People v. Hill, 8 A.D.3d 1076, 778 N.Y.S.2d 653 (4th Dept. 2004).

6. People v. Hill, 5 N.Y.3d 772, 801 N.Y.S.2d 794 (2005).

7. *Id.* at 773. Notably, in People v. Huston, 88 N.Y.2d 400, 409, 646 N.Y.S.2d 69 (1996), the Court reiterated that actual prejudice is not required, but only the potential for

prejudice.

8. 5 N.Y.3d at 773,801 N.Y.S.2d at 795 .

9.267 A.D.2d 870, 702 N.Y.S.2d 140 (3rd Dept. 1999).

10. 267 A.D.2d at 872, 702 N.Y.S.2d at 142 citing People v. Montagnino, *supra*.

11. 267 A.D.2d at 873, 702 N.Y.S.2d at 143, citing People v. Montagnino, *supra*. *Cf.* People v. Harris, 173 Misc.2d 248, 251, 661 N.Y.S.2d 712 (Sup. Ct. Kings Co. 1997) (denying motion to dismiss where "[t]he mitigation evidence proffered by defendant here is not admissible before the Grand Jury because it has no bearing on defendant's guilt or innocence"); *accord* People v. Evans, 2003 WL 22849777 (Sup. Ct. Queens Co. 2003).

12. 183 Misc.2d 290, 702 N.Y.S.2d 778 (Sup. Co. Bx. Co. 2000).

13. 183 Misc.2d at 292, 702 N.Y.S.2d at 780.

14. *Id.*

15. 19 Misc.3d 672, 858 N.Y.S.2d 502 (Sup. Ct. Queens Co. 2008).

16. 19 Misc.3d at 674, 858 N.Y.S.2d at 503 (footnote omitted; emphasis in original).

17. 24 Misc.3d 1212(A), 2009 WL 1939398 (Sup. Ct. N.Y. Co. 2009)

18. *Compare* People v. Mitchell, 82 N.Y.2d 509, 605 N.Y.S.2d 655 (1993) to People v. Isla, 96 A.D.2d 789, 466 N.Y.S.2d 16 (1st Dept. 1983) (prosecutor must introduce exculpatory part of statement along with inculpatory part); People v. Williams 298 A.D.2d 535, 748 N.Y.S.2d 667 (2nd Dept 2002) (requiring a prosecutor to present "materially influencing" exculpatory evidence).

19. People v. Valles, 62 N.Y.2d 36, 476 N.Y.S. 2d 50 (1984); People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1986).

20. People v. Harris, supra; People v. Evans, *supra*.