Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power

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PROSECUTORIAL MISCONDUCT IN THE GRAND JURY:
DISMISSAL OF INDICTMENTS PURSUANT TO THE
FEDERAL SUPERVISORY POWER

INTRODUCTION

The Supreme Court has held that a federal indictment is presumptively valid. Thus, grand jury proceedings are substantially insulated from judicial review. The federal courts, however, possess an inherent supervisory power that allows them to reach beyond the Constitution or acts of Congress to establish and maintain civilized standards of procedure and evidence. This power enables courts to dismiss indictments when they find prosecutorial misconduct to have occurred during grand jury proceedings. The federal courts of appeals, however, disagree as to whether a defendant, to justify dismissal, must prove that prosecutorial misconduct prejudiced the grand jury's decision to indict.

3. See generally infra notes 50-78 and accompanying text (discussing the supervisory power).

By definition, supervisory power rulings apply only in federal proceedings. See Beale, Reconsidering Supervisory Powers in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1434 (1984). The supervisory power of the federal courts rests upon the assumption that the federal courts represent the appropriate tribunals to exercise the overall responsibility for developing and supervising the implementation of the rules of federal procedure, particularly in criminal cases. See id. at 1435. McNabb v. United States, 318 U.S. 332 (1943), is generally regarded as the first decision to recognize federal courts' supervisory power. Soon thereafter, lower federal courts began to exercise their own supervisory power. See Beale, supra, at 1433. The earliest case decided solely upon the court's supervisory power was Helwig v. United States, 162 F.2d 837, 840 (6th Cir. 1947). See Beale, supra, at 1433 n.5.


5. Prosecutorial misconduct is anything that prevents the accused from receiving a fair trial. See D. Nissman & E. Hagen, The Prosecution Function 7 (1982). See also infra notes 40-44 and accompanying text (discussing the types of grand jury misconduct).


7. Compare United States v. Kouba, 822 F.2d 768, 774 (8th Cir. 1987) (indictment may be dismissed only upon a showing of actual prejudice to the accused) and United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982) (same) and United States v. Owen, 580 F.2d 365, 367-68 (9th Cir. 1978) (same) with United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983) (dismissal without requiring a showing of actual prejudice) and United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) (same).

For a discussion of the prejudice requirement, see infra notes 104-122 and accompanying text.
usually raise this issue during\textsuperscript{8} or after trial.\textsuperscript{9} Therefore, few courts have addressed the question of whether a defendant must prove that prosecutorial misconduct prejudiced him in order to justify a court’s dismissal of an indictment pursuant to a pre-trial motion.\textsuperscript{10} The Supreme Court has explicitly left this issue open.\textsuperscript{11}

This Note examines the question of whether a defendant must prove prejudice when, prior to trial, he raises the issue of prosecutorial misconduct in the grand jury proceedings. Part I looks at the roles of the prosecutor and the grand jury and the interaction between the two. Part II discusses the federal courts’ use of their supervisory powers to dismiss indictments. Part III examines the conflicting views of the courts of ap-


\textsuperscript{10} In the past year a few courts have faced pre-trial motions for dismissal. One such case was United States v. Omni Int’l Corp., 634 F. Supp. 1414 (D. Md. 1986), in which the Maryland District Court dismissed an indictment pursuant to a pre-trial motion when it found longstanding prosecutorial misconduct in the district. See id. at 1438. The court recognized the conflict among the circuits regarding the prejudice requirement, see id. at 1437, but did not take a decisive stand on the issue.

A recent Eleventh Circuit case, United States v. O’Keefe, 825 F.2d 314 (11th Cir. 1987), required a showing of prejudice, but failed to consider that the motion for dismissal had been made prior to trial. See id. at 318. Cf. United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1395 (9th Cir. 1983) (Norris, J., dissenting in part) (noting that no case has held that a defendant must demonstrate prejudice before an indictment may be dismissed pre-trial on supervisory power grounds), cert. denied, 465 U.S. 1079 (1984).

A probable explanation for the scarcity of case law on this point stems from the secrecy rules governing grand juries. See infra note 43. Usually, a defendant’s only access to grand jury materials is through the Jencks Act, 18 U.S.C. § 3500 (1982), which requires the prosecutor, after direct examination of a witness at trial, to produce the witness’ prior statements. See Mechanik, 475 U.S. 66, 80 (1986) (Marshall, J., dissenting). This disclosure, therefore, does not take place until after trial has begun. See id.; 18 U.S.C. § 3500 (1982).

The only way a defendant may view the grand jury records prior to trial is to make a request pursuant to Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure. See generally 1 C. Wright, Federal Practice and Procedure § 108, at 263-65 (2d ed. 1982) (disclosure of record to defendant). Courts, however, rarely grant such requests. See, e.g., United States v. Wilson, 565 F. Supp. 1416, 1436 (S.D.N.Y. 1983) (Weinfeld, J.) (“Speculation and surmise” do not substitute for fact and therefore do “not justify disturbing the traditional secrecy surrounding [grand jury] proceedings.”). This inability to view grand jury records prior to trial makes it almost impossible for a defendant to raise a pre-trial motion. New York, however, allows inspection of the grand jury minutes by the court “[u]nless good cause exists to deny the motion to inspect.” N.Y. Crim. Proc. Law § 210.30 (McKinney 1982). If the Federal Rules followed New York’s lead, this would save time and resources by unearthing improper procedures at the very beginning of the proceedings.

\textsuperscript{11} See United States v. Mechanik, 475 U.S. 66, 72 (1986) (“We express no opinion as to what remedy may be appropriate for a violation . . . [that] is brought to the attention of the trial court before the commencement of trial.”). The Court has recently granted certiorari to decide this issue. See Kilpatrick v. United States, 821 F.2d 1456 (10th Cir. 1987), cert. granted, 56 U.S.L.W. 3459 (U.S. Jan. 12, 1988) (No. 87-602).
peals as to the prejudice requirement. Part IV concludes that federal courts should grant defendants' pre-trial motions to dismiss indictments tainted by prosecutorial misconduct without requiring a showing of prejudice when the court finds that the misconduct represents a systemic problem.

I. THE INTERACTION BETWEEN THE PROSECUTOR AND THE GRAND JURY

In 1166, King Henry II established the grand jury in England to exercise tighter control over the administration of justice throughout his kingdom. This centralization of control diminished the power of both the church and the feudal lords. The grand jury, as created, existed not to protect citizens from arbitrary prosecution, but to serve the will of the king. The grand jury did not take on its present role as a "shield for the innocent against malicious and oppressive prosecution" until 1681, during the reign of King Charles II. British colonists transplanted the protection of the grand jury to America, where it firmly took root. By 1787, the Framers regarded this procedural safeguard as so essential to citizens' basic liberties that they incorporated it into the fifth amendment of the Constitution.

The grand jury proceeding functions as an ex parte investigation to

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13. See Note, supra note 12, at 1078.
15. See M. Frankel & G. Naftalis, supra note 12, at 9. Several developments in grand jury procedure contributed to the evolution of the grand jury to its current function as a protector of the people. First, the panel began hearing witnesses in private, thus enabling it to withstand pressure from the King. See id. at 9-10. Second, when it became apparent that trial juries were unable to protect the innocent because the King possessed the power to fine or imprison jurors who voted to acquit, the grand jury filled a necessary vacuum by refusing to indict innocent persons. See id. at 10. Finally, judges discontinued the practice of "cross-examining grand jurors about their findings." See id.
17. See United States v. Calandra, 414 U.S. 338, 343 (1974). The fifth amendment of the Constitution provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. The fifth amendment right to a grand jury applies only to federal criminal actions; it is not applicable to the states. See C. Torcia, Wharton's Criminal Procedure § 190, at 416 (12th ed. 1974). Each state may choose for itself whether it wishes to adopt the institution and proceedings of the grand jury. See Hurtado v. California, 110 U.S. 516 passim (1884). More than half the states have chosen to incorporate the grand jury as part of their criminal justice system. See Note, supra note 12, at 1078 & n.12. The exact structure and format, however, vary from state to state. See M. Frankel & G. Naftalis, supra note 12, at 19.
18. "Ex parte" is defined as, "done for, in behalf of, or on the application of, one party only." See Black's Law Dictionary 517 (5th ed. 1979).
determine whether probable cause to institute criminal proceedings against a person exists; it is not an adversarial hearing where the jurors determine guilt or innocence. No person may be charged with a felony unless first indicted by a grand jury. In order for a grand jury to determine whether probable cause to indict exists, grand jurors exercise broad investigatory powers, unrestrained by most technical procedural rules and rules of evidence. The prosecutor, as an officer of the court, serves as the grand jury's legal advisor, aiding, but ideally not directing, the

19. A finding of probable cause means that a fair probability of criminal conduct exists. See Black's Law Dictionary 1081 (5th ed. 1979). The grand jury must determine if sufficient evidence exists to warrant putting the subject of an investigation on trial. See M. Frankel & G. Naftalis, supra note 12, at 19.

20. See United States v. Calandra, 414 U.S. 338, 343-44 (1974). The grand jury serves the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). See United States v. DiBernardo, 775 F.2d 1470, 1476 (11th Cir. 1985), cert. denied, 106 S. Ct. 1948 (1986); see also United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir.) (the grand jury prevents the prosecutor from subjecting innocent people to the trauma of trial), cert. denied, 107 S. Ct. 187 (1986); United States v. Vetere, 663 F. Supp. 381, 386 (S.D.N.Y. 1987) (grand jury was established to protect against unfounded government prosecution).


22. See United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); U.S. Const. amend. V. The Supreme Court has interpreted the "infamous crime" language contained in the fifth amendment, see supra note 17, to mean a crime punishable by imprisonment. See Mackin v. United States, 117 U.S. 348, 352 (1886).

23. The Supreme Court has referred to the grand jury as:

[A] grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.


24. See Costello v. United States, 350 U.S. 359, 362-63 (1956); see generally 1 S. Beale & W. Bryson, supra note 2, at §§ 1:01-1:04 (early history of grand jury). The investigatory powers of the grand jury allow the jurors to compel the testimony of witnesses and the production of evidence. See United States v. Calandra, 414 U.S. 338, 343 (1974). Under the prosecutor's guidance, the grand jury may summon any person before it and force that witness to disclose everything he knows about the matter under inquiry. See id. at 343. "The duty to testify [before the grand jury] has long been recognized as a basic obligation that every citizen owes his Government." Id. at 345; see United States v. Bryan, 339 U.S. 323, 331 (1950); Blackmer v. United States, 284 U.S. 421, 438 (1932). If a witness summoned before the grand jury refuses to appear or refuses to cooperate, the judge may enter an order commanding compliance. See M. Frankel & G. Naftalis, supra note 12, at 20. A witness cannot refuse to answer a question on irrelevancy grounds. See Blair v. United States, 250 U.S. 273, 282 (1919). In addition, neither the witness nor the defendant has the right to have counsel present in the grand jury chamber. See In re Groban, 352 U.S. 330, 333 (1957). For a discussion of the breadth of the grand jury powers, see B. Gershman, Prosecutorial Misconduct § 2.1, at 2-3 to 2-4 (1987).

25. See Comment, Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence, 39 U. Chi. L. Rev. 761, 765 (1972); see also infra notes 27-34 and accompanying text (description of prosecutor's discretionary grand jury function). Justice Friendly, in his dissent from United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979) (Friendly, J., dissenting), recognized the dual role of the prosecutor before the grand jury:
grand jury's determination of probable cause.26

In her role as advisor, the prosecutor exercises wide discretion in conducting a grand jury proceeding.27 She decides which persons should be the targets of the investigation28 and what method of investigation she will use.29 She requests that the court convene a grand jury,30 obtains evidence,31 secures witnesses,32 conducts examinations,33 and instructs the jury on points of law.34 Thus, the prosecutor controls the proceedings and the flow of information. Furthermore, the prosecutor operates without the check of judge or adversary35—no right to cross-examine or to introduce evidence rebutting the prosecutor's evidence exists for the accused.36

The prosecutor's discretion, however, has boundaries. She must respect the grand jury's autonomy and therefore may not interfere with its unbiased judgment.37 In other words, the prosecutor may not act in such a way as to circumvent the constitutional safeguard provided by the

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26. See D. Nissman & E. Hagen, supra note 5, at 2; Note, supra note 12, at 1079. A prosecutor must resist the temptation to react emotionally even when a particular crime enrages the citizenry. See D. Nissman & E. Hagen, supra note 5, at 2. Furthermore, she must not yield to special interest groups and she must put politics aside. See id. at 5. The rule the prosecutor must follow is "faithfully to represent the public, strike hard, but be fair." Id. at 11.

27. See generally D. Nissman & E. Hagen, supra note 5, at 2-3 (discussing the power of the prosecutor in the grand jury proceedings); Gershman, supra note 24, § 2.1, at 2-2.

28. See D. Nissman & E. Hagen, supra note 5, at 13; Gershman, supra note 24, § 2.1, at 2-2.

29. See B. Gershman, supra note 24, § 2.1, at 2-2. The prosecutor decides "what to investigate, whom to question, how to interrogate, whom to indict, and how to draft the indictment." Id.; see M. Frankel & G. Naftalis, supra note 12, at 21-22.

30. See Moley, The Initiation of Criminal Prosecutions by Indictment or Information, 29 Mich. L. Rev. 403, 414 (1931); Note, supra note 12, at 1079.

31. Many prosecutors do not seek an indictment unless they personally are convinced that the suspect has in fact committed the crime. See Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 500 (1980).

32. Note, supra note 12, at 1079.

33. Id.; see Comment, supra note 25, at 766-67.

34. Note, supra note 12, at 1079; Comment, supra note 25, at 766-67.

35. G. Edwards, The Grand Jury 129 (1906); Note, supra note 12, at 1079; see Comment, supra note 25, at 767.


The lower federal courts have found a wide variety of prosecutorial actions during a grand jury proceeding to be improper. These include inflammatory or prejudicial remarks by the prosecutor intended either to discredit a witness or to bias the jury; preindictment publicity substantially generated by the prosecutor; use of the grand jury to obtain evidence for another criminal trial or for a civil case; and violation of the grand jury secrecy rules. In addition, federal prosecutors must adhere
to the Federal Rules of Criminal Procedure.\textsuperscript{44} Most federal courts, however, hesitate to exercise their supervisory power to dismiss an indictment tainted by prosecutorial misconduct.\textsuperscript{45}

Prosecutorial misconduct may stem from the two conflicting roles played by the prosecutor in grand jury proceedings. First, the prosecutor serves as an officer of the state.\textsuperscript{46} As such, she must use her best efforts to prosecute successfully those who have committed crimes.\textsuperscript{47} Second, the prosecutor serves as an officer of the court.\textsuperscript{48} In this capacity, she must advise the grand jury without influencing its determination.\textsuperscript{49} In other words, the prosecutor acts on her own conclusion that probable cause exists to bring a person to trial, yet she must avoid compelling the grand jury to accept this conclusion.

\section*{II. The Federal Courts' Use of Their Supervisory Power}

The federal courts possess an inherent power to supervise the administration of justice in order to establish and maintain civilized standards of


44. \textit{See} United States v. Mechanik, 475 U.S. 66, 69-70 (1986) (a violation of Rule 6(d) justifies dismissal of portions of an indictment if actual prejudice has resulted).


46. \textit{See} Comment, \textit{supra} note 25, at 765; \textit{see also supra} notes 27-34 and accompanying text (description of prosecutor's discretionary grand jury function).

47. The Supreme Court has defined a prosecutor as:

\begin{quote}
the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
\end{quote}


48. \textit{See} Comment, \textit{supra} note 25, at 765; \textit{see also supra} notes 27-34 and accompanying text (description of prosecutor's discretionary grand jury function).

49. \textit{See} United States v. Ciambrone, 601 F.2d 616, 628-29 (2d Cir. 1979) (Friendly, C.J., dissenting); Comment, \textit{supra} note 25, at 765; \textit{see also supra} notes 25-26 (role of prosecutor as legal advisor).
procedure and justice.\textsuperscript{50} Supervisory powers exist to protect a defendant's basic rights,\textsuperscript{51} to deter illegal conduct,\textsuperscript{52} and to protect judicial integrity.\textsuperscript{53} A federal court may exercise its supervisory power to formulate, within limits, procedural rules not specifically required by the Constitution or Congress.\textsuperscript{54} A court may enforce these rules with appropriate sanctions, including the sanction of dismissal.\textsuperscript{55} Therefore, although use of the supervisory power to dismiss an indictment does not require a constitutional violation,\textsuperscript{56} the federal courts may use their supervisory power to dismiss cases in which such a violation has occurred.\textsuperscript{57}

\textsuperscript{50} McNabb v. United States, 318 U.S. 332, 340 (1943); see United States v. Payner, 447 U.S. 727, 734-35 & n.7 (1980); Bartone v. United States, 375 U.S. 52, 54 (1963) (per curiam); Burton v. United States, 483 F.2d 1182, 1187 (9th Cir.), \textit{aff'd on rehearing}, 483 F.2d 1182 (9th Cir. 1973); Helwig v. United States, 162 F.2d 837, 840 (6th Cir. 1947).


In United States v. Jacobs, 547 F.2d 772, 775-76 (2d Cir. 1976), \textit{cert. dismissed}, 436 U.S. 31 (1978), the Second Circuit held that strike force attorneys must follow the same practice as the local United States Attorneys in giving warnings to target witnesses, even though such warnings were not constitutionally required. \textit{Id.} at 778.


\textsuperscript{56} See, e.g., United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983) (pursuant to the court's supervisory power, dismissal is justified "to prevent prosecutorial impairment of the grand jury's independent role"); United States v. Omni Int'l Corp., 634 F. Supp. 1414, 1440 (D. Md. 1986) (dismissal of indictment for flagrant prosecutorial misconduct). Courts exercise their supervisory power to deter illegality and to protect judicial integrity, not solely as a method of protecting a defendant's basic rights. \textit{See supra} notes 52-53 and accompanying text.

\textsuperscript{57} The federal courts sometimes use their supervisory power as an alternative to dismissal based upon a constitutional violation. See United States v. Kilpatrick, 821 F.2d 1456, 1465 (10th Cir. 1987) (court may dismiss indictment on basis of fifth amendment due process or grand jury clauses or by relying on its supervisory power), \textit{cert. granted}, 56 U.S.L.W. 3459 (U.S. Jan. 12, 1988) (No. 87-602); United States v. Chancen, 549 F.2d 1306, 1309 (9th Cir.), \textit{cert. denied}, 434 U.S. 825 (1977). Most of the lower court decisions employing supervisory authority have not involved constitutional violations. \textit{See Beale, supra} note 3, at 1460. In United States v. Jacobs, 531 F.2d 87, 90 (2d Cir. 1976), the Second Circuit dismissed an indictment pursuant to its supervisory power. The Supreme Court vacated and remanded the case "for further consideration in light of United States v. Mandujano, 425 U.S. 564 (1976)." United States v. Jacobs, 429 U.S. 909.
In *United States v. Hasting*, the Supreme Court held that the federal courts may exercise their supervisory power to correct prosecutorial misconduct when its use would remedy a violation of a defendant's recognized rights, preserve judicial integrity, or deter illegal or improper conduct. The Court held that to further these underlying purposes, a federal court faced with prosecutorial misconduct should balance the need to discipline the prosecutor against the need for the prompt administration of justice and the interest of crime victims before it agrees to dismiss an indictment pursuant to its inherent supervisory power.

The *Hasting* Court reinstated a conviction overturned by the Seventh Circuit for technical violations of the defendant's fifth amendment rights. Although the Supreme Court found that the prosecutor had acted improperly during trial summation, it reversed the Court of Appeals decision because it found the harm of the prosecutor's misconduct to be outweighed by the substantial costs of a retrial. *Hasting*, therefore, stands for the proposition that courts need not dismiss per se an indictment tainted by prosecutorial misconduct. It does not, however, establish a prejudice requirement; it merely requires a court to "balanc[e] the interests involved." In addition to the balancing test required by *Hasting*, lower federal courts have considered several other factors as limits on the exercise of their supervisory power to dismiss an indictment. Initially, courts accord grand jury proceedings a presumption of regularity. As a result, a de-

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(1976). On remand, the Second Circuit affirmed its previous decision because it recognized that while Mandujano had been a constitutional decision, this indictment had been dismissed based upon the court's supervisory power. United States v. Jacobs, 547 F.2d 772, 773-74 (2d Cir. 1976). The Supreme Court then dismissed the writ of certiorari as "improvidently granted." United States v. Jacobs, 436 U.S. 31 (1978).

59. See *id.* at 505.
60. See *id.* at 509.
61. See *id.* at 512.
63. See United States v. Hasting, 461 U.S. 499, 509 (1983). The Court recognized that a retrial infringes upon society's interests in the prompt administration of justice and protecting victims from unnecessarily having to relive their experience. See *id.* at 507.
64. See *id.* at 506-07 (reversals of convictions must be approached with a "view toward balancing the interests involved" (citing United States v. Payner, 447 U.S. 727, 734 (1980))).
65. See *Note, supra* note 12, at 1087.
67. See *Costello v. United States*, 350 U.S. 359, 363 (1956). "Presumption of regularity" means that, upon review, federal courts must presume that the conduct of both the prosecutor and the grand jurors was proper. See United States v. Mechanik, 475 U.S. 66,
fendant bears a heavy burden of proving that the prosecutor acted improperly during the grand jury proceedings.68 Furthermore, the judiciary, to preserve the independence of the prosecutor and the grand jury, must give deference to their independent decisions to indict the defendant.69 Finally, the courts must look to the availability of other, lesser sanctions70 before they agree to dismiss an indictment upon a showing of prosecutorial misconduct.71

In United States v. Mechanik,72 the Supreme Court applied the Hastings balancing test to reverse a Fourth Circuit decision to dismiss an indictment and conviction founded on a prosecutor's violation in a grand jury proceeding of one of the Federal Rules of Criminal Procedure.73 In reaching this result, the Supreme Court held that the petit jury's74 guilty verdict rendered harmless any error in the grand jury proceeding75 and that to dismiss the indictment after conviction would entail excessive social and economic costs.76 The Court, in dictum, stated that a defendant may justify these costs if he can show that the misconduct prejudiced his case in some way.77 The Court left open the question of the appropriate standard for dismissal of an indictment when, prior to trial, a defendant moves to dismiss on grounds of prosecutorial misconduct during grand

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69. See United States v. De Rosa, 783 F.2d 1401, 1404 (9th Cir.), cert. denied, 106 S. Ct. 3282 (1986); United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977); Beale, supra note 3, at 1457 n.169.

70. These lesser sanctions include a request by the court for an investigation by the Attorney General into the prosecutorial misconduct, see United States v. Myers, 510 F. Supp. 323, 328 (E.D.N.Y. 1980); holding the prosecutor in contempt of court, see United States v. Vetere, 663 F. Supp. 381, 386 (S.D.N.Y. 1987); and admonishing the prosecutor, see United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972); United States v. Vetere, 663 F. Supp. at 386.


73. See id. at 69-70 (joint testimony of two federal agents before grand jury violated Rule 6(d) of the Federal Rules of Criminal Procedure).

74. A petit jury is the ordinary jury for the trial of a civil or criminal action. Black's Law Dictionary 768 (5th ed. 1979). A grand jury, by contrast, is a jury of inquiry whose duties consist of determining whether probable cause that a crime has been committed exists and whether an indictment should be returned for such a crime. Id.

75. See Mechanik, 475 U.S. at 70.

76. See id. at 72. The Court noted that reversing a conviction entails substantial social costs that include forcing jurors, witnesses, the courts, the prosecutor and any defendants to expend further time and resources to repeat a trial; asking victims to relive their experiences; and possibly costing society the right to punish offenders. See id.

77. See id.
PROSECUTORIAL MISCONDUCT

III. THE CIRCUIT COURTS OF APPEALS' CONFLICTING VIEWS ON WHETHER DISMISSAL REQUIRES A SHOWING OF PREJUDICE

Although *Hasting* sets out the factors relevant to a district court's decision to exercise its supervisory power, each court of appeals that has considered these factors has accorded each different weight. The weight a federal court accords to the various factors relevant to its decision to exercise its supervisory power determines whether it will require a defendant to demonstrate prejudice before it will dismiss an indictment tainted by prosecutorial misconduct. Much controversy exists among the courts as to whether dismissal of an indictment pursuant to the supervisory power requires a showing of prejudice. Courts that reason that the primary purpose of dismissal is only to remedy a wrong done to a particular defendant require a showing of prejudice. Those circuits that focus upon the need for systemic deterrence of prosecutorial misconduct, however, will also base their decision to dismiss on the need to preserve judicial integrity, rather than solely on the presence or absence of prejudice to the defendant.

78. *Id.* The Court has granted certiorari to decide this issue. See Kilpatrick v. United States, 821 F.2d 1456 (10th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3459 (U.S. Jan. 12, 1988) (No. 87-602).

79. Federal courts may use their supervisory power to remedy a violation of a recognized right, to preserve judicial integrity, and to deter illegal conduct. See United States v. Hasting, 461 U.S. 499, 505 (1983). *But cf.* United States v. Caceres, 440 U.S. 741, 755 (1979) (where no violation of the Constitution or a federal rule occurs, the Court does not adopt a rigid exclusionary rule).

80. Compare infra notes 98-103 and accompanying text with infra notes 119, 120-22 and accompanying text.

81. See infra notes 123-27 and accompanying text.

82. See supra note 7 and accompanying text.


84. See, e.g., United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1394-95 (9th Cir. 1983) (Norris, J., dissenting in part) (primary goal of supervisory power is the "protection of systemic values by deterring official misconduct and preserving the appearance of fairness"), *cert. denied*, 465 U.S. 1079 (1984); United States v. Thibadeau, 671 F.2d 75, 78 (2d Cir. 1982) (dismissal will maintain proper prosecutorial standards); United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) (dismissal is only effective way to encourage prosecutorial compliance with ethical standards); United States v. McCord, 509 F.2d 334, 350 (D.C. Cir. 1974) (en banc) (dismissal maintains respect for the law), *cert. denied*, 421 U.S. 930 (1975); United States v. Basurto, 497 F.2d 781, 793-94 (9th Cir. 1974) (Hufstedler, J., concurring) (an important function of supervisory power is to guarantee that prosecutors "act with due regard for the integrity of the administration of justice").

Still other courts of appeals have recognized the conflict among the circuits, without establishing their own standard for dismissal. For example, while the Court of Appeals for the Fourth Circuit has not spoken clearly on the prejudice issue, district courts in the
The decision in *United States v. Hogan* provides an example of a court that focuses upon the need for systemic deterrence of prosecutorial misconduct. In *Hogan*, the Court of Appeals for the Second Circuit dismissed an indictment despite a lack of prejudice to the defendant because it found the actions of the prosecutor to have impaired the independent role of the grand jury. The court found several instances of prosecutorial misconduct, including characterization of the defendant as a "real hoodlum" and the presentation of extensive hearsay testimony.

In *Hogan* and other Second Circuit cases, dismissal of an indictment has been justified to achieve either of two objectives: to eliminate prejudice to the individual defendant, or to prevent widespread prosecutorial impairment of the grand jury's independent role. The latter objective is based upon the desire to enforce appropriate behavior by the government in presenting evidence to the grand jury. In other words, dismissal of an indictment for prosecutorial misconduct acts to deter future misconduct. The need for this deterrence justifies the extreme sanction of dismissal.

Similarly, other circuit courts have held the defendant to a lesser standard by looking beyond the individual defendant and instead focusing on

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Fourth Circuit have recognized the split among the circuits over this issue and have agreed to dismiss indictments where they find prosecutorial misconduct to be a long-standing practice in the district. See *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414, 1458 (D. Md. 1986); *United States v. Lawson*, 502 F. Supp. 158, 169-70 (D. Md. 1980).

The Seventh Circuit also has recognized the split among the courts of appeals on the issue of prejudice, but, it too has not taken a position. In *United States v. Roth*, 777 F.2d 1200 (7th Cir. 1985), the court noted with approval the requirement that the prosecutorial misconduct be outrageous or intentional, but left open the issue of prejudice. See id. at 1205.

85. 712 F.2d 757 (2d Cir. 1983).
86. See id. at 761.
87. See id.
88. See id. Use of hearsay evidence alone, however, is not a valid cause for dismissal. See Note, supra note 12, at 1081 n.36. To ensure that probable cause to indict the defendant exists, however, courts should avoid allowing undue reliance upon hearsay. See *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972) (prosecutor must not deceive grand jurors as to the "shoddy merchandise they are getting") (quoting *United States v. Payton*, 363 F.2d 996, 1000 (2d Cir.), cert. denied, 385 U.S. 993 (1966)).
92. See *United States v. Estepa*, 471 F.2d at 1137.
the integrity of the grand jury system. The rationales for this approach include the realization that dismissal of an indictment may help maintain proper prosecutorial standards; that dismissal does not really hurt the government because it may reindict; that dismissal maintains respect for the law, promotes confidence in the administration of justice and "preserve[s] the judicial process from contamination;" and that other sanctions have proved ineffective.

This "no prejudice" position represents the federal courts' appreciation of the realities of the grand jury system. The lack of restraints on a prosecutor enables her to abuse her special relationship with the grand jury. Such abuse places a defendant at enormous risk because an indictment itself, even if followed by acquittal, can have a devastating impact on the defendant's professional and personal life.

These courts, however, reserve the use of the sanction.
of dismissal for relatively serious instances of misconduct.\(^{103}\)

In contrast to the "no prejudice" position taken by the several courts of appeals, other circuit courts focus on the individual defendant and refuse to dismiss an indictment pursuant to their supervisory power without a showing of prejudice—that is, that the grand jury's decision to indict actually was based upon the prosecutorial misconduct.\(^{104}\)

For example, the Court of Appeals for the Fifth Circuit in United States v. McKenzie\(^{105}\) reinstated a grand jury indictment when it failed to find that the prosecutor's misconduct prejudiced the defendant.\(^{106}\) Although the court recognized the prosecutor's misleading response to the juror's questions about jury voting procedure to be egregious misconduct,\(^{107}\) it did not find that this misconduct had biased the grand jurors' determination of probable cause.\(^{108}\) The court defined prejudicial misconduct as conduct that effectively superimposes the will of the prosecutor on the grand jury.\(^{109}\)

The McKenzie court rationalized its prejudice requirement by stating that an indictment represents a preliminary step in the proceedings against a defendant.\(^{110}\) Under this view, a court relies on the safeguards associated with a trial to ensure that the defendant is not convicted improperly.\(^{111}\) Other circuits have deemed prejudice to be a necessary element of prosecutorial misconduct itself,\(^{112}\) or have found prosecutorial misconduct to constitute harmless error in the absence of prejudice.\(^{113}\)

The Court of Appeals for the Sixth Circuit has adopted a hybrid ap-
proach under which it will not dismiss an indictment unless to do so will both protect the individual defendant and serve to deter manifest systemic misconduct.\textsuperscript{114} For example, \textit{United States v. Talbot} \textsuperscript{115} holds that a defendant is entitled to the “extreme sanction” of dismissal only when he can prove that the misconduct prejudiced him and that the prosecutorial misconduct constitutes a longstanding or common abuse in the district.\textsuperscript{116} The Sixth Circuit has offered the strong public interest in prosecuting serious crimes as its rationale for this onerous standard.\textsuperscript{117}

The circuits that require a showing of actual prejudice to the defendant fail to address the realities of the grand jury system\textsuperscript{118} and the failure of less drastic sanctions to curb prosecutorial misconduct.\textsuperscript{119} Instead, they focus strictly on the individual defendant, failing to recognize the systemic dangers involved in allowing prosecutorial misconduct to continue unchecked. While a strong public interest in prosecuting serious crimes certainly exists,\textsuperscript{120} these circuits fail to consider the equally strong public interest in preserving judicial integrity.\textsuperscript{121} Furthermore, the Sixth Circuit’s almost unattainable requirement of both prejudice to the defendant and a systemic problem of prosecutorial misconduct\textsuperscript{122} renders the rules of conduct virtually unenforceable and the supervisory power impotent.

Thus, the relative value a court attributes to each of the factors contained in the \textit{Hasting} balancing test will determine whether it will require a showing of prejudice. Courts that require prejudice allot more weight to society’s interest in efficiently prosecuting serious crimes than to the wrong done to the individual defendant.\textsuperscript{123} Under this standard, if the prosecutorial misconduct did not bias the grand jury, the court will find that the wrong done to the defendant is de minimis and does not justify dismissal.\textsuperscript{124} Courts that dismiss an indictment without requiring a

\begin{itemize}
  \item \textsuperscript{115} 825 F.2d 991 (6th Cir. 1987), \textit{cert. denied}, 56 U.S.L.W. 3500 (1988).
  \item \textsuperscript{116} \textit{Id.} at 998-99 n.5. The alleged grand jury abuses included a violation of double jeopardy, speedy trial and due process rights. \textit{See id.} at 996.
  \item \textsuperscript{118} These courts fail to recognize the existence of grand jury abuse. \textit{See supra} notes 39-44 and accompanying text.
  \item \textsuperscript{119} \textit{See supra} note 97 and accompanying text (discussing the failure of lesser sanctions).
  \item \textsuperscript{121} See \textit{supra} notes 84, 100-02 and accompanying text.
  \item \textsuperscript{122} \textit{See supra} notes 114-17 and accompanying text.
  \item \textsuperscript{123} \textit{See supra} notes 110-17 and accompanying text.
\end{itemize}
showing of prejudice, however, allot more weight to society’s interest in preserving the grand jury system as a protection against malicious or unfounded prosecution than to society’s interest in efficiently prosecuting serious crimes.\textsuperscript{125} According to these courts, prosecutorial misconduct itself usurps a basic constitutional right,\textsuperscript{126} justifying the dismissal of a tainted indictment, even at the expense of judicial economy.\textsuperscript{127}

IV. DISMISSAL WITHOUT A SHOWING OF PREJUDICE WHEN THE DEFENDANT RAISES THE ISSUE OF PROSECUTORIAL MISCONDUCT IN A PRE-TRIAL MOTION

As stated previously, the Supreme Court has left open the question of the appropriate standard for dismissal when the defendant raises the issue of prosecutorial misconduct in a pre-trial motion.\textsuperscript{128} Few courts have confronted this “pre-trial” issue.\textsuperscript{129} Those circuits that do not require a showing of prejudice when the defendant raises the issue during or after trial,\textsuperscript{130} along with dissenting opinions of those courts that do,\textsuperscript{131} provide insight into how courts should handle pre-trial motions for dismissal—by focusing on the system rather than just the individual defendant.\textsuperscript{132} Under the \textit{Hasting} balancing test, the minimal cost imposed on the judicial system and on the victim by reindictment before trial\textsuperscript{133} militates in favor of dismissal without a showing of prejudice when dismissal would serve to deter prosecutorial misconduct. This will preserve the integrity of the grand jury process and, through it, that of the entire federal criminal justice system.\textsuperscript{134}

A. Balancing Relevant Interests

Under the Supreme Court’s decision in \textit{Hasting}, a federal court must conduct a balancing test prior to exercising its supervisory power to dismiss a tainted indictment.\textsuperscript{135} When a defendant raises the issue of

\textsuperscript{125} See supra notes 89-102 and accompanying text.
\textsuperscript{127} See, e.g., United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).
\textsuperscript{128} See Mechanik, 475 U.S. at 72.
\textsuperscript{129} See supra note 10.
\textsuperscript{130} See supra notes 85-103 and accompanying text.
\textsuperscript{131} See, e.g., Mechanik, 475 U.S. at 83 (Marshall, J., dissenting) (refusal to reverse convictions for demonstrated grand jury misconduct imposes unacceptable costs on society); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1395 (9th Cir. 1983) (Norris, J., dissenting in part) (“No case has held . . . that a defendant must show that a grand jury is biased before an indictment may be dismissed pretrial on supervisory power grounds.”), cert. denied, 465 U.S. 1079 (1984).
\textsuperscript{132} See supra notes 85-103 and accompanying text.
\textsuperscript{133} See infra notes 140-43 and accompanying text.
\textsuperscript{135} See supra note 59-60 & 66 and accompanying text.
prosecutorial misconduct before trial, application of the Hastinbalancing test favors dismissal of a tainted indictment as a means of protecting both the defendant's and society's interests in preserving fifth amendment rights.

Courts must consider various factors before agreeing to dismiss. When a motion is made during or after a trial on the merits, among the factors to be weighed is the trauma a victim will incur by reliving his experience at a second trial. Another factor to be considered is judicial and prosecutorial economy—keeping the time and money involved in prosecuting a crime to a minimum. A third factor is the strong public interest in prosecuting serious crimes. In light of these considerations, which emphasize economy of resources, courts will be less inclined to dismiss an indictment after society and the victim have invested resources in a trial.

When a defendant moves to dismiss prior to trial, however, the factors relevant to a court's decision to dismiss balance in favor of dismissal. Prior to trial the victim has not testified under cross-examination in an open court room. The trauma to the victim caused by testifying at a reindictment proceeding, thus, is less severe. Furthermore, a grand jury proceeding involves a much smaller expenditure of time and money than does a full trial. Therefore, if the government should choose to seek a second, untainted indictment, the nominal expenses already incurred should not act as a deterrent to its doing so. In a pre-trial motion, the Hastinbalancing favors dismissal: society's interest in the preservation of the grand jury system and the protection of the defendant outweigh the minimal costs of a second grand jury proceeding.

Finally, dismissal will not hamper the societal interest in prosecuting serious crimes. When a court dismisses an indictment pursuant to its supervisory power, the constitutional prohibition against double jeopardy does not apply, and the government is free to reindict. Therefore,

136. See supra notes 59-60.
139. See id. at 77.
140. As stated previously, the grand jury proceeding is ex parte. See supra note 18. No defense attorney is present to try to discredit the victim or other witnesses through cross-examination. See supra notes 74 & 89.
142. The fifth amendment provides in part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. Double jeopardy, however, does not apply to grand jury proceedings. See Note, supra note 12, at 1098 & n.170. Rather, jeopardy attaches only after a petit jury has been empaneled and sworn. See Crist v. Bretz, 437 U.S. 28, 35 (1978); Downum v. United States, 372 U.S. 734 passim (1963).
143. "The decision to resubmit a case to a grand jury is a matter of prosecutorial discretion that generally is not subject to judicial scrutiny." Note, supra note 12, at 1098 n.170; see United States v. Vetere, 663 F. Supp. 381, 387 (S.D.N.Y. 1987).
dismissal does not infringe substantially upon society's interest in prosecuting serious crimes.

Thus, the costs of dismissing an indictment pursuant to a pre-trial motion weigh little in the *Hasting* balance; the costs of continued prosecutorial misconduct, on the other hand, should tip the balance in favor of dismissal.144 Continued prosecutorial misconduct threatens to destroy the grand jury's role as a "shield for the innocent."145 Such misconduct not only violates the fifth amendment,146 but also threatens the integrity of the entire criminal justice system.

1. Deterrence

Courts afford the grand jury a presumption of regularity147 and should respect a prosecutor's independence.148 The prosecutor, however, possesses both the opportunity and the incentive to engage in misconduct during a grand jury proceeding.149 In addition, the secrecy rules shield the prosecutor from public scrutiny.150 With little restraint upon her actions, an overzealous federal prosecutor may, in any given case, convert the grand jury into a coercive arm of the United States Attorney's Office.151 To preserve the grand jury's role as a protector against unfounded prosecution, the courts must prevent such misconduct.

Courts can achieve this goal by granting pre-trial motions to dismiss prosecutor-influenced indictments without a showing of prejudice. Dismissal of indictments tainted by prosecutorial misconduct will deter future misconduct and preserve judicial integrity.152 Dismissing indictments results in a systemic inefficiency to which the United States Attorneys must respond by curbing instances of misconduct.153 As with the exclusionary rule,154 the benefit to the individual defendant repre-
sents only an incidental by-product of the primary goal of protecting systemic values by deterring official misconduct and preserving the "appearance of fairness."¹¹⁵⁵ Without deterrence, a real danger exists that the grand jury will deteriorate to serving as a "rubber stamp" of the prosecutor.¹¹⁵⁶ If this were to occur, the grand jury would no longer serve its fifth amendment purpose as a means of protecting the innocent from unfounded prosecution.¹¹⁵⁷

When raised pre-trial, prosecutorial misconduct during grand jury proceedings also necessitates dismissal because lesser sanctions have proven unsuccessful in curbing such misconduct.¹¹⁵⁸ Courts have recognized that admonishing the prosecutor fails to ensure the maintenance of prosecutorial standards.¹¹⁵⁹ Although the United States Attorney's offices have implemented policies to curb misconduct,¹¹⁶⁰ they have failed to translate the resulting policies into proper conduct by their trial prosecutors.¹¹⁶¹ Furthermore, although professional disciplinary sanctions exist,¹¹⁶² a criminal defendant generally lacks the resources to initiate proceedings "or to see that they are pressed to a successful conclusion."¹¹⁶³ Dismissal, although extreme, appears to be the only sanction

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¹¹⁵⁷. See supra notes 15-17 and accompanying text.

¹¹⁵⁸. See supra note 97.


¹¹⁶⁰. See United States v. Arcuri, 405 F.2d 691, 693 (2d Cir. 1968) (citing United States v. Arcuri, 282 F. Supp. 347, 350 (E.D.N.Y. 1968)); cert. denied, 395 U.S. 913 (1969)). The most prominent internal guidelines governing prosecutorial misconduct are the United States Attorneys' Manual. See 2 S. Beale & W. Bryson, supra note 2, § 10:21, at 78. The manual, however, is "intended to provide only internal guidance, and is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter civil or criminal." id. at 78-79 (citing United States Attorneys' Manual § 1-1.100).


¹¹⁶². See generally Gershman, supra note 24, at § 13.6 (reviewing various sanctions).
2. Technicalities

Critics have expressed concern that permitting lower courts to throw out indictments without a showing of prejudice will allow dismissals based on isolated technicalities. Federal courts will avoid this problem if they adhere to the dual purpose of dismissal: to protect the rights of an individual defendant and to deter prosecutorial misconduct that is recurring or widespread within a district. The Court of Appeals for the Third Circuit's decision in United States v. Serubo sheds light on how these purposes should affect the decision of whether or not to dismiss.

In Serubo, the Third Circuit panel held that a court should dismiss an indictment only if it finds at least one of three situations present: prosecutorial misconduct which actually prejudiced the grand jury's decision to indict; conduct amounting to more than "an isolated incident unmotivated by sinister ends;" or a type of misconduct which has become "entrenched and flagrant."
Serubo’s first requirement protects the rights of the individual defendant. The fifth amendment presupposes that the grand jury will operate as an independent investigative body. If the prosecutor usurps this independence by biasing the grand jury through her misconduct, the resulting indictment will violate the individual defendant’s fifth amendment rights.

The latter two Serubo requirements protect the integrity of the grand jury process. When the defendant shows an instance of prosecutorial misconduct to involve more than an isolated mistake made in good faith, or when the defendant shows that such misconduct has become the normal practice among the local Assistant United States Attorneys, preservation of the integrity of the system mandates that the courts adopt the harshest sanction available to them: they must dismiss the tainted indictment, regardless of whether the misconduct prejudiced the outcome of the grand jury proceeding.

Thus, application of the Serubo test will ensure that courts will not dismiss indictments for de minimis technical violations. In addition, it will further the federal courts’ interest in preserving judicial integrity and the integrity of the entire criminal justice system.

CONCLUSION

The use of the federal courts’ supervisory powers to dismiss an indictment presents the most effective way to curb prosecutorial misconduct at the grand jury level. When a defendant raises the issue of misconduct before trial, the court should dismiss without requiring the defendant to show prejudice if dismissal would serve to deter a systemic problem of prosecutorial misconduct.

Using the balancing test required by United States v. Hasting, societal interests favor dismissal when the defendant raises the issue in a pre-trial motion. No long and costly trial has occurred, no victims have testified


173. See supra note 17; United States v. Dionisio, 410 U.S. 1, 16-17 (1973) (compelled production of voice exemplars); United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.) (prosecutor’s misleading response to a juror’s question), cert. denied, 459 U.S. 823 (1982).

174. Courts have been faced with a variety of isolated incidents of prosecutorial misconduct. See, e.g., United States v. Rosenfield, 780 F.2d 10, 11 (3d Cir. 1985) (violation of grand jury secrecy rules), cert. denied, 106 S. Ct. 3294 (1986); United States v. Roth, 777 F.2d 1200, 1205 (7th Cir. 1985) (use of perjured evidence); United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) (improper use of subpoena power).

under cross-examination, and no supervening jury verdict has been handed down. On the other hand, the costs of unchecked prosecutorial misconduct may be substantial.

The Framers incorporated the grand jury system into the Constitution to protect citizens from unfounded government prosecution. Some instances of prosecutorial misconduct, however, have transformed individual grand juries into tools of the United States Attorneys' Offices. The rules of secrecy, the absence of judge or adversary, and the wide discretion granted to the prosecutor make the grand jury fertile ground for misconduct. Other, lesser sanctions have proven ineffective. If the courts allow misconduct to continue unchecked, they risk undermining the integrity of the entire criminal justice system.

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