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Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence

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Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence

R. Michael Cassidy*

INTRODUCTION

The bromide that “a grand jury would indict a ham sandwich if the prosecutor asked it to” reflects a generally accurate belief that the prosecutor exerts primary control over the flow of information before the grand jury. Notwithstanding this almost universal recognition that a prosecutor wields great power before the grand jury, it would probably surprise most lay persons to learn that in the federal system a prosecutor has no enforceable duty to present before the grand jury evidence which exonerates the target of the investigation. The debate over a prosecutor’s grand jury disclosure obligations, apparently laid to rest for the federal courts by the Supreme Court’s 1992 decision in United States v. Williams,1 has now been transferred to state courts and bar disciplinary authorities. In this article, I will discuss the contours and ethical underpinnings of a prosecutor’s disclosure obligations before the grand jury, and set forth a new framework for consideration of such issues.

Just as at its inception in twelfth century England,2 the dual functions of a

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2. The origin of the grand jury has been traced to England and the Assize of Clarendon in 1166. 2 Sir Frederic Pollock & William Maitland, The History of the English Law 642 (2d ed. 1923). The first clause of that assize provided that twelve lay men from each township, upon oath to tell the truth, could make a presentment to the sheriff of any man suspected of “being a robber or a murderer or a thief.” A presentment of the grand jury did not signify guilt, nor did it lead ineluctably to punishment. Such a presentment merely signified that the person presented was suspected of a crime. The defendant’s actual guilt or innocence was determined at trial, by battle or ordeal, and later, in the 13th century, by trial to a “petty” jury. 1 Sir William S. Holdsworth, A History of English Law 322 (4th ed. 1927). The early settlers in the American colonies had no established police force to investigate crime, so they imported the English grand jury. See Robert L. Misner, In Partial Praise of Boyd: The Grand Jury As Catalyst for Fourth Amendment Change, 29 Ariz. St. L.J. 805, 831 (1997). Initially celebrated by the colonists as a vital check on the royal prerogative, the right to indictment by a grand jury for “capital, or otherwise infamous” crimes was included among the fundamental protections of the Bill of Rights. U.S. Const. amend. V.
grand jury in criminal cases are both inquisitorial and accusatorial; that is, grand juries both investigate crimes and decide which charges to present to the sovereign for trial. For this reason, the grand jury often has been called both a “sword” and “shield.” The grand jury is a “sword” because through the power of subpoena, the power to compel testimony, and the power to seek immunity for witnesses, a grand jury may ferret out crimes. It is a “shield,” because through informed and independent decisionmaking, the grand jury may act to protect innocent persons from accusations not supported by probable cause. Despite the historical duality of the grand jury’s role, serious questions have been raised as to the ability of the grand jury to perform its shield function.

In many states and the federal court system, the American grand jury is composed of twenty-three lay citizens. Its work is conducted in total secrecy, and the modern grand jury receives guidance and instruction from only one advocate — the prosecutor. The prosecutor is responsible for making an opening statement, examining witnesses, introducing physical evidence, preparing the draft indictment, and instructing the jury on the legal elements of the crimes presented in the proposed charges. In some states, the prosecutor may even remain in the room while the grand jury deliberates, purportedly to assist in the event that any jurors have questions.

In sharp contrast, counsel for a defendant plays no role in the grand jury except silently to advise should the client be called as a witness. Otherwise,
defense counsel is not even allowed in the grand jury room.\textsuperscript{11} Neither the rules of evidence,\textsuperscript{12} nor the constitutional rights of a defendant to be secure from unreasonable searches and seizures,\textsuperscript{13} to confront the witnesses against him, and to testify in his own defense\textsuperscript{14} apply in grand jury proceedings.

Perhaps because the prosecutor's power at this early stage of criminal proceedings is paramount, grand juries return indictments in an extremely high percentage of cases.\textsuperscript{15} Not surprisingly, the status of the grand jury as an independent and quasi-judicial body capable of screening out unmeritorious charges repeatedly has been called into question. Much has been written about the failure or the inability of the grand jury to fulfill its historical function of screening out unmeritorious charges through the return of a "no bill." Once conceived as frontline security for the innocent against "hasty, malicious, and oppressive persecution,"\textsuperscript{16} the grand jury, according to some experts, has become a mere tool, or "rubber stamp," of the prosecutor.\textsuperscript{17} Many commentators in recent years have called for reform of the grand jury\textsuperscript{18} and many states have abolished the grand jury altogether in favor of other methods of pre-trial case screening, such as the use of judicial probable cause hearings.\textsuperscript{19}

\textsuperscript{11} In the federal grand jury, counsel for a witness is not allowed in the grand jury room during questioning of his client. United States v. Mandujano, 425 U.S. 564, 581 (1976). Cf. N.Y. LAW § 190.52 (allowing counsel for grand jury witness to be present during examination). If the witness seeks legal advice before answering a particular question, the witness must request a break in the proceedings to consult with counsel outside the grand jury room. See United States v. Calandra, 414 U.S. 338, 349 (1974) (noting that "because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial"); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, (9-11.151 (1999) (stating that if a witness has a lawyer, a grand jury will allow a reasonable opportunity to leave the grand jury room to consult with counsel).

\textsuperscript{12} FED. R. EVID. 1101(d)(2).

\textsuperscript{13} Hale v. Henkel, 201 U.S. 43, 64 (1906) (establishing a reasonableness test for grand jury subpoenas rather than a probable cause test); United States v. Calandra, 414 U.S. 338, 350 (1979) (refusing to apply exclusionary rule to grand jury proceedings).

\textsuperscript{14} United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988), cert. denied, 489 U.S. 1027 (1989).

\textsuperscript{15} According to statistics compiled by the Executive Office for United States Attorneys in Washington, D.C., in 1995, the U.S. Attorneys initiated 22,856 proceedings before federal grand juries. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' STATISTICAL REPORT 6 (1997). Of those investigations initiated before the grand jury in 1995, in only thirty-nine cases was an indictment not returned. Thus, for this one-year period, federal grand juries returned an indictment against some defendant in over ninety-nine and eight tenths percent of the cases initiated. U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 1995 Table 1.3. (visited Oct. 12, 1999) <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs95.pdf>.


\textsuperscript{17} Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 CORNELL L. REV. 260, 269 (1995); Amell, supra note 6, at 156.


\textsuperscript{19} Although the right to indictment by grand jury "for capital, or otherwise infamous crime" is embodied in the Fifth Amendment, the United States Supreme Court has ruled that this protection is not so inimical to the
Those jurisdictions that have abandoned the grand jury generally have done so at significant cost, because the inquisitorial function of the grand jury is not easily replaced. In situations where an arrest has not been made and law enforcement officials are seeking to “solve” a crime, the grand jury may play a unique and valuable investigative role; it may subpoena a witness to appear and answer questions under the pains and penalties of perjury; it may request a court to immunize a witness who asserts his right not to incriminate himself; it may command the production of documents and other physical evidence such as handwriting, voice, and blood samples; and, it may assess, in deliberative fashion, the relative credibility of witnesses whose accounts differ from one another. In lieu of an indictment, the grand juries of many states are authorized to publish their findings in the form of a “report” to the court which impaneled them, recommending civil redress or systemic reform. These important pre-charging investigatory tools are not available to prosecutors or police officers in most states unless they are acting through and on behalf of a duly constituted grand jury. Thus, commentators who call for the wholesale abandonment of the grand jury may be trading away important inquisitorial tools in return for a more balanced case screening process.

To date, proposals for grand jury reform have not been fruitful. Professor Andrew Leipold has proposed, among other possible reforms, replacing the grand jury with a body of legal experts acting independently of the government. Professor Peter Arenella has called for increasing the procedural protections available to targets of a grand jury investigation, such as by extending the exclusionary rule and the ban on hearsay to grand jury proceedings. Because these proposals would entail a drastic reformulation of the grand jury’s historic accusatory role, they have not gained political momentum. A more appropriate effort to improve the grand jury’s screening function must be sensitive to the concept of ordered liberty that the due process clause of the Fourteenth Amendment requires it in state courts. Hurtado v. California, 110 U.S. 516, 533 (1884). Twenty-five states now allow the initiation of criminal charges for felonies by information, and over half the states have abolished the grand jury altogether. See Morse, supra note 7, at 122; Leipold, supra note 17, at 314.

21. See SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE §3:01 (2d ed. 1997). In both England and the colonies, the grand jury’s right to report was exercised most frequently in cases involving public corruption or government misfeasance, thus allowing citizens to perform some oversight of their government via a sanction short of indictment. Barry Jeffrey Stern, Note, Revealing Misconduct by Public Officials Through Grand Jury Reports, 136 U. PA. L. REV. 73, 83 (1987). Today, special grand juries impaneled by the federal courts are authorized to issue reports on matters relating to corruption by public officials and organized crime. See 18 U.S.C. § 3333.
22. The legislatures in only twelve states have conferred upon prosecuting attorneys, acting independently of a duly constituted grand jury, the general authority to issue subpoenas duces tecum during criminal investigations (so called “investigative subpoenas”). See H. Morley Swingle, Criminal Investigative Subpoenas: How to Get Them, How to Fight Them. 54 J. Mo. B. 15 (1998).
23. Leipold, supra note 17, at 321.
preliminary nature of the grand jury’s inquiry, yet strong enough to guard against outrageous government conduct.

Grand jury reform efforts also must be viewed as part and parcel of a recent movement to curtail prosecutorial discretion generally, which reflects a popular reaction to prosecutorial overreaching. While calls for grand jury reform predated Independent Counsel Kenneth Starr’s investigation into the affairs of President Clinton, the Whitewater investigation clearly has intensified the debate. In 1997, Congress passed and President Clinton signed the Hyde Amendment, which allows certain defendants who prevail in criminal proceedings to sue the government to recover costs and attorneys fees, provided that they establish that the indictment was “vexatious, frivolous, or in bad faith.” In 1998, Congress passed, and President Clinton signed, the Citizens Protection Act (informally known as the “McDade Amendment”), as part of the 1998 Omnibus Consolidated and Emergency Supplemental Appropriations Bill. Provisions of the McDade Amendment make federal prosecutors subject to the local ethical rules of the states in which they practice. As the title of the Citizens Protection Act implies, one of its goals is to protect targets and witnesses of criminal investigations by curtailing prosecutorial discretion.

These recent restrictions on prosecutorial power confirm that most legislators, as well as many practitioners and commentators, believe that the grand jury has lost its ability to act as a “shield” by screening out unmeritorious charges. In addition, there is a widespread view that this erosion of the grand jury’s ability to act as a check on prosecutorial power is beyond repair. Nonetheless, the Supreme Court continues to act as if a grand jury indictment is a stronger or more valid finding of probable cause than a criminal complaint or information. Because, for some constitutional purposes, a grand jury determination of probable cause obviates the need for judicial review of probable cause at a preliminary hearing, it is incumbent upon prosecutors to ensure that the grand jury fulfills its essential screening function. It is concomitantly incumbent upon courts and commentators to seek workable mechanisms to hold prosecutors accountable in fulfilling this ethical responsibility.

27. An early draft of the McDade Amendment included a provision, not included in the final bill, that would have required the Judicial Conference of the United States to consider and report on a proposed amendment to Fed. R. Crm. P. 6 allowing witnesses before a federal grand jury to have counsel physically present in the room when they testify. H.R. 4276, 105th Cong. (1998).
28. In Gerstein v. Pugh, for example, the Supreme Court ruled that a grand jury indictment substitutes for a judicial finding of probable cause and obviates the need for hearing when there is pre-trial detention. 420 U.S. 103, 118 n.19 (1975). Thus, a defendant charged by information or complaint who is arrested and unable to post bail is entitled constitutionally to a preliminary hearing before a magistrate within forty-eight hours of his arrest, while a defendant arrested pursuant to an indictment warrant has no similar protection. The differences for a criminal defendant are grave, because he may be detained for long periods of time following indictment without any judicial finding of probable cause. See Fed. R. Crm. P. 5(c) (no preliminary examination required after indictment).
This Article analyzes the Supreme Court’s decision in *Williams*, in which the Court struck down such an attempt by the Tenth Circuit to impose an obligation on federal prosecutors to disclose substantial exculpatory evidence to the grand jury. After setting forth the contours of the problem in Section I of the Article, I argue in Section II that the *Williams* case was wrongly decided for two principal reasons. First, it offered only a one-sided analysis of the historical function of the grand jury. Second, it misapprehended the permissible supervisory role of the federal courts. More importantly, I discuss how the Supreme Court’s failure to act in this area does not preclude, but in fact invites, legislative or judicial action on the state level aimed at preventing prosecutorial abuse and excesses in the grand jury.

States interested in more accurate, independent, and informed case screening by grand juries should require prosecutors, either by decision, statute, or rule of criminal procedure, to refrain from distorting the evidence before the grand jury by omitting evidence in their possession that substantially negates the defendant’s guilt. By doing so, states would at least be assured that the prosecutor does not mislead the grand jury; without a fair presentation of the evidence, the grand jury cannot fulfill its obligation to determine whether there is probable cause to believe that the defendant has committed a crime. Imposition of such a rule barring distortion of evidence before the grand jury would be consistent with, if not arguably compelled by, a prosecutor’s general duty of fairness under the *Model Rules of Professional Conduct*, which are discussed in Section III. Section IV explores why a distortion test would also be more workable than the “substantial exculpatory evidence” approach taken by many states.

My proposal is not without significant costs in terms of the judicial resources needed to review a prosecutor’s presentation of evidence before the grand jury when a defendant raises an appropriate claim of error. These challenges would most often take the form of motions to dismiss indictments on the ground that the prosecutor failed to fulfill his duty to present exculpatory evidence to the grand jury. In Section V of the Article, I propose a framework for consideration of such motions and an appropriate remedy for a prosecutor’s failure to present certain substantially exculpatory evidence to the grand jury. This solution addresses the tension between the state’s interests in conserving judicial resources in its review of preliminary proceedings, and in encouraging a more balanced and fair grand jury presentation by the government.

I. ILLUSTRATION OF THE PROBLEM

To establish the framework for this discussion of a prosecutor’s ethical responsibilities before the grand jury, consider the following illustration:

*A group of teenage boys from an affluent suburb are charged with the rape of a mentally handicapped female classmate. The rape allegedly occurred in the basement of one boy’s home, with each boy allegedly participating or encour-
aging some form of sexual assault on the victim, including fellatio, digital penetration, and penetration with a baseball bat.

The defense was consent; that is, that the victim instigated the sexual encounter at the school parking lot, followed the teenagers to one of their homes, and willingly participated in the group sexual activity with the defendants. The victim, whom the defendants had known since childhood, was portrayed by the defense as sexually aggressive. Under the state's applicable aggravated sexual assault law, however, physical coercion or force need not be proved on a charge of sexual assault if "the victim is one whom the actor knew or should have known was . . . mentally defective."

In a motion by the prosecution before the family court to try the juvenile defendants as adults, the prosecution introduced evidence from psychiatric experts that the victim's IQ was 64, six points below normal intelligence; that she was mildly retarded; and that the defendants knew, or should have known that she was "slow." Defense experts, however, testified at the preliminary hearing that the victim's mental condition was borderline; that while she was arguably "slow," this slight mental defect would not have been apparent to the average teenage boy, and that it would not have affected her ability to understand her right to refuse sex.

The state family court granted the prosecution leave to try the juveniles as adults, and the prosecution proceeded to the grand jury. In a letter written to the prosecutor during the grand jury proceedings, counsel for the defendants asked the prosecutor to introduce before the grand jury evidence from their medical experts supporting their defense that the victim was not mentally defective under the terms of the applicable statute.

If the prosecution calls before the grand jury those psychiatric experts who testify that the victim was mentally defective, is the prosecutor also required to call as witnesses or summarize the testimony of experts hired by the defense who contradict this medical conclusion? This problem illustrates a recurring dilemma faced by prosecutors: how to evaluate potentially exculpatory evidence during a criminal investigation, and whether to present such evidence to a grand jury. The problem arises in myriad forms every day in jurisdictions across this country, but essentially boils down to two questions: (1) should the grand jury, whose sole task is to determine whether there is probable cause to believe that the defendant has committed a crime, hear evidence that undermines the state's theory, thereby transforming the grand jury from a merely accusatory body into a mini-trier of ultimate fact; and, (2) if so, how does a prosecutor determine whether a particular piece of evidence is exculpatory, without weighing credibility and abandoning or undercutting the official's traditional adversarial role?

For many prosecutors, the hypothetical just described poses an easy question for which they have a straightforward answer: the defendant will have a chance to call the medical experts to testify at trial before a petit jury, where the ultimate determination of guilt or innocence will be made. Therefore, they would assert, the prosecutor has no ethical, legal, or moral responsibility to make this evidence
known to what is essentially only a charging body. Other prosecutors, whether out of a broader view of their responsibilities or from an abundance of ethical caution, would introduce this evidence, having in mind the grand jury’s important screening function, and their own responsibility to pursue justice rather than simply to advocate for convictions.

The fact that there could be radically different approaches among experienced prosecutors to this frequently recurring problem should give us great pause. Presumably, all would agree that whether a grand jury chooses to indict or not indict a particular defendant certainly depends on a variety of factors, but one of them should not be the individual moral compass of the particular prosecutor assigned the case. Notwithstanding the radically different approaches to this problem taken among prosecutors at both the state and federal levels, most courts and commentators have been strikingly unhelpful in assisting prosecutors to define the parameters of their responsibility — if any — to present exculpatory evidence to the grand jury.

II. IN SEARCH OF A SOLUTION: AN OPPORTUNITY LOST

Most federal appellate courts considering the issue prior to 1992 ruled that a prosecutor does not have a general duty to present evidence favorable to a defendant to a grand jury. They reasoned that such a duty would transform the grand jury from an accusatory body into a finder of ultimate fact and would impose substantial resource demands on the judiciary by requiring review of grand jury presentations.

Many courts reaching this result relied on the Supreme Court’s 1956 decision in Costello v. United States,29 in which the Court ruled that an indictment based solely on hearsay evidence does not violate the Fifth Amendment. Reacting to concerns that allowing challenges to the quality or sufficiency of the evidence before the grand jury would heavily burden judicial resources with preliminary hearings, the Costello court stated that “[a]n indictment returned by a legally constituted and unbiased grand jury ... if valid on its face, is enough to call for trial of the charge on the merits.”30 Indeed, the Court continued, “neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grandjuries must act.”31 After Costello, lower courts had little trouble interpreting this admonition to mean that courts need not entertain claims that a prosecutor had omitted exculpatory evidence from his grand jury presentation.32

30. Id. at 363.
31. Id. at 362.
32. See United States v. Wilson, 798 F.2d. 509, 517–18 (1st Cir. 1986); United States v. Adamo, 742 F.2d 927, 937 (6th Cir. 1984); United States v. Civella, 666 F.2d 1122, 1127 (8th Cir. 1981); United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979); United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir. 1976).
A more serious and more difficult question was whether prosecutors had a duty to present to the grand jury *substantially* exculpatory evidence, that is, evidence which directly negated or contradicted evidence of the defendant’s guilt. Unlike general exculpatory evidence, which may simply cast some doubt on the credibility of government witnesses (such as impeachment evidence), evidence that affirmatively suggests that the defendant did not commit the crime, or that someone else did, is directly relevant to the grand jury’s accusatory function. If believed, it suggests that there is no probable cause to indict. Prior to 1992, the circuits were split on the question of whether prosecutors have an obligation to present to the grand jury substantially exculpatory evidence in their possession.

In 1992, the Supreme Court resolved this issue in *United States v. Williams*. A federal grand jury indicted John Williams, an investor from Tulsa, Oklahoma, on seven counts of bank fraud for knowingly making false statements intended to influence the actions of a federally insured financial institution. Specifically, the indictments alleged that the defendant misstated his financial position on balance sheets provided to the bank in support of his loan application by: 1) listing under “current assets” $6 million in notes receivable from venture capital companies he had an interest in, notwithstanding that these investments were highly speculative and not reducible to cash value in the short term; and 2) reporting under “income” the interest he received on these notes, notwithstanding that such interest was funded entirely by his own loans to the company. Williams moved to dismiss the indictments, arguing that the government failed to fulfill its

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33. For the purposes of constitutionally mandated pre-trial discovery, exculpatory evidence has been defined broadly as “evidence favorable to the accused.” Brady v. Maryland, 373 U.S. 83, 87 (1963). Stated simply, the prosecution must disclose to the defense prior to trial any “information known to or available to them which may develop doubt about the government’s narrative.” United States v. McVeigh, 954 F. Supp. 1441, 1449 (D. Colo. 1997). The *Brady* line of cases have established a broad definition of constitutionally exculpatory evidence, including evidence which would impeach a government witness (such as prior inconsistent statements or inconsistent identification), evidence which would show bias on the part of a government witness (such as promises, rewards, or inducements), evidence which would cast doubt on any essential element of the crime charged, or evidence which would suggest that someone other than the defendant committed the crime. Exculpatory evidence includes not only documents or testimony admissible in evidence, but also inadmissible materials which, if defense counsel had access to them, might lead to admissible evidence. See *United States v. LaRouche Campaign*, 695 F. Supp. 1265, 1279 (D. Mass. 1988).

34. *Compare* United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987) (“substantial exculpatory evidence . . . must be revealed to the grand jury”), United States v. Romano, 706 F.2d 370, 374 (2d Cir. 1983) (“A dismissal is warranted only in extreme circumstances . . . the prosecutor is not obligated to present all possible defenses to a grand jury.”), *and* United States v. Flomenhaft, 714 F.2d 708, 712 (7th Cir. 1983) (“while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target’s guilt.”) (quoting United States v. Dorfman, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981)), *with* United States v. Lasky, 600 F.2d 765, 768 (9th Cir. 1979) (“The prosecution was not required to present the grand jury with evidence which would tend to negate guilt.”), *and* United States v. Ruyle, 524 F.2d 1133, 1135 (6th Cir. 1975) (“If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. . . . An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for a trial of the charge on the merits.”).

obligation to present "substantially exculpatory evidence" to the grand jury. His lawyers argued that the government failed to introduce to the grand jury federal tax returns and Williams' testimony in a contemporaneous bankruptcy proceeding, both of which established that Williams consistently reported these notes (and interest on the notes) as current assets and income. According to Williams, his consistent treatment of these notes in other reporting forums belied an intent to mislead the banks, which was an essential element of the crime charged.

The district court agreed and dismissed the indictments, ruling that the evidence created "a reasonable doubt about [the defendant's] guilt" and "rendered the grand jury's decision to indict gravely suspect." Applying its ruling in United States v. Page, the Tenth Circuit Court of Appeals affirmed, holding that the district court's conclusion that the government possessed and withheld substantial exculpatory information from the grand jury was not clearly erroneous.

The Supreme Court granted certiorari to resolve the issue of "whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." The respondent argued both: 1) that imposing such an obligation on prosecutors is necessary to protect the Fifth Amendment's guarantee of indictment by a grand jury for serious crimes; and, 2) that the Tenth Circuit's disclosure rule, independent of the Fifth Amendment, was consistent with and supported by its general supervisory power over the grand jury. In a majority opinion by Justice Scalia, a sharply-divided Court reversed the Tenth Circuit, ruling that dismissal of an indictment for failure to disclose exculpatory evidence to the grand jury was not proper. The opinion is remarkable not for its result, but for its reasoning. The majority ruled that federal courts are without general superintendence power concerning the nature or quality of evidence presented to the grand jury.

36. Id. at 39.
37. Id.
38. Id.
39. Id.
40. See United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987) ("[W]hen substantial exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury.").
41. Williams, 504 U.S. at 39.
42. Id. at 40. The dissenters in Williams argued that certiorari was improvidently granted because the government had not argued in either the district court or in the court of appeals that federal courts are without power to supervise a prosecutor's presentation of evidence in the grand jury, but had argued only that the particular evidence left undisclosed in Williams did not constitute "substantially exculpatory" material within the ambit of the Tenth Circuit's Page rule. See id. at 70. The majority not only reached the merits of the question on which certiorari was granted, but assumed for the purposes of its opinion that the evidence left undisclosed in Williams was "substantial." See id. at 55.
43. See id. at 45, 51.
44. See id. at 54–55.
45. See id. at 50. In ruling that the federal courts had no general supervisory authority to fashion rules of superintendence over the grand jury, the Supreme Court clearly left open the possibility that a similar rule
Williams argued that the Tenth Circuit's disclosure rule could be justified "as a sort of Fifth Amendment 'common law.'"46 Rejecting this argument, the Court ruled that the Tenth Circuit's disclosure rule was not a necessary means to assure the defendant's constitutional right to "an independent and informed grand jury."47 Focusing on the accusatory role of the grand jury, Justice Scalia stated that "the grand jury sits not to determine guilt or innocence, but to assess whether there is an adequate basis for bringing a criminal charge."48 He added:

The [disclosure] rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory evidence as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.49

Justice Scalia rejected the notion that the Fifth Amendment assures putative defendants the right to a balanced presentation of evidence before the grand jury, noting that both in England and in the colonies, a person under investigation had no right to appear before the grand jury himself or to present a defense through others. Because the grand jury had no obligation to hear such defense evidence were it to be tendered,50 Justice Scalia refused to "convert a non-existent duty of the grand jury itself into an obligation of the prosecutor."51 His opinion reasoned that because the Fifth Amendment common law of the grand jury would not be abridged "if the grand jury itself chooses to hear no more evidence than that which suffices to convince it an indictment is proper,"52 to require a prosecutor to present exculpatory evidence, while denying that the grand jury has an obligation to consider it, "would be quite absurd."53

While Justice Scalia is correct that in England a putative defendant had no right to testify or to present a defense before the grand jury,54 it does not ineluctably follow from this historical fact that the later enacted Fifth Amendment does not require a prosecutor to present such evidence were it to come into his possession.55 The placement of the right to a grand jury indictment in the Fifth

mandating disclosure of exculpatory evidence could be fashioned through statute or a rule of criminal procedure. "[I]f there is an advantage to the proposal, Congress is free to prescribe it." Id. at 55.

46. Id. at 51. Respondent in Williams did not directly allege that the prosecutor's failure to present substantial exculpatory evidence to the grand jury deprived him of his Fifth Amendment right to indictment by such a body; rather, he argued that the "common law" of the Fifth Amendment empowered the Tenth Circuit to supervise the nature of evidence presented to the grand jury. Id. at 39.

47. Id. at 51 (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)).

48. Id.

49. Id.

50. See id. at 51-52.

51. Id. at 53.

52. Id.

53. Id. at 52.

54. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300 (1769) (grand jury is "only to hear evidence on behalf of the prosecution"), cited in Beavers v. Henkel, 194 U.S. 73, 84 (1904).

55. Certainly Justice Scalia is correct that if such a disclosure rule existed, a wise defense counsel who
Amendment, along with other key individual liberties such as the right not to be a witness against oneself and the right to due process of law, suggests that the grand jury was viewed as some form of safeguard between the government and its citizens. The prosecutor is an arm of the government, but the grand jury is a body of the people. It is not inconsistent, and surely not absurd, to suggest that the grand jury has no obligation to hear or consider a particular piece of evidence, but also that the prosecutor has some obligation to present it. In the former case, the finder of fact is given the choice of what evidence to consider; in the latter, the government deprives that very deliberative body of the opportunity to make such a choice.

Justice Scalia also undervalued the historical screening function of the grand jury. The majority in Williams concluded that requiring a prosecutor to disclose exculpatory evidence to the grand jury would do little to further the grand jury’s accusatory function because its duty is simply to charge, not to determine guilt or innocence. But, both in England and in the colonies, one of the roles of the grand jury was to screen out unmeritorious charges. Where exculpatory evidence is so substantial that to introduce it would actually lead the grand jury to conclude that there is no probable cause to believe that the defendant committed the crime, nondisclosure compromises this core screening function.

On the Fifth Amendment issue, the majority in Williams clearly felt constrained by the Court’s prior mandate in Costello not to inquire into the nature or sufficiency of evidence presented to the grand jury. In Costello, the Court had observed:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.

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56. Historical examples abound, both in England and the colonies, of grand juries exercising this screening function by “no billing” meritless or unpopular charges. In 1681, a London grand jury in England returned an “ignoramus,” or no bill, on charges of treason against the popular Earl of Shaftesbury and his follower, Stephen Colledge, who had challenged the authority of King Charles II to reestablish the authority of the Catholic Church in England. Antell, supra note 6, at 156. In the colonies, unpopular laws were often nullified by grand juries who refused to indict under them. In 1765, for example, a grand jury in Boston refused to indict the leaders of the Stamp Act Riot due to the unpopularity of the law and the perceived tyranny of the King. See Elizabeth G. McKendree, United States v. Williams: Antonin’s Costello — How the Grand Jury Lost the Aid of the Courts as a Check on Prosecutorial Misconduct, 37 How. L.J. 49, 57 (1993).


Although the express holding in *Costello* dealt only with judicial review of the *competence* of evidence before the grand jury (hearsay), the above cited dicta expressed the Court’s refusal to review the “competency and adequacy” of evidence before the grand jury. This dicta was repeated eighteen years later in *Calandra*, where the Court refused to apply the exclusionary rule in the grand jury to evidence seized in violation of the Fourth Amendment, stating that “the validity of an indictment is not affected by the character of the evidence considered.”59 By the time *Williams* was decided in 1992, the Supreme Court on two separate occasions had stated its disinclination to allow federal courts to review grand jury presentments to determine whether probable cause existed to support the crime charged, without expressly ruling so on facts properly before it.60 Having traveled down this road, the Court felt constrained in *Williams* to forestall challenges to the prosecutor’s decisions about what evidence to present to the grand jury: “It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury’s judgment while scrutinizing the sufficiency of the prosecutor’s presentation.”61 As a practical matter, the Court simply promoted efficiency over fairness. The Court did not want to commit the judicial resources necessary to review the scope or quality of evidence presented to the grand jury, worrying that the need to rule on such motions would “consume ‘valuable judicial time’”62 and engage the courts in “preliminary trials on the merits.”63

Because the Court concluded that the common law of the Fifth Amendment had not been violated by the prosecutor’s conduct in *Williams*, and because no specific statute or rule of criminal procedure required the prosecutor to present exculpatory evidence to the grand jury, the Court determined that the Tenth Circuit was without *power* to create a common law disclosure rule by judicial decision.64 Justice Scalia concluded that federal courts lack any general supervisory power over the grand jury because grand juries are not “judicial” proceedings.65 He relied on the fact that the grand jury is not mentioned in the body of the Constitution, but only in the Bill of Rights, to support his conclusion that it belongs to none of the three branches of government.66 He also pointed both to the scope of the grand jury’s power,67 and to the manner in which it was

60. The Court in *Williams* cited with approval United States v. Reed, 27 F. Cas. 727, 738 (C.C.N.D. N.Y. 1852), in which Justice Reed, riding circuit, found “[n]o authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof.” *Williams*, 504 U.S. at 54.
61. *Id*.
62. *Id* at 55.
64. See *Williams*, 504 U.S. at 46–47.
65. See *id* at 47.
66. *Id*.
67. *Id* at 48. Justice Scalia noted that the grand jury, unlike a court, conducts its proceedings in secrecy; that
exercised, to distinguish it from Article III courts. Having concluded that the grand jury is not part of the judiciary, the majority in Williams ruled that a court's power to regulate grand jury proceedings is not as broad as its supervisory power over its own proceedings. Therefore, the Court proclaimed that the judiciary's supervisory power over the grand jury should be limited to situations where the constitution, a statute, or a rule has been violated.

On the separation of powers issue, the Court in Williams struggled to distinguish its holding only three Terms earlier in Bank of Nova Scotia v. United States. In Bank of Nova Scotia, which also emanated from the Tenth Circuit, the Court had ruled that dismissal of an indictment for alleged prosecutorial misconduct before the grand jury was improper, where there was no showing that the violation "substantially influenced the grand jury's decision to indict" and no "grave doubt" that the indictment was free from the substantial influence of such violations. The challenged conduct of the prosecutor in Bank of Nova Scotia was multifarious, and included: allegedly violating Federal Rules of Criminal Procedure 6(d) by allowing unauthorized persons into the grand jury room; violating the secrecy provisions of Federal Rules of Criminal Procedure 6(e) by disclosing grand jury material to civil tax auditors and to other grand jury witnesses; and, intentionally presenting false and misleading evidence to the grand jury. The Supreme Court ruled that, even if the district court was correct in finding that they occurred, none of the violations prejudiced the defendant. Significantly, the Court did not rule that it was without power to dismiss the indictments where prejudice was found. Yet in Williams, the majority unconvincingly limited the holding of Bank of Nova Scotia by ruling that a federal court has power to dismiss an indictment only for "a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to a grand jury swears in its own witnesses; that a grand jury's jurisdiction is not limited to a specific case or controversy; and, that the target of a grand jury need not be informed of the nature of the proceedings against him. See id.

68. Justice Scalia noted that certain constitutional protections available in judicial proceedings have no application before the grand jury, such as double jeopardy and the Sixth Amendment right to counsel; moreover, evidence gathered in violation of a target's Fifth Amendment right against self-incrimination will not undermine the validity of an indictment. Id. at 49.

69. See Williams, 504 U.S. at 50 ("These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.").

70. The dissenting opinion by Justice Stevens, joined by Justices Blackmun, O'Connor, and Thomas, criticized the majority's rather facile conclusion that because the grand jury is not an Article III court, such courts have no general superintendence power to supervise grand jury proceedings, finding such logic "unpersuasive." Id. at 66 (Stevens, J., dissenting). Stevens correctly cited many instances in which the grand jury relies on the courts to fulfill its responsibilities, such as enforcing summonses and compelling witnesses to testify. Id. (Stevens, J., dissenting) (citing Brown v. United States, 359 U.S. 41, 49 (1959) (describing the grand jury as an "appendage of the court.").


72. Id. at 256 (quoting United States v. Mechanik, 457 U.S. 66, 78 (1986)).

73. Id. at 259–60.
ensure the integrity of the grand jury’s functions.‘’74 However, the improprieties complained of in Bank of Nova Scotia were clearly not limited to violations of Rule 6 or the Constitution,75 and Justice Scalia’s transparent attempt to limit the Williams holding to these few subsets of prosecutorial misconduct did not escape the stinging critique of the dissenters.76

The Court in Williams also understated the extent to which it had allowed judicial oversight of grand jury proceedings in the past. In the forty years preceding Williams, for example, the Court was very active in protecting the process of selecting grand jurors from racial and gender discrimination.77 The Court has also indicated its willingness to limit a grand jury’s subpoena power,78 and to dismiss indictments when a prosecutor intentionally presents perjured testimony to the grand jury.79 Not all of these forms of misconduct by or before the grand jury is expressly forbidden by Constitution, statute, or rule. As recently as its opinion in Bank of Nova Scotia, the Court looked instead to whether the misconduct complained of had so compromised the integrity of the grand jury as

74. United States v. Williams, 504 U.S. 36, 46 (1992) (quoting Mechanik, 457 U.S. at 74 (O’Connor, J., concurring)).
75. The claims that the prosecutor (1) intentionally presented false evidence to the grand jury and (2) berated an expert witness outside of the grand jury room clearly were not based on a clearly defined statute or rule, yet the majority in Bank of Nova Scotia applied a harmless error analysis to the claims of error, implying that had the misconduct prejudiced the defendant, dismissal would have been proper. See Bank of Nova Scotia v. United States, 487 U.S. 250, 261–62 (1988). Defendant in Bank of Nova Scotia did not argue that the prosecutor’s intentional presentation of false evidence to the grand jury made him an accomplice to a violation of 18 U.S.C. § 1623, which prohibits perjury by a witness before the grand jury.
76. See Williams, 504 U.S. at 65 (“Unquestionably, the plain implication of that discussion [in Bank of Nova Scotia] is that if the misconduct, even though not expressly forbidden by any written rule, had played a critical role in persuading the jury to return the indictment, dismissal would have been required.”).
77. See, e.g., Rose v. Mitchell, 445 U.S. 545, 555–56 (1979) (“Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.”); Wood v. Georgia, 370 U.S. 375, 390 (1962) (“the grand jury ... serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.”); Cassell v. Texas, 339 U.S. 282, 288 (1950) (“it was [the commissioners’] duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination.”); Ballard v. United States, 329 U.S. 187, 195–96 (1946) (“The systematic and intentional exclusion of women ... deprives the jury system of the broad base it was designed by Congress to have in our democratic society. ... [T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”).
79. See Bank of Nova Scotia, 487 U.S. at 260 (“Because the record does not reveal any prosecutorial misconduct with respect to these summaries, they provide no ground for dismissing the indictment.”). See also Mooney v. Holohan, 294 U.S. 103, 112 (1935) (“[D]ue process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.”); United States v. Basurato, 497 F.2d 781, 787 (9th Cir. 1974) (“Permitting a defendant to stand trial on an indictment which the government knows is based on perjured testimony cannot comport with this ‘fastidious regard for the honor of the administration of justice.’ ”) (quoting Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956)).
to render its proceedings “fundamentally unfair.” When it was deemed important enough, the Court was willing to intervene to protect the integrity of the grand jury process. Justice Scalia’s newly-minted and exclusive reliance on violations of express constitutional provisions, statutes, or rules as the bellwether of when a court may intervene in grand jury proceedings without violating principles of separation of powers appears simply to have been made up out of whole cloth.

In relying on principles of separation of powers to reach its decision, Williams recognized that “the Fifth Amendment’s ‘constitutional guarantee [of indictment by grand jury] presupposes an investigative body acting independently of either prosecuting attorney or judge.’” Yet total independence from both bodies is impossible. The grand jury cannot act except on the advice and direction of the prosecutor, and prosecutorial misconduct cannot be prevented and deterred except with the aid and intervention of the courts. By refusing to allow courts to exercise supervisory authority over grand juries, the Court may be preserving the grand jury’s independence from the judiciary, but only at the cost of maximizing the grand jury’s dependence on prosecutors.

Over twenty five years ago, the Supreme Court described the function of the grand jury as follows: “[I]t serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.” A prosecutor who knows of evidence that negates the defendant’s guilt, and who consciously chooses not to disclose it to the grand jury, either does not personally believe the evidence is credible, or seeks to gain some form of leverage by indicting an innocent defendant. In the former case, he is imposing his “intimidating power” on the grand jury by substituting his will for the collective and informed judgment of that deliberative body. In the latter case, he is acting “maliciously” by pursuing an indictment not supported by probable cause. The Court in Williams failed to recognize that either form of motivation is paradigmatically what the drafters of the Fifth Amendment sought to prevent when they placed the grand jury as a shield between the people and the sovereign. Nondisclosure of substantial exculpatory evidence makes the grand jury exclu-

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81. In Ballard, for example, the Court exercised its supervisory authority to prevent exclusion of women from service on grand juries, rather than relying on an express constitutional or statutory provision. Ballard v. United States, 329 U.S. 187, 190 (1946).
82. 504 U.S. at 49 (quoting United States v. Dionisio, 410 U.S. 1, 16 (1973)).
84. If exculpatory evidence is of such weight that it is likely to convince a trial jury to acquit, most sensible prosecutors would prefer that the grand jury “screen out” a case than that a weak indictment be followed by a prolonged trial and acquittal. Nonetheless, there are a number of rational but pernicious reasons that some prosecutors would not present the grand jury with credible evidence supporting the defendant’s innocence. See infra note 166 and accompanying text.
sively a tool of the prosecutor, rather than a bulwark between the prosecutor and the individual.

III. INEFFECTUAL ETHICAL RULES AND STANDARDS

A conscientious prosecutor has as much responsibility for protecting against unfounded convictions as he does in pursuing valid ones. For this reason, requiring balance and fairness on the part of government lawyers has long been considered an integral element of professional norms.85

The United States Attorney is 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.86

Simply put, a prosecutor’s duty is to seek justice, not convictions. Yet, to date, ethical rules aimed at prosecutorial fairness have not adequately addressed the particular problems posed by a prosecutor’s presentation of evidence to the grand jury.

Reasons for imposing a general duty of fairness on prosecutors were articulated in the American Bar Association’s 1970 Model Code of Professional Responsibility (“Model Code”):

This special duty [to seek justice] exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of which cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.87

Despite this statement, Model Code EC 7–13 contains only a general exhortation to prosecutors to seek “justice.”88 No disciplinary rule promulgated by the American Bar Association (“ABA”) in 1970 explicitly addressed a prosecutor’s obligation to present exculpatory evidence to a grand jury.

In 1983, the general principles articulated in Model Code EC 7–13 were given slightly more substance by Rule 3.8 of the ABA’s new Model Rules of Professional Conduct (“Model Rules”). Model Rule 3.8, entitled “Special Responsibili-

85. See Canon of Professional Ethics Canon 5 (1908) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”).
88. Id.
ties of a Prosecutor," contains several prescriptions aimed specifically at government lawyers in criminal cases. These include the requirements that a prosecutor make timely pre-trial disclosure of exculpatory Brady material and that the prosecutor refrain from seeking waiver of procedural rights from an unrepresented accused. 89 The comment to Model Rule 3.8 reiterates that these duties are part of a prosecutor’s general responsibility to be a “minister of justice” and not simply an advocate — thereby repeating the general exhortation for fairness articulated earlier by the ABA in both its 1908 Canons and its 1970 Model Code.

While Model Rule 3.8 does not directly address a prosecutor’s obligation to present exculpatory evidence to the grand jury, it does require a prosecutor to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” 90 Yet this rule does not curtail prosecutorial discretion in the decision as to what evidence to present to a grand jury. First, the use of the phrase “refrain from prosecuting” suggests a focus on the continued pursuit of a criminal matter after indictment, not on the grand jury’s decision to indict and the evidence offered by the prosecutor to influence this decision. Second, the phrase “the prosecutor knows” suggests a focus on the prosecutor’s subjective knowledge or his assessment of the credibility of the evidence, rather than a grand juror’s potential assessment of that same evidence. For example, to be in violation of Model Rule 3.8, even if it applied to a prosecutor’s decision of what evidence to submit to a grand jury, the prosecutor would have to “know” that the existence of this evidence would negate probable cause in the eyes of the grand jury; that is, without this evidence, that the grand jury would fail to indict. Such affirmative knowledge is impossible as an epistemological matter, and extremely unlikely as a practical matter. 91 Thus, the plain language of Model Rule 3.8 suggests that it was not intended to apply to grand jury proceedings at all, 92 but rather to criminal matters commenced by arrest and criminal complaint, such as those prosecuted in most state courts. There, for example, it would be improper for a prosecutor to fail to dismiss a charge instituted by a police officer once he analyzed the police reports and learned that there was insufficient evidence to satisfy an essential element of the offense.

91. An extreme example may illustrate the point. Even in a situation where the prosecutor is presenting evidence to a grand jury tending to establish that “A” committed a particular crime, and two days prior to indictment “B” walks in to the prosecutor’s office and confesses to the crime, the prosecutor still does not “know” that “B” committed the crime, for “B” may be confessing falsely. The prosecutor certainly does not “know” that the grand jury would believe “B” over other witnesses or evidence which points to “A”.
92. This construction is supported by several state variations on Model Rule 3.8, and commentary thereto. See, e.g., Ark. R. Prof. Conduct 3.8, cmt. (“the issuance of a grand jury indictment ordinarily indicates probable cause for the prosecutor to proceed.”); Texas R. Prof. Resp. 3.09, cmt. 2 (“Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper.”).
Some commentators on the Model Rules have looked to Model Rule 3.3 as a source of authority for imposing upon prosecutors an affirmative obligation to present substantially exculpatory evidence to a grand jury. Model Rule 3.3(d), dealing with an attorney’s obligations of candor to the tribunal, states: “In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Model Rule 3.3(d) has no basis or cognate in either the 1908 Canons or the Model Code. It has been argued that there were three external sources for imposing this ethical obligation of disclosure in ex parte proceedings: state common law relating to an attorney’s obligations in moving for a default judgment; rules of civil procedure relating to temporary restraining orders; and the rules of the United States Patent Office. All are uniquely civil, and have no obvious application to criminal proceedings.

The ABA has yet to construe Model Rule 3.3(d) in either a formal or informal opinion. However, two aspects of the commentary to Model Rule 3.3(d) suggest that the drafters did not intend it to apply to grand jury proceedings, notwithstanding that such proceedings may be considered ex parte. First, the comments discuss an advocate’s duty in ex parte proceedings to present certain adverse information necessary to “yield a substantially just result” when the conflicting position would normally “be expected to be presented by the opposing party.” A putative defendant is not a “party” to the grand jury’s investigation, because the litigation contemplated by a prospective indictment has not yet commenced; thus, at least one purported justification for the rule does not apply in the grand jury context. Second, the comment gives as one reason for the rule that, although the adverse party is not present or formally represented at ex parte proceedings, “[t]he judge has an affirmative responsibility to accord the absent party just consideration.” This statement suggests that the “tribunal” to whom the obligation of disclosure applies is a judicial tribunal, not a grand jury.

93. Model Rules Rule 3.3(d).
95. The drafters of Model Rule 3.3 clearly had civil proceedings foremost in their minds in drafting section (d). In the comment, they used the example of “an application for a temporary restraining order” as an instance where a party has a limited obligation of presenting adverse facts. Model Rules Rule 3.3 cmt. 15.
96. Dennis, supra note 94, at 179.
97. An ex parte proceeding is one conducted by or on behalf of one party only. “A judicial proceeding, order, injunction, etc. is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.” Black’s Law Dictionary 517 (5th ed. 1979). See also United States v. Calandra, 414 U.S. 338, 343–44 (1974) (terming a grand jury proceeding an “ex parte investigation”).
98. Model Rules Rule 3.3 cmt. 15.
99. Id.
100. See Model Rules of Professional Conduct Annotated Rule 3.3 (suggesting that term “tribunal,” though not defined by Model Rule 3.3 nor the comment thereto, applies to courts of law and other adjudicative hearings).
The issue of whether Model Rule 3.3(d) applies in the grand jury context is clouded somewhat by the comments to an entirely different section of the Model Rules. The comment to Model Rule 3.8, discussing a prosecutor's responsibility as a "minister of justice," states baldly and without elaboration, "[s]ee also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included." Thus, as just discussed, although Model Rule 3.3(d) does not explicitly state that it applies to grand jury proceedings, and although the comments to that rule arguably suggest otherwise, the comment to Model Rule 3.8 states that it does. This ambiguity has engendered substantial debate by state courts in their consideration and adoption of the Model Rules. Several states, including Massachusetts, have excluded the grand jury from an attorney's obligation of disclosure in ex parte proceedings, either by explicitly excluding the grand jury from the definition of ex parte proceedings covered by the rule, or by deleting reference to the grand jury in the comments, or both. Nevertheless, twenty-one of the thirty-eight states that have adopted some form of the Model Rules simply have retained, without elaboration, the ABA's curious and misplaced reference to the grand jury in their comments to Rule 3.8.

102. See Ala. Rules of Professional Conduct Rule 3.3(d) (1999) ("In an ex parte proceeding other than a grand jury proceeding"); Haw. Rules of Professional Conduct Rule 3.3(d) (1994) ("In an ex parte proceeding except grand jury proceedings and applications for search warrants"); Mass. Rules of Professional Conduct Rule 3.3(d) Cmt. 15 (1997) ("Rule 3.3 does not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries"); S.D. Model Rules of Professional Conduct Rule 3.3(d) (1999) ("In an ex parte proceeding, except grand juries and applications for search warrants").
103. See Tex. Disciplinary Rules of Professional Conduct Rule 3.09 cmt. 2 (1998) ("Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed").
104. See Mass. Rules of Professional Conduct Rules 3.8 and 3.3(d). In 1996, a Rules Committee appointed by the Supreme Judicial Court of Massachusetts proposed adopting the Model Rules of Professional Conduct, and proposed retaining the reference to the grand jury in Comment 1 to Model Rule 3.8. The Rules Committee's report was released for public comment, and both the Attorney General of Massachusetts and the United States Attorney for the District of Massachusetts filed letters in opposition. On June 9, 1997 the Supreme Judicial Court, which had since 1972 followed the Model Code of Professional Responsibility, issued its final order adopting, with some modifications, the Model Rules of Professional Conduct. Among these modifications the Massachusetts Supreme Judicial Court deleted reference to the grand jury in comments to its version of Model Rule 3.8 and excluded the grand jury from the definition of ex parte proceedings covered by its version of Model Rule 3.3(d), Mass. Rules of the Supreme Judicial Court Rule 3:07 (1998).
further fuels the as-yet-unresolved debate as to whether an attorney’s disclosure obligation in ex parte proceedings applies in grand jury presentations.\textsuperscript{106}

As may be seen from this discussion, the above-described rules of professional responsibility pertaining to a prosecutor’s ethical responsibilities before the grand jury are anything but clear.\textsuperscript{107} Even if they were, they would not be an adequate check on a prosecutor’s exercise of discretion. First, courts are unwilling to dismiss an indictment in response to a prosecutor’s violation of an ethical rule before the grand jury, preserving that ultimate sanction for instances in which a prosecutor either has deprived the defendant of important statutory or constitutional rights,\textsuperscript{108} or has substantially prejudiced the defendant through some egregious and flagrant ethical transgression that corrupts the judicial proceedings.\textsuperscript{109} The drafters of the Model Rules expressly stated that the ethical rules were intended to be enforced through bar discipline proceedings, and that “[v]iolation of a Rule should not . . . create any presumption that a legal duty has been breached.”\textsuperscript{110} Without the sanction of dismissal, there is little “bite” in the rules of professional conduct, and thus little incentive for prosecutors to tailor their conduct to accord with professional norms.

Second, state bar enforcement of any ethical rule requiring a prosecutor to disclose substantially exculpatory evidence to the grand jury would be extremely problematic due to the secrecy of grand jury proceedings.\textsuperscript{111} Transcripts of grand jury proceedings may not be turned over to bar counsel except upon leave of court after a showing of particularized need.\textsuperscript{112} Defense counsel, whose primary

\textsuperscript{106} See United States v. Colorado Sup. Ct., 87 F.3d 1161, 1165 (10th Cir. 1996) (ruling that United States Attorney had standing to challenge Colo. Rule 3.3 as a violation of the supremacy clause, because challenge to rule requiring prosecutors to present exculpatory evidence to the grand jury presented allegation of injury in fact). Subsequent to this decision, the Colorado Supreme Court deleted from its comment to Rule 3.8 reference to grand jury proceedings. See United States v. Colorado Sup. Ct., 988 F. Supp. 1368, 1369 (D. Colo. 1998).

\textsuperscript{107} See Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 VAND. L. REV. 45, 113 (1991). Professor Zacharias argues that the Model Rules contain too generalized an approach to prosecutorial ethics, and that by using amorphous “justice” concepts, the code drafters have “abdicate[d] their responsibility to write meaningful rules.” Id.

\textsuperscript{108} See, e.g., Whitehouse v. United States Dist. Ct., 53 F.3d 1349, 1360 (1st Cir. 1995) (explaining that a federal court’s power to dismiss an indictment is reserved for “extremely limited circumstances,” as doing so “directly encroaches upon the fundamental role of the grand jury”).

\textsuperscript{109} See, e.g., United States v. Lopez, 4 F.3d 1455, 1463–64 (9th Cir. 1993) (questioning prudence of remedying ethical violation through dismissal of indictment, and reversing trial court’s dismissal of indictment for interference with defendant’s right to counsel in violation of California “no contact” rule).

\textsuperscript{110} MODEL RULES scope.

\textsuperscript{111} A collateral consequence of the Williams decision is that federal grand jury transcripts are more likely to remain exclusively in the prosecutor’s possession. FED. R. CRIM. P. 6(e)(3)(c)(ii) allows a defendant access to grand jury transcripts “upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.” Yet in Williams, the Supreme Court dramatically limited the available legal grounds for bringing such pre-trial motions to dismiss. Bernstein, supra note 4, at 571–72.

\textsuperscript{112} See FED. R. CRIM. P. 6(c)(3)(c)(ii); United States v. Sells Eng’g, Inc., 463 U.S. 418, 425 (1983). See also
interest is in vindicating his client on criminal charges at trial, generally does not have even minimally sufficient incentives to pursue judicial leave to disclose grand jury minutes to an administrative enforcement agency. 113

Finally, state bar disciplinary rules can be an effective deterrent to prosecutorial misconduct only if they are applied with enough regularity and severity to deter prosecutors from omitting substantial exculpatory evidence in their grand jury presentations. Even if state bar overseers possessed the tools necessary to enforce a clearly defined ethical rule pertaining to grand jury disclosure, bar discipline is too erratic and uncertain, and the imposition of sanctions by the courts following disciplinary recommendations too uneven, to serve as an adequate incentive for prosecutors to present exculpatory evidence to the grand jury. 114 When issues of professional conduct are closely intertwined with substantive legal directives – in this case, Fifth Amendment protections – state bar disciplinary organizations simply are reluctant to become involved.

While efforts at rule making and enforcement have not adequately addressed the issue, the ABA has attempted to provide some ethical guidance to prosecutors in the form of non-binding standards of conduct. The ABA Standards Relating to the Administration of Criminal Justice (“Standards”), approved in 1973, are intended to present “guidelines that have long been adhered to by the best prosecutors and best defense advocates.” 115 They are aspirational standards only, and not disciplinary rules.

The Standards contain an important admonition pertaining to a prosecutor’s ethical responsibilities before the grand jury. Standard 3–3.6(b), pertaining to the prosecution function, provides that “[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.” 116 “Mitigating” evidence is substantially broader than “exculpatory” evidence. 117 If taken seriously, this standard would suggest that prosecutors

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114. Id. at 730–31. In a survey of forty-one states which analyzed disciplinary sanctions for Brady violations, Professor Rosen found that, during a seven year period, only six formal complaints were opened against prosecutors for failing to fulfill their pre-trial discovery obligations, and in only two cases were informal sanctions issued. Id. Because Brady violations directly impede a defendant’s ability to mount a defense at trial, one may assume that violations of a prosecutor’s grand jury disclosure obligations, if applicable, would be treated even more leniently by state bar disciplinary boards.


117. Mitigating factors are simply extenuating circumstances; that is, factors which do not excuse the conduct, but point towards mercy for the defendant. See Peek v. Kemp, 784 F.2d 1479, 1490 (11th Cir. 1986). For Eighth Amendment purposes, the Supreme Court has defined mitigating circumstances in the context of
IV. STATE APPROACHES TO THE PROBLEM

State courts and legislatures have not blindly followed the Supreme Court's reasoning in *Williams* by taking a “hands off” approach to this problem. Of the states that have addressed the issue by statute or common law, most have determined that prosecutors do have some limited and enforceable duty to present exculpatory evidence to the grand jury. However, they differ on how the requisite jury instructions in the penalty phase of death penalty cases as “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Examples include aspects of the defendant’s background which explain his conduct; mental impairment not rising to the level of a complete defense to the crime; intoxication or drug use; and, relevant aspects of the victim’s character or conduct that suggest that the victim may have initiated or provoked the defendant’s conduct. See also 18 U.S.C. § 3592 (1996) (setting forth permissible mitigating factors for jury to consider in sentencing phase of death penalty cases).

Standard 3–3.6(b) is echoed to varying degrees both in the United States Department of Justice (DOJ) *United States Attorneys' Manual*118 and in the National District Attorney’s Association (“NDAA”) *National Prosecution Standards*119 — non-binding internal codes of conduct for federal and state prosecutors, respectively. However, both the *United States Attorneys' Manual* and the *National Prosecution Standards* employ language significantly narrower than the Standard 3–3.6(b) in their definition of substantially exculpatory evidence. Neither the federal nor state prosecutors’ manuals include the ABA’s unusual reference to mitigating information. Moreover, the *United States Attorneys' Manual* requires disclosure to the grand jury only of evidence which directly negates guilt, not evidence which “tends” to negate guilt. For reasons that discussed in Section V, infra, the *United States Attorneys' Manual* offers a far more balanced and practical statement of a prosecutor’s ethical responsibilities in this area than either the *National Prosecution Standards* or Standard 3–3.6(b).

IV. STATE APPROACHES TO THE PROBLEM

State courts and legislatures have not blindly followed the Supreme Court’s reasoning in *Williams* by taking a “hands off” approach to this problem. Of the states that have addressed the issue by statute or common law, most have determined that prosecutors do have some limited and enforceable duty to present exculpatory evidence to the grand jury. However, they differ on how the

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118. The *United States Attorneys' Manual*, while expressly disavowing the creation of legal rights for defendants, serves as an internal ethical code for federal prosecutors. *U.S. Attorneys' Manual*, supra note 11, at 1–1.100. See also United States v. Blackley, 167 F.3d 543, 548 (D.C. Cir. 1999) (internal DOJ standards to not confer substantive rights upon criminal defendants). However, it does require federal prosecutors who are "personally aware of substantial evidence that directly negates the guilt of a subject to the investigation ... [to] present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." *U.S. Attorneys' Manual*, supra note 11, at 9–11.233.

119. The NDAA manual is intended as a "reference source on the prosecution function." *National District Attorney's Association, National Prosecution Standards* 1 (1991). Its relevant provision suggests that "[t]he prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt or preclude an indictment." *Id.* Standard 58.4, at 173.
A. ALLOWING A DEFENDANT TO APPEAR

Several states have enacted statutes which allow the target of a grand jury investigation to appear before the grand jury and either make a personal statement or give evidence on his own behalf. Although not expressly tied to exculpatory evidence per se, the practical significance of these statutes is that they allow the putative defendant the chance to avoid indictment altogether or reduce the potential charges against him if he is in possession of credible exculpatory evidence which would explain away or mitigate the offense.

Nevada, New York, New Mexico, and Georgia each have departed from the federal rule via statutes allowing the target of a grand jury investigation to appear and give evidence on his own behalf. These statutes differ from one another in several respects. Nevada and New Mexico require the prosecutor to notify the putative defendant of his target status and his right to appear. New York, however, without providing notice, puts the onus on the target to request an appearance. Georgia limits the category of cases in which the target has a right to appear to public corruption offenses.


121. Targets of federal grand jury investigations have no absolute right to appear before the grand jury. United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988). While the United States Attorneys' Manual cautions federal prosecutors to give "favorable consideration" to all "reasonable requests" by targets to appear before the grand jury, it does not require them to allow such an appearance. U.S. ATTORNEYS' MANUAL, supra note 11, at 9–11.152. Considerations which may affect the reasonableness of a request include the likelihood or consequences of delay, whether the target is represented, and the target's willingness to waive, in writing, his right against self-incrimination and to consent to full cross-examination. Id.

122. See NEV. REV. STAT. § 172.241 (1986); N.M. STAT. ANN. § 31-6-11(B) (1978). In a situation where the grand jury is investigating a crime which has not been charged in a lower court, providing the target with notice of his right to appear could compromise the secrecy and efficacy of the investigation by allowing the putative defendant to flee the jurisdiction, secrete evidence, or tamper with witnesses. Nevada allows the prosecutor to apply ex parte to the court supervising the grand jury for permission to withhold notice, if the prosecutor presents adequate cause to believe that the person under investigation is a flight risk or may pose a danger to the life or property of other persons. NEV. REV. STAT. § 172.241(3)(a). New Mexico allows the prosecutor himself to waive the notice requirement, in situations where "the prosecutor determines" that there is a risk of flight, danger to others, or potential obstruction of justice. N.M. STAT. ANN. § 31-6-11(B).

123. N.Y. CRIM. PROC. LAW § 190.50(5)(a) (Consol. 1996). New York requires the prosecutor to give the target notice of his statutory right to appear only in cases where the defendant has already been arraigned on a pending felony charge in local criminal court, and the underlying charge is the same offense which is the subject of the pending grand jury proceeding. Id.

B. BROAD DUTY TO DISCLOSE

For at least two reasons, these types of statutes are insufficient to ensure a more balanced presentation of evidence before the grand jury. First, the defendant who chooses to appear before the grand jury waives his right against self-incrimination, exposes himself to cross examination by the prosecutor, and risks future use of his statements against him at trial. For this reason alone, many, if not most, seasoned defense lawyers would advise targets of grand jury investigations not to testify before the grand jury, even if the target were in possession of exculpatory evidence and wanted to "tell his side of the story." This is particularly so in states that do not allow counsel for the witness to appear with his client in the grand jury room. Second, these "right to appear" statutes do not capture a host of situations where there is substantial exculpatory evidence known to the prosecutor but not to the defendant — such as the results of forensic examinations, recantation by material witnesses, or misidentification. In such circumstances, allowing the defendant the right to appear does not address fully the problem presented by a prosecutor who willfully withholds from the grand jury substantial exculpatory evidence.

A number of states have enacted statutes that, either expressly or by interpretation, require a prosecutor to disclose exculpatory evidence to the grand jury. For example, a Nevada statute provides that "[i]f the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury." The Supreme Court of Nevada has interpreted this "explain away the charge" language extremely broadly, dismissing indictments without prejudice to re-indictment where, for example, the prosecutor fails to present to the grand jury the target's general denials made to police or prior bad act evidence which arguably impeaches the alleged victim. The Nevada court has considered it necessary to vigorously and expansively enforce this statute in order to preserve the independence of the grand jury, reasoning that "a prosecutor's refusal to present exculpatory evidence 'destroys the existence of an independent and informed grand jury.'" Dissenting Nevada justices have accused the majority of adopting an "unnecessarily expansive view of the meaning of exculpatory evidence that may add an unwarranted dimension to grand jury proceedings."

126. Ostman v. Nevada, 816 P.2d 458 (Nev. 1991) (holding that where issue in rape investigation was one of consent, and victim was defendant's girlfriend, district attorney violated statute by failing to inform grand jury of defendant's voluntary statement to police after incident in question that the victim had voluntarily participated in sexual activity).
127. Sheriff v. Frank, 734 P.2d 1241, 1244 (Nev. 1987) (ruling that where victim of alleged sexual abuse had initially alleged abuse both by her father and brother, and later recanted allegation against brother, it was error for prosecutor to fail to inform grand jury about recantation, because it could have been considered by grand jury as prior false statement in assessing victim's credibility).
128. Ostman, 816 P.2d at 459 (quoting Frank, 734 P.2d at 1244).
129. Id. at 460.
California also has imposed a broad duty of disclosure upon prosecutors. In *Johnson v. Superior Court*, the attorney prosecuting a narcotics case did not present to the grand jury the defendant's testimony from an earlier probable cause hearing that he was selling amphetamines on the day of his arrest at the direction of law enforcement officials with the intention of informing on the buyers. The court ruled that the district attorney's failure to bring this testimony to the attention of the grand jury violated California Penal Code (939.7 which authorizes a grand jury to subpoena and consider evidence “when it has reason to believe that [such] other evidence within their reach will explain away the charge.” Stating that “[t]he grand jury cannot be expected to call for evidence of which it is kept ignorant,” the court ruled that the grand jury’s statutory right to consider such evidence would be illusory unless the district attorney also had an implied duty under the statute to inform the grand jury when he is personally aware of “evidence reasonably tending to negate guilt.” The court issued a writ prohibiting trial of the defendant and directing that the charge be dismissed without prejudice to the state’s right to seek another indictment.

Subsequent California cases suggest that *Johnson* requires prosecutors to disclose to the grand jury evidence that, if believed, would affect the degree of crime charged or undermine the credibility of a key state witness, but not evidence of legal insanity.

C. LIMITED DUTY TO DISCLOSE

Even in the absence of a controlling statute, some states have taken action in this area by judicial decision. New York, New Jersey, and Massachusetts are...
good examples of jurisdictions that have imposed a more limited duty of disclosure upon prosecutors in the grand jury by common law. The high courts of these states have struck a balance between full disclosure, which risks turning grand jury proceedings into mini-trials on the merits and severely taxing the resources of reviewing courts, and no duty of disclosure whatsoever, which limits the ability of the grand jury to perform a meaningful screening function. These jurisdictions have ruled that a prosecutor must disclose to the grand jury only that exculpatory evidence which is so "substantial" or "important" that it might reasonably have tended to affect the grand jury's decision to indict.

Since 1976, New York courts have recognized a duty on the part of prosecutors to disclose substantial exculpatory evidence to the grand jury. Although not resting this duty on state constitutional grounds, the New York Court of Appeals has likened a prosecutor's obligation of disclosure in the grand jury to a prosecutor's obligation under the Due Process Clause not to obtain a conviction based on evidence he knows to be false or perjured. Suggesting that omitting exculpatory evidence is like lying to the tribunal, the court of appeals stated that "as a public officer [the prosecutor] owes a duty of fair dealing to the accused and candor to the courts." The New York Court of Appeals has ruled that exculpatory out of court communications by the target need not be introduced before the grand jury unless they are part of a single statement with both inculpatory and exculpatory elements and the prosecutor intends to present the inculpatory section to the grand jury. The court has also ruled that when a witness before the grand jury testifies that she previously identified the defendant as the robber, the prosecutor need not notify the grand jury that the identification was made from a photograph rather than in person. The New York trial courts' record of enforcing this limited disclosure obligation with regard to impeachment material has been uneven, leading to inconsistent results.

142. Id.
143. People v. Mitchell, 626 N.E.2d 630, 632 (N.Y. 1993) (prosecutor introduced statement made by defendant upon 911 response that she stabbed husband "because he was cheating on me," but did not introduce subsequent, post-arrest statement at police station that she acted in self-defense). This result is explained by the fact that New York has a statute allowing a defendant to appear and testify before the grand jury. N.Y. CRIM. PROC. LAW 190.50(5)(a). There is little justification for requiring a prosecutor to introduce before the grand jury an unsworn, out of court exculpatory statement by the defendant, when the defendant has a right, if he so chooses, to appear before the grand jury and make the same statement under oath.
145. Compare Filis, 386 N.Y.S.2d at 990 (refusing to dismiss murder indictment where prosecutor failed to inform grand jury that witness who testified that specific men had killed her husband had earlier given statement to police suggesting her inability to identify the men), with People v. Monroe, 480 N.Y.S.2d 259, 267 (Sup. Ct. 1984) (dismissing rape indictment where witness who made positive identification before grand jury had earlier made an undisclosed equivocal identification at lineup).
The New York Court of Appeals has also ruled that the prosecutor has no duty to introduce to the grand jury evidence of the target's psychiatric history that would support an insanity defense.\textsuperscript{146} The court reasoned that a prosecutor is not required to present to the grand jury every conceivable defense that would be suggested by the evidence, but only those "complete" defenses which, if believed, would eliminate a "needless or unfounded prosecution."\textsuperscript{147} Although the defense of mental disease or defect may be considered a complete defense in New York because it relieves the defendant of criminal responsibility for his crime,\textsuperscript{148} it also subjects the defendant to detention in a psychiatric institution at the conclusion of the trial.\textsuperscript{149} The court of appeals was unwilling to require prosecutors to introduce evidence of mental disease or defect to the grand jury because it would implicitly accord the grand jury the latitude to return a "no bill" upon the successful assertion of the defense, thereby frustrating the intent of the legislature to allow civil commitment of defendants found not guilty by reason of insanity.\textsuperscript{150}

The New Jersey Supreme Court has ruled that a prosecutor has an obligation to disclose to the grand jury evidence which is both clearly exculpatory and directly negates the guilt of the accused.\textsuperscript{151} The New Jersey high court cautioned that it would interpret the second part of this test — "directly negates guilt" — very narrowly: to warrant dismissal of the indictment the omitted evidence must "squarely refute[e] an element of the crime in question."\textsuperscript{152} In its 1996 opinion announcing this new rule, the New Jersey Supreme Court suggested that its limited duty of disclosure will be triggered only in "a rare case," and went on to describe a number of forms of exculpatory evidence which in its view clearly are not so important as to squarely refute the state's case and directly negate guilt — such as prior inconsistent statements of a grand jury witness; prior criminal records of a grand jury witness; evidence that the accused lacked a motive for the crime; and, self-serving exculpatory statements made by the accused.\textsuperscript{153} The New Jersey court left open the possibility that evidence of bias on the part of a crucial witness may require disclosure "in the context of the nature and source of the evidence," and that a "reliable, unbiased alibi witness" may in certain circumstances also mandate disclosure.\textsuperscript{154}

\textsuperscript{146} Lancaster, 503 N.E.2d at 995.
\textsuperscript{147} Id. at 993–94 (distinguishing between exculpatory defenses and mitigating defenses).
\textsuperscript{148} N.Y. PENAL LAW § 40.15 (Consol. 1998).
\textsuperscript{149} N.Y. CRIM. PROC. LAW §§ 330.10(2), 330.20 (Consol. 1996).
\textsuperscript{150} Lancaster, 503 N.E.2d at 995.
\textsuperscript{151} State v. Hogan, 676 A.2d 533, 543 (N.J. 1996) (declining to dismiss indictment where prosecutor did not inform grand jury that armed robbery victim had recanted and then subsequently rescinded her recantation, "partly because recantations are often induced by duress or coercion, the sincerity of a recantation is to be viewed with extreme suspicion") (citations and internal quotations omitted).
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 543–44.
\textsuperscript{154} Id.
In Massachusetts, an indictment also may be dismissed due to defects in the grand jury presentation if the prosecutor withholds important exculpatory evidence from the grand jury. In the 1984 decision of Commonwealth v. Connor, the Supreme Judicial Court articulated the general rule that: "If the grand jury were not made aware of circumstances which undermine the credibility of evidence that is likely to have affected their decision to indict, then the appropriate remedy may be dismissal of the indictment." Yet, in the Connor case, the court concluded that the indictments need not be dismissed because the prosecutor “minimally fulfilled” his duty to alert the grand jury to a prior inconsistent statement by a key prosecution witness.

In the fourteen years since Connor, although the Massachusetts appellate courts have paid lip service to their power to dismiss an indictment in response to a prosecutor’s failure to present substantial exculpatory evidence to a grand jury, they have never exercised the power, even though several compelling instances of prosecutorial misfeasance have been presented to them. Repeatedly proclaiming that “prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury,” these cases typically conclude that the evidence allegedly withheld was simply not important enough to have affected the grand jury’s decision. In some instances, the Massachusetts courts have looked at the sufficiency of the other evidence presented to the grand jury in making this materiality determination, ruling that even had the grand jury considered the withheld and allegedly exculpatory evidence, there existed sufficient other evidence to meet the standard of probable cause. Furthermore, in instances


156. Id. at 1352. The witness testified in the grand jury that one of two co-defendants had paid him to register a car used to dispose of the victims’ bodies. Id. at 1351. The prosecutor failed to bring to the grand jury’s attention that this same witness had previously identified at a probable cause hearing the other co-defendant as the person who had paid him the money. Id. The court ruled that the grand jury was made minimally aware of this important inconsistency, by the witness’ statement to the grand jury that “in the past I have said it was Tommy.” Id. at 1352.

157. See Commonwealth v. McGahee, 473 N.E.2d 1077, 1080 (Mass. 1985) (prosecutor failed to notify grand jury that witness who saw alleged perpetrator of armed robbery run from variety store failed to identify defendant at line up); Commonwealth v. Tavares, 541 N.E.2d 578, 580 (Mass. App. Ct. 1989) (in prosecution for aggravated rape where defendant had allegedly met the victim in a bar and offered her a ride home, the prosecutor failed to inform grand jury of rape victim’s prior inconsistent statement to an Emergency Medical Technician (EMT) that she had been assaulted by someone who had picked her up “hitchhiking”); Commonwealth v. Petras, 529 N.E.2d 404, 406 (Mass. App. Ct. 1988) (in rape case, prosecutor failed to inform grand jury about victim’s statement to medical personnel at hospital suggesting lack of penetration); Commonwealth v. Pond, 510 N.E.2d 783, 785 (Mass. App. Ct. 1987) (prosecutor failed to inform grand jury that victim was uncertain in her testimony against defendant); Commonwealth v. Pace, 491 N.E.2d 1080, 1082 (Mass. App. Ct. 1986) (prosecutor failed to notify grand jury that rape victim had picked a picture of someone other than defendant out of photo array); Commonwealth v. McGuire, 476 N.E.2d 632, 633 (Mass. App. Ct. 1985) (prosecutor failed to inform grand jury that victim of armed robbery, who had identified the defendant to the police in person minutes after the street incident, had failed to pick the defendant out of a line up five weeks later).

158. McGahee, 473 N.E.2d at 1080.

159. See Commonwealth v. Buckley, 571 N.E.2d 609, 616 (Mass. 1991) (finding that “the grand jury heard
where the issue presented itself on direct review of a conviction following trial, the Massachusetts courts have on occasion reasoned that because the exculpatory evidence was made known to the trial jury and yet did not dissuade them from convicting the defendant, it would not likely have had any significant effect on the grand jury which indicted the defendant.\textsuperscript{160}

The experience of states such as Massachusetts, New York, and New Jersey highlights the flaws inherent in the "substantial exculpatory evidence" approach. Application of this standard requires the court reviewing the indictment to determine whether the withheld evidence, had it been introduced to the grand jury, would have likely made a difference in their decision to indict. This obviously requires the court to speculate as to what would have influenced the twenty-three lay citizens without having any actual knowledge of the contents of their deliberations.

A single example will serve to illustrate the practical difficulties of this substituted judgment of materiality. Assume that a government lawyer fails to alert the grand jury to evidence that a government witness (a co-conspirator) has been offered leniency in exchange for cooperation. A trial court reviewing this omission on a motion to dismiss may consider bias a form of substantial exculpatory evidence, and may dismiss the indictment. However, the grand jury, in its secret deliberations, may have disbelieved and totally discounted the co-conspirator's testimony for reasons unrelated to bias (e.g., lack of memory or lack of credibility), and might nevertheless have chosen to indict the defendant based on other evidence. In such circumstances, the judge's determination of what would have affected the grand jury's decision could well be totally erroneous. Applying this substituted, speculative judgment of materiality might do nothing to safeguard the independence of a particular grand jury decision, and might even undercut it.

Because a "substantial exculpatory evidence" test is so heavily dependent upon not only the particular factual context of each case, but also upon the subjective viewpoint of the reviewing judge called upon to substitute his view of sufficient evidence to establish probable cause with respect to Buckley's involvement in the murder even though prosecutor failed to introduce evidence of another man at murder scene wearing a maroon hat); Commonwealth v. Jacobson, 477 N.E.2d 158, 165 (Mass. App. Ct. 1985) (finding "sufficient other evidence before the grand jury . . . establish[ing] that the fire had been set" where prosecutor failed to alert grand jury to test on carpet sample which was inconclusive as to the presence of gasoline residue in arson case). Unlike federal law, this focus on the sufficiency of the evidence before the grand jury is permitted under Massachusetts law. While not expressly declining to follow the Supreme Court's ruling in \textit{Costello}, the Massachusetts Supreme Judicial Court has ruled that a court reviewing an indictment must minimally assure itself that the grand jury heard "sufficient evidence to establish the identity of the accused and probable cause to arrest him." Commonwealth v. McCarthy, 430 N.E.2d 1195, 1197 (Mass. 1982). Massachusetts thus is among a small number of jurisdictions, including New York, which allow the trial court to review the sufficiency of evidence before a grand jury. Wayne R. LaFave & Jerold H. Israel, \textit{Criminal Procedure § 15.5(c)} (2d ed. 1992). See also N.Y. Crim. Proc. Law § 190.65 (Consol. 1992).

materiality for that of the grand jury, the outcome of this judicial guesswork provides little guidance to ethical prosecutors in search of a standard to guide their conduct. It is not surprising that results in state cases applying a "substantial exculpatory evidence" standard vary wildly from jurisdiction to jurisdiction, and even from court to court within particular jurisdictions. A practitioner reviewing these decisions in search of a guiding standard is reminded of Goldilocks tasting the porridge of the three bears in the classic children’s story; some evidence is considered substantial enough to require disclosure, other evidence is considered insubstantial. While at either end of the spectrum it might be clear what exculpatory evidence is highly material ("too hot") and what exculpatory evidence is relatively immaterial ("too cold"), within these two extremes there are myriad forms of exculpatory evidence which a prosecutor may or may not choose to present to the grand jury, at his peril.

The difficulties in applying a "substantial exculpatory evidence" standard for grand jury disclosure are amply demonstrated, for example, by the New Jersey case of State v. Scherzer. This high profile suburban gang rape case is the source of the illustration in Section I, infra. In the grand jury, the Scherzer prosecutor only presented the government experts on the mental defect issue, not informing the grand jury of the defense experts' testimony, given at a preliminary hearing, which rebutted the government's experts. Following indictment, the defendants moved to dismiss, alleging that the prosecution had violated its duty to present substantial exculpatory evidence to the grand jury. The superior court denied the motion, and the defendant was tried and convicted. On appeal, the New Jersey appellate division, applying the two-part test of State v. Hogan, ruled that although the omitted evidence "directly negated the accused's guilt" because it rebutted an essential element of the crime (that the victim was "mentally defective"), it was "not clearly exculpatory" when viewed in the context of the nature and source of the evidence. With little analysis, the court stated that the "prosecutor had no obligation to present the grand jury with the testimony of defense experts thereby requiring the grand jury to make a credibility judgment." The test for whether the evidence was "clearly exculpatory" was whether the defense experts' testimony was so powerful or persuasive "as to induce a rational grand juror to conclude that the State ha[d] not made out a prima facie case."

The Scherzer case illustrates the danger inherent in asking courts to evaluate the alleged misconduct of prosecutors with reference solely to the importance or materiality of the exculpatory evidence at issue; such a test always requires the court to substitute its view of the exculpatory evidence for the grand jury's.

162. Scherzer, 694 A.2d at 227.
163. Id.
164. Id. (quoting Hogan, 676 A.2d at 533).
Scherzer, the court believed that the prosecution’s experts were as credible or more credible than the defense experts; otherwise, it could not reasonably have concluded that the omitted evidence was not so “clearly exculpatory” that it would have induced the grand jury not to indict. Had the grand jury found each of the prosecutor’s experts incredible, and the defense experts credible, there would have been no probable cause to believe that the defendants committed the crime.

V. A NEW MODEL

It might be argued that the likelihood of acquittal at trial is a sufficient check on prosecutors introducing substantial exculpatory evidence before the grand jury, and that therefore no judicial intervention is necessary. This argument suggests that if the evidence is of such weight that it will convince a trial jury to return an acquittal, most rational prosecutors would prefer that the grand jury screen out the case, rather than have indictment issue and be followed by a prolonged trial and eventual acquittal. Forces other than normative rules (in this case, a prosecutor’s time spent trying a borderline case and his ultimate record of convictions and acquittals) may adequately check a prosecutor’s inclination to withhold important exculpatory evidence from the grand jury. If believed, this argument suggests that state courts and legislatures should follow the Supreme Court’s lead in Williams and take a “hands off” approach to the problem.

Even if one accepts “fear of losing” as an appropriate deterrent to indicting weak cases,165 there are at least two flaws with this reasoning. First, only a very small percentage of indicted cases actually proceed to trial — most are resolved by plea bargaining. Because a defendant may be induced to plead guilty for reasons unrelated to factual or legal guilt,166 there are many instances in which a prosecutor “wins” even the weakest of cases. Moreover, there are a number of completely rational, though sometimes unethical, reasons that a prosecutor might fail to notify the grand jury of exculpatory evidence in his possession, including: 1) the offense is so serious that public outcry is pressing law enforcement to “solve” the crime; 2) the defendant has a serious criminal record and presents a threat to the community, such that indicting on a marginal case would serve the public interest in pre-trial detention and segregation, even if there is ultimately a verdict of not guilty; or, 3) the prosecutor is looking to “flip” the defendant and use the indictment as leverage to gain his cooperation against another target. In each of these situations, factors collateral to the guilt or innocence of the accused may induce a prosecutor to push forward with a weak indictment. The system needs a built-in check to protect against prosecutorial overzealousness.

The Supreme Court’s reluctance to impose a duty upon prosecutors to disclose

165. See Kenneth Bresler, “I Never Lost a Trial:” When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 538-40 (1996) (arguing that a prosecutor’s attainment of justice cannot and should not be measured by the results of a verdict).
166. See Arenella, supra note 18, at 508–11.
exculpatory evidence to the grand jury reflects pragmatic concerns for the enforceability of this duty once created. How exculpatory must the evidence be to mandate disclosure, and how can a court review an indictment without necessarily substituting its view of the evidence for that of the grand jury? Clearly, the Supreme Court found these questions impenetrable and therefore decided in Williams to forego the inquiry altogether. Yet those states that have eschewed the Williams approach and adopted a limited rule of disclosure for “substantial exculpatory evidence” have fared no better. They have assumed the laborious and costly task of reviewing grand jury presentations without any assurance that their conclusions as to which omissions “tend to negate probable cause” or “explain away the charge” either represents or protects the will of the grand jury. Nor does such speculation provide any meaningful guidance to prosecutors.

Rather than focusing solely on the materiality of the exculpatory evidence and its likely impact on the grand jury, a more workable and meaningful standard of review can be derived from Franks v. Delaware. It focuses on whether the prosecutor intended to distort the evidence and mislead the grand jury. For over twenty years, this standard has been applied successfully to omissions by police officers in search and arrest warrant applications, and it would map well to the topic of exculpatory evidence withheld from the grand jury.

The Supreme Court in Franks established a three-part test for reviewing an allegation that a search warrant was issued based on a false or misleading affidavit. To warrant a pre-trial hearing, the defendant must make a substantial preliminary showing that: 1) the affidavit contains false statements; 2) these false statements were made knowingly or intentionally, or with reckless disregard for the truth; and 3) these false statements were necessary to a finding of probable cause; that is, without the false statements the affidavit is insufficient to establish probable cause to search or seize. This showing “must be more than conclusive” and must be accompanied by a detailed offer of proof. “Allegations of negligence or innocent mistake are insufficient.”

If the defendant makes an adequate threshold showing of each of these three elements, he is entitled under Franks to an evidentiary hearing to test the veracity of the search warrant affidavit. Where the defendant establishes by a preponderance of the evidence after an evidentiary hearing that the affidavit was intentionally perjurious or that false statements were made with reckless disregard for the

168. Although the Supreme Court’s decision in Franks sets forth the framework for addressing claims of false statements in a search warrant affidavit, its holding has been applied to allegations of misstatements in an arrest warrant affidavit. See United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990); Dailey v. United States, 611 A.2d 963, 965 (D.C. 1992).
170. Id. at 171.
171. Id.
172. Id. at 156.
truth, and that with the false statements set to one side the "remaining content is insufficient to establish probable cause," the Fourth and Fourteenth Amendments require that the fruits of the warrant be suppressed to the same extent as if probable cause was lacking on the face of the affidavit entirely.\footnote{173}{Franks, 438 U.S. at 168 (noting that the constitutional requirement of probable cause "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause").}

The Franks test for determining when a misstatement in a warrant application violates the Fourth Amendment protection against unreasonable searches and seizures has been applied to \textit{omissions} in both search and arrest warrant applications, that is, failure by the law enforcement officer to alert the issuing magistrate to exculpatory facts.\footnote{174}{See United States v. Kyllo, 37 F.3d 526, 529 (9th Cir. 1994); United States v. Williams, 737 F.2d 594, 604 (7th Cir. 1984); United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980); United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980).} Where a police officer intentionally or recklessly omits from a warrant application exculpatory facts which are material to a finding of probable cause, courts have interpreted Franks to require suppression of evidence in certain narrowly defined circumstances.\footnote{175}{See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.4(b) (2d ed. 1987 & Supp. 1995).}

The post-Franks cases dealing with omissions in arrest warrants provide an apt framework for assessing claims of grand jury misconduct, because both an arrest warrant and an indictment represent a finding of probable cause that the defendant committed a particular crime, and both trigger a call to answer to those charges. Moreover, an indictment, like an arrest warrant, may lead to the apprehension of the named defendant and a deprivation of his liberty. Finally, a presumption of validity attaches both to an indictment and to a warrant.\footnote{176}{See Franks, 438 U.S. at 171; Costello v. United States, 350 U.S. 359, 363 (1956).} For these reasons, the standards for evaluating when an omission before the grand jury should result in a dismissal of the charges should be the same as the standard applied in determining when an omission in the application for an arrest warrant should result in the suppression of evidence.\footnote{177}{A "distortion" standard has several analogues outside the grand jury context in addition to Franks. Following the Supreme Court's decision in Costello upholding the use of hearsay testimony in the grand jury, some federal courts began scrutinizing a prosecutor's use of hearsay testimony before the grand jury utilizing a "distortion" standard, ruling that a prosecutor may not mislead the grand jury into thinking they are getting a first-hand account of evidence when in fact the witness is not testifying from personal knowledge. See United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972); United States v. Leibowitz, 420 F.2d 39, 41–42 (2d Cir. 1969). In Massachusetts, a line of cases parallel to the exculpatory evidence cases have recognized a prosecutor's duty not to distort the presentation before the grand jury. See \textit{infra} note 186 and accompanying text.} In both situations, the court "encounters conflicting values"\footnote{178}{Franks, 438 U.S. at 164.} between the presumed validity of the magistrate or grand jury decision on the one hand (and the concomitant desire to avoid litigating pretrial issues collateral to the guilt or innocence of the accused) and the need to safeguard the judicial process by deterring perjurious or misleading presentations of evidence at the probable cause stage.
When dealing with a factual misstatement in a warrant application, the line between a negligent misstatement (e.g., a typographical error) and an intentional misstatement (e.g., misstating the evidence in order to influence the magistrate), while perhaps difficult to draw in particular cases, is at least understandable. Yet when dealing with omissions — assuming that the law enforcement officer had knowledge of the exculpatory fact — every decision not to include a fact in the warrant application is “intentional.” Law enforcement officials routinely collect more information than they put in search warrant affidavits or present to the grand jury; a challenge to omissions which treats every intentional and material omission as cause for recission opens law enforcement to endless conjecture about which investigative leads they should have pursued and which fragment of information ultimately might have benefited the target. Omissions are therefore a problem different from misstatements because not every intentional omission is a deliberate falsehood. Omissions may be “intentional” but they may also be reasonable. For example, evidence may be excluded because law enforcement believes in good faith that it is underdeveloped, extraneous, or cumulative.

For these reasons, courts have struggled with the issue of what constitutes an intentional omission for purposes of the Franks test. In addressing the issue of when omissions should be sufficient grounds for suppressing the fruits of a warrant, some circuits collapsed the “intentionality” and “materiality” prongs of Franks into a single test, ruling that intent to present the magistrate with a “deliberate falsehood” can be inferred from the knowing omission of materially exculpatory evidence. That is, if a police officer knowingly withheld evidence which was so critical as to negate probable cause, such an omission must have been an intentional, or deliberate, falsehood.179

This approach was roundly criticized by the Fourth Circuit in the 1990 case of United States v. Colkley:

[E]very decision not to include certain information in the affidavit is “intentional” insofar as it is made knowingly. If, as the district court held, this type of “intentional” omission is all that Franks requires, the Franks intent prerequisite would be satisfied in almost every case. Franks clearly requires defendants to allege more than “intentional” omission in this weak sense. “The mere fact that the affiant does not list every conceivable conclusion does not taint the validity of the affidavit.” Franks protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead . . . the magistrate. . . . We have doubts about the validity of inferring bad motive under Franks from the fact of omission alone, for such an inference collapses into a single inquiry the two elements — “intentionality” and “materiality” — which Franks states are independently necessary.180

179. See, e.g., United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980) (stating that only omissions made with intentional or reckless disregard for accuracy will undermine the affidavit; negligent omissions alone will not suffice).
180. 899 F.2d 297, 301 (4th Cir. 1990) (citations omitted).
The reasoning of Cokley has become the prevailing view.\textsuperscript{181} Omissions in search and arrest warrant affidavits will be scrutinized to determine whether the challenged omissions made the application misleading; if they did, the warrant application as a whole may be considered a "deliberate falsehood" within the meaning of Franks. Then and only then must the court turn to the question of materiality and determine whether the inclusion of the omitted material in the affidavit would have negated probable cause.

The Franks standard for determining when a search is invalid under the Fourth Amendment would map well in determining when an omission before the grand jury should result in dismissal of the indictment. Applying this framework, states\textsuperscript{182} should dismiss indictments where the defendant has proven that: 1) substantial exculpatory evidence was in possession of the prosecutor; 2) the prosecutor knowingly or recklessly failed to disclose it to the grand jury in order to distort the grand jury presentation; and 3) reviewing the grand jury transcript, coupled with the improperly omitted material, the court determines that there is no probable cause to support the indictment.

Unlike the situation in which exculpatory evidence is simply withheld, where the evidence presented to the grand jury has been distorted by the prosecutor, or the grand jury has been told a "half truth," the prosecutor may be viewed as affirmatively misleading or deceiving the grand jury. Although not expressly recognizing that it was doing so, Massachusetts has applied a modified Franks approach to challenges of grand jury omissions, ruling that an indictment may be dismissed where "the integrity of the grand jury proceeding [is] impaired by an unfair and misleading presentation."

183 In Commonwealth v. O'Dell, the Supreme Judicial Court affirmed the dismissal of an indictment where the prosecutor introduced to the grand jury only that portion of a defendant's post-arrest statement linking him to the crime of armed robbery (presence and assistance in the getaway car), without also introducing the exculpatory portion of the same


\textsuperscript{182} This is not to imply that the federal battle on this issue is necessarily lost after Williams. There may still be avenues for federal judges to supervise the government's presentation of evidence before the grand jury. First, intentional distortion of evidence before the grand jury is more akin to subornation of perjury than it is omission, and some federal courts have ruled that a prosecutor's knowing use of perjured testimony in the grand jury violates the due process clause of the Fifth Amendment. See infra note 196. Note that a direct Fifth Amendment challenge was not raised in Williams. Moreover, Congress has acted to criminalize false declarations of material fact before the grand jury. See 18 U.S.C. 1623 (1999). Where distortion borders on an intentional falsehood, a federal court seeking to exercise its superintendence power over the grand jury to prevent misleading presentations by a prosecutor would be implementing the will of Congress and acting to deter violations of a statute "carefully drafted and approved by . . . the Congress to ensure the integrity of the grand jury's functions." United States v. Williams, 504 U.S. 36, 46 (1992), (quoting United States v. Mechanik, 457 U.S. 66, 74 (1986)) (O'Connor, J. concurring).

statement wherein the defendant denied knowing that his co-defendant “had any intention of pulling a robbery.” 184 The Court ruled that withholding this exculpatory piece of the defendant’s statement “distorted the portion that was repeated to the grand jury” 185 in such a way as to seriously impair the integrity of the proceedings. The Massachusetts high court has likened such distortion to “‘selling’ the grand jury ‘shoddy merchandise’ without appropriate disclaimers.” 186 The Massachusetts court’s focus in O’Dell was thus not on the adequacy of the evidence before the grand jury, but on the integrity of the grand jury proceedings themselves.

Application of the Franks distortion standard to grand jury omissions has at least three distinct advantages over the “substantial exculpatory evidence” approach presently taken in many states. First, to mandate an evidentiary hearing, the defendant’s attack on the indictment must be more than conclusory; it must allege deliberate or reckless distortion of the grand jury presentation, and it must be accompanied by a detailed offer of proof by way of affidavit. 187 If courts strictly adhere to this requirement of a preliminary showing, many claims will be denied at an early stage, without even reaching the issue of intent to mislead, because either the facts alleged to have been omitted from the presentation did not distort the presentation before the grand jury, or they were not so substantial as to negate probable cause when viewed in the context of the entire presentation. 188 Only in those rare cases where the defendant makes an adequate threshold showing of both of these prerequisites should the court hold an evidentiary hearing to determine whether the prosecutor’s omission was inten-

184. Id. at 830.
185. Id. at 829.
186. Commonwealth v. Connor, 467 N.E.2d 1340, 1351 (Mass. 1984) (quoting Commonwealth v. St. Pierre, 387 N.E.2d. 1135, 1139 (1979)). Two years after O’Dell, the Supreme Judicial Court expanded on this concept of grand jury “impairment,” by ruling that false evidence presented to the grand jury may also, in limited circumstances, distort the presentation and warrant dismissal of an indictment. See Commonwealth v. Mayfield, 500 N.E.2d 774, 777 (Mass. 1986). Addressing a claim that a police witness before the grand jury misrepresented the proximity of the defendant’s cigarette lighter to the body of the victim, the Court found that although the detective’s grand jury testimony was somewhat misleading, it did not warrant dismissal of the indictment. Id. at 780-81. “The defendant has not proved that [the detective] knowingly testified falsely concerning the cigarette lighter, or testified in reckless disregard of the truth, on a matter that was probably significant to the grand jury’s deliberations.” See id. at 781. Mayfield thus seems to add to the O’Dell “distortion” test two prerequisites: (1) the false or misleading evidence was presented by the government with knowledge of its falsity, or in reckless disregard for its truth, and (2) the false or misleading evidence was “probably” significant to the grand jury’s deliberations. See id. at 780-81. In short, to prove distortion in Massachusetts the defendant must now show both materiality and some bad faith on the part of the government, both of which are also prerequisites under the Franks test.

187. See Franks v. Delaware, 438 U.S. 154, 170 (1978) (“The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for the purposes of discovery or obstruction.”). 188. See Franks, 438 U.S. at 170. See, e.g., Connecticut v. Bergin, 574 A.2d 164, 169 (Conn. 1990) (allegation of omission in motion to suppress did not warrant hearing, where, even if intentional, the omission was not so material as to negate probable cause).
tional and purposefully designed to mislead. Thus, there need not be any new large scale commitment of judicial resources in applying a modified Franks distortion standard to alleged omissions before the grand jury. 189

Second, a distortion standard by its nature requires a reviewing court to consider the evidence omitted in light of what was included in the grand jury presentation; only when the absence of the omitted material makes the evidence presented misleading would a finding of deliberate falsehood be warranted. This approach recognizes that there are frequently volumes of material which could be made available to the grand jury, contrary conclusions or opinions which could be rendered by other witnesses, and innumerable leads or fragments of information which could have been pursued. Focusing on distortion rather than omission harmonizes a prosecutor's duty not to allow perjured testimony, with a prosecutor's right at the grand jury stage not to present every conceivable piece of evidence which might ultimately be introduced at trial.

In this regard, the gang rape scenario in State v. Scherzer amply illustrates the important difference between a pure omission standard and a distortion standard, and the reasons why a distortion standard is more workable. The New Jersey

189. This framework presupposes that defense lawyers will be allowed to inspect the grand jury minutes if necessary in order to advance colorable claims of material omissions. While not all states routinely allow defense counsel to inspect copies of the grand jury minutes during pre-trial discovery, even among states which do not allow defendants copies of the grand jury minutes as a matter of right in every criminal case, many states permit such inspection upon a showing of particularized need, such as where the defendant files a motion to dismiss the indictment against him properly raising a claim of misconduct or irregularity in the grand jury proceedings. See Annotation, Inspection of Certain Particular Portions of Minutes, 20 A.L.R. 3d 7 (Supp. 1998). Thus, where a defendant by affidavit has raised a claim that important exculpatory evidence was in possession of the prosecutor prior to indictment, and an articulable suspicion that such evidence was not disclosed by the prosecutor to the grand jury, the court may inspect the grand jury minutes in camera to determine whether such evidence was disclosed by the prosecutor, and if not, whether there has been a threshold showing of particularized need by the defendant sufficient to order disclosure of the grand jury minutes in order to allow the defendant to advance a colorable motion to dismiss. See, e.g., Oregon v. Harwood, 609 P.2d 1312, 1314-15 (Or. App. 1980) (requiring that the entire supporting affidavit be examined in light of controverting statements given at a hearing).

Another potential hurdle to the application of the Franks standard by state courts to grand jury presentations is the harmless error standard of review which has been applied to grand jury irregularities in the federal courts. In United States v. Mechanik, the Supreme Court ruled that certain claims of grand jury irregularity may not be raised on appeal following conviction, because the finding of guilt beyond a reasonable doubt by a petit jury renders any defect in the initial finding of probable cause harmless. 475 U.S. 66, 72-73 (1986). The claim in Mechanik involved a Rule 6(d) violation, that is, the unauthorized presence of persons other than the witness and the prosecutor in the grand jury. The Supreme Court was careful to limit its harmless error analysis to Rule 6(d) claims raised during the course of trial, but it is unclear whether its reasoning would bar post-conviction appeals based on claims of other grand jury misconduct. See id. at 72. A number of states have expressly declined to follow Mechanik on post-conviction review of state law claims pertaining to defects in the grand jury, finding that an intervening conviction does not render the claim of grand jury error harmless. See Minnesota v. Johnson, 463 N.W.2d 527, 531 (Minn. 1990); People v. Wilkins, 68 N.Y.2d 269, 277 (N.Y. 1986). Even on the federal level, at least one court of appeals has expressly limited Mechanik to "technical" violations of Rule 6, and has refused to apply it to more serious claims of grand jury irregularity which affect the "fundamental fairness" of the criminal process. See United States v. Taylor, 798 F.2d 1337, 1339 (10th Cir. 1986). A distorted or misleading grand jury presentation arguably undermines the fundamental fairness and integrity of the proceedings themselves.
appellate division upheld the prosecutor's discretion not to introduce this evidence, ruling that it was not "clearly exculpatory." But certainly it was exculpatory, in the sense that, had the grand jury believed the defense experts, they could not have found probable cause to support an essential element of the crime; that is, that the victim was mentally defective. But by failing to call to the grand jury the psychiatric experts proffered by the defense, the prosecutor was not distorting the medical evidence presented from its own experts. Evidence that Expert A holds opinion B is not distorted by the omission of evidence that Expert C holds opinion D. Experts can have different opinions, and it is for the ultimate trier of fact to determine which, if either, is credible. A "substantial exculpatory evidence" standard requires a prosecutor to second guess every piece of allegedly exculpatory evidence and try to determine what might be considered probative by the grand jury, forcing him into a dual role during the ex parte proceeding of both advocate for the state and advocate for the accused. But a distortion standard allows a prosecutor to be assured that so long as the omitted material does not bear so directly on evidence included in the grand jury presentation that its omission distorts the meaning of the evidence presented, the presentation will be upheld. 190

Finally, the Franks paradigm imposes a standard of materiality which gives due deference to the grand jury's determination of probable cause, and which presumes this determination to be valid. Unlike the standard "tends to negate probable cause," adopted by a number of states which have undertaken a limited duty of grand jury disclosure, and echoed in the ABA Standards for Criminal Justice, the Franks approach would require the defendant to prove that the omitted evidence would have actually made a difference. The appropriate test is not whether the omitted evidence "tended" to negate probable cause or "might" have affected the grand jury's decision, but whether the grand jury minutes supplemented by the omitted material could not have supported the existence of probable cause. 191 A Franks standard thus orients the court toward a more objective inquiry; a court reviewing a claim that a prosecutor intentionally

190. Compare Commonwealth v. O'Dell, 466 N.E.2d 828, 829 (Mass. 1984) (presentation of inculpatory portion of defendant's post arrest statement and exclusion of exculpatory portion rendered grand jury presentation misleading) with People v. Reynolds, 420 N.E.2d 1193, 1195 (Ill. App. 1981) (suppressing fruits of warranted search where police officer intentionally omitted from search warrant application in armed robbery case the time and place where the suspect had been subject to a traffic stop, which information, if it had been included in search warrant affidavit, would have made clear that following the armed robbery the suspect was traveling in direction opposite to his apartment, and could not have concealed the fruits of the robbery at location opined in the warrant).

191. United States v. Lefkowitz, 618 F.2d 1313, 1317 (9th Cir. 1980) (search warrant affidavit was supported by probable cause even if identity of informant had been revealed). See also Washington v. Garrison, 827 P.2d 1388, 1391 (Wash. 1992) (in applying Franks test to alleged omission from search warrant affidavit of statement by defendant's boyfriend that defendant may have moved stolen merchandise from her apartment, test of materiality was not whether issuing magistrate might have been swayed by this information, but whether a court reviewing the affidavit after the fact determines that omitted material negates probable cause).
distorted the evidence before the grand jury may dismiss the indictment only where it determines, after reviewing the grand jury minutes in conjunction with the omitted material, that the grand jury could not have indicted had they not been mislead. Where the grand jury could reasonably have returned the indictment even after considering the omitted evidence, the indictment should be upheld.192

One may argue that the Franks framework is inapposite to the grand jury context because a court has no power after Costello to dismiss a grand jury indictment not supported by probable cause; if the evidence before the grand jury is not reviewed for sufficiency, why should it be reviewed for veracity?193 First, not all state courts follow the Supreme Court’s rule in Costello and decline to review the sufficiency of evidence before the grand jury.194 More importantly, intentional distortion of evidence is more akin to perjury than it is to omission. Notwithstanding Costello, a number of federal courts have either ruled or suggested that a prosecutor’s knowing use of perjured testimony before the grand jury violates the Fifth Amendment.195 In the now famous words of Justice Sutherland, “while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.”196 A prosecutor owes a duty of good faith both to the grand jury and to the defendant.197 Intentional distortion, unlike mere omission, clearly raises the specter of bad faith, or, in Justice Sutherland’s words, a “foul blow.”

Whether the omission of a particular piece of exculpatory evidence has a distorting effect will vary from case to case depending on the interrelationship between the nature of the evidence presented and the importance of the evidence omitted. However, certain general conclusions can be drawn from the foregoing analysis. For example, where the prosecutor introduces evidence of forensic tests performed on a weapon found at a crime scene which link the defendant to the crime (e.g., by fingerprints), it would be a distortion to fail to inform the grand jury of other tests performed on the same weapon which were negative or inconclusive (e.g., DNA sampling). Similarly, it would be a distortion to introduce a portion of a defendant’s post arrest statement to the police, without including an exculpatory portion of the same statement on the same subject.

192. See United States v. Meling, 47 F.3d 1546, 1554 (9th Cir. 1995) (wiretap application which omitted informant’s criminal history and mental illness need not be suppressed, where probable cause existed for issuance of wiretap order even after considering omitted material). See also United States v. Udziela, 671 F.2d 995, 1001 (7th Cir. 1982) (applying same standard of materiality to use of perjured testimony in grand jury).


194. See supra note 157 and accompanying text.

195. See United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974). Interestingly, in Basurto the Ninth Circuit based its decision on the Due Process Clause of the Fifth Amendment, not the grand jury clause. Id. See also United States v. Adamo, 742 F.2d 927, 939–40 (6th Cir. 1984) (“the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment that the government knows is based partially on perjured testimony”). Cf. Mooney v. Holohan, 294 U.S. 103, 112 (1935) (prosecutor’s knowing use of perjured testimony at trial violates Due Process).


197. Basurto, 497 F.2d at 786.
These omissions render the portion of evidence presented to the grand jury misleading.

Other omissions clearly are not a distortion within the meaning of *Franks*. The government should be under no general obligation to inform the grand jury of general denials of the crime made by the defendant, prior inconsistent statements made by government witnesses, or other evidence reflecting on the credibility of witnesses before the grand jury, such as bias or inducements.

None of these types of exculpatory evidence directly and objectively modify the inculpative evidence presented to the grand jury; that is, the defendant may falsely deny the crime while others honestly insist on his guilt, a witness may have recounted the facts innocently but inaccurately on a prior occasion yet give a correct account before the grand jury, or a witness might have a variety of palpable motivations for lying, yet still testify truthfully.

Where, however, the omitted material directly modifies the evidence presented to the grand jury such that its omission rises to the level of misrepresentation, a prosecutor should produce it. For example, as stated above, a prosecutor should be under no general duty to disclose to the grand jury evidence that a cooperating witness has made a deal with the government, and the details of this plea bargain. However, if this same crucial witness states or implies to the grand jury that he has come forward solely because he wants to “do the right thing,” suggesting that his cooperation is the result of moral conviction rather than inducement, it would be a distortion within the meaning of *Franks* not to correct this misstatement and disclose to the grand jury the parameters of the plea bargain.

The question of whether to present alibi evidence to the grand jury presents perhaps one of the most difficult dilemmas faced by a prosecutor. Many prosecutors who are aware that the target of a grand jury investigation has an alibi defense will for strategic reasons call the purported alibi witness to testify at the grand jury, in order to test the witness’s memory under oath and discover in advance of trial his strength as a witness. Other prosecutors will do so out of an overriding sense of fairness, consistent with their ethical duty to pursue “justice” rather than merely to advocate for convictions. While there are strong policy reasons for encouraging prosecutors to present alibi witnesses, failure to do so would not constitute “distortion” sufficient to cause the dismissal of the indictment under a *Franks* test. Imagine an armed robbery case where the store clerk identifies the defendant as the robber, and the defendant’s brother provides an alibi. Although it would be impossible for the grand jury to believe both the clerk

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198. See, e.g., Oregon v. Harwood, 609 P.2d 1312, 1316 (Or. App. 1980) (stating that no case “requires a prosecutor to present all evidence which may be exculpatory, only that which clearly would have negated guilt or undermined the authority of the grand jury to act at all”) (internal quotations omitted).

199. See, e.g., United States v. Shields, 783 F. Supp. 1058, 1078 (N.D. Ill. 1991) (failure to mention informant’s “about face” in search warrant application did not violate *Franks*).

200. See, e.g., United States v. Reivich, 793 F.2d 957, 963 (8th Cir. 1986) (failure to mention promise of leniency to informant in search warrant application did not violate *Franks*).
and the brother, omission of the brother’s statement at the grand jury stage would not be distortive of the clerk’s presentation under the foregoing analysis; that is, the brother’s testimony does not so directly modify or alter the clerk’s testimony that to omit one and include the other makes the grand jury presentation misleading.

Imagine an armed robbery case where the store clerk identifies the defendant as the robber, and the defendant’s brother provides an alibi. Although it would be impossible for the grand jury to believe both the clerk and the brother, the omission of the brother’s statement at the grand jury stage would not be distortive of the clerk’s presentation. However, there certainly may be strategic rather than legal or ethical reasons why a prosecutor would call the brother to testify in the grand jury, including testing his memory under oath and discovering in advance of trial his strength as a witness.

Nor should the prosecutor be under an obligation to introduce evidence of affirmative defenses which might be available, such as self defense or insanity, so long as he does not distort any evidence which he voluntarily introduces on such issues of intent. 201 Although requiring production of affirmative defenses would aid the grand jury in exercising its screening function, it would do so only at the combined cost of forcing the prosecutor into the role and mindset of a defense attorney and turning the preliminary probable cause determination into a mini-trial on the merits.

This distortion standard should apply only to the intentional omission of evidence supporting the factual, not legal, innocence of the accused. Examples of situations where the defendant may be factually guilty (that is, he committed the proscribed offense with the requisite intent) but legally innocent (the law does not recognize him as guilty) include those cases where a confession was coerced, a search was illegal, the statute of limitations had expired, essential evidence was inadmissible, or some other procedural rule operated to bar a conviction. While some commentators have argued that consideration of legal innocence by the

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201. In a seminal piece predating the Williams decision, Professor Arenella proposed several significant reforms of the federal grand jury, including what he conceded was a “tentative suggestion” for imposing an obligation on prosecutors to disclose exculpatory evidence to the grand jury. Arenella, supra note 18, at 567. Arenella recommended a distinction between evidence that directly negates an essential element of the crime, which he argued should be the subject of mandatory disclosure, and evidence that supports an affirmative defense, which a prosecutor need not produce.

Arenella’s “compromise” proposal breaks down when one looks at how elastically most courts, and even Professor Arenella, would define “directly negates guilt” under Brady, particularly with regard to impeachment material. At one point in his brief discussion of the issue, Arenella suggests that, “If the prosecutor is aware of reliable information which raises substantial doubt about the credibility of a material witness” that evidence should be produced; in the same paragraph, however, Arenella suggests that general “credibility issues” concerning the government’s witnesses need not be the subject of mandatory disclosure. Id. at 567–68. This attempted distinction between “serious” or “substantial” issues pertaining to the credibility of a government witness and more “general” credibility issues shows the flaws inherent in a “substantial exculpatory evidence” approach to the government’s disclosure obligations at the grand jury stage, and highlights the benefits of the distortion approach. For how is a prosecutor to decide whether impeachment material raises a “substantial doubt” about a witness’ credibility, without placing himself in the position of the fact finder?
grand jury should be mandatory in order to prevent unwarranted trials,202 they overlook the public's interest in seeing the guilty brought to justice through an open and visible process. Because the grand jury operates in secrecy, encouraging the grand jury to "no bill" a case where the defendant is factually guilty but legally innocent would bring public disrespect upon the criminal justice system. Where the grand jury declines to return an indictment of a factually guilty person on the basis of legal innocence, the public's ability to comprehend and respect the criminal justice process may have been compromised. For this reason, only those exculpatory facts which support factual innocence of the accused should be the subject of a Franks distortion analysis.

CONCLUSION

The prosecutor's duty to pursue justice—and to protect the fundamental fairness of criminal proceedings whose basic aim is justice—may be at its apex in the grand jury. There, the prosecutor's presentation of facts and law "operates without the check of a judge or a trained legal adversary, and [is] virtually immune from public scrutiny."203

It is fallacious to conclude that a trial on the merits will expose all exculpatory evidence and exonerate an innocent defendant. The costs to a putative defendant arising from a prosecutor's breach of his fundamental duty of fairness in the grand jury cannot be overestimated. First, there are substantial costs associated with indictment which will not be remedied even by a subsequent acquittal, such as the expense of mounting a defense and the ongoing damage to one's reputation. Second, because so many indictments are resolved by plea bargains rather than by trial,204 and because reasons apart from factual guilt might lead a defendant to plead guilty,205 one cannot assume that all falsely accused defendants will be exonerated.

To check prosecutorial abuse, states should impose upon prosecutors the duty to disclose to the grand jury all substantial and admissible exculpatory evidence—that is, evidence that primarily suggests either that the defendant did not commit the crime, or that someone else did—wherever omitting such facts would constitute a distortion of the evidence presented. State courts are accustomed to applying a similar standard in reviewing search warrants after Franks v. Delaware. Although this reform would impose some costs on the judicial system, they could be offset by the judicial resources saved by the nonlitigation of unmeritorious charges. Even were this not the case, however, fairness to defendants and the dictates of justice would be advanced by promoting more balanced presentations of evidence before the grand jury.