NEW MEXICO LAW REVIEW

Volume 11
Issue 2 *Summer 1981*

Summer 1981

Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process

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CRIMINAL PROCEDURE–GRAND JURY–INADMISSIBLE EVIDENCE, DUE PROCESS. *Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979).

INTRODUCTION

The grand jury as an institution[1] has been under relentless attack[2] for decades on the ground that its secret processes lend themselves to prosecutorial misconduct. In recent years some courts, including those of New Mexico, have begun to look behind the cloak of secrecy surrounding both the grand jury and prosecutorial misconduct at the grand jury stage.[3] The extent to which the courts of New Mexico will penetrate the secrecy of the grand jury to protect the rights of the accused is uncertain. The decision of the New Mexico Supreme Court in *Maldonado v. State*[4] does little to clarify this uncertainty. This note will propose an interpretation of *Maldonado* which may resolve some of the conflicts presented by a literal reading of the opinion.

I. THE CASE

Richard Maldonado was indicted by a grand jury for the felonies of aggravated burglary and aggravated assault. During the grand jury proceedings, evidence which Maldonado alleged to be inadmissible at trial was presented to the grand jury.[5] At trial, the state did not seek to introduce the evidence. Maldonado was acquitted of the two fel-

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1. The history of the grand jury has been so often and so well traced that it would serve no purpose here to repeat that effort. For comprehensive studies of this history, *see, e.g.*, Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N.M. L. Rev. 14 (1971); Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101 (1931).

2. Lewis, *The Grand Jury: A Critical Evaluation*, 13 Akron L. Rev. 33 (1979); Johnston, *The Grand Jury–Prosecutorial Abuse of the Indictment Process*, 65 J. Crim. L. 157 (1974); Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 Am. Crim. L. Rev. 807 (1972); Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101 (1931).

3. State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979) (exculpatory evidence withheld from the grand jury prompted review); State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977) (false evidence given to the grand jury prompted review).

4. 93 N.M. 670, 604 P.2d 363 (1979).

5. *Id.* at 670, 604 P.2d at 363. The evidence was: a) a knife allegedly seized from Maldonado's brother's house, given to the grand jurors for their inspection, but which the witness could not identify; b) a police officer's testimony concerning Maldonado's refusal to speak after his *Miranda* warning; and c) a statement introduced as an admission of Maldonado's but made by Maldonado's attorney to a police officer.

onies but convicted of criminal trespass, a petty misdemeanor included in the burglary charge.

On appeal, Maldonado attacked the propriety of the evidence presented to the grand jury, and argued that its presentation constituted prosecutorial misconduct which denied him due process. The New Mexico Court of Appeals summarily affirmed the conviction[6] under *State v. Paul*[7] and *State v. Chance*,[8] relying on the earlier holdings that the courts have no authority to review the sufficiency, legality, or competency of evidence presented to the grand jury.

The New Mexico Supreme Court granted certiorari on two issues: 1) whether any court could review the admissibility of evidence presented to the grand jury, although not used at trial; and 2) whether Maldonado was denied due process when inadmissible evidence was presented to the grand jury.[9] The New Mexico Supreme Court agreed with the court of appeals, holding that New Mexico courts do not have the authority to review the sufficiency, legality, or competency of the evidence upon which an indictment is returned.[10] On the due process issue, the court held that, because the evidence was not admitted at trial, Maldonado's right to due process was not violated.[11]

II. STATUTORY AUTHORITY TO REVIEW—§ 31-6-11(A)

The first issue addressed by the court in *Maldonado* concerns the power of the courts to review grand jury proceedings to ensure that the statutes governing those proceedings are followed. Maldonado argued that the grand jury indictment must be quashed because the presentation of inadmissible evidence to the grand jury violated N.M. Stat. Ann. § 31-6-11(A) (1978), which provides that "[a]ll evidence must be such as would be legally admissible upon trial."[12] The New Mexico Supreme Court, as had the court of appeals,[13] rejected this argument on the basis of the rule laid down in *State v. Chance*.[14] In

6. Full briefs were not allowed by the court of appeals because of the summary calendar. Appellant's Petition for Writ of Certiorari n. 1, State v. Maldonado, 93 N.M. 67, 604 P.2d 363 (1979); Rules of Appellate Procedure for Criminal Cases, Rule 403. Furthermore, the court did not permit Maldonado to submit a transcript of the trial or of the grand jury proceedings. N.M. Rules Crim. App. 207(d). In a telephone conversation with author on August 19, 1980, M. Dickman, Appellate Public Defender, stated: "New Mexico seems to be the only state which has such a summary proceeding where transcripts and briefs are not allowed."

7. 82 N.M. 619, 485 P.2d 375 (Ct. App. 1971).

8. 29 N.M. 34, 221 P. 183 (1923).

9. 93 N.M. at 670, 605 P.2d at 363.

10. 93 N.M. at 671, 604 P.2d at 364.

11. 93 N.M. at 672, 604 P.2d at 365.

12. N.M. Stat. Ann. § 31-6-11(A) (1978).

13. State v. Maldonado, No. 4041 (N.M. Ct. App. filed May 8, 1979) (mem.).

14. 29 N.M. 34, 34, 221 P. 183, 183.

Chance, the supreme court held that courts are without the power to review the sufficiency, legality, or competency of evidence presented to the grand jury;[15] in refusing to grant review, the court in *Maldonado* quoted *Chance,* saying that statutes such as § 31-6-11(A) "governing the kind, character and degree of evidence which should be produced before the grand jury . . . are *directory* and for the *guidance* of the grand jury."[16] By use of this language, the supreme court implied that review will *never* be allowed when the petitioner's sole ground is a violation of § 31-6-11(A).

The court then insisted that "we do not give unbridled discretion to employ inadmissible evidence to obtain indictments,"[17] and that "[p]rosecuting attorneys *must* abide by the letter and spirit of § 31-6-11(A).[18] Unless these statements are to be taken as mere sound and fury, the courts must have some means of enforcing the statute and detecting violations. The only way that a court can determine whether § 31-6-11(A) has been violated is to review grand jury proceedings. The most logical and judicially economical way to ensure

15. 29 N.M. at 39, 221 P. at 184.

16. 93 N.M. at 671, 604 P.2d at 364. After making the statement quoted in *Maldonado,* the *Chance* court continued:

> To be sure, [the statute] should be followed, and members of the grand jury, as well as district attorneys, should endeavor to comply with their provisions . . . [but when an indictment is regular upon its face] . . . courts are without power or jurisdiction to inquire into the subject and review the testimony submitted to the grand jury to determine whether or not the required kind or degree of evidence was submitted.

The policy behind the *Chance* decision was that the accused should not be allowed to present a plea in abatement charging that no evidence had been submitted upon which an indictment could be returned, and then, at the hearing, introduce witnesses who had appeared before the grand jury and ascertain what their testimony would be at trial–"a highly objectionable procedure." 29 N.M. at 39, 221 P. at 185.

Now, however, pleas in abatement are no longer part of the procedure and the accused, upon motion, is allowed a transcript of the grand jury proceedings. N.M. Rules Crim. Pro. 29.2. This change in the procedure has negated the policy argument in *Chance* that the accused should not be allowed to introduce the grand jury witnesses at a plea in abatement hearing.

The New Mexico courts currently adopt the majority view in refusing to review the sufficiency or competency of the evidence upon which an indictment has been returned. Several jurisdictions, however, including New Mexico, will review indictments based on false or perjured evidence, or where exculpatory evidence was withheld from the grand jury. *See* note 37, *infra.*

Justice Botts, in his dissent to State v. Chance, 29 N.M. at 50, 221 P. at 189, apparently foresaw the problems inherent in the *Chance* decision which were emphasized by *Maldonado:*

> And, so it is my opinion, that the grand jury guaranteed to the people of New Mexico is an accusing body, sitting and acting, not independently, but as part of the court . . . free to make such accusations as to it seem proper, so long, and only so long, as those accusations are made in accordance *with the requirements of the law* . . . . (emphasis added).

17. 93 N.M. at 671, 604 P.2d at 364.

18. *Id.*

that prosecutors "abide by the letter and spirit" of the statute is to quash indictments obtained by violation of the statute. The court has therefore implicitly stated that the courts can and *will* review grand jury proceedings under § 31-6-11(A).

These contradictory statements, if taken literally, give no answer at all to the basic question presented: whether courts can, and will, review grand jury proceedings when inadmissible evidence is used to obtain an indictment. The court did not expressly state that it was establishing a balancing test for the determination of whether a review will be granted; however, if one infers that the court in *Maldonado* was establishing such a test for determining whether review will be granted, these contradictions can be avoided. Under this interpretation of the *Maldonado* opinion, such a determination will be made by balancing the need for enforcing § 31-6-11(A) against the policies opposing review of grand jury proceedings, in light of the court's conclusion New Mexico courts have not been given "clear statutory authority" to review under § 31-6-11(A).[19] This interpretation of *Maldonado* would allow the court to enforce the statute while recognizing that such review is not to be granted lightly.

Even if the court did employ a balancing test, examination of the

19. New Mexico courts seem to require "clear statutory authority" to review. In State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976), the court of appeals rejected the defendant's argument that the indictment should be void because of N.M. Stat. Ann. § 41-5-11(B) (1953) (now N.M. Stat. Ann. § 31-6-11(B) (1978)) was violated when exculpatory evidence was withheld from the grand jury, stating: "unless there is clear statutory authority to do so, we think the courts are without power to review [the grand jury's] action . . . ." 89 N.M. at 633, 556 P.2d at 41.

In an apparent attempt to justify refusal to review under § 31-6-11(A) while it will review under other grand jury statutes, the supreme court in *Maldonado* stated that there is no statutory authority to review evidence supporting a grand jury indictment, and noted that when the legislature amended the grand jury statutes in 1978, it chose not to give the courts authority to review under § 31-6-11(A). In 1853, however, the predecessor of the New Mexico statute which became § 31-6-11(A) read: "The grand jury can receive none but legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence." C.L. ch. 2 § 6 (1853). The 1853 statute was not amended until 1969, when the old, vague "legal and best evidence in degree" language was replaced by the much more specific phrase "[a]ll evidence must be such as would be *legally admissible upon trial.*" N.M. Laws 1979, ch. 276, § 11 (emphasis added). Arguably, with the adoption of such clear and precise language 11 years ago, the legislature at that time gave the courts the "clear statutory authority" to review under § 31-6-11(A).

In 1981, the New Mexico Legislature again passed a bill revising § 31-6-11(A). The bill as submitted replaced the 1969 amended language with the phrase, "The sufficiency, competency, *or legality* of the evidence upon which an indictment is based shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury." H.B. 417. The bill was revised, and passed April 8, 1981, with the words "or legality" deleted. *See* 1981 N.M. Laws ch. 238. Even if the 1969 revision was not "clear statutory authority" to review, the deletion of the words "or legality" from the bill as submitted should certainly give the court the required authority to review evidence which is not legally admissible at trial.

factors to be weighed indicates that, in *Maldonado,* the balance should have been struck in favor of review. The court stated that the "compelling reasons" why courts should not go behind an indictment to inquire into the evidence considered by the grand jury were "the need for both judicial economy and secrecy of the grand jury proceedings."[20] Under the facts of *Maldonado,* neither of these policies weighs heavily against allowing review.

Judicial economy has long been a prime concern of the courts. To further this goal, the secrecy of grand jury proceedings must be maintained in certain circumstances.[21] Denying review of grand jury proceedings certainly avoids delaying the judicial process. Other courts have said that review of the grand jury proceedings can result in "mini-trials" that frustrate the purpose of the grand jury,[22] and that once the courts begin to review, the potential for delay is obvious.[23]

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20. 93 N.M. at 671, 604 P.2d at 364.

21. Alexander and Portman, *Grand Jury Indictment versus Prosecution by Information –An Equal Protection–Due Process Issue,* 25 Hastings L.J. 997 (1974). Notwithstanding their strong criticism of the grand jury proceeding, the authors suggest that grand juries need not be abolished or opened to total court scrutiny in cases where the defendant has fled and cannot be proceeded against by information, in cases where it is critical to avoid premature cross-examination (such as with emotional or reluctant witnesses), in political cases where the prosecution needs special and secret investigative powers, or in cases where multiple defendants make the information process unwieldy and slow. *Id.* at 1008.

22. Costello v. United States, 350 U.S. 359 (1956) (Indictment based solely on hearsay evidence): "If indictments were to be held open to challenge *on the ground that there was inadequate or incompetent evidence* . . . [t]he result of such a rule would be that . . . a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence . . . ." *Id.* at 363 (emphasis added). *Costello,* however, was concerned only with hearsay evidence, and the court was worried about competency or adequacy of the evidence, a question not presented by *Maldonado. See also* United States v. Dionisio, 410 U.S. 1, 17 (1972) (holding that voice exemplars can be compelled by the grand jury without violating the defendant's constitutional rights): "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigations and frustrate the public's interest in the fair and expeditious administration of the criminal laws"; United States v. Kennedy, 564 F.2d 1329, 1339 (9th Cir. 1977): "Only in a flagrant case [of presentation of perjured evidence to the grand jury] should the trial judge dismiss an otherwise valid indictment . . . [t]o hold otherwise would allow a minitrial as to each presented indictment"; In re Fried, 161 F.2d 453, 465-66 (2d Cir. 1947), wherein L. Hand, concurring, and A. Hand, dissenting in part, were specifically opposed to allowing motions to suppress illegal evidence (coerced confession) before the grand jury, for the reasons discussed above. *But cf.* Johnson v. Superior Court of San Joaquin County, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975), Mosk, J., concurring opinion at 124 Cal Rptr. 46, 539 P.2d 806: "The administrative burden of requiring preliminary hearings for all indicted defendants would be negligible. Some indicted defendants may choose to waive the preliminary hearing. But even if none do so, no court congestion will eventuate."

23. *See* Taggard v. State, 500 P.2d 238, 245 (Alaska 1972); Erwin, J., concurring in part, dissenting in part. In an interview with the author on August 18, 1980, W. Smith, Chief Prosecutor, Bernalillo County District Attorney's Office, was asked how long the average indictment takes in Bernalillo County. Mr. Smith reluctantly estimated that the usual time is approximately 20 minutes: "It would be impossible to process all the criminal

If review for sufficiency or competency were allowed in every determination of probable cause, the judicial system would be unworkable.

Other aspects of judicial economy are thwarted, however, by refusal to review indictments in cases such as *Maldonado*. Enforcement of § 31-6-11(A) would prevent indictments based on evidence which is inadmissible at trial, where the defendant must be acquitted because of lack of evidence. The review required for this enforcement would have two judicially economical effects. First, the improper indictment would be quashed and the futile trial would not occur. Review would save time and money, and prevent unnecessary embarrassment to the defendant. Second, the knowledge that indictment would be reviewed under § 31-6-11(A) would deter overeager prosecutors from presenting inadmissible evidence to the grand jury. Maldonado was indicted for two felonies on the basis of inadmissible evidence. Had the indictment been quashed, the state would have saved considerable costs, and the statute would have had the proper deterrent effect.

The other factor which the court weighed against the need for review was the secrecy of the grand jury. Grand jury secrecy is a venerable tradition,[24] and courts in New Mexico have long upheld the majority view that the veil of secrecy will not be pierced to review the sufficiency of the evidence.[25] The policies behind that tradition remain valid in many instances.[26] In New Mexico, the reasons for secrecy were set out in *State v. Morgan:*

> (1) That the grand jurors themselves be secure in freedom from apprehension that their opinions and votes will not be subsequently disclosed; (2) that complainants and witnesses will be encouraged to appear before the grand jury and speak freely without fear that their testimony will be made public, subjecting them to possible discomfort or retaliation; (3) that those persons who are indicted will be

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charges in this county, with this population, if what amounted to a preliminary hearing were held in every case." Mr. Smith estimated that about 90% of the felonies in Bernalillo County were proceeded against by indictment. In comparison, 95.9% of the felonies in Los Angeles County, California, were proceeded against by information, which included preliminary hearings, in 1971. Alexander and Portman, *supra* note 2, at 1014.

24. Antell, *supra* note 2; Shannon, *supra* note 1. It is often thought that these traditional policies all furthered the notion that the grand jury should be a "buffer" between the accused and the abuses of the state such as those which became apparent in Star Chamber. However, when secrecy first began to surround the grand jury deliberations, its purpose was to protect the grand jurors and the witnesses, not the accused, from government persecution. Johnston, *The Grand Jury–Prosecutorial Abuse of the Indictment Process*, 65 J. Crim. L. 156, 158 (1974).

25. State v. Chance, 29 N.M. 34, 221 P. 183 (1923). *See also* State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973); State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App. 1971).

26. Alexander and Portman, *Grand Jury Indictment versus Prosecution by Information –An Equal Protection–Due Process Issue*, 25 Hastings L.J. 997 (1974).

> prevented from escaping prior to arrest or from tampering with witnesses against them; and (4) to prevent disclosure of derogatory information against persons who have not been indicted.[27]

The *Morgan* court also stated, however, that "[these policies remain] until the reasons for the secrecy have either been terminated or outweighed,"[28] and further noted that secrecy is only temporary or provisional and that, were the secrecy permanent, it would create an opportunity for abuse.[29]

None of the reasons for secrecy given in *Morgan* apply to *Maldonado.* Maldonado did not challenge the deliberations and voting of the grand jury; he simply questioned the admissibility of the evidence presented to the grand jury under § 31-6-11(A). Second, Maldonado's challenge to only inadmissible evidence would not have discouraged witnesses from speaking freely.[30] Third, Maldonado was arrested before he was indicted;[31] there was no need to "prevent his escape." Finally, there were no unindicted persons to protect from disclosure of derogatory information.[32]

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27. 67 N.M. 287, 289, 354 P.2d 1002, 1004 (1960). *Cf.* State v. Revere, 242 La. 183, ——, 94 So.2d 25, 29 (1957), cited in *Morgan,* which presents a set of five reasons for secrecy which are worded somewhat differently from the reasons for secrecy given in *Morgan.*

28. 67 N.M. at 289, 354 P.2d at 1004.

29. *Id.* In his strong dissent to the majority opinion in State v. Chance, Botts, J., voiced his fears about the results of the decision:

> If, as the opinion of the majority necessarily holds, the grand jury is a judicial tribunal absolutely independent of control or supervision by the court with which it sits, cloaked in absolute secrecy for all purposes, and thereby, both as to members and witnesses, wholly irresponsible, it contradicts every theory of the English and American judicial system of which we have been so proud.
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> . . . [T]he rule of public policy requiring the proceedings . . . to be kept secret, is one for the furtherance and promotion of justice, not for its obstruction or defeat, and when the reasons for the rule cease the rule itself ceases.

29 N.M. at 41, 53, 221 P. at 185, 190.

30. It is not clear from the record in this case whether those who testified before the grand jury actually participated in the trial. If they did, their testimony waived the secrecy privilege under *Morgan.* Their identities were not in question; a list of grand jury witnesses appears on the indictment. Besides, under the modern rules, the accused has access to the grand jury transcript. (*See* note 16, *supra*). Because the accused can find out what took place in the grand jury room by way of the transcripts, and witnesses still testify, despite the fact that their identities are known and the testimony is available to the defendant, this policy holds less sway than it once did.

31. Maldonado was arrested on July 11, 1978, and released to the public defender on July 13, 1978. He was indicted on the aggravated assault charge on August 10, 1978, and on the aggravated burglary count on September 27. Telephone interview with Rosemary Gurule, Administrative Secretary to the Public Defender (who was given authority to release this information by Joseph Riggs, District Public Defender) (Oct. 9, 1980).

32. Maldonado was the only person sought to be indicted, and there were no other possible indictees about whom the grand jury might have heard derogatory information in this case.

If the court did balance the need for enforcement of the statute against the need for judicial economy and the need for secrecy, the balance struck is lopsided. Although one aspect of judicial economy was furthered by refusal to review, other aspects were ignored, and the policies behind grand jury secrecy did not apply to Maldonado. The court balanced weak and inapplicable policies against the strength of a statute, decided that the policies were weightier, and effectively rendered § 31-6-11(A) invisible.

If the court did not use a balancing test, its decision must be interpreted to mean that review under § 31-6-11(A) will never be allowed, and § 31-6-11(A) again disappears. In either case, after *Maldonado*, no violation of § 31-6-11(A), however blatant, will trigger review or a remedy for the defendant.[33]

III. DUE PROCESS IN NEW MEXICO–AN "ELUSIVE CONCEPT"

The second issue addressed in *Maldonado* is that of review of grand jury proceedings on due process grounds. Maldonado argued that the presentation of inadmissible evidence to the grand jury constituted prosecutorial misconduct and violated his right to due process.[34] The New Mexico Supreme Court flatly rejected this argument and stated that the New Mexico position is that grand jury proceedings are reviewable on due process grounds when false evidence is presented to the grand jury or when the prosecution withholds exculpatory evidence.[35] The court noted that due process is an "elusive con-

33. At present, a defendant like Maldonado who is indicted upon the basis of inadmissible evidence has little recourse. He can move to quash the indictment, but that challenge is limited to three possibilities: That the grand jury was not selected according to law; that a member of the grand jury was ineligible to serve as juror; or that a member of the grand jury was a witness against him. N.M. Stat. Ann. § 31-6-3 (1978).

The defendant can try to move for a preliminary hearing after the indictment, but that procedure is not allowed in New Mexico. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970). Or, the defendant can appeal, which is first, a bit after the fact, if the trial should not have been held, and second, would appear to be futile, after *Maldonado*.

34. 93 N.M. at 671, 604 P.2d at 364. Maldonado also had an equal protection claim, which was not raised on appeal, possibly because of the time constraints imposed by the summary nature of the appeal. There have been persuasive arguments made that the grand jury proceeding is as much a "critical stage" as is the preliminary hearing, and that denial of the right to counsel and a different standard of evidence at the grand jury stage violates equal protection, because the accused is not afforded similar treatment under similar circumstances. Dash, *The Indicting Grand Jury–A Critical Stage?*, 10 Am. Crim. L. Rev. 807, 815 (1972).

35. 93 N.M. at 672, 604 P.2d at 365. *Accord*, State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979) (withholding of exculpatory evidence violates due process); State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977) (indictments based on false evidence are not "according to law").

The New Mexico position that withholding of exculpatory evidence from or presentation of false evidence to the grand jury is more liberal than that of some jurisdictions. In United

cept,"[36] and reasoned that violations of due process at the grand jury stage had to do with "prosecutorial misconduct that results or may result in the denial of a fair trial to the defendant."[37] Because the questionable evidence in this case was not used at trial,[38] the court held that Maldonado's right to due process was not violated.

In his treatise on constitutional law, Professor Tribe defines procedural due process as "such process as may be required to minimize substantially unfair or mistaken deprivations."[39] Professor Tribe's definition of "unfairness" includes "inaccuracy in governmental

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States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977), the United States court of appeals held that "only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment . . . ." 564 F.2d at 1338. Similarly, in United States v. Ruyle, 524 F.2d 1133 (6th Cir. 1975), applying federal law, as did *Kennedy*, the court held that when an indictment was "valid on its face . . . the defendant was not entitled to challenge it on the ground that information which he considered favorable to his defense was not presented to the grand jury." 524 F.2d at 1136.

36. 93 N.M. at 672, 604 P.2d at 365.

37. 93 N.M. at 672, 704 P.2d at 365. The New Mexico Supreme Court cited three cases to support that proposition. In United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) (prosecuting attorney learned of perjured testimony, notified opposing attorney, but not the court or the grand jury), the court noted the duty of good faith on the part of the prosecutory with respect to the court, the grand jury, and the defendant, and went on to state:

> The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and, in fact, *may be more severe.* The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury.

497 F.2d at 786 (emphasis added). Convictions of conspiracy to import and distribute marijuana were reversed, indicating that there is a right to an accurate determination of probable cause independent of the right to a fair trial. *Accord,* State v. Reese, 91 N.M. 77, 570 P.2d 614 (prior to trial, defendant's alternate request for relief should have been granted).

In Johnson v. Superior Court of San Joaquin County, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975), the California Supreme Court also noted the prosecutorial duty to the grand jury in the absence of the regular adversary system to present exculpatory evidence to the grand jury. The *Johnson* court, however, disposed of the case on statutory grounds, and did not address the petitioner's due process argument. The court issued a writ prohibiting the superior court from proceeding to trial.

In United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) (remark by witness during evening session of questioning which was presented to the grand jury amounted to manipulation of the array of evidence to the point of depriving the grand jury of independence and partiality), the United States district court said that the ethical standards espoused by the American Bar Association Standards Relating to the Administration of Criminal Justice § 3.6(b), regarding exculpatory evidence, were violated and dismissed the indictment before trial occurred. *Accord,* State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

But cf. Costello v. United States, 350 U.S. 359 (1956), where the United States Supreme Court refused to quash an indictment based solely on hearsay evidence, and pointed out "[t]he abuses of criminal practice would be enhanced if indictments could be upset on such a ground." The Court further stated that defendants are not entitled to a rule which would add nothing to the assurance of a fair trial. *Id.* at 363.

38. 93 N.M. at 672, 604 P.2d at 365.

39. L. Tribe, *American Constitutional Law,* § 10-7, at 503 (1978).

functions."[40] One of these functions is making an accurate determination of probable cause at the grand jury stage.[41] In the only three New Mexico cases dealing with due process in this context, the courts have been concerned with the accuracy of the indictment, and with fairness and justice.[42] The supreme court's focus in *Maldonado* on the right to a fair trial, if taken on its face, means that an accurate determination of probable cause is no longer a factor in the due process analysis in New Mexico. This position is inconsistent with prior New Mexico holdings, makes due process a more "elusive concept" than ever, and poses serious questions about New Mexico law on this issue.

The first question is whether the accused has any right to an accurate determination of probable cause by a grand jury conducted under proper procedure and without prosecutorial influence. Since grand juries indict only felonies in New Mexico,[43] the question is not whether Maldonado should have been convicted of a felony or a misdemeanor, but whether he was afforded an independent, factually accurate determination of probable cause with the presentation of inadmissible evidence to the grand jury—in other words, whether he should have been indicted at all.

The New Mexico courts have indicated that there is a due process right to an accurate determination of probable cause at the grand jury level. In *State v. Reese,* the court of appeals applied to the grand jury the concept that the use of false evidence at trial is a violation of due process.[44] The court stated: "Since [the accused] has no right

40. L. Tribe, *supra* note 39, § 10-13 at 539.

41. "The grand jury process is not a trial. It is merely a probable cause determination as to whether the defendant more likely than not committed the crime." Interview with W. Smith, Chief Prosecutor, Bernalillo County District Attorney's Office (August 18, 1980). *See also* Johnston, *supra* note 2, at 159, n. 2; Dash, *supra* note 2, at 808: "The grand jury's principal power today is to see whether prosecution for more serious offenses should proceed to trial"; *accord,* State v. Salazar, 81 N.M. 512, 513, 469 P.2d 157, 158 (Ct. App. 1970).

42. State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979), ("[T]he grand jury has a duty to protect a citizen against unfounded accusations . . . ."), 93 N.M. at 444, 601 P.2d at 77; State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977) ("The indictment based on false evidence violated defendant's right to due process"), 91 N.M. at 79, 570 P.2d at 617; State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976) (no "showing that defendant was deprived of fundamental fairness on the basis of evidence withheld from the grand jury" because the evidence was not clearly exculpatory). 89 N.M. at 634, 556 P.2d at 42.

43. New Mexico is an indictment/information state. N.M. Const. art. II § 14: "No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney . . . ." A prosecutor has information or complaint available in misdemeanor proceedings, and has the choice of grand jury indictment or criminal information on a felony charge. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

44. 91 N.M. at 79, 570 P.2d at 617.

concerning the grand jury except that it be duly impaneled and conducted according to law, his rights in this respect should be rigorously protected."[45] The court stated that the grand jury could have reconsidered the indictment in light of a corrected version of the testimony, implying that the grand jury made an inaccurate determination of probable cause when false evidence was presented to it in violation of procedure, and further implying that such an inaccurate determination should be corrected before trial.[46]

This right to an accurate determination of probable cause is violated when the prosecutor does not adhere to proper procedure and the grand jury is deprived of its independence as a neutral body determining probable cause. In New Mexico, prosecutorial misconduct *can*, therefore, be a violation of due process.[47] One of the major questions presented by the due process analysis in *Maldonado* is just what kind of prosecutorial misconduct will constitute a due process violation at the grand jury stage. In *State v. Herrera*, the withholding of exculpatory evidence in violation of statutory procedure also resulted in an inaccurate determination of probable cause because the influence of the prosecutor deprived the grand jury of its independence, and was therefore a violation of due process.[48]

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45. *Id.* The court did not explain exactly what the term "according to law" means, but it quoted Baird v. State, 90 N.M. 667, 568 P.2d 193 (1977), where a violation of N.M. Stat. Ann. § 41-5-4 (1953) (a procedural statute–unauthorized persons not permitted in the grand jury room) would have been grounds for dismissing the indictment had the defendant not waived her objections to the grand jury proceedings by entering into a subsequent plea agreement.

46. The conviction and sentence were reversed. 91 N.M. at 79, 570 P.2d at 617. It is not clear from the *Reese* opinion whether the prosecution attempted to use the false evidence at trial.

47. The *Herrera* court specifically noted that its holding (that due process requires presentation of evidence to the grand jury which tends to negate guilt) "is consistent with the ABA Standards Relating to the Administration of Criminal Justice, Section 3.6(b)." 93 N.M. at 444, 601 P.2d at 77; *accord,* United States v. Phillips, 435 F. Supp. 610 (N.D. Okla. 1977). Yet, in those same ABA standards, § 3.6(a) (which immediately precedes the section espoused by *Herrera* and *Phillips*), is couched in identical language to that in § 3.6(b). Section 3.6(a) sets out the prosecutor's duty to present to the grand jury only evidence which he believes to be admissible at trial.

The New Mexico Supreme Court apparently does not require that New Mexico prosecutors follow ABA Standard § 3.6(a) as it requires that prosecutors adhere to § 3.6(b). The opinion in *Maldonado* suggests no reason for the selective application of the ABA Standards.

48. 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979). The court stated:

> If the prosecutor is not obligated to present evidence tending to negate guilt, the grand jury hears only what the prosecutor wants it to hear, with the result that the grand jury becomes a tool of the prosecutor and is no longer making the probable cause determination required by [N.M. Stat. Ann. § 31-6-10 (1978)].

93 N.M. at 444, 601 P.2d at 75.

In State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App. 1974) the court said: "[b]efore the grand jury may vote an indictment charging an offense against the laws of the state, it

In *Maldonado,* the prosecutor violated proper procedure when he presented evidence specifically banned by §31-6-11(A). That conduct surely influenced that grand jury. The supreme court, however, found no due process violation. *Reese* held that the presentation of false evidence in violation of proper procedure caused such an inaccurate determination of probable cause that it was not correctable at trial. *Herrera* held that the withholding of exculpatory evidence in violation of the policies requiring that the indictment be free from prosecutorial influence created such an inaccurate determination of probable cause that the case could not even go to trial. It should follow from *Reese* and *Herrera* that the prosecution's presentation of inadmissible evidence, violating procedure and influencing the grand jury, would produce the same result. *Maldonado's* failure to so hold produced yet another contradiction. If the grand jury statutes, as interpreted in *Reese* and *Herrera,* did establish an independent right to a factually accurate determination of probable cause at the grand jury stage, the *Maldonado* decision has negated that right. If there never was such an independent right, the court has not made this clear.

The second question which arises as a result of the *Maldonado* court's focus on a fair trial is whether a fair trial can, or should, correct errors in the determination of probable cause at the grand jury stage. Again, the *Maldonado* decision is inconsistent with prior holdings.

In *Maldonado,* the court stated that there was no violation of due process because the "inadmissible evidence . . . will presumably not be admitted at trial by the trial judge."[49] This decision necessarily relies on the strengths of the adversary system, since any evidence is admissible unless properly objected to. Yet in *Reese,* the court of appeals made it clear that the adversary system cannot be relied upon to correct an inaccurate determination of probable cause: "—prior to trial—one of defendant's alternative requests for relief should have been granted. . . . If the indictment had been remanded to the grand jury, it could have reconsidered the indictment in light of a corrected version of [the] testimony."[50] In *Herrera,* the court of appeals affirmed the trial court's dismissal of the indictment. Apparently, the withholding of exculpatory evidence from the grand jury also cannot be corrected at trial.

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must be satisfied from the lawful evidence before it that an offense against the laws has been committed and that there is probable cause to accuse by indictment . . . ." 86 N.M. at 598, 526 P.2d at 192 (citing N.M. Stat. Ann. § 14-5-10 (1953), now N.M. Stat. Ann. § 31-6-10 (1978)).

49. 93 N.M. at 672, 604 P.2d at 395.

50. 91 N.M. at 79, 570 P.2d at 617.

Thus, *Maldonado,* which allows an inaccurate determination of probable cause to be corrected at trial, is inconsistent with *Reese* and *Herrera.* Since *Maldonado* seems to recognize the continued validity of *Reese* and *Herrera,* as far as due process at the grand jury stage is concerned, the reported opinions in New Mexico therefore create a double standard for determining whether prosecutorial misconduct violates due process at the grand jury stage, both under the "accurate determination of probable cause" and the "fair trial" analyses: if there is a question of false or exculpatory evidence, prosecutorial misconduct apparently causes such an inaccurate determination of probable cause that it neither can nor should be corrected at trial; but in cases where inadmissible evidence is presented to the grand jury, either the trial process must correct the error, or it will not be corrected at all. Under this double standard, one is left with two possible conclusions. Either prosecutorial misconduct, as a procedural violation of § 31-6-11(A) which produces an inaccurate determination of probable cause, is simply not as serious as is misconduct under the other grand jury statutes; or it may make no difference if the probable cause determination is inaccurate. The first conclusion makes one wonder about the effectiveness of the grand jury statutes and prosecutorial standards. The second conclusion means that due process at the grand jury stage in New Mexico is a dead issue.

CONCLUSION

The New Mexico Supreme Court opinion in *Maldonado* is confusing on the questions of whether the courts can review the admissibility of evidence presented to the grand jury and whether a violation of § 31-6-11(A) deprived Maldonado of his due process rights. Section 31-6-11(A) is the only grand jury statute which either cannot or will not be enforced by review of the grand jury proceedings. Whether the opinion is read literally or is read to establish a balancing test, § 31-6-11(A) is an empty statute. The court's holding that a fair trial can correct an inaccurate determination of probable cause is inconsistent with prior holdings that due process requires an accurate determination of probable cause at the grand jury level which is independent of prosecutorial influence or procedural violations.

The right to an accurate determination of probable cause should not be subjected to a double standard. If that right exists at all in New Mexico, a defendant either receives an accurate determination of probable cause in accordance with the proper procedures and without prosecutorial influence, or he does not; if he does not, he should be afforded a remedy independent of a "fair trial" in *all* cases.

Under the *Maldonado* opinion, that right and that remedy may be denied the defendant who was indicted on the basis of inadmissible evidence.

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