



National Association of Criminal Defense Lawyers

Power to Harm: Cases of Federal Grand Jury Abuse

In each of the cases below, the accused business or individual avoided a wrongful conviction. However, a wrongful indictment in itself — regardless of ultimate outcome — is devastating. As Supreme Court Justice Kennedy has noted, in the time period between indictment and trial, the accused may suffer ruinous consequences to his reputation and employment from which he may never recover even if acquitted.

These serious consequences make imperative efforts to restore the protective function of the federal grand jury. Additional safeguards are needed, to protect the individual or business subject to grand jury investigation, and to protect against the waste of tax dollars squandered on investigations and prosecutions that should not be pursued in the first place. We submit that basic reform of the federal grand jury is a logical and necessary next policy step for Congress to take in efforts to restore a balance of fairness to the nation's criminal justice system. While the grand jury continues to serve as a sword for the prosecutor, as the below cases demonstrate, it has long ceased to perform its historic function as an independent entity acting as a shield to safeguard the citizenry against prosecutorial excess.



Sigma International

In 1994, a grand jury sitting in Tampa, Florida, returned an indictment against the president of Sigma International for importing adulterated shrimp. The first grand jury did not indict the company (Sigma) or any of its other officers or employees. When the company's president fled the country, the prosecutors presented the case to a second grand jury in the hopes of indicting the company and several of its employees.

Over the course of its twelve-month term, the second grand jury spent considerable time evaluating all the testimony and documentary evidence presented by the government but did not vote on an indictment. Rather than extend the second grand jury's term — as was typical in those situations — the government discharged the second grand jury after twelve months and, that same day, impaneled a third grand jury to consider the case.

A week later, the prosecutor introduced the case to the third grand jury and told them that he expected them to return a superseding indictment *the following day*. Although two prior grand juries had considered the case for a total of three years without authorizing the indictment of these defendants, the third grand jury acceded to the prosecutor's request and returned a 12-count, 21-page superseding indictment against 7 defendants after considering the case for less than two days.

How did the third grand jury accomplish this impressive feat? By prodding, cajoling, misleading statements and other improper and overreaching conduct by the government prosecutor. In order to ensure the third grand jury rubber stamped the indictment, the prosecutor misrepresented the reason for the prior grand jury's discharge and also claimed that they had wanted to indict the defendants. He also provided his own misleading summaries and opinions of the evidence, misrepresented the law, vouched

for the credibility of some witnesses and accused others of perjury, and pressured the grand jury to return the lengthy indictment in less than two days.

For the first time in more than a decade, the Tenth Circuit Court of Appeals dismissed an indictment for grand jury abuse. What is most distressing about this case is that the prosecutor almost got away with his misconduct. After obtaining access to the previously-secret grand jury transcripts, the defense lawyers successfully persuaded the court to thoroughly consider the case again, and, after further evaluation, to recognize the insidious nature of the prosecutor's pervasive misconduct.

Sources: *United States v. Sigma International*, 244 F.3d 841 (11th Cir. 2001); Barry Tarlow, *Grand Jury Misconduct — A Window of Opportunity*, *The Champion*, Jan./Feb. 2002.



Sharon Hogge

Sharon Hogge was the sales vice president of a defense contractor suspected of conspiring to defraud the US Army. An FBI agent had assured Sharon Hogge that investigators were not focused on her. So, Ms. Hogge spoke freely with federal agents, pointing them to addresses where they found company records. She took notes during her conversations with agents, transcribing the words reflecting the agents' assurances to her like: "no ambush," and repeatedly scribbling, "I am not a criminal target."

Yet, when federal prosecutors convened a grand jury investigation into the company's suspected over-billing of the Defense Department, they added Ms. Hogge to the target list and easily obtained an indictment against her — despite the fact that as a sales vice president, she did not bill the Army or even handle an inventory. She learned she had been indicted when her husband woke her one Saturday morning in 1996 and stuck a newspaper in her face.

Prosecutors pushed their shoddy case to trial. There, the government's case fell apart. U.S. District Judge Hoyt criticized the prosecutor for trying to "make a criminal case out of a dispute over an accounting principle." He added: "I don't see *any evidence* suggesting . . . that Sharon Hogge should be charged in any of these counts [against the company's executives]." During the course of the failed prosecution, Ms. Hogge miscarried twice from the stress of the ordeal, considered suicide, and for the first time in her life, had to start seeing a psychologist.

Sources: Ann Davis, *Life in a Federal Prosecutor's Cross Hairs*, *Wall Street Journal*, Mar. 17, 1998, at B1, B17. *Cleared of Army Fraud, Woman Loses Effort to Recover Legal Fees*, *Wall Street Journal*, Mar. 26, 1998, at B13.



William Moore

William Moore operated a company that manufactured an optical scanning device usable for sorting mail. For several months, he attempted win the business of the U.S. Postal Service, but officials would not look at his device. Acting on the advice of others who had worked with the government, he hired a lobbyist. Unknown to Mr. Moore, the lobbyist he hired was under investigation for passing bribes to a member of the Postal Service's board of governors.

Another target of the same investigation, William Spartan, agreed to cooperate with the government in exchange for immunity. Spartan told the government he did not know if Moore had been told about the bribery scheme — and a polygraph indicated that he was telling the truth. Upon hearing this, the prosecutor confronted Spartan and tore up the immunity agreement. The prosecutor later agreed to give Spartan another chance. To “refresh” Spartan’s memory, prosecutors showed him slanted summaries of grand jury testimony purporting to implicate Mr. Moore. Still, in 19 separate answers, Spartan maintained that he did not know if Moore was involved. When Spartan eventually testified before the grand jury, the prosecutor questioned him in such a way as to elicit Spartan’s opinion based on the slanted grand jury summaries. The grand jury never found out about Spartan’s repeated denials of any knowledge linking Moore to the illegal scheme.

The government used similar tactics to slant the testimony of another witness. Prosecutors asked Frank Bray, an employee of Moore’s company, to adopt a 22-page summary of his statements that prosecutors had prepared. When Bray refused to sign the statement — because it suggested that Moore knew about the bribery scheme — the prosecutor threatened him with perjury. After prolonged negotiations, Bray agreed to sign the statement if the prosecutor would allow him to tell the grand jury that he didn’t know if Moore was aware of the bribes. The prosecutor agreed but then never gave Bray the opportunity to make that statement before the grand jury. All the grand jurors knew of Bray’s statements to prosecutors was his summary, which he had told prosecutors had been wrongly slanted against Mr. Moore.

The charges against Mr. Moore were eventually thrown out, but the damage was done. He was removed from his position as head of the company after the indictment, and competitors initiated a hostile takeover, putting 3000 employees out of work.

Source: Bill Moushey, *Win at All Costs: When Safeguards Fail*, Pittsburgh Post-Gazette, December 6, 1998.



For more information about federal grand jury reform, go to NACDL’s web site, www.criminaljustice.org, or contact Kyle O’Dowd, NACDL Legislative Director, at (202) 872-8600 (ext. 226), or kyle@nacdl.org.