Key NY State Grand Jury Rules Can Shape Defense Strategy

By **Ethan Greenberg** (October 23, 2025)

Ethan Greenberg

New York City is regarded by many as the informal business and finance capital of the U.S., and perhaps the entire world. For that reason, federal prosecutors in the U.S. District Court for the Southern District of New York have traditionally played a prominent role in prosecuting white collar crime in America.

Similarly, the Manhattan district attorney's office has a long tradition of prosecuting white collar cases under New York state law, and the New York state attorney general's office has followed suit.

It is by now a commonplace observation that today's U.S. Department of Justice has de-emphasized the prosecution of business crime in favor of other priorities — most notably, immigration law enforcement and the prosecution of ordinary street crime in select jurisdictions, such as Washington, D.C.[1]

As a result, many white collar practitioners anticipate that the offices of Manhattan District Attorney Alvin Bragg and New York State Attorney General Letitia James are going to step up their already considerable efforts to prosecute business crime in order to fill the gap left by federal authorities. Oddly enough, James now finds herself under federal indictment — as will be discussed later in this article.

New York state law differs from federal law in a number of ways that significantly affect white collar prosecutions, including with regard to grand jury practice. The focus of this article is to compare and contrast the procedural rules that govern the grand jury in New York state court and in federal court, and to examine how the differences between the state and federal rules can affect the defense of a white collar case.

The chief takeaway is this: New York state's grand jury rules are more favorable to a criminal defendant than the federal rules are. New York state's rules offer a genuine opportunity in a limited, but significant, number of cases for a white collar criminal defendant to either wholly defeat, or meaningfully reduce, the criminal charges that the prosecutor seeks to bring against that defendant.

Thus, while it has been famously observed that a grand jury will indict a ham sandwich if asked to do so by a prosecutor,[2] under New York state's grand jury rules there are times when a criminal defendant has a fighting chance to avoid appearing on the prosecutor's menu.

Grand juries ordinarily indict.

A grand jury — usually consisting of 23 citizens — first hears a streamlined presentation by the prosecutor of the evidence in a criminal case and then decides whether there is a sufficient basis to charge the defendant with a crime. If so, the grand jury votes an indictment. If not, the grand jury votes "no true bill" and, ordinarily, the case is then dismissed.

The case law traditionally recites that the grand jury has twin functions, as articulated by the U.S. Supreme Court in its 1992 decision in U.S. v. Williams: "bringing to trial those who may justly be accused, and shielding the innocent from unfounded accusations and prosecution."[3]

Accordingly, as the court observed in 1973 in U.S. v. Dionisio, when a grand jury votes no true bill, it serves its "historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."[4]

In practice, however, when a prosecutor presents a case to a federal grand jury it is very, very rare for the grand jury to refuse to indict. By way of illustration, in the year 2010 federal grand juries refused to indict in only 11 out of 179,849 cases.[5] Many scholars and criminal defense lawyers therefore do not believe that the grand jury truly fulfills its mission to protect the innocent accused from unwarranted prosecution.[6]

There are a few isolated exceptions to the general rule that federal grand juries indict when asked. This past summer, for example, the Department of Justice on at least six occasions failed to secure indictments from a federal grand jury in Washington, D.C., in cases growing out of the Trump administration's highly publicized efforts to crack down on street crime in the district.[7] But these cases are newsworthy precisely because they are so very rare.

Federal rules favor the prosecutor.

Why is it that federal grand juries almost always vote to indict a criminal defendant?

There are at least four reasons.

First, the prosecutor's burden of proof at the grand jury stage is a minimal one. In order to obtain an indictment a federal prosecutor must present evidence to the grand jury demonstrating probable cause to believe the defendant is guilty; the prosecutor does not have to prove guilt beyond a reasonable doubt at the grand jury stage as they must at trial.

In essence, the grand jury's limited function is to decide not whether a defendant is guilty, but rather only whether there is sufficient evidence to warrant a trial.

Second, the presentation of evidence to a grand jury is one-sided. As the Supreme Court noted in Williams, "It is axiomatic that the grand jury sits not to decide guilt or innocence, but to assess whether there is an adequate basis for bringing a criminal charge … and to make that assessment it has always been thought sufficient to hear only the prosecutor's side."[8]

Thus, the prosecutor alone presents evidence to the grand jury. No defense attorney is allowed to question witnesses, or even to be present in the grand jury room. And, in the federal system, the defendant has no right to testify before the grand jury, and no right to have witnesses called to testify before the grand jury on the defendant's behalf.

Third, rules of evidence do not apply in a federal grand jury. In particular, federal prosecutors can and do ask leading questions to grand jury witnesses, and federal grand juries are permitted to consider — and are usually presented with — a wealth of hearsay evidence.[9]

Thus, many federal grand jury presentations feature a single lead investigator — typically, an agent from the Federal Bureau of Investigation — who, with the aid of a few choice leading questions asked by the prosecutor, smoothly summarizes for the grand jury in an orderly and easily understood fashion all the evidence of guilt that the government has gathered from multiple witnesses and documents over the course of its investigation.

Moreover, federal grand juries are allowed to consider evidence that has been improperly seized by the government.[10]

Finally, federal grand jury indictments are not reviewed for legal sufficiency. That is to say, federal judges ordinarily do not review grand jury presentations to determine whether the evidence presented was adequate to make out probable cause.

A defendant who has been indicted must instead go to trial, and in the ordinary case only then can the defendant challenge the legal sufficiency of the evidence presented at trial by the prosecutor.[11]

New York state rules are better for defendants.

On the other hand, New York state law affords the defendant a number of important procedural protections at the grand jury stage of a criminal case that a defendant does not enjoy in federal court, and this helps the defendant in some cases to get a more favorable result in state court than in federal court.

Admittedly, under New York state law the prosecutor has essentially the same minimal burden of proof at the grand jury stage that a federal prosecutor does. New York state prosecutors — much like their federal counterparts — need only demonstrate reasonable cause to believe the defendant is guilty in order to obtain an indictment.[12]

And that is why even in New York state court most grand jury presentations result in an indictment.

However, the New York state grand jury rules are better for the defendant in at least four important respects.

First, under New York law — unlike federal law — by statute a defendant has a right to testify before the grand jury if the defendant wishes to do so.[13] If the defendant serves timely notice of their desire to testify and is not provided a reasonable opportunity to testify, then any indictment voted by the grand jury must be dismissed.[14]

Thus, under New York law, in most cases the defendant has the ability to present their own version of events to the grand jury in an effort to dissuade the grand jury from voting an indictment, or at least from voting for the most serious charges requested by the prosecutor.

Second, and somewhat similarly, under New York state law the defendant has the right to request that the grand jury hear from other witnesses for the defense. The prosecutor must inform the grand jury of such a request, and the grand jurors then choose whether or not to hear from such witnesses.[15] Widespread anecdotal evidence indicates that in practice almost all New York City grand juries — to their credit — choose, out of fairness, to hear such witnesses.

Third, with a few minor exceptions, New York grand jury presentations are governed by the same rules of evidence that apply at trial. Thus a New York state prosecutor may not present hearsay evidence or other inadmissible evidence to a grand jury; and an indictment that relies in important part upon inadmissible evidence must be dismissed.[16]

Finally, pursuant to New York state statute once an indictment is voted defense attorneys routinely move to inspect and dismiss.[17]

When such a motion is made, a judge must inspect — that is, read — the minutes of the grand jury proceeding and must dismiss the indictment, or reduce certain charges contained in the indictment, if: (1) The evidence presented to the grand jury did not establish reasonable cause to believe the defendant guilty of the crimes charged; (2) the indictment relies upon inadmissible evidence presented to the grand jury; (3) the prosecutor gave the grand jury materially faulty instructions on the law applicable in the case; or (4) the prosecutor engaged in some other conduct that substantially impaired the integrity of the grand jury proceedings.

Moreover, under New York's relatively recently reformed discovery rules (in 2020), within a short period of time after an indictment is voted, the prosecutor must — in the absence of a motion for a protective order — turn over to the defense attorney the testimony of the witnesses who testified before the grand jury so that the defense attorney can investigate the case and prepare for trial.[18]

With the minutes of such testimony in hand, defense counsel can analyze the grand jury presentation in some detail and make an intelligent and pointed argument to the court as part of the defendant's motion to dismiss as to why the grand jury evidence was inadequate and/or inadmissible.

By way of contrast, under federal law the minutes of witness testimony before the grand jury need not be turned over to the defense until the time of trial, and the defendant ordinarily has no right to compel the court to inspect and dismiss.[19]

Defendants do better under New York rules.

The net result of these procedural advantages provided by New York law is that a grand jury indictment is not quite as automatic in the New York state system as it is in federal court. Fully reliable statistical evidence on this point is hard to come by. But studies indicate that New York state grand juries either refuse to indict altogether, or reject felony charges in favor of misdemeanor charges, from 5% to 10% of cases presented.[20]

Thus, in the New York state system, grand juries do vote to indict in most cases. But there are nevertheless a significant number of cases where the grand jury declines to indict altogether, or at least declines to include in an indictment the most serious charges requested by the prosecutor.

There are factors other than the procedural rules that likely contribute to this disparity in the rate of indictment between the state and federal systems. For one thing, state prosecutors usually have a far bigger case load than do federal prosecutors.

As a result, federal prosecutors can be far more selective when deciding which cases to present to the grand jury; and federal prosecutors generally have more time to prepare, and greater access to investigative resources, when presenting cases to the grand jury than do state prosecutors.

These other considerations are undoubtedly part of the reason why there are higher rates of indictment in federal than in state court. But New York state's procedural rules are likely the most important reason why New York defendants get more favorable results from the grand jury process.

New York rules offer several strategic choices.

One crucial protection afforded to the defendant by New York state law is, as noted, the right to testify before the grand jury. This gives a defendant the opportunity to present his or her story to the grand jury and to try to convince the grand jury not to indict.

In most cases, however, it is not wise for the defendant to testify before the grand jury, for a number of related reasons. To begin with, recall that the grand jury's limited task is to decide whether there is sufficient evidence to warrant a trial.

Accordingly, a defendant's grand jury testimony must be extremely powerful and persuasive in order to persuade the grand jury to vote no true bill. If instead the defendant's grand jury testimony merely disputes in inconclusive fashion the testimony of the prosecution's witnesses, then the grand jury will usually vote to indict and leave it to the trial jury to sort out which side's version of the facts is more believable.

Moreover, if the grand jury does indict, then whatever the defendant has said when testifying before the grand jury can be used against the defendant at trial.

Even though the defendant will, of course, deny guilt when testifying before the grand jury, the defendant will nevertheless in the course of testifying often have to concede certain facts by necessity — for example acknowledging that key documents are authentic, or admitting to identity or to motive — that can help the prosecution prove its case at trial.

Equally important, once a defendant testifies before a grand jury, the defendant's theory of the case is in effect largely frozen. That is so because if the defendant gives an even slightly different version of events at trial than before the grand jury, then the defendant will be impeached with defendant's prior sworn grand jury testimony and be made to look like a liar before the trial jury.

Notably, grand jury proceedings take place before the defense has received any documents in discovery from the prosecution, and there is a risk that without the benefit of discovery the defendant may mistakenly testify before the grand jury to facts that will later be contradicted by the documents. If so, this too will hurt the defendant's chances at trial.

More generally, it is not an easy thing for most defendants to testify before a grand jury. Under New York state law, the defendant's lawyer does not have the opportunity to ask the defendant questions before the grand jury and, by that means, to guide and shape the defendant's testimony.

The Criminal Procedure Law instead provides that the defendant must first give a narrative statement to the grand jury, after which the prosecutor and grand jurors can ask the defendant questions.[21]

Accordingly, a defendant who testifies before the grand jury should be an articulate and confident speaker who can, without the aid of friendly questions, provide an easily understood and compelling narrative demonstrating innocence — and the defendant must also be sharp enough to withstand cross-examination by the prosecutor.

Otherwise, testifying before the grand jury can make things worse, rather than better, for the defendant.

Thus, there are considerable risks associated with a defendant testifying before a grand jury. Nevertheless, in some white collar cases it can be worthwhile to take these risks. This can be true, in particular, where the defendant already has a very good sense of the outlines of the prosecution's potential case, and can launch a vigorous and targeted attack — supported by documents — on a key element of the prosecutor's case.

Take, for example, the Oct. 9 federal indictment of James, the New York attorney general. It has been widely reported for some time that the theory of the James prosecution is that James falsely represented on a mortgage loan application that she intended to use a house in Virginia as a second home, when in fact she later used it as a rental property.

It has also been reported that James made it clear elsewhere in the very same mortgage loan application that she intended to use the house as a rental property.

Preliminary news accounts of court proceedings are often wrong. But — assuming for didactic purposes that these press reports about the James prosecution are essentially correct — if the James case been brought in New York state court rather than federal court, then for a number of related reasons the case might well have been a good candidate for the defendant to testify before the grand jury.

To begin with — even without discovery — by virtue of the extensive press coverage the James case has already garnered, the defense would know with reasonable certainty what allegations James needed to rebut through her grand jury testimony; and James would not likely be met with unexpected questions about unanticipated issues.

In addition, due to her extensive experience as a litigator and politician, James would obviously be an intelligent and savvy witness — able to make a good presentation on her own behalf, and unlikely to be tripped up by cross-examination.

And most importantly, James would have a good chance to convince the grand jury that she lacked the intent to deceive the lender required in order to commit mortgage fraud because — as the mortgage application documents themselves reportedly show — she disclosed her true intentions to the lender in writing.

And James' chances to prevail in the grand jury might have been especially good if — as seems to have been true with the U.S. Department of Justice's recent failures to obtain indictments in Washington, D.C. — the grand jury did not fully trust the prosecutor's motives in bringing the case.

Moreover, even if James were unable to convince the grand jury to vote no true bill, under New York law her counsel would also have the opportunity thereafter to make a motion to inspect and dismiss; and defense counsel might well win a dismissal of the indictment on the ground that the grand jury evidence was inadequate to prove probable cause, because the mortgage application documents themselves reportedly contain a prominent and truthful description of James' intentions for the property.

This article is, of course, not intended to serve as an analysis of James' case — about which important facts are only beginning to emerge. But her case does provide a useful and timely illustration of the sort of case where a white collar criminal defendant might well be better off in New York state court than in federal court because of the procedural protections that New York state law provides at the grand jury stage.

Conclusion

Federal grand juries almost always vote to indict. New York state grand juries usually vote to indict, but that result is not so automatic in New York state court as it is in the federal system. There are on occasion situations where, utilizing sound discretion and judgment, defense counsel can use the protections afforded by New York state law to win an early dismissal of charges against a while collar criminal defendant.

Ethan Greenberg is a shareholder at Anderson Kill PC. He previously served as an acting New York Supreme Court justice presiding over criminal cases, and as an assistant district attorney in the New York County District Attorney's Office.

[1] See e.g., Jeffrey Chemerinsky and Michael J. McCarthy, The State of DOJ White Collar Enforcement: An Incoherent Policy Sets the DOJ on an Increasingly Clear Path, National Law Review, June 17, 2025.

[2] Former Chief Judge of the New York Court of Appeals, Sol Wachtler, once sarcastically commented that a grand jury will indict a ham sandwich when asked to do so. See Marcia Kramer and Frank Lombardi, New York State Top Judge: Abolish Grand Juries and Let Us Decide, N.Y. Daily News, Jan. 31, 1985 at 3.

[3] United States v. Williams, 504 U.S. 36, 51 (1992).

[4] United States v. Dionisio, 410 U.S. 1, 17 (1973). See also Wood v. Georgia, 370 U.S. 375, 390 (1962) ("Historically, the [grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution.").

[5] U.S. Dept. of Justice: Federal Justice Statistics 2010, Statistical Tables, December 2013, at 12.

[6] See e.g., Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260 (1995).

[7] These six cases included (somewhat ironically, in light of Judge Wachtler's oft-quoted witticism) one case where a defendant was charged with felony assault for throwing a sandwich at a federal officer. See Aaron Zelinsky and David Reiser, The Grand Jury Strikes Back, Lawfare, Sept. 8, 2025, https://www.lawfaremedia.org/article/the-grand-jury-strikes-back.

[8] United States v. Williams, 504 U.S. 36, 51 (1992).

[9] Costello v. United States, 350 U.S. 359 (1956) approves the practice of presenting hearsay to a federal grand jury.

[10] United States v. Calandra, 414 U.S. 338 (1974) approves the presentation of illegally seized evidence to a federal grand jury.

[11] See 1 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §113 (5th Ed.) (updated Sept. 2025).

[12] See N.Y. Crim. Pro. §190.65(1); People v. Jennings, 69 N.Y. 2d 103 (1986).

[13] See N.Y. Crim. Pro. §190.50(5).

Of course, in order to invoke the right to testify before the grand jury the defendant must first know that a grand jury presentation is underway.

In the ordinary case — where the defendant is first arrested and arraigned, and then the case is presented to the grand jury — defendant's need to know that a grand jury presentation has begun presents no obstacle to invoking the defendant's right to testify. That is so because at arraignment the District Attorney is required by statute to formally notify the defendants that the prosecutor intends to present the case to the grand jury; and the defendant can then serve "cross-notice" that defendant wants to testify before the grand jury.

In some complex white collar cases, however, the procedure is different: the District Attorney presents the case to the grand jury and obtains an indictment before the defendant is arrested and arraigned. In that circumstance the defendant may not know of the existence of the grand jury proceeding until it is already too late for the defendant to testify.

Accordingly, if a business person gets wind that a grand jury may be looking into his or her activities — as, for example, when business associates report that D.A. investigators are asking questions and serving grand jury subpoenae — it is wise for counsel as a precautionary matter to serve the District Attorney with a formal request to testify before the grand jury. This preserves the defendant's right to testify; and it may also serve to initiate discussions between defense counsel and the District Attorney that can lead to an acceptable negotiated resolution of the matter.

[14] See People v. Evans, 79 N.Y.2d 407 (1992) and N.Y. Crim. Pro. §190.50(5)(c).

[15] See N.Y. Crim. Pro. §190.50(6); People v. Stepteau, 81 NY 2d 799 (1993); People v. Ali, 19 Misc. 3d 672 (S. Ct. Queens Co. 2006).

[16] See N.Y. Crim. Pro. §§190.30(1) and 190.65(1); People v. Huston, 88 N.Y.2d 400, 409-10 (1996).

[17] See N.Y. Crim. Pro. §§210.20 and 210.30.

[18] N.Y. Crim. Pro. §245.20(b).

[19] See Fed R. Crim. Pro. 26.2 and note 11 supra.

[20] See Rik Simmons Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1, 12-13 (Feb. 2002).

[21] Crim. Pro. §190.50(5)(b); People v. Smith, 84 N.Y.2d 998 (1994).

See People v. Thompson, 22 NY 3d 687, 698 (2014) ("[W]here the defendant chooses to testify [before the grand jury] the prosecutor may, within limits, ask probing or even skeptical questions of the defendant about issues raised by his or her testimony.").