

Let's Go To The Grand Jury Audiotapes! Takeaways For The Defense Bar From The Recent Chicago Debacle



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This summer, federal prosecutors in Chicago dropped multiple criminal indictments in the wake of revelations of serious irregularities and prosecutorial misconduct in the grand jury process: namely, that a prosecutor who presented those cases to grand juries had improperly vouched for witness credibility and for the strength of the government's case, expressed personal opinions on the guilt of the accused, engaged in *ex parte* communications with grand jurors, and dismissed jurors who disagreed with the government's case. This led United States Attorney Andrew Boutros of the Northern District of Illinois not only to dismiss those cases (*U.S. v. Rabbitt* (the "Broadway Six"), *U.S. v. Ishkirat*, and *U.S. v. Ahmed*) but also to announce that the government would review more than 1,000 grand jury cases dating back to 2007 that were associated with the prosecutor, in an effort "to restore the judiciary's, defense bar's, and public's confidence in the grand jury practices of the district."

One of the most important revelations of these events—meriting defense bar attention—is that some of the prosecutorial misconduct would not have come to light *but for the existence and disclosure of grand jury audiotapes.*

As the government conceded in *Ishkirat*, some of the prosecutor's improper statements to the grand jury had been captured on audiotape but were not reflected in the court reporter's transcript—either because the statements occurred when no court reporter was present or after the court reporter had stopped typing.

This is a big deal. Many defense lawyers have no idea whether their local United States Attorney's Office audiotapes grand jury proceedings; meanwhile, the Chicago debacle vividly demonstrated how a grand jury transcript was materially incomplete such that only the audiotape revealed the full extent of prosecutorial impropriety. This, in turn, begs the two questions addressed in this article: (1) Are all federal grand jury proceedings audiotaped? (2) Given what happened in Chicago, how should defense lawyers incorporate the potential existence of grand jury audiotapes into their practice?

(1) Are All Federal Grand Jury Proceedings Audiotaped?

The answer is unclear—and no law requires that federal grand jury proceedings be audiotaped. To be sure, Rule 6(e) of the Federal Rules of Criminal Procedure (which was enacted by Congress and has the force of law) mandates the recording

of "all" grand jury proceedings other than juror deliberations. That rule, however, permits the proceedings to be recorded either "by a court reporter or by a suitable recording device." Rule 6(e). Prosecutors—not courts or grand jurors—decide the manner of recording and are charged with then retaining control of the recording. Thus, each of the 93 United States Attorneys' Offices apparently has discretion as to whether to audiotape grand jury proceedings. The Justice Manual of the Department of Justice (including its chapter on "Grand Jury" practice, 9-11.000) reflects no central policy on this issue.

As seen in Chicago, at least some federal prosecutors' offices use both methods: a court reporter and an audiotape to record grand jury proceedings. We know, too, from the now-dismissed case against former FBI director James Comey that grand jury proceedings in the Eastern District of Virginia are audiotaped. In *U.S. v. Comey*, when the government was ordered to turn over underlying grand jury materials for the court's review, it turned over both a transcript and an audiotape. Having reviewed both, the magistrate judge then found numerous instances of "highly irregular" government conduct—including that the transcript and audiotape "likely d[id] not reflect the

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full proceedings.” (Note: The district court subsequently dismissed the *Comey* indictment based on the defective appointment of Interim United States Attorney Lindsay Halligan, a ruling now on appeal before the Fourth Circuit Court of Appeals.)

There are additional reasons to believe that many, if not all, federal prosecutors’ offices regularly audiotape grand jury proceedings. First, audiotaping saves money: prosecutors need only have court reporters prepare transcripts of portions of the proceeding (such as witness testimony), while preserving other portions (such as legal instructions) only on audiotape. Second, court reporters may themselves audiotape the proceedings to have backup for their stenographic notes irrespective of whether the government instructs them to do so. Significantly, in instances where court reporters audiotaped grand jury proceedings of their own volition, courts have held that prosecutors nevertheless retain legal control over those audiotapes and could be required to produce them. (See *United States v. Reid*, 553 F. Supp. 3d 882 (W.D. Wash. 2021); *United States v. Suggs*, No. 03-CR-109, 2003 WL 21801493 (E.D. Pa. Aug. 4, 2003)).

Accordingly, even without full clarity on the audiotaping practices used by every federal district for its grand jury proceedings, defense lawyers should be aware that audiotapes of grand jury proceedings may exist in their cases.

(2) How should defense lawyers incorporate the existence of grand jury audiotapes into their practice?

It bears noting at the outset that defendants must clear a high bar to gain pre-trial access to grand jury materials. Because secrecy is a hallmark of the federal grand jury system, courts have long presumed regularity in grand jury proceedings and will order disclosure to the defense only in rare circumstances. Defendants must show, based on non-speculative facts, a “particularized need” that outweighs secrecy—for instance, facts suggesting that the grand jury proceeding was tainted because the government misled the grand jury, engaged in outrageous or inflammatory conduct, improperly vouched for witness credibility, or violated grand jury secrecy rules. Even then, courts often take the conservative, intermediary step of reviewing the grand jury materials *in camera* (where only the judge sees them) before deciding whether disclosure to the defense is warranted.

While this demanding “particularized need” standard is unlikely to change anytime soon, the Chicago debacle can be invoked to challenge the presumption of regularity and persuade federal judges that *in camera* review is appropriate. After all, the Chicago cases laid bare how the secrecy that protects grand jury proceedings can—if left entirely unchecked—insulate prosecutorial misconduct. The Chicago debacle furthermore underscores why, when grand jury audiotapes exist, *both* the

transcript *and* audiotape should be reviewed to assess a potential grand jury taint that prejudiced the defendant. To review only the court reporter’s transcript would be to ignore the stark reality exposed in Chicago: that the transcript may be incomplete and omit material evidence.

This issue is not unlike how reality forced federal authorities to alter their policy on preserving and disclosing agents’ notes of witness interviews. For years, the FBI’s practice was to destroy the rough notes once agents finished preparing a final “302” report of the witness’s interview statements. But that flew in the face of actuality—namely, that agents’ notes might, and often did, contradict the 302 report or contain additional favorable, exculpatory, or impeaching material not included in the 302 report and to which the defense was entitled. FBI policy changed in the 1970s to require preservation of agents’ notes. And after 2009, when a court spectacularly threw out the corruption conviction of former U.S. Senator Ted Stevens because the prosecution had failed to disclose crucial notes of witness interviews, government practices evolved further. Prosecutors now commonly turn over agents’ underlying notes along with the 302s. So too here: when a legitimate basis exists for the defense to have pre-trial access to grand jury material or for courts to review those materials *in camera*, no one should reflexively assume that the transcripts alone fully capture the contents of the grand

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jury proceedings. The Chicago debacle proves otherwise. Both transcripts and audiotapes should be requested and reviewed.

Defense counsel can also invoke the recent Chicago debacle, and the *Comey* case, to press on whether and how federal prosecutors are fulfilling their Rule 6(e) obligation to record “all” grand jury proceedings besides juror deliberations. For example, who presses the “on” and “off” buttons for grand jury audiotapes? What practices are followed to ensure that grand jury recordings are complete? These are fair questions, and they matter to the integrity of the system.

Defense counsel can also demand, and may be entitled to receive, grand jury audiotapes as part of criminal discovery—particularly where a defendant testified in the grand jury, such that audiotape contains the defendant’s own statements, or where there are grounds to believe that grand jury audiotapes contain exculpatory *Brady* material. In *U.S. v. Reid*, a 2021 perjury case in the Western District of Washington, the court ordered the government to produce the grand jury audiotape of the defendant’s own statements and found a *Brady* violation because the government failed to do so promptly.

Finally, the defense bar should stay tuned as more than 1,000 grand jury cases in Chicago are now reviewed for potential

irregularities and prosecutorial misconduct. Should additional examples emerge of prosecutors’ statements being captured on grand jury audiotapes but not in the transcripts, that development will further heighten sensitivity to this issue. Meanwhile, the defense bar’s knowledge that federal grand jury audiotapes do or may exist should factor into strategic thinking on how best to represent clients and safeguard defendants’ rights.