A GRAND JUROR SPEAKS

The inside story of how prosecutors always get their way

By Gideon Lewis-Kraus

For four weeks last spring—three hours a day, five days a week—I served, along with twenty-two other New York County residents, as a member of a grand jury. We met each morning on a high floor in the Criminal Courts Building on Centre Street and performed our role as a minor procedural hurdle to one or another of Manhattan's 500 assistant district attorneys. Very few of the lawyers carried bags or briefcases, so they invariably seemed on the verge of slapstick catastrophe as they schlepped and stacked their distended accordion folders of material evidence and annotated statutes, questioned their witnesses, called forth arresting officers, clarified the underlying legal definitions—the meaning of "to sell," to our surprise, includes "to give"—and asked us to vote on whether there was reasonable cause to believe that an alleged perpetrator had committed a crime.

I completed my service before Michael Brown and Eric Garner were killed, before the actions of grand juries became a focus for pundit and protester alike. In the wake of the refusals of grand juries to indict the police officers who killed Brown and Garner, the one thing most people have learned about grand-jury proceedings is that they follow the lead of the prosecutor. No case is mounted by the defense; the state's version of events is the only story on offer. As I saw firsthand, this makes the prosecutors singularly powerful narrators.

One of the first stipulations in the New York State grand-juror's handbook is secrecy, the violation of which is a Class E felony punishable with imprisonment. That section reads, in part:

> The purposes of grand jury secrecy are to obtain the full cooperation of the witnesses who appear before the grand jury, to permit grand jurors to make decisions free from outside interference, and to protect an innocent person who may be investigated but never indicted.

For that reason, I won't reveal the names of the people involved in the crimes I will discuss, and I'll change the names of my fellow jurors.

Because of the secrecy requirement, those who haven't served on a grand jury have little idea of the closed circuits of that cramped, wood-paneled room. But if the actions of jurors like me can bring thousands of people into the streets to protest, it seems worth risking a felony charge to describe the arguments and expectations of the chamber.

For the most part, we heard evidence in the form of witness testimony—from the victims or from the officers who'd investigated the crime. On three occasions, however, we watched videos; we looked forward to these respites from the dull routine of buy-and-bust drug cases as though they were field trips. One of these videos documented a crime so distinctive and well publicized that I'm unable to disguise it here. That one was, in any case, uncontroversial. We voted unanimously to indict, as we usually did, as we'd been encouraged, perhaps even pressured, to do.

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The other two videos showed security-camera footage. The first, in the waxy-green monochrome we associate with antiquated night-vision accessories, was taken by a camera mounted outside a Washington Heights corner store. The time stamp let us know that it was just after three in the morning on a Tuesday in March. Two men, one much taller than the other, emerged from the bodega. It looked, at first, as though their arms were linked in the solidarity of a late-night frolic. After a moment, though, it became clear that the shorter one was grasping the elbow of the taller one, who was struggling to break free. The tall man pulled away, pivoted back to face his shorter companion, and pushed him in the chest. The short guy fell backward against the bodega's glass door, wheeled around, and plowed headfirst into the tall guy's gut. At this point, an enormous aproned employee of the bodega exploded out of the store and fit himself between the two fighting men. He easily pushed them apart. The video had no sound, but it was clear even through the grain and the pallor that he was shouting at the short man to be on his way.

The short man left, the employee and the tall guy reentered the bodega, and the door swung closed. The unvarying frame presented the pale-emerald glow of the shop at night. We watched the late-hour scene for ten minutes. (The court's video technician had left the room, and no one stood up to fast-forward.) It had an almost hypnotic quality, and I found it hard to turn away when I knew there was more action to come. Members of the grand jury—the ones who had made it clear what a burden this had been for their jobs in finance or marketing—nevertheless illicitly checked their email. The video recaptured the general attention when the short man came back into view and reentered the store.

My neighbor Louis elbowed me. Louis was an unemployed pipe fitter and amateur cartoonist who had lived his entire life within a three-block radius of 125th Street and Frederick Douglass Boulevard. He had become the unofficial ambassador of the loose little obstructionist bloc that four of us had formed. It had been three weeks, and we had yet to defeat an indictment. We had, on two occasions, come close.

"He went to get his gun," Louis said.

The short man, the tall man, and the employee burst back through the bodega doors onto the street. Their quarrel looked increasingly unstable. It was hard to tell, from the dim, distant footage, who was pushing whom and who was reaching for what. The fracas ended, and the tall man walked east, out of the frame, down the block. The short man stepped out of the frame to the south, and then, as if rethinking a rash decision, stepped back into the frame, reached into his coat, and in one smooth motion pulled out his gun and shot off into the air in the general direction of the tall man's exit. We could see a tiny green flash when the gun discharged.

We had been asked to consider three charges against the defendant: criminal possession of a weapon, criminal use of a firearm, and attempted murder. On the first two counts, there was no discussion. We all raised our hands to indict in silence. On the third count, we were far from consensus. The grand jury was divided along lines that had become familiar.

There were jurors who thought that our role was to rubber-stamp indictments, who took at face value the prosecutors' instructions that reasonable cause, the burden of proof required to formally accuse someone of a crime, is a very low standard, that the subsequent trial would establish the facts "beyond a reasonable doubt," that all extenuating circumstances would be considered as part of the due process of that trial. And then there were those who knew that 90 percent of felony cases never come to trial, that the assistant district attorneys often seek the highest possible charges to give themselves maximum leverage in the plea-bargain negotiations to follow, that the suggestion that extenuating circumstances would ultimately be aired and thoughtfully considered by a judge and trial jury was a sop. What goes on in grand-jury chambers is supposedly the prelude to the trial itself, but the major considerations of justice—the decision by which, say, a mere possessor of drugs will be accused of being a drug dealer—were by and large carried out there, shuffled into the system at the point where the evidentiary bar was lowest.

"But he shot a loaded gun," Amy, the head rubber-stamper, said, shaking her head. She couldn't understand the friction; she found Louis impossible. By the halfway point of our term she could barely look at him. As she couldn't possibly believe that the faster we voted on these cases the earlier we'd get to leave—the faster we voted on these cases, the more of them we'd see—she must have identified with the process so much that she had taken up its efficiency and alacrity as a personal cause.

"I know," Louis said. "I'm not arguing with you about that. I'm just saying this guy ain't no attempted murderer." He gripped his chair and pushed himself to his feet, then unsteadily descended the steps to the front of the room, where he pushed aside the heavy testimony table.

"Let me show you something we all know in my neighborhood." He turned his body to the side and raised his arm, fast and loose, offhandedly pulling a pretend trigger one time as he swung the imaginary firearm a good forty-five degrees up from horizontal.

"That," he said, "is a warning shot." He paused.

"And this here is attempted murder."

He turned to face Amy head-on. She recoiled. He extended his right hand and stabilized it with his left. "Pop pop pop pop pop pop."

He pulled the imaginary trigger until his imaginary clip was exhausted.

"That's attempted murder. And right here we have a decision between sending this guy to prison for three years for criminal possession of a weapon, or sending him to prison for ten and turning him into an attempted murderer." The grand jury voted to indict.

Over the course of sixty hours of service, we voted on more than a hundred cases. The number of times we refused to indict could be counted on one finger. We were simply not expected to dismiss charges.

This had been true from the very first case we heard, a robbery. A cop gave testimony that she'd seen, from the back of an unmarked police car, two visibly intoxicated youths emerging from a midtown bodega. She told her sergeant to follow the young men, who approached a woman at the next intersection and tried to steal her headphones and her purse. A short time later, two different cops, who were patrolling on foot, apprehended the men under some scaffolding after a short altercation. We heard testimony from the first officer, from the victim of the theft, and from the officer who made the arrest. Before the arresting officer was dismissed, the assistant district attorney asked if there were any questions from the grand jury. She swept the room with a desultory glance, missing the raised hand of Louis, who had already established himself as our skeptical voice of reason. Louis waved again, more aggressively this time, and she came over and bent down to hear his whispered question. In New York State, members of a grand jury are allowed to question witnesses, but, as the handbook puts it, the prosecutor "reviews grand jurors' questions for witnesses and permits only those that are relevant and legally proper."

He whispered loudly enough for half the room to hear him. "What I want to know is, could the arresting cop smell alcohol on the men's breath during their little scuffle?"

The A.D.A. exhaled slowly as she stood up. She addressed the officer. "A member of the grand jury would like to know if you smelled alcohol in the process of making your arrest."

The cop shook his head no, not to his recollection.

Most of the jurors sighed. This was going to be a long month, and this guy seems to think he's on *Law & Order*. (The confusion between reality and television was, to be fair, further confused by the state's Office of Court Administration: the Ken Burns–style orientation video we'd just watched was narrated by Sam Waterston.)

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Illustration by Richard Mia

"THE QUICKEST WAY TO KNOW YOUR WAY AROUND THE DETAILS OF THE CRIMINAL-JUSTICE SYSTEM IS JUST TO BE A PERSON OF COLOR," SAID LOUIS.

The A.D.A. looked back at Louis. He began once more in a stage whisper. "What I'm trying to understand is: How did the first cop see, through the back of a tinted cop car, that these young fellas were under the influence of alcohol? It seems to me that maybe she was racially profiling them."

The A.D.A. was losing her patience. She stage-whispered back, "Those are the sorts of procedural questions that will be addressed at trial. Right now, you only have to decide if there's enough evidence for reasonable cause to believe that a crime was committed."

She dismissed the witness, instructed us on the law, and left the room. The secretary read off the charge and asked for votes to indict. Twenty-two of us raised our hands. Louis looked around the room, shook his head, and raised his hand, too.

There was one time the obstructionist bloc held sway. It was one of the last cases we heard, and involved the third of the three videos. It was also the only time in our four weeks that we heard the testimony of an alleged perpetrator.

The security footage, in color this time, showed the foyer of a popular athletic-apparel shop downtown. The alleged perpetrator had been arraigned on multiple counts of shoplifting over a period of several months.

The time stamp read 7:00 P.M. on a Thursday, a busy time for the store. The defendant walked in through the double glass doors, approached a low table, withdrew a black duffel from his overcoat, expanded it to full size, and in one practiced motion swept a pile of jackets into the bag. The jackets were black, with white zippers. He swung the full duffel onto his shoulder and, without pausing to look around, walked calmly out of the store.

There was no disputing that the man had been shoplifting. The many counts of petit larceny—goods in the amount of $750 on the tenth of February, in the amount of $875 on the thirteenth of March, and so on—saw rapid up-and-down votes. The question, however, was about the charge of grand larceny. The statute defined grand larceny as the theft of more than a thousand dollars' worth of goods. The jackets in the video, we were told by the store's general manager, cost $99 each, and the store alleged that the man had taken fifteen of them.

The alleged perpetrator had, despite his counsel's warning that it was unlikely to do him any good, appeared in front of us to testify on his own behalf. As the man came into the grand-jury chamber, Louis turned to me.

"I'll tell you right now what he's going to say. He's going to say he knows the difference between the petit charge and the grand charge. He's going to say he knows that the petit charge carries a maximum charge of one year and he probably won't serve. But that grand charge, man, that's two to four, and he'll sure enough serve it."

"Louis," I asked, "did you go to law school or something?" By that point in our service Louis and I were sharing bad cart-coffee during breaks. "How the hell do you know this stuff with this degree of granularity?"

Louis looked at me. "In my community, everybody's got a cousin or a brother or a nephew who's been there. We all know this stuff. The quickest way to know your way around the details of the criminal-justice system is just to be a person of color. You learn real quick."

The man was sworn in. All he wanted to say, he explained, was that he didn't steal fifteen jackets. He stole ten jackets. He stole ten jackets—and here his lawyer tried to dissuade him from an admission of outright guilt, to no avail—because he knew that ten jackets times $99 a jacket was $990, and $990 was less than $1,000. That was all he wanted to say.

He left the room, and we watched the video again. We pressed our faces up against the TV screen, trying to count the white zippers. We couldn't get past seven. The secretary called for a vote on grand larceny, and, for the first time, we voted to dismiss a charge. We relayed the news to the A.D.A.

The A.D.A. returned. She was dropping the grand-larceny charge and presenting a slightly different grand-larceny charge, under the legal theory that his aggregate thefts had a value of more than $3,000.

We had, as ever, no choice. We voted to indict. ■