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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 119

ROHAN MANRAGH, JR.,

Appellant.

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20 Eagle Street  
Albany, New York  
October 11, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

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1 CHIEF JUDGE DIFIORE: Number 119, the People of  
2 the State of New York v. Rohan Manragh.

3 Good afternoon, counsel.

4 MR. SCOTT: Good afternoon, justices; Thomas  
5 Scott for the defendant-appellant Rohan Manragh.

6 JUDGE FAHEY: Mr. Scott, would you move over in  
7 the center so I can hear you better? Thanks.

8 MR. SCOTT: Yes, Your Honor.

9 JUDGE FAHEY: I'm getting old. Okay.

10 MR. SCOTT: Okay. This all began with a  
11 contested grand jury proceeding wherein the defendant  
12 testified and his mother testified and he and - - -

13 JUDGE GARCIA: Counsel, you have two main cases  
14 it seems here to me that we've decided, Pelchat, right, and  
15 Hansen. Pelchat we say it's - - - you know, we reverse and  
16 Hansen we say we don't on the introduction of hearsay.  
17 Pelchat, sole witness in the grand jury confesses that to  
18 the ADA that he was mistaken, and the ADA doesn't correct  
19 it. Why is this more like Pelchat and not Hansen?

20 MR. SCOTT: Well, Pelchat hinged substantially on  
21 the constitutional function of the grand jury to indict as  
22 well as the prosecutor's duty of fair dealing. And I think  
23 those are the issues in our case. And - - -

24 JUDGE GARCIA: But here your client is asking to  
25 put in a statement which is essentially hearsay and the



1 district - - - the people don't make the request to the  
2 grand jury. There's a hearing in front of the - - - in  
3 front of the trial court, and that motion is denied. But -  
4 - - so what is it about not relaying that request to the  
5 grand jury that makes this a fundamental error in the sense  
6 of Pelchat?

7 MR. SCOTT: Okay. I - - - I think another case  
8 to be considered by this court to juxtapose with Hansen is  
9 Huston. Now in Huston, there was a grand jury presentation  
10 where the prosecutor committed a variety of errors  
11 introducing hearsay evidence, vouching for witnesses, et  
12 cetera, and there was an indictment for murder. He - - -  
13 the defendant stood trial and was convicted. And the - - -  
14 this court reversed that conviction, you know, finding that  
15 the error committed in the grand jury was not vitiated by a  
16 conviction by jury.

17 JUDGE GARCIA: Again, that seems to go, Huston,  
18 to the integrity of the proceeding, right. There was  
19 misconduct by the prosecutor in the grand jury room that I  
20 think we said tainted the integrity of the proceeding  
21 itself, so the proceeding that led to the indictment. And  
22 here it seems the argument is they should have relayed this  
23 request to put in this kind of testimony that would, for  
24 the most part as I read it, be hearsay testimony.

25 MR. SCOTT: Well, I - - - I mean I just - - -



1 well, even if it's hearsay, it - - - the question remains  
2 whether it's admissible.

3 JUDGE GARCIA: But how did not doing that impair  
4 the integrity of what the grand jury actually did which I  
5 think is more Huston and Pelchat.

6 MR. SCOTT: All right. I - - - I think you're  
7 perhaps giving too much focus on, you know, intent or - - -  
8 rather than results. Now for example, in Hill, you know,  
9 there was an impairment of the grand jury because the  
10 prosecutor was asked by the grand foreman what were the  
11 nature of the witness that the defendant wanted the grand  
12 jury to hear, and he knew they were alibi witnesses, but he  
13 - - - he said he didn't know. And - - -

14 JUDGE GARCIA: Hill is not a - - - Hill is not a  
15 case like this. Hill was a direct appeal of the denial of  
16 the motion, wasn't it?

17 MR. SCOTT: That's correct. It was - - - it was  
18 not a guilty plea, Your Honor. It was a - - - it was a  
19 motion to dismiss an indictment.

20 JUDGE GARCIA: So isn't that a different analysis  
21 than what is such a fundamental defect in the grand jury  
22 proceeding that it survives a guilty plea?

23 MR. SCOTT: Well, there was a finding in Hill  
24 that there was an impairment of the integrity of the grand  
25 jury proceeding which is the same finding as in - - -



1                   JUDGE FAHEY: Well, I guess just to follow up on  
2                   - - - on the Judge's question, the problem I have in  
3                   looking at it is - - - is I have to say is this - - - if  
4                   it's fundamental to the integrity of the grand jury that  
5                   means two things to me just off the top of my head. First,  
6                   that the grand jury was not able to make a fair or honest  
7                   evaluation, number one, and, number two, that the evidence  
8                   was of such a nature that it could be dispositive or - - -  
9                   or play a large role in their determination. This evidence  
10                  doesn't seem to fall within that category, and that's what  
11                  I think you need to address. Why does this evidence fall  
12                  within one of those two categories?

13                  MR. SCOTT: Well, you had a situation here - - -  
14                  I mean the record - - - if you look at the record,  
15                  including, for example, the presentence report, there is an  
16                  indication that - - - that the complainant was charged at  
17                  some point in this with a crime.

18                  JUDGE FAHEY: Right.

19                  MR. SCOTT: So - - - and there is also the fact  
20                  that there's a relationship between the two, relationship  
21                  obviously gone sour. And - - -

22                  JUDGE WILSON: He pleaded guilty to violating a  
23                  protective order essentially, right? An order of  
24                  protection?

25                  MR. SCOTT: That's correct, Your Honor.



1 JUDGE WILSON: So how does - - - so forget the  
2 hearsay issue, suppose this is all non-hearsay. How does  
3 it affect his guilt or innocence as to the violation of the  
4 order of protection? It - - - it almost seems to do the  
5 opposite, right? It puts him in a place that he wasn't  
6 supposed to be.

7 MR. SCOTT: Well, I think there's definitely an  
8 issue as to the credibility of the complainant and the  
9 defendant. And - - -

10 JUDGE RIVERA: I think Judge Wilson's point is  
11 that the - - - that the testimony that's proffered, right,  
12 that - - - that Naper (ph), I think that's how it's  
13 pronounced, was going to give would have placed him in the  
14 - - - in the location that would establish the violation of  
15 the orders.

16 MR. SCOTT: Well - - - well, the violation he  
17 pled to - - -

18 JUDGE RIVERA: He himself was seeking to put  
19 information forward that was not exculpatory.

20 MR. SCOTT: Okay. What - - - what the violation  
21 of which he was convicted was telephone calls. All right.  
22 Not being at that location where - - - where according to  
23 that source there was a chaotic scene and perhaps he was a  
24 victim of a crime. And if the proposed testimony of Naper  
25 did go to the complaining witness' credibility, Tiffany

1 (ph), and to her motive in terms of, you know, her disdain  
2 for the defendant. And as the cases I've cited in my  
3 briefs indicate, that is relevant testimony, you know, that  
4 could be admissible by external evidence. And that's the  
5 reason why it was not irrelevant hearsay.

6 And I would like to point out that all this  
7 larger issue of the fact of whether a plea survives - - - a  
8 claim survives a guilty plea is before this court that  
9 there is other issues that may foreclose this court  
10 reaching that. If the defendant's plea was found to be  
11 involuntary then any, you know, potential issue with  
12 Pelchat or Hansen would be obviated.

13 And, you know, I think the record speaks for  
14 itself that you had a defendant suffering from multiple  
15 sclerosis. You had the coercion of a consecutive sentence  
16 for promoting prison contraband when in fact that was not  
17 the law. You had threats of consecutive incarceration.  
18 You had the defendant's mother removed from the courtroom  
19 on June 4th I believe, two days before he pled guilty. And  
20 all of these factors cumulatively, I submit, would  
21 demonstrate that the plea was not knowingly, voluntarily,  
22 and intelligently made.

23 And with regard to that issue and the trial  
24 court's denial of his motion to withdraw that plea, I think  
25 this court's decision in McKeon - - - McKennan (ph), I'm



1           sorry, when you said that ordinarily if a defendant makes a  
2           claim of innocence before sentence is imposed, the court  
3           should either allow the withdrawal of the plea or conduct a  
4           hearing to determine whether there's merit to that claim.  
5           And that clearly was not followed in this case.

6                        CHIEF JUDGE DIFIORE: Mr. Scott, excuse me. I  
7           neglected to ask you if you wanted to reserve two minutes  
8           for rebuttal time, so I took it upon myself to reserve the  
9           two minutes for you. If you would like to continue now and  
10          forgo rebuttal or sit down and wait until you're - - -

11                      MR. SCOTT: I'll take the rebuttal, Your Honor.  
12          Thank you.

13                      CHIEF JUDGE DIFIORE: Okay. Excellent. Thank  
14          you.

15                      Counsel.

16                      MS. MANZELLO: Good afternoon, Your Honors. I'm  
17          Assistant District Attorney Caren Manzello on behalf of the  
18          District Attorney of Suffolk County, Timothy Sini, for  
19          respondent, may it please the court. This court has long  
20          recognized society's interests in the finality of  
21          judgments. I think previously describing - - -

22                      JUDGE FEINMAN: So - - - so are there any  
23          violations of CPL 190 that would survive a guilty plea?

24                      MS. MANZELLO: Well, in this particular case,  
25          190.50(6) has been called into question which is the



1 defendant's right to call his own witnesses. Certainly, if  
2 there was a violation of the defendant's right to testify  
3 on his own behalf and that was denied that would survive.

4 JUDGE GARCIA: What if he has an alibi witness  
5 that puts him far away from the scene of the crime and the  
6 request is made to the ADA and the ADA doesn't relay that  
7 to the grand jury?

8 MS. MANZELLO: Well, I think that the most  
9 important thing that we have to keep in mind is that the  
10 district attorney's function and the district attorney's  
11 role is to make a determination as to what evidence should  
12 go before the grand jury and what evidence should not.

13 JUDGE GARCIA: I'm curious about that actually,  
14 under the statute. So is it your view that if a defendant  
15 presents a witness with a summary like this and the ADA  
16 believes it's inadmissible hearsay, they don't have to send  
17 that to the jury or would the proper procedure be - - - and  
18 again, not going to the ultimate issue in this case but  
19 would the proper procedure be to relay the request to the  
20 grand jury with an explanation of the type of evidence that  
21 it's appropriate for the grand jury to hear generally?

22 MS. MANZELLO: I believe pursuant to the findings  
23 in both Huston and DeFalco (ph) where they specifically say  
24 that the district attorney has broad discretion and is to  
25 make the decision whether or not to present evidence and

1 whether or not to exclude it that the district attorney is  
2 not required to put to vote every witness. The district  
3 attorney should as a legal advisor make a determination.  
4 And in this case, an appropriate determination that the  
5 evidence - - -

6 JUDGE FAHEY: Well, but that's - - - I didn't - -  
7 - I didn't think that right was reserved for the district  
8 attorney. I thought the decision on the evidence was  
9 reserved for the grand jury, and that the - - - the  
10 district attorney has an ethical obligation to present that  
11 evidence to the grand jury.

12 MS. MANZELLO: Well, under 210.35 of the CPL  
13 there is a subsection (4) that lists the errors that the  
14 district attorney could make that would render a grand jury  
15 proceeding defective, and not calling a witness the  
16 defendant has requested be called is not listed. And I  
17 think that gives us some - - -

18 JUDGE WILSON: But it might fall under - - - it  
19 might fall under subdivision (5), no?

20 MS. MANZELLO: Right, the catch-all phrase it  
21 might fall under, but that would be I think of a very rare  
22 occasion something such as is the nature - - -

23 JUDGE WILSON: Something like Judge Garcia's  
24 example where there's an alibi witness?

25 MS. MANZELLO: Well, I think that without knowing



1 specifically the testimony that alibi witness was going to  
2 give it's somewhat speculative on my part but - - -

3 JUDGE FAHEY: Well, but let's - - - let's just  
4 assume it's exculpatory evidence. That's what Judge Garcia  
5 was talking about.

6 MS. MANZELLO: Well, not - - -

7 JUDGE GARCIA: Right, let's say I met the guy in  
8 a - - - in a city that's 500 miles away at the exact time,  
9 and in fact, I took a photo with my phone and I have my  
10 phone with the photo and a time date stamp.

11 MS. MANZELLO: I think that - - - I think that  
12 witness - - - the appropriate thing to do would be for the  
13 district attorney to go before the grand jury and explain  
14 to the grand jury this is the nature of the witness  
15 defendant has proffered and have them vote. But I don't  
16 think - - -

17 JUDGE WILSON: But the question - - - but - - -

18 MS. MANZELLO: - - - every witness qualifies for  
19 that.

20 JUDGE WILSON: But the question is not that. The  
21 question is if that happens and the - - - and the  
22 prosecutor doesn't do that and the defendant pleads guilty  
23 what then?

24 MS. MANZELLO: Well, that's why I think this  
25 case, the overriding issue is the finality of judgments.



1           What we have here is a defendant that has stood up and  
2           acknowledged his guilt. And the - - -

3                       JUDGE FAHEY: But that's not really what we're  
4           asking you. What we're asking you - - - I understand the  
5           nature of the finality here. But what - - - what we're  
6           asking you is what does impair the integrity of grand jury  
7           when you have an obligation to present evidence, evidence  
8           have been proffered, you basically said the evidence isn't  
9           strong enough, I'm not going to bother to present it, who  
10          gets to make that call, you or the grand jury? And if you  
11          don't present the evidence and it is exculpatory can a plea  
12          be vacated?

13                      MS. MANZELLO: I think the district attorney gets  
14          to make that call. I believe that in this case, the call  
15          was appropriate because if we take it a step further, what  
16          was the district attorney actually supposed to put to vote  
17          before this grand jury?

18                      JUDGE GARCIA: Do you want to hear this witness?  
19          The way I read the statute is - - -

20                      MS. MANZELLO: But then would it - - -

21                      JUDGE GARCIA: - - - you relay the request,  
22          here's what they want to testify about. I can remind you  
23          that only non-hearsay evidence is admissible for your  
24          consideration in this. And then the grand jury can make a  
25          determination of whether or not they believe that's



1 relevant. I - - - that's how I read the statute.

2 MS. MANZELLO: Well, I believe that given the  
3 broad discretion the district attorney has as a legal  
4 advisor that it wouldn't particularly seem productive for  
5 her to put to vote a witness that already has - - - there's  
6 been a determination made really doesn't have evidence that  
7 should be heard by this grand jury. So - - -

8 JUDGE RIVERA: But isn't your recourse already in  
9 the statute that if - - - if the grand jury votes to hear  
10 the witness you can go to a judge?

11 MS. MANZELLO: True.

12 JUDGE RIVERA: Right? You can go to a judge and  
13 request that there not be a subpoena issued, quash the  
14 subpoena, whatever it is so that the witness doesn't  
15 appear. And you can make your arguments or limit the  
16 testimony to whatever is non-hearsay testimony. But the  
17 questions that are being asked is why, given the nature of  
18 the statute and the nature of the right and the grand jury  
19 proceedings and the purpose of the grand jury are you able  
20 not to present the question to the grand juries as to  
21 whether or not they want to hear from the witness?

22 MS. MANZELLO: Well, perhaps the - - -

23 JUDGE RIVERA: I mean in this case they might  
24 have agreed with the ADA.

25 MS. MANZELLO: Exactly. Perhaps the better



1 practice - - -

2 JUDGE RIVERA: We wouldn't be here.

3 MS. MANZELLO: - - - would be always to, you  
4 know, preserve the record and put before the grand jury  
5 that question and then ultimately if you disagree with them  
6 to go before the impaneling - - - impaneling judge and ask  
7 for some type of ruling, but I think we've kind of moved  
8 past that.

9 JUDGE STEIN: But do you - - - do you agree that  
10 there are any circumstances under which the failure of the  
11 - - - other than the defendant's testimony, the failure of  
12 the DA to bring a witness to the grand jury's attention  
13 would survive a guilty plea?

14 MS. MANZELLO: I think that the only direction  
15 that I find guidance from that would be a case such as  
16 Pelchat where there is some particular willful or  
17 intentional or pervasive misconduct where the district  
18 attorney knows - - -

19 JUDGE RIVERA: Why - - - why is that necessary?  
20 Where would we find that in the statute or if you've got  
21 some - - -

22 MS. MANZELLO: Well, I think that that implicates  
23 the integrity - - -

24 JUDGE RIVERA: Where is that?

25 MS. MANZELLO: - - - of the process. I think



1 that goes to the heart of the process and is of a more of a  
2 constitutional - - -

3 JUDGE RIVERA: You mean - - - so you mean even  
4 when an ADA in good faith acts - - -

5 MS. MANZELLO: When the ADA - - -

6 JUDGE RIVERA: - - - that they're - - - excuse  
7 me. They could not be something that so taints the process  
8 for a reason not to related to someone's bad faith or bad  
9 conduct?

10 MS. MANZELLO: I suppose there could be something  
11 that so taints the process but I think that would then rise  
12 to the level of the conduct by the district attorney being  
13 pervasive and willful. And then - - -

14 JUDGE GARCIA: But let's say in my example they  
15 misread the testimony affidavit and they think it's a  
16 different time and place then the crime. So they think  
17 this just isn't relevant. It's not really an alibi, but in  
18 fact it's just a misreading and it's not intentional. It's  
19 just a mistake. But this exculpatory evidence that shows  
20 the person was in a different time and place or strongly  
21 supports that never gets presented to the grand jury.

22 MS. MANZELLO: Well, there we would have a  
23 situation of an honest mistake or an honest error. And  
24 once again - - -

25 JUDGE GARCIA: And is that what we're really



1 looking at in terms of the grand jury not getting that  
2 exculpatory evidence? It would have to be intentional?

3 MS. MANZELLO: Well, I think anytime there's  
4 intentional conduct it - - - it sort of changes the playing  
5 field. However, in that case where your example is that  
6 the district attorney simply made an error, I think it  
7 clearly falls into an evidentiary ruling, and it doesn't  
8 impair the integrity of the process or rise to the level of  
9 a constitutional defect we have to - - -

10 JUDGE RIVERA: So then under your rule in any bad  
11 faith conduct regardless of the nature of the testimony or  
12 evidence that the defendant wanted to - - - the individual  
13 wants to present to the grand jury or wants the grand jury  
14 to at least know exists to decide for itself whether or not  
15 it wants to hear - - - as long as there's bad faith or bad  
16 conduct does it matter the nature of the actual evidence  
17 that might be presented?

18 MS. MANZELLO: Meaning that there's bad faith but  
19 it's evidence that would not have been appropriate in any  
20 event if I'm understanding your question?

21 JUDGE RIVERA: I'm ask - - - I'm asking you how  
22 you're caveating if at all your rule. It's my question to  
23 you.

24 MS. MANZELLO: Okay. Well, I think that what the  
25 rule should be is that once the - - - the district attorney



1 exercises the broad discretion and makes a decision not to  
2 proffer or inform the grand jury of a witness the defendant  
3 has made or requests to call, which is a statutory right, I  
4 think that that does not constitute either a jurisdictional  
5 defect, it doesn't constitute something of a constitutional  
6 defect either, and that it would not survive - - -

7 JUDGE STEIN: But why doesn't it go to the - - -

8 MS. MANZELLO: - - - a guilty plea.

9 JUDGE STEIN: Why doesn't it go to the integrity,  
10 though, of the process? Even if it's a mistake if it's  
11 such a fundamental mistake as such as a witness who says  
12 this person couldn't possibly have been there, why doesn't  
13 that amount to a constitutional defect?

14 MS. MANZELLO: Well, I don't believe that every  
15 evidentiary or technical error made by the district  
16 attorney - - -

17 JUDGE STEIN: Not every evidentiary - - -

18 MS. MANZELLO: - - - could rise to that level.

19 JUDGE STEIN: No, that's the - - - that's the  
20 point is obviously not every evidentiary ruling, but there  
21 - - - but your position seems to be that there are none  
22 that could rise to that level unless they were intentional.  
23 And - - - and I - - - you know, and I - - - in my mind,  
24 something like that could be seen as going to the integrity  
25 of the process. It's more likely than not - - - and I'm



1 not saying this is the standard - - - that the grand jury  
2 wouldn't indict if they had that - - - that information.

3 MS. MANZELLO: Well, I think that's an important  
4 distinction. I think that in particular, the factual  
5 circumstances of this case show that's not even remotely  
6 accurate. The defendant actually testified in the grand  
7 jury. This witness was not a witness giving rise to the  
8 incident and the charges before the grand jury. I don't  
9 think this case on its facts even approaches any of these  
10 examples. And in fact, I think Hansen is where we find our  
11 greatest guidance. The bottom line was the district  
12 attorney behaved appropriately, made an evidentiary ruling  
13 whether in question or not as to the accuracy of the  
14 correctness of that ruling, and then the defendant pled  
15 guilty.

16 And once the defendant pled guilty there was no  
17 further opportunity for him to go back and challenge issues  
18 of evidentiary nature and pretrial proceedings. And he - -  
19 - he knew that. He was advised of that when he pled guilty  
20 that he was giving up his right to do that. And so where  
21 would there ever be finality if a defendant was given the  
22 opportunity after pleading guilty, a voluntary and knowing  
23 and intelligent plea, which I think this record clearly  
24 establishes, to go back and challenge every evidentiary  
25 ruling that occurred in the grand jury and any pretrial



1 proceeding. I don't - - - I don't think we would ever move  
2 forward towards that formidable interest of finality to a  
3 plea for society. And I think this case is ripe for  
4 forfeiture. I think that the facts of this case are so  
5 similar to Hansen that it would be really, you know,  
6 unfortunate for us to abandon the very well-reasoned  
7 decision in Hansen. And - - -

8 CHIEF JUDGE DIFIORE: Thank you, Ms. Manzello.

9 MS. MANZELLO: Thank you.

10 CHIEF JUDGE DIFIORE: Mr. Scott.

11 MR. SCOTT: Yes, thank you. Okay. Hansen  
12 involved the district attorney playing a videotape I  
13 believe of a news clipping. He - - - news - - - news  
14 story, excuse me. He inadvertently played too much and  
15 introduced hearsay. He instructed the grand jury,  
16 disregard that hearsay and the record is clear that the  
17 quantum of evidence, non-hearsay evidence, was sufficient  
18 to sustain the indictment. So clearly, any possible  
19 prejudice to the defendant in that case was de minimis, and  
20 it's not analogous to our case.

21 JUDGE FEINMAN: All right - - -

22 JUDGE GARCIA: But I think - - - I'm sorry, go  
23 ahead.

24 JUDGE FEINMAN: Oh, I'm sorry. Go ahead.

25 JUDGE GARCIA: I think what I was getting at and



1 I think some of my colleagues is what we were - - - I think  
2 the hypotheticals were going to go was almost a reverse  
3 Pelchat, right. So instead of the grand jury getting the  
4 notice and the - - - and - - - or instead of the DA doing  
5 this in the grand jury and knowing there was this  
6 fundamental error there was this piece of evidence that  
7 should have gone in that didn't go in. And I think that's  
8 a - - - that's an interesting issue.

9 But I'm - - - what I'm having trouble with is  
10 seeing how what happened in this case with the statement  
11 assume that that should have been brought to the grand jury  
12 and the grand jury should have been given the opportunity  
13 to look at that properly instructed and make a decision.  
14 Assume that. I still have some difficulty seeing how what  
15 happened specifically here with this proffer rises to the  
16 level of Pelchat or to call it a reverse Pelchat.

17 MR. SCOTT: Well, Pelchat is sui generis because  
18 I mean obviously there was no evidence before the grand  
19 jury connecting the defendant with the commission of the  
20 crime. So that's kind of unique.

21 JUDGE GARCIA: But it still - - - to go to your -  
22 - - your opponent's point here, it's still I think given  
23 the finality of pleas has to be some fundamental type of  
24 impairment of the integrity of the grand jury process which  
25 I think is what our case law pretty clearly says. So again



1 I go back to my original question is how does your alleged  
2 error here fit within that scheme.

3 MR. SCOTT: Again, I think focusing on intent,  
4 whether it was bad faith - - - you know, the prosecutor in  
5 Hill, he was told the - - - to have these alibi witnesses  
6 and then he was told I believe by the police that one of  
7 the alibi witnesses recanted. So he was, like, well, what  
8 should I do? So he made the wrong decision, I mean  
9 obviously. But my point is that it's the result that - - -  
10 that I believe should be focused on. If the result is the  
11 exclusion of relevant evidence, then - - - then that is the  
12 evil that should be sought to be obviated. Not whether the  
13 prosecutor had a venal intent.

14 CHIEF JUDGE DIFIORE: And you're not arguing that  
15 there wasn't legally sufficient evidence before the grand  
16 jury that indicted your client, are you?

17 MR. SCOTT: No, but I think that had this  
18 evidence been introduced on a closed case such as this  
19 dealing with people who have a relationship, who have a  
20 child together - - -

21 JUDGE FEINMAN: Well, so I want to focus on the  
22 actual record here for just a second, if I may. And your  
23 client testified in the grand jury, right?

24 MR. SCOTT: That's correct, Your Honor.

25 JUDGE FEINMAN: And so why didn't when he was



1           testifying in the grand jury have an opportunity to sort of  
2           put forth in the course of his testimony the existence of  
3           Ms. Naper and her so-called evidence.

4                   MR. SCOTT: I believe he did, Your Honor. That's  
5           - - - that would be in the record - - -

6                   JUDGE FEINMAN: So if that's the case, if the  
7           grand jury wanted to hear from her, they could have told  
8           the DA that.

9                   MR. SCOTT: Well, I think there's a procedure,  
10          there's a statute. The statute should be followed, and I  
11          mean whether or not the grand jury could have taken it upon  
12          themselves to, you know, confront the prosecutors - - - and  
13          say we want to hear this testimony, I think - - -

14                  JUDGE FEINMAN: Grand juries, you know, they have  
15          a police officer in a police case says that I saw whatever,  
16          you know, in terms of a sale and the defendant comes in and  
17          says something different and sometimes the grand jury says  
18          to the DA, you know what, we want to hear from the - - -  
19          the other officer who was on the scene. Grand juries do  
20          things like that all the time.

21                  MR. SCOTT: Well, I think we can rely on the  
22          affirmation of the prosecutor who said in - - - in that  
23          affirmation which was in opposition to the defendant's  
24          motion to dismiss the indictment based on the 190(6)  
25          violation that the grand jury was not given an opportunity



1 - - - I'm paraphrasing of course, not given an opportunity  
2 to hear the testimony of Naper as it was excluded by the  
3 district attorney's office. Maybe we can take that at its  
4 face value.

5 CHIEF JUDGE DIFIORE: And, Mr. Scott, is it your  
6 position that every witness that the defendant requests to  
7 go before the grand jury, the prosecutor must put that  
8 witness before the grand jury?

9 MR. SCOTT: That's what the statute says, Your  
10 Honor, and I believe - - -

11 JUDGE WILSON: Well, must - - - must put the  
12 witness before the grand jury or must advise the grand jury  
13 of the witness's - - -

14 MR. SCOTT: That's - - - that's the correct  
15 statement. Is to advise the grand jury and request that  
16 the grand jury determine whether they want to hear this  
17 witness, and then the prosecutor has the option of seeking  
18 a protective order if the evidence - - -

19 CHIEF JUDGE DIFIORE: So there are no  
20 circumstances under which the district attorney has the  
21 authority to make a determination that it's not even - - -  
22 based on whatever the particulars are it's not even to - -  
23 - they don't have the obligation to even advise the grand  
24 jury and - - - is that what you're arguing?

25 MR. SCOTT: I think that's what the statute says,



1 Your Honor.

2 JUDGE FAHEY: Well, it doesn't say that they - -  
3 - that they - - - you're not saying that they don't have  
4 the right to advise the grand jury. The only question  
5 really is do they have an obligation to put it to the grand  
6 jury. Of course, the DA could advise the grand jury.

7 MR. SCOTT: The grand jury - - - I think there's  
8 a case in my brief - - -

9 JUDGE FAHEY: No, no. Answer my question now.

10 MR. SCOTT: Yeah.

11 JUDGE FAHEY: My question is - - - and it was  
12 Judge Wilson's question before - - - do they have to put  
13 the name to the grand jury and say do you want to hear from  
14 this person?

15 MR. SCOTT: Yes, I think that's what the statute  
16 says.

17 JUDGE FAHEY: Isn't that what you're asking here?

18 MR. SCOTT: Yes. And - - -

19 JUDGE FAHEY: You're not saying that they have to  
20 hear from them, that they can't deny them, that the DA  
21 can't advise them. You're saying that if I'm a defendant  
22 and I say I want you to hear from this witness you've got  
23 to at least ask the grand jury if they will want to hear  
24 from this witness?

25 MR. SCOTT: Precisely.



1 CHIEF JUDGE DIFIORE: No gatekeeping function for  
2 the district attorney?

3 MR. SCOTT: There's no gatekeeping function in  
4 the statute, Your Honor.

5 CHIEF JUDGE DIFIORE: All right.

6 MR. SCOTT: And - - -

7 JUDGE FAHEY: Well, only for the defendant,  
8 though, not for any other witness or any other person.  
9 Only the defendant can say this is my witnesses I want you  
10 to hear.

11 MR. SCOTT: Right, but the district attorney  
12 doesn't have a gatekeeping function saying that I can  
13 exclude this witness.

14 JUDGE FAHEY: Right.

15 MR. SCOTT: This case saying maybe the district  
16 attorney could tell the grand jury I don't think you should  
17 hear this witness, even that might be questionable, but  
18 ultimately the decision has to be made by the grand jury.

19 JUDGE RIVERA: To - - - to clarify, the defendant  
20 here testified before the grand jury?

21 MR. SCOTT: That's correct, Your Honor.

22 JUDGE RIVERA: Did the defendant during that  
23 testimony ever reference a witness that he wanted the grand  
24 jurors to hear?

25 MR. SCOTT: That's correct, Your Honor.



1 JUDGE RIVERA: He did or did not?

2 MR. SCOTT: Did. Did.

3 JUDGE RIVERA: He did?

4 MR. SCOTT: That's according to the - - - again,  
5 according to the affirmation of ADA Walsh which is in the  
6 record, and she said that that it was a request pre-grand  
7 jury and a request during the grand jury.

8 JUDGE RIVERA: So - - - so why doesn't that  
9 satisfy (6)? Because it says, "A defendant may request the  
10 grand jury either orally or in writing." So the - - - the  
11 defendant testifies and says by the way, I want you to hear  
12 this witness. You can call her.

13 MR. SCOTT: Again, I think we rely on the  
14 affirmation of ADA Julie Walsh. She said the grand jury  
15 was not given an opportunity to hear this witness as the  
16 testimony was excluded by the district attorney's office.

17 JUDGE RIVERA: Yes, but let me just - - - if he  
18 says that can not the ADA read the statute to mean okay, he  
19 requested it, I don't have to now present the name, he  
20 already did so through his testimony?

21 MR. SCOTT: Well, that's not what she said in an  
22 affirmation.

23 JUDGE RIVERA: No, but I'm asking you as a  
24 hypothetical. If that were the case does the ADA still  
25 have to go to the grand jury and say you know that witness

1 he - - - he said he wanted to call, I'm repeating that he  
2 says he wants to call that - - - he wants you to consider  
3 calling that witness?

4 MR. SCOTT: I think that would be - - -

5 JUDGE RIVERA: Hearing from that witness.

6 MR. SCOTT: - - - appropriate, Your Honor.

7 JUDGE RIVERA: What?

8 MR. SCOTT: I think that would be appropriate,  
9 Your Honor.

10 JUDGE RIVERA: For the ADA not to then repeat  
11 what the defendant has said on the - - -

12 MR. SCOTT: Well, perhaps you say that you've  
13 heard the defendant testify that Diane Naper has a certain  
14 testimony he wants you to hear. Now I'd like you to  
15 consider that and vote and tell me whether you want to hear  
16 that witness. And like I - - - and like I said if the  
17 witness testimony - - - proposed testimony was so obviously  
18 inadmissible then the remedy would be to seek the  
19 intervention of the court.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rohan Manragh, Jr., No. 119 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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