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New York Court of Appeals Holds Prosecutor May, without Court Approval, Ask Grand Jury to Vacate Indictment before It Is Filed in Order to Present Additional Evidence

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defendant admits to sexual intercourse with the complainant, it is the presence or absence of consent which ultimately determines whether the act was a crime.[48] Therefore, to allow the admission of RTS evidence to show that sexual intercourse was nonconsensual would also tend to prove that the crime of rape took place. If faced with the admissibility of RTS evidence and the defense of consent, it is submitted that the Court of Appeals, in accordance with *Taylor*, would hold that "the helpfulness . . . [of such evidence would be] outweighed by the possibility of undue prejudice."[49] This would be an unfortunate outcome, and, it is further submitted, render ineffective New York's attempt to assist its victims of rape.

William J. White

New York Court of Appeals holds prosecutor may, without court approval, ask grand jury to vacate indictment before it is filed in order to present additional evidence

At common law there was no limit on a prosecuting attorney's power to repeatedly submit a charge to successive grand juries until one voted an indictment.[1] This broad power left open to a pros-

stated, it is an element of every offense defined in this article . . . that the sexual act was committed without consent of the victim").

[48] *See* Massaro, *supra* note 1, at 410-23 (discussing what constitutes consent).

[49] *See Taylor*, 75 N.Y.2d at 293, 552 N.E.2d at 139, 552 N.Y.S.2d at 891; *see also* People v. Bledsoe, 36 Cal. 3d 236, 249, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1980) (expert testimony that complainant suffers from RTS unfairly prejudices defendant by creating aura of special reliability); State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) (expert testimony on RTS produces extreme danger of unfair prejudice when admitted on issue of consent); State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984) (same). *But see* State v. Whitman, 16 Ohio App. 3d 246, 247, 475 N.E.2d 486, 488 (1984) (probative value of RTS evidence on issue of consent outweighs prejudicial impact).

[1] *See* People v. Wilkins, 68 N.Y.2d 269, 273, 501 N.E.2d 542, 543, 508 N.Y.S.2d 893, 894 (1986); People *ex rel.* Flinn v. Barr, 259 N.Y. 104, 107-08, 181 N.E. 64, 65 (1932). "The only protection then available to an individual was the constitutional prohibition against being twice placed in jeopardy for the same crime, and that protection could not be invoked until the time of trial." *In re* Special Grand Jury, 129 Misc. 2d 770, 774, 494 N.Y.S.2d 263, 267 (Nassau County Ct. 1985) (citing People v. Rosenthal, 197 N.Y. 394, 401, 90 N.E. 991, 994 (1910), *aff'd*, 226 U.S. 260 (1912)).

The influence a prosecutor can have over a grand jury has led critics to characterize the grand jury as a "rubber stamp" of the prosecutor. *See* Note, *The Exercise of Supervisory*

ecutor the possibility of forum-shopping in search of a more compliant grand jury when charges were previously dismissed by another.[2] Upon recognizing "a need to insulate the grand jury process from the excesses which would flow from domination by a prosecutor,"[3] the New York Legislature enacted section 190.75 of the New York Criminal Procedure Law ("CPL"), which currently prohibits resubmission of dismissed charges to a grand jury without court approval.[4] Additionally, even with court authorization, section 190.75 limits the prosecution to a single resubmission.[5] Recently, however, in *People v. Cade*,[6] the New York Court of Appeals held that after a grand jury has voted to indict, but before the indictment has been filed with the court, a prosecutor may, without court approval, ask the grand jury to vacate its prior vote

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Powers to Dismiss a Grand Jury Indictment— A Basis for Curbing Prosecutorial Misconduct, 45 OHIO ST. L.J. 1077, 1079-80 (1984) (citing D. NISSMAN & E. HAGEN, THE PROSECUTION FUNCTION 2 (1982)); *see also* United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983) ("prosecutors, by virtue of their position, have gained such influence over grand juries that these bodies' historic independence has been eroded").

Even Chief Judge Wachtler of the New York Court of Appeals has expressed the skepticism felt by many New York judges and lawyers regarding grand jury proceedings when he stated that "a Grand Jury would indict a 'ham sandwich.' " *In re* Grand Jury Subpoena of Stewart, 144 Misc. 2d 1012, 1016 n.1, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct. N.Y. County 1989).

[2] *See Wilkins*, 68 N.Y.2d at 273, 501 N.E.2d at 543-44, 508 N.Y.S.2d at 894-95; *Barr*, 259 N.Y. at 108, 181 N.E. at 65; People v. Pack, 179 Misc. 316, 323, 39 N.Y.S.2d 302, 309 (N.Y.C. Spec. Sess. N.Y. County 1942).

[3] *Wilkins*, 68 N.Y.2d at 273, 501 N.E.2d at 544, 508 N.Y.S.2d at 895.

[4] *See* CPL § 190.75 (McKinney 1982). Section 190.75 provides, in pertinent part:

> 1. If upon a charge that a designated person committed a crime, either (a) the evidence before the grand jury is not legally sufficient to establish that such person committed such crime or any other offense, or (b) the grand jury is not satisfied that there is reasonable cause to believe that such person committed such crime or any other offense, it must dismiss the charge
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> 3. When a charge has been *so dismissed*, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury. If in such case the charge is again dismissed, it may not again be submitted to a grand jury.

Id. (emphasis added).

[5] *Wilkins*, 68 N.Y.2d at 273, 501 N.E.2d at 544, 508 N.Y.S.2d at 895 (citing CPL § 190.75, commentary at 343 (McKinney 1982)); People v. Kirby, 112 Misc. 2d 906, 911, 447 N.Y.S.2d 606, 609 (Sup. Ct. N.Y. County 1982), *rev'd*, 92 App. Div. 2d 848, 460 N.Y.S.2d 572 (1st Dep't 1983), *appeal dismissed*, 63 N.Y.2d 1033, 473 N.E.2d 1188, 484 N.Y.S.2d 814 (1984). CPL section 190.75(3) differs from its predecessor, section 270 of the Code of Criminal Procedure, in that the latter contained no limitation on a judge's ability to resubmit charges. *See Wilkins*, 68 N.Y.2d at 273, 501 N.E.2d at 544, 508 N.Y.S.2d at 895.

[6] 74 N.Y.2d 410, 547 N.E.2d 339, 548 N.Y.S.2d 137 (1989).

to indict so that it may hear additional evidence.[7]

In *Cade*, a Queens County grand jury voted a true bill[8] charging the defendant, Mark Cade, with murder in the second degree and criminal possession of a weapon in the second degree.[9] However, before the indictment was filed, the grand jury vacated its vote at the request of the assistant district attorney in order to hear additional evidence.[10] After hearing this additional evidence, the grand jury voted a second true bill and an indictment was filed charging the defendant on the same two counts.[11] The defendant moved to dismiss on the ground that the second submission was improper because it was not authorized by the court.[12] The Supreme Court, Queens County, granted the defendant's motion with leave to the district attorney to resubmit the charges to another grand jury, and the Appellate Division, Second Department, affirmed.[13]

The Court of Appeals reversed by a vote of 4 to 3 and ordered the indictment reinstated.[14] Writing for the court, Judge Simons stated that by their terms, CPL sections 190.75[15] and 190.60[16] "apply only to prior 'dismissals' and require judicial permission to resubmit charges when the first grand jury hearing the evidence has rejected it as insufficient."[17] Judge Simons reasoned that the grand

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[7] *Id.* at 417, 547 N.E.2d at 342, 548 N.Y.S.2d at 140.

[8] *See* People v. Marine, 142 Misc. 2d 449, 457, 537 N.Y.S.2d 745, 749 (Sup. Ct. Kings County 1989) ("true bill is short for [a] true bill of indictment").

[9] *Cade*, 74 N.Y.2d at 413-14, 547 N.E.2d at 340, 548 N.Y.S.2d at 138.

[10] *Id.* at 414, 547 N.E.2d at 340, 548 N.Y.S.2d at 138. This evidence consisted of new testimony that on the day of the murder the defendant was in exclusive possession of the shotgun which was recovered from him. *Id.*

[11] *Id.* at 413, 547 N.E.2d at 340, 548 N.Y.S.2d at 138.

[12] *Id.*

[13] People v. Cade, 140 App. Div. 2d 99, 100-03, 532 N.Y.S.2d 143, 144-46 (2d Dep't 1988), *rev'd*, 74 N.Y.2d 410, 547 N.E.2d 339, 548 N.Y.S.2d 137 (1989). The Appellate Division, Second Department, held that the prosecutor's request that the grand jury void its vote prior to the filing of the indictment must be considered a withdrawal of the case from the grand jury's consideration and, therefore, the equivalent of a dismissal. *Cade*, 140 App. Div. 2d at 103, 532 N.Y.S.2d at 145.

[14] *Cade*, 74 N.Y.2d at 418, 547 N.E.2d at 343, 548 N.Y.S.2d at 141.

[15] *See supra* note 4.

[16] *See* CPL § 190.60(4) (McKinney 1982). Section 190.60(4) provides: "After hearing and examining evidence as prescribed in section 190.55, a grand jury may . . . [d]ismiss the charge before it, as provided in section 190.75." *Id.*

[17] *Cade*, 74 N.Y.2d at 414, 547 N.E.2d at 340-41, 548 N.Y.S.2d at 138-39. The court stated that "we consistently held in the past, when applying the Code of Criminal Procedure, that a court order was not necessary for resubmission unless there was an initial refusal by a Grand Jury to indict or a prior court dismissal of the indictment." *Id.* at 414-15,

jury's vote to vacate its original indictment in order to receive additional evidence supporting charges it had approved previously was not the equivalent of a rejection of the prosecution's evidence and, therefore, could not be treated as a dismissal.[18] Judge Simons concluded that since the actions of the district attorney did not impair the integrity of the grand jury proceedings or invite prejudice to the defendant within the meaning of CPL section 210.35,[19] the indictment against the defendant could stand.[20]

Vigorously dissenting, Judges Kaye, Alexander, and Titone argued that the grand jury's compliance with a prosecutor's request

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547 N.E.2d at 341, 548 N.Y.S.2d at 139; *see* People v. Rodriguez, 11 N.Y.2d 279, 285-86, 183 N.E.2d 651, 653, 229 N.Y.S.2d 353, 356 (1962) (no court order necessary to resubmit charges unless prior grand jury refusal to indict); People *ex rel.* Flinn v. Barr, 259 N.Y. 104, 108, 181 N.E. 64, 65 (1932) (order of court required before previously dismissed charge could be resubmitted to another grand jury); People v. Rosenthal, 197 N.Y. 394, 401, 90 N.E. 991, 994 (1910) (no court order to resubmit required unless defendant put in jeopardy under former indictment), *aff'd*, 226 U.S. 260 (1912). Further, the court stated that "[n]othing in the Criminal Procedure Law was intended to change that rule; under the present statute a superseding indictment may also be obtained without court authorization." *Cade*, 74 N.Y.2d at 415, 547 N.E.2d at 341, 548 N.Y.S.2d at 139 (citing DeCanzio v. Kennedy, 67 App. Div. 2d 111, 119-20, 415 N.Y.S.2d 513, 519 (4th Dep't 1979)).

[18] *Cade*, 74 N.Y.2d at 416, 547 N.E.2d at 342, 548 N.Y.S.2d at 140. "Quite the contrary," the court stated, "they signify acceptance, not rejection." *Id.*

The court noted that as a practical matter, the district attorney could have achieved the same result by obtaining a superseding indictment without court approval. *Id.* The court further noted that even if an existing indictment was subject to a pending motion to dismiss and the motion was subsequently granted by the court, the prosecutor still could have obtained a superseding indictment. *Id.* (citing People v. Leyra, 1 N.Y.2d 199, 202-03, 134 N.E.2d 475, 476, 151 N.Y.S.2d 658, 660 (1956)). The court concluded that requiring the district attorney to obtain court approval to resubmit the charges to another grand jury would be a waste of limited prosecutorial and judicial resources in view of these available alternatives. *Cade*, 74 N.Y.2d at 417, 547 N.E.2d at 342, 548 N.Y.S.2d at 140. However, in *Cade*, the prosecutor had little reason to obtain a superseding indictment, as he had already presented sufficient evidence to convince the grand jury to indict and chose only to supplement the proof. *Id.*

[19] *See* CPL § 210.35(5) (McKinney 1982). Section 210.35(5) provides:

> A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when:
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> . . . .
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> 5. The proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result.

Id. CPL section 210.20(1)(c) provides: "After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that . . . the grand jury proceeding was defective, within the meaning of section 210.35." CPL § 210.20(1)(c) (McKinney 1982). For examples of prosecutorial misconduct held to render a grand jury proceeding defective and justify dismissal of the indictment see *infra* note 30.

[20] *Cade*, 74 N.Y.2d at 415, 547 N.E.2d at 341, 548 N.Y.S.2d at 139.

that it vacate its prior vote to indict was the "functional equivalent of a dismissal."[21] The dissenting judges contended that the only proper way for the prosecution to re-present a case to the grand jury without court approval would be to obtain a superseding indictment pursuant to CPL section 200.80.[22]

The dissent's argument that the CPL authorizes resubmission of a case to a grand jury, *only* by means of a superseding indictment, appears to be based on an incorrect premise, as the word "only" does not appear in the text of CPL 200.80.[23] To that end, the *Cade* majority noted that this procedure was neither explicitly proscribed nor prescribed by the CPL.[24] It seems, therefore, that a careful analysis of the CPL supports the majority's position that section 190.75[25] is only applicable when a grand jury has rejected the evidence before it and has refused to indict.[26]

Further, the dissent's reliance on *People v. Wilkins*[27] is misplaced, as this case is distinguishable from *Cade*. In *Wilkins*, the

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[21] *Id.* at 422, 547 N.E.2d at 345, 548 N.Y.S.2d at 143 (Kaye, Alexander, and Titone, JJ., dissenting). The dissent believed that dismissal was mandated by People v. Wilkins, 68 N.Y.2d 269, 271, 501 N.E.2d 542, 542-43, 508 N.Y.S.2d 893, 893-94 (1986). *See Cade*, 74 N.Y.2d at 418-19, 547 N.E.2d at 343, 548 N.Y.S.2d at 141 (Kaye, Alexander, and Titone, JJ., dissenting); *see also infra* notes 27-29 and accompanying text (discussion of *Wilkins*).

[22] *Cade*, 74 N.Y.2d at 419, 547 N.E.2d at 343, 548 N.Y.S.2d at 141 (Kaye, Alexander, and Titone, JJ. dissenting). CPL section 200.80 provides:

> If at any time before entry of a plea of guilty to an indictment or commencement of a trial thereof another indictment is filed in the same court charging the defendant with an offense charged in the first indictment, the first indictment is, with respect to such offense, superseded by the second and, upon the defendant's arraignment upon the second indictment, the count of the first indictment charging such offense must be dismissed by the court.

CPL § 200.80 (McKinney 1982).

[23] *See Cade*, 74 N.Y.2d at 417, 547 N.E.2d at 342-43, 548 N.Y.S.2d at 140-41; *see also supra* note 22 (text of CPL § 200.80).

[24] *Cade*, 74 N.Y.2d at 417, 547 N.E.2d at 342, 548 N.Y.S.2d at 140.

[25] *See supra* note 4.

[26] *See supra* note 17 and accompanying text. This point is succinctly explained by Judge Hancock in his dissent in *Wilkins*:

> By the very terms of CPL 190.75(3), the *dismissal* (referred to in the phrase "[w]hen a charge has been so dismissed") which requires permission for resubmission is the dismissal by the Grand Jury under CPL 190.75(1) when there is no "legally sufficient" evidence (subd [a]) or when "the grand jury is not satisfied that there is reasonable cause to believe" (subd [b]) that the defendant committed the crime charged. Clearly, a dismissal under the statute can only result from action by the Grand Jury. An action of the prosecutor cannot be deemed an action of the Grand Jury.

People v. Wilkins, 68 N.Y.2d 269, 279, 501 N.E.2d 542, 547-48, 508 N.Y.S.2d 893, 898-99 (1986) (Hancock, Jr., J., dissenting).

[27] 68 N.Y.2d 269, 501 N.E.2d 542, 508 N.Y.S.2d 893 (1986).

prosecutor unilaterally withdrew a case from the grand jury *before* the vote on whether or not to issue an indictment occurred.[28] The *Wilkins* court held that this withdrawal was the equivalent of a dismissal and that, therefore, court approval was required before the district attorney could resubmit the matter to another grand jury.[29] In *Cade*, however, the grand jury had already voted to indict, and the prosecutor was merely attempting to supplement the proof.[30] Thus, there would be no prejudice to the defendant, nor would the integrity of the grand jury proceedings be impaired, since in a *Cade* situation the prosecutor would have no reason to forum shop for a more compliant grand jury.[31]

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[28] *See id.* at 271, 501 N.E.2d at 543, 508 N.Y.S.2d at 894.

[29] *Id.* The *Wilkins* court believed that the resubmission of the defendant's case to another grand jury without court authorization rendered the grand jury proceeding defective within the meaning of CPL section 210.20(1)(c) in that the proceedings failed "to conform to the requirements of article one hundred ninety 'to such degree that the integrity thereof is impaired.'" *See id.* at 276, 501 N.E.2d at 546, 508 N.Y.S.2d at 897 (footnote omitted) (quoting CPL section 210.35(5) (McKinney 1982)). In addition, because the first grand jury may have dismissed the charges had it been given the opportunity to vote, and because a request for leave to resubmit the charges may have been denied, the court felt that prejudice to the defendant may have resulted. *Id.* at 276-77, 501 N.E.2d at 546, 508 N.Y.S.2d at 897.

It is argued that the withdrawal of the case from the grand jury's consideration in *Wilkins* was not a "dismissal" of the charges within the meaning of CPL section 190.75. Nonetheless, it is submitted that the case was correctly decided on the ground that either the grand jury proceeding was defective, or there was a risk of prejudice to the defendant.

[30] *Cade*, 74 N.Y.2d at 417, 547 N.E.2d at 342, 548 N.Y.S.2d at 140. Nonconformance with Article 190 ("The Grand Jury and its Proceedings"), which has been held to be sufficient to mandate dismissal under CPL sections 210.20(1)(c) and 210.35(5), *see supra* note 19, has involved misconduct on the part of the prosecutor or an occurrence which might have affected the integrity of the proceedings themselves. *See Wilkins*, 68 N.Y.2d at 278, 501 N.E.2d at 547, 508 N.Y.S.2d at 898 (Hancock, Jr., J., dissenting) (citing People v. Beauvais, 98 App. Div. 2d 897, 898, 470 N.Y.S.2d 887, 888 (3d Dep't 1983) (presence of unauthorized persons before grand jury) and People v. DiFalco, 44 N.Y.2d 482, 485, 377 N.E.2d 732, 735, 406 N.Y.S.2d 279, 281 (1978) (presentation of evidence by unauthorized prosecutor)).

It is interesting to note that, in *Cade*:

> there was no indication that a quorum of the members of the Grand Jury who had heard the initial presentation were present during the renewed presentation, nor did it appear that those members of the Grand Jury who were not present at the initial presentation were instructed not to vote following the additional presentation. . . .

Cade, 140 App. Div. 2d 99, 101, 532 N.Y.S.2d 143, 144 (2d Dep't 1988), *rev'd*, 74 N.Y.2d 410, 547 N.E.2d 339, 548 N.Y.S.2d 137 (1989). The Court of Appeals dismissed this issue in passing, noting that the defendant did not question the quorum in his omnibus motion and that the parties did not address the matter at trial. *Cade*, 74 N.Y.2d at 418, 547 N.E.2d at 343, 548 N.Y.S.2d at 141 (since "issue was not raised in the Appellate Division . . . court should not have considered it on the People's appeal").

[31] *Cade*, 74 N.Y.2d at 416, 547 N.E.2d at 341, 548 N.Y.S.2d at 139. It is this point which

While the *Cade* decision is sound when limited strictly to its facts, it may open the door to potential abuse of the indictment process. For example, the *Cade* court failed to stress that while this procedure is a legitimate exercise of prosecutorial power, it should not be used in violation of other CPL provisions which serve to protect the defendant from unnecessary harassment.[32] In addition, the *Cade* court did not limit the number of times a prosecutor may ask a grand jury to vacate its vote to indict in order to present new evidence or submit new charges.

While the *Cade* decision does not contravene the now well-established rule that prohibits the resubmission of previously *dismissed* charges to another grand jury without court approval, it does provide a procedure which grants a prosecutor greater control over the indictment process.[33] Under *Cade*, once a grand jury has

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clearly distinguishes *Cade* from *Wilkins*. Approval of the prosecutor's conduct in *Wilkins* could have led to the same abuse the legislature hoped to avoid by enacting CPL section 190.75(3), by way of precedent allowing a prosecutor to withdraw the case from the grand jury *before* it had the opportunity to vote, and then resubmit the charges to successive grand juries until a favorable result was obtained. *Cade*, 74 N.Y.2d at 415-16, 547 N.E.2d at 341, 548 N.Y.S.2d at 139; *Wilkins*, 68 N.Y.2d at 275, 501 N.E.2d at 545, 508 N.Y.S.2d at 896.

[32] Section 180.80 of the CPL, for example, requires the release of a defendant who has been held in custody on a felony complaint for more than 120 hours, or 144 hours if the detention period includes a Saturday, Sunday, or legal holiday, unless one of several conditions is met. *See* CPL § 180.80 (McKinney 1982). Included among these conditions is the filing of an indictment or a written certificate that there has been a vote for an indictment before the defendant's application for release has been made. *Id.*

In addition, section 190.65(3) of the CPL provides that, upon voting an indictment, the grand jury "must" file it with the court. *See* CPL § 190.65(3) (McKinney 1982). While it has been held that this provision is only directory and imposes no time limits on filing, *see* Dawson v. People, 25 N.Y. 399, 405-06 (1862), it is clear that an indictment may not remain unfiled for an indefinite period of time without constituting harassment of the defendant.

Further, CPL section 190.60 lists five permissible courses of action for a grand jury when presented with a case: (1) indict; (2) direct the filing of a prosecutor's information; (3) request a removal to family court; (4) dismiss the charges; or (5) submit a grand jury report. *See* CPL § 190.60 (McKinney 1982). It is submitted that the *Cade* court has apparently added a sixth permissible cause of action: allowing a grand jury which has voted to indict to vacate its vote at the prosecutor's request to hear additional evidence.

[33] *See* CPL § 210.20(1)(b) (McKinney 1982). A defendant can move to dismiss an indictment on the ground that "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged." *Id.* Rather than exposing a case to a motion to dismiss for legal insufficiency, or risking an unfavorable outcome on a request for judicial permission to resubmit under CPL section 210.20(4), it is submitted that a prosecutor can, after *Cade*, maintain control of the process by treating the original grand jury action as though it had never occurred and obtain another indictment supported by new evidence. It is suggested that since this could result in the potential exploitation of the indictment process, either the Legislature or the Court of Appeals should re-evaluate the breadth of prosecutorial power. One alternative would be to limit a prosecutor to one re-presentation of evidence in the *Cade* context. This approach would be consistent with CPL section 190.75(3), which limits

voted to indict, a prosecutor may resubmit charges or present new evidence to the same grand jury or a different one, so long as this action does not impair the integrity of the grand jury proceedings or prejudice the defendant.

Craig A. Damast

CIVIL PRACTICE LAW AND RULES

CPLR 3406(a): Court of Appeals finds dismissal is improper sanction for failure to file a timely notice of medical malpractice

The massive number of medical malpractice claims has created a crisis for both physicians and patients, prompting much legislative attention over the past fifteen years.[1] To discourage meritless claims, the New York State Legislature has implemented significant substantive and procedural changes in the law,[2] most recently, the enactment of the Medical Malpractice Reform Act ("Reform Act") in 1985.[3] A critical feature of the Reform Act was

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the prosecutor to one resubmission of previously dismissed charges to a grand jury. *See* CPL § 190.75(3) (McKinney 1982); *supra* note 5 and accompanying text.

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[1] *See* Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOKLYN L. REV. 135, 137-44 (1986). The crisis has been characterized by a threatened decline in the availability of health care services provided by insured physicians due to exorbitant malpractice insurance rates. *See id.* at 137. A major contributing factor to the crisis has been the rapid increase in the number of malpractice claims filed. *See* Brinkley, *AMA Study Finds Big Rise in Claims for Malpractice*, N.Y. Times, Jan. 17, 1985, at A1, col. 4. The large number of substantial settlements and inflated damage awards also has contributed to the malpractice crisis. *See* Sullivan, *Reducing Doctors' Costs*, N.Y. Times, Apr. 12, 1985, at B4, col. 5.

[2] *See* Note, *supra* note 1, at 139. The New York Legislature first responded to the medical malpractice crisis in 1974 by enacting section 148-a of the Judiciary Law. *See* N.Y. JUD. LAW § 148-a (McKinney 1982 & Supp. 1986). The Judiciary Law was amended to require the use of medical malpractice panels to encourage settlements and discourage meritless claims. *See* Judiciary Law, ch. 146, § 1, [1974] N.Y. Laws 182 (McKinney). *But see* Note, *supra* note 1, at 161-62 (criticizing medical malpractice panels as costly failures). Additional legislative reforms include reducing the statute of limitations period for medical malpractice claims, CPLR 214-a (McKinney 1984), and modifying the informed consent doctrine, N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1985).

[3] Medical Malpractice Reform Act, ch. 294, [1985] N.Y. Laws 685 (McKinney). The Reform Act, which became effective July 1, 1985, was directed initially to medical and den-