

History and Overview of the Grand Jury Process

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Viewpoints on the Process: Prosecution and Defense

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Tim Young has been the Ohio Public Defender since January 1, 2008, after serving as a county public defender for 14 years. He has led reform efforts for indigent defense in Ohio and started the Ohio Wrongful Conviction Project, a non-DNA exoneration project. Tim serves as vice-chair on the Criminal Justice Recodification Committee and committee member on the Ohio Sentencing Commission. Tim previously served as the chair of the National Association for Public Defense (NAPD), chair and vice chair of the American Council of Chief Defenders, and also served as a member on the Joint Task Force to Review the Administration of Ohio's Death Penalty, Task Force on Funding of Ohio Courts, Access to Justice Task Force, and Rule 8 subcommittee. He has tried numerous cases throughout his career ranging from misdemeanors to homicide cases. Tim received his B.A. and his J.D. from the University of Dayton. He has devoted his career to serving the indigent population of our society

Morris Murray was elected Defiance County Prosecuting Attorney in 2008. Prior to assuming office, Mr. Murray served the previous 23 years as an Assistant Prosecutor for Defiance County and from 1989 to 2008 and also served as Director of the County's Child Support Enforcement Agency. He is a 1979 Graduate of the University of Dayton, receiving his Bachelor of Science Degree with a double major in Criminal Justice and Philosophy. Mr. Murray began his career in Law Enforcement in 1980 as a Police Officer for the City of Fairborn, Ohio. He later attended the University of Dayton, School of Law, receiving his J.D. in 1984. During his career, Mr. Murray has extensive trial experience and has prosecuted several thousand cases with a particular focus on Child Victim related crimes involving the physical and sexual abuse of children. Mr. Murray has experience as a trainer at state and national conferences on topics related to his experience. He has served as a board member and is past President for the northwest Ohio based Center for Child and Family Advocacy. He has been an active member of various organizations involved with children and families. Mr. Murray is also a past President of the Ohio Child Support Directors Association and the Defiance County Bar Association and currently serves as Vice President of the Ohio Prosecuting Attorneys Association, and as a member of that organization's Executive and Legislative Committees.

The Supreme Court of Ohio Task Force to Examine Improvements to the Ohio Grand Jury

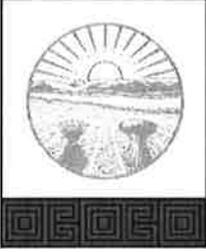
Representative Robert Cupp Ohio House of Representatives

State Representative Robert R. Cupp of the 4th House District of Ohio is a graduate of Columbus Grove Local schools. He earned his political science and law degrees from Ohio Northern University in Ada, Ohio. Representative Cupp has served as an elected official in all three branches of government and at both the local and state levels: as an Allen County commissioner, a four-term state senator, a court-of-appeals judge, and a justice of the Supreme Court of Ohio. He also served as a city prosecutor and, most recently, Chief Legal Counsel to Ohio Auditor of State, Dave Yost. In the Senate, Representative Cupp served two terms as the President Pro Tempore, the Senate's 2nd highest leader. In addition to his public service, he engaged in the private practice of law in Lima for more than 25 years and has taught courses in leadership studies, judicial process, and state education policy at Ohio Northern University. Representative Cupp is now serving his first term in the Ohio House of Representatives. He serves on the following committees: Education, Finance, Judiciary, Public Utilities, and the Joint Education Oversight Committee. He also serves as Chair of the House Finance Subcommittee on Primary and Secondary Education. He serves on several other external committees including the Ohio Constitutional Modernization Commission, the Ohio Supreme Court's Grand Jury Task Force, and the Council of State Governments' MLC Mid-West Canada Relations Committee.

A Discussion of Grand Jury Court Cases

Professor Ric Simmons
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Professor Ric Simmons is the Chief Justice Thomas J. Moyer Professor for the Administration of Justice and Rule of Law at The Ohio State University Moritz College of Law. Prior to teaching at Moritz, Professor Simmons graduated from Columbia Law School, he clerked for the Honorable Laughlin E. Waters of the Central District of California and then served for four years as an assistant district attorney for New York County. Professor Simmons has also co-authored two casebooks: *Learning Evidence: From the Federal Rules to the Courtroom* (with co-author Debby Merritt) (3rd ed. 2014 West Publishing) and *Learning Criminal Procedure* (with co-author Renee Hutchins) (2014 West Publishing). He teaches Evidence, Criminal Law, Criminal Procedure, and Computer Crime and Surveillance. He has also written over a dozen articles on criminal procedure issues, including an article and a book chapter on the grand jury. He is currently serving on the Ohio Supreme Court's Task Force to Examine Improvements to the Ohio Grand Jury System.



THE SUPREME COURT *of* OHIO

Overview *of the* Grand Jury System

Task Force
*to Examine Improvements
to the Ohio Grand Jury System*



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THE HISTORY OF THE GRAND JURY

Origination in England

The grand jury was first recognized as an institution in 12th century England by King Henry II.¹ The installation of the grand jury under King Henry has been called a power grab of sorts. By requiring the grand jury to initiate all criminal prosecutions, the crown held authority that otherwise would belong to the church or barons.

Furthermore, King Henry's grand jury did not truly serve as the protective shield for an accused's rights. More than anything, the grand jury was a political weapon used against enemies of the crown.² It wasn't until the mid-1600s that the grand jury began to emerge as a protective barrier against an accused defendant and an overbearing government.

In 1681, the British crown pursued an indictment against the Earl of Shaftesbury for allegedly making treasonous statements. Despite strong government influence and pressure, the grand jury refused to return an indictment.³ It was this defiance of the crown that first revealed the grand jury as a shield for the accused.⁴

Colonial America

As England journeyed to the American colonies, so too did the grand jury. Each American colony instituted its own version of the grand jury, with variations found in how grand jurors were selected or appointed.⁵ Outside of criminal prosecutions, colonial-era grand juries were used for a variety of functions. They levied taxes, appointed public officials, and supervised public works.⁶ Certain colonies even allowed grand juries to audit public institutions and inspect jails.⁷

In the buildup to the American Revolution, grand juries became a tool for "outright resistance to the monarchy."⁸ Despite British officials accusing newspaper publisher John Peter Zenger of printing libelous statements about the crown, a colonial grand jury refused to indict him – three times.⁹ After gaining independence from the British, Americans adhered to the idea that

¹ 1 BEALE, SARA, ET AL., GRAND JURY LAW & PRACTICE, § 1:2 (2d ed. 2002)

² Ric Simmons, *Article: Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, 6 (2002)

³ *Id.* at 9 (citing Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 715 (1972)). The government later questioned the foreperson for the grand jury as to why no indictment was issued and ultimately imprisoned him in the Tower of London. BEALE at §1:2, 1-10.

⁴ Mark Kadish, *Article: Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U.L. REV. 1, 9 (1996).

⁵ BEALE at §1:3, 1-13.

⁶ Kadish at 10.

⁷ BEALE at §1:3, 1-13.

⁸ Kadish at 10.

⁹ *Id.* at 12. Zenger was ultimately prosecuted by a bill of information, which only emboldened the American preference for grand juries.

the grand jury could act as a great defender of liberty. In 1791, the Fifth Amendment to the U.S. Constitution was adopted and, with it, the right to a grand jury was created.

Continued Use Across the Country

After its inclusion in the Constitution, the right to a grand jury was uniformly provided by individual states as well.¹⁰ By the mid-1800s, however, this consensus was quickly eroding. Contending that the grand jury had outlived its purpose and that its investigatory powers were infringing on personal liberties, multiple states removed the right to a grand jury from their constitutions.¹¹

Around this same time, six newly admitted states declined to utilize the grand jury. Mostly western and sparsely populated, these states contended that the grand jury was too cumbersome and inefficient for their needs.¹²

In the 1970s, another push for grand jury reform emerged but at the federal level. Following the Watergate scandal, there was concern over the Department of Justice using the grand jury system to harass opponents of the current administration.¹³ This concern led to the Grand Jury Reform Act of 1976, which proposed several procedural changes to the federal grand jury but died in Congress. During this era, multiple states either greatly weakened or eliminated the right to a grand jury.¹⁴

Over time, the role of the American grand jury has been diluted. In roughly half of all states, an indictment is not needed to bring a criminal charge.¹⁵ In most of those states, criminal charges are initiated through a preliminary hearing before a judge.

History in Ohio

In 1802, Ohio included the right to a grand jury in its first constitution.¹⁶ In 1851, Ohio revamped its constitution but retained the right to a grand jury.¹⁷ In 1953, the General Assembly enacted a series of statutes that established a basic framework for how the grand jury should

¹⁰ BEALE at §1:4.

¹¹ *Id.* at §1-5, 1-21. Michigan, Indiana, Kansas, and Oregon all did away with the constitutional right to a grand jury, but allowed it to exist should the legislature enact it.

¹² *Id.* These states were those admitted to the Union in 1889: Idaho, Montana, Washington, North Dakota, South Dakota, and Wyoming.

¹³ Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 340 (2004).

¹⁴ BEALE at §1:5, 1-27. These states include Maryland, Hawaii, Illinois, and Pennsylvania.

¹⁵ *Id.* at §1-7, 1-32. A more thorough account of which states use grand juries can be found in “Survey of Other States’ Use of the Grand Jury,” included with these materials.

¹⁶ BEALE at §1:4, 1-20; Ohio Const. of 1802, Art. VII, §10.

¹⁷ Ohio Const., Art. I, §10.

operate.¹⁸ These statutes set forth how jurors should be selected, how many votes would be required to issue an indictment, and how a witness may be held in contempt for refusing to testify.

In 1973, the Supreme Court of Ohio implemented Ohio Criminal Rule 6. This rule set forth the procedure for challenging the legal qualifications of particular grand jurors or of the panel as a whole and allowed for the dismissal of an indictment in the event that jurors are not selected in accordance with the law. Ohio Crim. R. 6 also required secrecy for grand jury proceedings.

Ohio Crim. R. 6 also requires that a grand jury consist of nine members, and that seven must vote in favor of an indictment for one to issue. Eleven years later – in 1984 – the General Assembly passed a bill that required grand juries to have 15 members, with 12 votes needed to secure an indictment. The Supreme Court of Ohio has ruled that the “7 of 9” standard in Crim. R. 6 applies because the number of votes needed to indict is a procedural issue, and thus under the purview of the Supreme Court’s rules.¹⁹

Outside of some minor tweaks to modernize the selection of grand jurors from the countywide jury pool, the grand jury in Ohio has remained essentially unchanged.

A more thorough look at how different states use grand juries and why they do so can be found in “Survey of Other States’ Use of the Grand Jury,” included in this packet.

¹⁸ R.C. 2939.01, et seq.

¹⁹ *State v. Brown*, 38 Ohio St. 3d 305, 528 N.E.2d 523 (1988).



THE CURRENT FUNCTION AND CAPABILITY OF THE GRAND JURY IN AMERICA AND OHIO

Federal System

Under the Fifth Amendment of the U.S. Constitution, a citizen accused of a “capital, or otherwise infamous crime” has the right for that case to be brought before a grand jury. The overriding purpose of this requirement was to shield citizens from overzealous prosecution.¹ Over the years, the breadth of this protection has been fleshed out by the U.S. Supreme Court, the Federal Rules of Criminal Procedure, and various pieces of legislation.

For instance, the U.S. Supreme Court has held that multiple constitutional protections that apply to criminal defendants do not apply at the grand jury stage.² It has also limited a court’s power to shape how the grand jury functions and what types of evidence are required for an indictment.³

In 1945, Rule 6(e) of the Federal Rules Criminal Procedure first codified the requirement that grand jury proceedings be secret.⁴ The secrecy of grand jury proceedings has also been affected by the Jencks Act, the Right to Financial Privacy Act, the Freedom of Information Act, and other statutes.⁵ Rule 6 also sets forth that a grand jury must have 16 to 23 members, and that an indictment requires votes from at least 12 of those members.

Though the federal grand jury system has been a constitutional right since the nation’s birth, individual states have never been required to provide a grand jury in their own criminal justice systems as a matter of federal constitutional law.⁶ Because states are quasi sovereign, they are free to define the use of grand juries by state constitution or state law. Accordingly, states are left entirely on their own to either craft their own version of a grand jury or to use a system other than the grand jury.⁷

Ohio System

Ohio has opted to include an accused’s right to a grand jury in its state constitution, and particular the state Bill of Rights.⁸ The grand jury language used in Ohio is almost identical to that used in the U.S. Constitution. Also like the federal model, Ohio requires secrecy in its grand

¹ For a more detailed discussion of the grand jury’s history and purpose, refer to “The History of the Grand Jury,” included in this packet.

² *United States v. Williams*, 504 U.S. 36, 49, 112 S. Ct. 1735, 1743 (1992) (restating various holdings that limit constitutional protections during a grand jury proceeding, including the right to counsel and protection against double jeopardy).

³ *Id.* at 52 (holding that an appellate court cannot prescribe standards of prosecutorial conduct before a grand jury by requiring that any exculpatory evidence be presented).

⁴ I BEALE, SARA, ET AL., *GRAND JURY LAW & PRACTICE*, § 5:2, 5-9 (2d ed. 2002) (over the years, this rule has been amended multiple times).

⁵ *Id.* at §5:3, 5-10.

⁶ *Hurtado v. California*, 110 U.S. 516 (1884).

⁷ A more thorough examination of what other states have done can be found in “Survey of Other States’ Use of the Grand Jury,” included in this packet.

⁸ Ohio Const., Art. I, §10.

jury proceedings through Ohio Crim. R. 6(E). The secrecy requirement is mentioned in the grand juror's oath and again in the charge given to the grand jury.⁹

One difference between Ohio and the federal system is the number of jurors required. In Ohio, a grand jury consists of nine members and seven votes are needed to secure an indictment.¹⁰

Ohio's mirroring of the federal model is helpful because any federal case law, while not binding, would be persuasive and instructive in any constitutional analysis of Ohio's grand jury system. For that reason, the federal case law can supplement the material used to show what the Ohio grand jury – under the law – must be, can be, and should be.

What an Ohio Grand Jury Must Be – The Constitutional Floor

When assessing what traits a grand jury is required have under the Ohio Constitution, the answer is simple: Not many. As the U.S. Supreme Court wrote: “An indictment returned by a legally constituted and unbiased grand jury, [...] if valid on its face, is enough to call for trial of the charge on the merits. *The Fifth Amendment requires nothing more.*”¹¹ The Constitution also requires that a grand jury's decision be “informed and independent.”¹²

In order to find that a grand jury's independence and integrity has been compromised, a party typically must show prosecutorial misconduct of an egregious nature that “substantially influenced the grand jury's decision to indict.”¹³ In *United States v. Sigma Int'l.*, an assistant U.S. Attorney urged a grand jury to indict the defendant on a rushed time table, made questionable characterizations of evidence and procedure, and even falsely intimated that a previous grand jury wanted to indict the defendant but could not because its term ended. For those reasons, the Eleventh Circuit ordered that the indictment be dismissed.

In contrast, the exclusive use of hearsay evidence does not rise to the level of supplanting the grand jury's independence.¹⁴ Similarly, a grand jury may remain independent in a murder case even though its foreman is a casual acquaintance with the deceased victim.¹⁵

⁹ R.C. 2939.06; R.C. 2939.07.

¹⁰ Ohio Crim. R. 6(A) and (F). As discussed in “The History of the Grand Jury,” Ohio has statutes that require a different number of grand jurors. The Supreme Court of Ohio, however, has ruled that the number of grand jurors is a procedural issue, meaning Crim. R. 6 overrules these statutes.

¹¹ *Costello v. United States*, 350 U.S. 359, 363 (1956) (emphasis added) A grand jury's required level of due process has also been described as “an informed and independent determination.”

¹² *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391, (9th Cir. Cal. 1983) (citing *Stirone v. United States*, 361 U.S. 212, 218-19 (1960)).

¹³ *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, (1988); see also *United States v. Sigma Int'l*, 244 F.3d 841, Note 41 (11th Cir. 2001) (“[W]here a grand jury is so overborne by a prosecutor's or judge's influence that the indictment that issues cannot meaningfully be called ‘of a Grand Jury,’ U.S. Const. amend. V, the indictment must be dismissed.”)

¹⁴ *Costello*, 250 U.S. at 361.

¹⁵ *State v. Thomas*, 3rd Dist. Case No. 8-91-18, 80 Ohio App. 3d 452, 457

Under the language in the U.S. and Ohio Constitutions, the grand jury has typically been given a great deal of freedom to “pursue its investigations unhindered by external influence or supervision” from a court.¹⁶ While a grand jury is mostly free from a court’s inherent power to supervise, that does not mean it is able to ignore all statutes or rules.¹⁷

What an Ohio Grand Jury Can Be – Drafting the “Few, Clear Rules”

The U.S. Supreme Court wrote that the grand jury and prosecutors presenting before it are given “wide latitude,” but both entities are still “bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.”¹⁸ Both the U.S. Congress and the Ohio General Assembly have enacted certain statutes that effect how a grand jury functions. Similarly, Ohio Crim. R. 6 and Fed. R. Crim. Pro. 6 provide standards for a grand jury. This section will explore various topics related to the operation of a grand jury and the guidelines that can be enacted to control them.

- Presenting Cases Following a No-Bill

The grand jury language in the U.S. and Ohio Constitutions does not create double jeopardy protection at the grand jury level. In other words, a prosecutor may present a case to a grand jury multiple times, even if prior juries decline to indict the accused.¹⁹ While the constitutional language does not bar multiple presentations of a case, several states have done so by statute. Fifteen states have statutes or court rules that prohibit presenting a case to the grand jury more than once.²⁰ Thirteen of these states have a constitutional requirement for a grand jury that is similar to Ohio’s.

Proponents of allowing multiple presentations to a grand jury contend that a prosecutor is not required to submit their entire case to a grand jury, and that a no-bill may be the result of hearing incomplete evidence.²¹ Different grand juries may also have reasonable differences of opinion as to whether an indictment should issue, and allowing resubmission to another grand jury compensates for the fact that there is no appeal from a grand jury issuing a no-bill.²²

¹⁶ *Id.* (quoting *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973)).

¹⁷ The detached relationship between Ohio’s trial courts and the grand jury has been covered in the news following a Cuyahoga County grand jury’s decision to not indict a Cleveland police officer after the death of Tamir Rice. See Cory Shaffer, *Judge plays limited role in grand jury hearings*, THE PLAIN DEALER, Jan. 7, 2016, available at http://www.cleveland.com/metro/index.ssf/2016/01/judge_plays_limited_role_in_gr.html.

¹⁸ *United States v. Mechanik*, 475 U.S. 66, 74 (1986); see also *Williams*, 504 U.S. at 55.

¹⁹ *Williams*, 504 U.S. at 49.

²⁰ Alaska, Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, and South Dakota. BEALE at §8:6, 8-60.

²¹ *Id.* at §8-6, 8-56.

²² *Id.* at §8-6, 8-57.

An obvious advantage to applying double jeopardy protection at the grand jury stage would be that prosecutors' presentations to grand juries would be much more thorough and prepared.²³ Furthermore, by preventing a prosecutor from presenting a case to multiple panels, the grand jury's role as a public shield for the accused is strengthened.²⁴

- Applying Rules of Evidence

The majority of jurisdictions that utilize a grand jury do not require that its proceedings follow the rules of evidence.²⁵ There are, however, jurisdictions that apply the rules of evidence to a grand jury proceeding – some with particular exceptions.

California, Michigan, Oklahoma, and South Carolina apply the rules of evidence in total.²⁶ Alaska, Minnesota, and New York apply the rules of evidence but allow hearsay for the sake of convenience, such as authenticating public reports or laboratory test results. Nine other jurisdictions require that all evidence presented to a grand jury be “legal evidence.”²⁷

Not requiring adherence to the rules of evidence would provide for a more efficient presentation to a grand jury. Oftentimes, a single law enforcement agent can provide all the required testimony for an indictment – if left unburdened from the rule against hearsay.²⁸ An argument can be made, however, that the grand jury cannot get an adequate feel for the evidence if they only hear it from a single source.²⁹ Such a plain presentation makes it harder for the grand jury to fulfill its role as a screening body.

- Internal Procedure

While Ohio's Constitution, statutes, and rules of criminal procedure provide a very loose framework, most of a grand jury's internal procedures are left to be performed without guidance. Procedural matters such as how a grand jury votes, when it votes, and who determines when a vote is held are not addressed in Ohio law. Presumably, these gaps are plugged by the grand jurors themselves, local prosecutors, or local judges.

²³ Ric Simmons, *Article: Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, 20 (2002) (contending that quick, undetailed presentations would lead to a grand jury becoming a “rubber stamp” for indictments).

²⁴ *Id.*

²⁵ BEALE, at §4:21; Ohio Evid. R. 101(c)(2) specifically precludes the rules of evidence from applying to grand jury proceedings.

²⁶ *Id.*

²⁷ *Id.* While there is no clear case law showing what constitutes “legal evidence,” some statutes tend to be more strongly worded so as to imply only admissible evidence shall be used. Other statutes are more open-ended, seemingly allowing inadmissible evidence.

²⁸ Simmons at 22-23.

²⁹ *Id.*

- Judicial Review

While most jurisdictions allow minimal interaction between the court and the grand jury, others allow for more robust oversight over the grand jury's decision. In New York, a criminal defendant can move the court to review the grand jury minutes to determine if there was sufficient evidence presented.³⁰

While advocates for the New York method insist it ensures that the grand jury process is not abused, others contend that too much judicial oversight would encroach on the grand jury's traditional independence.

- Right to Testify

Most jurisdictions do not provide an accused criminal defendant with the right to testify before the grand jury. The general theory behind this rule is that the grand jury is an inquisitorial body as opposed to an adjudicatory one.³¹ Some states – such as New York, Nevada, New Mexico, and Indiana – have statutes that provide the accused an opportunity to testify before a grand jury.³²

Instead of passing a statute, other states have viewed the accused's right to testify as a common law right and a necessary element of the grand jury. In West Virginia, the state Supreme Court has ruled that allowing the accused to present evidence allows the grand jury “to fulfill its function of protecting individual citizens and providing them with a forum for bringing complaints within the criminal justice system[.]”³³

- Model Oath or Charge

The grand jury's oath and charge likely has the most direct effect on its understanding of its role and responsibilities. While R.C. 2939.06 mandates a specific oath for grand jurors, R.C. 2939.07 only requires an explanation of the law applicable to their duties and that particular attention be given to their “obligation of secrecy.”

While model charges exist for the federal and Ohio grand jury system, they are not mandatory in nature and can be altered by individual courts.³⁴ In theory, different grand juries can be given different instructions – even in the same county – as long as the charge meets the basic requirements set forth in R.C. 2939.07.

³⁰ New York Crim. Proc. Law 210.030; see also Simmons at 26-27 (outlining that some reviews of grand jury transcripts only take minutes).

³¹ BEALE, at §4:19, 4-102.

³² *Id.* at §4:19, 4-106 (New York and Nevada's statutes require that the accused waive their right against self-incrimination and also the civil immunity provided to all grand jury witnesses).

³³ *Id.* at §4:19, 4-104 (quoting *State ex rel. Miller v. Smith*, 285 S.E.2d 500, 504 (W.Va. 1981)) (Other states that have found a common law right to testify before a grand jury include Georgia, Louisiana, Maryland, and New Jersey).

³⁴ *Id.* at §4:5; O.J.I. 301.07.

One example of this can be found in recent testimony before the Ohio Constitutional Modernization Committee. In his testimony, Defiance County Prosecutor Morris Murray quoted portions of a grand jury charge.³⁵ While most of the quoted language loosely tracks the sample language from the Ohio Jury Instructions (“OJI”), there are key differences. The quoted charge warns that “rumor and hearsay testimony are unreliable” and “should be disregarded.” The model charge in OJI does not address hearsay at all.³⁶

Some contend that the charge should have a more robust explanation of the grand jury’s investigative power, independence, and discretion.³⁷ This would better empower the grand jury to fulfill its original role as a voice of the public within the criminal justice system and avoid the appearance that it serves as a “rubber stamp” for the local prosecutor.

- Secrecy

Virtually all jurisdictions require a great deal of secrecy from grand jurors. The arguments for enhanced secrecy are largely based around encouraging testimony from those who may otherwise be unwilling, and also preventing an accused criminal from fleeing the jurisdiction. Also, secrecy protects the reputation of the accused should the grand jury decide not to indict.

There are, however, some exceptions utilized in some states that increase grand jury transparency. California makes public the transcripts from any grand jury proceeding that results in an indictment.³⁸ California also permits grand jury proceedings to be completely public if a court finds that subject matter involves “alleged corruption, misfeasance, or malfeasance in office or dereliction of duty of public officials or employees[.]”³⁹

- A Citizens’ Grand Jury

While traditionally convened at regular intervals through an arm of the government, a grand jury can be convened under unique circumstances prescribed by law. One such oddity is a grand jury convened by citizens’ petition.

In jurisdictions such as Oklahoma, Nebraska, Nevada, New Mexico, and North Dakota, a group of citizens may gather signatures to form a grand jury and investigate an alleged crime.⁴⁰ Such a mechanism allows a directly democratic approach to investigating crime.

³⁵ Testimony of Morris Murray, Defiance County, Ohio Prosecutor, before the Ohio Constitutional Modernization Commission, Judicial Branch and Administration of Justice Committee, Dec. 10, 2015, *available at* <http://www.ocmc.ohio.gov/ocmc/committees/judbranch>.

³⁶ O.J.I. 301.07.

³⁷ Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 350 (2010).

³⁸ Cal. Penal Code § 938.1 (Though the court may order the transcripts be sealed per a party’s request or on the court’s own motion).

³⁹ Cal. Penal Code § 939.1.

⁴⁰ BEALE, at §4:2, 4-4.

While Ohio has a similar provision – allowing a citizen with knowledge of a crime to make formal allegations in an affidavit – the statute only requires that the matter be investigated by the local prosecuting authority instead of a grand jury.⁴¹

What an Ohio Grand Jury Should Be – Maintaining the Shield

The grand jury was created to protect citizens from over-zealous prosecution, acting as a shield against unfounded or unfair criminal charges. In more modern times, however, the grand jury has come under fire from scholars asserting that its once protective function is a relic of the past.

Citing near perfect indictment rates, many say the grand jury has become “a total captive of the prosecutor[.]”⁴² This, many argue, shows it has strayed from its initial purpose as a screening entity. Furthermore, strict secrecy requirements limit what amount of review can be given to grand jury proceedings.⁴³ This lack of oversight, some contend, leads to inadequate and unquestioned evidence being used at the grand jury levels.⁴⁴

In response to these critiques, others point out that high indictment rates are a product of only taking worthy cases before a grand jury.⁴⁵ Testifying before Ohio Constitutional Modernization Committee, Butler County Prosecutor Michael Gmoser noted that “any perceived gain from an unfounded indictment is quickly buried by a failed prosecution and the negative publicity that goes with it.”⁴⁶ Also, the concept of secrecy in a grand jury is paramount to the integrity of the body’s investigation. Without secrecy, a chilling effect would hinder a grand jury’s willingness to issue subpoenas and endanger a witness’ candor.⁴⁷

One critique of the traditional grand jury does, however, expose a potential downside of secrecy: losing public confidence in the process. Not knowing what information is presented to a grand jury can lead to speculation – which may or may not be well-founded.

Such questions of public policy aim at the very makeup of Ohio’s grand jury process. Through creation and amendment of statute and rule, the functions of the grand jury can be loosened, tightened, tweaked, and overhauled.⁴⁸ How these changes have been implemented across the country will be more fully explored in “Survey of Other States’ Use of the Grand Jury,” included in this packet.

⁴¹ R.C. 2935.09; see also *In re Charging Affidavit of Demis*, 5th Dist. No. 2013 CA 00098, 2013-Ohio-5520.

⁴² Fairfax at 342, Note 11 (quoting a former federal judge as stating “The grand jury is the total captive of the prosecutor, who, if he is candid, will concede that he can indict anybody, at any time, for almost anything before any grand jury.”).

⁴³ Simmons at 26-27 (citing Fred A. Bernstein, *Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 600-03 (1994)).

⁴⁴ *Id.*

⁴⁵ Fairfax at 343.

⁴⁶ Testimony of Michael Gmoser, Butler County, Ohio Prosecutor, before the Ohio Constitutional Modernization Commission, Judicial Branch and Administration of Justice Committee, Dec. 10, 2015, *available at* <http://www.ocmc.ohio.gov/ocmc/committees/judbranch>.

⁴⁷ *Id.*

⁴⁸ One commentator has even argued for shifting the purview of the grand jury to other areas entirely, such as reviewing plea agreements, assisting in drug courts, and reviewing criminal sentences. Fairfax at Part III.



GRAND JURY STATISTICS

When looking to analyze statistics on grand juries, the unfortunate reality is that “grand jury statistics are notoriously difficult to obtain.”¹ There is, however, one largely accepted truth: Grand juries vote to indict at a very high rate.

High Indictment Rates

According to statistics from the U.S. Department of Justice, federal grand juries – through the 1980s and early 1990s – voted to indict in more than 99 percent of cases before them.² Of course, there are many possible reasons for this. Some contend that prosecutors only take cases to the grand jury they know are likely to earn an indictment. Others argue a high indictment rate shows that the grand jury is merely an extension of the prosecutor, unable or unwilling to place a check on the executive branch.

One or both of these explanations may be true, but the reality is that there is insufficient evidence to really be certain. Grand juries operate largely outside of the public eye, leaving the world unable to investigate whether they are properly performing their function as a screening entity.

High Conviction Rates

One statistic tending to show that prosecutors mainly pursue strong cases is conviction rate. In 2014, federal prosecutors secured 74,392 guilty verdicts, 312 not guilty verdicts, and 5,470 cases were dismissed or disposed of in some fashion.³ Of those 80,174 cases resolved in 2014, around 92 percent resulted in a conviction. In studies of previous years, it is generally expected that about 90 percent of all convictions are the result of a guilty plea.⁴

High Plea Bargain Rates

While those numbers clearly show that most indictments are validated by a guilty verdict, some have contended that the high number of guilty pleas actually shows the downside of a high indictment rate.⁵ Such a theory posits that prosecutors seek indictments for a more serious charge

¹ Ric Simmons, *Article: Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, Note 133 (2002).

² Statistical Reports from Executive Office for U.S. Attorneys for years 1985 to 1991, available at <http://www.justice.gov/usao/resources/annual-statistical-reports>. (In 1992, these annual reports stopped including numbers of times a grand jury declined to indict an accused. Also, every single annual report lists an indictment rate of more than 99 percent.)

³ Statistical Reports from Executive Office for U.S. Attorneys for 2014, available at <http://www.justice.gov/usao/resources/annual-statistical-reports>. Similar conviction rates are found in previous years.

⁴ Federal Justice Statistics 2011-2012, Pg. 19-20, available at <http://www.bjs.gov/content/pub/pdf/fjs1112.pdf>.

⁵ Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 563, 505-06 (1980).

when the evidence is marginal, then secure a plea bargain for a lesser charge. In such a scenario, the indictment is less of a threshold for suspicion and more of a bargaining chip.

In Ohio, there are no real statistics as to conviction rate. The statistics in Ohio do suggest a high plea bargain rate. In 2014, Ohio Courts of Common Pleas terminated 64,022 criminal cases by way of a trial, plea, diversion program, or dismissal.⁶ Of those cases, just shy of 80 percent were disposed of by way of a plea, about 10 percent were dismissed, and about seven percent utilized a diversion program. Less than three percent went to trial.⁷

Just under 45 percent of all 2014 criminal cases ended with a plea to a *lesser* charge than the one listed in the indictment.⁸ Similar rates for both are found in 2013 and 2012.⁹ In more populace areas, the number of pleas to lesser charges appears to be even larger. In 2014, 67 percent of cases in Cuyahoga County Court of Common Pleas ended through pleading to a lesser charge. In Franklin County that number is 64 percent, and in Hamilton County it is 58 percent.

⁶ 2014 Ohio Courts Statistical Report, Supreme Court of Ohio, pg. 77-78, *available at* <http://www.supremecourt.ohio.gov/Publications/annrep/14OCSR/2014OCSR.pdf>. (14,773 criminal cases were transferred to another judge or court, or stayed because of the party being unavailable or going through a bankruptcy. Those cases are not included in this statistic.)

⁷ *Id.* 51,046 cases ended in a plea, 6,808 were dismissed, 4,619 utilized a diversion program, and 1,549 went to trial.

⁸ *Id.* 28,330 cases pleaded to a lesser charge.

⁹ Ohio Courts Statistical Reports, *available at* <http://www.supremecourt.ohio.gov/Publications/default.asp>.

SURVEY OF OTHER STATES' USE OF THE GRAND JURY

While the right to a grand jury is entrenched in America's history and mandated in its constitution, the Federal judiciary has not held that it is required at the state level.¹ Individual states are free to adopt the traditional grand jury, modify it, or abandon it completely. To that end, states have fulfilled their role as "laboratories of democracy" by experimenting with different variations on the grand jury.²

Whether to Require an Indictment

While almost every state gives law enforcement the option to use a grand jury, not every state *requires* it do so.³ In 27 states, the prosecution has the option of filing a criminal complaint or seeking a grand jury indictment.⁴ A list of these states can be found below:

- | | | |
|--------------|----------------|-----------------------------|
| - Arizona | - Maryland | - Pennsylvania ⁵ |
| - Arkansas | - Michigan | - South Dakota |
| - California | - Missouri | - Utah |
| - Colorado | - Montana | - Vermont |
| - Hawaii | - Nebraska | - Washington |
| - Idaho | - Nevada | - Wisconsin |
| - Illinois | - New Mexico | - Wyoming |
| - Indiana | - North Dakota | |
| - Iowa | - Oklahoma | |
| - Kansas | - Oregon | |

These 27 states generally maintain alternative, dual systems for bringing felony charges: (1). The traditional grand jury process; and, (2) Prosecutors filing charges by information or presentment.

¹ *Hurtado v. California*, 110 U.S. 516 (1884).

² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (elaborating on the importance of individual states being able to try "novel social and economic experiments[.]")

³ In Connecticut, there is no grand jury system used to indict accused defendants. There is a grand jury system available to prosecutors to investigate crimes and issue a report as to whether they believe a crime has been committed, but the ultimate decision to file the case lies with the prosecutor.

⁴ Nine of these states have a constitution that requires the use of a grand jury, but allows the state legislature to abolish or modify its use. All nine of those states have enacted statutes that allow for prosecution by filing a complaint. The nine states are Colorado, Illinois, Indiana, Iowa, Nebraska, North Dakota, South Dakota, Utah, and Wyoming.

⁵ The Pennsylvania Constitution requires the use of a grand jury, but allows individual counties to create a system of prosecution by information. Every county in the state has created such a system. I BEALE, SARA, ET AL., GRAND JURY LAW & PRACTICE, § 1:7, 1-32 (2d ed. 2002)

In contrast, 22 states still mandate the use of a grand jury for felony level crimes:⁶

- Alabama
- Alaska
- Delaware
- Florida
- Georgia
- Kentucky
- Louisiana
- Maine
- Massachusetts
- Minnesota
- Mississippi
- New Hampshire
- New Jersey
- New York
- North Carolina
- Ohio
- Rhode Island
- South Carolina
- Tennessee
- Texas
- Virginia
- West Virginia

Whether a grand jury indictment is required is often determined by a state's constitution, and in particular cases the state's Bill of Rights. States that allow alternative charging systems generally require the legislature to define which system will be used in which circumstances. In contrast, states where the constitution mandates the use of the grand jury have no alternative available. The Ohio Bill of Rights, for example, directly prescribes the process by which prosecutors must seek felony charges.

Size of the Grand Jury, Votes Needed for Indictment, Length of Term

Of the 22 states that provide a right to a grand jury, most require the jury to have approximately 12 to 18 members.⁷ The number of grand jurors needed can be as few as 5 or as many as 23.⁸ Other states, such as California and Delaware, require different numbers of jurors depending on the size of the particular county. Ohio grand juries must consist of at least 9 members.⁹

Regardless of how many jurors ultimately comprise a grand jury, a supermajority is typically required to issue an indictment. Most states require votes of approximately three-quarters of their grand jurors for an indictment.¹⁰ This varies to some extent in states that allow for different sized grand juries. For instance, in Maine a grand jury can consist of 13 to 23 jurors – but an indictment *always* requires 12 votes. For a Maine grand jury made up of 13 jurors, 12 of their

⁶ Florida, Louisiana, Minnesota, and Rhode Island only require an indictment in a capital case. *Id.*

⁷ There is a wide variance between states as to how many grand jurors are required, but most fall within the range of 12 to 18. State Court Organization Tables, National Center for State Courts, Table No. 47, available at <http://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx>.

⁸ *Id.* Virginia requires its grand juries consist of five to seven members. States such New York, Georgia, and Minnesota allow their grand juries to have up to 23 members.

⁹ R.C. 2939.02 requires a grand jury to consist of 15 members, but the Supreme Court of Ohio has ruled that the conflicting requirement set forth in Ohio Crim. R. 6 controls, meaning only 9 are required. *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988).

¹⁰ State Court Organization Tables, *supra* note 5.

votes would be needed to issue an indictment. Similar situations can be found in New Hampshire, North Carolina, and Mississippi. In Ohio, 7 votes are needed for an indictment.¹¹

States also vary as to how long a grand jury must serve. The length of a grand jury's term can range from 30 days to two years.¹² The typical term, however, is between 6 and 18 months. In Ohio, a grand jury's term lasts 4 months.

Appointment of Special Prosecutor

In light of several high profile cases where the use of grand juries has led to criticism, a number of states have introduced legislation to reform their grand jury processes.¹³ One proposed reform is the use of a special prosecutor in cases where a police officer is implicated in a fatality. Proponents of the special prosecutor system contend that it alleviates the appearance of impropriety in cases where the "symbiotic relationship" between prosecutors and law enforcement "creates public suspicion."¹⁴

New York State recently instituted such a reform by way of executive order.¹⁵ The executive order, signed on July 8, 2015 requires that the state attorney general serve as special prosecutor in any case where an officer kills an "unarmed" civilian or where "there is significant question as to whether the civilian was armed and dangerous at the time of his or her death."¹⁶ South Carolina has also implemented new procedures that require an open hearing on a motion to recuse a state attorney general from grand jury proceedings.¹⁷ Special Prosecutor bills have also been introduced in the state legislatures of California, Connecticut, Georgia, Iowa, and Maryland but have not made it further than committee hearings.¹⁸ California has taken the step of removing officer related shootings from the grand jury process altogether.¹⁹

Ohio has a generalized statute allowing for the appointment of special prosecutors, but leaves it to the discretion of the presiding court and does not specifically set forth a procedure for doing so in a grand jury investigation.²⁰ Missouri has a statute similar to Ohio's, leading many to

¹¹ R.C. 2939.20 requires 12 votes for an indictment, but the Supreme Court of Ohio has ruled that the conflicting requirement set forth in Ohio Crim. R. 6 controls, meaning only 7 votes are required. *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988).

¹² State Court Organization Tables, *supra* note 5. A grand jury's term in New Hampshire is 30 days, while Tennessee and South Carolina have 2 year terms.

¹³ Steven M. Witzel, *Grand Jury Reform One Year After Ferguson and Staten Island*, NEW YORK LAW JOURNAL, Sept. 10, 2015, available at <http://www.newyorklawjournal.com/id=1202736713658/Grand-Jury-Reform-One-Year-After-Ferguson-and-Staten-Island?mcode=0&curindex=0&curpage=ALL>.

¹⁴ *Id.*

¹⁵ New York Exec. Order 147, available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO147.pdf>.

¹⁶ *Id.*

¹⁷ S.C. Code Ann. §14-7-1650.

¹⁸ Witzel, *supra* note 13; California AB-86, available at http://leginfo.legislature.ca.gov/faces/billsStatusClient.xhtml?bill_id=201520160AB86.

¹⁹ Cal. Penal Code 917(a).

²⁰ R.C. 2941.63.

advocate for a special prosecutor in the case of Michael Brown.²¹ In Washington, the grand jury itself has the authority to petition for a special prosecutor.²²

Expanded Guidance as to Independent Investigatory Powers

Grand juries have historically been vested with broad investigatory powers, though it is an open question as to whether jurors are aware of the extent of this power.²³ Without a presiding judicial officer, functionality requires the prosecutor serve a key role in the basic operation and organization of the grand jury. With the goal of emphasizing the grand jury's independence, a small minority of states have limited the prosecutor's role in the grand jury investigation²⁴ and others have taken steps to include the presiding court.²⁵

Some states have taken steps to encourage a grand jury to launch its own investigation. In Virginia, grand juries are divided into two separate categories: Regular and Special.²⁶ A regular grand jury performs the traditional function of voting whether to issue indictments. A special grand jury is given enhanced investigatory authority. Also, a special grand jury can be convened at the order of the court, request of the prosecutor, or at the request of the grand jurors themselves.

In fact, the presiding court is *required* to ask the regular grand jury – upon completion of its duties – whether it desires to convene as a special grand jury to “investigate and report on any condition that involves or tends to promote criminal activity, either in the community or by any governmental authority, agency or official thereof.”²⁷ Once convened, the prosecutor may only be present before the special grand jury at its request, and special counsel may be appointed to advise the grand jury.²⁸ The Special Grand jury may then vote as to whether an indictment may issue from its findings.

What Do Grand Juries Hear – And From Whom?

As set forth above, prosecutors are largely responsible for presenting evidence to the grand jury and, traditionally, are not required to present exculpatory evidence. About a quarter of all states – through statute or case law – address whether exculpatory evidence must be presented to the grand jury.²⁹ Of those states, the duty placed upon prosecutors ranges from only strongly

²¹ Associated Press, *Background of prosecutor in Ferguson case has some questioning probe's credibility*, CBS NEWS, August 18, 2014, available at <http://www.cbsnews.com/news/background-of-prosecutor-in-ferguson-case-has-some-suspicious-of-bias/>.

²² Wash. Rev. Code Ann. § 10.27.070(10).

²³ See generally, Andrew D. Leipold, *Article: Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

²⁴ BEALE, §4:15, 4-66. A prosecutor's presence in grand jury proceedings is severely limited in Connecticut, North Carolina, and South Carolina.

²⁵ *Id.* at §4:15, 4-71. Many states have clarified, through statute, that both a prosecutor *and* the court may provide basic legal advice to the grand jury.

²⁶ Va. Code §19.2, Ch. 13, et seq.

²⁷ Va. Code §19.2-191(2).

²⁸ Va. Code §19.2-210; §19.2-211.

²⁹ BEALE, §4:17, 4-84 to 85.

suggesting the disclosure of *exonerating* evidence³⁰ to requiring disclosure of any evidence that would be *exculpatory*.³¹

While it is often the case that a prosecutor has no duty to present exculpatory evidence, it is a different question as to whether the grand jury may demand it itself. Generally speaking, a grand jury has broad power to subpoena any evidence it desires. Some states, however, have statutes that tell a grand jury how it must handle exculpatory evidence.³² Twelve states grant the grand jury the *discretion* to demand the exculpatory evidence,³³ while five other states *require* that a grand jury demand exculpatory evidence when it knows of its existence.³⁴

If evidence is not presented by the prosecutor or demanded by the grand jury, it may be provided by the accused themselves. The overwhelming majority of states do not give the accused a right to testify or present evidence.³⁵ At least three states do allow an accused to request the prosecutor for an opportunity to testify, and if their initial request is denied they may appeal to the presiding judge.³⁶ Tennessee allows the accused to make this request directly to the grand jurors.³⁷ Other states, such as Indiana, Nevada, New Mexico and New York, allow an accused to testify under certain conditions.³⁸

³⁰ *Id.* Alaska, Arizona, Connecticut, Hawaii, Idaho, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, and Oregon. Ohio is included on this list based on case law, but the cited case is a malicious prosecution lawsuit which only states in dicta that exonerating evidence *should* be given to the grand jury in the interest of justice. *Mayer v. City of Columbus*, 10th Dist. No. 94APE09-1316, 105 Ohio App.3d 728, 740 (1995).

³¹ Cal. Penal Code § 939.71.

³² BEALE, §4:18, 4-97.

³³ Arizona, Arkansas, Idaho, Iowa, Kentucky, Louisiana, New Mexico, New York, Utah, Oklahoma, Oregon, and South Dakota.

³⁴ Alaska, California, Nevada, North Dakota, and Montana.

³⁵ BEALE, §4:19, 4-100. Of course, the prosecutor always has the option to present the accused's testimony.

³⁶ BEALE, §4:19, 4-104 to 105. Colorado, Nebraska, and North Carolina.

³⁷ Tenn. Code §40-12-104

³⁸ BEALE, §4:19, 4-106. A common requirement is that the accused waive their right against self-incrimination.



NOTES



THE SUPREME COURT *of* OHIO

65 South Front Street
Columbus, Ohio 43215-3431

THE GRAND JURY IN OHIO CONSTITUTIONAL AND STATUTORY LAW

CLE PRESENTATION

1. The Grand Jury in the Ohio Constitution
2. Crim.R. 6 and Revised Code Chapter 2939.
3. The work of the Ohio Constitutional Revision Commission.
4. The governor's Task Force on Community-Police Relations.
5. Pending legislation relating to Grand Juries.
6. The work of the Ohio Constitutional Modernization Commission's Judicial Branch and Executive Branch Committee on the topic of grand juries.
 - Memoranda dated July 2, 2015 and January 26, 2016
 - Minutes of meetings on July 9, 2015, December 10, 2015, and February 11, 2016

THE GRAND JURY IN THE OHIO CONSTITUTION

1802 Constitution

Article VIII (Bill of Rights)

Section 10

That no person arrested or confined in jail shall be treated with unnecessary rigor or be put to answer any criminal charge but by presentment, indictment, or impeachment.

Section 11

That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusations against him and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment a speedy public trial by an impartial jury of the County or District in which the offense shall have been committed; and shall not be compelled to give evidence against himself, nor shall he be twice put in jeopardy for the same offense.

1851 Constitution

Article I (Bill of Rights)

Section 10

Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; be the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense.

Current Provision (Last Amended in 1912)

Article I (Bill of Rights)

Section 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a

capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

RULE 6. The Grand Jury

(A) Summoning grand juries. The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

(B) Objections to grand jury and to grand jurors.

(1) Challenges. The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, if it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(C) Foreman and deputy foreman. The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall upon the return of the indictment file the record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

(D) Who may be present. The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(E) Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the

grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

(F) Finding and return of indictment. An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forthwith.

(G) Discharge and excuse. A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) Alternate grand jurors. The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impaneled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.

[Effective: July 1, 1973.]

RULE 7. The Indictment and the Information

(A) Use of indictment or information. A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment shall be signed in accordance with Crim. R. 6(C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been

impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

[Effective: July 1, 1973; amended effective July 1, 1993; July 1, 2000.]

Staff Note (July 1, 2000 Amendment)

Rule 7(A) Use of Indictment or Information

The July 1, 2000 amendment permits the prosecution of misdemeanor charges by complaint in the juvenile division of a common pleas court. Prior to this amendment, a misdemeanor could only be prosecuted in the common pleas court by an indictment or information.

The impetus for the amendment was statutes holding parents criminally accountable for their children's chronic truancy. Since these charges are misdemeanors, prior to the amendment of this rule a parent could be prosecuted only by a grand jury indictment or an information. Obtaining a grand jury indictment is costly and time consuming, and a defendant must first waive indictment before an information can be used. This amendment, which limits the use of complaints to proceedings in juvenile court, is intended to help prosecutors and juvenile authorities handle truancy and other misdemeanor charges in a more expeditious and less costly manner than under the prior rule.

To view R.C. 2313.17, please go to:

<http://codes.ohio.gov/orc/2313.17>

To view R.C. Chapter 2939 (grand juries), please go to:

<http://codes.ohio.gov/orc/2939>

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STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to
the Ohio Constitution

PART 11

THE BILL OF RIGHTS



April 15, 1976

Ohio Constitutional Revision Commission

41 South High Street
Columbus, Ohio 43215

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OHIO LEGISLATIVE

APR 16 1976

LEGISLATIVE COMMISSION
STATE HOUSE

ARTICLE I

Section 10

Present Constitution

Section 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Commission Recommendation

The Commission recommends the amendment of Section 10 as follows:

Section 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury in the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

In addition, the Commission has appointed a special committee to study the subject of the grand jury.

History: Comparison with Federal Constitution

Article I, section 10 is one of the few sections of the Ohio Bill of Rights that has been altered and enlarged from 1802 to the present. The guarantees of this section, which now largely follow both the Fifth and the Sixth Amendments of the Federal Constitution, originally appeared in Article VIII, section 11 of the Constitution of 1802. That section provided for the right to counsel, the right to know the nature and cause of the charge, the right to confrontation, and the right to compulsory service of process in approximately the same manner in which they were guaranteed in the Sixth Amendment. In prosecutions by indictment or presentment, it guaranteed the right to a speedy public trial by an impartial jury in the county where the offense was committed. It also provided two Fifth Amendment guarantees; the right against self-incrimination and the right against double jeopardy.

The Convention of 1850-51 added the first sentence and altered the remaining language of section 11 to follow more closely that of the Sixth Amendment. The first sentence, though, does not follow the Fifth Amendment exactly; several explanatory phrases were included. The Convention added "Except . . . cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary . . ." the opposite of "infamous crimes". The Fifth Amendment does not mention misdemeanors. Instead, it states that a grand jury presentment or indictment is necessary only for "capital and infamous crimes". Article I, section 10 also adds material dealing with grand juries only implied by the Fifth Amendment — that their size and the number necessary to return an indictment will be determined by law. With these additions but without the parts dealing with depositions or a failure to testify, Article I, section 10 was passed by the Convention.

The Convention of 1912 added those portions dealing with depositions and the failure to testify. Alarmed by the high crime rate and the small number of convictions, some members of the Convention of 1912 decided to counter what they believed was an overemphasis on the rights of criminals. The proponents of change cited several areas where changes could be made to neutralize at least some of the advantages the criminals enjoyed in any prosecution. Previously, depositions could be used only by the defendant. The reformers contended that this gave an unfair advantage to the defendant and often resulted in a guilty man being freed. Therefore, they proposed that the state also be given the opportunity to use depositions. Another addition in 1912 was permitting prosecutors in criminal cases to comment about the failure of defendants to testify. There have been no further changes since 1912.

As noted above, Article I, section 10 of the Ohio Constitution largely copies similar Amendments of the United States Bill of Rights.

The Fifth Amendment reads:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment reads:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Not all provisions of the Fifth Amendment are incorporated in section 10; some are found elsewhere in the Ohio Bill of Rights.

Comment — The Grand Jury

The grand jury requirement of the Fifth Amendment is the only provision of the Fifth or Sixth Amendment that has not been applied to state criminal proceedings through the due process clause of the 14th Amendment. The states are, therefore, free to use or reject the use of a grand jury.

A considerable amount of controversy has surrounded the grand jury in recent years. Its use is viewed by some as one of the most important protections in the Bill of Rights against false accusations of crime being made public; others, however, tend to view the grand jury as a "witch-hunting" arm of government or the prosecutor.

The Commission has appointed a special committee to consider grand juries, and a report on that subject will be made in the future.

Comment — the Sixth Amendment Rights

Section 10 sets forth a series of rights of persons accused of crimes that are essentially the same as those found in the Sixth Amendment. In the Ohio order, they are:

1. Right to appear and defend in person and with counsel;
2. Be informed of the nature and cause of the accusation and demand a copy;
3. Confront witnesses;
4. Compulsory process to secure witnesses on the accused's behalf;
5. Speedy and public trial in the county where the crime was committed;
6. Jury trial.

The Sixth Amendment places the speedy and public trial first and the right to counsel last; the right to "appear and defend in person" does not appear in the Sixth Amendment but is certainly implicit in all the other rights. There are other language differences, but they do not appear to be differences of substance.

All the Sixth Amendment rights have been applied to state criminal proceedings through the due process clause of the 14th Amendment. The leading cases are:

1. Right to counsel — *Gideon v. Wainwright*, 372 U. S. 335 (1963)
2. Be informed of the nature of accusation — *Cole v. Arkansas*, 333 U.S. 196 (1948)
3. Confront witnesses — *Pointer v. Texas*, 380 U. S. 400 (1965)
4. Compulsory process — *Washington v. Texas*, 388 U. S. 14 (1967)

5. Speedy and public trial — *Klopper v. North Carolina*, 386 U. S. 213 (1967)
6. Trial by jury (felonies) — *Duncan v. Louisiana*, 88 S. Ct. 1444 (1968)

Of course, the recitation of these rights and the citation of cases making them applicable to the states does not say much about them. Volumes can, and have been, and will be written about each one. The limits and extensions of each are not yet fully known and perhaps never will be. For the purposes of studying whether the Ohio Constitution should be revised with respect to any of these provisions of section 10, however, it seems sufficient to inquire whether any Ohio cases or statutes or rules go beyond present federal interpretations of the Sixth Amendment in any way that would seem to call for constitutional amendment in Ohio. No such cases, statutes, or rules have been found, and no person has appeared before the committee or the Commission recommending any change in any of these provisions.

Comment — Right to Take Depositions

Section 10 next provides for depositions of witnesses who cannot attend the trial to be taken either by the prosecution or the defendant, by authorizing the General Assembly to so provide by law. This provision has no parallel in the Federal Constitution nor is it generally found in the constitutions of other states. As noted above, it was one of the proposals of the 1912 Convention, and was added because delegates to that Convention believed that defendants had an unfair advantage over prosecutors because the statutes apparently only authorized defendants to secure testimony of absent witnesses by deposition. Although the provision does not guarantee either the defendant or the state the right to take depositions, it does guarantee the accused, if such depositions are authorized and taken, the right to be present and examine the witness face to face.

Comment — Self-Incrimination; Failure to Testify

The next provision in section 10 repeats one of the provisions of the Fifth Amendment — that no person shall be compelled, in any criminal case, to be a witness against himself. The privilege against self-incrimination was applied to the states as part of due process in *Malloy v. Hogan*, 378 U. S. 1 (1964).

The right not to incriminate oneself has been much litigated. It is available to witnesses as well as to defendants and is available in civil litigation, before grand juries, before legislative committees and before administrative agencies. As with the Sixth Amendment rights it has been, and undoubtedly will continue to be, explored for limits and uses, and much written about.

One aspect of self-incrimination deserves comment, because the Ohio provision contains language not found in the Fifth Amendment — “. . . but his failure to testify may be considered by the court and jury and may be believed that defendants had an unfair advantage over prosecutors be the subject of comment by counsel.” This clause was added in 1912. The United States Supreme Court, in *Griffin v. California*, 380 U. S. 609 (1965), overturned a conviction appealed from the California Supreme Court on the grounds that the judge and the prosecutor had violated the defendant's rights by commenting on his failure to testify. Under the California Constitution, with a section closely resembling its Ohio counterpart, the judge and prosecutor had been allowed to comment on this failure. The Supreme Court said that the rule of evidence that allowed this gave the state the privilege of tendering to the jury for its consideration the failure of the

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STATE OF OHIO

**OHIO CONSTITUTIONAL
REVISION COMMISSION**

**Recommendations for Amendments to
the Ohio Constitution**

**FINAL REPORT
INDEX TO PROCEEDINGS AND RESEARCH**



JUNE 30, 1977

FILED
OFFICE OF THE CLERK

RES'D. SEP 11 1977

DEPARTMENT OF RESEARCH
STATE HOUSE

Article I, Section 10 Grand Juries; Trials

Present Constitution

Section 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Commission Recommendation

The Commission recommends that Section 10 of Article I be amended to read as follows:

~~Section 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.~~ In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and ~~may be the subject of comment by counsel.~~ No person shall be twice put in jeopardy for the same offense.

Comment

The study of the topics of the grand jury and the civil trial jury was referred by the Commission, at the suggestion of the Bill of Rights Committee, to a special committee established for that particular purpose.

Section 10 of Article I was adopted in its present form in 1912, the provision regarding the right to indictment by grand jury being carried over substantially unchanged from the Constitution of 1851, in which it first appeared. The Commission recommends the deletion of the first sentence of Section 10, referring to the grand jury, because that subject is covered in a separate section, a new Section 10A, in this report. The remaining provisions of Section 10 would then deal only with an accused's rights at trial and certain trial court procedures.

The provision in the next to last sentence of this section which permits the failure of an accused to testify to be the subject of comment by counsel has been previously recommended for repeal by this Commission. (Part 11, Bill of Rights, p. 32). In light of *Griffin v. California*, 380 U.S. 609 (1965), which invalidated a similar provision of the California Constitution, no other conclusion is possible but that the provisions offends the Fifth Amendment right against self-incrimination. The Commission, therefore, endorses and renews the previous recommendation.

Article I, Section 10A

Commission Recommendation

The Commission recommends that a new Section 10A be enacted to read as follows:

Section 10A. EXCEPT IN CASES ARISING IN THE ARMED FORCES OF THE UNITED STATES, OR IN THE MILITIA WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER, FELONY PROSECUTIONS SHALL BE INITIATED ONLY BY INFORMATION, UNLESS THE ACCUSED OR THE STATE DEMANDS A GRAND JURY HEARING. A PERSON ACCUSED OF A FELONY HAS A RIGHT TO A HEARING TO DETERMINE PROBABLE CAUSE. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE TIME AND PROCEDURE FOR MAKING A DEMAND FOR A GRAND JURY HEARING. IN THE ABSENCE OF SUCH DEMAND, THE HEARING TO DETERMINE PROBABLE CAUSE SHALL BE BY A COURT OF RECORD. AT EITHER SUCH HEARING BEFORE A COURT OR AT A GRAND JURY HEARING, THE STATE SHALL INFORM THE COURT OR THE JURY, AS THE CASE MAY BE, OF EVIDENCE OF WHICH IT IS AWARE THAT REASONABLY TENDS TO NEGATE THE GUILT OF AN ACCUSED OR OF A PERSON UNDER INVESTIGATION. THE INADVERTENT OMISSION BY THE STATE TO INFORM THE COURT OR THE JURY OF EVIDENCE WHICH REASONABLY TENDS TO NEGATE GUILT, IN ACCORDANCE WITH THE REQUIREMENTS OF THIS SECTION, DOES NOT IMPAIR THE VALIDITY OF THE CRIMINAL PROCESS OR GIVE RISE TO LIABILITY.

A PERSON HAS THE RIGHT TO THE PRESENCE AND ADVICE OF COUNSEL WHILE TESTIFYING AT A GRAND JURY HEARING. THE ADVICE OF COUNSEL IS LIMITED TO MATTERS AFFECTING THE RIGHT OF A PERSON NOT TO BE A WITNESS AGAINST HIMSELF AND THE RIGHT OF A PERSON NOT TO TESTIFY IN SUCH RESPECTS AS THE GENERAL ASSEMBLY MAY PROVIDE BY LAW.

Comment

The proposed Section 10A is a substitute for the grand jury provisions deleted from present Section 10. It carries over the exception of cases arising in the military from the provisions of the section (because the services have their own tribunals) but contains no reference to cases of impeachment (because they are not "felony prosecutions" and therefore do not need to be excepted). Neither does it contain a provision now in the Constitution which states that the number of persons to constitute a grand jury and to return an indictment shall be provided by law, since this matter is now covered by Criminal Rule 6.

The military exemption language is altered ("armed forces of the United States" is substituted for "army and navy") only to make sure that every branch of the service is exempted. The Commission was advised that lack of specificity on this point has raised some questions in the past.

The adoption of the proposed Section 10A would have four principal effects:

1. To make the information (or complaint) the primary method of initiating felony prosecutions, but permit either the accused or the state to demand a grand jury hearing.
2. To grant to every person accused of a felony the right to a hearing to determine probable cause, either before a court of record or a grand jury.

3. To impose a duty on the prosecutor to tell either the court or the grand jury about evidence he knows of which tends to negate the guilt of an accused or of a person under investigation. However, an omission by the prosecutor would not affect the validity of a prosecution unless it was shown that the omission was deliberate.
4. To permit any witness before a grand jury to have counsel present to advise on the right not to testify against oneself and the right not to testify with regard to certain privileged matters (husband/wife, attorney/client, physician/patient communications, etc.) which right is defined by state law.

History and Background of Grand Jury Provision

The grand jury in contemporary American law can be traced to twelfth century England. In Ohio, under Criminal Rule 6(A), a grand jury is to be called by the common pleas court "at such times as the public interest requires". The historic role of the grand jury is to determine whether there is probable cause to conclude that a particular crime has been committed and that a particular person or persons have committed it. If the grand jury so finds, it is its duty to return an indictment -- a formal accusation of crime -- upon which a trial is based. In Ohio, an indictment is returned to the common pleas court which called the grand jury, under Criminal Rule 6(F).

At its inception, the grand jury had some characteristics of both modern grand juries and petit juries, that is, it functioned both as an accuser of crime and a trier of facts. By the time of the American Revolution, however, grand jury and petit jury functions had become clearly separated and grand jury proceedings had come to be conducted strictly in secret in order to protect those who may have been wrongly accused, to protect witnesses, and to prevent those who may have committed a crime from escaping before trial. The grand jury came to be regarded as a buffer between the individual and the state, and for that reason was incorporated into the Constitution of the United States in the Fifth Amendment, which reads in part:

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.

"Capital or other infamous crime" has been held to refer to felonies, so that the constitutional right to indictment by a grand jury is limited to such crimes, even though a grand jury may investigate, and indict for, misdemeanors also.

Most states, including Ohio in 1851, adopted state constitutional provisions conferring the right to indictment by a grand jury patterned on the Fifth Amendment model. However, the Fifth Amendment right to grand jury indictment is not binding on the states. *Hurtado v. California*, 110 U.S. 516 (1884). As a result, there are variations among the states in the manner in which felony prosecutions are handled. In a majority of states, felonies may be prosecuted by information or by indictment at the option of the prosecutor. A smaller group, which presently includes Ohio, requires indictment by a grand jury but authorizes a defendant to waive indictment. A still smaller group of states requires indictment in all felony cases.¹

Rationale of Changes

Except in the instance where an indictment has already been returned at the time of arrest, a person arrested on a felony charge in Ohio is entitled to a preliminary hearing. Such hearing is held in a municipal or county court, and its function is to determine probable cause. If the court finds such cause and the defendant does not waive the right to a grand jury indictment, the defendant is "bound over" to the common pleas court, and the matter proceeds to a grand jury hearing, whose purpose, like that of the preliminary hearing, is to determine probable cause. Further, it appears to be common practice to take a case which is dismissed by the court at a preliminary hearing to the grand jury in order to obtain an opposite result in terms of continuing the prosecution.

¹For a wide-ranging discussion, see the papers published in "A Symposium - The Grand Jury", 10 *Am. Crim. L. Rev.*, No. 4 (Spring 1972).

Thus, a duplication of effort and a waste of time are inherent in the system. It is the elimination of this duplication and waste that is the chief motivation for the recommendation that the Constitution provide for either a preliminary hearing or a grand jury hearing, but not both, in each felony case.

The implementation of this provision will undoubtedly require some changes in the statutes and the rules. The recommendation is so drafted that it would require proceeding by information unless a demand were made for a grand jury hearing either by the accused or by the state. If the state made such a demand at the very beginning stages (even before a suspect was in custody), that would determine the course to be followed, which might lead to a secret indictment, just as at present. However, a change would have to be made to accommodate the situation in which the state elects to proceed by information (or complaint) and the accused has not had an opportunity to elect to proceed in this manner or to ask for a grand jury hearing. To effectuate this right of choice, provision will have to be made for the secret filing of informations (and complaints) in much the same manner as secret indictments -- which will continue to remain available -- are filed today. The proposal does not specify to which court the demand for a grand jury hearing is to be addressed. It is implicit that the demand is to be addressed to the court which has jurisdiction of the case. If the Commission recommendation for a single level of trial courts is adopted, it follows that the court would be the appropriate court of common pleas.

Law enforcement officials indicate that the option of initiating felony prosecutions by complaint, as well as by information, should be specifically sanctioned in the Constitution. A change in the recommendation to this extent would be fully consistent with the original intent of the Commission. The rationale in relation to prosecution by information would, of course, be equally applicable to a prosecution initiated by complaint.

Since the proposed language for Section 10A grants the right to a hearing to determine probable cause, which the state does not have to grant today, it follows that once a demand for a grand jury hearing is made, it must be granted, because the determination of probable cause is mandatory.

The requirement that the prosecutor inform a judge or a grand jury of known evidence which tends to negate guilt is intended to reinforce the often stated belief that it is the prosecutor's duty to seek justice, above all. And granting the right to the presence and advice of counsel is intended to give substance to the protection of specific rights that are universally recognized but which, in the view of the Commission, are not and can not be effectively protected by any other means.

It is universally recognized that the constitutionally prescribed privilege not to testify against oneself and the statutorily prescribed privilege against divulging certain communications (such as attorney/client or husband/wife) may be asserted before a grand jury. However, a grand jury proceeding has historically been regarded not as a trial but as an inquest to determine probable cause. On the basis of this distinction, the Supreme Court has not yet held the basic rules of evidence, the right to counsel while under interrogation, the right to face one's accuser, and the right to testify in one's own behalf, applicable to a grand jury hearing. See *Costello v. United States*, 350 U.S. 359 (1956). On the other hand, it is now well established that at a preliminary hearing held to determine probable cause, a defendant is entitled to the presence and advice of counsel, to testify, and to present or cross-examine witnesses. *Coleman v. Alabama*, 399 U.S. 1 (1969). Even before *Coleman*, serious inquiry had begun as to whether what had been said about the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel in cases such as *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966) did not justify the conclusion that a grand jury hearing was of such a critical nature as to require the presence of counsel to protect the rights of a witness not to testify against himself and to claim statutorily prescribed privileges which can be asserted. See Ronald I. Meshbesh, "Right to Counsel Before Grand Jury", 41 F.R.D. 189.

It is in this context that the Committee to Study the Grand Jury and Civil Trial Juries examined the question of the grand jury. The testimony presented before the committee ranged from a suggestion that the grand jury be abolished to one that it be retained unchanged. The committee determined early in its study that there are some classes of cases in which the grand jury could serve a useful purpose. These include cases that have complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases which involve use of force by police or other cases which tend to arouse community sentiment; and sex offenses and other types of cases in which either the identity of the complaining witness or the identity of the person being investigated should be kept secret in the interest of justice unless the facts reveal that prosecution is warranted.

The committee further concluded that the Constitution should not deny either an accused or the state the opportunity to seek indictment by a grand jury on a case by case basis, even though in "ordinary" criminal prosecutions the preliminary hearing, with its attendant safeguards, seems the more appropriate method for establishing probable cause.

Having concluded that the grand jury should continue to exist as an alternate method, the committee was further of the view that the grand jury proceedings must be refined in order to strengthen the hand of the grand jury in gathering all the facts relevant to a decision and in order fully to implement the recognized rights of witnesses and potential defendants. The Commission fully shares these views.

Although there was some opposition expressed to the requirement that the prosecutor inform the judge or grand jury of evidence which tends to negate guilt -- on the basis that this would result in the prosecutor's having to "try the case of the defense" -- a majority of those who addressed the committee favored, or did not oppose, such a proposal. It is the Commission's view that the proposal, as worded, does not require the state to "try the case of the defense", or impose a duty to search for evidence, but only to bring before the judge or jury all those known facts which may have a bearing on the determination of probable cause. Some prosecutors do this now as a matter of practice. Some jurisdictions presently require such disclosure by statute. See *Johnson v. Superior Court of San Joaquin County*, 124 Cal. Rep. 32 (1975). The fair disclosure of relevant facts which may be in the possession of the state because of its particular position, at the early stages of a criminal prosecution, is of such fundamental importance that there should be a constitutional directive with regard to it.

The recommendation to permit the presence of counsel in the grand jury room to advise a testifying witness would resolve a dilemma which has troubled both the bench and the bar as the concepts of privilege and the right to counsel have become more clearly defined. It has become increasingly difficult to justify a distinction between right to counsel outside the grand jury room and right to counsel inside it. The most plausible argument against permitting counsel inside the room is that this would admit another person into the room and thus break the traditional secrecy of grand jury proceedings. However, this argument falls when one considers that a witness has the theoretical right to leave the room to consult with counsel on every question. Further, an attorney could be sworn to secrecy as effectively as anyone else in the room. Whatever the problems with the presence of counsel may be, the need to effectively safeguard the rights of a witness, who may be at the same time the target of an investigation or at least a potential defendant, far outweighs them. See *Sheridan v. Garrison* (D.C.E.D. La. 1967), 273 F. Supp. 673. It must be emphasized that the proposal presented here would limit the right of counsel to advise a witness on matters of privilege personal to the witness. Counsel would be permitted in the grand jury room only while the client-witness was testifying, and could not object to the admission of evidence (such as hearsay) which did not involve a question of such privilege. Several states now permit counsel in the grand jury room under specific circumstances, e.g. Arizona Rules of Criminal Procedure 12.6; Michigan Statutes Annotated 28:943; Washington Revised Code Annotated 10.27.120. There is at least one bill presently pending before Congress giving a grand jury witness the right to counsel inside the grand jury room in federal prosecutions. We conclude that the granting of this right has become appropriate for inclusion in the Ohio Constitution.

In addition to the principles set forth in the recommendation, the Commission, through its study committee, received several other suggestions relating to grand juries. These included a possible provision to permit local prosecutors to convene multiple-county grand juries to investigate crime which overlaps county boundaries, and a requirement that all grand jury proceedings be transcribed. While these suggestions have merit, we conclude that they are more properly matters to be disposed of by statute or court rule.

Article II, Section 4 Legislator Eligibility to Appointive State Office

Present Constitution

Section 4. No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

No member of the general assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.

Commission Recommendation

The Commission recommends the amendment of Article II, Section 4 as follows:

Section 4. No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

~~No member of the general assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.~~

Comment

The Commission recommendation for repeal of the final paragraph of Article II, Section 4 is aimed at removing from the Constitution language that no longer serves the purpose for which it was intended, and is considered to have a detrimental effect on appointing qualified persons to public office. At the time the provision was originally placed in the Constitution, the legislature had extensive appointive powers, and legislators might create or increase the salaries of offices and then appoint themselves to those offices. The legislature's power to appoint has been substantially reduced. Today, when salaries are increased to compensate for inflation, as is often the case, members of the general assembly are precluded from being appointed to those offices, although otherwise qualified, by the constitutional language proposed for repeal.

History and Background of Section

Article II, Section 4 as adopted by Ohio voters on May 8, 1973, was considered by the Commission's Legislative/Executive Committee, which recommended the amendment of the first paragraph of the section, and the transfer of the second paragraph, which was formerly Article II, Section 19, to Section 4, with some minor wording changes but no substantive modification.

The second paragraph prohibits the appointment of a legislator to an office either created or the compensation of which has increased during his term, for the duration of his legislative term and one year thereafter. A form of this prohibition has existed in Ohio's fundamental law since the beginning of statehood. The Ohio Constitution of 1802 stated, in Article I, Section 20:



FINAL REPORT

APRIL 29, 2015

EXECUTIVE SUMMARY

Accountability and oversight: Action must be taken to ensure that agencies and officers will be held accountable by the communities they serve.

Community education: Create methods to establish the public's understanding of police policies and procedures and recognition of exceptional service in an effort to foster support for the police. Police officers and community members must become proactive partners in community problem solving.

Community involvement: There must be ongoing efforts by law enforcement and the community to build trust and strengthen relationships.

Grand jury process: The grand jury process shall be reviewed by the Supreme Court of Ohio, the Ohio Constitutional Modernization Commission, or appropriate governmental authority, as it applies to the use of force.

Recruiting and hiring: The State of Ohio shall require all law enforcement agencies to adopt, at a minimum, hiring policies. The State will develop a model policy on hiring to be used by law enforcement agencies.

Standards: The State of Ohio shall require all law enforcement agencies to adopt, at a minimum, policies including, but not limited to, the use of deadly force, with the goal of enhancing the protection of all lives. The State will develop a model policy to be used by law enforcement agencies.

Training: In order to allow officers to do their jobs safely and effectively, and to protect the public, the State of Ohio shall require a greater emphasis on, and investment in, training.



RECOMMENDATIONS

Grand jury process: The grand jury process shall be reviewed by the Supreme Court of Ohio, the Ohio Constitutional Modernization Commission, or appropriate governmental authority, as it applies to the use of force.

Public and expert testimony recommendations

Speakers at the public forums expressed concerns about the grand jury process. To many, the grand jury process is perceived as unfair on several levels. Officers and prosecutors work together, and thus, investigations of officer misconduct by the prosecutor are seen as biased. Grand juries are closed to the public, and for this reason are perceived as secretive. One public speaker suggested educating the community on the grand jury process, and others discussed the need to make the details of the grand jury proceedings available to the public at their conclusion. Another member of the public recommended disallowing officers to waive their right to a full jury in an officer-involved death. In addition to holding law enforcement officers accountable for their behaviors, some suggested that there needs to be more prosecutorial accountability, and that perhaps there should exist an oversight committee for prosecutors, similar to that which has been recommended for law enforcement.

Task Force recommendations

While the focus of the Task Force was specific to community-police relations, it became evident during the public forums that further analysis of the judicial process, and in particular the grand jury process, is necessary. With this in mind, the Task Force developed their recommendations. Several recommendations were offered by individual members. One Task Force member recommended amending Rule 6 of the Rules of Criminal Procedure to permit the Presiding or Administrative Judge of the court of common pleas upon request of the prosecutor to be present and preside over grand jury proceedings when it is in the interest of justice, with the judge bound by secrecy as well, unless the court orders otherwise. Another Task Force member recommended abolishing the grand jury and replacing it with a preliminary hearing, which is a transparent and open process. A Task Force member suggested judicial budgets should be removed from local governance to elevate judges away from local influences. Another member encouraged diversity in the composition of grand juries, as well as educating the grand jury about its right to ask for more information and witnesses.

Multiple Task Force members recommended the following:

- Judicial oversight of the grand jury process.
- Creating an open and transparent grand jury process by authorizing the release of the grand jury testimony when, in the interest of justice, there is a particularized need, and the safety of witnesses would not be impacted.
- Requiring a grand jury to review all officer-involved deaths or serious injuries, in the absence of an independent investigation.

To view H.B. 380 of the 131st General Assembly, please go to:

[http://search-prod.lis.state.oh.us/solarapi/v1/
general assembly 131/bills/hb380/IN/00?format=pdf](http://search-prod.lis.state.oh.us/solarapi/v1/general%20assembly%20131/bills/hb380/IN/00?format=pdf)

To view S.B. 258 of the 131st General Assembly, please go to:

[http://search-prod.lis.state.oh.us/solarapi/v1/
general assembly 131/bills/sb258/IN/00?format=pdf](http://search-prod.lis.state.oh.us/solarapi/v1/general%20assembly%20131/bills/sb258/IN/00?format=pdf)

To view S.J.R. 6 of the 131st General Assembly, please go to:

[http://search-prod.lis.state.oh.us/
solarapi/v1/general assembly 131/resolutions/sjr6/IN/0
0?format=pdf](http://search-prod.lis.state.oh.us/solarapi/v1/general%20assembly%20131/resolutions/sjr6/IN/00?format=pdf)

To view S.J.R. 4 of the 131st General Assembly, please go to:

[http://search-prod.lis.state.oh.us/solarapi/v1/
/general assembly 131/resolutions/sjr4/IN/00?format=pdf](http://search-prod.lis.state.oh.us/solarapi/v1/general%20assembly%20131/resolutions/sjr4/IN/00?format=pdf)



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice Chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan B. Becker, Student Intern

DATE: July 2, 2015

RE: History and Use of Grand Juries

This memorandum is being provided to the Judicial Branch and Administration of Justice Committee as an aid to its review of Article I, Section 10, specifically, the use of the grand jury in criminal prosecutions.

The Grand Jury in Ohio

The Ohio Constitution provides for the use of the grand jury in Article I, Section 10, which states, in part:

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.

Section 10 also requires that the accused be allowed to appear and defend in person, and sets out the right to counsel, the right to demand details about the accusation, to have a copy of the charges, to face witnesses, to have defense witnesses compelled to attend, to have a speedy trial by an impartial jury, the right against self-incrimination (nevertheless allowing comment

regarding the accused's failure to testify), and the protection against double jeopardy. The section further specifies provision may be made by law for deposing witnesses. In short, the lengthy section encompasses many of the procedural safeguards enumerated in the United States Constitution, specifically in the Fifth and Sixth Amendments.¹ Article I, Section 10 is original to the 1851 constitution, but was amended in 1912.

The grand jury process in Ohio is further controlled by Revised Code Chapter 2939. That chapter governs the size and selection of the grand jury; the use of additional or alternate jurors; specific terms of juror service, including compensation, the juror's oath, and the need to maintain secrecy; organizational matters such as the jury's use of a foreman and a clerk; procedural matters such as the jury's deliberations and the reporting of conclusions; and evidentiary matters, such as the procurement of witness attendance and testimony. Revised Code Chapter 2939 is provided as Attachment A to this memorandum.

The Use of the Grand Jury in the United States

In the United States, grand juries are used as a method for indicting persons accused of crimes. A prosecutor presents evidence and witnesses to a grand jury, which then votes if the evidence is enough to establish probable cause. The procedure is intended to protect the accused from frivolous criminal charges by ensuring that lay citizens decide if the prosecutor has made a correct decision. A grand jury is chosen by random selection from the district's voter rolls. It sits for a period of time – in the federal system for 18 months – hearing all the different charges brought by the prosecutor during that period. In the federal system, the jury is made up of between 16 and 23 members, with the need of 12 jurors to concur to indict the accused.² The process is kept in strict confidence, with the record of proceedings rarely being reviewed by anyone besides the prosecutor as a way of protecting the integrity of the grand jury process.

History

The grand jury system originated in 12th Century England, under the reign of King Henry II. At the time, Great Britain lacked a sophisticated policing mechanism. Grand juries were a way for citizens to note suspicious behavior and then, as jurors, report on suspected crime to the rest of the jury. This helped centralize policing power with the king, power that otherwise would have been held by the church or barons. By the 17th Century, grand juries began to be viewed as a way of shielding the innocent against criminal charges.³ Resembling the system used today, the government was required to get an indictment from a grand jury before prosecuting a person. This turn from the jury being a "tool of the crown" to "defender of individual rights" came after two refusals by a London grand jury to indict the Earl of Shaftesbury on a dubious treason charge in 1667, leaving the lasting effect of freemen being entitled to the right to have their neighbors review the charges against them before the government could indict them. American colonists followed this tradition, using the process to nullify despised English laws, as grand juries refused to indict those who took stances against the royalist government. The most famous example of this was newspaper editor John Peter Zenger who was arrested for libel in 1743 based on his criticisms of the New York royal governor. Three grand juries refused to indict

him, and although royal forces would still put him on trial after an information proceeding, a trial jury acquitted him.

After independence, the U.S. Constitution's framers considered grand juries to be so vital to due process that the institution was enshrined in the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *." Many states followed suit, protecting grand juries in their own constitutions. Ohio's version uses almost identical language: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury."⁴ Three other states, Alaska, Maine, and New York, also used the Fifth Amendment as their indictment clause model. The Ohio Supreme Court, following the language of the clause, has ruled the grand jury to be a required entitlement of the accused. *State v. Sellards*, 17 Ohio St.3d 169, 169, 478 N.E.2d 781 (1985).

From these two traditions flow the basic duties of grand jury today, often described as "the sword and the shield." First, the jury has a screening function, whereby the grand jury reviews evidence presented to them by a prosecutor to decide if there is probable cause for an indictment, thus "shielding" the accused from false charges. The grand jury also has an investigative function, in which it gathers evidence and issues subpoenas, using the "sword" to discover criminal conduct. While the latter has been used for sensational effect in political corruption cases, and in other cases lacking identifiable victims who would otherwise help investigators, it is the former most people think of when discussing grand juries, and it is the most common form.⁵

Criticism and Support

Grand juries have come under criticism since at least the 19th Century. At that time, the new Western states did not include grand juries in their constitutions, although this is likely because populations of those states were so dispersed that requiring citizens travel to a central location to form a grand jury would have been too onerous. Also at that time, many states removed the requirement from their constitutions, with one Michigan legislator declaring grand juries to be "akin to the star chamber."⁶

Both recently and historically, the use of the grand jury has been criticized as merely a reflection of the prosecutor's interest in securing or, in some instances, avoiding an indictment.⁷ While currently the focus of public attention, these concerns are not new. In 1973, U.S. Supreme Court Justice William Douglas noted that it was "common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting). Concerns remain that grand juries merely rubberstamp the decisions of prosecutors, leading to the famous quote by the New York state judge Sol Wachtler that a district attorney "could get a grand jury to indict a ham

sandwich.”⁸ There is near-unanimous scholarly agreement that the grand jury system is in need of reform or fundamentally broken.⁹ It is notable that the United Kingdom abandoned the system in the 1930s, and grand juries no longer are used by any common law country besides the United States.

Nevertheless, many argue that the grand jury process is important for reaching justice. Justice Learned Hand described grand juries as being the “voice of the community.” *In re Kittle*, 180 F. 946 (S.D.N.Y. 1910). Supporting community involvement in local criminal proceedings, Professor Ric Simmons of the Ohio State University Moritz College of Law has argued that, while federal grand juries might turn into rubber stamps, state grand juries using the correct processes could ensure the protection of defendants’ rights. According to Simmons, grand juries can provide the only lay perspective in a system where jury trials are becoming scarce.¹⁰ Simmons does suggest reform for the grand jury system where the prosecutor would only have one chance for an indictment and the process would have a higher evidentiary standard.

Legal Issues

There is no U.S. constitutional requirement that states have grand jury indictments for any crime. The Fifth Amendment’s guarantee of a grand jury has not been extended to the states through the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516 (1884). There have been no challenges to overturn *Hurtado*. Even during the Warren era, when the Supreme Court applied Fourteenth Amendment principles to much of the Bill of Rights, grand juries remain a requirement only in the federal criminal justice system. *Beck v. Washington*, 369 U.S. 541, 545 (1962). “Ever since *Hurtado v. California*, 100 U.S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions.” In *Alexander v. Louisiana*, 405 U.S., 625, 633 (1971), the Court stated it “has never held that federal concepts of a ‘grand jury,’ binding on the federal courts under the Fifth Amendment, are obligatory for the States.” The grand jury requirement, along with the Seventh Amendment, remain the last elements of the Bill of Rights that have not been incorporated by the Court to be applied to state government. As such, state grand jury procedure can be remarkably different from that of a federal grand jury, and is even completely abolished in some states.

While United States Supreme Court precedent has not required states to use grand juries, the court has strongly supported the federal grand jury system mentioned in the Fifth Amendment. The court has issued decisions protecting the grand jury’s ability to hear hearsay evidence (*Costello v. United States* 350 U.S. 359 (1956)), to hear evidence that otherwise would be excluded (*United States v. Calandra* 414 U.S. 338, (1974)), and allowing prosecutors not to present exculpatory evidence (*United States v. Williams*, 504 U.S. 36 (1992)). Ohio decisions have reflected the Supreme Court’s rulings in federal criminal cases. An Ohio appellate court simply quoted *United States v. Calandra* in deciding against a defendant. *State v. Muenick*, 26 Ohio App.3d 3, 498 N.E.2d 171 (1985). The Ohio Rules of Evidence explicitly do not apply to grand juries. Evid.R. 101(C)(2).

Moreover, the defendant is not allowed access to the records of the grand jury's proceedings. Ohio Crim.R. 16(J)(2) explicitly states that transcripts of grand jury testimony are not subject to disclosure but are governed by Crim.R. 6. Specifically, Crim.R. 6(E) states the deliberations and vote of the grand jury shall not be disclosed. *See also* R.C. 2939.11. In addition to these rules, the Ohio Supreme Court held in *State v. Patterson*, 28 Ohio St.2d 181, 185, 277 N.E.2d 201 (1971), that grand jury minutes are not released before or during trial unless "the ends of justice require[] it, such as when the defense shows that a particularized need exists * * * " (quoting *State v. Laskey*, 21 Ohio St.2d 187, 257 N.E.2d 54 (1970)). The balancing test is repeated in *In re Petition for Disclosure of Evidence Presented to Franklin County Grand Juries in 1970*, 63 Ohio St.2d 212, 407 N.E.2d 513 (1980). *See also Wiggins v. Kumpf*, 2d Dist. No. 26263, 2015-Ohio-201, 2015 Ohio App. LEXIS 174, 2015 WL 302839 (Montgomery Cty., Jan. 23, 2015).

While Ohio courts consistently follow jurisprudence relating to the federal system, this trend is not universal, as one-fifth of states with grand juries allow judicial review of grand jury conclusions. The most significant evidence of this trend is the system adopted in New York.¹¹

State Comparisons

States' use of the grand jury process falls into several categories. Some, like Ohio, require a grand jury for a variety of different crimes, while others require a grand jury only for capital crimes. Some states allow the legislature the option to abolish the grand jury system, some allow the legislature to choose between grand juries or the use of an information system, and some are completely silent on the issue. A complete list of state constitutional provisions relating to grand juries is provided as Attachment B.

Under a preliminary hearing system, the prosecutor files a document referred to as an "information." The defendant may then challenge the information in front of a judge. If the prosecutor can satisfy the judge that there is probable cause in the case, the defendant is held over to trial. Twenty-seven states allow any prosecution to be initiated by information.¹²

Colorado, Connecticut, Illinois, Indiana, Iowa, Nebraska, North Dakota, South Dakota, Utah, and Wyoming explicitly empower the legislature to abolish or modify the grand jury system. Though only Connecticut has used this power, all of these states have the option of changing to an information system at their choosing. Connecticut abolished their grand jury system and replaced it with an "adversarial probable cause hearing" by a constitutional referendum.¹³

Today, only 18 states require a grand jury indictment to initiate all serious criminal charges: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and West Virginia. Four states require grand jury indictments for crimes carrying a capital sentence or life imprisonment: Florida, Louisiana, Minnesota, and Rhode Island.¹⁴

Note that not all grand juries are required by state constitutional amendments. Eight states: Georgia, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, Tennessee, and

Virginia, require grand juries by statute, with their constitution either being silent, or allowing either indictment or information as chosen by the legislature.¹⁵

Grand Jury Discussion in the Ohio Constitutional Revision Commission

The Constitutional Revision Commission in the 1970s (“1970s Commission”) formed a special sub-committee of the Bill of Rights Committee to study both the grand jury and civil petit jury systems in Ohio.¹⁶

The Grand Jury and Civil Trial Jury Committee of the 1970s Commission discussed four questions relating to possible changes to the operation of grand juries in the Ohio constitution: 1) whether indictment by grand jury should only be mandatory in cases of impeachment, cases arising in the armed forces of the United States, or in the militia when in actual service during time of public danger, and capital offenses; 2) whether indictment by grand jury should be confined only to capital and a limited number of other offenses; 3) whether all grand jury witnesses should have the right to the assistance of counsel; and 4) whether the prosecuting attorney should be compelled to present evidence that tends to exculpate the defendant at grand jury proceedings. The committee heard from several witnesses on the topic.

One witness, an administrative judge with the Franklin County Court of Common Pleas, expressed his view that the grand jury is a “functioning and viable body,” and shared a letter he had received from a grand jury foreman who had found the experience to be very positive in helping his understanding of the criminal justice system. Another witness, who was executive director of the American Bar Foundation, presented a report listing arguments for and against grand juries. On the side opposing grand juries, he recognized that juries can serve as tools of the prosecutor, that there may not be enough constitutional safeguards when grand juries serve their investigatory function, and that they can be inefficient when combined with other screening processes like preliminary hearings. On the side supporting grand juries, he noted that they promote citizen participation and fulfill a need for prosecutors to have someone else make the charging decision. His conclusion was that grand juries should not be used for the vast majority of cases, and are best used when the prosecutor has a difficult choice on whether to prosecute.

The committee of the 1970s Commission also heard from a representative of the Coalition to End Grand Jury Abuse, who emphasized her organization’s position that grand juries lack independence. She recommended that all witnesses should have counsel available, all those subpoenaed should know ahead of time what they have been accused of, and grand juries should not collect facts. She added that transcripts of the hearing should be given to the defendant, and there should be limits on grand jury’s power to issue subpoenas. Speaking in support of grand juries, a county prosecutor also appeared before the committee, and described the typical grand jury experience in his county. He further described a unique case in which a white police chief shot an unarmed Africa-American suspect. He said there were calls for a murder prosecution but the prosecutor thought it was important that a grand jury made up of members of the community be allowed to make the final judgment about whether to indict. He said grand juries are particularly important in homicide cases. Considering possible reforms, the prosecutor said grand juries should not be required for some lesser offenses. He discredited a criticism that

prosecutors could use evidence in grand jury hearings that would not be admissible in court, as he said it would be pointless to go to trial with evidence that could not be used. Finally, he noted it can be important for grand juries to hear evidence that is helpful to the defendant.

Other witnesses expressed that having both a preliminary hearing procedure and a grand jury procedure is unnecessary, that exculpatory evidence as well as incriminating evidence should be presented to jurors, and that the General Assembly should be given the power to abolish the grand jury. Witnesses further opined that grand juries should be saved for only the most serious charges, such as capital murder or rape, and that defense attorneys should be given a copy of the grand jury proceedings, so as to ensure witnesses are giving the same story both then and at trial. One witness, a law professor, expressed that the best use of grand juries is in murder cases, cases with political ramifications, and sexual crimes, and that they are also useful for investigating political corruption and inspecting the conditions of jails and other public institutions.

The committee also heard from a representative of the Ohio Prosecuting Attorneys Association who said that, historically, the grand jury was a constitutional right of the defendant, and that removing the grand jury in order to streamline the criminal prosecution process would impinge that constitutional right. He said, as a practical matter, having the prosecutor present evidence that might exculpate the accused would put the burden on prosecutors to anticipate what evidence would be favorable to a defendant, which involved making subjective conclusions on matters of evidence in a hearing that is supposed to be investigatory, not adversarial, and would result in prosecutors going beyond their authority and doing the work of the defense. He also was critical of the suggestion that advisory counsel be afforded grand jury witnesses, an unnecessary provision because under current practice witnesses were not precluded from leaving the room and consulting with counsel. He said allowing advisory counsel to be present for the proceedings would only defeat one of the chief advantages of a grand jury proceeding: secrecy. Asked whether he thought prosecutors could be as diligent in suggesting the innocence of the accused as they are in attempting to establish guilt, the witness answered that the role of the prosecutor is not as a juror, but to take all the evidence available to the grand jury and let that body decide. He emphasized it is not the function of the prosecutor to determine probable cause, but to present what he or she feels may be a legitimate claim to the grand jury.

In his written remarks, the witness supported allowing grand jury proceedings for felonies other than capital offenses, such as those that may involve extreme deprivation of freedom, liberty, and property. He also advocated continuing to prohibit advisory counsel's presence in grand jury proceedings in order to preserve secrecy and the investigatory nature of the proceeding, as well as avoiding a requirement that prosecutors offer exculpatory evidence because it would burden the grand jury process with dilatory evidentiary appeals.

The committee of the 1970s Commission debated the merits of several of the proposed modifications. No members expressed any problem with requiring a grand jury indictment as the exclusive means of initiating the prosecution of a capital offense. Further, the committee agreed that the prosecutor should always have the option of taking a case to the grand jury instead of utilizing the information or a preliminary hearing. The committee wrestled with how to explicitly favor the use of the information, basically a preliminary hearing in which an individual

is actually accused, as the primary means of prosecuting non-capital crimes. The committee could not come to a consensus on how to make the information secret in the same way as is a grand jury proceeding. The committee ultimately chose to agree on the purpose of the provision and table discussion of procedure.

As for a provision requiring prosecutors to present exculpatory evidence on behalf of the accused, the committee agreed that there is a tendency for prosecutors to favor their own case rather than that of the accused. No agreement was reached as to specific language, although several alternatives were discussed.

Regarding a possible provision that would allow witnesses to have counsel present during grand jury proceedings, the committee agreed that there was currently no real right to counsel because it was ultimately up to the witness to make a decision as to when to seek the advice of counsel. Further, the committee proposed language instructing appropriate counsel to advise the client on “matters of self-incrimination,” and that every witness, not just the witness who was also the accused, should enjoy such a right. (There are cases in which it is unknown whether an individual is just a witness or if they are going to end up being the accused, so affording only the accused the right to have counsel present defeats the idea of secrecy in the grand jury proceeding.)

The committee of the 1970s Commission finally recommended that the information should be the primary method of initiating a criminal charge, unless the defendant asks for a grand jury. The committee also supported adoption of a provision that would allow for either a preliminary hearing or grand jury to establish probable cause; require the prosecutor to provide exculpatory evidence to a grand jury; and allow witnesses in front of the grand jury to have counsel with them.

Endnotes

¹ The Fifth Amendment to the U.S. Constitution provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

² Fed. R. of Crim. P. 6.

³ Beale, Sarah, et al., Grand Jury Law & Practice 1.2.

⁴ Ohio Const., Art. I, Sec. 10.

⁵ Beale, *supra*, 1.7.

⁶ Report of the Judiciary Committee of the House of Representatives on recommending the passage of the bill to provide for the trial of offenses upon information, Michigan House Document No. 4 (1859); Michigan House Journal (1859), 237; Michigan Senate Journal (1859), 567; Laws of Michigan (1859), No. 138, sec. 1, 7, as described in: Younger, Richard D., *The Grand Jury Under Attack, Part I*, 46 J. Crim. L. Criminology & Police Sci. 26 (1955-56), pp. 35-36, available at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4344&context=jclc>, accessed July 1, 2015.

⁷ Recently, after the failure of grand juries to indict for the deaths of Eric Gardner and Michael Brown, there was public outcry that grand juries were archaic and serve no practical purpose. See, e.g., Hazzard Corbell, LaDoris, "Grand Juries Should Be Abolished," *Slate*, Dec. 9, 2014. Web. Available at: http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_gardner_and_michael_brown.html, accessed July 1, 2015.

⁸ Kramer, Marcia and Frank Lombardi, "New top state judge: Abolish grand juries & let us decide," *New York Daily News*, Jan. 31, 1985, p. 3. Available at: <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208>, accessed June 30, 2015.

⁹ See Decker, John F., *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L.Rev. 341 (2005), available at: <http://adams.law.ou.edu/olr/articles/vol58/decker583.pdf>, accessed July 1, 2015; Washburn, Kevin K., *Restoring the Grand Jury*, 76 Fordham L.Rev. 2333 (2008), available at: <http://www.law.virginia.edu/pdf/workshops/0708/washburn.pdf>, accessed July 1, 2015; Leipold, Andrew D., *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L.Rev. 260 (1995), available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2544&context=clr>, accessed July 1, 2015.

¹⁰ Simmons, Ric, *Re-Examining the Grand Jury: Is there Room for Democracy in the Criminal System?* 82 B.U. L.Rev. 1 (2002).

¹¹ *Id.*, at 27.

¹² See Beale, *supra*, at 8.2 (Pennsylvania has a unique system of allowing common pleas courts to replace the grand jury with prosecution by information at the permission of the state's supreme court, with currently all lower courts choosing the information system.) Available at: <http://www.courts.phila.gov/pdf/report/ri/Grand-Jury-Subcommittee-Report.pdf>, accessed July 1, 2015.

¹³ Matthews, Jason K., *The Evolution of Connecticut's Grand Jury System*, OLR Research Report, 2002-R-0088, Jan. 18, 2002. Available at: <http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0088.htm>, accessed July 1, 2015.

¹⁴ Professor James R. Acker argues that grand juries should be required for all possible death sentence cases to lower the chances of arbitrary uses of the punishment. See Acker, James R., *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisprudence of Death*, 21 Pac. L.J. 31 (1989).

¹⁵ Brenner, Susan & Lori Shaw, "Federal Grand Jury," Web. Last modified Nov. 17, 2006. <http://campus.udayton.edu/~grandjur/stategj/abolish.htm>, accessed July 1, 2015.

¹⁶ Ohio Constitutional Revision Commission, Proceedings of the Grand Jury and Civil Trial Jury Committee, Volume 10, January 23, 1976, pp. 5245 et seq.

ATTACHMENT B

50 State Survey of the Use of Grand Juries

ALABAMA

Article I, Section 8

That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established.

ALASKA

Article I, Section 8

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

ARKANSAS

Article 2, Section 8

No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger * * *.

ARIZONA

Article 6, Section 17

The superior court shall be open at all times, except on nonjudicial days, for the determination of non-jury civil cases and the transaction of business. For the determination of civil causes and matters in which a jury demand has been entered, and for the trial of criminal causes, a trial jury shall be drawn and summoned from the body of the county, as provided by law. The right of jury

trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause or by the parties with the consent of the court in any criminal cause. Grand juries shall be drawn and summoned only by order of the superior court.

CALIFORNIA

Article I, Section 14

Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.

Section 23

One or more grand juries shall be drawn and summoned at least once a year in each county.

CONNECTICUT

Article I, Section 8

No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

COLORADO

Article I, Section 8

Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information.

Section 23

The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons.

DELAWARE

Article I, Section 8

No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger * * *.

FLORIDA

Article I, Section 15

No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

GEORGIA

Article I, Section 1, Paragraph (c)

The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors

HAWAII

Article I, Section 11

Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee.

IDAHO

Article I, Section 8

No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of public prosecutor.

ILLINOIS

Article I, Section 7

No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use. No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.

INDIANA

Article 7, Section 17

The General Assembly may modify, or abolish, the grand jury system.

IOWA

Article I, Section 11

All offences less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offence, unless on presentment or indictment by a grand jury, except in cases arising in the army, or navy, or in the militia, when in actual service, in time of war or public danger. The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of a grand jury.

KANSAS

[No constitutional requirement. Grand juries permitted by statute.]

KENTUCKY

Section 12

No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

LOUISIANA

Article V, Section 34(A)

There shall be a grand jury or grand juries in each parish, whose qualifications, duties, and responsibilities shall be provided by law. The secrecy of the proceedings, including the identity of witnesses, shall be provided by law. (B) Right to Counsel. The legislature may establish by law terms and conditions under which a witness may have the right to the advice of counsel while testifying before the grand jury.

MAINE

Article I, Section 7

No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offenses, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger.

MARYLAND

[No requirement in constitution. Requirement found in statute.]

MASSACHUSETTS

[No requirement in constitution. Requirement found in statute.]

MISSOURI

Article I, Section 16

That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: Provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime; and that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.

MICHIGAN

[Abolished the constitutional requirement for a grand jury in 1859. Grand jury permitted by statute.]

MINNESOTA

[Abolished the constitutional requirement of a grand jury in 1904. Grand jury permitted by statute.]

MISSISSIPPI

Article 3, Section 26

Notwithstanding any other provisions of this Constitution, the Legislature may enact laws establishing a state grand jury with the authority to return indictments regardless of the county where the crime was committed. The subject matter jurisdiction of a state grand jury is limited to criminal violations of the Mississippi Uniform Controlled Substances Law or any other crime involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a violation of the Mississippi Uniform Controlled Substances Law or a crime involving narcotics, dangerous drugs or controlled substances if the crime occurs within more than one (1) circuit court district of the state or transpires or has significance in more than one (1) circuit court district of the state. The venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

Section 27

No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

MONTANA

Article II, Section 20

(1) Criminal offenses within the jurisdiction of any court inferior to the district court shall be prosecuted by complaint. All criminal actions in district court, except those on appeal, shall be prosecuted either by information, after examination and commitment by a magistrate or after leave granted by the court, or by indictment without such examination, commitment or leave. (2)

A grand jury shall consist of eleven persons, of whom eight must concur to find an indictment. A grand jury shall be drawn and summoned only at the discretion and order of the district judge.

NEBRASKA

Article I, Section 10

No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; Provided, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system.

NEVADA

Article 1, Section 8(1)

No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature) except on presentment or indictment of the grand jury classic language.

NEW HAMPSHIRE

[No constitutional requirement. Grand jury permitted by statute.]

NEW JERSEY

Article I, Section 8

No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger.

NEW MEXICO

Article II, Section 14

No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of

war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

NEW YORK

Article I, Section 6

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her

official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law.

NORTH CAROLINA

Article I, Section 22

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

NORTH DAKOTA

Article I, Section 10

Until otherwise provided by law, no person, shall, for a felony be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases offenses shall be prosecuted criminally by indictment or information. The legislature may change, regulate, or abolish the grand jury system.

OHIO

Article I, Section 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.

OKLAHOMA

Section II-17

No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint

Section II-18

A grand jury shall be composed of twelve (12) persons, any nine (9) of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a district judge upon his own motion; or such grand jury shall be ordered by a district judge upon the filing of a petition therefor signed by qualified electors of the county equal to the number of signatures required to propose legislation by a county by initiative petition as provided in Section 5 of Article V of the Oklahoma Constitution, with the minimum number of required signatures being five hundred (500) and the maximum being five thousand (5,000); and further providing that in any calendar year in which a grand jury has been convened pursuant to a petition therefor, then any subsequent petition filed during the same calendar year shall require double the minimum number of signatures as were required hereunder for the first petition; or such grand jury shall be ordered convened upon the filing of a verified application by the Attorney General of the State of Oklahoma who shall have authority to conduct the grand jury in investigating crimes which are alleged to have been committed in said county or involving multicounty criminal activities; when so assembled such grand jury shall have power to inquire into and return indictments for all character and grades of crime. All other provisions of the Constitution or the laws of this state in conflict with the provisions of this constitutional amendment are hereby expressly repealed.

The Legislature shall enact laws to prevent corruption in making, filing, circulating and submitting petitions calling for convening a grand jury.

OREGON

Article VII, Section 5d (3)

Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

PENNSYLVANIA

Article I, Section 10

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia,

when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law.

RHODE ISLAND

Article I, Section 7

Except in cases of impeachment, or in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, no person shall be held to answer for any offense which is punishable by death or by imprisonment for life unless on presentment or indictment by a grand jury, and no person shall be held to answer for any other felony unless on presentment or indictment by a grand jury or on information in writing signed by the attorney-general or one of the attorney-general's designated assistants, as the general assembly may provide and in accordance with procedures enacted by the general assembly. The general assembly may authorize the impaneling of grand juries with authority to indict for offenses committed any place within the state and it may provide that more than one grand jury may sit simultaneously within a county. No person shall be subject for the same offense to be twice put in jeopardy. Nothing contained in this article shall be construed as in any wise impairing the inherent common law powers of the grand jury.

SOUTH CAROLINA

Article I, Section 11

No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. The General Assembly may provide for the waiver of an indictment by the accused. Nothing contained in this Constitution is deemed to limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

SOUTH DAKOTA

Article 6, Section 10

No person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor, except in cases of impeachment, in cases cognizable by county courts, by justices of the peace, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: provided, that the grand jury may be modified or abolished by law.

TENNESSEE

Article I, Section 14

That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

TEXAS

Article I, Section 10

* * * [N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

UTAH

Article I, Section 13

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

VERMONT

Chapter II, Section 39

All prosecutions shall commence, By the authority of the State of Vermont . All Indictments shall conclude with these words, against the peace and dignity of the State . And all fines shall be proportioned to the offences.

VIRGINIA

[No requirement in constitution. Requirement found in statute.]

WASHINGTON

Article I, Section 25

Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Section 26

No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

WEST VIRGINIA

Article III, Section 3-4

No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury.

WISCONSIN

Article I, Section 7

In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

WYOMING

Article I, Section 9

The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law. A grand jury may consist of twelve (12) persons, any nine (9) of whom concurring may find an indictment. The legislature may change, regulate or abolish the grand jury system.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice-chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice
Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan Becker, Student Intern

DATE: January 26, 2016

RE: Supplemental Memorandum Regarding the Use of
Grand Juries in the United States

At its July 2015 meeting, the Judicial Branch and Administration of Justice Committee discussed issues surrounding the use of the grand jury in criminal prosecutions across the United States. This memorandum is intended to provide supplemental research on that topic.

Preliminary Hearing

In 27 states, only an information filed by the prosecutor, with the opportunity for a preliminary hearing, is necessary to charge a person with a crime.¹ However, many of these states also allow a prosecutor to choose between presenting evidence to a grand jury and using an information with a preliminary hearing (though the information filing is far more common). In most of these states, a defendant can be denied a preliminary hearing if they have been indicted by a grand jury. *See, e.g., Martinez v. State*, 423 P.2d 700 (Alaska 1967). A grand jury may be preferred by a prosecutor for "saving time, limiting defense discovery, or reducing the number of times the victim must testify publicly."² States with both an indictment and an information process may not systematically use one against certain classes of people. For instance, a prosecutor cannot choose an indictment over an information on the basis of a classification such as race, sex, or religion. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

¹ Sara S. Beale et al., *Grand Jury Law & Practice* 2d, 8.2.

² *Id.*

Constitutionally, the accused has a right to have either a grand jury or a judge establish probable cause before a case may go to trial. “[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.” *Hurtado v. California*, 110 U.S. 516, 538 (1884). The United States Supreme Court has ruled that a defendant has a constitutionally-protected right to have a preliminary hearing after the filing of an information. It also concluded that since the preliminary hearing only establishes probable cause, the accused is not entitled to the assistance of counsel. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Grand Jury Legal Counsel

There has been a small but vocal call for the appointment of legal counsel to serve as an independent advisor to grand juries. “The most important reform would be to give the grand jury an independent legal adviser, selected from outside the prosecutor’s office.”³ Currently, Hawaii is the only state to provide independent legal counsel to the grand jury, requiring it through a constitutional provision that reads:

Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

Haw. Const. art. I, § 11.

University of Dayton Professor Thaddeus Hoffmeister notes that Hawaii’s grand jury legal advisors consider their role to be highly effective in ensuring grand juries can make independent decisions.⁴ Susan W. Brenner, also a University of Dayton law professor, suggests that “Hawaii’s unique system is a solid model for federal grand juries and states wishing to re-establish the legitimacy and independence of grand juries.”⁵ Another writer considers the short period for serving on the jury as ensuring the advisor does not become “an entrenched party in the system.”⁶ The provision does not require the independent counsel to be present throughout the entire proceeding. *State v. Kahlbaun*, 64 Haw. 197, 638 P.2d 309 (1981). The purpose of

³ Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L.Rev. 1, 65 (2004).

⁴ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. Crim. L. & Criminology 1171 (2008).

⁵ Susan W. Brenner, *Forum: Faults, Fallacies, and the Future of Our Criminal Justice System: The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol’y & L. 67, 95 (1995).

⁶ Note, *What Do You Do With a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 S. Cal. L.Rev. 617, 637 (1998).



independent counsel is to provide a service for the grand jury, not the accused. *State v. Hehr*, 63 Haw. 640, 633 P.2d 545 (1981).

The only effort to provide counsel to a federal grand jury was made by then Senator Richard Nixon, who sought to give investigatory grand juries special counsel from outside the United States Attorney's Office.⁷ Nixon likely was thinking about the successful grand jury investigation into Alger Hiss, an investigation Nixon helped necessitate as a Congressman on the House Committee on Un-American Activities. The bill died in committee.⁸

Evidentiary Standards

There have been calls in the academic community for states to adopt tougher evidentiary standards than is required for federal grand juries. Professor John F. Decker argues for witnesses to have the right to counsel, the requirement of allowing exculpatory evidence, the exclusion of illegally or improperly obtained evidence, admonishments, the right for witnesses to appear, and the right to transcripts.⁹

Standards for protecting the accused that go beyond what is constitutionally required likely will be allowed by the courts. Ohio courts recognize the need for statutes that implement the constitutional guarantee of a speedy trial if they represent "a rational effort to enforce the constitutional guarantee * * *." *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980). Courts also recognize that statutes can offer stronger protections to defendants than what is constitutionally required. *See, e.g., State v. Jones*, 37 Ohio St.2d 21, 24, 306 N.E.2d 409, 411, fn. 1 (1974) (R.C. 2935.20 offers the accused a stronger right to counsel than what is guaranteed by the federal Constitution). Any statute that excludes illegally or improperly obtained evidence, allows exculpatory evidence, and allows witnesses to have the right to counsel are likely to be seen as constitutional. Some states already require some exculpatory evidence to be given to the jury. *See, e.g., State v. Hogan*, 144 N.J. 216, 676 A.2d 533 (New Jersey 1996).

New York Grand Jury Procedure

The New York grand jury system offers some of the strongest protections for persons subject to grand jury investigations and can serve as an example for Ohio. Moritz College of Law Professor Ric Simmons finds New York grand juries to be "active and engaged, and they critically evaluate the cases that come before them."¹⁰ Simmons calls for other states to follow the New York model by stopping prosecutors from re-presentation of the case if a grand jury investigation does not result in an indictment. He further advocates the New York practice of

⁷ Note, *Powers of Federal Grand Juries*, 4 Stan. L.Rev. 68, 75 (1951).

⁸ Note, *Reviving Federal Grand Jury Presentments*, 103 Yale L.J. 1333, 1345 n.60 (1999); Susan W. Brenner & Lori E. Shaw, *2 Fed. Grand Jury: A Guide to Law and Practice* (Supp. 2004), § 27:6.

⁹ John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L.Rev. 341 (2005).

¹⁰ Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L.Rev 1, 45 (2002).



banning hearsay testimony, allowing a suspect to testify in front of the grand jury, and providing judicial review of indictments, thus giving courts the power to reverse convictions if the indictment process was faulty. One commentator describes the New York process as relying on courts' willingness to be aggressive in protecting defendants' due process rights in the face of legislative silence on the matter.¹¹

Though these standards may appear tough, New York courts recognize that “[a] Grand Jury proceeding is not a ‘mini trial’ but a proceeding convened primarily to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution.” *People v. Lancaster*, 69 N.Y.2d 20, 30, 503 N.E.2d 990 (1986) [internal citations and quotation marks removed]. Nevertheless, in the New York grand jury, as in other states, there is not the back and forth of a trial, nor a requirement to call every possible witness. See *People v. Thompson*, 22 N.Y.3d 687, 8 N.E.3d 803 (2014).

Police Action and the Grand Jury

California currently has pending a bill requiring the Attorney General to appoint a special prosecutor to investigate all use of deadly force by police officers, giving the sole discretion to the prosecutor to file charges.¹² The bill, AB-86 as introduced by Democrat Assemblymember Kevin McCarty, is currently held under submission in committee.

In Ohio, however, the accused has a constitutional right to a grand jury. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985). Unless the accused waives his right to a grand jury, he is entitled to have the charges be brought forth in front of one. *Ex parte Stephens*, 171 Ohio St. 323, 170 N.E.2d 735 (1960).

New York Judge Aaron Short offers a different solution. He suggests that a judge should oversee a grand jury that is hearing a case against police officers and have the transcripts of those hearings to be open to the public. However, this proposal has not been adopted by the legislature.¹³

¹¹ Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 Pace L.Rev. 41, 92 (1994).

¹² Melanie Mason, “Tired of prayer vigils?: California debates 20 bills aimed at police force,” *Los Angeles Times* (May 3, 2015), <http://www.latimes.com/local/politics/la-me-pol-police-force-legislature-20150504-story.html> (last visited Jan. 27, 2016). Text of bill available at: http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB86 (last visited Jan. 27, 2016).

¹³ Aaron Short, “NY chief judge proposes sweeping grand jury reforms,” *New York Post*, (Feb. 17, 2015), available at <http://nypost.com/2015/02/17/ny-chief-judge-proposes-sweeping-grand-jury-reforms/> (last visited Jan. 27, 2016).



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE**

**FOR THE MEETING HELD
THURSDAY, JULY 9, 2015**

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:00 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Kurfess, Manning, Obhof, Sapphire, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the May 14, 2015 meeting of the committee were approved as amended.

Presentation:

The committee then turned to the issue of grand juries, specifically a proposal for change that was formulated by the Task Force on Community-Police Relations, and was brought to the committee by Senator Sandra R. Williams, who had served on the task force.

"Grand Jury Recommendation by the Ohio Task Force on Community-Police Relations"

*Senator Sandra Williams
Task Force Member*

Senator Williams introduced the recommendations of the task force, discussing the need for a preliminary hearing system in Ohio. She expressed concern over the lack of transparency in grand jury procedures and unchecked authority of the prosecutor. She argued the Ohio grand jury system is non-transparent, as the proceedings, witnesses, and materials are kept secret. Sen. Williams noted that although indictment rates are high, there has been a refusal to indict police officers in the high-profile deaths of John Crawford, Michael Brown, and Eric Gardner. The discretion given to the prosecutor means he or she can show favoritism toward certain defendants like police officers. Sen. Williams noted the criminal justice system works on the basis of

fairness and trust, and the grand jury is counter to fairness and undermines that trust. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police. Sen. Williams noted that it was unclear how much reform of the grand jury system in Ohio would be possible without violating the state constitution.

Chair Abaray then invited questions by committee members.

Committee member Richard Saphire said it is unclear to him whether the accused has a constitutional right to insist on a grand jury or whether the option is with the government. Sen. Williams said usually the accused does not know he is being brought before the grand jury. Mr. Saphire then asked what is the significance of saying a defendant has a right to grand jury if it is all up to the prosecutor whether a grand jury is utilized. Sen. Williams said that, in Ohio, the prosecutor has to go through the grand jury when the crime is a felony. Mr. Saphire asked whether this procedure is statutory, and Sen. Williams answered this is in the Ohio Constitution, at Article I, Section 10. Mr. Saphire said this was not clear from the language of the section, and Chair Abaray suggested that the second speaker to present to the committee, Professor Gregory Gilchrist, might be able to address the question.

Judge Fischer said he understands there are problems, but most of the issues sound statutory. He said Ohio Revised Code Chapter 2939 has not been revised since 1953, asking whether the legislature should be the appropriate body to make the changes. Judge Fischer asked why it would be necessary to throw out the entire system for one issue that, by statute, could be changed. Sen. Williams answered that the legislature could do a few things, but to get rid of the grand jury, a constitutional amendment would be required. She continued, saying, the reforms she advocates are being pursued through several different channels. She said the Legislative Service Commission reviewed the recommendations and said some of them must be undertaken through the Ohio Supreme Court rulemaking authority, but that others could be accomplished legislatively. Sen. Williams said the history of the task force effort to change the grand jury process was that she had sent a letter to Ohio Supreme Court Chief Justice Maureen O'Connor seeking reforms, but was informed that, because the grand jury was constitutional, the Supreme Court could not act. She said the grand jury may be fair in some instances, but in the case of officer-involved shootings, the procedure does not seem fair from the public's viewpoint. Sen. Williams said her effort involves attempting change through all possible options.

"An Introduction to the Grand Jury"

*Professor Gregory M. Gilchrist
Associate Professor of Law
University of Toledo College of Law*

The committee then heard a presentation by Gregory M. Gilchrist, professor of law at the University of Toledo College of Law, who introduced the committee to the history and function of the grand jury. Prof. Gilchrist said grand juries originally were to protect the people from the over-politicized power of the king. He said the right belongs to the accused, so the accused cannot be prosecuted for an applicable crime unless the charge has gone through a grand jury.

Mr. Saphire asked whether, if a particular defendant or his or her counsel believes the grand jury would not be an appropriate way to proceed, could the defendant waive the grand jury, thereby requiring the state to proceed by presentment (an information), which is a public process. Prof. Gilchrist denied that this would be the case, saying an information involves the prosecutor working solo and then filing with the court, and only at that time does it become public.

Chair Abaray asked whether there is a difference between a presentment and an indictment. Prof. Gilchrist explained that a presentment was originally another way the grand jury could indict, by bringing the charges itself without assistance from a prosecutor. He said that procedure has not happened in at least 100 years, and at the federal level he is not sure it could happen. Prof. Gilchrist added he is not sure it could happen without a U.S. attorney signing off on it. He said this procedure is not used anymore.

Mr. Saphire described how, in an individual case, if the defendant believes a grand jury is a preferable way to proceed and the prosecutor does not agree, the defendant can insist, but then problems could arise in the context of a grand jury as described by Sen. Williams. He asked whether there is a more public way to proceed other than using the grand jury or presentment. Prof. Gilchrist said no, in Ohio he does not believe there is, but that there is in other states. He said, for example, California developed a preliminary hearing program that was practically a mini trial. He noted that procedure has been changed by the legislature in California because it was seen as burdensome. He added there are a number of states that do this. Senior Policy Advisor Steven H. Steinglass noted that Wisconsin is one of these states. Prof. Gilchrist said that the Ohio language is the same as the federal provision. He said he has not researched Ohio case law on this question, but this language is fairly open, so it is possible the process could be revised without change to the Ohio Constitution. He noted that New York is a good example, indicating that the accused has the right to testify in New York. He said conceivably a change could be implemented under Article I, Section 10. He said that, as to Judge Fischer's question about whether change must be undertaken in the constitution, Prof. Gilchrist said if the committee wanted to drastically change the procedure by statute, the language in the constitution does not seem to allow it.

Prof. Gilchrist then turned to the issue of whether the grand jury system works. He said in its current use the grand jury is not very effective as a shield for the individual citizen. He observed that historically it was, noting that in colonial times it was a tool against royal prosecutors, and colonists refused to issue indictments. Today, he said, the procedure is largely in the control of the prosecution. Despite this, the U.S. Supreme Court continues to insist that the grand jury controls the prosecution rather than being controlled by the prosecution. He said the prosecutor does control what the grand jury sees and hears, and how you do it makes a difference. He said the other reason prosecutors have such control is that trust is a human function. Because grand juries serve for a period of months they could be comprised by people with no experience in the law. In such an instance, he said the jury could be fully guided by the prosecutor, whom they get to know on a day-to-day basis.

Mr. Saphire asked, if a grand jury believes a prosecutor is acting inappropriately, whether the grand jury has the legal authority to compel the prosecutor to abandon the attempt to indict. Prof. Gilchrist answered practical concerns would matter more than actual authority as the grand jury

can ask follow-up questions and gather information. He said the grand jury has the authority of the court to issue subpoenas, and could issue its own subpoenas without the approval of the prosecutor. He said, technically, the jury needs the approval of the judge, so, as a practical matter, it is only when there is an unfair “fishing expedition” that the judge gets involved.

Mr. Saphire then asked whether, because the jury relies on the prosecutor to do its job, there has to be some affinity or mutual respect between the prosecutor and the grand jury for the jury to be effective. The grand jury also learns the law from the prosecutor, said Prof. Gilchrist, noting the federal government’s prosecution of Lawrence Stevens, the attorney for GlaxoSmithKline, in a case in which, during the grand jury investigation, some jurors asked questions and the prosecutor’s answer was erroneous. [*United States v. Stevens*, 771 F. Supp.2d 556 (D. Md. Mar. 23, 2011).] He said when the judge reviewed the case, he saw the error and dismissed the indictment for that reason. Prof. Gilchrist said that, as a practical matter, it is hard to imagine grand juries doing much without the assistance of the prosecutor’s office.

Prof. Gilchrist noted that in only a tiny fraction of federal criminal cases is a finding of “no indictment” returned. He said that in New York there is a higher instance of no bills, but that states vary. He said it is common for the prosecutor to get indictments when he asks. He noted there is a small number of “no bills,” but it does happen.

Chair Abaray asked whether prosecutors ask the jury what it wants to do, and whether there are cases in which the prosecutor is not asking for an indictment. Prof. Gilchrist said it is possible for a prosecutor to present to a grand jury when he is not actually hoping for an indictment. He said he has no information or idea how often that happens.

Chair Abaray then asked whether, if the prosecutor goes to the grand jury, does he distinguish the separate acts of presenting evidence and asking for indictment. Prof. Gilchrist said no, that in the federal system it is all together. He said it is a professionalized business; FBI is good with the evidence. He noted the prosecution is using the power of the grand jury, but the FBI agent and the prosecutor to decide what to do next.

Committee member Mark Wagoner asked whether there are empirical numbers for the state of Ohio as to how often the grand jury returns an indictment as versus how often the grand jury is used. Prof. Gilchrist said he hasn’t gathered that data. He said one reason the data doesn’t exist is that the grand jury functions in secret. He said the defense attorney is not allowed in with the client. He said only the members of grand jury, the court reporter, the accused, the prosecutor, and the witnesses are in the jury room. Prof. Gilchrist added that witnesses are not sworn to secrecy; they can tell anyone anything they want. He said that, for everyone but the witness, it is a secret proceeding. Prof. Gilchrist said it sounds un-American to be in secret, but that there are reasons for the secrecy.

Mr. Wagoner asked whether the accused has a right to testify. They do not, said Prof. Gilchrist, although it is unusual for a defense attorney to ask. He said when the accused asks, many prosecutors will allow it. He added, “As a prosecutor, I would be worried about how that would look if it is brought out at trial, and so I would allow it as a practical matter.”

Prof. Gilchrist noted that the reasons for secrecy include preventing the accused from knowing about the investigation (flight fear), and also to protect the jurors from undue influence. He added, the concern is about what would happen if everyone knew about the grand jury's business – the jurors might be influenced by neighbors and others, whereas with secrecy they are able to make a decision based only on the evidence.

Mr. Sapphire asked whether, if a person learns he is being investigated by the grand jury, he would be free to leave the jurisdiction, further noting that technically the person hasn't been charged yet and would be free to go. Prof. Gilchrist agreed, but said few people are able to leave the jurisdiction because they have knowledge they are being investigated.

Prof. Gilchrist said another reason for secrecy is to protect the safety of witnesses, who could be threatened if their testimony might incriminate. He said a final reason for secrecy is to protect the reputation of the accused, because once someone is accused there is harm, and even if the person is acquitted, it is still an ordeal. He noted that the power of accusation is a powerful tool. Prof. Gilchrist commented that sometimes charges might be made up by a witness, so that, with secrecy, if the grand jury finds no probable cause, the person's reputation is not tarnished.

Describing the vote taken by jurors, Prof. Gilchrist said the standard for whether to indict is "probable cause," which is a low standard. He said 12 out of 15 jurors have to vote to indict. He further stated the rules of evidence do not apply, so that sometimes the prosecution proceeds solely on the testimony of an FBI agent. Prof. Gilchrist observed that the grand jury is a relatively informal procedure. He said the jury is not entitled to receive exculpatory materials, nor is the prosecutor required to present them. He noted there are tactical reasons why the prosecutor would want to present them, but he is not required to do that.

Mr. Sapphire commented that the process seems loaded in favor of the prosecutor and, if that is true, given all the aggravation and cost and expense for the accused, it seems to raise some serious concerns about the use of the grand jury, if it is almost a rubber stamp. Mr. Sapphire wondered whether Prof. Gilchrist is aware of any state recently that has moved away from the grand jury system to something else. Prof. Gilchrist said he is not aware of that.

Chair Abaray followed by asking whether any states have both a grand jury system and an information system. Prof. Gilchrist said yes but that he doesn't know how that works.

Prof. Gilchrist noted that Mr. Sapphire's question raises the idea that, if this is a rubber stamp, why not get rid of the grand jury and allow prosecutors to proceed by information. He said one thing to note is that the *Hurtado* case, from 1884, indicates the states are not bound by Fifth Amendment to the U.S. Constitution, but the court in *Hurtado* was reviewing a California preliminary hearing procedure and found it was consistent with due process. [*Hurtado v. California*, 110 U.S. 516 (1884).] He said he is not sure what would happen if the state eliminated any kind of proceeding at all.

Chair Abaray asked whether any Ohio Supreme Court cases interpret any component as being essential. Prof. Gilchrist said there is an Ohio case requiring grand jury transcripts. He said the rules say there *may* be a court reporter, but the Ohio Supreme Court says there *must* be. Chair

Abaray asked whether that is something the committee should research. Prof. Gilchrist said he has not looked into that. Vice-chair Fischer noted there are several Supreme Court cases on Crim.R. 6(E), the secrecy provision. He said *Organic I* [*In re Special Grand Jury Investigation Concerning Organic Technologies*, 74 Ohio St.3d 30, 656 N.E.2d 329 (1995)] and *Organic II* [*In re Special Grand Jury Investigation Concerning Organic Technologies*, 84 Ohio St.3d 304, 703 N.E.2d 790 (1999)] explicitly adopted the federal process for declassifying the proceedings.

Prof. Gilchrist said that the transcripts become public during trial. In federal court, the transcripts are considered to be Jencks material.¹ When the prosecution calls a witness at trial, the prosecutor has to provide the witness's prior statements to the jury, and must give the transcript of that prior testimony to the defense.

Regarding Jencks material, committee member Jeff Jacobson asked whether, if there was no grand jury process and instead it is just bill of information, there would be less opportunity for the defense to prepare witnesses, and less opportunity to keep the witnesses honest. Prof. Gilchrist agreed that even under a grand jury process that can still happen because a prosecutor can proceed through the use of hearsay. Mr. Jacobson asked whether the defense has any right to see what the witness said. Prof. Gilchrist explained the way it works is that the defense has no right to Jencks material until after the direct examination of the witness. He said usually you get it earlier because the attorneys are collegial. He said it is easy enough for the prosecutor to insulate more fully by calling the witness before the agent.

Mr. Jacobson commented on the saying that a prosecutor could get a grand jury to indict a ham sandwich if he wanted to, asking whether that saying is as true in Ohio as elsewhere. He additionally wondered about whether there are safeguards against abuse of the system by prosecutors. Prof. Gilchrist answered there is nothing helpful on Ohio rates of indictment through the use of the grand jury. As far as the procedural safeguards, he said he doesn't know of any specific ones, but that having a court reporter present helps. He said there are not many formal procedural safeguards, and courts have been reluctant to supervise prosecutorial discretion. He said the question involves the role of the executive branch, and the judiciary doesn't get involved.

Mr. Jacobson asked whether there are ethical considerations. Prof. Gilchrist said that, yes, as attorneys, prosecutors have the same ethical obligations as defense attorneys, and have additional duties as special officers of justice. But, he said, what goes with that is there is no outside power that has the ability to enforce those duties. Mr. Saphire added that to enforce an ethical duty, you have to know about a breach, and so the conduct that is believed unethical has to be brought to light. He said that with secrecy, it is rare that would happen. Nevertheless, Mr. Saphire said, the grand jury itself can check the prosecutor.

Chair Abaray asked whether there should be a different procedure in cases of officer-involved shootings. She asked whether any states distinguish between the process depending on the accused, and whether there would be equal protection issues raised by the concept of having two

¹ The Jencks Act, 18 U.S.C. § 3500, requires the prosecutor to produce statements by a prosecution witness, but only after the witness has testified. Under Fed. R. Crim. Pro. 6, Jencks material would include a witness's grand jury testimony, if the witness testified at trial.

different procedures. Prof. Gilchrist said he is not able to answer that, remarking that no other state separates out the class of accused.

Chair Abaray then directed the same question to Sen. Williams, who said she has not seen another state adopting this. She does know there are legislative initiatives being considered by other states, citing research provided to her by the Legislative Service Commission. She said Connecticut and Pennsylvania used the ballot initiative to get rid of the grand jury. In Connecticut, the accused has to go before a judge, while Pennsylvania lets the individual counties determine how to proceed. She further noted that there are 25 states that make use of the grand jury optional.

Mr. Jacobson commented that it seems the only check on the prosecutor is the grand jury itself. He said there may be some self-censorship on the part of the prosecutor. Prof. Gilchrist said there is one other check: it is the prosecutor's office, their bosses, and the policies of each office. He said the U.S. Department of Justice has rigorous policies, and has published an internal rule that they do provide exculpatory matter to the jury even though there is no Supreme Court requirement for this.

Judge Fischer said that, to him, the check is that there is no prosecutor in the room when the jury deliberates and when they vote. Prof. Gilchrist said that is a good point. Judge Fischer said prosecutors do not bring a case unless they think they can get an indictment, and they pick the cases to bring before the grand jury. Prof. Gilchrist agreed, saying one would expect a high rate of indictments because of this practice.

Mr. Saphire asked Prof. Gilchrist where he stands on the issue of whether to keep or eliminate grand juries. Prof. Gilchrist said, as a practitioner, there is not much shield value; he thinks prosecutors get the indictments they want to get. He said, on the whole, based on his research, something like the New York system seems like a good balance. He said that method would maintain the grand jury but would have procedural checks.

Mr. Jacobson noted that the problem people have worried about in the past has not been failure to indict but what to do about the overzealous prosecutor. He said in the last year there have been newer concerns about a failure to indict. He asked whether these are mutually incompatible worries. Prof. Gilchrist said he is not sure the two situations are incompatible. He said the worry about failure to indict is that the game is rigged. He said in a public preliminary hearing setting, rigging the game wouldn't be possible. He said he is not sure a more rigorous procedure is at odds with false no bills.

Representative Emilia Sykes asked what reforms Prof. Gilchrist would recommend. Prof. Gilchrist said he would consider specific ideas from New York's experience with the criminal indictment process. He said they apply the rules of evidence more rigorously in the grand jury, although he is not sure they apply the full rules. He added that New York recognizes a right of the accused to testify, requires a judicial review of the final transcripts after indictments are returned, even having a review for a no indictment. Prof. Gilchrist also said that in New York there is no "double jeopardy" in the grand jury process, meaning that when the prosecutor

presents evidence but the jury refuses to issue an indictment, the prosecutor cannot try again. Ohio, by contrast, allows the prosecutor to keep trying, he said.

Sen. Williams commented that when she met with the Legislative Service Commission staff, she was told it is not clear what could be done statutorily without violating what the grand jury is understood to mean within the Ohio Constitution.

Committee member Charles Kurfess remarked that when he reads the constitutional provision, he thinks one could suggest that prosecutorial control of the grand jury is inconsistent with our constitutional provision. He asked whether there is any reason that a judge could not appoint counsel to advise the grand jury. Prof. Gilchrist said he is unsure what authority the judge would use. He said the grand jury is an independent body, not part of the executive or judiciary branches. Judge Fischer said the grand jury is not an arm of the court, and wondered, so long as *Hurtado* and other cases say the federal constitution doesn't go that far, why wouldn't states be able to create their own version of grand juries. Prof. Gilchrist agreed with this assessment.

Judge Fischer said he does not see it as a constitutional problem, saying "If you get past whether we want [a grand jury] or not, then the rest is legislative."

Prof. Gilchrist said if someone wanted an alternative procedure, then it is a constitutional question. But the process is not constitutional, said Judge Fischer.

Mr. Saphire asked Sen. Williams whether she had heard from prosecutors, defense attorneys, or others during the task force proceedings. Sen. Williams said the task force did not hear from those parties. Mr. Saphire suggested it might be interesting to hear from organizations whose members are involved in the process.

Chair Abaray agreed, saying the committee should put more resources into getting this input in order to assist its deliberations. Sen. Williams added that Franklin County Prosecutor Ron O'Brien was on the task force, and he provided insight into the recommendation to have a judge oversee all grand juries. She added that the task force also heard from some people who had served on grand juries who said they accepted what the prosecutor said because they did not have a lot of information.

Mr. Saphire wondered whether grand juries know they can disregard the prosecutor, and, if they do not, do they defer to the prosecutor without knowing they do not have to. Prof. Gilchrist suggested it might be useful to look at what courts around the state do to educate grand jurors.

Mr. Wagoner said there is often a video presented in order to prepare and educate petit jurors, but that he does not know if anything similar exists for a grand jury. Executive Director Steven C. Hollon answered he is not aware of courts using a video of this type.

Chair Abaray asked Sen. Williams if she thought having a judge involved in the process would help. Sen. Williams said that judges run for office and are supported by prosecutors, unions, and police. She said having a judge involved might make the process more transparent, but it is still problematic.

Chair Abaray recalled an incident from her practice in which there was a rumor of an investigation by a grand jury of a former client. She said the client was never called before a grand jury, and the possible accusations were not publicized, with the result that his reputation was not ruined. She said that is the flip side of the concern. She asked Sen. Williams if she had any thoughts on the protective effect of the grand jury process in that type of situation.

Sen. Williams agreed the anonymity of the potentially accused person can be an issue, but when there is an officer-involved shooting everyone knows who the officer is. She said if the incident is made public by the media, people know. Sen. Williams noted the belief among some in Cuyahoga County, based on recent incidents, that prosecutors can destroy people just by bringing an investigation to the grand jury. She said prosecutors may not say they want an indictment to be returned.

Mr. Saphire asked Mr. Steinglass whether the Constitutional Revision Commission in the 1970s made a formal proposal about grand juries. Mr. Steinglass said they did recommend eliminating the grand jury but nothing happened in the General Assembly. Mr. Steinglass said he would do further research and advise the committee if there is more information on this. Sen. Williams said the Legislative Service Commission found those recommendations, noting there were five recommendations made, but the General Assembly did not act on any of them.

Mr. Jacobson said there seems to be a compelling reason to make this more of a constitutional concern. He said "We could defer but there are plenty of reasons to include more safeguards." He said, at the same time, he is concerned that the issue of the moment is being used to eliminate a long term positive protection for the accused. Mr. Jacobson said the committee should not want to get rid of the protections of the grand jury for the individual in order to address current issues. He speculated this is what motivated people in the past. He said the idea of involving a judge who could be there and/or review an indictment, might be something around which there could be more consensus. Mr. Jacobson added that the committee should be searching for a balance. Chair Abaray agreed and said she wants to emphasize the committee is here because it respects the judiciary. She does not want to imply the committee distrusts the judiciary to perform its function. She said one role of the committee should be to address this lack of comfort for citizens, but that the committee also should uphold the role of the judiciary.

Mr. Steinglass said that in the 1970s, the Constitutional Revision Commission recommended the repeal of the grand jury language, and then recommended a new Article I, Section 10a, along with a substitute set of provisions. He said the 1970s Commission had four goals: the first being they favored the information or complaint as the primary method, but permitted either the accused or the state to demand a grand jury hearing. The second goal was to grant every person accused of a felony the right to a grand jury. The third goal was to require the prosecutor to reveal exculpatory evidence. Finally, he said, the fourth goal of the 1970s Commission is that they wanted to permit any witness appearing before a grand jury to have counsel present. Mr. Steinglass said staff would send a copy of the 1970s Commission's final recommendation to the committee members.

Mr. Wagoner suggested the next steps for the committee could be to get prosecutors, defense attorneys, and judges to present about their experiences. He also recommended obtaining input from the Ohio Judicial Conference.

Mr. Jacobson observed that the choice given in the 1970s recommendation was for the prosecutor to use the grand jury, or to have the prosecutor or the accused opt for a preliminary hearing.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:30 p.m.

Approval:

The minutes of the July 9, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the December 10, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Excused

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE**

**FOR THE MEETING HELD
THURSDAY, DECEMBER 10, 2015**

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:40 p.m.

Members Present:

A quorum was present with Chair Abaray and committee members Jacobson, Kurfess, Mulvihill, Obhof, Saphire, Skindell, and Wagoner in attendance.

Approval of Minutes:

The minutes of the July 9, 2015 meeting of the committee were approved as amended.

Presentation:

Chair Abaray then turned the committee's attention to the ongoing consideration of the issue of the use of grand juries in Ohio, as provided in Article I, Section 10. She introduced two members of the Ohio Prosecuting Attorneys Association, Michael T. Gmoser, prosecuting attorney for Butler County; and Morris J. Murray, prosecuting attorney for Defiance County, who were present to provide their perspective on the use of grand juries in criminal prosecutions.

"The Grand Jury Process"

*Michael T. Gmoser
Prosecuting Attorney
Butler County, Ohio*

*Morris J. Murray
Prosecuting Attorney
Defiance County, Ohio*

Mr. Gmoser spoke first, indicating that 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He remarked that law is an evolutionary institution, but there are some aspects of law that should be a constant. He said the grand jury process should be a constant, and is provided for under federal law in the United States Constitution. He added that the grand jury process is an Ohio institution that has changed very little over the years because it is based on the principle that no person shall be held to answer for a serious crime without a grand jury indictment, and that the process requires secrecy. Mr. Gmoser acknowledged that whenever there is an issue that demands transparency, the institutions that demand secrecy come under attack and that is only natural. But, he said, transparency is not a good thing when it comes to charging someone as opposed to trying someone. He cautioned the committee that it could do damage if it acts in favor of transparency, because the secrecy in the grand jury process benefits the guilty as well as the innocent.

Mr. Gmoser said he first wanted to emphasize that prosecutors do not, in the main, indict innocent people if they can avoid it. He said prosecutors have to be accountable to the public and do not want to try cases they cannot win. He said, unlike the popular saying, there is nothing to be gained by "indicting a ham sandwich," adding that might be true as an exception to the rule, "but we should not change the whole system because of it." He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors have an interest in protecting suspects from the condemnation of public disclosure. He remarked that the other function he finds essential to the operation of his office is the use of the grand jury as a tool to obtain information in a private, secret way. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

He explained the end result of a grand jury proceeding is a charging instrument that results in a court proceeding in which the defendant has all the protections afforded a criminal defendant. At the time a criminal charge is brought, the accused has a right to the evidence, but he said this does not mean the evidence should be given to the defense before or during grand jury proceedings. Mr. Gmoser concluded his presentation by asking the committee to "protect a vital institution of our state" by making no modifications that will eliminate the confidential nature of the grand jury process.

Chair Abaray explained that an issue the committee has been asked to address, which was raised by communications from Sen. Sandra Williams and Ohio Supreme Court Chief Justice Maureen O'Connor, is whether there are any changes or recommendations that would help the public gain confidence in the grand jury system. She said, when things are done in secret, that requires trust, and if trust is eroded, that has a negative effect. She asked Mr. Gmoser whether he had any suggestions for ways to improve the process, beginning, specifically with a practice used in other states, such as Pennsylvania and New York. Chair Abaray described that, in those states, grand jury proceedings are recorded by a court reporter and then, at the end of the proceeding, are reviewed by a judge who signs off that the process was properly done. Chair Abaray wondered whether Mr. Gmoser is familiar with this practice and what his opinion is of it.

Mr. Gmoser responded that prosecutors are against that practice. He said this kind of oversight, particularly a method that uses a commission to review the proceedings, can create problems because if a controversy arises the public then wants to fire the commission. He said, regardless, the successful operation of the system always depends on the quality of the prosecutor, calling prosecutors “the most ethically-oriented people we have in our society dealing with criminal law.” He said, as prosecutor, he is able to identify problems and knows how the system should work. He added having another layer of oversight would complicate speedy trial requirements. He said oversight would be impossible in the larger counties, maybe possible in smaller counties, but in little communities everyone knows everyone’s business anyway. He said that is not a workable solution, adding that judges already are involved; every grand jury is instructed by a judge about its duties. He said if the committee would want to require the prosecutor to inform members of the grand jury that it is their jury and not the prosecutor’s grand jury, he would be okay with that because he already does that. He said he insures the grand jury’s independence, and that the grand jury never is told what it must do. He does inform the grand jury of the law, what the complicating factors are, and what the details of the case are, and if that practice were institutionalized by a law requiring it he would be amenable to that. He added that the proceedings are recorded and transcripts are made. He said these are the practices he would suggest, rather than an additional layer of oversight.

Chair Abaray explained that the role of the Commission is to look into issues, and that the committee is not advocating a position.

Committee member Richard Saphire noted that one fifth of the states allow judicial review, wondering whether Mr. Gmoser is familiar with the experience in other states. Mr. Gmoser replied that he is not in a position to comment on that.

Senator Larry Obhof commented that the grand jury process provides fairness to the would-be defendant, meaning that if someone is not actually charged with a crime, all the things that could be said in that room could taint how that person is viewed publicly. Mr. Gmoser agreed, saying that is the secrecy that is required. He said that could be devastating for the person who is being investigated but not charged. He said justice comes first for the prosecutors, but not for defense attorneys, whose role is to defend their client.

Committee member Jeff Jacobson said he has no issue with secrecy, acknowledging that there is a danger to people who have not or may not be charged in having rumors become a matter for public conversation. But, he said, that is not the end of the story. He wondered whether Mr. Gmoser was familiar with a situation that developed in Wisconsin, in which a prosecutor decided to go after certain people for activity that was not actually criminal, with the result that multiple incidents of prosecutorial abuse and harassment of citizens occurred before two rulings by the state supreme court stopped the abuse of process. Mr. Jacobson said this all occurred because the prosecutor started with a theory that was not the law, then told the grand jury what the law is and was wrong. Mr. Jacobson wondered how oversight could have been helpful in preventing that abuse of the system.

Mr. Gmoser said the fact that the incident was publicized is evidence that the system works. He said an extra layer of oversight would not prevent unethical activity that perverts the system.

Mr. Jacobson followed up, asking, “if a prosecutor decides to investigate what is not a crime and tells the grand jury it is a crime, who can tell the grand jury that he is wrong?” He added that a system that would allow oversight in certain instances could prevent abuses. He commented, “someone could have died as result of those activities [in Wisconsin], and yet no one could challenge the prosecutor’s interpretation of the law within the context of that investigation.”

Mr. Gmoser answered that one size would not fit all, and that it would be impossible to establish specific categories that a judge would be able to look at. He said he would not want to see oversight required just because of a problem in Wisconsin. Mr. Jacobson continued that there was also a similar instance at Duke University, to which Mr. Gmoser replied that this is not that big of a problem if only two cases illustrate it.

Committee member Dennis Mulvihill asked whether Mr. Gmoser always asks the grand jury to return an indictment. Mr. Gmoser replied that he never asks the grand jury to return an indictment, and that he also informs assistant prosecutors that they should never ask the grand jury to do that. He said he suspects many prosecutors do it the same way. He said he may recommend one charge as versus another, but he never tells them they must do something. Mr. Gmoser said he tells the grand jury “here is the grocery list of offenses; your duty is to find probable cause, not proof.” He added that the grand jury gets that instruction from a judge before they hear it from him. He said, if all the evidence that is ever produced in a case has been heard by the grand jurors, and in their minds the case will never arise above a probability, and they are convinced the case will not be proved beyond a reasonable doubt, he is not going to proceed. He said some juries will indict anyway, but in that situation he goes to the judge and asks for the case to be *nolle prosequi*.

Mr. Mulvihill asked how often the grand jury reaches a conclusion that Mr. Gmoser does not think is justified. Mr. Gmoser answered that this occurs less than 10 percent of the time.

Chair Abaray then recognized Morris J. Murray, prosecutor for Defiance County. Mr. Murray began by emphasizing that the grand jury process is “absolutely critical” to the fair and efficient administration of justice. He then read from the jury instructions that are provided to grand jurors at the time they are sworn by the judge. The instructions describe the grand jury as an “ancient and honored institution,” indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward. The instructions further describe a two-fold purpose for secrecy, one being that it protects the reputation of the person under investigation, and the other being that a person who learns he or she is being investigated could then have the opportunity to escape. The instructions go on to describe the meaning and purpose of a criminal indictment, to describe the process by which information will be presented to the jurors, and to set out the requirements that must be met before an indictment is handed down. The instructions also caution the jurors that they must be fair and unbiased, must recognize that hearsay evidence is unreliable, and that, as the sole judges of the facts, are not to be influenced by the prosecutor in deciding whether to approve an indictment. The instructions describe that the jury’s deliberations will be conducted outside the presence of others. Finally, the instructions state: “In the field of crime your authority for

investigation is almost unlimited. It must, however, be directed by honest and conscientious motives to determine if a person or persons should be charged with a specific crime.”

Mr. Murray commented that grand jurors take these instructions to heart. He emphasized that prosecutors do not seek to indict innocent people and do not pursue cases in which it is clear that there is no probable cause. He noted that, on the other hand, if grand jurors decide a true bill should be returned, a prosecutor is obligated to pursue the case, even if it is difficult or controversial. Mr. Murray reiterated the importance of secrecy to the process because it protects the privacy of persons subject to a grand jury proceeding. He concluded by stating that the grand jury process is “not broken” but accomplishes the objectives set forth in the grand jury instructions.

Chair Abaray recognized Mr. Saphire, who asked whether jurors get the instructions in writing. Mr. Murray answered that the instructions are available in writing if the jurors want them. Mr. Saphire said he agreed that the instructions are comprehensive and give a juror a sense of responsibility, but said he wonders if jurors listening to instructions being read would have the ability to understand. Mr. Murray said he is not sure if jurors fully comprehend all they hear, but, based upon what jurors say and the kinds of questions they ask, he does believe that they understand the instructions. He added, “while there are examples of bad cases, when you consider the hundreds of thousands of cases nationwide, our batting average is pretty good.”

Mr. Murray continued that law enforcement investigation is the first step, with the second step being the prosecutor’s review of the evidence. He said there is an element of prosecutorial discretion, and a prosecutor has to determine if a case is even worthy of a grand jury proceeding. He noted that confidentiality comes into play for a lot of good reasons. He said high profile cases can cause people to want to try to fix something that is not broken, adding that “very little, if anything, needs to be done” with regard to Ohio’s process.

Chair Abaray asked whether the grand jury instructions are required in Ohio. Mr. Murray answered that there are rules and statutory requirements regarding instructions that he believes are fairly consistent throughout the state. Chair Abaray then commented that the more the public can be informed about the grand jury process, the more it might benefit society as a whole. Mr. Murray replied that this is a good point, and that public servants could improve public education about the grand jury process.

Chair Abaray said she had heard jurors are allowed to consider evidence that is actually hearsay within hearsay, wondering how commonly that occurs. Mr. Murray noted that the instructions caution jurors that hearsay can be unreliable. He said, as a practical matter, he might have 15 to 20 cases that need review by a grand jury, so that for expediency he may present hearsay through a process that has the investigating officer reading a witness statement, for example. He said he might want the witness there in some cases, but that isn’t always necessary, adding it would bog down the process to always require a live witness, or, alternately, to simply say the grand jury cannot consider hearsay.

Mr. Mulvihill asked about the close relationship between police and prosecutors. He said some public criticism now arises out of that close relationship when a police officer is under suspicion,

and that there is an appearance of a conflict of interest. He said his more specific question is whether, where there is a conflict of interest, there should be a separate body to investigate officers.

Mr. Murray said cases may already be publicized before a prosecutor even gets the file. He said he would prefer that as little as possible be in the media about a high-profile case. Regarding the prosecutor's relationship with the police department, he said the process requires working daily with police officers. If the people he works with get in trouble or are accused of wrongdoing, he said he does not handle that case. He said he does not think an oversight commission, or other review would help, but, rather, "we just need common sense." He said he would get special prosecutor to handle the case if it involves police officer conduct.

Mr. Mulvihill wondered whether it might be easier to have an independent body that would investigate police officers or public officials. Mr. Murray said he has no problem with people who are unconnected with the case from handling the matter. He said any attorney can be a special prosecutor, although usually it is someone with experience. He said, like all attorneys, prosecutors are required to avoid the appearance of conflict and impropriety. He said he would never stay on a case in which he has a conflict.

Committee member Charles Kurfess asked how often grand juries change. Mr. Murray said jurors serve for four months. Mr. Kurfess then asked whether there should be a limit on how many times a prosecutor takes the same case to a grand jury in an effort to continue to try for an indictment. He wondered if, barring additional evidence, there should be a limit. Mr. Murray answered that he can count on one hand the times he has taken a case back to a grand jury, and in those instances it was because there was new evidence. He said he does not want to tie the prosecutor's hands from a public perspective. He said, as an example, sometimes witnesses recant or tell a new story, or a child witness changes his or her testimony. He said he hopes the public elects prosecutors who are competent and ethical. He said he does not know how one could put a check on that.

Mr. Kurfess asked whether, in those instances, the second grand jury should be advised that the case already has been heard. Mr. Murray said if he were to say that, he would be unable to avoid a discussion of the evidence that was presented on the previous occasion, or to avoid the question of why there was no indictment after the previous hearing.

Mr. Kurfess asked how the prosecutor decides whether to invite the accused to appear before the grand jury. Mr. Gmoser answered that he has had the accused come before the grand jury in certain cases, specifically cases such as date rape, in which he thinks it is important for the jurors to hear both sides of the story. Mr. Murray answered that sometimes counsel will ask to let the defendant testify, and sometimes the defendant wants to.

Mr. Kurfess commented that the grand jury process is the least understood by the public of all parts of the criminal procedure.

Mr. Gmoser noted that petit jurors in his county get written instructions, but that the grand jurors do not. He said he tells them the instructions, because he does not believe they get the full

import of the instruction at the time they are sworn. Mr. Kurfess said that, when he was a judge, he always gave written copies of the instructions.

Mr. Kurfess then asked about the substantive difference between a grand jury indictment and a preliminary hearing procedure. Mr. Murray answered the preliminary hearing process is often happening at an earlier stage, where there has been an investigation that blows up in a hurry. He said the presentation of a minimal amount of testimony is the same, but much more comprehensive information is presented to a grand jury. Mr. Gmoser said preliminary hearings are handled by municipal prosecutors. Mr. Murray added that it is often new prosecutors who handle preliminary hearings.

Mr. Kurfess asked whether there is any substantial difference between the federal grand jury procedure and Ohio grand jury procedures. Mr. Gmoser said the federal procedure is extremely guarded. Mr. Murray said, in the federal system, access to testimony is easier after the grand jury process has concluded. He said, in Ohio, prosecutors provide a transcript of grand jury testimony if the defendant testifies, and sometimes provide the transcript of the testimony of an accusing witness, but other than that they do not provide a transcript.

Mr. Kurfess invited the prosecutors' observations as to the purpose gleaned from the constitutional provision.

Mr. Gmoser said a grand jury is a device that protects the administration of justice and the fairness of the system, and is a form of due process protecting all rights across the board. Mr. Murray added the protections include protecting those who might be falsely accused.

Mr. Jacobson said it is a problem to focus on prosecutors' potential conflict of interest in regard to law enforcement, as prosecutors also may work closely with others such as the attorney general. Mr. Jacobson asked whether there are phases in a grand jury presentation, and whether, when the prosecution has presented its evidence, the jurors are given general or specific instructions about the case.

Mr. Murray said jurors are told the code section and the elements of the crime, and then are told they need to decide whether the information they have heard satisfies the elements of that crime. Mr. Jacobson followed up, asking whether a prosecutor could suggest one crime but not name the other potential crimes the evidence might support. He said he wondered if those instructions at the end of the presentation should be what should be transcribed and reviewed by a judge.

Mr. Gmoser answered that a judge is not going to sit as a second prosecutor and examine what the first prosecutor did. Mr. Jacobson clarified that he is not asking to check sufficiency, but is asking whether what was said as an instruction was fair and legitimate, and not a violation of someone's rights. He asked "what is wrong with the suggestion that someone who has unchecked power for a short amount of time could, in theory, abuse that power?"

Mr. Gmoser answered that no prosecutors do what Mr. Jacobson is suggesting could happen. He said the idea of a judge reviewing the final instructions to the jurors would not work and is not a good idea. Mr. Murray clarified regarding the instruction, saying if a prosecutor misinstructs, the

check on the process is what happens after that. He said he does not think the statistics will support that the process needs to be changed. He said there are a lot of cases that do not result in an indictment.

Mr. Jacobson continued, suggesting that if prosecutors do not want a judge to review their actions, why not provide the defendant a copy of the instructions so if there is something wrong it can be brought to someone's attention. Mr. Gmoser said prosecutors get a charge from the police, but sometimes the charge should be less or should be more, and this is why the charges are not always the same. He explained it is in the discretion of the prosecutor to decide the charge, and in doing so, the prosecutor ends up owning the case. He added, if the prosecutor loses the case, it is on the prosecutor.

Mr. Jacobson said he admits the system generally works, but wondered what percentage of cases is subject to a plea bargain. He explained that the fact of indictment is enough to force a plea, and because a defendant pleads guilty does not mean the original charge was fair. Mr. Murray said most prosecutors are telling the jury: "here is the evidence, here are the potential offenses," and they will offer the grand jury the opportunity to charge one or more offenses and some may be higher level of crimes than the circumstances warrant. He said, there is a necessity for that plea bargaining process to happen, but the grand jury gets the first look at it. Mr. Gmoser added "just because we plea bargain does not mean the charge was not well founded."

Mr. Mulvihill asked who provides answers if jurors have questions. Mr. Murray said the jury instructions notify jurors they can ask the court, adding the prosecutor is by statute the legal advisor to the grand jury. Mr. Mulvihill asked whether Mr. Murray recommends to the grand jury what the indictment should be, based on what the evidence shows. Mr. Murray said the procedure is not like in a trial. He said, in the grand jury he is saying "here is the evidence, here are your options." He said he tries to be as literal as possible.

Chair Abaray noted that a failure to indict was of concern in some of the police shooting cases. She wondered if, in situations where everyone knows about the incident, there has been consideration to releasing to the public the jury instruction or the charges. Mr. Gmoser said prosecutors would not consider doing so. He said the public trust issue would not be solved by giving a tutorial to the public. He added, in Butler County, every police shooting goes to a grand jury, but some counties do not require those cases to go to the grand jury. He said he always takes it to the grand jury when police are involved.

Mr. Kurfess asked whether the prosecutors always allow jurors the possibility of charging a lesser-included offense. Mr. Gmoser said that depends. He gave an example of a murder of a two-year-old year old child in which the suspect was indicted for felony murder but also for involuntary manslaughter. He said the two crimes have very different penalties, but he charged both ways because he did not want an argument with the court and the defense about whether one is a lesser-included offense of the other. Mr. Murray answered that sometimes the defense does not want a compromise option, and that the decision goes back to the strength of the evidence.

Chair Abaray thanked the prosecutors for their presentations.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:10 p.m.

Approval:

The minutes of the December 10, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the February 11, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Patrick Fischer

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE**

**FOR THE MEETING HELD
THURSDAY, FEBRUARY 11, 2016**

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:40 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, McColley, Mulvihill, Saphire, and Sykes in attendance.

Approval of Minutes:

The minutes of the December 10, 2015 meeting of the committee were approved.

Presentations:

Senator Sandra R. Williams
Senate District 21

Chair Abaray recognized Senator Sandra R. Williams to update the committee on efforts she and other interested parties have undertaken to revise Ohio's grand jury process. Noting the Ohio Constitution currently requires a grand jury indictment in the case of any felony, Sen. Williams said she believes the grand jury process should be removed from the Ohio Constitution. She said she and Senator Charleta Tavares have introduced Senate Joint Resolution 4, a proposal that, if adopted, would require the General Assembly to determine the indictment process. She added that her constituents support the use of a preliminary hearing process, rather than a grand jury investigation, for incidents involving police officer shootings. She said the high-profile nature of these incidents signifies that the public is already aware of the investigation, negating the need for secrecy.

Identifying four recommendations she would like the committee to support, Sen. Williams first suggested the General Assembly should adopt legislation requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer's use of lethal force against an unarmed suspect. She said these high-profile cases currently are tried by local prosecutors who often have worked closely with the law enforcement officer being investigated. She said she has introduced Senate Bill 258 in order to make this change in the law, saying her proposed legislation is similar to a New York Executive Order as well as New York legislation concerning cases involving the use of lethal force. She said the purpose of her bill is to remove perceived bias and establish an acceptable standard for the investigation of lethal force cases in which a suspect is unarmed.

Sen. Williams additionally advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. She said this reform could be established either by legislation or by amending the constitution; however, she said amending the constitution is more practical because it would eliminate constant adjustments to the process that are inherent in statutory law. She said this concept derives from a similar provision adopted in a 1978 amendment to the Hawaii Constitution. She said, the Hawaii provision specifically indicates, at Article I, Section 11, that whenever a grand jury is impaneled there shall be an independent counsel appointed as provided by law to advise the jurors, and that the independent counsel will be selected from among licensed attorneys and will not be a public employee. Sen. Williams advocated the grand jury counsel having specific guidelines about interactions with jurors, and that the prosecutor should not be the only source of legal guidance to the jury. She said this would be another way to provide transparency to the process, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee. Describing how this would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence provided, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law rather than on best trial strategy. Sen. Williams added that the independent counsel would be selected by the presiding judge of the local common pleas court, and the length of service of the counsel would be determined by law.

Sen. Williams also recommended that the General Assembly or Supreme Court would expand the rules and set standards allowing access to grand jury transcripts. She said this practice is being followed in Indiana, which had enacted legislation requiring transcripts to be made available to requesting parties. She said the Indiana law requires the requesting party to make a formal request and pay for the transcript. She added an additional possibility, not used in Indiana, would allow those directly impacted by a grand jury outcome to request the transcript. Sen. Williams suggested the committee could support a request that the Supreme Court create a system and procedure for releasing transcripts in grand jury cases. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted. She said current Ohio law is unclear on whether a private citizen or entity could receive a transcript of a grand jury hearing, but that legal research suggests that the transcript may only be available to a defendant who must request a court order, and that only where there is a question about inconsistencies in testimony is the request granted. Sen. Williams said New Hampshire's court rules are an example of clear guidelines for allowing a transcript to be provided.

Sen. Williams' additionally recommended a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise. She noted the Tamir Rice case in Cuyahoga County as an example. In that case, the prosecutor did not ask the grand jury to vote on whether to indict the officers being investigated for using lethal force against an unarmed suspect. She said if an independent panel were created, it could review the actions of the prosecutor in that type of case to determine if proper procedures were followed. Sen. Williams added the independent panel would be useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging, thus restoring openness to the process. She said this recommendation would retain the need for secrecy while allowing review if there is a question whether the prosecutor is conducting the investigation in good faith.

Sen. Williams acknowledged that the secrecy component has been an integral part of the grand jury process, but said modern realities demand that there be some way to review the proceedings in cases in which there is significant public interest, where the public may feel justice is being circumvented, or where motives are viewed as politically expedient. She said when it comes to high profile cases, the secrecy of the process and, in many cases, the evidence presented, no longer retains the need to be secret. She said the current grand jury system in Ohio operates without any mechanism to review the process.

Sen. Williams acknowledged there are many ways to provide transparency in the process, but the four recommendations she noted would be reforms that would "remove the current unfettered control prosecutors currently have over grand jurors," and would bring about a reviewable process. She concluded by emphasizing that the current grand jury system is in need of reform, and urged the committee to recommend goals and parameters for improvements to the system.

Sen. Williams then answered the committee's questions. Committee member Jeff Jacobson said he shares some of Sen. Williams' concerns about the grand jury process. He said the Hawaii model would be worth a further review, and wondered whether the committee could obtain additional research and possibly hear from someone with knowledge of that system, specifically how it has operated and whether there have been any complications. Chair Abaray noted a staff memorandum discussing the Hawaii model, referencing research by Professor Thaddeus Hoffmeister at the University of Dayton School of Law.¹

Mr. Jacobson said he also likes the concept of having a judge review the grand jury transcript. He said he is not sure the transcript should have to be made public, but a system in which someone could review the proceedings to determine if something inappropriate happened would provide protection, even if one is concerned about breaking the secrecy or exposing witnesses to unnecessary risk. Mr. Jacobson added he appreciates Sen. Williams' efforts and expressed support for having the committee spend some time with her proposals.

Sen. Williams noted that the staff of the Senate Democratic Caucus, as well as the Legislative Service Commission, have researched her proposals. She said the options that she has put forth

¹ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171 (2007-08).

are one way to have secrecy while at the same time offering some sense of transparency. Chair Abaray said that, in addition to Hawaii, the systems used in New York or Pennsylvania should also be considered.

Mr. Saphire said, other than the notion of a general counsel, it is unclear to him which of the other proposals merit a constitutional amendment, as opposed to Supreme Court rules or legislative action. Sen. Williams responded that all proposals could be the subject of statutes enacted by the General Assembly, but it would be better for the change to be embedded in the constitution so that the procedure is not changed when someone decides they do not like it or there is a new General Assembly.

Mr. Saphire asked whether any states require special prosecutors in law enforcement use-of-excessive-force situations. Sen. Williams said she would try to find out the answer to that question. Mr. Saphire said the notion of having a general counsel is interesting and that he agrees with Mr. Jacobson on that point. Mr. Saphire asked whether Sen. Williams agrees that if general counsel is appointed the prosecutor should be in the room, but the jury could decide whether to direct its questions to the general counsel or to the prosecutor. Sen. Williams said the special counsel should be the only one describing the legal parameters to the grand jury because it is best to have an independent person providing the law. She noted an incident in Wisconsin in which the prosecutor gave false information to the grand jury, saying the assistance of an independent counsel could have prevented that situation.

Committee member Dennis Mulvihill asked whether Sen. Williams believes the grand jury process is most questionable when the subject of the investigation is a public official or police officer, or whether the problem is broader. Sen. Williams said the problem occurs in all cases. She said when there is a process in which a prosecutor can allege numerous charges just to scare the subject into accepting a plea, having a judicial panel to review that procedure would make the system more transparent and would reduce the number of persons in the criminal justice system.

Mr. Mulvihill said, in his experience, the process of appointing a special prosecutor in high profile cases does not help because a special prosecutor is no more unbiased than the local police. He said he would have concerns about using special prosecutors because they come with the same bias as the local prosecutor, adding the problem goes all the way up to the attorney general and the Bureau of Criminal Investigations. Mr. Mulvihill said he thinks that, in addition to grand jury reform, the committee might want to consider requiring a special office that has no relationship with any police force to investigate high profile cases. He asked whether, if no other change is made, Sen. Williams would advocate making an exception to the secrecy rule. Sen. Williams said she agrees having a special prosecutor probably will not rid the system of problems. But, she said, coupling a requirement for a special prosecutor with a preliminary hearing process that is open to the public might make the system more transparent. She said, when it comes to investigations of public officials and law enforcement, the transcript should be made available, because public officials should be held to a higher standard.

Chair Abaray asked whether Sen. Williams has considered requiring the grand jury instructions to be docketed, as well as docketing any law that was provided to the grand jury, so that the

public could review what information was provided to the grand jury. Sen. Williams said she sees no problem with that information being made available to the public.

Representative Robert McColley said he likes the special counsel idea, asking whether that person would have to be someone with experience in the criminal law area, such as a former prosecutor or defense attorney. He also wondered how Hawaii resolves conflicts of interest, such as where counsel appointed by the court may wish to continue appearing in cases before that court. Sen. Williams said she does not have any specific information on that, but she would envision that the special counsel in that courtroom should not be practicing there and that it has been suggested that the person come from an entirely different part of the state and have no involvement with that prosecutor or courtroom. She said she would suggest that rule because it would promote transparency.

Rep. McColley wondered about the practical effect of requiring special counsel to have no connection to the court or county in question. He said the idea of having 88 different counsels, one for each county, all over the state would be difficult to carry out, particularly in rural areas. Sen. Williams suggested one solution might be to have special counsel be someone who doesn't practice law at all, such as a law professor.

Chair Abaray noted the memorandum in the meeting materials contains further information about the process in Hawaii, specifically that the special counsel is a short-term appointment, and is a local attorney who must be unaffiliated with the state.

Representative Emilia Sykes offered the example of visiting judges or senior judges, who are retired but will sit for other judges. She said that may be a source of persons who could provide the special counsel service. She asked whether Sen. Williams' proposal regarding obtaining the grand jury transcript is limited to the situation in which there is actually an indictment, or whether the transcript could be obtained when there is a "no bill." Sen. Williams said the transcript could be obtained in either case.

Chair Abaray said she was assuming that if there is public interest but no indictment is returned a transcript would be available. Sen. Williams said that is correct, noting that in the Tamir Rice case the public has expressed an interest in knowing what evidence was presented to the grand jury.

Timothy S. Young
Ohio Public Defender

Chair Abaray then recognized Attorney Timothy S. Young, Ohio Public Defender.

Mr. Young said the relevant question is not whether Ohio should have grand juries, for the reason that grand juries are "a vital and important step in the criminal justice process." He continued that, when used correctly, a grand jury protects the innocent as well as being a first step in the prosecution of those who have committed crimes. However, he said, the unfettered, unchecked secrecy in the process sets it apart from the rest of the justice system and society's basic ideals relating to government.

Noting that government is based on checks and balances, and that many governmental entities are subject to oversight, Mr. Young said the rest of the criminal justice system is transparent, with trials being adversarial, in public, and overseen by a judicial officer. In addition, he said, error correction is built into the system with appellate and post-conviction processes. However, he observed, “there is no error correction for a grand jury process that has gone wrong or been misused.”

Discussing the legal basis for the grand jury process, Mr. Young described that the Ohio Constitution is silent on the issue of secrecy, which, instead, is addressed in R.C. 2939.01 through 2939.24, as well as Crim.R. 6(E). He said secrecy applies both to the jurors’ deliberations and votes, and to the evidence and testimony that were presented to them.

Although the concept of secrecy is now codified, Mr. Young indicated it originally arose out of the common law, and was intended to protect the reputation of the accused, to prevent the escape of a person whose indictment may be contemplated, to insure the freedom of the grand jury in its deliberations, to prevent interference with witness testimony, and to encourage witness disclosure of evidence.

Discussing whether secrecy is still needed after an indictment has been issued, Mr. Young indicated that, at that point, there are no more privacy interests to protect. He said, despite this, prosecutors and legal precedent maintain a continuing need for secrecy, and will block a defendant’s effort to obtain the names and testimony of witnesses who appeared before the grand jury. Mr. Young indicated that, in such an instance, a defendant can only obtain this information by demonstrating a particularized need for the evidence, a standard that he said is “nearly impossible” to meet. He said defendants cannot give detailed descriptions of what they need access to when they have not been allowed to know the content of the transcript. He added that he does not advocate that the entire transcript necessarily be provided, but that the witnesses’ testimony should be available if there is inconsistency.

Mr. Young said his conclusion is that no policy is being served by this practice. He remarked, “if justice is the ultimate goal, then there is no supportable rationale for maintaining the secrecy of witness testimony before a grand jury when that same witness is in court giving testimony on the same matter,” adding that fewer wrongful convictions would result if attorneys could confront and cross-examine witnesses regarding any differences between their trial testimony and their grand jury testimony.

Mr. Young said another area where secrecy is not needed is in the case of police shootings or where a public official is accused of wrongdoing related to his or her official duties. He said maintaining secrecy in those cases frustrates the general public as well as arguably violating the defendant’s right to confront trial witnesses with prior sworn statements to the grand jury. He said, in these high-profile cases, the public already knows about the incident from media reports, as well as knowing the identity of the persons involved. He said, in those instances, “there are no viable privacy interests to protect that outweigh the public’s valid interest in these types of proceedings.” He further noted that secrecy involving government officials can cause public distrust in government, and undermines notions of fairness in the justice system.

Mr. Young also emphasized the importance of distancing the local prosecutor from involvement in the presentment of a high-profile law enforcement or public official case to the grand jury. He said the issue is not whether the prosecutor can be unbiased, but whether a perception of bias is created. He said the standard of avoiding the appearance of impropriety is the guiding principle in those cases. He added, because it is necessary for the prosecutor to have a close working relationship with law enforcement, the local prosecutor in such cases is easily subject to accusations of bias and favoritism. Thus, he said, a process that creates an independent investigating authority is needed in those cases. To address this issue, Mr. Young suggested that if the case involves a police shooting, the local prosecutor should not conduct the proceedings, which, instead could be undertaken by a retired judge, whose experiences and knowledge as well as disconnection from the local electorate, would allow the grand jury investigation to be conducted in an impartial manner.

Mr. Young recommended the following reforms to the grand jury process:

- The grand jury should remain as part of the criminal justice system;
- After indictment, protection of the testimony of trial witnesses is no longer necessary, so that their testimony should be made available to the court and counsel;
- The secrecy requirement should be eliminated in cases involving the conduct of a public official in the performance of official duties; and
- In the case of a police shooting, a separate independent authority should be charged with the investigation and presentation of the matter to the grand jury.

Having concluded his remarks, Mr. Young then answered the committee's questions.

Mr. Saphire noted that the committee has heard from two prosecutors who say the system works fine. He asked Mr. Young why he believes the system is working well. Mr. Young answered that, in his career, there have been instances when a client was not indicted, but that the people's reputation in their private lives is important. He said if the grand jury process is replaced by a preliminary hearing process, the accusations have been made public. He noted there are "he said/she said cases," in which there is no overwhelming proof; for instance if someone is accused of sexual misconduct. He noted there are wide-ranging implications in that situation, and for that reason it makes sense to have a grand jury in our system of justice.

Chair Abaray asked for clarification about witness statements versus actual testimony, wondering if defense attorneys get access to transcribed witness statements in the current system. Mr. Young said they are supposed to get them, and his presumption is that they do, noting that he rarely gets summary statements that come out later that are slightly different. He said if the witness actually testifies before the grand jury, and an indictment results, there is little or no reason why that should not be transcribed and provided to court and counsel. Chair Abaray followed up, asking whether Mr. Young is suggesting that the transcript would be available live in the grand jury room or whether it would be made available later. Mr. Young said the transcript would be provided later.

Mr. Mulvihill asked about the idea of having a retired judge conduct the proceeding, wondering who would do the investigation that the retired judge would rely on. He said his concern is that the investigation process in a police shooting incident is inherently flawed, with officers not wanting to delve deeply with witnesses who may provide inculpatory evidence. Mr. Young said there are a number of options, including investigators in his office, in the attorney general office, or in a private investigation business, and that a fund could be set aside to have them do the investigation. Mr. Mulvihill said he is not confident that attorney general provides unbiased investigations. Mr. Young said he tends to agree there is a concern, but he would be less concerned if investigators were working at the direction of a retired judge. He said he would hope at that point the retired judge would object if the investigation shows signs of bias.

Chair Abaray asked Mr. Young's opinion of the special counsel concept used in Hawaii, wondering if Mr. Young also had opinions of systems used in New York and Pennsylvania. Mr. Young said he is less familiar with other states' processes, but his concern with using special counsel is what would occur if a question arises and the special counsel is not immediately available. He said if that system is adopted, counsel would have to be available whenever the grand jury is in session. He noted that "error correction in our system is a good thing. We will make mistakes, but it is about error correction."

Committee Discussion:

Chair Abaray then asked committee members to provide their impressions of the proposals for changing the grand jury procedure, and to give guidance on questions meriting further research.

Mr. Mulvihill said he is concerned that there is a great potential for abuse of the process. He observed that when police officers are investigated the system can be abused, for the reason that human nature can prevent law enforcement from being objective when it investigates law enforcement. He said he would support further discussion of how to conduct a grand jury investigation when law enforcement is being investigated. He said he likes the Hawaii concept, as well as Mr. Young's point about transparency being needed once the person is indicted. He said he also likes Sen. Williams' point about transparency being needed even when a person is not indicted.

Chair Abaray wondered whether there would be an equal protection issue if a transcript is released in one situation but not another. Mr. Mulvihill said he is not sure that releasing the transcript is violative of the rights of the person under investigation. He said if the prosecutor can release the transcript when it serves the prosecution, and the decision is not made on the basis of secrecy, there is no concern about violating the rights of the suspect.

Rep. McColley said the proposals are all interesting concepts, adding he appreciates what Mr. Young said regarding inconsistent statements after the indictment. He said he is in favor of keeping the grand jury in some form, but he is still trying to digest what that form should be.

Mr. Saphire said he is not sure he has heard enough criticism suggesting the solution to the problem is the abolition of the grand jury. He said there are issues that need to be addressed, adding he likes the concept of having an independent source of legal advice. He commented that

the two prosecutors who testified to the committee claimed they were independent legal advisors to the grand jury, but that he has a fair amount of skepticism about that. He said the idea of having an independent legal advisor available to the grand jury is interesting to him. He said although the idea of increasing transparency is interesting, he wonders if changes should be made through constitutional revision, as opposed to legislative reform. He said he is open to proposals or formulations of constitutional language that would address secrecy issues, but Supreme Court involvement in playing a more active role might be helpful. He said requiring transcripts is also a good idea, but he is not sure constitutional revision is the best way to do that. Except for the Hawaii experience, he said he is not sure whether other states have reformed their procedures at the constitutional versus the nonconstitutional level. He said it might be good to see some proposals with some actual language. He concluded he is still thinking about how to address this, but has no concrete ideas right now.

Judge Pat Fischer said he is leaning toward the views expressed by Mr. Sapphire, and that he has not heard anything that rises to the level of a constitutional dimension. He noted the proposals could come about through action by the General Assembly; for example proposals two and three by Mr. Young and proposals two, three, and four by Sen. Williams could be addressed by amending Crim.R. 6(D) and (E). He added Mr. Young's proposal number four would have to be done by statute. He said he does not believe these changes rise to the level of the constitution, but could be done more easily by going through the General Assembly or the Supreme Court rulemaking procedures, which would allow more flexibility for change. He noted that secrecy matters, and this is why the grand jury exists. He said other issues, specifically the availability of transcripts, can be dealt with by court rules. He said "we are at a level where we do not need to alter the state constitution to reach changes that people will want."

Clarifying his position, Mr. Sapphire noted he is not averse to constitutional change, but does not want to codify all issues in constitutional language. He said there might be ways to deal with issues in constitutional language. He said he would be willing to consider something like the Hawaii proposal, but he would benefit from more research on the question.

Chair Abaray said it is not necessary or imperative to change the constitution, but that she agrees with Mr. Sapphire that there may be some issues important enough that the committee would want to propose that they be put into the constitution. She added the specifics then could be addressed by the legislature. She noted her concern, which arose after hearing from the two prosecutors who presented to the committee, that there is no standard for uniformity in how any given grand jury is charged or instructed in the state. She said it sounds like county prosecutors can make their own rules. She said, in her view, there are certain things that should happen the same way, for example, there is a requirement that a civil jury have the same jury instruction on what the law is; so this should be true in the criminal area as well.

Mr. Sapphire asked Sen. Williams whether she is offering the Hawaii approach as a model for the committee to consider. He said he would encourage her, if she thinks changes are suitable for constitutional amendment, to bring forward specific proposals for constitutional amendments. Sen. Williams said she would continue to work on this. Mr. Sapphire noted he would follow up with Prof. Hoffmeister regarding the Hawaii experience to see if more information might be made available to the committee.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:54 p.m.

Approval:

The minutes of the February 11, 2016 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the June 9, 2016 meeting of the committee.

Janet Gilligan Abaray, Chair

Judge Patrick F. Fischer, Vice-chair

The Supreme Court of Ohio

TASK FORCE TO EXAMINE IMPROVEMENTS TO THE OHIO GRAND JURY SYSTEM - WORKGROUPS

JURY / PUBLIC EDUCATION

- Charge:**
1. Address the public perception of the grand jury system and the basis for such perception and, if necessary, recommend ways to improve the public's trust and confidence in the system.
 2. Address public understanding of the grand jury system and, if necessary, recommend ways to improve public education about the system.
-

RULE AND STATUTE REVIEW / RECONCILIATION

- Charge:**
1. Review grand jury systems used in other states.
 2. Review R.C. Chapter 2939 and Crim.R. 6 to do all the following:
 - Determine whether improvements are necessary to improve the neutrality and objectivity of the grand jury system and, if so, recommend amendments;
 - Determine whether the rule should be amended to revise those provisions concerning the grand jury deliberation process;
 - Determine if there are inconsistencies between the statutes and the rule and recommend any necessary amendments to reconcile those inconsistencies.
-

POLICE USE OF LETHAL FORCE

- Charge:** Determine if new processes or procedures are needed to ensure fairness and equality in cases involving police use of lethal force and, if so, make recommendations for improved processing or procedures in such cases.
-

GRAND JURY SECRECY

- Charge:** Review the reasons for grand jury secrecy and determine whether changes, which are consistent with these reasons, are needed to improve the process and public confidence in the grand jury system.
-

ROLE OF JUDICIARY / PROSECUTION

- Charge:**
1. Determine whether more extensive grand jury instructions should be included in the Ohio Jury Instructions.
 2. Determine whether there is a need for improved grand juror orientation and education.
 3. Determine whether the current balance between prosecutorial and judicial roles in the grand jury system needs to be modified.

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Speeches

Chief Justice Maureen O'Connor
Task Force to Examine Improvements to the Ohio Grand Jury System
Feb. 17, 2016

Good evening and welcome.

In a few minutes, I will turn this meeting over to Judge McIntosh, chair of the task force.

But before that, I want to make a few brief comments and deliver your charge.

The concept of a grand jury has been part of the U.S. Constitution since 1791.

Even before then, however, at least two of the original 13 colonies – Massachusetts and New Hampshire – made their ratification of the Constitution contingent on the inclusion of a grand jury provision.

The point being, the grand jury system was a part of the fabric of our criminal justice system before the adoption of the federal Constitution and the Bill of Rights.

Likewise, in Ohio, the grand jury has been a constant in our state Constitution's Bill of Rights as far back as the original Constitution in 1802.

It's important to point out that every state constitutional revision since has preserved the protection of the grand jury.

Other states have chosen different systems for initiating criminal proceedings. But the grand jury is part of our constitution, a part that we must respect even while we seek ways to improve its operation and the operations of the entire criminal justice system.

Accordingly, I formed this task force to recommend ways to improve the functioning and fairness of grand juries and to see what additional steps can be taken to improve the public's confidence, understanding, and trust in our justice system.

I am not asking you to determine whether the grand jury system should be eliminated, especially given that it is embedded in our constitution and most notably in that portion of our state constitution that we call the Bill of Rights. That is not on the table. Everything else, however, is on the table because it has to be on the table.

Specifically, your charge includes, among other things:

Reviewing grand jury systems used in other states.

One item to consider is if other states' grand jury models provide for a more transparent system that engenders more public trust and confidence in the process.

You will also be tasked with reviewing Ohio Revised Code section 2939 and Criminal Rule 6 of the Ohio Rules of Criminal Procedure, both of which concern grand juries.

One item to consider is whether procedural matters such as how a grand jury votes, when it votes, and who determines when a vote is held should be laid out specifically in Ohio law or rules.

Another item to consider is whether all grand juries should receive a mandatory set of instructions from which they cannot deviate.

And, finally, you have been asked to address public understanding and public perception of our grand jury system. This is crucial.

Without knowledge of our institutions the public cannot respect and have allegiance to our institutions. Without allegiance to our institutions, the work of those institutions will be discredited.

The public needs to know what the grand jury does.

They need to know the role played by the grand jury.

They need to understand where the grand jury fits in the continuum of our criminal justice system.

We need to figure out ways to better communicate what the grand jury does to the average citizen to restore public confidence and improve public perception of grand juries.

But our education efforts cannot begin and end with the general public. We must also educate grand jurors themselves about their role, the instructions they receive, and the process as a whole.

Part and parcel of your work to examine the grand jury process will no doubt include asking tough questions that involve the secrecy of grand jury proceedings and what evidence can and should be presented for consideration and by whom.

It is absolutely critical that you keep an open mind about all aspects of the grand jury. I ask you to consider all the issues and invest your best efforts at examining and improving the system.

We cannot make improvements if we are unable to see the need, consider the opportunities, or remain attached to the notion "but we've always done it this way."

Improvement and innovation always include an element of risk. I am asking each of you individually and together to take a risk that we can make things better. Every institution created by humans can always be improved.

If we intend to build the public's allegiance to our justice system, then we, as individuals who represent various leaders of that system, have an obligation to take the necessary steps and examine all the issues.

This is not our system. It is not "owned" by any one interest or even all the interests represented at this table. This system belongs to the people of this great state and it is our obligation to address their concerns to deliver trustworthy justice. That is the only way people will have allegiance to our justice system.

Thank you for agreeing to serve in this necessary capacity and to undertake this important work.

You were chosen for your diversity of experience, expertise, and thoughtfulness and thoroughness.

Thank you especially to Judge McIntosh as chair and Wayne County Prosecutor Dan Lutz, who agreed to serve as vice chair.

It is my belief that examination of this issue by a broad-based membership of judges, prosecutors, defense attorneys, law professors, legislators, law enforcement and community leaders is going to result in a fair, impartial, and balanced analysis, and practical and specific recommendations where needed.

I realize that your work is cut out for you and that you don't have a lot of time in which to accomplish it. It's crucial, for a variety of reasons, to undertake this task with speed.

As for a timeframe, I would like to see the task force work diligently in order to deliver an initial report and recommendations by June 15, which can be shared with the public for comment. I would expect a final report to be delivered later in the summer.

Please know that Supreme Court staff stand ready as a resource to assist with tracking down information, coordinating meetings, and serving as a sounding board for ideas.

Thank you again for your time and attention tonight, for your willingness to serve, and most importantly for agreeing to further the cause of justice in the state of Ohio. Judge McIntosh, the floor is yours.

The Supreme Court of Ohio

TASK FORCE TO EXAMINE IMPROVEMENTS TO THE OHIO GRAND JURY SYSTEM

ROSTER

Honorable Stephen McIntosh (Chair)
Franklin County Court of Common Pleas
Columbus

Daniel Lutz (Vice Chair)
Wayne County Prosecuting Attorney
Wooster

Senator Kevin Bacon
Ohio Senate
Columbus

Senator Edna Brown
Ohio Senate
Toledo

Honorable Joyce Campbell
Fairfield Municipal Court
Fairfield

Representative Robert Cupp
Ohio House of Representatives
Lima

Honorable Michelle Earley
Cleveland Municipal Court
Cleveland

Honorable William Finnegan Marion
County Court of Common Pleas Marion

Honorable Steven Gall
Cuyahoga County Court of Common Pleas
Cleveland

Professor Mark Godsey
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Honorable Michael Goulding Lucas
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Chief Eliot Isaac Cincinnati
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Janet Jackson
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Honorable Melissa Powers
Hamilton County Municipal Court
Cincinnati

Professor Ric Simmons
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Representative Fred Strahorn
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