

To: Judge Eileen T. Gallagher

From: C. Ellen Connally, Grand Jury Foreperson, January Term 2006

Monday/Wednesday

Re: Grand Jury Report

Date: April 26, 2006

I would like to start my report by thanking you for the honor of serving as Grand Jury Foreperson. By serving in this position it is with pleasure that I join a distinguished group of citizens who have performed yeoman service for this county and its citizens in the furtherance of justice over many generations.

After spending twenty-four years as a Municipal Court Judge and hearing thousands of preliminary hearings, this was an opportunity to see the criminal justice system from a different and unique perspective. There were some positive aspects of the task and some negative aspects which I would like to illiterate here. After reading the reports of other Grand Jury fore persons, I am concerned that these reports get their "15 minutes of fame" and are then filed away and never read again, except for the occasional person who undertakes the same roll. Hopefully, at least some of my comments will be considered by the Judges of the Common Pleas Court, the Prosecutors Office, the various police departments and the public in general.

In order to make this report in an orderly fashion, I intend to organize it under headings.

Juror Orientation:

Generally the jurors' orientation was helpful and informative. Even with my background in law and criminal justice I found the information enlightening, particularly the presentations on sex crimes, identity theft, financial crimes and the West Shore Enforcement Bureau.

The jail tour was well done and professional. Overall, I would commend Sheriff Gerald McFall for a well-run facility in light of the limitations that he has in terms of jail population and space. The explanation as to jail space was not only informative but beneficial to the community in the long run. Virtually all of the jurors had a changed opinion of the necessity of a new jail facility for the County. Several stated that in the future when proposals are made relative to new jail facilities they will be outspoken in their support. They recognized the problem that has plagued our community and most communities, namely that everyone wants more jail space but no one wants a jail in their neighborhood.

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The tour of the Cleveland Police crime lab was interesting but it was clear that our facilities are not state of the art. Most of the equipment was clearly aging. While the lab appears to do its job, it is not what the general public, who watch crime shows on TV would expect. An influx of funds could clearly improve aspects of crime detection. Jurors often asked questions based on technology that they had seen on TV and were told that it was not available in our county.

I also learned that there have been attempts for several years to have one countywide crime lab which would service Cleveland and all suburban police agencies. Although I have no knowledge as to what actual activity there is in this area, it sounds like a good idea.

Instructions to the Jurors:

At the beginning of the term the jurors are instructed by the judge as to the law and their responsibilities. These instructions are given in the midst of the jurors initial entry into the system. Former Grand Jury Foreperson Phyllis Crocker suggested in September of 2003 that each juror be given a copy of the Ohio Revised Code. This seems to me to be an excellent suggestion. In the alternative, each juror should be given a copy of something similar to a law student's guide to criminal law that list the elements of each crime. I noticed that the prosecutors worked from a notebook that had definitions and elements of each crime. A copy of such a manual to each juror would be beneficial to remind jurors of the various elements of the crimes so that they could check them off as they hear the testimony of the witnesses. Municipal Court Judges can make reference to the elements of a crime when determining probable cause at a probable cause hearing. I see no reason why jurors who have no legal background should not have this same opportunity.

Jurors, as good citizens, want to fight crime and punish the guilty. It is clear that for the most part they identify with the prosecutor, the police, and especially the victim. As a result there is a tendency to go along with anything that the prosecutor and the police suggest. There were many times when the jurors suggested additional charges which were sometimes beneficial, but often it was merely an attempt to further punish a person without realizing that these charges have to be proved a time of trial and there is a burden of proof on the prosecution even if it is only probable cause. There must be some scintilla of evidence to meet that burden even if it is only probable cause. As the term progressed, some jurors felt empowered and frequently suggested more charges, often to the consternation of others.

Commitment of time:

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The task of being a Grand Jury Foreperson and/or individual juror is an awesome undertaking. When a person accepts the responsibility, I am not sure that they are fully versed initially as to the extent of the undertaking. The Grand Jury meets two days a week from 8:30 to usually 4:00 with an occasional day when we adjourned some what earlier and a couple of days that we went past 4:00. We took short lunch hours so as not to extend our days.

Each day we had somewhere between 30 - 40 cases in the morning and the afternoon. For each session we were given a list of cases but frequently there were add ons. There were also frequent errors on the lists. It was common to have clerical errors on the paper work that we received relative to the lists of cases and the jurors.

I am not sure whether the term of four months is set by statute or by rule of court, however, I would suggest that a term of three months might be more acceptable. During the last month there was a feeling among several jurors of "I'll be glad when this is over." I overheard the Grand Jury receptionist commenting how people loved being on the Grand Jury and wanted to come back, that was certainly not my experience. While most of the jurors were paid by their employers and saw their service as a break from their normal routines, persons who are self employed could in no way be a part of the system. One woman lost her job as a result of her service. On the other hand, there was at least one retired male who loved the experience since it gave him something to do two days a week.

One consistent problem was jurors that did not show up and did not call in or came in late. There is a direct line to the grand jury bailiff, however, there is no voice mail on the system. Jurors should be give some kind of laminated card with the appropriate phone numbers on it so that they can easily call in and leave a message notifying the grand jury bailiff or the prosecutor that they are not going to be in. We had people who didn't show and didn't call. I am not suggesting sanctions against these jurors, and we generally had enough people with the alternates, however, we should make the call in service more convenient. Voice mail would allow the juror to call in at any time and leave a message that can be retrieved when the staff comes in.

The Grand Jury Staff:

My grand jury was serviced by Jerry Englehart who is a retired police officer who works as a bailiff to the grand jury. While at times cordial, Jerry was also abrasive. When I went to the store room to get some legal pads for the jury, Jerry came into the Grand Jury room and yelled at me, saying that I should not have gone into the store room and "never do that again."

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There were a number of times when I had to interrupt the proceedings and ask Jerry and police officers waiting to have their case heard to quiet down. On April 17, we had an unusually long day and did not finish until 4:50. When we left the jury room, Jerry was already gone. In my experience, the bailiff stays with a jury until they are finished.

Jerry was never a "willing worker." When I made inquiry about getting additional jurors or checking on the status of absent jurors, he quickly blew me off. One juror came occasionally - once every other week or so and when she came she was very late or would arrive in the afternoon. Another two women just stopped showing up. When I inquired as to whether or not there was a policy for this kind of juror or what had been done in the past again, I was blown off and told to forget about it.

It was common that the trash from the previous would not be removed from the Grand Jury room when we arrived in the morning. The waste bin of the paper shredder, which we used constantly to shred our notes, was frequently filled. Jurors would empty it. There were several days that we took the trash and put it out in the hall in hopes that it would be picked up. Once again, Jerry did not see that making sure that the trash was removed was a part of his job.

There were at least two occasions that Jerry interrupted the proceedings for a phone call for the prosecutor. I can appreciate that he may have felt the matter was urgent, however the manner of his interruption was less than appropriate. He just barged in and started talking.

On several days we had extremely long dockets. Early in my term there was such a day and I suggested that we should play it by ear in terms of finishing all of the cases in the morning. It was my idea that if the proceedings went too long we would have to give the court reporter and the jurors a break and have witnesses come back in the afternoon. Jerry became visibly angry over my suggestion. It turned out that this never happened, but the way I saw it, the foreperson sets the schedule and judges the ability of the jurors to continue to hear cases. After 25 years of being on the bench and dealing with jurors and court staff the entire time, I am well aware that there reaches a point where you become saturated and need to take a lunch break. Long proceedings are very stressful for the court reporters and tired and stressed out jurors will not be fair to the prosecution or the accused. The decision as to when to take a break for lunch and whether or not witnesses should be instructed to come back in the afternoon was my call and I did not appreciate Jerry's comments.

Jerry runs what amounts to a pop concession in the jury room. He buys canned sodas and places them in the refrigerator provided by the county and charges \$.35 a can. This is obviously

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a convenience for the jurors. However, it does compete with the commercial establishments in the Justice Center who charge somewhere closer to \$1 a can. In and of itself I'm not complaining about this courtesy to the jurors. What galled me was the day that one of my jurors took and paid for a pop which turned out to be flat. Jerry grabbed the can from her hand, questioned her ability to determine whether or not the pop was flat and was extremely rude about the whole situation. This juror and several other jurors who witnessed the incident were very upset. The particular juror who had the pop grabbed from her hand never spoke to Jerry again. She was offended and remained so throughout her entire service.

The county provides coffee pots and we were told that we should bring our own coffee and cream, which we did. One day Jerry told the juror who had been involved in the can of pop incident that she had taken a very large cup of coffee. She was further incensed. One day he yelled at us about some coffee cream that was left on the counter. Another day he was upset because one of the jurors came in and made coffee.

Although the Justice Center is a non smoking facility, the Grand Jury staff allows the jurors who smoke to go to a small room within the Grand Jury complex. When I mentioned that this was inappropriate since the Justice Center was non smoking, Jerry basically told me to "butt out." He said that this room allowed jurors to get a smoke and get back to work quickly as opposed to going outside or into the Justice Center garage where other smokers commune. When the smokers returned from the unventilated smoking room, their clothes would be permeated with cigarette smoke. Several non smokers found the odor offensive. Eventually, one juror moved her seat rather than sit next to a smoker.

When errors were made on the docket sheets, Jerry became agitated, inferring that we were wrong and the docket sheets were correct. Jurors take extensive notes during the course of the proceedings. We constantly asked for new legal pads. All we ever got were the remnants of used legal pads that were left over from prior proceedings. One juror, after numerous requests, brought her own. Finally I went to an office supply store and bought new legal pads.

While these comments may seem petty, I feel that they are important. The jurors have taken time out of their busy lives to make a commitment to the system. Their stay should be made as pleasant as possible. Court staff are paid to serve the public and the jurors. At least they could be cordial. During the course of my service Jerry was on vacation. Walter Luke was

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assigned to fill in. He was extremely professional and cordial. It was a pleasure to work with him. Also, Kathleen (Last Name Unknown) receptionist filled in on occasion. She was also very cordial.

The Prosecutors Office:

During my entire four months on the Grand Jury I never laid eyes on or spoke with Cuyahoga County Prosecutor Bill Mason. It seems to me that for no other reason than sheer politics, he would have stopped in one day and introduced himself or come in on the day that we were sworn in.

Prosecutor Lynn Travis who worked the room on Mondays was extremely cordial and helpful. She presented the cases in a professional manner. I was also impressed with Prosecutor Holly Gallagher who filled in a few days. She was extremely fair in her presentations, concise in her explanations and did not seek to over indict.

Unfortunately, the prosecutor who was scheduled to work our room on Wednesdays resigned for personal reasons shortly after we started our term. As a result, Wednesdays became a hodgepodge of prosecutors, some who were apparently given just a few minutes notice of the days assignment. One Wednesday we did not have cases because there were no prosecutors. The first day that prosecutor Jay Gallagher was assigned to work the room he apparently received the assignment at the last minute. It was obvious that he did not want to be there and made it known. He returned to the room several times and each time it seemed clear to all of the jurors that he did not want to be there. He was not receptive to questions and seemed disgusted when questions were asked.

On April 5, Jay Gallagher was the morning prosecutor. We had heard the testimony of several witnesses. At the conclusion of a particular witness's testimony, Gallagher got up and walked out of the room. At first I thought he was checking on the next witness. But he made no comment as to what was going on or where he was going. After his absence persisted for several minutes I went out to look for him. He returned several minutes later apparently having gone to the men's room. I certainly had no problem with his necessity to take a break, but it seems that any normal person with any kind of common manners would have said that they had to be excused for a few minutes. He returned as if nothing had ever happened. We all sat there trying to figure out what was going on with this guy. He is apparently lacking of normal social graces.

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With the variety of prosecutors that we had in the room we all noticed the lack of consistency in the charges. Identical facts did not always result in the same charges with different prosecutors or even the same prosecutor. On another occasion we had identical facts on a forged check. The woman who was committed the offense in Cleveland was charged with a more serious offense than a person from the suburbs. I pointed this out and the charges were made the same, but had I not been there, the charges would have been grossly inconsistent while the facts remained the same.

My experience in terms of the racial make up of the prosecutors office was the same as Rev. Marvin McMickles who commented in his 2002 report to of the Grand Jury on the lack of African American representation on the prosecutor's staff. Just as McMickles pointed out in his report, during my entire term as Grand Jury foreperson, I never saw an African American prosecutor. On one occasion we had a Hispanic woman. Rev. McMickles refers to an apartheid type system. I am not willing to go that far because I am well aware that there are African Americans on the staff of the prosecutor's office, however when day after day you indict hundreds of African Americans, the presence of some African Americans, other than African American Police Officers (who were almost all from Cleveland) would have been meaningful. Other than one black female who was in attendance at the initial instructions to the Grand Jury, who I believe works for the clerk of courts and we never saw again, and one African American court reporter (who only worked the room one day) I never saw an African American on the staff of the Grand Jury or the Prosecutor's office.

We had cases presented from multiple suburban police departments and other police agencies. I saw one African American police officer from Highland Hills, but he did not testify. Other than an African American officer from the City of East Cleveland and one part time African American officer from Bratenhal, not one other suburb sent an African American, Asian or Hispanic officer to the Grand Jury. Although female officers routinely testified on behalf of the Cleveland Police Department I can only recall one, possibly two female officers from suburban departments.

Early in the term there were a number of cases presented that were more than two years old. When I inquired as to where these cases had been I was told that they had been neglected by an assistant county prosecutor who was no longer with the office. While that may be the case,

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where was the supervisor of that employee?

One such case involved a woman who asserted that she had been sexually assaulted. The events had taken place in early to mid 2004. The police investigation was contemporary with the events, however, the case was presented in January of 2006 and would surely not go to trial until late 2006. Justice Oliver Wendell Holmes is famous for his quote that “justice delayed is justice denied.” The facts of the case were not strong and I suspect that any prosecutors trying to prove them will have a difficult time even if timely filed but with the delay it would be even more difficult. Here was a victim who was essentially lost in the system.

In addition, there were many cases where the defendant was originally assigned to the first offender diversion program. Such programs are commendable and needed. However, when persons fail to comply their cases should be timely brought to the Grand Jury. We saw cases that were over a year old. They had apparently gotten lost in system somewhere between the removal from the diversion program and presentation to the Grand Jury.

The prosecutors who presented internet sex crimes did an excellent job with clear and concise presentations of evidence. The prosecutor who presented cases on failure to pay child support cases was also well prepared and concise. The records presented by the prosecutor and the child support unit were well documented and thorough. It was clear in each case presented that the child support bureau had made every effort to collect the funds prior to asking for an indictment.

The Police:

The City of Cleveland made a decision some years ago that they could save money and cut overtime by having police liaison officers present cases to the Grand Jury rather than having the individual arresting officers present the cases. While there may be some financial merit to this plan, I question the utility of the system. Since the Grand Jury does not see the arresting officer, what you have is a series of officers who come in day after day and read from a report - essentially hearsay on hearsay. They have no personal knowledge of the events to which they “testify.” While by in large the officers are very professional, some come in with a very jovial attitude wanting to tell the jurors “what a bad guy this defendant is.” Unless the prior offense is an element of the offense for which they are seeking an indictment, jurors should not be unfairly influenced with such information. No matter how heinous the crime, the defendant at least is

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entitled to some presumption of innocence.

In cases such as felony domestic violence, an element of the offense is proof of a prior conviction. This is also the case in certain enhanced felonies. However, it was common for police officers to arrive lacking the necessary verification or this information. This was also common in drug cases, where results were not available or the officer just did not have them for a variety of reasons. The unavailability of the drug test was not always the officer's fault but it warranted the officer coming back and it delayed the proceedings. The knowledge that you are required to have drug test results is very basic, however, it was apparently not clear to all police officers. As a result they sat around and waited for their case to be called only to find out that the case could not go forward. Sometimes the officers were drawing overtime. Sometimes it was a part of their regular assignment however, whatever the case, it was a waste of valuable police time. This again may seem trivial, but when you have as many as 80 cases in a day, every delay adds another 8 - 10 minutes to what is a very long day and further complicates the system. In addition it was time that could have been spent on other cases.

While many officers from both Cleveland and the suburbs were well prepared, others were not. If an officer is selected to be the liaison officer, it seems to me that it should be an officer who can concisely relate the events to which he or she is seeking the indictment. He or she should have taken the time to read the report and become familiar with the information. This is their job.

In the course of their testimony, officers relate their interaction with suspects. It was surprising how many confessions were obtained at the scene and how much information that was volunteered by suspects. However, it became a source of irritation to me when officers consistently cast any suspect who exercised his or her constitutional right to remain silent or obtain the advice of counsel in a negative light. The inference was clear that anyone who did not want to talk to the police or wanted to get a lawyer was clearly guilty.

In early March we had an appearance by a state park ranger who testified to several cases that happened in the Waterfront State Park. One of the cases was a drug case from June of 2005. The rest of the cases were from the fall of 2005. When I inquired as to why the cases had taken so long, he stated that there had been a problem getting test result from the crime lab. I found this explanation very hollow. Once again, this seems to me a case of justice delayed.

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On a positive side, there were a number of cases where the police officers went over and above the call of duty, using their personal time and resources to investigate cases. They should be commended.

Over indictments:

I constantly felt that the prosecutor's office sought to over indict individuals charged with a crime. I am not trying to be soft on crime, but charge a person with what they did and what a prosecutor can reasonably prove at time of trial.

One source of constant irritation to me was the charge of possession of criminal tools. PCT is a crime that involves the use of some instrumentality in the commission of a crime. The classic law school example is the person who breaks into a house and has a screw driver, hammer or some other tool to initiate the break in.

However, in the eyes of the prosecutor every person who is charged with a drug offense and also has cash and a cell phone is in possession of a criminal tool. If there is any scintilla of evidence that the person used this phone to make calls related to a drug transaction or the cash in question to buy or sell drugs, I would be absolutely willing to return a true bill. In a society where virtually every person has a cell phone and it cost \$30 - \$50 or more to fill the average car with gas, having a hundred dollars and a cell phone is not out of the ordinary. But yet, if a person is arrested for drugs, with absolutely no connection between the phone or the cash, they are charged with criminal tools and grand jurors return indictments.

When I routinely inquired of the police the connection between the cash and/or the cell phone and the commission of the drug offense, police officers would respond to my questions with comments like "usually," or "in my experience" drug dealers use cell phones. Or "we always do it this way." In my opinion that is not sufficient evidence to show a connection between the instrumentality and the crime and is insufficient to met the prosecutors burden of proof of probable cause. Naively, jurors go along with this primarily charge feeling that they are doing the right thing.

Drug Cases:

I served on the Grand Jury for four months. During that four months period I never saw a crack pipe case from a suburb. Only Cleveland police brought in cases for possession of a crack pipe. No one will ever convince me that the possession of crack pipes stop at the borders of

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Cleveland.

Crack pipes come into the system in four ways. The vast majority seem to come in through traffic stops where the pipe is retrieved during the arrest or incident to a search of the vehicle. Others are the result of some observed unlawful conduct or suspicion thereof and the resulting pat down and arrest. Many come in as a result of a buy/bust sting conducted by the police. Finally many such cases come in when police enter a residence or hotel room and find the crack pipes, almost always in plain view. I got the impression that in many cases police go out and essentially “shot fish in a barrel.” They know the so called ‘high drug areas’ so they go to the locations, pick up a couple of crack uses, arrest them, get an indictment and conviction, get some overtime, keep the crime statistics up and repeat the same cycle. No one seems to go to the next level.

The cocaine that is used to make crack is coming from somewhere and not within the United States. Theoretically persons could be growing the marijuana in their basements or their back yards but they are not growing poppy plants or coca bushes. So where is it coming from? Why aren't the police going to the next level? The apprehension and arrest of the low-level drug users is important to the community and no one wants drug dealers on their corner. This is criminal activity and I am not trying to say that it should be over looked. But the problem is, that the arrest and conviction of these low level individuals is of no value in the larger picture other than filling court rooms and jails. The only cases that we saw that involved large amounts of drugs were cases in which the police officers discovered the contraband by accident as a result of a traffic stop or pursuant to a search for other reasons. There were other cases that resulted in large amounts of drugs, but they resulted from a tip that was not the result of police investigation.

Crack Pipe Cases:

I took an oath to uphold the law at the beginning of my Grand Jury service to follow the laws of Ohio. However, three weeks into my service, I could no longer in good conscience maintain that oath as it related to crack pipe cases. I could not in good conscience saddle people with a felony charge based on residue that did not result in an ascertainable amount of cocaine. In addition, the vast majority of these cases involved African American residents of the inner city. Not one suburb brought in similar charges. Again, possession of crack pipes does not end at the

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border of Cleveland. If it is a felony in Cleveland to possess a crack pipe, it should be a felony in West Lake, East Lake and every other suburb. Other jurisdictions charge possession of a crack pipes as possession of drug paraphernalia, a misdemeanor of the first degree for which the person can receive up to six months in jail. In addition, there is a drivers license suspension in connection with the charge. It is a serious offense. But residents of Cleveland are not allowed the opportunity to avoid a felony conviction. They receive a felony indictment and if convicted will suffer the stigma of a felony conviction and the numerous collateral sanctions that go along with the conviction for the rest of their lives. As a result, I made a decision in mid February to recuse myself when the only charge against the defendant was possession of a crack pipe. The remaining jurors made all decisions on those cases.

Results of this report:

It is clear from the length and depth of this report that I have serious concerns about our system of criminal justice and the Grand Jury system. As grand jurors we stand as the check between the prosecutor who has an obligation and a duty to prosecute crime and the rights of the accused. The Grand Jury was established by the Founders to insure that persons are not wrongfully charged. It is not supposed to be the rubber stamp to the prosecutor's office. Therefore it is important that the jurors be fully informed and that their physical surroundings are as comfortable and congenial as possible.

Under our system, the foreperson is required to submit a report. These are my findings and opinions and I submit them in the hope that someone will listen to them and be concerned. Unless other Grand Jury fore persons or like-minded members of the bench, criminal bar, the media, or the general public takes some concern, my report will be buried and soon forgotten.

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