

MEMORANDUM

TO: Judge Burt W. Griffin

FROM: Phyllis L. Crocker, Grand Jury Foreperson, May Term 2003,
Monday/Wednesday, B Side

RE: Grand Jury Report

DATE: 24 September 2003

The experience of the May Term 2003 Grand Jury, Monday/Wednesday, B Side was unique, and in the end worthwhile, despite its brevity. While you impaneled and instructed the Grand Jury on April 30, 2003, and we assembled to hear cases on our first day of service, May 5, 2003, we did not actually hear a case until the last day of our term, August 27, 2003. As you know, William Mason, the Cuyahoga County Prosecutor, objected to your instructions and sought to have us discharged. Our service as a grand jury was suspended while he litigated both our continued existence and your supervision of us. The legal proceedings over these issues took the better part of the summer, and of our appointed term of service. Still, in the end, you continued to preside over us, and we were allowed to carry out our duty as a Grand Jury. On August 25, 2003 you re-instructed us, and we then heard cases for one day.

Given our short term of service we were unable to fulfill some of our statutory duties, such as visiting and inspecting the county jail. In addition, we did not receive the training that other grand juries received. In part this was due to your decision that we would not tour the County Crime Lab. However, we also did not receive other training: on our first day of service, a gentleman came to talk to us about financial crimes, but was not allowed to make his presentation because of Mason's motion to discharge us. I also understood that we would have heard from someone at a rape crisis service.

Our term of service was, nonetheless, noteworthy. Five issues deserve comment: the commitment of the grand jurors, the usefulness of having copies of the Ohio Criminal Code, the value of your instructions, the significance of your appointing me as the Foreperson, and, finally, the importance of, and limitations on, the independence of the grand jury.

Members of the grand jury. Every person on this grand jury, including those present the first two days and those who heard cases at the end, took their service seriously, and felt privileged to serve. I realize that may sound unexceptional, but it struck me as extraordinary. During the first two days that we were together in May, when our status was in limbo, we talked about what grand jury duty meant to each of us. One woman talked about how she had felt chills when the prosecutor, during voir dire, said that apart from joining the military, being on a grand jury was one of the few ways that citizens could serve their country. Each person seemed to feel that same sense of honor, and was frustrated that he/she might not be allowed to serve. When we were re-

called in August, all but two of that original group came to court. (And I believe the two who did not return had intervening circumstances that prevented their serving at the end.) One woman came for both days in August even though she was on vacation. On the last day, as we re-introduced ourselves and met the new alternates, many expressed regret that we would only meet for that one day. It is remarkable to me that so many felt so strongly about this work, even though it meant considerable rearranging of one's life for four months.

The Ohio Criminal Code. On August 25, when you re-instructed the grand jury, you gave each of us a notebook containing provisions of the Ohio Criminal Code. You selected statutes that pertained to the crimes for which the prosecutor would most often seek indictments. This was an invaluable resource for the grand jurors. We referred to it both as the prosecutor presented each case to us, and when we were deliberating. It helped everyone, grand jurors and prosecutors alike, to be able to refer to and read the legal description of the crimes. This proved especially important on the first day as we were unfamiliar the elements of each crime. Also, it became apparent that the definition of certain terms mattered, for example, the difference between physical harm and serious physical harm. Rather than making the prosecutors repeat the statutory language several times, we could read it ourselves. This gave the grand jurors a better understanding of the proposed charges, and it allowed us to ask informed questions of the prosecutors and witnesses about how the testimony applied to each of the elements. By the end of that one day, the prosecutors thought that they would like their own copy of the notebook! And, I understand that the Supervising Prosecutor, Kristine Travaglini, intends to provide similar notebooks to other grand juries.

Your instructions to the grand jury. Your instructions discussed the standard of proof for indicting individuals with crimes. This included the following language:

It is your duty to determine whether there is sufficient evidence or probable cause to require an accused to stand trial. If the evidence fails to establish the probability of guilt you must refuse to return an indictment.

No public purpose would be served by indicting a person when it appears to you that the evidence is not sufficient to sustain a conviction. To sustain a conviction at trial, a trial jury must find beyond a reasonable doubt that the offender committed a particular offense.

This language was important to us because it provided a reference point for the difference between indicting individuals and convicting them at trial. This distinction was helpful both while the prosecutors were presenting cases for our consideration and during our deliberations. While it is not the responsibility of the grand jury to decide if the individual should be convicted, it is the duty of the grand jury to decide if the evidence would sustain a conviction. In order to do that, it was essential to know the level of proof required for a conviction.

My service as Grand Jury Foreperson. Despite our abbreviated term of service, I believe that it made a difference for the grand jury to have as its foreperson someone with legal training, knowledge, and experience. It was not critical that my background was in the criminal law area, but it was an asset. Two examples, one from our first day of service, when we heard no cases, and one from our last day, when we did hear cases, exemplify the benefit.

During the first two days of service, I was able to explain why we were not hearing cases and why the prosecutor was seeking to discharge us. I never discussed the particulars of the prosecutor's objections to your charge because I thought that would put us in a better position to be recharged—and other grand jurors agreed. But I did explain the basics of filing motions, who Chief Judge McMonagle was, etc. On a more fundamental level, I explained legal terminology, for example the meaning of "ex parte." As you know, the grand jury retained legal counsel to represent our views to Chief Judge McMonagle regarding Mason's motion. While we were consulting with our attorney, one of the assistant prosecutors put a statement on the record objecting to our meeting. When we later learned he had done this, we asked the court reporter to read his objection to us, and heard that he objected to our meeting because it was "ex parte." At the time, I understood he did not think we should have met by ourselves, i.e., "ex parte," without his presence. I was so familiar with this phrase that it did not occur to me that others would not know its meaning, and therefore not understand his complaint. During a later conversation, one woman asked, rather sheepishly, what "ex parte" meant. Other grand jurors were relieved that she asked, because they also did not know. The fact that I was able to explain its meaning was important because it allowed everyone to know what the prosecutor was saying.

Similarly, when we discussed cases, I was able to explain how a defendant's mental illness would be relevant at trial. Some of the grand jurors thought that the trial jury would hear, as a matter of course, evidence about a person's mental limitations and would take that into account in deciding the person's guilt. After I explained the concepts of competency to stand trial and insanity, and how the evidence a jury might hear could be quite limited, several of the grand jurors rethought how we should proceed. Thus, with more accurate information, we were able to deliberate more thoughtfully.

The independence of the grand jury. Once impaneled, each grand jury is an independent legal body. A judge supervises the grand jury, and prosecutors present cases for indictment, but the grand jury deliberates in secrecy and its decisions, in the main, are not subject to review. The power to indict, to initiate formal criminal charges against an individual, is an awesome one. Once indicted a person's life is changed forever. As Monroe Freedman observed, "Merely to be charged with a crime is a punishing experience. The defendant's reputation is damaged, usually irreparably, despite an ultimate failure to convict."¹ This quote highlights the link between indictment and conviction; it is a connection that you emphasized in your instructions to us.

¹ MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 84 (1975) quoted in Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 41 (1979).

I fear, however, that the enormity and gravity of the grand jury's power, and its independence in exercising that power, are lost on grand jurors because of the way the connection between indictment and conviction is presented. The grand jury is repeatedly assured that a trial jury will decide whether the defendant should be convicted, despite the fact that everyone but the grand jury knows that a trial by jury is highly unlikely. In most jurisdictions, and I assume this is true in Cuyahoga County, approximately 90% of criminal cases result in plea bargains, not trials by juries. The failure to properly convey to the grand jury what actually happens in the criminal justice system lessens the grand jury's role in the process and disguises the import of the indictment.²

I did not appreciate the impact of the constant references to the eventual trial by jury until I was in the midst of deliberating as a grand juror. These references began, however, during our voir dire,³ appeared as part of our instructions, and arose during our day of service both when the prosecutors presented cases to us and when we deliberated. At each point, the way the prosecutors spoke about our responsibilities, and the instructions you gave us to follow, created the firm impression that a trial would occur in every case.

The repeated references to trial by jury reinforce the place of the grand jury as just another step in the process leading to the trial: a crime is committed, the police either see it or investigate it, the prosecutor decides to seek charges, asks the grand jury to indict (usually based on hearsay testimony) and then the jury will make the real decision about whether this person is guilty or not, based on hearing first-person, non-hearsay testimony. Yet, when most cases do not proceed to trial, the only testimony that will be heard by anyone in those cases is what the grand jury hears. The grand jury, therefore, deliberates based on an assumption that is false. The truth is that, in most cases, no trial jury will be impaneled so no one will hear first-person testimony, no other group of citizens will test or judge the evidence against the accused, and no trial jury will determine whether the offender committed the crime by proof beyond a reasonable doubt. Because the charges made in the indictment rarely will be tested in any further manner, the grand jury plays a much greater role in the system than it is led to believe. Yet, because grand jurors do not

² It is not an original observation to suggest that the actual role of the grand jury is less than it should be. Critics of the grand jury have long rued the "rubber-stamping" nature of most grand juries. See e.g., Lewis, *supra* note 1. Most often this criticism stems from some common observations: the grand jury is usually composed of lay persons who have no knowledge of legal terms and concepts, so they do not understand, nor are able to carry out, their responsibilities in an independent manner; and the grand jury hears so many cases so quickly that it cannot properly consider each one. In either case the result is that the grand jury relies too heavily on the prosecutor's assessment of the case. These criticisms have merit. Indeed, you recognized the problem of the lack of legal knowledge and provided us with copies of the Ohio Criminal Code (and appointed me as the Foreperson).

³ The prosecutor made a point of telling us that we would not have to decide whether to convict anyone because that was the trial jury's role. As I recall, this came up in the context of asking grand jurors about their views on the death penalty. One woman indicated that she could not sentence anyone to death, and the prosecutor reminded her that she would not have to because the grand jury's role was only to decide if enough evidence existed for the case to proceed.

know that trials are the exception rather than the rule, they cannot appreciate the magnitude of their indictments.

Some might argue that the grand jury does not need to know more about the process of which they are a part. That, just like sentencing information, or the defendant's prior criminal record, or maybe even the information I conveyed about competency to stand trial and insanity, knowing about plea-bargaining is irrelevant to deciding whether to indict a person. None of these matters affect whether sufficient information exists to indict. However, knowing about other parts of the criminal justice system, in particular the virtual absence of trials, seems qualitatively different and directly relevant to the grand jury's task. The instructions tell the grand jury that "no public purpose would be served by indicting a person when it appears to you that the evidence is not sufficient to sustain a conviction." Certainly this makes the standard of proof required for a conviction relevant, and the next sentence of the instructions provided that. It also makes the process by which a person is convicted relevant to the grand jury. If no other adversarial testing is likely to take place, the role of the grand jury is even more important because it becomes the only body of citizens to hear and weigh information about the alleged crime.

Two issues are relevant in considering what difference it would make if grand jurors knew that most of the cases they indict will not go to trial but result in a plea bargain: how grand jurors would incorporate this knowledge into their deliberations and what they are told about plea bargaining. I believe that grand jurors would treat each case more seriously and demand of themselves that they ask more questions, seek surer proof, and give each case greater consideration. This is not to say that grand jurors act flippantly—they do not. Nonetheless, the process demands that we act quickly on cases. In our brief term of service we heard less than fifteen cases. Most grand juries, when they "get up to speed" hear about 50 cases a day.⁴ The sheer numbers suggest that full consideration of every case is unlikely to occur. So if jurors knew a trial was unlikely, and gave greater time to each case, two events might occur: one, they might vote on fewer cases each day, and two, they might indict on fewer cases. Neither result would sit well with the prosecutor. But, those indictments would be more meaningful.

The second issue is what grand jurors would be told about plea bargains. If they were told only that plea bargains meant that the defendant admitted that sufficient evidence existed for a jury to convict, having this information would probably make little difference. But, if they were told more—that innocent people may plead guilty and the reasons why that might occur⁵—then they might have a more discriminating appreciation of the plea-bargaining process. That in turn might make them better able to see the enormity of the power that they have in deciding who to indict and on what charges.

⁴ See HANDBOOK FOR EVERYDAY USE BY MEMBERS OF THE CUYAHOGA COUNTY GRAND JURY 2 (1995) ("In a typical day, you will hear more than 50 cases.") See also Lewis, *supra* note 1 at 54 (noting that his grand jury heard approximately 1000 cases during its term).

⁵ For example, being offered a deal that makes the risk of going to trial and losing too high, or having a lawyer who is not willing to investigate or otherwise provide adequate counsel.

Scholars and grand jury forepersons have, over the years, proposed reforms to the grand jury system that they believe would shore-up the grand jury's independence and improve the criminal justice system.⁶ The reforms often focus on educating the grand jury about their responsibilities and expanding the quality of the information available to the grand jury. For example, providing training to grand jurors about their powers and duties; requiring the prosecutor to present exculpatory evidence about the commission of the crime,⁷ to inform all witnesses of their constitutional right not to incriminate themselves, and to present non-hearsay evidence.

My service as Grand Jury Foreperson convinces me that an additional reform is needed: educating the grand jury about the practical effect of its indictments in the criminal justice system. Some might say that this already occurs—the grand jury is told how the case comes to them through police investigation, how the prosecutor reviews all cases before presenting them to the grand jury, and that if the grand jury indicts, the case will proceed to trial. But that only explains the process as theory, not in practice. When the vast majority of cases do not go to trial, it is misleading to tell the grand jury that they do. Grand jury members are smart enough and committed enough to learn the truth about what happens to the cases after indictment. Just as our grand jury benefited from having copies of the Ohio Criminal Code because it gave us independent knowledge of the charges we were considering, so too, telling grand jurors more about how the criminal justice system actually works will increase grand jury independence and make the system stronger.

⁶ See Lewis, *supra* note 1, at 64-66 (proposing, among others, reforms of additional resources for the grand jury, training, allowing an accused's attorney to be present during questioning, and requiring better quality of evidence). Cf. Letter from The Rev. Marvin C. McMickle, Ph.D., Grand Jury Foreperson September Term 2001, to Administrative and Presiding Judge McMonagle (Feb. 19, 2002) (raising concerns about the high number and apparent racial bias of petty drug charges brought against African-Americans; Memo from Dorothy McComb to Bill Monroe, Grand Jury Foreman, September Term 2002 (Dec. 3, 2002) (raising concerns about the large volume low level felony drug cases and the deleterious effect on deliberations due to the large number of cases presented each day).

⁷ Approximately one-third of the states require that the prosecutor tell the jury about exculpatory evidence regarding the accused. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, *CRIMINAL PROCEDURE* §15.7 at 786 (3d. ed.). See, e.g., *State v. Gaughran*, 615 A.2d 1293, 1295 (N.J. 1992) (holding that under the N.J. Constitution the prosecutor is obliged to present "substantially exculpatory evidence" it has gathered).