

CORPUS JURIS SECUNDUM[®]

A CONTEMPORARY STATEMENT OF
AMERICAN LAW
AS DERIVED FROM
REPORTED CASES AND LEGISLATION

By

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GRAND JURIES

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PREFACE

The basic object of the C.J.S. set has been to present in concise form the result of the steady stream of precedents which have replaced, modified, or supplemented older doctrines, while at the same time preserving those principles or statements of law which have withstood the test of time and are firmly embedded in our jurisprudence. In carrying out this objective, the publisher has followed a planned program of replacement volumes for diverse areas where there have occurred substantial changes and developments in the law which can no longer be adequately dealt with in the pocket parts. In addition to reflecting these developments, such revisions provide an opportunity for reorganization of subject matter in accordance with modern editorial techniques designed to facilitate research, and for the featuring of the latest and most significant pronouncements of the courts.

Pursuant to the commitment to maintain the integrity and usefulness of C.J.S., a new and revised edition of volume 38, containing various titles, including Game; Conservation and Preservation of Wildlife, Gaming, Garnishment, Gas, Gifts, Grand Juries, and Guaranty, is published in replacement volumes 38 and 38A. A table of corresponding sections is set forth following the section analysis of each title to enable the reader to correlate the material of the prior volume 38 with that discussed in the recompiled volumes.

The pronouns "he", "his", and "him", as used in this work are not intended to convey the masculine gender alone. This form is used in a generic sense so as to avoid sentences which could be grammatically awkward.

The material in the new volumes is derived from reported cases and legislation. Each section is prefaced by a convenient summary of the law, and a library reference to the relevant key number of the West Digest System affords access to related areas.

For definitions, which have been eliminated from these volumes, please consult Black's Law Dictionary and Words and Phrases.

As with other volumes of the set, annual pocket parts will be published to supplement the volumes with relevant new cases and statutory changes.

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October, 1996

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I. IN GENERAL

§ 1. Scope of Title

This title includes a discussion of bodies of persons sworn to inquire into and make presentment of public offenses; the nature and constitution of such juries; the qualifications, selection, summoning, and compensation of grand jurors; challenges and objections to grand jurors; the organization, powers, duties, and general conduct of business of grand juries; secrecy as to their proceedings; the liabilities of grand jurors; and the liability of others for interference with grand juries.

Subjects excluded from this title and treated in other titles include indictments and presentments, the necessity for such accusations, and the finding, filing, and requisites of such accusations.¹ Other subjects excluded from this title and treated in other titles include juries in general,² and the privilege against self-incrimination.³

§ 2. General Considerations

A grand jury is a body of men who, according to law, are selected and summoned to serve before a competent court and are

by such court impaneled, sworn, and charged to inquire with regard to crimes committed within its jurisdiction and to present all offenders against the law. It is an inquisitorial and accusatorial, rather than a trial, body.

Library References

Grand Jury ⇐1, 26, 33.

A grand jury is a body of men selected and summoned according to law to serve before a competent court and by such court impaneled, sworn, and charged to inquire with regard to crimes committed within its jurisdiction, and to present all offenders against the law in the mode and manner defined by it.⁴ It is sometimes called a "grand inquest,"⁵ a term denoting a body with powers of investigation and inquisition.⁶ The grand jury holds a high place as an instrument of justice.⁷

The grand jury serves a dual function.⁸ First, it determines if there is probable cause to believe that a person has committed a crime,⁹ so that he

1. See C.J.S. Indictments and Informations.
2. See C.J.S. Juries.
3. See C.J.S. Criminal Law and C.J.S. Witnesses.
4. Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.
5. U.S.—Geiger v. U.S., Md., 162 F. 844, 89 C.C.A. 516.
Md.—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152 Md. 616.
N.Y.—People v. Doe, 286 N.Y.S. 343, 247 A.D. 324, affirmed 3 N.E.2d 875, 272 N.Y. 473.
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6. U.S.—Blair v. U.S., N.Y., 39 S.Ct. 468, 250 U.S. 273, 63 L.Ed. 979.
7. N.Y.—Matter of Fuhrer, 419 N.Y.S.2d 426, 100 Misc.2d 315.
8. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743—Branzburg v. Hayes, Ky., 92 S.Ct. 2646, 408 U.S. 665, 33 L.Ed.2d 626, dissenting opinion United States v. Caldwell, 92 S.Ct. 2686, 408 U.S. 665, 33 L.Ed.2d 657.
In re Grand Jury Subpoena Served Upon Doe, C.A.2(N.Y.), 781 F.2d 238, 83 A.L.R.Fed. 461, certiorari denied Roe v. U.S., 106 S.Ct. 1515, 475 U.S. 1108, 89 L.Ed.2d 914—U.S. v. Claiborne, C.A.9(Nev.), 765 F.2d 784, certiorari denied 106 S.Ct. 1636, 475 U.S. 1120, 90 L.Ed.2d 182.
Colo.—People v. Maestas, 606 P.2d 849, 199 Colo. 143.
- D.C.—U.S. v. Coachman, 752 F.2d 685, 243 U.S.App.D.C. 228.
Miles v. U.S., App., 483 A.2d 649.
- Hawaii—State v. O'Daniel, 616 P.2d 1383, 62 Haw. 518.
- Ill.—People v. Hayes, 564 N.E.2d 803, 151 Ill.Dec. 348, 139 Ill.2d 89, certiorari denied Hayes v. Illinois, 111 S.Ct. 1601, 449 U.S. 967, 113 L.Ed.2d 664.
- Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.
- Mass.—Commonwealth v. Club Caravan, Inc., 571 N.E.2d 405, 30 Mass.App.Ct. 561.

Mo.—Conway v. Quinn, App., 168 S.W.2d 445.

N.J.—State v. Myers, 570 A.2d 1260, 239 N.J.Super. 158, certification denied 604 A.2d 598, 127 N.J. 323.

N.Y.—People v. Monroe, 480 N.Y.S.2d 259, 125 Misc.2d 550.

Common law

Dual role of the grand jury as investigator and protector is not embodied in a catalogue of regulations and rules for grand jury behavior but rather is described in the case law and legal authorities and passed along as part of our common-law heritage.

U.S.—Application of Jordan, D.C.W.Va., 439 F.Supp. 199.

Balance functions

U.S.—In re Disclosure of Grand Jury Material, N.D.W.Va., 645 F.Supp. 76.

Triple function

Ancient function of grand jury in Anglo-American system of justice has traditionally been to sort accusations of criminal conduct, to advance public interest through discovery and indictment of persons chargeable with certain crimes, and to safeguard citizens against arbitrary, oppressive, and unwarranted criminal accusations.

N.J.—State v. LeFurge, 502 A.2d 35, 101 N.J. 404.

9. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.

Ariz.—State v. Sanchez, App., 797 P.2d 703, 165 Ariz. 164, review denied.

Conn.—State v. Couture, 482 A.2d 300, 194 Conn. 530, certiorari denied 105 S.Ct. 967, 469 U.S. 1192, 83 L.Ed.2d 971, appeal after remand 589 A.2d 343, 218 Conn. 309.

D.C.—Gregory v. U.S., App., 393 A.2d 132.

Primary function

Ariz.—State v. Coconino County Superior Court, Div. II, 678 P.2d 1386, 139 Ariz. 422—State v. Baumann, 610 P.2d 38, 125 Ariz. 404.

should be formally charged¹⁰ and required to stand trial,¹¹ and files charges¹² and causes a prosecution¹³ if there is such probable cause. Second, it protects citizens against unfounded prosecutions.¹⁴ The grand jury is a primary security to the innocent against hasty, malicious, and oppressive prose-

cution, and stands between accused and accuser to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.¹⁵

A grand jury is an inquisitorial,¹⁶ informing,¹⁷ and accusing¹⁸ body, and it is not a trial body.¹⁹ Thus,

Ill.—Phillips v. Graham, 427 N.E.2d 550, 56 Ill.Dec. 355, 86 Ill.2d 274.
N.Y.—People v. Calbud, Inc., 402 N.E.2d 1140, 49 N.Y.2d 389, 426 N.Y.S.2d 238.

Application of Rodriguez, 468 N.Y.S.2d 833, 121 Misc.2d 694.

Twofold purposes

Purposes of a grand jury proceeding are twofold: it seeks to determine if a crime has been committed and who committed that crime.

N.Y.—People v. Perez, 433 N.Y.S.2d 541, 105 Misc.2d 845.

Investigatory and accusatory function

N.Y.—People v. Hylton, 529 N.Y.S.2d 412, 139 Misc.2d 645.

Investigate possible offenses

Colo.—People v. Maestas, 606 P.2d 849, 199 Colo. 143.

N.Y.—People v. Curry, 579 N.Y.S.2d 1000, 153 Misc.2d 61.

10. Colo.—People v. Rickard, 761 P.2d 188.

D.C.—U.S. v. Haldeman, 559 F.2d 31, 181 U.S.App.D.C. 254, certiorari denied Ehrlichman v. U.S., 97 S.Ct. 2641, 431 U.S. 933, 53 L.Ed.2d 250 and Mitchell v. U.S., 97 S.Ct. 2641, 431 U.S. 933, 53 L.Ed.2d 250, rehearing denied 97 S.Ct. 2992, 433 U.S. 916, 53 L.Ed.2d 1103.

R.I.—State v. Driscoll, 360 A.2d 857, 116 R.I. 749.

11. U.S.—U.S. v. Rubio, C.A.Cal., 727 F.2d 786.

Alaska—Chief v. State, App., 718 P.2d 475.

Ga.—Beckham v. O'Brien, 336 S.E.2d 375, 176 Ga.App. 518.

Mass.—Commonwealth v. McNary, 140 N.E. 255, 246 Mass. 46, 29 A.L.R. 483.

R.I.—State v. Romano, 456 A.2d 746.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

12. U.S.—U.S. v. Ciambrone, C.A.N.Y., 601 F.2d 616.

13. Ill.—People v. Herbert, 438 N.E.2d 1255, 63 Ill.Dec. 892, 108 Ill.App.3d 143, certiorari denied Herbert v. Illinois, 103 S.Ct. 1190, 459 U.S. 1204, 75 L.Ed.2d 436.

Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

14. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.

U.S. v. Claiborne, C.A.9(Nev.), 765 F.2d 784, certiorari denied 106 S.Ct. 1636, 475 U.S. 1120, 90 L.Ed.2d 182.

Alaska—Preston v. State, 615 P.2d 594.

Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

Mass.—Commonwealth v. McLeod, 477 N.E.2d 972, 394 Mass. 727, certiorari denied Aiello v. Massachusetts, 106 S.Ct. 248, 474 U.S. 919, 88 L.Ed.2d 256.

N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

Pa.—Commonwealth v. Hubbs, 8 A.2d 611, 137 Pa.Super. 229.

Principal purpose

U.S.—U.S. v. Thomas, C.A.7(Ill.), 788 F.2d 1250, certiorari denied 107 S.Ct. 187, 479 U.S. 853, 93 L.Ed.2d 121, appeal after remand 934 F.2d 840.

One of its primary functions

One of primary functions of grand jury is to act as shield against arbitrary prosecution.

Ill.—People v. Rodgers, 442 N.E.2d 240, 65 Ill.Dec. 929, 92 Ill.2d 283.

Check against prosecutor and judge

Among functions of grand jury is to provide check against overzealous or mistaken prosecutor or overconditioned or biased response of a judge.

U.S.—U.S. v. Donohue, D.C.Md., 574 F.Supp. 1269.

15. U.S.—Wood v. Georgia, Ga., 82 S.Ct. 1364, 370 U.S. 375, 8 L.Ed.2d 569.

16. Ala.—Carr v. State, 187 So. 252, 28 Ala.App. 466.

Alaska—U.S. v. Caldwell, 8 Alaska 117.

Cal.—People v. Foster, 243 P. 667, 198 C. 112.

Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed on rehearing 131 So. 147, 100 Fla. 373—Reed v. State, 113 So. 630, 94 Fla. 32.

Ind.—Adams v. State, 17 N.E.2d 84, 214 Ind. 603, 118 A.L.R. 1095.

Okl.—Tweedy v. Oklahoma Bar Ass'n, 624 P.2d 1049.

General criminal investigation

(1) The grand jury is an investigating body.

Md.—Hitzelberger v. State, 196 A. 288, 173 Md. 435.

(2) The proceedings before a grand jury constitute the only general criminal investigation known to the law.

N.Y.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 A.D. 723.

17. U.S.—U.S. v. Atlantic Commission Co., D.C.N.C., 45 F.Supp. 187.

N.C.—State v. Crowder, 136 S.E. 337, 193 N.C. 130.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

18. U.S.—U.S. v. Atlantic Commission Co., D.C.N.C., 45 F.Supp. 187.

Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed on rehearing 131 So. 147, 100 Fla. 373—Reed v. State, 113 So. 630, 94 Fla. 32.

Md.—Hitzelberger v. State, 196 A. 288, 173 Md. 435—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

Wis.—State v. Lawler, 267 N.W. 65, 221 Wis. 423, 105 A.L.R. 568.

19. U.S.—U.S. v. Atlantic Commission Co., D.C.N.C., 45 F.Supp. 187.

it does not determine guilt or innocence,²⁰ and is not the ultimate fact finder,²¹ or a trier of fact,²² and does not try or convict,²³ and merely determines whether there is probable cause for a charge,²⁴ and whether an accusation is warranted,²⁵ and not whether a conviction is warranted.²⁶ Investigating, as distinct from indicting, grand juries do not even accuse, but only inquire and report.²⁷

Grand jury proceedings are ex parte rather than adversarial,²⁸ and are part of the investigatory process rather than the prosecution.²⁹ The grand jury is unfettered by technical rules³⁰ such as those which apply at trial.³¹ Constitutional rights applicable at trial are inapplicable or not fully applicable to grand jury proceedings.³²

20. U.S.—Bracy v. U.S., Cal., 98 S.Ct. 1171, 435 U.S. 1301, 55 L.Ed.2d 489, rehearing denied 98 S.Ct. 1603, 435 U.S. 965, 56 L.Ed.2d 57 (per Mr. Justice Rehnquist, as Circuit Justice).

U.S. v. Leverage Funding Systems, Inc., C.A.Cal., 637 F.2d 645, certiorari denied 101 S.Ct. 3110, 452 U.S. 961, 69 L.Ed.2d 972.

U.S. v. Atlantic Commission Co., D.C.N.C., 45 F.Supp. 187—U.S. v. Direct Sales Co., D.C.S.C., 40 F.Supp. 917.

Conn.—In re Investigation of Grand Juror into Bethel Police Dept., 452 A.2d 935, 188 Conn. 601.

Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376.

Mass.—Commonwealth v. McLeod, 477 N.E.2d 972, 394 Mass. 727, certiorari denied Aiello v. Massachusetts, 106 S.Ct. 248, 474 U.S. 919, 88 L.Ed.2d 256.

N.M.—State v. Juarez, App., 790 P.2d 1045, 109 N.M. 764, certiorari denied 790 P.2d 1032, 109 N.M. 751.

N.Y.—People v. Calbud, Inc., 402 N.E.2d 1140, 49 N.Y.2d 389, 426 N.Y.S.2d 238.

People v. Watson, 486 N.Y.S.2d 592, 127 Misc.2d 439.

Wyo.—Hennigan v. State, 746 P.2d 360.

Prosecutorial arm

A grand jury is not a judicial arm but a prosecutorial arm.

Md.—Bartram v. State, 364 A.2d 1119, 33 Md.App. 115, affirmed 374 A.2d 1144, 280 Md. 616.

21. Fla.—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed on rehearing 131 So. 147, 100 Fla. 373.

22. Conn.—In re Investigation of Grand Juror into Bethel Police Dept., 452 A.2d 935, 188 Conn. 601.

Md.—Bartram v. State, 374 A.2d 1144, 280 Md. 616.

23. U.S.—In re Oliver, Mich., 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

24. U.S.—Bracy v. U.S., Cal., 98 S.Ct. 1171, 435 U.S. 1301, 55 L.Ed.2d 489, rehearing denied 98 S.Ct. 1603, 435 U.S. 965, 56 L.Ed.2d 57 (per Mr. Justice Rehnquist, as Circuit Justice).

Falamante v. Romero, C.A.N.M., 620 F.2d 784, certiorari denied 101 S.Ct. 223, 449 U.S. 877, 66 L.Ed.2d 99.

U.S. v. Boffa, D.C.Del., 513 F.Supp. 444.

Alaska—Coleman v. State, 553 P.2d 40.

Ariz.—State ex rel. Collins v. Kamin, 725 P.2d 1104, 151 Ariz. 70.

Minn.—State v. Moore, 438 N.W.2d 101.

W.Va.—State ex rel. Pinson v. Maynard, 383 S.E.2d 844, 181 W.Va. 662.

25. N.D.—State v. Nordquist, 309 N.W.2d 109.

26. N.D.—State v. Nordquist, 309 N.W.2d 109.

27. Conn.—In re Investigation of Grand Juror into Bethel Police Dept., 452 A.2d 935, 188 Conn. 601.

Special grand jury

Sole function of special grand jury is to gather evidence and synthesize its findings into report which may be presented to regular grand jury.

Va.—Vihko v. Commonwealth, 393 S.E.2d 413, 10 Va.App. 498.

28. U.S.—U.S. v. Civella, C.A.Mo., 666 F.2d 1122—U.S. v. Ocanas, C.A.Tex., 628 F.2d 353, rehearing denied 633 F.2d 582, certiorari denied 101 S.Ct. 2316, 451 U.S. 984, 68 L.Ed.2d 840.

U.S. v. Rodriguez, S.D.N.Y., 777 F.Supp. 297—State of New Jersey ex rel. Kudisch on Behalf of Vargas v. Overbeck, D.C.N.J., 618 F.Supp. 196.

Fla.—Antone v. State, 382 So.2d 1205, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141, rehearing denied 101 S.Ct. 632, 449 U.S. 1057, 66 L.Ed.2d 512.

Hawaii—State v. Kahlbaun, 638 P.2d 309, 64 Haw. 197—State v. Rodrigues, 629 P.2d 1111, 63 Haw. 412.

Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

Mont.—State ex rel. Brackman v. District Court of First Judicial Dist. In and For Lewis and Clark County, 560 P.2d 523, 172 Mont. 24.

N.Y.—People v. Lancaster, 503 N.E.2d 990, 69 N.Y.2d 20, 511 N.Y.S.2d 559, certiorari denied Lancaster v. New York, 107 S.Ct. 1383, 480 U.S. 922, 94 L.Ed.2d 697—People v. Brewster, 472 N.E.2d 686, 63 N.Y.2d 419, 482 N.Y.S.2d 724.

29. N.Y.—People v. Filis, 386 N.Y.S.2d 988, 87 Misc.2d 1067.

30. U.S.—Costello v. U.S., N.Y., 76 S.Ct. 406, 350 U.S. 359, 100 L.Ed. 397, rehearing denied 76 S.Ct. 692, 351 U.S. 904, 100 L.Ed. 1440.

Ala.—Gore v. State, 114 So. 791, 22 Ala.App. 136, certiorari denied Ex parte State ex rel. Attorney General, 114 So. 794, 217 Ala. 68.

31. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 112 L.Ed.2d 795, 498 U.S. 292, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229—U.S. v. Calandra, Ohio, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561, 66 O.O.2d 320—U.S. v. Johnson, Ill., 63 S.Ct. 1233, 319 U.S. 503, 87 L.Ed. 1546, rehearing denied 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488 and U.S. v. Sommers, 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488.

U.S. v. Hyder, C.A.Fla., 732 F.2d 841.

Ill.—People v. Pinjoli, 581 N.E.2d 693, 3 Dist., 163 Ill.Dec. 539, 221 Ill.App.3d 254.

Iowa—State v. Paulsen, 286 N.W.2d 157.

32. U.S.—U.S. v. Shoiber, D.C.Pa., 489 F.Supp. 393.

Conn.—State v. Stepney, 435 A.2d 701, 181 Conn. 268, certiorari denied 101 S.Ct. 856, 449 U.S. 1077, 66 L.Ed.2d 799.

Fla.—Antone v. State, 382 So.2d 1205, certiorari denied 101 S.Ct. 287, 449 U.S. 913, 66 L.Ed.2d 141, rehearing denied 101 S.Ct. 632, 449 U.S. 1057, 66 L.Ed.2d 512.

Mass.—Commonwealth v. McLeod, 477 N.E.2d 972, 394 Mass. 727, certiorari denied Aiello v. Massachusetts, 106 S.Ct. 248, 474 U.S. 919, 88 L.Ed.2d 256.

N.M.—Matter of Grand Jury Sandoval County, App., 750 P.2d 464, 106 N.M. 764.

Protect limited rights

Since an accused has no right with respect to grand jury proceedings except that grand jury be duly impaneled and conducted according to law, his right in that respect should be rigorously protected.

rather than
investigatory pro-
The grand jury
such as those
nal rights appli-
fully applicable

A grand jury is generally not regarded as a judicial body or tribunal.³³ However, its functions are of a judicial nature;³⁴ a proceeding before it constitutes a judicial inquiry;³⁵ and according to some authorities it is regarded as a judicial body or tribunal.³⁶ Sometimes it is described as a governmental agency.³⁷

A grand jury proceeding is a criminal proceeding,³⁸ even though it may result in a civil contempt citation.³⁹ It has been said that grand juries are concerned with facts, not statutes.⁴⁰

Multiple grand juries.

The same matters may be considered by more than one grand jury.⁴¹ A potential accused has no right to have his case considered by a particular grand jury,⁴² and is not automatically prejudiced when a court impanels a new grand jury instead of recalling a discharged one.⁴³

Presumption of regularity.

Grand jury proceedings are granted a presumption of regularity,⁴⁴ and a grand jury is presumed to have acted in accordance with its sworn duty.⁴⁵

§ 3. Relation to Other Bodies and Officers

- a. In general
- b. Relation to prosecuting officer

N.M.—Baird v. State, 568 P.2d 193, 90 N.M. 667.

33. Md.—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.

34. Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

Judicial rather than legislative

Wis.—State ex rel. Town of Caledonia, Racine County v. County Court of Racine County, 254 N.W.2d 317, 78 Wis.2d 429.

35. U.S.—Levine v. U.S., N.Y., 80 S.Ct. 1038, 362 U.S. 610, 4 L.Ed.2d 989, rehearing denied 80 S.Ct. 1605, 363 U.S. 858, 4 L.Ed.2d 1739—Cobbledick v. U.S., Cal., 60 S.Ct. 540, 309 U.S. 323, 84 L.Ed. 783.

36. Cal.—Greenberg v. Superior Court for City and County of San Francisco, 121 P.2d 713, 19 C.2d 319.

Ex parte Bruns, 58 P.2d 1318, 15 C.A.2d 1—Ex parte Peart, 43 P.2d 334, 5 C.A.2d 469—Irwin v. Murphy, 19 P.2d 292, 129 C.A. 713.

N.C.—State v. Crowder, 136 S.E. 337, 193 N.C. 130.

37. Tenn.—Stanley v. State, 104 S.W.2d 819, 171 Tenn. 406.

Tex.—Ex parte Kennedy, 33 S.W.2d 443, 116 Tex.Cr. 118.

Ex parte Port, Cr.App., 674 S.W.2d 772.

38. U.S.—In re Williams, W.D.Pa., 766 F.Supp. 358, affirmed 963 F.2d 567.

39. U.S.—In re Williams, W.D.Pa., 766 F.Supp. 358, affirmed 963 F.2d 567.

40. Alaska—Nicholson v. State, App., 656 P.2d 1209.

41. U.S.—In re Grand Jury Proceedings, C.A.Okl., 658 F.2d 782.

42. Iowa—State v. Paulsen, 286 N.W.2d 157.

43. Iowa—State v. Paulsen, 286 N.W.2d 157.

a. In General

While a grand jury is generally regarded as a part of the court to which it is attached, it is to some extent independent of the court.

Library References

Grand Jury §=1, 33.

The grand jury is to some extent under the supervision of the court, as discussed *infra* § 78.

According to some authorities, a grand jury is never an independent body,⁴⁶ whether it is engaged in the exercise of its ordinary functions and powers in considering formal indictments laid before it by the district attorney, or in the performance of the special and occasional duty of investigating matters given it in charge by the court.⁴⁷ However, although after it is summoned, a grand jury does not become an entirely independent body,⁴⁸ it is very generally conceded that after it is duly organized the larger part of its legitimate functions is to be performed by it as a separate and independent body acting apart from the court.⁴⁹ A grand jury is clothed with great independence in many areas.⁵⁰ Some authorities state that a grand jury is a sepa-

44. U.S.—In re Grand Jury Proceedings, C.A.1(Puerto Rico), 814 F.2d 61.

Existence of presumption in criminal proceeding see C.J.S. Criminal Law § 702.

45. U.S.—Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

46. Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

Commonwealth v. Hubbs, 8 A.2d 611, 137 Pa.Super. 229.

47. Pa.—Commonwealth v. Hubbs, 8 A.2d 611, 137 Pa.Super. 229.

48. U.S.—In re National Window Glass Workers, D.C. Ohio, 287 F. 219, 1 Ohio Law Abs. 419.

49. Okl.—Coleman v. State, 118 P. 594, 6 Okl.Cr. 252.

Whether grand jury can investigate offense not called to its attention by court see *infra* § 79.

Freedom from influence or coercion

(1) On being impaneled, the grand jury is an independent body or arm of the court in its investigations and work in the sense that it is free from restraint or coercion from any source.

Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

(2) It must act free from influence, fear, favor, affection, reward, or hope thereof, proceeding from, or without, the court.

U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.

50. U.S.—Brown v. U.S., N.Y., 79 S.Ct. 539, 359 U.S. 41, 3 L.Ed.2d 609, rehearing denied 79 S.Ct. 873, 359 U.S. 976, 3 L.Ed.2d 843.
In re Grand Jury Investigation of Hugel, C.A.9(Cal.), 754 F.2d 863.

In re Grand Jury 79-01, D.C.Ga., 489 F.Supp. 844.

rate, distinct,⁵¹ independent⁵² body; or that it may⁵³ or must⁵⁴ act independently of the court;⁵⁵ or that, although, as stated supra this section, it is a part or adjunct of the court, it is an independent and self-acting body⁵⁶ and, within its field, operates wholly independently of the court.⁵⁷

A grand jury is not and should not be captive to any of the three branches of government,⁵⁸ and belongs to neither the executive nor the judicial branch.⁵⁹

It has been held that grand jurors are not judicial officers,⁶⁰ but more frequently they are regarded as officers of the court.⁶¹

Insofar as other grand juries or jurors are concerned, each panel of grand jurors is a distinct legal entity.⁶² There is no serious legal objection, according to some authorities, to the operation of two grand juries in the county at the same time.⁶³

A grand jury is a constituent part or branch of a court⁶⁴ having general criminal jurisdiction,⁶⁵ it is an arm,⁶⁶ appendage,⁶⁷ agency,⁶⁸ or adjunct⁶⁹ of the

51. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.
Tex.—Barnes v. State, 116 S.W.2d 408, 134 Tex.Cr. 461.

Separate tribunal

Tex.—Ex parte Port, Cr.App., 674 S.W.2d 772.

52. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.

Cal.—Ex parte Peart, 43 P.2d 334, 5 C.A.2d 469.

53. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

Tenn.—Stanley v. State, 104 S.W.2d 819, 171 Tenn. 406.

54. U.S.—U.S. v. Hyder, C.A.Fla., 732 F.2d 841.

U.S. v. Provenzano, D.C.N.Y., 440 F.Supp. 561.

55. N.J.—State v. Hilltop Private Nursing Home, Inc., 426 A.2d 1041, 177 N.J.Super. 377.

56. N.C.—Lewis v. Wake County Com'rs, 74 N.C. 194.

57. Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

58. U.S.—U.S. v. Chanen, C.A.Ariz., 549 F.2d 1306, certiorari denied 98 S.Ct. 72, 434 U.S. 825, 54 L.Ed.2d 83.

59. U.S.—U.S. v. Udziela, C.A.Ill., 671 F.2d 995, certiorari denied 102 S.Ct. 2964, 457 U.S. 1135, 73 L.Ed.2d 1353.

60. Ind.—Adams v. State, 17 N.E.2d 84, 214 Ind. 603, 118 A.L.R. 1095.

61. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.

Cal.—Ex parte Bruns, 58 P.2d 1318, 15 C.A.2d 1—Irwin v. Murphy, 19 P.2d 292, 129 C.A. 713.

62. N.Y.—In re Grand Jurors Ass'n, Bronx County, 25 N.Y.S.2d 154.

63. Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

64. Ky.—Bowling v. Sinnette, 666 S.W.2d 743.

Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

N.Y.—People v. DiFabio, 4 Dept., 566 N.Y.S.2d 172, 170 A.D.2d 1028, affirmed 588 N.E.2d 80, 79 N.Y.2d 836, 580 N.Y.S.2d 182—Dodge v. Supreme Court, State of New York, 291 N.Y.S. 527, 249 A.D. 103, affirmed 12 N.E.2d 538, 276 N.Y. 444—People v. Jackson, 199 N.Y.S. 870, 205 A.D. 202—People v. Pisanti, 38 N.Y.S.2d 850, 179 Misc. 308.

N.C.—Lewis v. Wake County Com'rs, 74 N.C. 194.

Part of court system

U.S.—In re Grand Jury 79-01, D.C.Ga., 489 F.Supp. 844.

Part of criminal judicial process

Minn.—In re Grand Jury of Wabasha County, Charged by Court January 19, 1976, 244 N.W.2d 253, 309 Minn. 148.

Part of court machinery

A grand jury is part of the federal court machinery.

U.S.—Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

65. Hawaii—Matter of Moe, 617 P.2d 1222, 62 Haw. 613.

Ill.—People v. Sheridan, 181 N.E. 617, 349 Ill. 202.

People v. Conzo, 23 N.E.2d 210, 301 Ill.App. 524.

66. U.S.—Levine v. U.S., N.Y., 80 S.Ct. 1038, 362 U.S. 610, 4 L.Ed.2d 989, rehearing denied 80 S.Ct. 1605, 363 U.S. 858, 4 L.Ed.2d 1739.

In re Swearingen Aviation Corp., D.C.Md., 486 F.Supp. 9, disclosure ordered 605 F.2d 125.

Mo.—State v. McClure, 31 S.W.2d 39, 325 Mo. 1228.

N.Y.—Spector v. Allen, 22 N.E.2d 360, 281 N.Y. 251.

People v. Monroe, 480 N.Y.S.2d 259, 125 Misc.2d 550—People v. Aviles, 391 N.Y.S.2d 303, 89 Misc.2d 1.

Ohio—State ex rel. Shoop v. Mitrovich, 448 N.E.2d 800, 4 Ohio St.2d 220, 4 O.B.R. 575.

Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382—Petition of McNair, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373.

Commonwealth v. Hubbs, 8 A.2d 611, 137 Pa.Super. 229.

Arm of court system

Alaska—O'Leary v. Superior Court, Third Judicial Dist., 816 P.2d 163 (per Matthews, Chief Justice, with one Justice concurring and one Justice concurring in part).

Arm of judiciary

U.S.—In re Grand Jury Investigation of Cuisinarts, Inc., C.A.Conn., 665 F.2d 24, certiorari denied Connecticut v. Cuisinarts, Inc., 103 S.Ct. 1520, 460 U.S. 1068, 75 L.Ed.2d 945.

D.C.—Washington v. U.S., App., 366 A.2d 457.

Tex.—Euresti v. Valdez, App.—Corpus Christi, 769 S.W.2d 575.

Agent of state

A grand jury is an agent of the sovereign state, a body constituting an arm of the court.

N.Y.—People v. Cirillo, 419 N.Y.S.2d 820, 100 Misc.2d 502.

67. U.S.—Brown v. U.S., N.Y., 79 S.Ct. 539, 359 U.S. 41, 3 L.Ed.2d 609, rehearing denied 79 S.Ct. 873, 359 U.S. 976, 3 L.Ed.2d 843.

In re Terranova, D.C.Wis., 495 F.Supp. 837.

68. Mo.—State v. McClure, 31 S.W.2d 39, 325 Mo. 1228.

69. Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

Necessary adjunct

A grand jury is a necessary adjunct of all courts charged with the enforcement of the criminal law.

Mo.—State ex rel. Lashly v. Wurdeman, 187 S.W. 257.

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Misc.2d 550—People v.

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court, but is not the court.⁷⁰ It has no existence
aside from the court which calls it into existence
and on which it is attending;⁷¹ and it may be
empowered to discharge the legal functions im-
posed on it only by virtue of the authority which it
derives as a body of men sworn and impaneled in
open court in the mode prescribed by law.⁷² It is
powerless to perform its investigative function
without the court's aid.⁷³ However, it has also been
held that a grand jury is not an agency of the
court.⁷⁴

b. Relation to Prosecuting Officer

The grand jury is not an agency of the prosecuting officer.

Research Note

Whether grand jury can investigate offense not submitted by
prosecutor is treated *infra* § 79.

A grand jury is not an agency,⁷⁵ arm,⁷⁶ or ap-
pendage⁷⁷ of the prosecuting officer, or an adjunct
of his office.⁷⁸ It can⁷⁹ and must⁸⁰ act independ-
tly of the prosecuting officer, and cannot function at
the uncontrolled will of such officer or his assis-
tant,⁸¹ or become an instrument of the prosecu-
tion.⁸² Although the prosecutor may guide the
grand jury in the exercise of its functions, the
grand jury alone determines the course of an inves-

70. N.Y.—Spector v. Allen, 22 N.E.2d 360, 281 N.Y. 251.

Application of Mullen, 31 N.Y.S.2d 710, 177 Misc. 734.

71. U.S.—In re National Window Glass Workers, D.C. Ohio, 287 F.
219, 1 Ohio Law Abs. 419.

72. Mass.—Commonwealth v. Bannon, 97 Mass. 214.

73. U.S.—Brown v. U.S., N.Y., 79 S.Ct. 539, 359 U.S. 41, 3 L.Ed.2d
609, rehearing denied 79 S.Ct. 873, 359 U.S. 976, 3 L.Ed.2d 843.

74. Tenn.—Stanley v. State, 104 S.W.2d 819, 171 Tenn. 406.

Investigating government

Grand jury's function of investigating and reporting on local govern-
ment is not inherently part of judicial system.

Cal.—Gillett—Harris—Duranceau & Associates, Inc. v. Kemple, 147
Cal.Rptr. 616, 83 C.A.3d 214.

75. Tenn.—Stanley v. State, 104 S.W.2d 819, 171 Tenn. 406.

76. N.Y.—People v. Aviles, 391 N.Y.S.2d 303, 89 Misc.2d 1.

77. N.Y.—People v. Cirillo, 419 N.Y.S.2d 820, 100 Misc.2d 502.

78. Cal.—Ex parte Peart, 43 P.2d 334, 5 C.A.2d 469.

79. Ariz.—Marston's, Inc. v. Strand, 560 P.2d 778, 114 Ariz. 260.

N.Y.—People v. Monroe, 480 N.Y.S.2d 259, 125 Misc.2d 550.

Tenn.—Stanley v. State, 104 S.W.2d 819, 171 Tenn. 406.

80. U.S.—U.S. v. Hyder, C.A.Fla., 732 F.2d 841.

U.S. v. Provenzano, D.C.N.Y., 440 F.Supp. 561.

81. U.S.—In re National Window Glass Workers, D.C. Ohio, 287 F.
219, 1 Ohio Law Abs. 419.

82. Minn.—State v. Richards, App., 464 N.W.2d 540, review denied.

tigation.⁸³ The prosecutor has a limited function in
his dealings with the grand jury.⁸⁴ The grand jury
performs its investigative function under the di-
rection, but not under the control, of the prosecu-
tor.⁸⁵

However, the relation between a public prosecut-
ing officer and the grand jury to whom he trans-
mits his bills of indictment is not to be determined
by any rule of universal application.⁸⁶

The presence of the prosecuting officer in the
grand jury room and his participation in the pro-
ceedings is discussed *infra* § 102.

§ 4. Origin and History

The grand jury system is of ancient common-law origin.
At the time of the settlement of this country the grand jury no
longer retained its early function of trying offenders as well as
accusing them.

Library References

Grand Jury ⇐1.

The institution of the grand jury is of very
ancient origin,⁸⁷ it goes back many centuries⁸⁸ to
the early history of England.⁸⁹ Although attempts
have been made to trace the institution back to its
first existence,⁹⁰ it is said that its origin is lost in
obscurity.⁹¹ At any rate, the grand jury system is

83. U.S.—U.S. v. DiBernardo, C.A.11(Fla.), 775 F.2d 1470, certiorari
denied 106 S.Ct. 1948, 476 U.S. 1105, 90 L.Ed.2d 357, on remand
657 F.Supp. 500, affirmed in part, vacated in part 880 F.2d 1216.

In re Grand Jury Proceedings, D.Puerto Rico, 700 F.Supp. 626.

84. U.S.—U.S. v. Pabian, C.A.Fla., 704 F.2d 1533.

85. U.S.—U.S. v. Cosby, C.A.Ga., 601 F.2d 754, 60 A.L.R.Fed. 67.

86. N.C.—State v. Crowder, 136 S.E. 337, 193 N.C. 130.

87. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.

Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815,
221 Iowa 732.

Md.—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152
Md. 616.

Mo.—Conway v. Quinn, App., 168 S.W.2d 445.

Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

88. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.

Mo.—Conway v. Quinn, App., 168 S.W.2d 445.

89. Iowa—Maley v. District Court of Woodbury County, 266 N.W.
815, 221 Iowa 732.

90. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.

Md.—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152
Md. 616.

Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.

Pa.—Petition of McNair, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373.

91. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.

Pa.—Petition of McNair, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373.

a product of the common law,⁹² the civil law making no provision for a body like the grand jury;⁹³ it came to this country as a part of the common law.⁹⁴

The grand jury was, at first, a body not only of accusers, but of triers as well;⁹⁵ but at the time of the settlement of this country it was an informing and accusing tribunal only.⁹⁶ It originated when there raged a conflict between the rights of the subject and the power of the crown;⁹⁷ it served in England as a barrier between the king and the rights of the subject⁹⁸ and secured the subject against oppression from unfounded prosecutions of the crown.⁹⁹

§ 5. Constitutional and Statutory Provisions in General

In federal prosecutions, the Fifth Amendment has adopted the grand jury as it existed at common law. In a state which has adopted the common law, a constitutional provision relating to the grand jury is deemed to refer to the common-law grand jury.

Library References

Grand Jury ⇐1, 2.

The Fifth Amendment to the United States Constitution provides that, in federal courts, certain crimes can be prosecuted only on a presentment or indictment of a grand jury, as discussed in C.J.S. Indictments and Informations § 6. The Fifth Amendment has adopted the grand jury as it existed at common law.¹

The Federal Constitution does not require the use of grand juries in state court prosecutions, as discussed in C.J.S. Constitutional Law §§ 1016, 1019 and C.J.S. Indictments and Informations §§ 6,

9. If a state chooses to use grand juries, requirements imposed in federal prosecutions by the Fifth Amendment provision concerning grand juries are inapplicable in state prosecutions.² However, the state is bound by the Fourteenth Amendment requirements of due process and equal protection.³

In many states, constitutional or statutory provisions require that certain crimes be prosecuted on indictment or presentment by a grand jury, as considered in C.J.S. Indictments and Informations § 6. In a state which has adopted the common law, a constitutional provision relating to the grand jury is deemed to refer to the common-law grand jury of historic origin.⁴ However, in some states the creation of grand juries is not constitutionally required.⁵ Where not constitutionally required, the grand jury is a creature of statute.⁶ The legislature may enact a statute providing for grand juries even in the absence of a constitutional requirement of grand juries.⁷ Where a grand jury system is derived from common law, the elimination of a constitutional provision for grand juries does not invalidate such system.⁸

It is judicially noted that some states have practically abolished the grand jury,⁹ as by allowing, through constitutional provisions, all prosecutions to be begun and carried out without the intervention of a grand jury,¹⁰ but providing that a grand jury may be called where prosecuting officers will not act.¹¹ The view is asserted that, generally speaking, under modern conditions, a grand jury is an antiquated, superfluous, and well-nigh useless

92. Cal.—Fitts v. Superior Court in and for Los Angeles County, 57 P.2d 510, 6 C.2d 230.
 Ill.—People ex rel. Ferrill v. Graydon, 164 N.E. 832, 333 Ill. 429.
 93. Cal.—Fitts v. Superior Court in and for Los Angeles County, 57 P.2d 510, 6 C.2d 230.
 94. Fla.—Cotton v. State, 95 So. 668, 85 Fla. 197.
 Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.
 Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.
 95. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.
 Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.
 Md.—Hitzelberger v. State, 196 A. 288, 173 Md. 435—Gamble v. State, 163 A. 859, 861, 164 Md. 50—In re Report of Grand Jury of Baltimore City, 137 A. 370, 152 Md. 616.
 96. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.
 97. U.S.—U.S. v. Olmstead, D.C.Wash., 7 F.2d 756.
 98. Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.
 99. Iowa—Maley v. District Court of Woodbury County, 266 N.W. 815, 221 Iowa 732.

1. U.S.—Application of Jordan, D.C.W.Va., 439 F.Supp. 199.
 2. U.S.—Boothe v. Wyrick, D.C.Mo., 452 F.Supp. 1304.
 Iowa—State v. Williams, 285 N.W.2d 248, certiorari denied 100 S.Ct. 1859, 445 U.S. 921, 64 L.Ed.2d 277.
 3. R.I.—State v. Jenison, 405 A.2d 3, 122 R.I. 142.
 4. Cal.—Fitts v. Superior Court in and for Los Angeles County, 57 P.2d 510, 6 C.2d 230.
 5. Nev.—Gier v. Ninth Judicial Dist. Court of State of Nev., In and For County of Douglas, 789 P.2d 1245, 106 Nev. 208.
 6. Ill.—People v. Gibson, 440 N.E.2d 339, 64 Ill.Dec. 787, 109 Ill.App.3d 316., habeas corpus dismissed in part, granted in part U.S. ex rel. Gibson v. McGinnis, 773 F.Supp. 126, habeas corpus denied 793 F.Supp. 173.
 7. Conn.—State v. Sanabria, 474 A.2d 760, 192 Conn. 671.
 8. Fla.—Girardeau v. State, App., 403 So.2d 513, petition for review dismissed 408 So.2d 1093.
 9. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.
 10. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.
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piece of legal machinery,¹² there being seldom any reason for invoking the cumbersome proceeding before it where prosecuting officers are willing to act.¹³

In some states matters pertaining to the grand jury are purely statutory and not controlled by the common law.¹⁴

Statutes governing the grand jury process should be strictly construed and compliance therewith meticulously observed.¹⁵ The legislature may apply procedural reforms retroactively so as to invalidate preexisting grand juries.¹⁶ Once a grand jury process is established by the legislature, the implementation becomes a judicial administrative responsibility.¹⁷

§ 6. Authority of Courts to Convene Grand Juries

A court may have either express or implied constitutional or statutory authority to convene a grand jury, it having implied authority when it is invested with jurisdiction of criminal offenses which can be prosecuted only on indictment or presentment of a grand jury.

Library References

Grand Jury §=1, 20.

At common law the process for summoning a grand jury was a precept either in the name of the king or of two or more justices of the peace directed to the sheriff. This was issued anterior to any action of the court, the object being to have a grand jury in attendance at the commencement of the term.¹⁸ The court, however, had power to have a grand jury summoned during the term, as occasion might require.¹⁹

12. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.

13. Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62.

14. La.—State ex rel. De Armas v. Platt, 192 So. 659, 193 La. 928.

15. N.Y.—Matter of June 1982 Grand Jury of Supreme Court of Rensselaer County, 3 Dept., 471 N.Y.S.2d 378, 98 A.D.2d 284.

16. Conn.—State v. Blasko, 522 A.2d 753, 202 Conn. 541.

17. Fla.—State ex rel. Reichle v. Edwards, 409 So.2d 1043.

18. Va.—Curtis v. Commonwealth, 13 S.E. 73, 87 Va. 589.

Commonwealth v. Burton, 4 Leigh 645, 31 Va. 645.

19. Va.—Curtis v. Commonwealth, 13 S.E. 73, 87 Va. 589.

Commonwealth v. Burton, 4 Leigh 645, 31 Va. 645.

20. Neb.—Pinn v. State, 186 N.W. 544, 107 Neb. 417.

Tex.—Robinson v. State, 274 S.W. 137, 100 Tex.Cr. 424.

Legislative power

The constitution imposes no restraint on power of legislature to determine when, under what circumstances, and how a grand jury may be summoned.

In the United States, while effect is accorded constitutional and statutory provisions relating to the convening of grand juries by courts,²⁰ courts invested with jurisdiction of criminal offenses, which can be prosecuted only on indictment or presentment of a grand jury, possess the power of summoning and impaneling grand juries apart from any express statutory authorization,²¹ the power being inferred as necessary and incidental to the discharge of the duty enjoined on the court in connection with the prosecution of offenses.²² Federal courts possess the inherent power to convene grand juries when they are necessary to satisfy the Fifth Amendment.²³ However, a grand jury cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal.²⁴

A court having no jurisdiction of criminal offenses has no jurisdiction to summon a grand jury;²⁵ and the same is true of courts whose criminal jurisdiction is so limited as not to require the instrumentality of a grand jury in order to discharge their duties fully.²⁶

A special judge who has failed to take oath as prescribed by the constitution is without authority to organize and impanel a grand jury.²⁷

A court is held to be without power to set a grand jury investigation in motion unless the court has reasonable cause to believe that the investigation will disclose some criminal misconduct which is within its jurisdiction to punish.²⁸

A grand jury is presumed to be legally constituted.²⁹

Ill.—People v. Grizzel, 46 N.E.2d 78, 382 Ill. 11—People ex rel. Ferrill v. Graydon, 164 N.E. 832, 333 Ill. 429.

21. Colo.—Williams v. People, 103 P. 298, 46 Colo. 183.

22. Ill.—Miller v. People, 56 N.E. 60, 183 Ill. 423.

23. U.S.—U.S. v. Christian, C.A.3, 660 F.2d 892.

24. U.S.—In re Mills, Ark., 10 S.Ct. 762, 135 U.S. 263, 34 L.Ed. 107.

25. Me.—State v. Doherty, 60 Me. 504.

26. Mich.—Jasnowski v. Connolly, 163 N.W. 910, 197 Mich. 257.

27. Tex.—Enloe v. State, 150 S.W.2d 1039, 141 Tex.Cr. 602.

28. Pa.—Petition of McNair, 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373.

29. Iowa—State v. Paulsen, 286 N.W.2d 157.

Federal rules of criminal procedure.

Under the Federal Rules of Criminal Procedure, the court shall order one or more grand juries to be summoned at such time as the public interest requires.³⁰

§ 7. — Special or Emergency Grand Juries

- a. In general
- b. Federal special grand jury
- a. In General

A special grand jury may be called by the court under a valid and applicable statute conferring authority to do so or, in some situations, apart from statutory authorization. A grand jury may be procured by order of court where there has been a failure to procure a jury in the manner prescribed by law.

Library References

Grand Jury §=1, 10, 20.

Under statutes so providing, a grand jury may be procured by order of court where, from a specified cause or any other cause, there has been a failure to procure a jury in the manner prescribed by law;³¹ and apart from any express statutory provision it has been held that this power may be exercised by a court invested by the constitution with original jurisdiction of criminal cases.³²

30. Fed.Rules Cr.Proc., Rule 6(a)(1), 18 U.S.C.A.

31. Ala.—Burgess v. State, 42 So. 681, 148 Ala. 654.

32. Ark.—Straughan v. State, 16 Ark. 37.

33. Ark.—Sutton v. State, 260 S.W. 409, 163 Ark. 562.

Ky.—Sowders v. Commonwealth, 248 S.W. 187, 197 Ky. 834.

Court has discretion

Idaho—Parsons v. Idaho State Tax Com'n, Dept. of Revenue and Taxation, App., 716 P.2d 1344, 110 Idaho 572.

Finding of necessity

Formal finding of necessity is not necessary to empanel grand jury pursuant to statute, which grants authority to district court to call grand jury in its discretion if court believes one is "necessary"; district court need not take evidence or seek advice concerning propriety of calling grand jury.

Wyo.—Hennigan v. State, 746 P.2d 360.

Additional grand jury

(1) Under proper conditions a circuit judge may empanel an additional grand jury to function concurrently with a regularly empaneled grand jury.

Ky.—Board of Ed. of Jefferson County v. Nicholson, 551 S.W.2d 1.

(2) Though motion and supporting affidavit requesting empaneling of special grand jury need not set forth in detail evidence on which Commonwealth's attorney may rely, there must be at least an allegation of conduct which would constitute reasonable grounds to believe that a grand jury investigation will disclose criminal activity within court's jurisdiction to punish; in addition, the papers must make it

A special grand jury may be called in pursuance of authority conferred by a valid and applicable statute,³³ such as a statute authorizing the ordering or summoning of a special grand jury whenever the judge is of opinion that justice requires it,³⁴ or a motion to set aside an indictment is sustained after the regular grand jury has been discharged,³⁵ or where the regular grand jury has been discharged during the term.³⁶ Under some statutes, the question of the necessity of a special grand jury after the discharge of the regular jury is left to the discretion of the court.³⁷ So aside from statute the rule is generally laid down that it is competent for a court to summon and impanel a special grand jury whenever, after the discharge of the regular jury, it is deemed necessary for the administration of public justice.³⁸

If the regular grand jury has been illegally impaneled at the beginning of the term it is competent for the court, unless restricted by statute, to discharge it at any time during the term, and impanel another.³⁹ Statutes sometimes expressly confer such authority.⁴⁰ However, unless permitted by statute,⁴¹ the disqualification of certain members of a grand jury does not authorize the discharge of the entire grand jury and the summoning and impaneling of another, although the withdrawal of the disqualified jurors would reduce

apparent that the regular grand jury is, for reasons beyond its control, unable to adequately function.

Ky.—Board of Ed. of Jefferson County v. Nicholson, 551 S.W.2d 1.

(3) Under statute providing that grand jury may be selected as often as public interest may require, county may empanel as many grand juries as are necessary to deal with volume of criminal activity.

Nev.—Lera v. Sheriff, Clark County, 568 P.2d 581, 93 Nev. 498.

Multicounty grand jury

Purpose of statute authorizing supreme court to convene multicounty, investigating grand juries is to enhance ability of commonwealth to inquire into criminal activity or public corruption reaching into several counties.

Pa.—Commonwealth v. Bradfield, 508 A.2d 568, 352 Pa.Super. 466, appeal denied 520 A.2d 1384, 513 Pa. 633.

34. Ill.—People v. Grizzel, 46 N.E.2d 78, 382 Ill. 11—People ex rel. Ferrill v. Graydon, 164 N.E. 832, 333 Ill. 429—People v. Bush, 133 N.E. 201, 300 Ill. 532.

35. Ark.—Sutton v. State, 260 S.W. 409, 163 Ark. 562.

36. Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

37. Mo.—State ex rel. Hall v. Burney, 84 S.W.2d 659, 229 Mo.App. 759.

38. Colo.—Mackey v. People, 2 Colo. 13.

39. Va.—Litton v. Commonwealth, 44 S.E. 923, 101 Va. 833.

40. Iowa—State v. Von Kutzleben, 113 N.W. 484, 136 Iowa 89.

41. Cal.—People v. Manahan, 32 C. 68.

the panel below the number required by law.⁴² The disqualified jurors should be dismissed and their places supplied,⁴³ especially where a statute expressly so provides.⁴⁴

Where the authority of a court to order a special venire is restricted to specified contingencies, it is essential to its authority to issue a special venire that the condition contemplated by the statute exist.⁴⁵ Constitutional provisions in some states are deemed to prevent the legislature from authorizing the impaneling of a special or additional grand jury to function at the same time and in the same county with a regular grand jury attending on the same court,⁴⁶ but in a state wherein there is no constitutional restraint on the power of the legislature to determine at what time and under what circumstances a grand jury may be summoned, and the legislature has exercised its power by authorizing an order for a special venire at any time the judge is of opinion that public justice requires it, a special grand jury may be impaneled even though a regular grand jury is in existence and is performing its duties and functions.⁴⁷

Request by prosecuting officer.

A statute requiring, in certain circumstances, the empanelment of an investigating grand jury on the application of a prosecuting officer has been upheld.⁴⁸

42. La.—*State v. Furco*, 25 So. 951, 51 La. Ann. 1082.

43. Nev.—*Eureka County Bank Habeas Corpus Cases*, 126 P. 655, 35 Nev. 80, rehearing denied 129 P. 308, 35 Nev. 80.

44. Iowa—*State v. Wheeler*, 105 N.W. 374, 129 Iowa 100.

45. Ala.—*Bailey v. State*, 55 So. 601, 172 Ala. 418.

46. R.I.—*In re Opinion to the Governor*, 4 A.2d 487, 62 R.I. 200, 121 A.L.R. 806.

47. Ill.—*People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 333 Ill. 429.

48. Pa.—*In re Investigating Grand Jury of Philadelphia County*, 415 A.2d 17, 490 Pa. 31.

When justified

(1) Power to convene a special investigating grand jury is never exercised except for urgent necessity or where the public interest would suffer from delay incident to the ordinary forms of law, and upon satisfaction of criteria established by the supreme court.

Pa.—*Commonwealth v. Barger*, 375 A.2d 756, 249 Pa. Super. 59.

(2) Information to sustain application to empanel grand jury or to sustain submission notice should support, *inter alia*, reasonable conclusion of possibility of criminal activity.

Pa.—*In re Investigating Grand Jury of Philadelphia County*, 415 A.2d 17, 490 Pa. 31.

(3) Special investigating grand jury may be convened to investigate criminal activity only upon reasonable cause to believe that an investigation will disclose some criminal misconduct within jurisdiction of court to punish; but where such reasonable cause exists, even if it should be determined by court that no crime was in fact committed,

Request by citizens.

Under some constitutional or statutory provisions, a court must convene a grand jury or otherwise submit a matter to a grand jury upon the petition of a certain number of persons,⁴⁹ and must make an initial determination of the legality of the proposed inquisition.⁵⁰

b. Federal Special Grand Jury

Some federal district courts must order a special grand jury to be summoned at least once in each period of 18 months.

Each federal district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of 18 months unless another special grand jury is then serving.⁵¹

Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for the district to be impaneled.⁵²

such conclusion would not affect the validity of the grand jury but would warrant only dismissal of any informations.

Pa.—*Commonwealth v. Barger*, 375 A.2d 756, 249 Pa. Super. 59.

Evaluation of request

(1) Under Investigating Grand Jury Act, president judge merely evaluates facial sufficiency of application to meet "statement" requirements of Act, and, in effect, grand juries may be empaneled on representations of district attorney which satisfy the Act.

Pa.—*In re Investigating Grand Jury of Philadelphia County*, 415 A.2d 17, 490 Pa. 31.

(2) If challenge is made to statements or allegations of application to empanel grand jury or of submission notice, supervising judge has discretion to evaluate and may accept factual affidavit, evidence or factual representations of district attorney through in camera or, where appropriate, adversary hearing and determine whether allegations and statements are adequate in terms of Investigating Grand Jury Act and were made in good faith, but good faith should not be found unless statements and allegations were made as result of information, rather than surmise, which could include tips, rumors or evidence.

Pa.—*In re Investigating Grand Jury of Philadelphia County*, 415 A.2d 17, 490 Pa. 31.

49. N.M.—*Cook v. Smith*, 834 P.2d 418, 114 N.M. 41.

50. N.M.—*Cook v. Smith*, 834 P.2d 418, 114 N.M. 41.

51. 18 U.S.C.A. § 3331(a).

52. 18 U.S.C.A. § 3332(b).

§ 8. — Grand Juries for Special Terms

Subject to statutory limitations, if any, a court authorized to hold a special term has power to convene a grand jury for such term.

Library References

Grand Jury ⇨1.

A court authorized to hold a special term has power to convene a grand jury for such term⁵³ under express statutory authority⁵⁴ or in the absence of a statutory limitation.⁵⁵

However, the court is bound by any statutory limitation on its power to call a grand jury to serve at a special term.⁵⁶

§ 9. De Facto Grand Jury or Juror

Authorities differ as to whether there can be a de facto grand jury.

Library References

Grand Jury ⇨1.

There is no such thing as a de facto grand jury in a federal court.⁵⁷

Likewise, some state courts assert that there is no such thing as a de facto grand jury,⁵⁸ but other state courts take a view to the contrary.⁵⁹ It has been held that the acts of a de facto grand jury are valid in the absence of fraud or prejudice.⁶⁰

There cannot be a grand jury de facto when there is a grand jury de jure.⁶¹

It has been held that the de facto officer doctrine applies to an improperly appointed grand juror.⁶²

§ 10. Improper Purpose

It is improper to use grand jury proceedings merely to elicit evidence for use in a civil case or to prepare a pending indictment for trial.

Research Note

Improper purpose for subpoena is treated infra § 137.

Library References

Grand Jury ⇨1, 24-26.

Use of grand jury proceedings merely to elicit evidence for use in a civil case is improper per se.⁶³ Government attorneys may not use a grand jury proceeding to gain advantages in a civil case which they are not entitled to.⁶⁴

It is improper to use a grand jury for the primary purpose of strengthening the government's case on a pending indictment or as a substitute for discovery.⁶⁵ The government may not utilize a grand jury for the sole or primary purpose of gathering evidence for use in a pending trial,⁶⁶ or of preparing a pending indictment for trial,⁶⁷ or of securing additional, postindictment evidence to be used at trial.⁶⁸ However, there appears to be some authority to the contrary.⁶⁹ Where no further in-

53. N.J.—State v. Bolitho, 136 A. 164, 103 N.J.Law 246, affirmed 146 A. 927, 104 N.J.Law 446—State v. McDevitt, 87 A. 123, 84 N.J.Law 11, affirmed 90 A. 287, 85 N.J.Law 731.

54. Ky.—Sowers v. Commonwealth, 248 S.W. 187, 197 Ky. 834.
Tex.—Lennon v. State, 26 S.W.2d 227, 114 Tex.Cr. 500—Hickox v. State, 253 S.W. 823, 95 Tex.Cr. 173.

55. Cal.—People v. Carabin, 14 C. 438.

56. Tex.—Terrell v. State, 139 S.W.2d 108, 139 Tex.Cr. 130.

57. U.S.—U.S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

58. Tenn.—Roberts v. State, 247 S.W. 101, 147 Tenn. 323.

59. Alaska—State v. Roark, App., 705 P.2d 1274.

Cal.—Ex parte Haymond, 27 P. 859, 91 C. 545—In re Gannon, 11 P. 240, 69 C. 541.

N.Y.—People v. Petrea, 92 N.Y. 128.

Wis.—State v. Wescott, 217 N.W. 283, 194 Wis. 410.

60. Tenn.—State v. McFarland, Cr.App., 638 S.W.2d 416.

61. Ill.—People v. Brautigam, 142 N.E. 208, 310 Ill. 472.

62. Alaska—State v. Roark, App., 705 P.2d 1274.

Tex.—Howard v. State, App. 9 Dist., 704 S.W.2d 575.

63. U.S.—U.S. v. Sells Engineering, Inc., Cal., 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743.

Exclusively criminal

Grand jury investigation is not conducted in good faith unless it is used to conduct investigations that are in their inception exclusively criminal.

U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136.

64. D.C.—Synanon Church v. U.S., D.C., 579 F.Supp. 967, affirmed 820 F.2d 421, 261 U.S.App.D.C. 13.

65. U.S.—U.S. v. Gibbons, C.A.Ok., 607 F.2d 1320.

66. U.S.—U.S. v. Phillips, D.C.Ill., 577 F.Supp. 879.

67. U.S.—In re Grand Jury Proceedings, C.A.1(Puerto Rico), 814 F.2d 61—U.S. v. Woods, C.A.Mich., 544 F.2d 242, certiorari denied Hurt v. U.S., 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, Blair v. U.S., 97 S.Ct. 1652, two cases, 430 U.S. 969, 52 L.Ed.2d 361, certiorari denied 97 S.Ct. 1652, 430 U.S. 969, 52 L.Ed.2d 361, Jackson v. U.S., 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270 and Kilpatrick v. U.S., 97 S.Ct. 2675, 431 U.S. 954, 53 L.Ed.2d 270, rehearing denied 97 S.Ct. 2689, 431 U.S. 960, 53 L.Ed.2d 279.

U.S. v. Raphael, S.D.N.Y., 786 F.Supp. 355, affirmed U.S. v. Alegria, 980 F.2d 830.

68. U.S.—U.S. v. Doss, C.A.Tenn., 545 F.2d 548, rehearing 563 F.2d 265.

In re Grand Jury Matter No. 86-525-5, E.D.Pa., 689 F.Supp. 454.

N.Y.—People v. Heller, 472 N.Y.S.2d 824, 122 Misc.2d 991.

69. Pa.—Commonwealth v. Lang, 537 A.2d 1361, 517 Pa. 390.

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Miller Brewing Co.,
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Supp. 967, affirmed

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79.

1 (Puerto Rico), 814
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L.Ed.2d 778, Blair v.
59, 52 L.Ed.2d 361,
69, 52 L.Ed.2d 361,
53 L.Ed.2d 270 and
54, 53 L.Ed.2d 270,
60, 53 L.Ed.2d 279.

55, affirmed U.S. v.

8, rehearing 563 F.2d

Pa., 689 F.Supp. 454.

isc.2d 991.

l, 517 Pa. 390.

dictments are contemplated, a grand jury should not be used to prepare a witness for trial.⁷⁰

Where there is a legitimate purpose behind a grand jury investigation, the proceeding is not improper merely because the government may derive an incidental benefit not related to such purpose.⁷¹ Furthermore, where a legitimate purpose for a grand jury investigation predominates, the fact that the government may derive an incidental tactical benefit does not render the proceeding improper.⁷² The government may continue a grand jury investigation even when the evidence received may also relate to a pending indictment,⁷³ where obtaining evidence relevant to the indictment is not the sole or dominant purpose.⁷⁴

The grand jury process may not be used by the prosecutor solely to conduct his own investigation.⁷⁵

Grand juries may not select targets of investigation out of malice or an intent to harass,⁷⁶ and may not be used by the prosecutor to harass witnesses.⁷⁷ Grand juries must operate within the limits of the First Amendment, and may not harass the press for purposes not of law enforcement but of disrupting a reporter's relationship with his news sources.⁷⁸

70. La.—State v. Johnson, App. 4 Cir., 467 So.2d 47, writ denied 474 So.2d 1301.

71. U.S.—Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.Wis., 687 F.2d 1079, on rehearing 717 F.2d 1136—U.S. v. Gibbons, C.A.Okla., 607 F.2d 1320.

72. State of New York v. Wagner, 398 N.E.2d 372, 34 Ill.Dec. 697, 79 Ill.App.3d 369, 12 A.L.R.4th 761.

73. D.C.—Brooks v. U.S., 448 A.2d 253.

74. U.S.—In re U.S. Grand Jury Proceedings, Western Dist. of Louisiana, Cid, C.A.5(La.), 767 F.2d 1131.

In re Grand Jury Matter No. 86-525-5, E.D.Pa., 689 F.Supp. 454—U.S. v. Phillips, D.C.Ill., 577 F.Supp. 879.

N.Y.—People v. Donaudy, 386 N.Y.S.2d 326, 87 Misc.2d 787.

Wyo.—Hopkinson v. State, 664 P.2d 43, certiorari denied 104 S.Ct. 262, 464 U.S. 908, 78 L.Ed.2d 246.

75. U.S.—U.S. v. Scott, C.A.7(Ill.), 784 F.2d 787, certiorari denied 106 S.Ct. 2257, 476 U.S. 1145, 90 L.Ed.2d 702.

76. N.J.—State v. Misik, 569 A.2d 894, 238 N.J.Super. 367.

77. U.S.—U.S. v. R. Enterprises, Inc., Va., 111 S.Ct. 722, 498 U.S. 292, 112 L.Ed.2d 795, on remand In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229.

78. U.S.—U.S. v. (Under Seal), C.A.Va., 714 F.2d 347, certiorari dismissed Doe v. U.S., 104 S.Ct. 1019, 464 U.S. 978, 78 L.Ed.2d 354.

79. U.S.—Branzburg v. Hayes, Ky., 92 S.Ct. 2646, 408 U.S. 665, 33 L.Ed.2d 626, dissenting opinion United States v. Caldwell, 92 S.Ct. 2686, 408 U.S. 665, 33 L.Ed.2d 657.

80. U.S.—U.S. v. Hyder, C.A.Fla., 732 F.2d 841—U.S. v. Burke, C.A.N.Y., 700 F.2d 70, certiorari denied 104 S.Ct. 72, 464 U.S. 816, 78 L.Ed.2d 85.

§ 11. Impartiality in General

Authorities differ as to whether there is a right to an unbiased grand jury.

Research Note

Fair cross section requirement is discussed infra §§ 13-19. Disqualification of grand juror for interest, bias, or prejudice is considered infra § 27.

Library References

Grand Jury ◊=1, 2½, 15, 20, 26.

A grand jury must be fair, impartial, and unbiased,⁷⁹ and must remain impartial and free from the appearance of being disinterested in fundamental constitutional principles.⁸⁰ The grand jury must remain free from suspicion and distrust and must always rest on a plane so high that no criticism can attach to it.⁸¹ Persons who are investigated by the grand jury have the right to be free of distrust, suspicion, and frustration toward the grand jury.⁸²

However, it has also been held that there is no right to an unbiased grand jury.⁸³

The fact that the grand jury considering a perjury indictment is the grand jury to which the allegedly perjurious statement was made does not mean that the jurors are unable to base their decisions on

In re Hunter, D.C.Mo., 520 F.Supp. 1020, affirmed 673 F.2d 211—U.S. v. Lawson, D.C.Md., 502 F.Supp. 158—U.S. v. Gold, D.C.Ill., 470 F.Supp. 1336—U.S. v. Azzarelli Const. Co., D.C.Ill., 459 F.Supp. 146.

Ariz.—Crimmins v. Superior Court, In and For Maricopa County, 668 P.2d 882, 137 Ariz. 39.

Conn.—State v. Simms, 518 A.2d 35, 201 Conn. 395.

N.Y.—People v. Hill, 415 N.Y.S.2d 541, 67 A.D.2d 427, appeal dismissed 408 N.E.2d 678, 50 N.Y.2d 894, 430 N.Y.S.2d 270, motion denied 432 N.E.2d 137, 55 N.Y.2d 800, 447 N.Y.S.2d 435, reargument denied 434 N.E.2d 1081, 55 N.Y.2d 1038, 449 N.Y.S.2d 1030, reconsideration denied 434 N.E.2d 267, 55 N.Y.2d 975, 449 N.Y.S.2d 198.

People v. Hussein, 568 N.Y.S.2d 296, 150 Misc.2d 119.

Independent and informed

To render decision free from bias, grand jury must be both independent and informed.

U.S.—U.S. v. Law Firm of Zimmerman & Schwartz, P.C., D.Colo., 738 F.Supp. 407.

80. U.S.—In re Layden, D.C.Ill., 446 F.Supp. 53.

81. Miss.—Mosley v. State, 396 So.2d 1015.

82. Miss.—Mosley v. State, 396 So.2d 1015.

83. U.S.—In re Balistrieri, D.C.Wis., 503 F.Supp. 1112.

Ind.—Averhart v. State, 470 N.E.2d 666, certiorari denied 105 S.Ct. 2051, 471 U.S. 1030, 85 L.Ed.2d 323, dismissal of habeas corpus affirmed 23 F.3d 410.

Mass.—Commonwealth v. Lewis, 427 N.E.2d 934, 12 Mass.App. 562, review denied 440 N.E.2d 1173, 385 Mass. 1101.

the evidence.⁸⁴ A grand jury may consider an indictment even if it has heard evidence of accused's participation in other crimes,⁸⁵ at least where the two offenses could properly have been joined in a single indictment.⁸⁶ It has been held that a grand jury may consider indictment of a person even if it heard immunized testimony from such person.⁸⁷ However, there is authority to the contrary.⁸⁸

§ 12. Compensation of Jurors

The right of a grand juror to compensation and the amount thereof is dependent on statutory provisions.

Library References

Grand Jury ⇌14.

The right of a grand juror to compensation and the amount thereof is dependent on statutory provisions.⁸⁹

A member of the grand jury is properly allowed extra compensation for his services as stenographer.⁹⁰

II. COMPOSITION AND FORMATION

A. DISCRIMINATION; FAIR CROSS SECTION

§ 13. In General

- A. General considerations
- b. Fair cross section in general
- c. Jury Selection and Service Act in general

a. General Considerations

Purposeful discrimination against an identifiable group in the selection of grand juries may involve a violation of the constitutional guaranty of equal protection.

Research Note

Discrimination and fair cross section requirement as affecting selection of foreman are considered infra § 55. Objections to indictment for irregularities in composition of grand jury are treated in C.J.S. Indictments and Informations § 176.

Library References

Grand Jury ⇌2½, 8, 17.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Purposeful discrimination against an identifiable group in the selection of grand juries may involve a violation of the constitutional guaranty of equal protection.⁹¹ Such discrimination need not involve an absolute exclusion, and may involve substantial underrepresentation of the group.⁹² Purposeful discrimination is required, and a disproportionate impact is insufficient.⁹³ The existence of a constitutional violation does not depend upon whether accused is a member of the group discriminated

84. U.S.—U.S. v. Vinieris, D.C.N.Y., 595 F.Supp. 88.
 Ariz.—Franzi v. Superior Court of Arizona In and For Pima County, 679 P.2d 1043, 139 Ariz. 556.
 N.M.—State v. Watkins, App., 590 P.2d 169, 92 N.M. 470.

Not best practice

Although it would have been better practice not to have sought perjury and conspiracy to commit perjury indictments from same grand jury which heard alleged perjury, no reversible error resulted.

Miss.—Smallwood v. State, 584 So.2d 733.
 85. Alaska—Bangs v. State, App., 663 P.2d 981.
 86. Alaska—Massey v. State, App., 771 P.2d 448.
 N.Y.—Gojd v. Booth, 435 N.Y.S.2d 325, 79 A.D.2d 1013.
 87. N.J.—State v. Maiorana, 573 A.2d 475, 240 N.J.Super. 352, certification denied 604 A.2d 601, 127 N.J. 327.
 88. U.S.—U.S. v. Hinton, C.A.N.Y., 543 F.2d 1002, certiorari denied Carter v. U.S., 97 S.Ct. 493, 429 U.S. 980, 50 L.Ed.2d 589, Darby v. U.S., 97 S.Ct. 764, 429 U.S. 1051, 50 L.Ed.2d 767, Bates v. U.S., 97 S.Ct. 796, 429 U.S. 1066, 50 L.Ed.2d 783 and Cameron v. U.S., 97 S.Ct. 1677, 430 U.S. 982, 52 L.Ed.2d 376.
 89. Iowa—Park v. Polk County, 261 N.W. 508, 220 Iowa 120.
 90. Mich.—People v. Lauder, 46 N.W. 956, 82 Mich. 109.

91. U.S.—Vasquez v. Hillery, Cal., 106 S.Ct. 617, 474 U.S. 254, 88 L.Ed.2d 598—Casteneda v. Partida, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498—Hernandez v. State of Texas, Tex., 74 S.Ct. 667, 347 U.S. 475, 98 L.Ed. 866.
 Ga.—Creamer v. State, 258 S.E.2d 212, 150 Ga.App. 458.
 La.—State v. Cage, 337 So.2d 1123.
 Mo.—State v. Johnson, App., 539 S.W.2d 493, certiorari denied 97 S.Ct. 1558, 430 U.S. 934, 51 L.Ed.2d 779.
 N.J.—State v. Dixon, 593 A.2d 266, 125 N.J. 223.
 Equal protection as affecting constitution of juries in general see C.J.S. Constitutional Law § 722. Equal protection as affecting grand juries in general see C.J.S. Constitutional Law § 752.
 92. U.S.—Casteneda v. Partida, Texas, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.
 N.Y.—People v. Guzman, 457 N.E.2d 1143, 60 N.Y.2d 403, 469 N.Y.S.2d 916, certiorari denied Guzman v. New York, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.
 93. U.S.—Casteneda v. Partida, Texas, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498—Akins v. State of Texas, Tex., 65 S.Ct. 1276, 325 U.S. 398, 89 L.Ed.2d 1692, rehearing denied 66 S.Ct. 86, 326 U.S. 806, 90 L.Ed.2d 491.

against.⁹⁴

Racial discrimination in grand jury selection violates the equal protection guaranty.⁹⁵ Once a state chooses to provide grand juries, it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias.⁹⁶ The principles that apply to the systematic exclusion of potential jurors on the ground of race are essentially the same in the case of grand juries as in the case of petit juries.⁹⁷ Accused is entitled to require that the state not deliberately and systematically deny to members of his race the right to participate as grand jurors in the administration of justice.⁹⁸ Limitation of the number of persons of a particular race on a grand jury in approximate proportion to the number eligible for grand jury service violates the equal protection guaranty.⁹⁹

Even discrimination designed to obtain a racial balance is improper.¹

Where a state subjects a person to indictment by a grand jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States, the state violates the requirement of due process.²

b. Fair Cross Section in General

It has been held that, where a grand jury is used, there is a constitutional right to the selection of the grand jury from a fair cross section of the community.

It has been held that, where a grand jury is used, there is a constitutional right to the selection of the grand jury from a fair cross section of the community.³ This right has been held to arise under the Sixth Amendment right to trial by an impartial jury,⁴ made applicable to the states by the Four-

94. U.S.—Peters v. Kiff, Ga., 92 S.Ct. 2163, 407 U.S. 493, 33 L.Ed.2d 83, on remand 491 F.2d 967 (per Mr. Justice Marshall, with two justices concurring and three justices concurring in the judgment). Standing to assert violation see infra § 19.

Deliberately selecting juror in same group as accused

Sheriff's looking to match defendant with grand juror of same race as defendant was not evidence of innocent intent but itself constituted a conscious effort to establish panel based on racial factors, a practice as impermissible as systematic exclusion.

U.S.—Villafane v. Manson, D.C.Conn., 504 F.Supp. 78, affirmed 639 F.2d 770, certiorari denied 101 S.Ct. 3066, 452 U.S. 930, 69 L.Ed.2d 431.

95. U.S.—Tollett v. Henderson, Tenn., 93 S.Ct. 1602, 411 U.S. 258, 36 L.Ed.2d 235—Brown v. Allen, N.C., 73 S.Ct. 397, 344 U.S. 443, 97 L.Ed.2d 469, dissenting opinion Daniels v. Allen, 73 S.Ct. 437, 344 U.S. 443, 97 L.Ed. 469, rehearing denied 73 S.Ct. 827, two cases, 345 U.S. 946, 97 L.Ed. 1370 and Speller v. Allen, 73 S.Ct. 827, 345 U.S. 946, 97 L.Ed. 1370—Akins v. State of Texas, Tex., 65 S.Ct. 1276, 325 U.S. 398, 89 L.Ed. 1692, rehearing denied 66 S.Ct. 86, 326 U.S. 806, 90 L.Ed. 491—Smith v. State of Texas, Tex., 61 S.Ct. 164, 311 U.S. 128, 85 L.Ed. 84, conformed to 147 S.W.2d 1118, 140 Tex.Cr. 565—Pierre v. State of Louisiana, La., 59 S.Ct. 536, 306 U.S. 354, 83 L.Ed. 757—Norris v. State of Alabama, Ala., 55 S.Ct. 579, 294 U.S. 587, 79 L.Ed. 1074.

Neal v. State of Delaware, Del., 103 U.S. 370, 26 L.Ed. 657.

Jefferson v. Morgan, C.A.6(Tenn.), 962 F.2d 1185, certiorari denied 113 S.Ct. 297, 506 U.S. 905, 121 L.Ed.2d 221.

Tex.—Flores v. State, App.—El Paso, 783 S.W.2d 793.

Racial discrimination as constituting reversible error per se without showing of prejudice see C.J.S. Criminal Law § 1718.

Violates state statute

U.S.—Williams v. State of Mississippi, C.A.Miss., 608 F.2d 1021, appeal dismissed, certiorari denied 101 S.Ct. 49, 449 U.S. 804, 66 L.Ed.2d 8.

96. U.S.—Carter v. Jury Commission of Greene County, Ala., 90 S.Ct. 518, 396 U.S. 320, 24 L.Ed.2d 549.

97. U.S.—Alexander v. Louisiana, La., 92 S.Ct. 1221, 405 U.S. 625, 31 L.Ed.2d 536—Pierre v. State of Louisiana, La., 59 S.Ct. 536, 306 U.S. 354, 83 L.Ed. 757.

Equal protection as affecting constitution of juries in general see C.J.S. Constitutional Law § 722. Equal protection as affecting constitution of petit juries see C.J.S. Constitutional Law § 770.

98. Alexander v. Louisiana, La., 92 S.Ct. 1221, 405 U.S. 625, 31 L.Ed.2d 536—Eubanks v. State of Louisiana, La., 78 S.Ct. 970, 356 U.S. 584, 2 L.Ed.2d 991—Reece v. State of Georgia, Ga., 76 S.Ct. 167, 350 U.S. 85, 100 L.Ed. 77, rehearing denied 76 S.Ct. 297, 350 U.S. 943, 100 L.Ed. 822, opinion conformed to 91 S.E.2d 29, 212 Ga. 161—Hernandez v. State of Texas, Tex., 74 S.Ct. 667, 347 U.S. 475, 98 L.Ed. 866—Patton v. State of Mississippi, Miss., 68 S.Ct. 184, 332 U.S. 463, 1 A.L.R.2d 1286, 92 L.Ed. 76, mandate conformed to 33 So.2d 456, 203 Miss. 265—Smith v. State of Texas, Tex., 61 S.Ct. 164, 311 U.S. 128, 85 L.Ed. 84, conformed to 147 S.W.2d 1118, 140 Tex.Cr. 565—Pierre v. State of Louisiana, La., 59 S.Ct. 536, 306 U.S. 354, 83 L.Ed. 757—Carter v. State of Texas, Tex., 20 S.Ct. 687, 177 U.S. 442, 44 L.Ed. 839.

Conn.—State v. Wright, 542 A.2d 299, 207 Conn. 276.

Mo.—State v. Baker, 636 S.W.2d 902, certiorari denied 103 S.Ct. 834, 459 U.S. 1183, 74 L.Ed.2d 1027.

99. U.S.—Cassell v. State of Texas, Tex., 70 S.Ct. 629, 339 U.S. 282, 94 L.Ed. 839.

1. N.J.—State v. Ramseur, 524 A.2d 188, 106 N.J. 123, denial of habeas corpus affirmed 983 F.2d, certiorari denied 113 S.Ct. 2433, 508 U.S. 947, 124 L.Ed.2d 653.

2. U.S.—Peters v. Kiff, Ga., 92 S.Ct. 2163, 407 U.S. 493, 33 L.Ed.2d 83, on remand 491 F.2d 967 (per Mr. Justice Marshall, with two justices concurring and three justices concurring in the judgment).

3. U.S.—Machetti v. Linahan, C.A.Ga., 679 F.2d 236, certiorari denied 103 S.Ct. 763, 459 U.S. 1127, 74 L.Ed.2d 978—Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Com'rs, C.A.Tex., 622 F.2d 807, certiorari denied 101 S.Ct. 1479, 450 U.S. 964, 67 L.Ed.2d 613.

D.C.—Obregon v. U.S., App., 423 A.2d 200, certiorari denied 101 S.Ct. 3054, 452 U.S. 918, 69 L.Ed.2d 422.

Ky.—Colvin v. Commonwealth, 570 S.W.2d 281.

La.—State v. Lawrence, 351 So.2d 493.

Nev.—Adler v. State, 594 P.2d 725, 95 Nev. 339.

N.J.—State v. Dixon, 593 A.2d 266, 125 N.J. 223.

R.I.—State v. Manocchio, 448 A.2d 761, certiorari denied 103 S.Ct. 820, 459 U.S. 1173, 74 L.Ed.2d 1017.

4. U.S.—U.S. v. Abell, D.C.Me., 552 F.Supp. 316, 68 A.L.R.Fed. 157—U.S. v. Musto, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Denticio v. U.S., 104 S.Ct.

teenth Amendment.⁵ However, it has also been held that the Sixth Amendment is inapplicable to grand juries,⁶ and that the fair cross section right is therefore inapplicable to state grand juries.⁷ It has also been held that such a right arises under the Fourteenth Amendment general requirement of due process, and is applicable to state grand juries.⁸ Even authorities who hold that such a right does not arise under the Sixth Amendment hold that such a right applies in federal prosecutions and arises under the Fifth Amendment right to an indictment by a grand jury.⁹

Some statutes provide a fair cross section requirement.¹⁰

The principles concerning the fair cross section requirement applicable to petit juries, discussed in C.J.S. Constitutional Law § 1067 and C.J.S. Juries § 124, have been held to apply likewise to grand juries.¹¹ The fair cross section right is not entirely

analogous to the right of equal protection.¹² It has been held that a violation does not require intent,¹³ or bad faith.¹⁴ However, it should be noted that the due process requirement is not implicated by a negligent act causing an unintended loss of liberty, as discussed in C.J.S. Constitutional Law § 977. The test under the Sixth Amendment is the same as that under the Jury Selection and Service Act.¹⁵

c. Jury Selection and Service Act in General

Under the Jury Selection and Service Act, in federal court there is a right to grand juries selected at random from a fair cross section of the community.

Under the Jury Selection and Service Act, it is the policy of the United States that all litigants in federal court entitled to trial by jury shall have the right to grand juries selected at random from a fair cross section of the community in the district or

- 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883—U.S. v. Hanson, D.C.Minn., 472 F.Supp. 1049, affirmed 618 F.2d 1261, certiorari denied 101 S.Ct. 148, 449 U.S. 854, 66 L.Ed.2d 67.
- 5. Ohio—State v. Puente, 431 N.E.2d 987, 69 Ohio St.2d 136, 23 O.O.3d 178, certiorari denied 102 S.Ct. 2910, 457 U.S. 1109, 73 L.Ed.2d 1318.
- 6. Ariz.—State v. Acosta, App., 608 P.2d 83, 125 Ariz. 146. Mass.—Commonwealth v. Bastarache, 414 N.E.2d 984, 382 Mass. 86.
- 7. Ariz.—State v. Acosta, App., 608 P.2d 83, 125 Ariz. 146.
- 8. N.Y.—People v. Guzman, 457 N.E.2d 1143, 60 N.Y.2d 403, 469 N.Y.S.2d 916, certiorari denied Guzman v. New York, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.
- 9. D.C.—Oregon v. U.S., App., 423 A.2d 200, certiorari denied 101 S.Ct. 3054, 452 U.S. 918, 69 L.Ed.2d 422.
- 10. Ga.—Devier v. State, 300 S.E.2d 490, 250 Ga. 652, appeal after remand 323 S.E.2d 150, 253 Ga. 604, certiorari denied 105 S.Ct. 1877, 471 U.S. 1009, 85 L.Ed.2d 169.
- 11. D.C.—Oregon v. U.S., App., 423 A.2d 200, certiorari denied 101 S.Ct. 3054, 452 U.S. 918, 69 L.Ed.2d 422. Ky.—Commonwealth v. McFerron, 680 S.W.2d 924.
- 12. Ga.—Parks v. State, 330 S.E.2d 686, 254 Ga. 403, 62 A.L.R.4th 833.

Difference

(1) In equal protection matters, focus is on purposeful discrimination while in fair cross section cases, focus is not on discriminatory conduct but instead is on whether jury selection system is impartial and will yield microcosm of community which can fairly represent views of all persons within society.

U.S.—U.S. v. Musto, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Denticio v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

(2) Standards under the fair cross section requirements for grand jury and the equal protection clause differs somewhat in that fair cross section distinctiveness encompasses the broader principle that jury should be drawn from a source fairly representative of the community, whereas equal protection focuses upon classes which have historically

been discriminatorily excluded or substantially underrepresented based on race or national origin.

N.Y.—People v. Guzman, 454 N.Y.S.2d 852, 89 A.D.2d 14, affirmed 457 N.E.2d 1143, 60 N.Y.2d 403, 469 N.Y.S.2d 916 certiorari denied Guzman v. New York, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.

13. U.S.—U.S. v. Donohue, D.C.Md., 574 F.Supp. 1269—U.S. v. Musto, D.C.N.Y., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Denticio v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883—Villafane v. Manson, D.C.Conn., 504 F.Supp. 78, affirmed 639 F.2d 770, certiorari denied 101 S.Ct. 3066, 452 U.S. 930, 69 L.Ed.2d 431.

Conn.—State v. Castonguay, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

Statute

Ga.—Devier v. State, 300 S.E.2d 490, 250 Ga. 652, appeal after remand 323 S.E.2d 150, 253 Ga. 604, certiorari denied 105 S.Ct. 1877, 471 U.S. 1009, 85 L.Ed.2d 169.

N.J.—State v. Long, 499 A.2d 264, 204 N.J.Super. 469.

14. U.S.—U.S. v. Musto, 540 F.Supp. 346, affirmed U.S. v. Aimone, D.C.N.Y., 715 F.2d 822, certiorari denied Denticio v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

N.J.—State v. Porro, 377 A.2d 950, 152 N.J.Super. 259, affirmed 385 A.2d 1258, 158 N.J.Super. 269, certiorari denied 99 S.Ct. 724, 439 U.S. 1047, 58 L.Ed.2d 706.

15. U.S.—U.S. v. Miller, C.A.9(Idaho), 771 F.2d 1219.

Purpose

Purpose of fair cross section protection is to provide criminal defendant with grand juries which are microcosms of community. U.S.—U.S. v. Perez—Hernandez, C.A.Fla., 672 F.2d 1380.

Community

The term "community" is a term of art referring to total populace of division or district wherein court convenes and not to a particular city or municipality within division or district.

U.S.—Jeffers v. U.S., D.C.Ind., 451 F.Supp. 1338.

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division wherein the court convenes,¹⁶ and that all citizens shall have the opportunity to be considered for service on grand juries in the district courts of the United States.¹⁷ No citizen shall be excluded from service as a grand juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.¹⁸ The Act embodies two important general principles: random selection, and determination of disqualifications, excuses, exemptions, and exclusions upon the basis of objective criteria only.¹⁹

Even if the Sixth Amendment is inapplicable to grand juries, the Act extends the Sixth Amendment fair cross section requirement to federal grand

juries.²⁰ The test under the fair cross section requirement of the Act is the same as the one under the Sixth Amendment.²¹ A violation does not require intent.²²

Relief will be provided where there is a substantial failure to comply with the provisions of the Act.²³ A violation must be substantial,²⁴ and a technical deviation is insufficient.²⁵ In determining whether a violation is substantial, the goals of the Act must be considered.²⁶ A violation is substantial only if it contravenes the principles of random selection or objective criteria.²⁷ Various violations have been held not substantial²⁸

16. 28 U.S.C.A. § 1861.

17. 28 U.S.C.A. § 1861.

18. 28 U.S.C.A. § 1862.

19. U.S.—U.S. v. Butts, D.C.Fla., 514 F.Supp. 1225.

20. U.S.—U.S. v. Donohue, D.C.Md., 574 F.Supp. 1269.

21. U.S.—U.S. v. Miller, C.A.9(Idaho), 771 F.2d 1219.

U.S. v. Musto, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Dentico v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

22. U.S.—Villafane v. Manson, D.C.Conn., 504 F.Supp. 78, affirmed 639 F.2d 770, certiorari denied 101 S.Ct. 3066, 452 U.S. 930, 69 L.Ed.2d 431.

23. 28 U.S.C.A. § 1867.

Prejudice unnecessary

U.S.—U.S. v. Caron, D.C.Va., 551 F.Supp. 662, affirmed 722 F.2d 739, certiorari denied 104 S.Ct. 1602, 465 U.S. 1103, 80 L.Ed.2d 132—U.S. v. Coleman, D.C.Mich., 429 F.Supp. 792.

Grand jury not nullity

Selection of Grand Jury in substantial noncompliance with Act does not mean that grand jury was a "nullity" having no authority to do anything.

U.S.—U.S. v. Caron, D.C.Va., 551 F.Supp. 662, affirmed 722 F.2d 739, certiorari denied 104 S.Ct. 1602, 465 U.S. 1103, 80 L.Ed.2d 132.

24. U.S.—U.S. v. Bearden, C.A.Ga., 659 F.2d 590, certiorari denied Northside Realty Associates, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456 and Browning-Ferris Industries of Georgia, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456, on remand 555 F.Supp. 595.

Violation of plan

A substantial violation of district plan for grand jury selection is equally a substantial violation of the Jury Selection and Service Act.

U.S.—U.S. v. Coleman, D.C.Mich., 429 F.Supp. 792.

25. U.S.—U.S. v. Savides, C.A.1(Mass.), 787 F.2d 751—U.S. v. Gregory, C.A. Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84 L.Ed.2d 321, certiorari denied Spurlock v. U.S., 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321—U.S. v. Schmidt, C.A.Tex., 711 F.2d 595, rehearing denied 716 F.2d 901, certiorari denied 104 S.Ct. 705, 464 U.S. 1041, 79 L.Ed.2d 169.

26. U.S.—U.S. v. Brummitt, C.A.Tex., 665 F.2d 521, certiorari denied 102 S.Ct. 2244, 456 U.S. 977, 72 L.Ed.2d 852.

U.S. v. Butts, D.C.Fla., 514 F.Supp. 1225—U.S. v. Tarnowski, D.C.Mich., 429 F.Supp. 783.

Quantitative and qualitative analysis

In determining whether wrongful exclusion of potential jurors results in substantial violation of Act, quantitative and qualitative analysis is undertaken: quantitatively, a substantial violation generally will not be found if number of errors is small; qualitatively, inquiry is whether there has been frustration of Act's underlying principle of exclusions on basis of objective criteria only.

U.S.—U.S. v. Bearden, 659 F.2d 590, certiorari denied Northside Realty Associates, Inc. v. U.S., C.A.Ga., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456 and Browning-Ferris Industries of Georgia, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456, on remand 555 F.Supp. 595.

Violation of plan

(1) When violation of a local plan for selection of grand jurors is alleged, court looks to see if any of policies of statute governing grand jury selection were frustrated therefrom.

U.S.—U.S. v. Schmidt, C.A.Tex., 711 F.2d 595, rehearing denied 716 F.2d 901, certiorari denied 104 S.Ct. 705, 464 U.S. 1041, 79 L.Ed.2d 169.

(2) Grand jury selection plan can only be considered a supplement to the plan and does not replace the Act and a defendant must show that the basic purposes of the Act have been subverted by failure to follow requirements of plan.

U.S.—U.S. v. Tarnowski, D.C.Mich., 429 F.Supp. 783.

27. U.S.—U.S. v. Savides, C.A.1(Mass.), 787 F.2d 751—U.S. v. Gregory, C.A. Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84 L.Ed.2d 321, certiorari denied Spurlock v. U.S., 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321.

Otherwise technical violations

Otherwise technical violations constitute "substantial failure to comply" when they affect random nature or objectivity of selection process.

U.S.—U.S. v. Butts, D.C.Fla., 514 F.Supp. 1225.

Exclusion necessary

Absent showing that some cognizable group was excluded from jury selection process, no substantial violation of Act will lie.

U.S.—U.S. v. Butts, D.C.Fla., 514 F.Supp. 1225.

28. Misinterpretation or misapplication

Mere misinterpretation or misapplication by jury clerk's office of objective criteria contemplated by Act does not violate objectivity principle, in absence of discriminatory potential or effect.

U.S.—U.S. v. Bearden, C.A.Ga., 659 F.2d 590, certiorari denied Northside Realty Associates, Inc. v. U.S., 102 S.Ct. 1993, 456 U.S. 936, 72

§ 14. Right to Particular Composition

Accused has no right to a grand jury of any particular demographic composition. The grand jury need not be a mirror of the community.

Library References

Grand Jury ⇨2½, 17.

Accused has no right to a grand jury of any particular demographic composition²⁹ or racial composition,³⁰ or a grand jury composed only of individuals who have interests or occupations similar to those of accused.³¹ Accused cannot demand that members of any particular race be included on the grand jury,³² and cannot claim as a matter of right that his race shall have representation on the grand jury.³³

The venire need not be a mirror of the community.³⁴ The grand jury need not be a mirror of the community³⁵ or a fair cross section of the community.³⁶ Under the Jury Selection and Service Act, it is the master jury wheel, and not the actual grand jury, which must represent a fair cross section of the community.³⁷ The equal protection guaranty does not require proportional representa-

tion of all the component ethnic groups of the community on every grand jury.³⁸ Fairness in selection does not require proportional representation of races;³⁹ there is no requirement of precise proportional representation of any particular group on the grand jury.⁴⁰ Every identifiable class or race need not be represented on the grand jury.⁴¹

§ 15. Showing of Violation

- a. In general
- b. Fair cross section

a. In General

Accused establishes a prima facie case of an equal protection violation in grand jury selection by showing substantial underrepresentation of an identifiable group and a selection procedure that is susceptible to abuse or is not neutral. If a prima facie case is established, the burden shifts to the government to rebut the presumption of discrimination.

Library References

Grand Jury ⇨2½, 8, 17.

Generally, in order to show that an equal protection violation has occurred in the context of grand

L.Ed.2d 456 and *Browning-Ferris Industries of Georgia, Inc. v. U.S.*, 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456, on remand 555 F.Supp. 595.

Public notice

Jury clerk's failure to comply with requirement of public notice before and after each drawing of starting numbers from jury wheel, in violation of local plan and Jury Selection and Service Act, did not constitute substantial violation of the Act, where starting number methods did not substantially affect randomness or objectivity of selection process.

U.S.—U.S. v. *Bearden*, C.A.Ga., 659 F.2d 590, certiorari denied *Northside Realty Associates, Inc. v. U.S.*, 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456 and *Browning-Ferris Industries of Georgia, Inc. v. U.S.*, 102 S.Ct. 1993, 456 U.S. 936, 72 L.Ed.2d 456, on remand 555 F.Supp. 595.

Time

Time is not of the essence of the Jury Selection and Service Act which requires that grand jury selection plan must provide for periodic emptying and refilling of the master jury wheel the interval for which shall not exceed four years.

U.S.—U.S. v. *Tarnowski*, D.C.Mich., 429 F.Supp. 783.

29. U.S.—U.S. v. *Test*, C.A.Colo., 550 F.2d 577.

U.S. v. *Guoladdle*, D.C.Okl., 496 F.Supp. 337.

30. U.S.—*Stewart v. Ricketts*, D.C.Ga., 451 F.Supp. 911.

31. N.Y.—*People v. Mulroy*, 439 N.Y.S.2d 61, 108 Misc.2d 907.

32. Fla.—*Bryant v. State*, 386 So.2d 237.

33. U.S.—*Alexander v. Louisiana*, La., 92 S.Ct. 1221, 405 U.S. 625, 31 L.Ed.2d 536—*Akins v. State of Tex.*, Tex., 65 S.Ct. 1276, 325 U.S. 398, 89 L.Ed. 1692, rehearing denied 66 S.Ct. 86, 326 U.S. 806, 90 L.Ed. 491.

Neal v. State of Delaware, Del., 103 U.S. 370, 26 L.Ed. 567.

34. U.S.—U.S. v. *Gregory*, C.A.Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84

L.Ed.2d 321, certiorari denied *Spurlock v. U.S.*, 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321.

Ill.—*People v. Teller*, 359 N.E.2d 803, 3 Ill.Dec. 944, 45 Ill.App.3d 410.

35. U.S.—U.S. v. *Gregory*, C.A.Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84 L.Ed.2d 321, certiorari denied *Spurlock v. U.S.*, 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321.

Conn.—*State v. Wright*, 542 A.2d 299, 207 Conn. 726.

Ill.—*People v. Teller*, 359 N.E.2d 803, 3 Ill.Dec. 944, 45 Ill.App.3d 410.

La.—*State v. Lawrence*, 351 So.2d 493.

Mo.—*State v. Stewart*, App., 714 S.W.2d 724.

N.J.—*State v. Ramseur*, 524 A.2d 188, 106 N.J. 123, denial of habeas corpus affirmed 983 F.2d 1215, certiorari denied 113 S.Ct. 2433, 508 U.S. 947, 124 L.Ed.2d 653.

36. U.S.—U.S. v. *Gibson*, D.C.Ohio, 480 F.Supp. 339.

Ga.—*Campbell v. State*, 240 S.E.2d 828, 240 Ga. 352, certiorari denied 99 S.Ct. 218, 439 U.S. 882, 58 L.Ed.2d 194.

37. U.S.—U.S. v. *Percival*, C.A.7(III.), 756 F.2d 600.

Geographic representation

U.S.—U.S. v. *Gregory*, C.A.Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84 L.Ed.2d 321, certiorari denied *Spurlock v. U.S.*, 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321.

38. U.S.—*Hernandez v. State of Texas*, Tex., 74 S.Ct. 667, 347 U.S. 475, 98 L.Ed. 866.

39. U.S.—*Akins v. State of Texas*, Tex., 65 S.Ct. 1276, 325 U.S. 398, 89 L.Ed. 1692, rehearing denied 66 S.Ct. 86, 326 U.S. 806, 90 L.Ed. 491.

Fla.—*Andrews v. State*, 443 So.2d 78.

40. U.S.—U.S. v. *Ramos Colon*, D.C.Puerto Rico, 415 F.Supp. 459.

41. Conn.—*State v. Avcollie*, 453 A.2d 418, 188 Conn. 626, certiorari denied 103 S.Ct. 2088, 461 U.S. 928, 77 L.Ed.2d 299.

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jury selection, accused must show that the procedure employed resulted in substantial underrepresentation of an identifiable group.⁴² The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.⁴³ Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.⁴⁴ Purposeful discrimination is not proven by showing that on a single grand jury the

number of members of one race was less than that race's proportion of eligible individuals.⁴⁵ A selection procedure that is susceptible of abuse or is not neutral supports the presumption of discrimination raised by the statistical showing.⁴⁶ While it has been said that, once accused has shown substantial underrepresentation, he has made out a prima facie case of discriminatory purpose,⁴⁷ it has also been held that a prima facie case requires proof of a distinct class, the degree of underrepresentation, and a procedure that is susceptible to abuse or not neutral.⁴⁸

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42. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

43. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

44. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

Population

(1) Only consider eligible population.

U.S.—*Newman v. Henderson*, C.A.La., 539 F.2d 502, rehearing denied 544 F.2d 518, certiorari denied *Maggio v. Newman*, 97 S.Ct. 2986, 433 U.S. 914, 53 L.Ed.2d 1100.

Ky.—*Ford v. Commonwealth*, 665 S.W.2d 304, certiorari denied 105 S.Ct. 392, 469 U.S. 984, 83 L.Ed.2d 325.

(2) Proof of discrimination in grand jury selection process should be based on eligible population statistics rather than gross population statistics, but once defendant established the underrepresentation of his class over a significant period of time by use of the gross population statistics, thereby evidencing prima facie case of discriminatory purpose, State had the burden to rebut the case.

Tex.—*Cerda v. State*, App. 7 Dist., 644 S.W.2d 875.

(3) Whether a significant disparity exists between percentages of blacks found present in the source of jury list and those actually appearing on grand jury panel is determined by the difference between the percentage of blacks on the grand jury list and the percentage in the population as a whole and not the percentage of blacks on the traverse jury list.

Ga.—*Cochran v. State*, 260 S.E.2d 391, 151 Ga.App. 478, appeal after remand 271 S.E.2d 864, 155 Ga.App. 418.

Period

Period of two years of random sampling of jury panels on which defendant based his statistical data to establish racial discrimination in method of selection of grand jurors was not "period of significance," such as would satisfy guidelines set out in federal cases for establishing prima facie case.

Ky.—*Ford v. Commonwealth*, 665 S.W.2d 304, certiorari denied 105 S.Ct. 392, 469 U.S. 984, 83 L.Ed.2d 325.

Statistics

(1) Under some circumstances, statistics alone can establish such clear pattern of discrimination in grand jury selection that they cannot be explained on any legitimate grounds, and when this occurs, the statistics may amount to circumstantial evidence sufficient to satisfy intent requirement, but how clear such pattern must be appears to vary with nature of the case.

U.S.—*Villafane v. Manson*, D.C.Conn., 504 F.Supp. 78, affirmed 639 F.2d 770, certiorari denied 101 S.Ct. 3066, 452 U.S. 930, 69 L.Ed.2d 431.

(2) Absolute difference test, ratio approach and focus upon differences caused by underrepresentation of recognizable, distinct class on grand jury are inadequate as evidence of intent to discriminate. U.S.—*Villafane v. Manson*, D.C.Conn., 504 F.Supp. 78, affirmed 639 F.2d 770, certiorari denied 101 S.Ct. 3066, 452 U.S. 930, 69 L.Ed.2d 431.

(3) If, based on statistics, it appears unlikely that particular pattern of racial distribution would have resulted from random choice of grand jurors, it is reasonable to infer that discriminatory racial factors have entered into the selection process, and thus primary reliance is placed by the court upon the statistical decision theory as means of testing probability that certain degree of underrepresentation could have been result of random choice rather than intentional discrimination.

U.S.—*Villafane v. Manson*, D.C.Conn., 504 F.Supp. 78, affirmed 639 F.2d 770, certiorari denied 101 S.Ct. 3066, 452 U.S. 930, 69 L.Ed.2d 431.

(4) Grand jury discrimination was not to be evaluated through comparison of straight racial percentages, a mathematically incorrect methodology; rather, standard deviation analysis was to be applied.

U.S.—*Moultrie v. Martin*, C.A.S.C., 690 F.2d 1078.

Foremen

As evidence of discrimination in constituting racial composition of grand jury, fact that none of grand jury foremen during period analyzed was black was irrelevant.

U.S.—*Boykins v. Maggio*, C.A.La., 715 F.2d 995, certiorari denied *Boykins v. Blackburn*, 104 S.Ct. 1918, 466 U.S. 940, 80 L.Ed.2d 465.

Petit juries

Where both grand and petit juries were drawn from same venire, number of blacks appearing on petit juries were to be looked at to obtain a full overview of system in determining whether there was underrepresentation.

U.S.—*LaRoche v. Perrin*, C.A.N.H., 718 F.2d 500.

45. U.S.—*Akins v. State of Texas*, Tex., 65 S.Ct. 1276, 325 U.S. 398, 89 L.Ed. 1692, rehearing denied 66 S.Ct. 86, 326 U.S. 806, 90 L.Ed. 491.

46. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

47. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

48. U.S.—*Jefferson v. Morgan*, C.A.6(Tenn.), 962 F.2d 1185, certiorari denied 113 S.Ct. 297, 506 U.S. 905, 121 L.Ed.2d 221—*Ellis v. Lynaugh*, 873 F.2d 830, C.A.5(Tex.), certiorari denied 110 S.Ct. 419, 493 U.S. 970, 107 L.Ed.2d 384—*Ross v. Hopper*, C.A.Ga., 716 F.2d 1528, on rehearing 756 F.2d 1483, on remand 785 F.2d 1467.—U.S. v. *Brummitt*, C.A.Tex., 665 F.2d 521, certiorari denied 102 S.Ct. 2244, 456 U.S. 977, 72 L.Ed.2d 852.

La.—*State v. James*, App. 1 Cir., 459 So.2d 1299, writ denied 463 So.2d 600, grant of habeas corpus reversed *James v. Whitley*, 39 F.3d 607, certiorari denied 115 S.Ct. 1704, 131 L.Ed.2d 565.

It has also been held that a prima facie case of discrimination can be demonstrated by showing underrepresentation on the particular grand jury that indicted accused and a selection system that is subject to abuse,⁴⁹ or by showing underrepresentation on numerous grand juries over a significant period of time, without showing underrepresentation on the particular grand jury.⁵⁰ However, it has also been held that only if there is underrepresentation on the particular grand jury does the makeup of prior grand juries become relevant.⁵¹

If a prima facie case of discrimination is established, the burden shifts to the government to rebut the presumption of discrimination.⁵² A simple protestation from an official that improper considerations played no part in the selection is insufficient.⁵³ The mere general assertions by officials of their performance of duty is not an adequate justification for the complete exclusion of a particular race from grand jury service.⁵⁴ Furthermore, chance and accident alone do not constitute an explanation for the continuous omission of a partic-

ular race from grand juries over a long period of time.⁵⁵ The fact that the group allegedly discriminated against constitutes a governing majority is insufficient.⁵⁶

b. Fair Cross Section

In order to establish a prima facie violation of a fair cross section requirement with respect to grand juries, accused must show that a group is distinctive, that its representation in venire is not fair and reasonable in relation to its numbers in the community, and that this underrepresentation is due to systematic exclusion. The burden then shifts to the government to prove that the selection system furthers a significant state interest.

In order to establish a prima facie violation of a fair cross section requirement with respect to grand juries, accused must show that the group alleged to be excluded is a distinctive group in the community, that the representation of this group in venire is not fair and reasonable in relation to the number of such persons in the community, and that this underrepresentation is due to the systematic exclusion of the group in the selection process.⁵⁷ The disparity in representation must be substan-

Tex.—*Cerda v. State*, App. 7 Dist., 644 S.W.2d 875.

Underrepresentation alone insufficient

Ariz.—*State v. Acosta*, App., 608 P.2d 83, 125 Ariz. 146.

Causal link

Prima facie case of grand jury discrimination is not made out by "significant disparity" alone or by "significant disparity" and mere "opportunity for discrimination," but only by proof that infected source provided opportunity for discrimination and that use of such infected source produced significant disparity.

Ga.—*Cochran v. State*, 271 S.E.2d 864, 155 Ga.App. 418.

49. U.S.—*Jefferson v. Morgan*, C.A.6(Tenn.), 962 F.2d 1185, certiorari denied 113 S.Ct. 297, 506 U.S. 905, 121 L.Ed.2d 221.

50. U.S.—*Jefferson v. Morgan*, C.A.6(Tenn.), 962 F.2d 1185, certiorari denied 113 S.Ct. 297, 506 U.S. 905, 121 L.Ed.2d 221.

51. Tex.—*Espinoza v. State*, Cr.App., 604 S.W.2d 908.

52. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

Or.—*State v. Walton*, 809 P.2d 81, 311 Or. 223, appeal after remand 894 P.2d 1212, 134 Or.App. 66, review denied 899 P.2d 1197, two cases, 321 Or. 429.

R.I.—*State v. Jenison*, 405 A.2d 3, 122 R.I. 142.

Examples

(1) Evidence detailing procedures followed by Commissioner of Jurors in selecting grand jurors, setting forth such facts as the number of members of the underrepresented group who were not residents of the area, who are illiterate, who are not of good moral character, or who are prior felons is probative of whether underrepresentation of particular group is unlawful.

N.Y.—*People v. Guzman*, 457 N.E.2d 1143, 60 N.Y.2d 402, 469 N.Y.S.2d 916, certiorari denied *Guzman v. New York*, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.

(2) Prima facie case is not rebutted by simple allegation that figures establishing population percentages do not make allowance for excluded classes, nor is state's burden met, as it would be in Sixth Amend-

ment fair cross section case, by government showing of "adequate justification" for disproportionate representation of identifiable classes.

U.S.—*U.S. v. Jenison*, D.C.Fla., 485 F.Supp. 655.

53. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

Gibson v. Zant, C.A.Ga., 705 F.2d 1543.

U.S. v. Abell, D.C.Me., 552 F.Supp. 316, 68 A.L.R.Fed. 157.

Ga.—*Fouts v. State*, 239 S.E.2d 366, 240 Ga. 39.

54. U.S.—*Eubanks v. State of Louisiana*, La., 78 S.Ct. 970, 356 U.S. 584, 2 L.Ed.2d 991.

55. U.S.—*Eubanks v. State of Louisiana*, La., 78 S.Ct. 970, 356 U.S. 584, 2 L.Ed.2d 991.

56. U.S.—*Castaneda v. Partida*, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.

57. U.S.—*Cox v. Montgomery*, C.A.Ga., 718 F.2d 1036—U.S. v. Foxworth, C.A.Mass., 599 F.2d 1.

U.S. v. Donohue, D.C.Md., 574 F.Supp. 1269—*U.S. v. Daly*, D.C.Tex., 573 F.Supp. 788—*U.S. v. Musto*, D.C.N.J., 540 F.Supp. 346, affirmed *U.S. v. Aimone*, 715 F.2d 822, certiorari denied *Dentico v. U.S.*, D.C.N.J., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

Mo.—*State v. Garrett*, 627 S.W.2d 635, certiorari denied 103 S.Ct. 208, 459 U.S. 906, 74 L.Ed.2d 166, habeas corpus granted *Garrett v. Morris*, 815 F.2d 509, certiorari denied *Jones v. Garrett*, 108 S.Ct. 233, 484 U.S. 898, 98 L.Ed.2d 191.

State v. Stewart, App., 714 S.W.2d 724.

Group must be cognizable

Cal.—*People v. Estrada*, 155 Cal.Rptr. 731, 93 C.A.3d 76.

Systematic exclusion

(1) Necessary.

tial.⁵⁸ The disparity must be based not on total population, but on those of the group who are eligible to serve as jurors.⁵⁹

Once accused establishes a prima facie violation, the burden shifts to the government to prove that the selection system furthers a significant state interest.⁶⁰

§ 16. Groups Covered

With respect to the prohibition on discrimination and the fair cross section requirement applicable to grand jury selection,

N.Y.—*People v. Guzman*, 454 N.Y.S.2d 852, 89 A.D.2d 14, affirmed 457 N.E.2d 1143, 60 N.Y.2d 403, 469 N.Y.S.2d 916, certiorari denied *Guzman v. New York*, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.

(2) It has been said that, for the purpose of making out a prima facie case, there is no difference between underrepresentation in equal protection cases and systematic exclusion in fair cross section cases.

Ky.—*Commonwealth v. McFerron*, 680 S.W.2d 924.

(3) Fact that group members do not respond to summons for grand jury service to qualify in proportion to their representation within the community is not an inherent defect in the selection process sufficient to constitute a showing of systematic exclusion.

N.Y.—*People v. Guzman*, 454 N.Y.S.2d 852, 89 A.D.2d 14, affirmed 457 N.E.2d 1143, 60 N.Y.2d 403, 469 N.Y.S.2d 916, certiorari denied *Guzman v. New York*, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.

Particular grand jury

(1) Defendant bears burden of showing that underrepresentation of distinctive group exists not only generally but also on his own jury or grand jury panel.

Mo.—*State v. Bernard*, App., 641 S.W.2d 462.

(2) Party may assert underrepresentation of group on grand jury list, although there was no such underrepresentation on his jury.

U.S.—*U.S. v. Donohue*, D.C.Md., 574 F.Supp. 1269.

(3) Where statutory procedures designed to secure random selection of grand jurors and prevent "stacking" of grand jury against a suspect have not been complied with, accused indicated by such grand jury has no obligation to demonstrate that such "stacking" in fact happened to him, as the evil which must be avoided is the appearance that it could have happened.

Ohio—*State v. Davis*, 397 N.E.2d 1215, 60 Ohio App.2d 355, 14 O.O.3d 315.

58. U.S.—*U.S. v. Gregory*, C.A.Ala., 730 F.2d 692, rehearing denied 740 F.2d 979, certiorari denied 105 S.Ct. 1170, 469 U.S. 1208, 84 L.Ed.2d 321, certiorari denied *Spurlock v. U.S.*, 105 S.Ct. 1171, 469 U.S. 1208, 84 L.Ed.2d 321—*U.S. v. Kleifgen*, C.A.Nev., 557 F.2d 1293.

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

Statistics

(1) Statistical decision theory could not properly be used since focus of due process test is not on intent but, rather, on whether the array was reasonably representative of the community.

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

(2) Absolute difference test could not be used since that test is inadequate when the percentage of persons in the group is small in relation to the entire population, and since the result obtained from use of that test distorted reality.

various groups have been found cognizable, such as women and blacks.

Library References

Grand Jury ⇐2½, 17.

Illegal discrimination or violation of the fair cross section requirement with respect to grand jury selection must involve a cognizable or distinctive group, as discussed supra § 15. The test for a cognizable group is the same under the equal protection guaranty and the fair cross section require-

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

(3) Ratio method, or comparative disparity method, could not be used since that method yielded results that distorted reality in situation in which only a very small proportion of the population was in group.

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

(4) In assessing whether a given defendant's constitutional or statutory rights have been violated through the operation of a jury selection process, the proper focus of inquiry must be the impact of challenged process on grand and petit juries.

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

(5) Where group constituted relatively small percentage of eligible jury population, court would focus on absolute disparity.

U.S.—*U.S. v. Musto*, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. *Aimone*, 715 F.2d 822, certiorari denied *Dentico v. U.S.*, 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

(6) In determining whether a cognizable group has been substantially underrepresented on a grand jury venire, the court will look to people and not percentages; that is, it will consider the effect of the deviation on the absolute numerical composition of the grand jury.

U.S.—*U.S. v. Potter*, C.A.Nev., 552 F.2d 901.

59. U.S.—*U.S. v. Brummitt*, C.A.Tex., 665 F.2d 521, certiorari denied 102 S.Ct. 2244, 456 U.S. 977, 72 L.Ed.2d 852.

Age

(1) In determining underrepresentation of identified groups on grand jury, it is appropriate to define community in terms of voting age population since only those persons 18 years of age or older are eligible for jury service.

U.S.—*U.S. v. Musto*, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. *Aimone*, 715 F.2d 822, certiorari denied *Dentico v. U.S.*, 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

(2) Defendant adequately stated percentage of community made up by the groups by providing voting-age populations.

U.S.—*U.S. v. LaChance*, C.A.2(Conn.), 788 F.2d 856, certiorari denied 107 S.Ct. 271, 479 U.S. 883, 93 L.Ed.2d 248.

60. U.S.—*U.S. v. Musto*, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. *Aimone*, 715 F.2d 822, certiorari denied *Dentico v. U.S.*, 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883—*U.S. v. Cabrera-Sarmiento*, D.C.Fla., 533 F.Supp. 799.

Conn.—*State v. Castonguay*, 481 A.2d 56, 194 Conn. 416, appeal after remand 590 A.2d 901, 218 Conn. 486.

Mo.—*State v. Davidson*, App., 583 S.W.2d 208.

ment.⁶¹ Cognizability is a question of fact.⁶²

The essence of the cognizability requirement is the need to delineate an identifiable group which, in some objectively discernible and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the grand jury panel.⁶³ Factors considered include adequacy of definition, degree of cohesiveness, and potential for prejudice.⁶⁴ The group must be defined and limited by some factor, a common thread or basic similarity in attitude or ideas or experience must run through the group, and there must be a community of interest such that the group's interests cannot be adequately represented if the group is excluded.⁶⁵ It must be characterized by a basic similarity in attitudes, ideas, or experiences which cannot be adequately

represented if the group is excluded, and must be perceived as distinct by the community at large.⁶⁶ The group must comprise a substantial percentage of the population.⁶⁷

Discrimination in grand jury selection need not be based upon race or color in order to violate the equal protection guaranty.⁶⁸ Racial groups other than blacks and whites are protected.⁶⁹ Discrimination on the basis of ancestry or national origin is covered.⁷⁰

Various groups have been found cognizable,⁷¹ such as males,⁷² women,⁷³ blacks,⁷⁴ Hispanics,⁷⁵ American Indians,⁷⁶ the young,⁷⁷ and the poor.⁷⁸

Various groups have been found not cognizable,⁷⁹ such as age groups,⁸⁰ the young,⁸¹ the poor,⁸² work-

61. U.S.—U.S. v. Daly, D.C.Tex., 573 F.Supp. 788.

62. U.S.—U.S. v. Daly, D.C.Tex., 573 F.Supp. 788.

63. U.S.—U.S. v. Potter, C.A.Nev., 552 F.2d 901.

64. U.S.—U.S. v. Marrapese, D.C.R.I., 610 F.Supp. 991.

65. U.S.—U.S. v. Gruberg, D.C.N.Y., 493 F.Supp. 234.

N.J.—State v. Porro, 377 A.2d 950, 152 N.J.Super. 259, affirmed 385 A.2d 1258, 158 N.J.Super. 269, certiorari denied 99 S.Ct. 724, 439 U.S. 1047, 58 L.Ed.2d 706.

66. U.S.—U.S. v. Abell, D.C.Me., 552 F.Supp. 316.

67. Ky.—Commonwealth v. McFerron, 680 S.W.2d 924.

68. U.S.—Hernandez v. State of Texas, Tex., 74 S.Ct. 667, 347 U.S. 475, 98 L.Ed. 866.

69. U.S.—Hernandez v. State of Texas, Tex., 74 S.Ct. 667, 347 U.S. 475, 98 L.Ed. 866.

70. U.S.—Hernandez v. State of Texas, Tex., 74 S.Ct. 667, 347 U.S. 475, 98 L.Ed. 866.

71. College persons

Group consisting of the presidents, professors, tutors, and students of recognized universities and colleges was sufficiently large to fulfill the cognizability requirement.

R.I.—State v. Jenison, 405 A.2d 3, 122 R.I. 142.

72. U.S.—U.S. v. Kleifgen, C.A.Nev., 557 F.2d 1293.

73. U.S.—Gibson v. Zant, C.A.Ga., 705 F.2d 1543.

U.S. v. Donohue, D.C.Md., 574 F.Supp. 1269.

74. U.S.—Gibson v. Zant, C.A.Ga., 705 F.2d 1543—U.S. v. Kleifgen, C.A.Nev., 557 F.2d 1293.

75. U.S.—U.S. v. Yonkers Contracting Co., Inc., S.D.N.Y., 682 F.Supp. 757.

Conn.—State v. Couture, 482 A.2d 300, 194 Conn. 530, certiorari denied 105 S.Ct. 967, 469 U.S. 1192, 83 L.Ed.2d 971, appeal after remand 589 A.2d 343, 218 Conn. 309.

76. U.S.—U.S. v. Brady, C.A.Mont., 579 F.2d 1121, certiorari denied 99 S.Ct. 849, 439 U.S. 1074, 59 L.Ed.2d 41.

Soshone and Arapahoe

U.S.—U.S. v. Tranakos, D.Wyo., 690 F.Supp. 971.

77. U.S.—Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Com'rs, C.A.Tex., 622 F.2d 807, certiorari denied 101 S.Ct. 1479, 450 U.S. 964, 67 L.Ed.2d 613.

78. U.S.—Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Com'rs, C.A.Tex., 622 F.2d 807, certiorari denied 101 S.Ct. 1479, 450 U.S. 964, 67 L.Ed.2d 613.

79. Nonhomeowners

U.S.—Sands v. Cunningham, D.C.N.H., 617 F.Supp. 1551.

Nonwhite

U.S.—U.S. v. Daly, D.C.Tex., 573 F.Supp. 788.

Single persons

Ga.—Pope v. State, 345 S.E.2d 831, 256 Ga. 195, appeal after remand 354 S.E.2d 429, 257 Ga. 32, certiorari denied 108 S.Ct. 207, 484 U.S. 873, 98 L.Ed.2d 159.

Students

N.J.—State v. Butler, 382 A.2d 696, 155 N.J.Super. 270.

Unemployed

U.S.—U.S. v. Kleifgen, C.A.Nev., 557 F.2d 1293.

Ga.—Pope v. State, 345 S.E.2d 831, 256 Ga. 195, appeal after remand 354 S.E.2d 429, 257 Ga. 32, certiorari denied 108 S.Ct. 207, 484 U.S. 873, 98 L.Ed.2d 159.

Union affiliation

U.S.—U.S. v. Gibson, D.C.Ohio, 480 F.Supp. 339.

80. U.S.—U.S. v. Rosenthal, D.C.Ga., 482 F.Supp. 867.

Ga.—Fouts v. State, 239 S.E.2d 366, 240 Ga. 39.

S.C.—State v. Plath, 284 S.E.2d 221, 277 S.C. 126, appeal after remand 313 S.E.2d 619, 281 S.C. 1, certiorari denied Arnold v. South Carolina, 104 S.Ct. 3560, 467 U.S. 1265, 82 L.Ed.2d 862, rehearing denied 105 S.Ct. 27, 468 U.S. 1226, 82 L.Ed.2d 920 and 105 S.Ct. 28, 468 U.S. 1226, 82 L.Ed.2d 920.

81. U.S.—U.S. v. Potter, C.A.Nev., 552 F.2d 901.

Sands v. Cunningham, D.C.N.H., 617 F.Supp. 1551—U.S. v. Musto, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Dentico v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883—U.S. v. Layton, D.C.Cal., 519 F.Supp. 946.

Cal.—People v. Estrada, 155 Cal.Rptr. 731, 93 C.A.3d 76.

Ga.—Lee v. State, 365 S.E.2d 99, 258 Ga. 82, certiorari denied 109 S.Ct. 195, 488 U.S. 879, 102 L.Ed.2d 165.

Tex.—Burks v. State, Cr.App., 583 S.W.2d 389, certiorari denied 100 S.Ct. 3050, 448 U.S. 907, 65 L.Ed.2d 1136.

ing people,⁸³ the less educated,⁸⁴ professions or occupations,⁸⁵ recent residents,⁸⁶ and residents of particular areas.⁸⁷

§ 17. Qualifications, Exemptions, and Excuses

Under the prohibition on discrimination and the fair cross section requirement applicable to grand jury selection, the exclusion or exemption of various persons has been upheld, and the excusing of grand jurors on an individualized basis generally does not result in a violation.

Library References

Grand Jury § 2, 2½, 17.

A statute excluding a class of individuals from grand jury selection must be predicated upon a rational and nondiscriminatory basis.⁸⁸ Under the prohibition on discrimination and the fair cross section requirement applicable to grand jury selec-

tion, the exclusion from grand jury selection of various persons has been upheld,⁸⁹ such as aliens,⁹⁰ minors,⁹¹ persons charged with or convicted of a felony,⁹² persons whose senses of hearing or seeing are substantially impaired,⁹³ persons who do not meet a residency requirement,⁹⁴ public employees,⁹⁵ and persons in certain occupations.⁹⁶

Exemptions granted on request to members of specific occupations and professions whose uninterrupted performance is considered to be of significant interest to the state have been upheld.⁹⁷ Various particular occupational exemptions have been upheld.⁹⁸ A child care exemption has been upheld.⁹⁹

The excusing of grand jurors on an individualized basis, as distinct from systematic exclusion, generally does not result in a constitutional violation,¹

Standard of review

Young persons, though they belong in cross section from which jurors are drawn, do not make up a constitutionally highly protected class, that is, one which has suffered oppression and discrimination, and their claimed underrepresentation does not invoke high standard of judicial review.

Ga.—Parks v. State, 330 S.E.2d 686, 254 Ga. 403, 62 A.L.R.4th 833.

82. U.S.—Sands v. Cunningham, D.C.N.H., 617 F.Supp. 1551.

Cal.—People v. Estrada, 155 Cal.Rptr. 731, 93 C.A.3d 76.

Ga.—Carter v. State, 315 S.E.2d 646, 252 Ga. 502.

83. U.S.—U.S. v. Layton, D.C.Cal., 519 F.Supp. 946.

Blue collar workers

Cal.—People v. Estrada, 155 Cal.Rptr. 731, 93 C.A.3d 76.

84. U.S.—U.S. v. Potter, C.A.Nev., 552 F.2d 901.

Cal.—People v. Estrada, 155 Cal.Rptr. 731, 93 C.A.3d 76.

Ga.—Pope v. State, 345 S.E.2d 831, 256 Ga. 195, appeal after remand 354 S.E.2d 429, 257 Ga. 32, certiorari denied 108 S.Ct. 207, 484 U.S. 873, 98 L.Ed.2d 159.

85. Ky.—Commonwealth v. McFerron, 680 S.W.2d 924.

Professionals

Potential grand jurors with "professional" occupations did not constitute a cognizable group.

U.S.—U.S. v. Marrapese, D.C.R.I., 610 F.Supp. 991.

Clergymen

N.J.—State v. Butler, 382 A.2d 696, 155 N.J.Super. 270.

86. U.S.—Sands v. Cunningham, D.C.N.H., 617 F.Supp. 1551.

Ga.—Pope v. State, 345 S.E.2d 831, 256 Ga. 195, appeal after remand 354 S.E.2d 429, 257 Ga. 32, certiorari denied 108 S.Ct. 207, 484 U.S. 837, 98 L.Ed.2d 159.

87. U.S.—U.S. v. Abell, D.C.Me., 552 F.Supp. 316.

Ala.—Rayburn v. State, Cr.App., 495 So.2d 733.

Mass.—Commonwealth v. Duteau, 424 N.E.2d 1119, 384 Mass. 321.

88. N.Y.—People v. Legrand, 387 N.Y.S.2d 807, 88 Misc.2d 41.

89. U.S.—U.S. v. Avalos, C.A.Fla., 541 F.2d 1100, rehearing denied 545 F.2d 168, certiorari denied 97 S.Ct. 1656, 430 U.S. 970, 52 L.Ed.2d 363.

90. U.S.—U.S. v. Avalos, C.A.Fla., 541 F.2d 1100, rehearing denied 545 F.2d 168, certiorari denied 97 S.Ct. 1656, 430 U.S. 970, 52 L.Ed.2d 363.

Conn.—State v. Thigpen, 397 A.2d 912, 35 Conn.Sup. 98.

91. Persons under 21

Ga.—Welch v. State, 229 S.E.2d 390, 237 Ga. 665.

18-year old

U.S.—Graham v. Collins, C.A.5(Tex.), 950 F.2d 1009, affirmed 113 S.Ct. 892, 506 U.S. 461, 122 L.Ed.2d 260, rehearing denied 113 S.Ct. 1406, 507 U.S. 968, 122 L.Ed.2d 778.

92. U.S.—U.S. v. Foxworth, C.A.Mass., 599 F.2d 1.

93. U.S.—Eckstein v. Kirby, D.C.Ark., 452 F.Supp. 1235.

94. U.S.—U.S. v. Daly, D.C.Tex., 573 F.Supp. 788.

One year

U.S.—U.S. v. Rosenthal, D.C.Ga., 482 F.Supp. 867.

Alaska—Smiloff v. State, 579 P.2d 28.

95. N.Y.—People v. Legrand, 387 N.Y.S.2d 807, 88 Misc.2d 41.

96. Ala.—Clark v. State, Cr.App., 551 So.2d 1081, cause remanded 551 So.2d 1090, on remand 551 So.2d 1091, affirmed 551 So.2d 1091.

Lawyers

Iowa—State v. Gartin, 271 N.W.2d 902.

97. R.I.—State v. Courteau, 461 A.2d 1358.

98. D.C.—Sweet v. U.S., App., 449 A.2d 315.

Ministers

U.S.—U.S. v. Butler, C.A.Ga., 611 F.2d 1066, rehearing denied 615 F.2d 685, certiorari denied Fazio v. U.S., 101 S.Ct. 97, 449 U.S. 830, 66 L.Ed.2d 35.

College professors and students

R.I.—State v. Conway, 463 A.2d 1319.

99. U.S.—U.S. v. Daly, D.C.Tex., 573 F.Supp. 788—U.S. v. Manbeck, D.C.S.C. 514 F.Supp. 141—U.S. v. Rosenthal, D.C.Ga. 482 F.Supp. 867—U.S. v. Lindelow, D.C.Puerto Rico, 435 F.Supp. 367.

1. N.J.—State v. Porro, 385 A.2d 1258, 158 N.J.Super. 269, certiorari denied 99 S.Ct. 724, 439 U.S. 1047, 58 L.Ed.2d 706.

even if jurors are excused for reasons not defined by statute.² When jurors are excused because they may impair the progress of the proceedings or prejudice the parties or because they have served their statutory time, there is no realistic risk of bias.³ A self-selection process whereby jurors are excused for personal, health, or business reasons protects fairly well against any realistic risk of bias, at least where the panel remains large and there is no indication that requests are being granted or denied differentially.⁴ Where the excusing of grand jurors reduces a group's representation to impotence or unreasonably restricts the possibility that the grand jury will comprise a representative cross section of the community, a constitutional violation may result.⁵

§ 18. Particular Methods of Selection

A "key man" system of grand jury selection is not unconstitutional per se. Random selection is not constitutionally required, but may be required by statute. Use of voter registration lists as the sole source of names of prospective grand jurors has been upheld.

Library References

Grand jury § 2½, 8, 17.

The mere fact that officers are given discretion in selecting grand jurors and that the selection system might be applied in a discriminatory manner does not, in and of itself, result in a violation of the equal protection guaranty.⁶ Thus, a "key man" system of selection is not in and of itself unconstitutional.⁷ Random selection is not constitutionally required.⁸ However, a key man system is susceptible of abuse.⁹ Where there are qualified members of a particular race available, the exclusion by officers of all members of such race whom they do not know to be qualified, without either knowing or seeking to learn whether there are in fact any members qualified to serve, violates the equal protection guaranty.¹⁰

Drawing a grand jury exclusively from those indicating a willingness to serve is not unconstitutional.¹¹

Some statutes require random selection.¹² However, completely random selection is not necessarily required by statutes.¹³

The use of tax lists in the selection of grand jurors does not necessarily violate the equal protection guaranty.¹⁴ The use of voter registration lists as the sole source of names of prospective grand jurors has been upheld,¹⁵ but may in some circum-

- 2. Or.—State v. Gortmaker, 668 P.2d 354, 295 Or. 505, certiorari denied 104 S.Ct. 1416, 456 U.S. 1066, 79 L.Ed.2d 742.
- 3. Or.—State v. Gortmaker, 655 P.2d 575, 60 Or.App. 723, affirmed 668 P.2d 354, 295 Or. 505, certiorari denied 104 S.Ct. 1416, 465 U.S. 1066, 79 L.Ed.2d 742.
- 4. Or.—State v. Gortmaker, 655 P.2d 575, 60 Or.App. 723, affirmed 668 P.2d 354, 295 Or. 505, certiorari denied 104 S.Ct. 1416, 465 U.S. 1066, 79 L.Ed.2d 742.
- 5. N.J.—State v. Ramseur, 524 A.2d 188, 106 N.J. 123, denial of habeas corpus affirmed Ramseur v. Beyer, 903 F.2d 1215, certiorari denied 113 S.Ct. 2433, 508 U.S. 947, 124 L.Ed.2d 653.
- 6. U.S.—Franklin v. State of South Carolina, S.C., 30 S.Ct. 640, 218 U.S. 161, 54 L.Ed. 980—Williams v. State of Mississippi, Miss., 18 S.Ct. 583, 170 U.S. 213, 42 L.Ed. 1012.
- Ga.—Moon v. State, 375 S.E.2d 442, 258 Ga. 748, certiorari denied 111 S.Ct. 1638, 499 U.S. 982, 113 L.Ed.2d 733, rehearing denied 111 S.Ct. 2841, 501 U.S. 1224, 115 L.Ed.2d 1010, grant of habeas corpus reversed Zant v. Moon, 440 S.E.2d 657, 264 Ga. 93, certiorari denied 115 S.Ct. 437, 130 L.Ed.2d 348, rehearing denied 115 S.Ct. 783, 130 L.Ed.2d 676.
- Mo.—State v. Johnson, App., 539 S.W.2d 493, certiorari denied 97 S.Ct. 1558, 430 U.S. 934, 51 L.Ed.2d 779.
- 7. U.S.—Castaneda v. Partida, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.
- Mo.—State v. O'Neal, 718 S.W.2d 498, certiorari denied 107 S.Ct. 1388, 480 U.S. 926, 94 L.Ed.2d 702, denial of habeas corpus affirmed O'Neal v. Delo, 44 F.3d 655, rehearing and suggestion for rehearing en banc denied, certiorari denied 116 S.Ct. 129, 133 L.Ed.2d 78—State v. Baker, 636 S.W.2d 902, certiorari denied 103 S.Ct. 834, 459 U.S. 1183, 74 L.Ed.2d 1027.
- 8. Conn.—State v. Avcollie, 453 A.2d 418, 188 Conn. 626, certiorari denied 103 S.Ct. 2088, 461 U.S. 928, 77 L.Ed.2d 299.

- 9. U.S.—Castaneda v. Partida, Tex., 97 S.Ct. 1272, 430 U.S. 482, 51 L.Ed.2d 498.
- 10. U.S.—Hill v. State of Texas, Tex., 62 S.Ct. 1159, 316 U.S. 400, 86 L.Ed. 1559.
- 11. Nev.—Adler v. State, 594 P.2d 725, 95 Nev. 339.
- 12. Equal chance
Requirement of random process to insure representativeness of grand jury panel demands that each person have equal chance of serving.
N.J.—State v. Ramseur, 524 A.2d 188, 106 N.J. 123, denial of habeas corpus affirmed 983 F.2d 1215, certiorari denied 113 S.Ct. 2433, 508 U.S. 947, 124 L.Ed.2d 653.
- Duplication of names
A random grand jury selection process demands a minimization of the duplication of names on the source list.
N.J.—State v. Long, 499 A.2d 264, 204 N.J.Super. 469.
- 13. Ind.—State ex rel. Burns v. Sharp, 393 N.E.2d 127, 271 Ind. 344.
- 14. U.S.—Brown v. Allen, N.C., 73 S.Ct. 397, 344 U.S. 443, 97 L.Ed. 469, dissenting opinion Daniels v. Allen, 73 S.Ct. 437, 344 U.S. 443, 97 L.Ed. 469, rehearing denied 73 S.Ct. 827, two cases, 345 U.S. 946, 97 L.Ed. 1370, and Speller v. Allen, 73 S.Ct. 827, 345 U.S. 946, 97 L.Ed. 1370.
- 15. U.S.—Bryant v. Wainwright, C.A.Fla., 686 F.2d 1373, rehearing denied 691 F.2d 512, certiorari denied 103 S.Ct. 2096, 461 U.S. 932, 77 L.Ed.2d 305.
U.S. v. Daly, D.C.Tex., 573 F.Supp. 788.
Ala.—Sanders v. State, Cr.App., 426 So.2d 497.
La.—State v. Kahey, App. 3 Cir., 461 So.2d 543.

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stances be improper as violating the fair cross section requirement.¹⁶ Similarly, the use of a list of persons with driver's licenses as the sole source has been upheld.¹⁷

In the case of federal grand juries, the Jury Selection and Service Act requires random selection.¹⁸ However, the end result need not conform to a statistician's technical definition of "randomness."¹⁹ The selection of volunteers from the pool of prospective grand jurors is improper under the Act.²⁰ Under the Act, except in certain districts, the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters, but some additional source or sources shall be used where necessary to foster statutory policies and protect statutory rights.²¹

§ 19. Standing of Accused

Accused may challenge the exclusion of a group from jury selection and raise a claim of discrimination or violation of the fair cross section requirement even if accused is not a member of such group.

N.J.—State v. Porro, 377 A.2d 950, 152 N.J.Super. 259, affirmed 385 A.2d 1258, 158 N.J.Super. 269, certiorari denied 99 S.Ct. 724, 439 U.S. 1047, 58 L.Ed.2d 706.

Voters and licensed drivers

La.—State v. Shepard, 350 So.2d 615.

16. U.S.—Bryant v. Wainwright, C.A.Fla., 686 F.2d 1373, rehearing denied 691 F.2d 512, certiorari denied 103 S.Ct. 2096, 461 U.S. 932, 77 L.Ed.2d 305.

17. Ala.—Rayburn v. State, Cr.App., 495 So.2d 733.

18. 28 U.S.C.A. § 1861.

Jury Selection and Service Act in general see supra § 13.

19. U.S.—U.S. v. Cabrera-Sarmiento, D.C.Fla., 533 F.Supp. 799.

20. U.S.—U.S. v. Branscome, C.A.Va., 682 F.2d 484.

21. 28 U.S.C.A. § 1863(b)(2).

Supplementation

(1) When prima facie case of jury discrimination is established, supplementation of eligible voter list used to select potential jurors with some other source or source of names is congressionally mandated.

U.S.—U.S. v. Brummitt, C.A.Tex., 665 F.2d 521, certiorari denied 102 S.Ct. 2244, 456 U.S. 977, 72 L.Ed.2d 852.

(2) Additional sources can only supplement and not supplant voter lists; supplemental sources should be used only when voter lists deviate substantially from makeup of local community.

U.S.—U.S. v. Brady, C.A.Mont., 579 F.2d 1121, certiorari denied 99 S.Ct. 849, 439 U.S. 1074, 59 L.Ed.2d 41.

22. U.S.—U.S. v. Donohue, D.C.Md., 574 F.Supp. 1269—U.S. v. Cronn, D.C.Tex., 559 F.Supp. 124, affirmed 717 F.2d 164, certiorari denied 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 884, rehearing denied 105 S.Ct. 51, 468 U.S. 1250, 82 L.Ed.2d 942—U.S. v. Cabrera-Sarmiento, D.C.Fla., 533 F.Supp. 799.

Research Note

Persons entitled to object to composition of grand jury in general are discussed infra § 62.

Library References

Grand Jury ⇨ 2½, 17.

Accused may challenge the exclusion of a group from grand jury selection even if accused is not a member of such group.²² Thus, even if accused is not a member of the group, accused may raise a claim of discrimination²³ or violation of the fair cross section requirement.²⁴

The standing of accused to challenge discrimination against a group of which accused is not a member was originally justified by some authorities on the ground that indictment by a grand jury selected in a discriminatory manner violates accused's own right to due process.²⁵ However, more recent case law dealing with petit juries suggests that accused may assert the equal protection rights of a juror.²⁶

U.S. v. Long, D.C.Pa., 88 F.R.D. 701, affirmed 676 F.2d 688, certiorari denied Arrondale v. U.S., 103 S.Ct. 64, 459 U.S. 828, 74 L.Ed.2d 66.

Ariz.—State v. Acosta, App., 608 P.2d 83, 125 Ariz. 146.

Fla.—Del Sol v. State, App. 3 Dist., 537 So.2d 693, review discharged 548 So.2d 1110—Castillo v. State, App. 3 Dist., 466 So.2d 7, approved in part, quashed in part 486 So.2d 565.

Tenn.—Post v. State, Cr.App., 580 S.W.2d 801.

23. Cal.—People v. Estrada, 155 Cal.Rptr. 731, 93 C.A.3d 76.

Contrary view

There is some authority for the view that, at least in the case of gender discrimination, accused may not challenge discrimination against a group to which accused does not belong.

Tenn.—State v. Coe, 655 S.W.2d 903, certiorari denied 104 S.Ct. 745, 464 U.S. 1063, 79 L.Ed.2d 203.

24. U.S.—U.S. v. Marrapese, D.C.R.I., 610 F.Supp. 991—U.S. v. Musto, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Denticco v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883—U.S. v. Cabrera-Sarmiento, D.C.Fla., 533 F.Supp. 799—U.S. v. Layton, D.C.Cal., 519 F.Supp. 946.

N.Y.—People v. Wells, 454 N.Y.S.2d 849, 89 A.D.2d 1020, affirmed People v. Guzman, 457 N.E.2d 1143, 60 N.Y.2d 403, 469 N.Y.S.2d 916, certiorari denied Guzman v. New York, 104 S.Ct. 2155, 466 U.S. 951, 80 L.Ed.2d 541.

25. U.S.—Peters v. Kiff, Ga., 92 S.Ct. 2163, 407 U.S. 493, 33 L.Ed.2d 83, on remand 491 F.2d 967 (per Mr. Justice Marshall, with two justices concurring and three justices concurring in the judgment).

U.S. v. Yonkers Contracting Co., Inc., S.D.N.Y., 682 F.Supp. 757.

26. U.S.—Powers v. Ohio, Ohio, 111 S.Ct. 1364, 499 U.S. 400, 113 L.Ed.2d 411, appeal after remand 635 N.E.2d 1298, 92 Ohio App.3d 400, dismissed, motion overruled 632 N.E.2d 910, 69 Ohio St.3d 1442, certiorari denied 115 S.Ct. 366, 130 L.Ed.2d 319.

B. COMPETENCY AND QUALIFICATIONS OF GRAND JURORS

§ 20. In General

Statutory and constitutional provisions dealing with grand juror qualifications must be observed.

Research Note

Constitutional prohibition on discrimination and fair cross section requirement as affecting validity of statutes regarding qualifications are treated supra § 17. Objections to indictment because of disqualification of grand juror are considered in C.J.S. Indictments and Informations § 176.

Library References

Grand Jury ⇐5.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

It has been said that the qualifications of grand jurors may be changed from time to time by the legislature.²⁷ Valid statutory provisions prescribing the qualifications of grand jurors must be observed.²⁸ Sometimes the grounds of qualification or disqualification stated therein are deemed exclusive,²⁹ especially where it is expressly provided by statute that they shall be exclusive;³⁰ but in a state where there is no constitutional provision prescribing the qualifications of a grand juror, a statute providing that each grand juror shall possess certain stated qualifications and be in other respects a qualified juror is construed to refer to statutory requirements and common-law disqualifications which have not been merged in statutory provisions.³¹ Constitutional provisions dealing directly with the question of qualifications will, of course, be accorded effect.³²

Under some statutes, the qualifications of grand jurors are the same as those required of petit jurors.³³ However, it has been held that a statute making all provisions of law covering qualifications and disqualifications of petit jurors applicable to

grand jurors relates only to qualifications and disqualifications generally applicable to all jurors³⁴ and that it is not to be construed as making all grounds of challenge to the favor which are applicable to a petit juror grounds of disqualification of a grand juror.³⁵

The placing of his name on the grand jury list is neither a necessary³⁶ nor a sufficient³⁷ qualification of a prospective juror. According to some authorities, however, a person is not qualified to serve as a grand juror where he is not a regular juror for the week during which the grand jury is drawn.³⁸ Also, it is held that a grand juror is incompetent where his name has been substituted in the venire for that of another.³⁹

It is the court and not the prosecutor who has general supervisory authority over the qualifications and eligibility of persons called to serve as grand jurors.⁴⁰

Time of qualification.

A grand juror must be qualified to serve as such at the time he serves.⁴¹ A grand juror's qualification is determined and fixed at the time he is impaneled and takes the qualifying oath.⁴²

Presumption and burden of proof as to qualifications.

The presumption is that members of a grand jury possess the qualifications prescribed by law;⁴³ and in the absence of record or other competent evidence on the question⁴⁴ the burden is on the challenging party to show disqualification.⁴⁵ It has, however, been held that, where the state takes issue on defendant's plea in abatement, denying the validity of an indictment on the ground of the

27. N.C.—State v. Barker, 12 S.E. 115, 107 N.C. 913.

28. Ill.—People v. Bain, 193 N.E. 137, 358 Ill. 177—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

Tex.—King v. State, 152 S.W.2d 342, 143 Tex.Cr. 27.

29. W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

30. Nev.—State v. Millain, 3 Nev. 409.

31. Va.—Waller v. Commonwealth, 16 S.E.2d 808, 178 Va. 294, certiorari denied Waller v. Youell, 62 S.Ct. 1106, 316 U.S. 679, 86 L.Ed. 1752, rehearing denied 62 S.Ct. 1289, 316 U.S. 712, 86 L.Ed. 1777, motion denied 62 S.Ct. 1285, 316 U.S. 648, 86 L.Ed. 1732.

32. S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212.

33. Iowa—State v. Pelsler, 163 N.W. 600, 182 Iowa 1.

34. Fla.—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed on rehearing 131 So. 147, 100 Fla. 373—Peoples v. State, 35 So. 223, 46 Fla. 101.

35. Fla.—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed on rehearing 131 So. 147, 100 Fla. 373—Peoples v. State, 35 So. 223, 46 Fla. 101.

36. W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

37. W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

38. N.C.—State v. Barkley, 151 S.E. 733, 138 N.C. 349.

39. Fla.—Hicks v. State, 120 So. 330, 97 Fla. 199.

40. N.M.—Matter of Grand Jury Sandoval County, App., 750 P.2d 464, 106 N.M. 764.

41. N.C.—State v. Barkley, 151 S.E. 733, 138 N.C. 349.

42. Tex.—Howard v. State, App. 9 Dist., 704 S.W.2d 575.

43. La.—State v. Richey, 196 So. 545, 195 La. 319—State v. White, 192 So. 345, 193 La. 775.

44. U.S.—U.S. v. Reilly, D.C.Pa., 30 F.2d 866.

45. La.—State v. Richey, 196 So. 545, 195 La. 319.

incompetency of the grand jurors by affirmatively alleging their competency, it must support such allegation by evidence.⁴⁶

It has been held that all persons 21 years old or older are presumptively eligible for grand jury duty.⁴⁷

Jury Selection and Service Act.

Under the Jury Selection and Service Act, in the case of a federal grand jury, a person shall be deemed qualified to serve on a grand jury unless one of several enumerated disqualifications applies.⁴⁸ Certain public officers or employees are barred from service, as discussed *infra* § 30.

§ 21. Age

A grand juror must not be a minor; and his age must not exceed the maximum limit, if any, prescribed by constitutional or statutory provisions.

Library References

Grand Jury ◊=5.

Under some statutes, grand jurors must be at least 21 years of age.⁴⁹ Under the Jury Selection and Service Act, a person is not qualified to serve on a federal grand jury if he is not at least 18 years old.⁵⁰ It seems that, apart from statute, a minor is disqualified to serve as a grand juror.⁵¹

The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served.⁵²

If a maximum age limit is prescribed by constitutional or statutory provision, grand jurors must not be over that age.⁵³

§ 22. Business or Occupation

If the statute so provides, a person engaged in a certain business or occupation may be disqualified to serve on a grand jury.

Persons engaged in certain businesses or occupations are, or at times have been, disqualified by statute from serving on a grand jury.⁵⁴ Such statutes are not applicable to persons not within their terms.⁵⁵

Unless the statute so provides, persons are not disqualified because of their particular occupations.⁵⁶ A butcher is not disqualified from serving on a grand jury merely because of his occupation.⁵⁷

§ 23. Citizenship

Ordinarily, a grand juror must be a citizen of the United States. Under a statute so providing, but not otherwise, an alien who has declared his intention to become a citizen of the United States is competent to serve as a grand juror.

Library References

Grand Jury ◊=5.

At common law, an alien is disqualified to serve as a grand juror.⁵⁸ Under many statutes, grand jurors are required to be citizens of the United States⁵⁹ and of the state.⁶⁰ A statute defining a grand jury as a body of men returned from the "citizens of the county" has been held to mean that the grand jurors must be citizens of the United States who are of the county.⁶¹ Absence from the state on temporary business with no intention of changing his citizenship does not disqualify a grand juror.⁶²

Under the Jury Selection and Service Act, a person is not qualified to serve on a federal grand jury if he is not a citizen of the United States.⁶³

Declaration of intention.

Under a statute so providing, aliens who have declared their intention to become citizens of the United States are competent to serve as grand jurors,⁶⁴ but in the absence of such a provision it

46. Ala.—State v. Ligon, 7 Port. 167.

Miss.—Beason v. State, 34 Miss. 602.

47. Mo.—State v. Baker, 636 S.W.2d 902, certiorari denied 103 S.Ct. 834, 459 U.S. 1183, 74 L.Ed.2d 1027.

48. 28 U.S.C.A. § 1865(b).

49. N.J.—State v. Hoffman, 58 A. 1012, 71 N.J.Law 285.

50. 28 U.S.C.A. § 1865(b)(1).

51. N.C.—State v. Perry, 29 S.E. 384, 122 N.C. 1018.

52. N.C.—State v. Perry, 29 S.E. 384, 122 N.C. 1018.

53. U.S.—Christopoulos v. U.S., S.Ct., 230 F. 788, 145 C.C.A. 98.

54. Ky.—Commonwealth v. Pritchett, 11 Bush 277.

55. Va.—Commonwealth v. Willson, 2 Leigh 739, 29 Va. 739.

56. W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

57. Ala.—Mason v. State, 53 So. 153, 168 Ala. 48.

58. Va.—Waller v. Commonwealth, 16 S.E.2d 808, 178 Va. 294, certiorari denied Waller v. Youell, 62 S.Ct. 1106, 316 U.S. 679, 89 L.Ed. 1752, rehearing denied 62 S.Ct. 1289, 316 U.S. 712, 86 L.Ed. 1777, motion denied 62 S.Ct. 1285, 316 U.S. 648, 86 L.Ed. 1732.

59. La.—State v. Soileau, 138 So. 92, 173 La. 531.

60. Fla.—Cotton v. State, 95 So. 668, 85 Fla. 197.

61. N.Y.—People v. Scannell, 75 N.Y.S. 500, 37 Misc. 345, 16 N.Y.Crim.R. 321.

62. La.—State v. Alexander, 35 La. Ann. 1100.

63. 28 U.S.C.A. § 1865(b)(1).

64. Mont.—Territory v. Harding, 12 P. 750, 6 Mont. 323.

has been held that, where citizenship is required, a declaration of intention is insufficient to qualify one as a grand juror.⁶⁵

§ 24. Conviction of, or Pending Prosecution for, Crime

A person charged with, or convicted of, a crime or offense may be disqualified to serve as a grand juror.

Library References

Grand Jury ⇐5.

At common law one convicted of crime was disqualified to serve as a grand juror.⁶⁶ Under some statutes, persons convicted of certain crimes or offenses,⁶⁷ or charged with any offense,⁶⁸ are disqualified.

Under the Jury Selection and Service Act, a person is not qualified to serve on a federal grand jury if he has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.⁶⁹ If the person is so charged or convicted, an affirmative act recognized in law must take place to restore his civil rights in order for him to be eligible.⁷⁰ In the absence of an affirmative act such as pardon, amnesty, or expunction of the conviction, the person is ineligible even if he has the right to vote and to hold office under state law.⁷¹

65. Wis.—State v. Cole, 17 Wis. 674.

66. Ill.—Musick v. People, 40 Ill. 268.

Tenn.—State v. Deason, 65 Tenn. 511, 6 Baxt. 511.

67. La.—State v. Smith, 83 So. 264, 145 La. 1091.

Infamous crime

Person convicted of numerous lesser crimes but who has not been convicted of infamous crime is not disqualified.

Miss.—Herring v. State, 374 So.2d 784.

Must be convicted in court of same state

Ga.—Clark v. State, 338 S.E.2d 269, 255 Ga. 370.

Timing

Statute prohibiting convicted felons from serving as grand jurors was not violated as result of fact that one member of grand jury was convicted of a felony after the indictments had been returned for an offense committed prior to the indictments where the juror had not been charged with a crime or arrested at time of his service as a grand juror.

Ga.—Owens v. State, 305 S.E.2d 102, 251 Ga. 313, appeal after remand Lumpkin v. State, 338 S.E.2d 431, 255 Ga. 363.

68. La.—State v. Richey, 196 So. 545, 195 La. 319—State v. Gunter, 177 So. 60, 188 La. 314—State v. Phillips, 114 So. 171, 164 La. 597—State v. Butler, 90 So. 395, 149 La. 1036.

69. 28 U.S.C.A. § 1865(b)(5).

§ 25. Freeholder or Householder

Being a freeholder or a householder, or both, is a necessary qualification for grand jury service when, and only when, it is so provided by a statute in force at the time.

Library References

Grand Jury ⇐5.

The authorities leave it somewhat doubtful whether it was necessary in England at common law for grand jurors to be freeholders.⁷²

In the United States, it has generally been held that, in the absence of a statute requiring it, a grand juror need not be a householder or a freeholder;⁷³ but under a statute so providing, and in force at the time, it is a necessary qualification for service that a grand juror be a freeholder⁷⁴ or a householder,⁷⁵ or a freeholder and a householder,⁷⁶ or either a freeholder or a householder.⁷⁷ In the absence of provision to the contrary,⁷⁸ a statute fixing a freehold qualification does not confine the freehold interest to lands of the county.⁷⁹

§ 26. Infirmity

Under some statutes, a person may be disqualified to serve as a grand juror by reason of a mental or physical infirmity.

Library References

Grand Jury ⇐5.

Insane persons and idiots are incompetent to act as grand jurors under the provisions of some stat-

70. U.S.—U.S. v. Hefner, C.A.4(Va.), 842 F.2d 731, certiorari denied 109 S.Ct. 174, 488 U.S. 868, 102 L.Ed.2d 144.

71. U.S.—U.S. v. Hefner, C.A.4(Va.), 842 F.2d 731, certiorari denied 109 S.Ct. 174, 488 U.S. 868, 102 L.Ed.2d 144.

72. N.Y.—People v. Jewett, 6 Wend. 386.

73. N.C.—State v. Perry, 29 S.E. 384, 122 N.C. 1018.

74. Va.—Wysor v. Commonwealth, 6 Gratt. 711, 47 Va. 711.

75. Ohio—Shoemaker v. State, 12 Ohio 43.

Purpose

Purposes behind statutory requirement that grand juror be householder are that grand jurors be actual members of community served by grand jury, that they have experience of making important and binding practical decisions of everyday living, and that they be capable of making important decisions independent of family or relatives or others.

Ind.—Stevens v. State, 354 N.E.2d 727, 265 Ind. 396, rehearing 357 N.E.2d 245, 265 Ind. 396.

76. Tenn.—State v. Bryant, 10 Yerg. 527.

77. Ind.—Palmer v. State, 150 N.E. 917, 197 Ind. 625.

78. Ind.—Wills v. State, 69 Ind. 286.

79. Tenn.—State v. Bryant, 18 Tenn. 527, 10 Yerg. 527.

utes.⁸⁰

Under the Jury Selection and Service Act, a person is not qualified to serve on a federal grand jury if he is incapable, by reason of mental or physical infirmity, to render satisfactory jury service.⁸¹

§ 27. Interest, Bias, or Prejudice

- a. In general
- b. Particular matters
- c. Provision for automatic exclusion

a. In General

Under some statutes or rules, a person shall be disqualified from serving as a grand juror in a particular case if he is biased or prejudiced.

Research Note

General requirement that grand jury be impartial is considered supra § 11.

Library References

Grand Jury ¶5, 15, 18.

Under some statutes or rules, a person shall be disqualified from serving as a grand juror in a particular case if he is biased or prejudiced.⁸² Grand jurors may be challenged for bias or prejudice,⁸³ and there are some statutory provisions to this effect.⁸⁴ Indeed, it has been asserted generally

that defendant in a criminal prosecution is entitled to the absolute impartiality of the grand jurors who pass on the indictment.⁸⁵ The ultimate question is whether the juror can base his decision solely on the evidence presented to him and the law.⁸⁶ This determination is largely committed to the discretion of the trial court.⁸⁷

On the other hand, it is held or stated that a statute which defines the cases in which a grand juror is incompetent and must not take part also limits such cases;⁸⁸ that no interest, except as defined by statute, will so disqualify a member of a grand jury as to vitiate an indictment returned;⁸⁹ that prejudice⁹⁰ or bias⁹¹ does not disqualify a grand juror or render him incompetent; and that interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror⁹² or be a ground of objection to an indictment in the finding of which he participates.⁹³

An objection that a grand juror is incompetent, by reason of interest, to act in a particular case may be ineffective when it is made too late under the governing statute,⁹⁴ or when the juror did not vote on the indictment.⁹⁵

Jury Selection and Service Act.

Under the Jury Selection and Service Act, a person may be excluded from federal grand jury

80. Or.—State v. Carlson, 62 P. 1016, 39 Or. 19.

81. 28 U.S.C.A. § 1865(b)(4).

82. Ariz.—State v. Salazar, 557 P.2d 552, 27 Ariz.App. 620.

83. Iowa—State v. Gillick, 7 Clarke 287, 7 Iowa 287.
Neb.—Patrick v. State, 20 N.W. 121, 16 Neb. 330.

84. N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

85. S.C.—State v. Richardson, 146 S.E. 676, 149 S.C. 121.

86. Ariz.—State v. Emery, 642 P.2d 838, 131 Ariz. 493, appeal after remand 688 P.2d 175, 141 Ariz. 549—State v. Gretzler, 612 P.2d 1023, 126 Ariz. 60, appeal after remand State v. Superior Court of State of Ariz., In and For Pima County, 627 P.2d 1081, 128 Ariz. 583 and 659 P.2d 1, 135 Ariz. 42, certiorari denied 103 S.Ct. 2444, 461 U.S. 971, 77 L.Ed.2d 1327, rehearing denied 104 S.Ct. 32, 463 U.S. 1236, 77 L.Ed.2d 1452.

87. Ariz.—State v. Salazar, 557 P.2d 552, 27 Ariz.App. 620.

Source of bias

The state of mind referred to in the statute must arise from circumstances occurring outside or something heard outside without sanction of oath.

N.M.—State v. Raulie, 290 P. 789, 35 N.M. 135.

88. Ala.—Sheppard v. State, 10 So.2d 822, 243 Ala. 498.

89. Fla.—Lake v. State, 129 So. 827, 100 Fla. 373, affirmed on rehearing 131 So. 147, 100 Fla. 373.

90. Md.—Coblentz v. State, 166 A. 45, 164 Md. 558, 88 A.L.R. 886.

91. Ala.—Sheppard v. State, 10 So.2d 822, 243 Ala. 498.

Alaska—U.S. v. Caldwell, 8 Alaska 117.

Ga.—In re Hensley, 362 S.E.2d 432, 184 Ga.App. 625.

Tenn.—Rippy v. State, 550 S.W.2d 636.

Functions of grand jury

The basic theory of functions of a grand jury does not require that grand jurors should be impartial and unbiased.

Ga.—Creamer v. State, 258 S.E.2d 212, 150 Ga.App. 458.

Not a legal qualification

(1) Freedom from personal bias is not a legal qualification for a grand juror.

Ind.—Sparks v. State, 499 N.E.2d 738.

(2) Freedom from personal bias is not one of initial legal qualifications for grand juror.

Ind.—Stevens v. State, 354 N.E.2d 727, 265 Ind. 396, rehearing 357 N.E.2d 245, 265 Ind. 396.

Not ground for challenge

U.S.—Schwartz v. U.S. Dept. of Justice, D.C.Pa., 494 F.Supp. 1268.

D.C.—Khaalis v. U.S., 408 A.2d 313, certiorari denied Adam v. U.S., 100 S.Ct. 1059, 444 U.S. 1092, 62 L.Ed.2d 781.

92. Alaska—U.S. v. Caldwell, 8 Alaska 117.

N.C.—State v. Oxendine, 278 S.E.2d 200, 303 N.C. 235.

93. Alaska—U.S. v. Caldwell, 8 Alaska 117.

94. Tex.—Jones v. State, 147 S.W.2d 508, 141 Tex.Cr. 70—Staton v. State, 248 S.W. 356, 93 Tex.Cr. 356.

95. U.S.—U.S. v. Lynch, D.C.La., 11 F.2d 298.

service by the court on the ground that such person may be unable to render impartial jury service.⁹⁶

b. Particular Matters

It has been held that various matters concerning interest, bias, or prejudice do not necessarily disqualify a person from grand jury service, such as a relationship with a person involved in the case.

It has been held that, in the absence of statutory provision to the contrary,⁹⁷ various matters concerning interest, bias, or prejudice do not necessarily disqualify a person from grand jury service,⁹⁸ such as the fact that a person has originated a complaint against the person accused of crime,⁹⁹ or is a witness for the prosecution,¹ or has unsuccessfully opposed accused as a candidate for public office,² or has formed and expressed an opinion as to the prisoner's guilt.³

The same rule has been applied where the person is related to or has some relationship with the

injured person,⁴ a prosecutor,⁵ an investigator,⁶ a witness,⁷ a jury commissioner,⁸ or defendant.⁹

The same rule has been applied to a person who has evinced a desire and purpose to enforce the law against a particular kind of crime,¹⁰ or who has strong feelings about crimes,¹¹ or has subscribed funds for the purpose of legitimately suppressing a particular violation of law.¹² The mere fact that a person is a member of an association organized for the purpose of aiding the public officers in the maintenance of law and order and the suppression of crime does not disqualify such person as a grand juror.¹³

A grand juror need not be free from all previous knowledge of the case¹⁴ or even of knowledge of the precise circumstances of the case.¹⁵ It has been held that a person may serve as a grand juror even if he was present at the crime scene,¹⁶ or served on a prior grand jury that indicted accused for a different crime,¹⁷ or is aware of accused's

96. 28 U.S.C.A. § 1866(c)(2).

97. Alaska—U.S. v. Caldwell, 8 Alaska 117.

N.C.—State v. Pitt, 80 S.E. 1060, 166 N.C. 268.

98. Alaska—U.S. v. Caldwell, 8 Alaska 117.

Employment as jailer

Ala.—Kuenzel v. State, Cr.App., 577 So.2d 474, affirmed Ex parte Kuenzel, 577 So.2d 531, certiorari denied 112 S.Ct. 242, 502 U.S. 886, 116 L.Ed.2d 197.

99. Alaska—U.S. v. Caldwell, 8 Alaska 117.

Mass.—In re Tucker, 8 Mass. 286.

1. Alaska—U.S. v. Caldwell, 8 Alaska 117.

Nev.—State v. Millain, 3 Nev. 409.

2. Ark.—Rice v. State, 161 S.W.2d 401, 204 Ark. 236.

3. Ill.—People v. Looney, 145 N.E. 365, 314 Ill. 150.

Nev.—State v. Williams, 129 P. 317, 35 Nev. 276.

4. Ala.—Sledge v. State, 93 So. 875, 208 Ala. 154.

Sisk v. State, 115 So. 766, 22 Ala.App. 368.

N.C.—State v. Oxendine, 278 S.E.2d 200, 303 N.C. 235.

Ohio—Zell v. State, 15 Ohio App. 446, 32 Ohio C.A. 385.

Knows injured person

Alaska—Nix v. State, App., 653 P.2d 1093.

Conn.—State v. Aillon, 521 A.2d 555, 202 Conn. 385.

5. Partner

(1) District attorney's law partner, who possessed no disqualifying knowledge when grand jury was convened, was competent to serve as member of grand jury.

Ala.—Eddings v. State, Cr.App., 443 So.2d 1308.

(2) Assistant district attorney's law partner was competent.

Ala.—Ervin v. State, Cr.App., 442 So.2d 123.

Spouse

Wife of assistant district attorney, who was also part-time employee of district attorney's office, was competent to serve as member of grand jury indicting defendant, though assistant district attorney was present

at grand jury proceedings, where assistant district attorney did not participate in presentation of cases and there was no discussion between assistant district attorney and wife regarding any cause pending before grand jury.

Ala.—Cardwell v. State, Cr.App., 544 So.2d 987.

6. Fla.—Herman v. State, App., 396 So.2d 222, certiorari dismissed 402 So.2d 610, habeas corpus denied 744 F.Supp. 1128, affirmed 929 F.2d 623.

7. Mich.—People v. Edmond, 273 N.W.2d 85, 86 Mich.App. 374.

8. Tex.—Rogers v. State, Cr.App., 774 S.W.2d 247, certiorari denied 110 S.Ct. 519, 493 U.S. 984, 107 L.Ed.2d 520, denial of habeas corpus affirmed Ex parte Rogers, 819 S.W.2d 533, rehearing denied, habeas corpus denied 864 F.Supp. 584, affirmed 70 F.3d 340, certiorari denied 116 S.Ct. 1881, 135 L.Ed.2d 176.

9. Husband of defendant's wife's sister

Husband of defendant's wife's sister is not brother-in-law to defendant, and, even if he were, it would not constitute a reason for his not serving as a grand juror.

Fla.—Cruce v. State, 100 So. 264, 87 Fla. 406.

10. Alaska—U.S. v. Caldwell, 8 Alaska 117.

11. Ariz.—State v. Salazar, 557 P.2d 552, 27 Ariz.App. 620.

12. Alaska—U.S. v. Caldwell, 8 Alaska 117.

13. Alaska—U.S. v. Caldwell, 8 Alaska 117.

Okl.—Fooshee v. State, 108 P. 554, 3 Okl.Cr. 666.

14. Me.—State v. Haberski, 449 A.2d 373, certiorari denied 103 S.Ct. 823, 459 U.S. 1174, 74 L.Ed.2d 1019.

N.M.—Matter of Grand Jury Sandoval County, App., 750 P.2d 464, 106 N.M. 764—State v. Watkins, App., 590 P.2d 169, 92 N.M. 470.

15. N.M.—State v. Watkins, App., 590 P.2d 169, 92 N.M. 470.

16. Ind.—Sparks v. State, 499 N.E.2d 738.

17. Iowa—State v. Williams, 360 N.W.2d 782.

investigator,⁶ a defendant.⁹

to a person who enforce the law,¹⁰ or who has subscribed or suppressing a mere fact that a person organized for officers in the suppression of a person as a grand

from all previous of knowledge of case.¹⁵ It has as a grand juror the scene,¹⁶ or indicted accused of accused's

dict attorney did not was no discussion ding any cause pend-

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Mich.App. 374.

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App., 750 P.2d 464, d 169, 92 N.M. 470.

2 N.M. 470.

reputation in the community.¹⁸ An examining magistrate or commissioner is not disqualified to act as a grand juror on cases sent on by himself.¹⁹

There are some authorities which hold that the fact that a grand juror has formed or expressed an opinion as to the guilt or innocence of accused is a sufficient ground of challenge.²⁰ It would seem, according to some of the authorities, that relationship of a grand juror, by blood or marriage to the prosecutor is a ground for challenge.²¹

c. Provision for Automatic Exclusion

Various statutes or rules preclude persons with specified types of interests in a case from serving as grand jurors in such case.

Some statutes or rules provide that a witness cannot be a grand juror.²² The fact that the grand jury which indicts a person for perjury and false swearing was the same grand jury which heard the allegedly perjurious statement does not violate such a statute or rule.²³ Under a statute providing that the validity of a grand jury may be challenged on the ground that a member thereof was a witness against the person indicted, the term "witness" means a person called to give evidence regarding matters under inquiry by the grand jury,²⁴ and the fact that the grand jury has previously returned other indictments against a person does not render the grand jurors witnesses against him.²⁵

Judicial recognition is accorded statutes providing that a grand juror connected by blood or marriage with the person charged shall not be present at, or take part in, the consideration of the charge,²⁶ or that he shall not participate in the investigation of a public offense committed against his person or property, or when he is prosecutor,²⁷ and a statute declares it a ground of challenge that a person summoned to serve as a grand juror is the

prosecutor or complainant on any charge against accused.²⁸ Previous formation and expression of an unqualified opinion of guilt of accused is sometimes expressly made a ground of challenge by statute.²⁹

§ 28. Knowledge of Language; Literacy

Disqualification to serve as a grand juror may arise, under the statutes, from illiteracy or insufficient knowledge of the language in which the proceedings are conducted to obtain a clear understanding of what is said and done.

Library References

Grand Jury ◊5.

One who lacks a sufficient knowledge of the language in which the proceedings before the grand jury are conducted to obtain a clear understanding of what is said and done is not, under some statutes, competent to serve as a grand juror.³⁰ By statute, ability to speak, read, and write the English language is sometimes made a necessary qualification of grand jurors.³¹ In the absence of a statute so providing, a person is not disqualified because he can read and write only a few words.³²

Under the Jury Selection and Service Act, a person is not qualified to serve on a federal grand jury if he is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;³³ or is unable to speak the English language.³⁴

§ 29. Prior Service as Juror

Whether prior service in the same capacity during a certain period renders a person ineligible to serve as a grand juror depends on statutory provisions.

Library References

Grand Jury ◊5.

Effect will be accorded applicable statutes rendering persons ineligible to serve as grand jurors

18. Ga.—Moss v. State, 297 S.E.2d 459, 250 Ga. 368.

19. U.S.—U.S. v. Belvin, C.C.Va., 46 F. 381.

20. Iowa—State v. Gillick, 7 Clarke 287, 7 Iowa 287.

21. S.C.—State v. Boyd, 34 S.E. 661, 56 S.C. 382.

22. Ariz.—Franzi v. Superior Court of Arizona In and For Pima County, 679 P.2d 1043, 139 Ariz. 556.

Ground of challenge

Okl.—Covart v. State, 111 P. 672, 4 Okl.Cr. 122.

23. Ariz.—Franzi v. Superior Court of Arizona In and For Pima County, 679 P.2d 1043, 139 Ariz. 556.

24. N.M.—State v. Hogervorst, App., 566 P.2d 828, 90 N.M. 580, certiorari denied 567 P.2d 485, 90 N.M. 636.

25. N.M.—State v. Hogervorst, App., 566 P.2d 828, 90 N.M. 580, certiorari denied 567 P.2d 485, 90 N.M. 636.

26. Ala.—Wilson v. State, 54 So. 572, 171 Ala. 25.

Tenn.—State v. Maddox, 69 Tenn. 671, 1 Lea 671.

27. Ala.—Sheppard v. State, Ala., 10 So.2d 822, 243 Ala. 498.

28. Tex.—Staton v. State, 248 S.W. 356, 93 Tex.Cr. 356.

29. Iowa—State v. Harris, 172 N.W. 942, 186 Iowa 627.

30. U.S.—U.S. v. Benson, C.C.Cal., 31 F. 896, 12 Sawy. 477.

31. Iowa—State v. Greenland, 100 N.W. 341, 125 Iowa 141.

La.—State v. Hudgens, 179 So. 57, 189 La. 128.

Tex.—Ex parte Harris, 39 S.W.2d 883, 118 Tex.Cr. 154.

32. Miss.—Herring v. State, 374 So.2d 784.

33. 28 U.S.C.A. § 1865(b)(2).

34. 28 U.S.C.A. § 1865(b)(3).

who have served in that capacity within a certain period.³⁵

However, such persons are not rendered incompetent by statutes which merely forbid their selection by the officers charged with the duty of selecting grand jurors.³⁶

Under a statute permitting service,³⁷ or in the absence of statute,³⁸ prior service as a juror within a prescribed period is not a disqualification. A person may serve as a grand juror even if he has previously served as a petit juror.³⁹

§ 30. Public Officers or Employees

The holding of a public office does not in the absence of statute disqualify a person as a grand juror.

Library References

Grand Jury ⇐5.

In the absence of statutory enactment to the contrary, the fact that a juror is a public officer does not disqualify him from serving as a grand juror.⁴⁰

While statutes declaring specified public officers incompetent to serve as grand jurors during their terms of office will, when applicable, be accorded effect,⁴¹ they are not applicable to other public officers⁴² or to persons who are not public officers.⁴³

Under some statutes, all elected officers and officials are incompetent to serve as grand jurors during their terms of office.⁴⁴

Jury Selection and Service Act.

Under the Jury Selection and Service Act, the following persons are barred from federal grand jury service: members in active service in the armed forces; members of fire or police departments; and public officers actively engaged in the performance of official duties.⁴⁵

§ 31. Qualification as Elector or Voter

When so required by a constitutional or statutory provision, a grand juror must possess the qualifications of a voter or elector.

Library References

Grand Jury ⇐5.

Under some constitutional or statutory provisions, a grand juror need not have the qualifications of a voter or elector.⁴⁶

Some constitutional or statutory provisions make it essential that a grand juror shall have the qualifications of a voter or elector.⁴⁷ However, not all qualified voters are eligible as grand jurors.⁴⁸ Under a statute requiring grand jurors to be electors, it is essential only that they should have the qualifications of an elector; a person need not have voted or have his name on the poll books to be eligible,⁴⁹ nor need he be a registered voter, where registration is considered only as evidence of existence of qualification, and not as a qualification, to vote,⁵⁰ nor need he still live in the precinct where he is

35. Cal.—*People v. Quijada*, 97 P. 689, 154 C. 243.
 36. Minn.—*State v. Cooley*, 75 N.W. 729, 72 Minn. 476.
 37. Ga.—*Long v. State*, 127 S.E. 842, 160 Ga. 292 answers to certified questions conformed to 128 S.E. 784, 34 Ga.App. 124.
 38. Or.—*State v. Brown*, 41 P. 1042, 28 Or. 147.
 39. Or.—*State v. Gortmaker*, 668 P.2d 354, 295 Or. 505, certiorari denied 104 S.Ct. 1416, 465 U.S. 1066, 79 L.Ed.2d 742.
 40. N.J.—*State v. Ruffu*, 150 A. 249, 8 N.J.Misc. 392.
 41. Fla.—*Cawthon v. State*, 156 So. 129, 115 Fla. 801—*Lindsay v. State*, 122 So. 1, 97 Fla. 701.
 42. Ga.—*Narramore v. State*, 351 S.E.2d 643, 181 Ga.App. 254, certiorari granted 354 S.E.2d 160.
 Miss.—*Robinson v. State*, 173 So. 451, 178 Miss. 568.
 Va.—*Webb v. Commonwealth*, 120 S.E. 155, 137 Va. 833.
 43. U.S.—*Johnson v. U.S.*, C.C.A.Fla., 11 F.2d 606, certiorari denied 46 S.Ct. 488, 271 U.S. 675, 70 L.Ed. 1145.
 44. Ga.—*Hayes v. State*, 226 S.E.2d 819, 138 Ga.App. 666.

Elective office

Term "elective office," within statute providing that any person who holds any elective office in state or local government is incompetent to serve as a grand juror, is an office filled by citizens registered to vote and voting at an election.

Ga.—*Ingram v. State*, 323 S.E.2d 801, 253 Ga. 622, certiorari denied 105 S.Ct. 3538, 473 U.S. 911, 87 L.Ed.2d 661, rehearing denied 106 S.Ct. 20, 473 U.S. 927, 87 L.Ed.2d 697, denial of habeas corpus affirmed 26 F.3d 1047, rehearing and rehearing en banc denied 36 F.3d 96, certiorari denied 115 S.Ct. 1137, 130 L.Ed.2d 1097, rehearing denied 115 S.Ct. 1444, 131 L.Ed.2d 323.

45. 28 U.S.C.A. § 1863(b)(6).

Public officer

"Public officer" means a person who is either elected to public office or directly appointed by a person elected to public office.
 28 U.S.C.A. § 1869(i).

46. Va.—*Waller v. Commonwealth*, 16 S.E.2d 808, 178 Va. 294, certiorari denied *Waller v. Youell*, 62 S.Ct. 1106, 316 U.S. 679, 86 L.Ed. 1752, rehearing denied 62 S.Ct. 1289, 316 U.S. 712, 86 L.Ed. 1777, motion denied 62 S.Ct. 1285, 316 U.S. 648, 86 L.Ed. 1732.

47. S.C.—*State v. Rector*, 155 S.E. 385, 158 S.C. 212.

Tex.—*Harper v. State*, 234 S.W. 909, 90 Tex.Cr. 252.

48. Tex.—*Harper v. State*, 234 S.W. 909, 90 Tex.Cr. 252.

49. Iowa—*State v. Harris*, 97 N.W. 1093, 122 Iowa 78.

50. Del.—*State v. Lyons*, 5 A.2d 495, 1 Terry 77, 40 Del. 77.

N.M.—*State v. Chama Land & Cattle Co.*, App., 805 P.2d 86, 111 N.M. 317, certiorari denied 804 P.2d 1081, 111 N.M. 262.

registered.⁵¹ Under some constitutional provisions, however, a grand juror must be a legally⁵² registered elector.⁵³

A requirement that jurors shall be selected from the class of voters called property voters has been held not to require that one having the qualifications of a property voter at the time of his selection continue to possess them after that time.⁵⁴

§ 32. Religious or Political Beliefs and Alliances

The qualifications of a grand juror are not affected by his connection or lack of connection with a political or religious organization; and the same is true as to the effect of his religious beliefs.

Library References

Grand Jury ⇐5.

A grand jury should be selected with a view to the qualifications prescribed by law, without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political, or religious.⁵⁵

Neither religious beliefs nor church adhesion⁵⁶ nor membership in, or affiliation with, a political party,⁵⁷ affects the qualifications of a grand juror.

§ 33. Residence

To be qualified as a grand juror, a person must have the required residence and, under some statutes, he must be a resident for a prescribed length of time preceding the service.

Library References

Grand Jury ⇐5.

A person who is not a resident of the state is, under the statutes, incompetent as a grand juror.⁵⁸ Under some statutes, grand jurors must be residents of the state for a particular length of time preceding their service.⁵⁹

At common law, a grand juror is required to be a resident of the county.⁶⁰ The same qualification is required by many statutes.⁶¹ Some statutes require grand jurors to be residents of the county for a particular length of time preceding their service.⁶² Absence on temporary business with no intention of abandoning his residence does not disqualify a grand juror.⁶³

A grand juror's qualification as to residence must be determined by his status at the time of his service.⁶⁴ He is not disqualified because he moves out of the county after his impaneling.⁶⁵ It is not sufficient that he was qualified when selected, if he removed to another county before the grand jury was impaneled.⁶⁶ However, it is said that disqualification of a grand juror resulting from his departure permanently from the state exists only from the time it becomes known to the court.⁶⁷

Jury Selection and Service Act.

Under the Jury Selection and Service Act, a person is not qualified to serve on a federal grand jury if he has not resided for a period of one year within the federal judicial district.⁶⁸

§ 34. Taxpayer

Whether assessment for, or payment of, taxes, or liability to taxation, is necessary to qualify a person as a grand juror depends on statutory provisions.

Library References

Grand Jury ⇐5.

In the absence of statutory requirement, grand jurors need not be taxpayers, if otherwise qualified.⁶⁹

Effect will be accorded to statutes, in force at the time, requiring grand jurors to be taxpayers;⁷⁰ taxable persons;⁷¹ persons not in default in the

51. N.M.—State v. Chama Land & Cattle Co., App., 805 P.2d 86, 111 N.M. 317, certiorari denied 804 P.2d 1081, 111 N.M. 262.

52. S.C.—State v. Bibbs, 6 S.E.2d 276, 192 S.C. 231.

53. S.C.—State v. Rector, 155 S.E. 385, 158 S.C. 212.

54. U.S.—U.S. v. Gradwell, D.C.R.I. & W.Va., 227 F. 243.

55. N.Y.—People v. Jewett, 3 Wend. 314.

56. U.S.—U.S. v. Eagan, C.C.Mo., 30 F. 608.

57. U.S.—U.S. v. Eagan, C.C.Mo., 30 F. 608.

58. Fla.—Cotton v. State, 95 So. 668, 35 Fla. 197.

59. Wis.—Lask v. U.S., 1 Pinn. 77.

60. Conn.—State v. Hamlin, 47 Conn. 95.

61. Fla.—Cotton v. State, 95 So. 668, 35 Fla. 197.

La.—State v. Morris, 171 So. 437, 185 La. 1037.

62. La.—State v. Morris, 171 So. 437, 185 La. 1037.

63. La.—State v. Wimby, 43 So. 984, 119 La. 139.

N.M.—State v. Watkins, App., 590 P.2d 169, 92 N.M. 470.

64. N.C.—State v. Wilcox, 10 S.E. 453, 104 N.C. 847.

65. Tex.—Howard v. State, App. 9 Dist., 704 S.W.2d 575.

66. N.C.—State v. Wilcox, 10 S.E. 453, 104 N.C. 847.

67. La.—State v. Tolett, 141 So. 57, 174 La. 553.

68. 28 U.S.C.A. § 1865(b)(1).

69. R.I.—State v. Rife, 30 A. 467, 18 R.I. 596.

70. Mont.—Territory v. Harding, 12 P. 750, 6 Mont. 323.

71. Or.—State v. Carlson, 62 P. 1016, 39 Or. 19.

payment of taxes;⁷² or persons assessed on the last assessment roll of the county.⁷³ So, also, a statute removing in certain cases the disqualification of grand jurors based on failure to pay taxes for the preceding year will, when applicable, be accorded effect.⁷⁴

Some statutes providing that jurors shall be selected from persons assessed on the assessment roll are deemed to relate merely to the mode of

selecting jurors and not to apply to the qualifications of a grand juror.⁷⁵

A grand juror need not have paid his taxes to qualify under a constitutional provision requiring a juror to be a qualified elector, where a qualified elector is a registered elector and payment of taxes is made a condition only for voting and not for registration.⁷⁶

C. EXEMPTIONS

§ 35. In General

A statutory exemption from service on a grand jury is a privilege which a prospective juror may claim or waive.

Research Note

Constitutional prohibition on discrimination and fair cross section requirement as affecting constitutionality of exemption are treated supra § 17.

Library References

Grand Jury ⇐6.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Statutory provisions are controlling in respect of exemption from service on grand juries by persons of designated classes,⁷⁷ such as public officers,⁷⁸ and persons who have reached a specified age limit,⁷⁹ or have served as jurors within a specified time,⁸⁰ or are engaged in specified occupations.⁸¹

Such statutory provisions are for the benefit of the persons exempted⁸² and do not have the effect

of absolutely disqualifying them,⁸³ but merely extend to them a privilege or favor⁸⁴ which they may claim⁸⁵ or waive.⁸⁶ Hence, as a general rule, the fact that a grand juror may be exempt is no ground for challenge,⁸⁷ or for attacking an indictment.⁸⁸ The court has no right, on its own motion, to discharge prospective grand jurors as disqualified because they are exempt.⁸⁹

The fact that a person has a fixed scrupulous or religious objection to the discharge of the duties of a grand juror has been held not to be a sufficient ground for exempting him from service, in the absence of a statute exempting such persons.⁹⁰

§ 36. Federal Grand Jury

In the case of federal grand juries, volunteer safety personnel shall be excused from jury service upon individual request.

Library References

Grand Jury ⇐6.

72. N.C.—State v. Perry, 29 S.E. 384, 122 N.C. 1018.

73. Cal.—Kitts v. Superior Court of Nevada County, 90 P. 977, 5 C.A. 462.

74. U.S.—Davis v. U.S., C.C.A.N.C., 49 F.2d 269, certiorari denied 51 S.Ct. 657, 283 U.S. 859, 75 L.Ed. 1465.

75. U.S.—Gridley v. U.S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—U.S. v. Mitchell, C.C.Or., 136 F. 896.

76. S.C.—State v. Smalls, 159 S.E. 555, 161 S.C. 197.

77. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

78. Ohio—Koch v. State, 32 Ohio St. 353.

79. Ill.—People v. Coffman, 170 N.E. 227, 338 Ill. 367.

80. La.—State v. Hopkins, 40 So. 166, 115 La. 786.

81. N.Y.—People v. Shearer, 7 N.Y. S.2d 152, 169 Misc. 69.

Attorney

Ga.—Ingram v. State, 323 S.E.2d 801, 253 Ga. 622, certiorari denied 105 S.Ct. 3538, 473 U.S. 911, 87 L.Ed.2d 661, rehearing denied 106 S.Ct. 20, 473 U.S. 927, 87 L.Ed.2d 697, denial of habeas corpus affirmed Ingram v. Zant, 26 F.3d 1047, rehearing denied 36 F.3d 96,

certiorari denied Ingram v. Thomas, 115 S.Ct. 1137, 130 L.Ed.2d 1097, rehearing denied 115 S.Ct. 1444, 131 L.Ed.2d 323.

82. Alaska—U.S. v. Caldwell, 8 Alaska 117.

83. Ill.—People v. Coffman, 170 N.E. 227, 338 Ill. 367.

N.Y.—People v. Shearer, 7 N.Y.S.2d 152, 169 Misc. 69.

84. Ill.—People v. Coffman, 170 N.E. 227, 338 Ill. 367.

N.Y.—People v. Shearer, 7 N.Y.S.2d 152, 169 Misc. 69.

85. Ill.—People v. Coffman, 170 N.E. 227, 338 Ill. 367.

N.Y.—People v. Shearer, 7 N.Y.S.2d 152, 169 Misc. 69.

86. N.Y.—People v. Shearer, 7 N.Y.S.2d 152, 169 Misc. 69.

87. Ga.—Ingram v. State, 323 S.E.2d 801, 253 Ga. 622, certiorari denied 105 S.Ct. 3538, 473 U.S. 911, 87 L.Ed.2d 661, rehearing denied 106 S.Ct. 20, 473 U.S. 927, 87 L.Ed.2d 697, denial of habeas corpus affirmed Ingram v. Zant, 26 F.3d 1047, rehearing denied 36 F.3d 96, certiorari denied Ingram v. Thomas, 115 S.Ct. 1137, 130 L.Ed.2d 1097, rehearing denied 115 S.Ct. 1444, 131 L.Ed.2d 323.

Iowa—State v. Pell, 119 N.W. 154, 140 Iowa 655.

88. Mass.—Commonwealth v. Hayden, 40 N.E. 846, 163 Mass. 453.

89. La.—State v. Smith, 83 So. 264, 145 La. 1091.

90. S.C.—State v. Willson, 13 S.C.L. 393.

Under the Jury Selection and Service Act, in the case of federal grand juries, volunteer safety personnel shall be excused from jury service upon individual request.⁹¹ A federal district court's plan for random jury selection shall specify those other groups of persons or occupational classes whose members shall, on individual request, be excused; but such groups or classes shall be excused only if

the court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with statutory policies.⁹² The Act's bar on service by certain public officers and employees is treated *supra* § 30.

D. SELECTION AND DRAWING

§ 37. In General

At common law the mode of selecting grand jurors was within the sheriff's discretion, but the subject is now generally regulated by statute. Substantial compliance with the statutes is usually sufficient, and mere irregularities are not fatal, particularly where the statutes are considered directory rather than mandatory.

Research Note

Prohibition on discrimination and fair cross section requirement, including Jury Selection and Service Act provisions relevant thereto, are treated *supra* §§ 13-19.

Library References

Grand Jury ⇐8.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

Constitutional provisions generally do not require that grand jurors be selected in any particular manner.⁹³

At common law, grand jurors were selected by the sheriff, and the manner of their selection was a matter within his discretion.⁹⁴ At present, the mode of selecting a grand jury generally is a matter of statutory requirement,⁹⁵ the subject being one which the legislature is authorized to regulate by statute in the absence of constitutional provision prescribing or proscribing any particular method of selection.⁹⁶

Statutes concerning the selection and drawing of grand jurors must be complied with,⁹⁷ and may not be arbitrarily ignored;⁹⁸ and generally is essential to the existence of a legal grand jury that there be at least a substantial compliance with the mode of selection prescribed by statute.⁹⁹ A substantial compliance is generally considered sufficient, however,¹ and technical irregularities not amounting to

91. 28 U.S.C.A. § 1863(b)(5)(B).

92. 28 U.S.C.A. § 1863(b)(5)(A).

93. Conn.—*State v. Simms*, 518 A.2d 35, 201 Conn. 395.

94. Fla.—*Hicks v. State*, 120 So. 330, 97 Fla. 199.

Ind.—*Randolph v. State*, 162 N.E. 656, 200 Ind. 210.

N.D.—*State v. Walla*, 224 N.W. 211, 57 N.D. 726.

95. Ariz.—*Kingsbury v. State*, 232 P. 887, 27 Ariz. 289, modified on rehearing on other grounds 235 P. 140, 28 Ariz. 86.

Fla.—*Taylor v. State*, 158 So. 437, 117 Fla. 706.

Ind.—*Randolph v. State*, 162 N.E. 656, 200 Ind. 210.

La.—*State ex rel. De Armas v. Platt*, 192 So. 659, 193 La. 928.

Neb.—*Pinn v. State*, 186 N.W. 544, 107 Neb. 417.

N.C.—*State v. Peacock*, 16 S.E.2d 452, 220 N.C. 63.

S.C.—*State v. Pridmore*, 161 S.E. 335, 163 S.C. 73—*State v. Wells*, 161 S.E. 177, 162 S.C. 509.

Tex.—*Terrell v. State*, 139 S.W.2d 108, 139 Tex.Cr. 130—*Cockrell v. State*, 117 S.W.2d 1105, 135 Tex.Cr. 218—*Powell v. State*, 269 S.W. 443, 99 Tex.Cr. 276.

Va.—*McDaniel v. Commonwealth*, 181 S.E. 534, 165 Va. 709.

Purpose of statutes

(1) Statutes regulating the selection of grand jurors are enacted for public reasons rather than for the benefit of any individual; they are intended to facilitate the selection of a jury, to equalize the burden of jury service, and to preclude the packing of juries or the selection of

jurors with reference to particular matters and causes likely to be submitted to them for determination.

N.D.—*State v. Walla*, 224 N.W. 211, 57 N.D. 726.

(2) The general purpose of these statutes is to expedite and not to hamper the administration of justice.

W.Va.—*State v. Muncey*, 135 S.E. 594, 102 W.Va. 462.

96. N.C.—*State v. Peacock*, 16 S.E.2d 452, 220 N.C. 63.

97. Ky.—*Kitchen v. Commonwealth*, 122 S.W.2d 121, 275 Ky. 564—*Miller v. Commonwealth*, 42 S.W.2d 518, 240 Ky. 346.

98. Tex.—*Parks v. State*, 117 S.W.2d 797, 135 Tex.Cr. 260—*Sanchez v. State*, 252 S.W. 548, 94 Tex.Cr. 606.

99. Fla.—*Hicks v. State*, 120 So. 330, 97 Fla. 199.

Ill.—*People v. Mack*, 11 N.E.2d 965, 367 Ill. 481.

Ind.—*State ex rel. Burns v. Sharp*, 393 N.E.2d 127, 271 Ind. 344.

Ky.—*Bain v. Commonwealth*, 140 S.W.2d 612, 283 Ky. 18.

Tex.—*Gentry v. State*, Cr.App., 770 S.W.2d 780, certiorari denied 109 S.Ct. 2458, 490 U.S. 1102, 104 L.Ed.2d 1013.

1. Ala.—*Brewer v. State*, Cr.App., 440 So.2d 1155, appeal after remand 500 So.2d 482.

Ill.—*People v. Lieber*, 192 N.E. 331, 357 Ill. 423.

Iowa—*State v. Dohrn*, 259 N.W.2d 801.

Okl.—*Smith v. State*, 287 P. 1103, 46 Okl.Cr. 160.

a substantial departure from the method prescribed do not render a grand jury illegal and incompetent,² at least where it does not appear that accused has been prejudiced in any way,³ or that any of the grand jurors was incompetent or in any way disqualified.⁴ An irregularity is considered fatal where it deprives defendant of some substantial right⁵ or is so gross, and so at variance with the strict mandate of the law, as to amount to a wrong per se.⁶

Under some statutes, no objection to any irregularity in the selection of a grand jury will prevail unless the irregularity amounts to corruption.⁷ Even under such statutes, however, proceedings for selecting a grand jury may be vitiated by the participation therein of a person who is not a jury commissioner, who has no authority so to participate, and whose acts are null and void.⁸ Where the departures from the mode of selection prescribed by statute which may affect the legal existence or competency of the grand jury are expressly enumerated or restricted by statute, there is a legislative determination, which in the absence of constitutional violation must be followed by the courts, that only such departures constitute an invasion of the substantial rights of accused,⁹ the object of such statutes being to eliminate technical objections and

permit a trial on the merits, so far as constitutional limitations allow.¹⁰

Noncompliance with statutes prescribing the manner of selecting grand jurors may be waived by accused by his failure to make proper objection at the proper time.¹¹ However, objection to the legality of a grand jury need not be made in limine where some constitutional guaranty has been invaded, or where there has been an arbitrary disregard of the express command of a statute prescribing the manner of selecting grand jurors.¹²

The officials charged with the drawing or selection of the grand jury are sometimes vested with a wide discretion in the selection of grand jurors and the determination of their fitness.¹³ The court has no right to tell duly constituted jury commissioners how they shall discharge the duties and responsibilities imposed on them by the law;¹⁴ it has power only to declare their actions null and void under circumstances of malfeasance or misfeasance.¹⁵ Under some statutes, the major requirement for selection of a grand jury should be that the system of selection is not arbitrary and that complete impartiality should be sought.¹⁶

Statutes as mandatory or directory.

A statute providing for the selection of a grand jury is directory when a departure from the meth-

- 2. U.S.—*U.S. v. McClure*, D.C.Pa., 4 F.Supp. 668.
- Ind.—*State ex rel. Burns v. Sharp*, 393 N.E.2d 127, 271 Ind. 344—*Weer v. State*, 36 N.E.2d 787, 219 Ind. 217, rehearing denied 37 N.E.2d 537, 219 Ind. 217.
- La.—*State v. Brantley*, 143 So. 46, 175 La. 192, followed in *State v. Chandler*, 143 So. 47, 175 La. 197.
- Tenn.—*State v. Wiseman*, Cr.App., 643 S.W.2d 354.
- Tex.—*Gentry v. State*, Cr.App., 770 S.W.2d 780, certiorari denied 109 S.Ct. 2458, 490 U.S. 1102, 104 L.Ed.2d 1013.
- 3. U.S.—*U.S. v. Glasser*, C.C.A.Ill., 116 F.2d 690, modified on other grounds 62 S.Ct. 457, 315 U.S. 60, 86 L.Ed. 680, rehearing denied *Kretzke v. U.S.*, 62 S.Ct. 629, 315 U.S. 827, 86 L.Ed. 1222 and *Roth v. U.S.*, 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1222.
- Ill.—*People v. Lieber*, 192 N.E. 331, 357 Ill. 423.
- Miss.—*Nelson v. State*, 133 So. 248, 160 Miss. 401.
- Wis.—*Petition of Salen*, 286 N.W. 5, 231 Wis. 489.

Infringement of substantial rights necessary

Iowa—*State v. Dohrn*, 259 N.W.2d 801.

Prejudice not presumed

- Iowa—*State v. Dohrn*, 259 N.W.2d 801.
- 4. U.S.—*U.S. v. Glasser*, C.C.A.Ill., 116 F.2d 690, modified on other grounds 62 S.Ct. 457, 315 U.S. 60, 86 L.Ed. 680, rehearing denied *Kretzke v. U.S.*, 62 S.Ct. 629, 315 U.S. 827, 86 L.Ed. 1222 and *Roth v. U.S.*, 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1222.
- Miss.—*Nelson v. State*, 133 So. 248, 160 Miss. 401.
- 5. Okl.—*Gravitt v. State*, 279 P. 968, 44 Okl.Cr. 45.
- 6. La.—*State v. Kifer*, 173 So. 169, 186 La. 674, 110 A.L.R. 1017.

- 7. Ala.—*Mullins v. State*, 130 So. 527, 24 Ala.App. 78, certiorari denied 130 So. 530, 222 Ala. 9.
- Kan.—*State v. Millhaubt*, 61 P.2d 1356, 144 Kan. 574, certiorari denied 57 S.Ct. 931, 301 U.S. 701, 81 L.Ed. 1356, rehearing denied 57 S.Ct. 5, 302 U.S. 773, 82 L.Ed. 599.
- 8. La.—*State v. Taylor*, 10 So. 203, 43 La. Ann. 1131.
- 9. N.D.—*State v. Walla*, 224 N.W. 211, 57 N.D. 726.
- 10. N.D.—*State v. Walla*, 224 N.W. 211, 57 N.D. 726.
- 11. Ky.—*Bain v. Commonwealth*, 140 S.W.2d 612, 283 Ky. 18.

Failure to object before return of indictment

Where defendant was arrested and gave bond before indictment was returned, he should have objected to grand jurors because of alleged irregularity in drawing names of grand jurors, before return of indictment.

- Ga.—*Burns v. State*, 11 S.E.2d 350, 191 Ga. 60.
- 12. Tex.—*Haile v. State*, 95 S.W.2d 708, 131 Tex.Cr. 17.
- 13. U.S.—*U.S. v. Ballard*, D.C.Cal., 35 F.Supp. 105.
- La.—*State v. Pierre*, 3 So.2d 895, 198 La. 619, certiorari denied 62 S.Ct. 186, 314 U.S. 676, 86 L.Ed. 541.
- Tex.—*Hamilton v. State*, 150 S.W.2d 395, 141 Tex.Cr. 614, certiorari denied 62 S.Ct. 117, 314 U.S. 609, 86 L.Ed. 490.
- 14. U.S.—*U.S. v. McClure*, D.C.Pa., 4 F.Supp. 668.
- Tex.—*Davis v. State*, 288 S.W. 456, 105 Tex.Cr. 359.
- 15. U.S.—*U.S. v. McClure*, D.C.Pa., 4 F.Supp. 668.
- 16. Ind.—*Wireman v. State*, 432 N.E.2d 1343, certiorari denied 103 S.Ct. 350, 459 U.S. 992, 74 L.Ed.2d 389.

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od prescribed therein does not deprive the party challenging the regularity of the selection of rights granted to him by other statutes or by constitutional provisions.¹⁷ Such a statute is mandatory when its observance is required in order to prevent fraud, unjust prosecutions, or an invasion of the rights of citizens given them by other statutes or by constitutional provisions.¹⁸ A statute providing that the names of jurors shall be placed in a sealed envelope and drawn by lot from the envelope has been held mandatory, and is not complied with by drawing the names from an open box.¹⁹ Provisions respecting the drawing and listing of grand jurors are of course directory where the governing statute expressly so provides;²⁰ but such provisions are intended to cover cases where there has been an attempt to follow the statute, and have no application where there has been no attempt whatever to comply with the statute, but, on the contrary, a total departure therefrom.²¹

Statutes which are directory only should nevertheless be followed;²² but where the method prescribed for selecting grand jurors is directory merely, a grand jury, although selected or drawn in an irregular or informal mode, must be esteemed legal and competent to perform all the duties of such a body,²³ at least if disqualified persons have not been placed on the jury,²⁴ and no prejudice appears.²⁵

Effect of death of grand juror.

The death of a grand juror is presumed to operate impartially, and a jury list legally selected is not rendered illegal because of such death.²⁶

§ 38. Notice and Time of Selection

Although the various acts connected with the selection of a grand jury should be performed at the times specified in the

statute, the failure to do so does not generally vitiate the action of the grand jury. Notice of the drawing must be given as prescribed by statute.

Library References

Grand Jury ⇐8.

The time for performing the various acts connected with the selection and drawing of a grand jury,²⁷ as, for example, the time for drawing the panel,²⁸ placing the names in the jury box,²⁹ or selecting additional names,³⁰ depends on the terms of the governing statutes. Statutory provisions of this character have generally been held to be directory merely, so that failure to follow them strictly will not vitiate the action of the grand jury.³¹ The failure of any officer to perform the duties required of him within the time specified in no way invalidates the selecting and drawing of grand jurors where statutes in effect so provide.³²

Generally, all grand jurors need not be drawn at the same time.³³

Notice of the meeting at which the drawing is to be made must be given to the officers who are to make the drawing, where statutes so prescribe;³⁴ and under some statutes it is held that such notice must be in writing.³⁵ The notice must be served on those officers who in the particular instance constitute the drawing board,³⁶ and, where an officer is designated to serve in the event that another is disqualified, the notice is to be served on the officer who is to participate in the drawing and not on the one who is disqualified.³⁷ Absence of notice has been considered immaterial where the officers to be notified were present and performed their duties,³⁸ or where it is not shown that the jurors selected

17. Fla.—Gray v. State, 197 So. 333, 143 Fla. 588.

18. Fla.—Gray v. State, 197 So. 333, 143 Fla. 588.

19. La.—State v. Kifer, 173 So. 169, 186 La. 674, 110 A.L.R. 1017.

20. Miss.—Atkinson v. State, 101 So. 490, 137 Miss. 42.

21. Miss.—Ellis v. State, 107 So. 757, 142 Miss. 468.

22. W.Va.—State v. Muncey, 135 S.E. 594, 102 W.Va. 462.

23. Ind.—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

N.C.—State v. Mallard, 114 S.E. 17, 184 N.C. 667.

24. Ala.—Pickens v. State, 22 So. 551, 115 Ala. 42.

N.C.—State v. Paramore, 60 S.E. 502, 146 N.C. 604.

25. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

N.C.—State v. Mallard, 114 S.E. 17, 184 N.C. 667.

Okl.—State v. Childers, 252 P. 6, 122 Okl. 64.

W.Va.—State v. Muncey, 135 S.E. 594, 102 W.Va. 462.

26. U.S.—U.S. v. Rondeau, C.C.La., 16 F. 109, 4 Woods 185.

27. Iowa—State v. Burris, 190 N.W. 38, 194 Iowa 628.

28. Ala.—Mullins v. State, 130 So. 527, 24 Ala.App. 78, certiorari denied 130 So. 530, 222 Ala. 9.

29. Ind.—Randolph v. State, 162 N.E. 656, 200 Ind. 210.

30. Wis.—State v. Wescott, 217 N.W. 283, 194 Wis. 410.

31. Iowa—State v. Burris, 190 N.W. 38, 194 Iowa 628.

Tex.—King v. State, 234 S.W. 1107, 90 Tex.Cr. 289.

32. Wash.—State v. Krug, 41 P. 126, 12 Wash. 288, error dismissed 17 S.Ct. 995, 164 U.S. 704, 41 L.Ed. 1183.

33. Or.—State v. Odiome, 683 P.2d 1380, 68 Or.App. 891, review denied 690 P.2d 506, 298 Or. 150.

34. S.D.—State v. Johnson, 210 N.W. 350, 50 S.D. 388.

35. S.D.—State v. Fellows, 207 N.W. 477, 49 S.D. 481.

36. S.D.—State v. Johnson, 210 N.W. 350, 50 S.D. 388.

37. S.D.—State v. Johnson, 210 N.W. 350, 50 S.D. 388.

38. Iowa—State v. Hassan, 128 N.W. 960, 149 Iowa 518.

were not otherwise qualified to serve.³⁹

§ 39. Size of Jury Panel

The size of the jury panel depends on the terms of the applicable statutes. Such statutes must be followed, and departures therefrom have in some cases been held fatal to the action of the grand jury.

Library References

Grand Jury ⇌ 8.

The number of names of prospective grand jurors to be placed in the jury box, or on the list or panel, depends on the provisions of the governing statutes.⁴⁰

The drawing of a smaller number than the statute requires has been held to be a material departure from the mode of selection prescribed by statute and fatal to the validity and competency of a grand jury subsequently impaneled from the names drawn.⁴¹ Where statutes expressly provide for the selection of a panel consisting of a designated number of grand jurors, and a smaller number is selected, the officers charged with the selection of grand jurors may at a subsequent meeting properly treat the panel so selected as a nullity, and proceed to select a panel consisting of the required number.⁴² Jury commissioners may not strike from the venire list, and remove from the jury box, the names of jurors without replacing them, or at least making a bona fide effort to replace them, by an equal number of qualified jurors sufficient to make up the required number of prospective grand jurors.⁴³

It has been held fatal that more names were drawn from the jury box than directed by statute⁴⁴ or that more names were placed in the box than were authorized by order of a judge acting under a statute giving him the right to order such addition-

al names to be placed in the jury box as he deems needful.⁴⁵

Under some statutes, the fact that more or fewer names were drawn on the panel than the statutes prescribed is immaterial, or at least is not fatal.⁴⁶ Objection cannot be taken that more names were drawn on the panel from which a grand jury was subsequently selected than the statute directed where by statute no objection going to the formation of the grand jury can be taken except that the names were not drawn in the presence of the officers designated by law.⁴⁷ It has been held not improper practice to draw alternates for the grand jury consisting of persons in excess of the maximum number of persons permitted to serve as grand jurors.⁴⁸

In the absence of statute, the number of names of prospective grand jurors to be placed in the jury box may properly be left to the discretion of judges of courts of record, evidenced by rules adopted for that purpose.⁴⁹

§ 40. By Whom Selected and Drawn

Grand jurors should be selected only by the officers designated by statute to perform such duty. A grand jury selected by de facto officers, or by officers who have failed to comply with directory provisions as to taking an oath, is generally considered competent to act.

Library References

Grand Jury ⇌ 7, 8.

Grand jurors should be selected and drawn by the officer or officers designated by statute to perform such duty.⁵⁰ A grand jury selected or drawn by a person or persons other than those designated by law,⁵¹ or by a person who is disqualified to act in this capacity,⁵² is generally held to be illegal and incompetent to perform the duties of such a body. A sufficient number of officers must

39. Ohio—State v. Sublett, 436 N.E.2d 1376, 70 Ohio App.2d 252, 24 O.O.3d 356.

40. Ill.—People v. Price, 20 N.E.2d 61, 371 Ill. 137, certiorari denied Price v. People of State of Illinois, 60 S.Ct. 94, 308 U.S. 551, 84 L.Ed. 463.

La.—State v. Brantley, 143 So. 46, 175 La. 192.

41. Fla.—Keech v. State, 15 Fla. 591—Gladden v. State, 12 Fla. 562.

42. Ill.—People v. Routson, 188 N.E. 883, 354 Ill. 573.

43. La.—State v. Brantley, 143 So. 46, 175 La. 192.

44. Miss.—Leathers v. State, 26 Miss. 73.

45. Fla.—Slayton v. State, 141 So. 875, 105 Fla. 586.

46. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

Wis.—State v. Wescott, 217 N.W. 283, 194 Wis. 410.

47. Ala.—Stevenson v. State, 41 So. 526, 148 Ala. 663.

48. U.S.—Gaughan v. U.S., C.C.A.Neb., 19 F.2d 897.

49. Ill.—People v. Bain, 193 N.E. 137, 358 Ill. 177.

50. Fla.—Livingston v. State, 145 So. 761, 108 Fla. 193, corrected on other grounds 152 So. 205, 113 Fla. 391.

R.I.—State v. Muldoon, 20 A.2d 687, 67 R.I. 80.

Judge

Applicable statute does not mandate that county grand jury board randomly select persons ultimately chosen to sit on grand jury, nor does it preclude reasonable selection by supervising judge.

Mich.—People v. Edmond, 273 N.W.2d 85, 86 Mich.App. 374.

51. Cal.—Bruner v. Superior Court of City and County of San Francisco, 28 P. 341, 92 C. 239.

52. La.—State v. Malone, 86 So. 800, 148 La. 288.

be present.⁵³ Where a majority of all the officers designated to conduct the drawing of grand jurors appear and act, this is generally sufficient.⁵⁴

Statutes concerning the appointment of jury commissioners should be rigidly enforced.⁵⁵ Under some,⁵⁶ but not other,⁵⁷ statutory provisions it is proper for the court, in selecting a jury commissioner, to consider his political party affiliations. A statute providing that one of two jury commissioners shall be a resident of a particular locality has been construed as not prohibiting the appointment of both from such locality.⁵⁸

De facto officers.

It is the general rule that the fact that the grand jurors were selected or drawn by de facto officers does not render the grand jury illegal or incompetent to act.⁵⁹ The acts of jury commissioners who are officers de facto are valid as to third persons and the public.⁶⁰ Jury commissioners in possession of their offices under color of title are at least de facto officers.⁶¹

Oath.

It has been held that, where the officer designated to select grand jurors is required by statute to take an oath in order to be qualified to act, a grand jury selected or drawn by an officer who had not been sworn is illegal and incompetent.⁶²

However, the failure to comply with directory provisions as to the taking of an oath has been held

not fatal.⁶³ An oath administered to a jury commissioner is not invalidated by a slight misdescription of the office.⁶⁴ No objection can be taken to the failure of the selecting officers to take the oath required by law where it is declared by statute that no objection going to the formation of the grand jury can be taken except that the jurors were not drawn in the presence of the officers designated by law.⁶⁵ The failure of a court clerk, who is ex officio a jury commissioner, to take a special oath as jury commissioner has been held not fatal, his oath as court clerk being considered sufficient.⁶⁶ Where jury commissioners subscribed the required oath after they drew the list of grand jurors, their subscription was held to relate back to the beginning of their official duties.⁶⁷

§ 41. Apportionment of Grand Jurors

There must be substantial compliance with statutes requiring prospective grand jurors to be apportioned among designated localities; but a departure from the statutory provisions is not in all cases fatal.

Library References

Grand Jury ⇐4.

The common-law practice required the sheriff to select some of the persons returned by him as grand jurors from every hundred.⁶⁸ It was not required that they should be selected from that part of the county in which the offense was committed or in which defendant resided.⁶⁹

53. Commissioners

(1) Presence of two duly appointed commissioners to prepare jury list is mandatory.

W.Va.—State v. Pancake, 296 S.E.2d 37, 170 W.Va. 690.

(2) Fact that jury commissioners did not always select names for grand jury in presence of each other was not such substantial failure to comply with statutory requirements that selection resulted in illegal grand jury.

Ind.—Wireman v. State, 432 N.E.2d 1343.

Judge

Purpose of statute providing that each district judge in rotation according to seniority shall select one name from the venire was to procure random selection from list and to prevent any one judge or fraction from controlling selection process, and thus absence of some of the judges during selection process did not violate statute.

Nev.—Lera v. Sheriff, Clark County, 568 P.2d 581, 93 Nev. 498.

54. Ga.—Smith v. State, 15 S.E. 682, 90 Ga. 133.

55. Ky.—Miller v. Commonwealth, 42 S.W.2d 518, 240 Ky. 346.

56. U.S.—U.S. v. Caplis, D.C.La., 257 F. 840.

57. Ill.—People v. Price, 20 N.E.2d 61, 371 Ill. 137, certiorari denied Price v. People of State of Illinois, 60 S.Ct. 94, 308 U.S. 551, 84 L.Ed. 463.

58. Ind.—Dale v. State, 164 N.E. 260, 200 Ind. 408.

59. Iowa—State v. Burris, 190 N.W. 38, 194 Iowa 628.

La.—State v. White, 101 So. 136, 156 La. 770—State v. Smith, 96 So. 127, 153 La. 577.

N.J.—State v. Cioffe, 26 A.2d 57, 128 N.J.L. 342, affirmed, 32 A.2d 79, 130 N.J.L. 160.

Wis.—State v. Wescott, 217 N.W. 283, 194 Wis. 410.

60. La.—State v. Mitchell, 96 So. 130, 153 La. 585.

61. La.—State v. Mitchell, 96 So. 130, 153 La. 585.

N.J.—State v. Cioffe, 26 A.2d 57, 128 N.J.L. 342, affirmed 32 A.2d 79, 130 N.J.L. 160.

62. La.—State v. Flint, 26 So. 913, 52 La. Ann. 62.

State v. Bradley, 32 La. Ann. 402.

63. Ga.—Harris v. State, 12 S.E.2d 64, 191 Ga. 243.

Mich.—People v. Edmond, 273 N.W.2d 85, 86 Mich. App. 374.

64. La.—State v. Mitchell, 96 So. 130, 153 La. 585.

65. Ala.—Sims v. State, 41 So. 413, 146 Ala. 109.

66. La.—State v. Smith, 96 So. 127, 153 La. 577.

67. Ga.—Rosenblatt v. State, 58 S.E. 1107, 2 Ga. App. 649.

68. Neb.—Patrick v. State, 20 N.W. 121, 16 Neb. 330.

69. Ala.—Williams v. State, 61 Ala. 33.

N.H.—State v. Jackson, 90 A. 791, 77 N.H. 287.

At present the terms of the governing statutes determine the necessity for selecting grand jurors from designated districts or divisions of a county, as, for example, from the particular division or locality in which the court is held or from the different divisions proportionately.⁷⁰ It has been held essential to the legal existence of a grand jury that there be a substantial compliance with the requirements of such statutes.⁷¹ A grand jury drawn in violation of a statute providing that not more than a certain number should be drawn as grand jurors from any specified division has been held to acquire no legal existence.⁷² On the other hand, an honest omission of jury commissioners to apportion jurors properly has been held not fatal.⁷³

The Constitution does not require that a federal grand jury be selected from the entire district.⁷⁴ A federal grand jury need not be drawn from a particular division.⁷⁵

§ 42. Protection and Certification of Lists or Panels

The integrity of the grand jury box and the list of grand jurors should be scrupulously protected. Where statutes so require, the jury lists or jury panels must be certified.

Library References
Grand Jury ⇨8.

The integrity of the grand jury box and the list of grand jurors should be scrupulously protected.⁷⁶

Where statutes so require, the jury lists or jury panels must be certified by the officers charged with the duty of their preparation.⁷⁷ A substantial compliance with such requirement is generally held to be sufficient,⁷⁸ and mere irregularities in the form of the certificate do not invalidate the list.⁷⁹ A deputy clerk of court may record the list of the jurors on the journals of the court and certify to

the correctness thereof.⁸⁰ The fact that the list of grand jurors was not signed by the commissioners has been held not fatal where it appeared that the list drawn by them was in fact the one from which the grand jury in question was drawn.⁸¹

§ 43. Correction and Revision of Jury List

The jury list from which grand jurors are to be selected is subject to correction and revision from time to time where the governing statutes so provide.

Library References
Grand Jury ⇨8.

The jury list from which grand jurors are to be selected is subject to correction and revision from time to time where the governing statutes so provide.⁸² Such provisions are generally held to be directory merely, and where the officers charged with the duty of correction and revision fail to perform such duty, a grand jury selected from the old list is legal and competent to perform the duties of such a body.⁸³

The action of a board in amending a grand jury list should not be annulled by reason of its failure to cause an entry thereof to be made in the minutes of its proceedings.⁸⁴ Where a change in a grand jury list is made by the proper officials, it is immaterial who performs the necessary clerical work incidental to the change.⁸⁵

Under some statutes providing for the drawing and listing of jurors, a judge may direct the jury commissioners to prepare a new jury list and draw a new grand jury where irregularities or omissions pertaining to the selection of grand juries have occurred.⁸⁶

Under statutes providing for the addition of names to the jury box when needed, it has been held that the additional names are to be placed in

70. Ala.—*McCullum v. State*, 93 So. 261, 18 Ala.App. 558.
Ill.—*People v. Green*, 161 N.E. 83, 329 Ill. 576—*People v. Sepich*, 237 Ill.App. 178.
71. Ill.—*People v. Green*, 161 N.E. 83, 329 Ill. 576.
72. Iowa—*State v. Kouhns*, 73 N.W. 353, 103 Iowa 720—*State v. Russell*, 58 N.W. 915, 90 Iowa 569.
73. Hawaii—*Territory v. Braly*, 29 Hawaii 7.
74. U.S.—*Seadlund v. U.S.*, C.C.A.III., 97 F.2d 742.
75. U.S.—*U.S. v. White Lance*, D.C.S.D., 480 F.Supp. 920.
76. Ind.—*State v. Bass*, 1 N.E.2d 927, 210 Ind. 181, followed in *State v. Powell*, 1 N.E.2d 929, 210 Ind. 701.
Ky.—*Miller v. Commonwealth*, 42 S.W.2d 518, 240 Ky. 346.
77. Wash.—*State v. Krug*, 41 P. 126, 12 Wash. 288, error dismissed 17 S.Ct. 995, 164 U.S. 704, 41 L.Ed.2d 1183.

Oath or seal
Fact that clerk's certification of list of prospective grand jurors lacked oath or seal did not render certification defective.
Nev.—*Lera v. Sheriff*, Clark County, 568 P.2d 581, 93 Nev. 498.
78. Iowa—*State v. Carter*, 121 N.W. 801, 144 Iowa 371.
79. Ark.—*Brassfield v. State*, 18 S.W. 1040, 55 Ark. 556.
80. Okl.—*Tegeler v. State*, 130 P. 1164, 9 Okl.Cr. 138.—*Reed v. Territory*, 98 P. 583, 1 Okla.Cr. 481.
81. Tex.—*Bryant v. State*, 260 S.W. 598, 97 Tex.Cr. 11.
82. La.—*State v. Johnson*, 41 So. 117, 116 La. 856.
83. N.C.—*State v. Durham Fertilizer Co.*, 16 S.E. 231, 111 N.C. 658.
84. Iowa—*State v. Pierson*, 216 N.W. 43, 204 Iowa 837.
85. Iowa—*State v. Pierson*, 216 N.W. 43, 204 Iowa 837.
86. S.C.—*State v. Wells*, 161 S.E. 177, 162 S.C. 509.

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the box with the other names still remaining there, and that the box should be emptied of all names only when a new list of names for the succeeding year is put into the box.⁸⁷

§ 44. Record of Selection and Drawing

A record must be made of the matters pertaining to the selection and drawing of grand juries where the statutes so require, but not otherwise.

Library References

Grand Jury ⇐8.

E. SUMMONING JURORS

§ 45. In General

The mode of summoning grand jurors, the number to be summoned, and the time of summoning, depend on the terms of the governing statutes, which must be substantially complied with. Technical irregularities, however, are not fatal, particularly under statutes which are directory merely, or which expressly limit the effect of irregularities.

Library References

Grand Jury ⇐9.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

At common law, a grand jury could be summoned by open venire, and, in the absence of statute otherwise providing, this mode of summoning a grand jury is still available.⁹²

At present, the method of summoning grand jurors is very generally regulated by statute in the different jurisdictions, and the particular method depends on the terms of the governing statute.⁹³ There must be a substantial compliance with the method of summoning prescribed by such statute;⁹⁴ but a substantial compliance is sufficient, and mere irregularities not amounting to a substantial departure from the method prescribed by statute are immaterial,⁹⁵ particularly under statutes

Under some statutes, the names of prospective grand jurors are required to be recorded.⁸⁸ In the absence of statutory requirement, it is not necessary that a record be kept showing the selection of jury lists⁸⁹ or the manner of the drawing of the panel.⁹⁰

The failure to enter on the minutes the court's order directing the clerk and the jury commissioner to place in the jury box the number of names required by statute does not render the grand jury an illegal body.⁹¹

providing that a jury summoned in an informal or irregular manner shall nevertheless be deemed a legal jury after it has been impaneled and sworn,⁹⁶ or under statutes providing that irregularities in summoning a grand jury shall not be fatal unless defendant has thereby been deprived of some substantial right.⁹⁷

According to some authorities, it is not necessary that the sheriff serve the venire on the grand jurors personally, service on the grand jurors by mail, to which they respond, being considered sufficient,⁹⁸ in the absence of any showing that the substantial rights of accused were prejudiced thereby.⁹⁹ However, there is also authority which holds that notice given by the sheriff by mail, or otherwise than by service of the regular writ, is not a legal summons.¹

Statutes as mandatory or directory.

A statute providing for the summoning of a grand jury is directory when a departure therefrom does not, in the absence of fraud or prejudice, militate against other statutory or constitutional rights of the party challenging the regularity of the

87. Fla.—Slayton v. State, 141 So. 875, 105 Fla. 586.

88. Ind.—Weer v. State, 36 N.E.2d 787, 219 Ind. 217, rehearing denied 37 N.E.2d 537, 219 Ind. 217.

89. Iowa—State v. Carney, 20 Iowa 82.

90. Iowa—State v. Howard, 10 Iowa 101.

91. U.S.—Williams v. U.S., C.C.A.Cal., 275 F. 129.

92. Colo.—Rogers v. People, 94 P.2d 453, 104 Colo. 594.

93. Ariz.—Kingsbury v. State, 232 P. 887, 27 Ariz. 289, modified on rehearing on other grounds 235 P. 140, 28 Ariz. 86.

Tex.—Winn v. State, 135 S.W.2d 118, 138 Tex.Cr. 202.

94. Tex.—Woolen v. State, 150 S.W. 1165, 68 Tex.Cr. 189.

95. Place of summoning

The fact that grand jurors are summoned while at the courthouse rather than at their respective homes does not change their competency to serve.

Ill.—People v. Birger, 160 N.E. 564, 329 Ill. 352.

96. Miss.—Nelson v. State, 133 So. 248, 160 Miss. 401.

97. Okl.—Gravitt v. State, 279 P. 968, 44 Okl.Cr. 45.

98. Ill.—People v. Sink, 30 N.E.2d 40, 374 Ill. 480—People v. Wallace, 135 N.E. 723, 303 Ill. 504.

People v. Sepich, 237 Ill.App. 178.

99. Ill.—People v. Wallace, 135 N.E. 723, 303 Ill. 504.

1. W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

grand jury.² A mandatory statute pertaining to the summoning of a grand jury is one required to be observed in order to prevent fraud, unjust prosecution, or an invasion of statutory or constitutional rights of citizens.³ Provisions respecting the summoning of grand jurors are of course directory only, where the governing statute expressly so provides.⁴

Prior order of court.

At common law, it seems that a precept for the summoning of grand jurors might be issued independently of any action on the part of the court,⁵ and, under some statutes, the clerk in issuing a venire acts ex officio and under the mandate of the statute and not by direction or authority of the court.⁶ However, under some statutes a prior order of the court authorizing the summoning of grand jurors is the proper mode of procedure,⁷ although failure to comply with such statutes has been held not to affect the validity of the action of the grand jury summoned.⁸ The court may organize the panel if found in attendance, although it has come in response to a summons issued without the prescribed order therefor.⁹

Number to be summoned.

At common law, the sheriff of the county was required to return to every session of the peace, and every commission of oyer and terminer, and of general jail delivery, twenty-four good and lawful men of the county.¹⁰ At present, the number of grand jurors to be summoned is governed by the applicable statutory or constitutional provision.¹¹ While statutes of this character have been regarded as directory,¹² it has also been held that the summoning of a greater number than the statute directs is a substantial departure from the method

of selection prescribed, and fatal to the legal existence and competency of a grand jury.¹³

Time of summoning.

Where statutes prescribe the time of summoning grand jurors, as for example where they require that grand jurors shall be summoned or notified, or that the writ shall issue, within a specified period prior to the commencement of the term, the statutory provisions should be complied with in every respect.¹⁴ Such statutes are frequently considered directory, however, so that a deviation therefrom which cannot be harmful does not vitiate the organization or actions of the grand jury.¹⁵ Thus, under the view that statutes of this character are directory to the sheriff or officer, and intended for the convenience of grand jurors that they may have sufficient notice of the service required of them, it is held that, if the grand jurors attend and serve without such notice, the validity of the organization of the grand jury is not affected.¹⁶

§ 46. Writ

The issuance and return of a writ of venire facias or similar process are required by some authorities for the summoning of a grand jury. Technical defects in the writ or return usually are not considered fatal to the legality of the grand jury.

Library References

Grand Jury ⇐9.

At common law, the process for summoning a grand jury was a precept either in the name of the king or of two or more justices of the peace directed to the sheriff.¹⁷ In this country the rule has been laid down by some authorities, either at common law or under statute, that a writ of venire facias or a process in the nature of that writ is necessary for the bringing together of a grand jury authorized to find valid indictments, and that the

2. Fla.—Gray v. State, 197 So. 333, 143 Fla. 588.
 3. Fla.—Gray v. State, 197 So. 333, 143 Fla. 588.
 4. Miss.—Atkinson v. State, 101 So. 490, 137 Miss. 42.
 5. Va.—Curtis v. Commonwealth, 13 S.E. 73, 87 Va. 589.
 Commonwealth v. Burton, 4 Leigh 645, 31 Va. 645.
 6. Me.—State v. Symonds, 36 Me. 128.
 7. U.S.—Rice v. U.S., C.C.A.N.Y., 35 F.2d 689, certiorari denied 50 S.Ct. 246, 281 U.S. 730, 74 L.Ed. 1146.
 Ala.—Bolton v. State, 150 So. 362, 25 Ala.App. 539, certiorari denied 150 So. 364, 227 Ala. 465.
 8. Mo.—State v. Connell, 49 Mo. 282.
 9. Ind.—Hess v. State, 73 Ind. 537.
 10. Neb.—Patrick v. State, 20 N.W. 121, 16 Neb. 330.
 11. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

12. Ill.—Beasley v. People, 89 Ill. 571.
 13. Miss.—Leathers v. State, 26 Miss. 73.
 14. Mass.—Commonwealth v. Krathofski, 50 N.E. 1040, 171 Mass. 459.
 Utah—Thorp v. People, 24 P. 908, 3 Utah 441.
Any day during term
 If the court may order an open venire for a grand jury "during the term," the particular day of the term on which the order is made is immaterial.
 Colo.—Rogers v. People, 94 P.2d 453, 104 Colo. 594.
 15. Tex.—King v. State, 234 S.W. 1107, 90 Tex.Cr. 289.
 16. Ky.—White v. Commonwealth, 85 S.W. 753, 120 Ky. 178, 27 Ky.L.Rptr. 561.
 17. Va.—Curtis v. Commonwealth, 13 S.E. 73, 87 Va. 589.

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courts are without power to dispense with it.¹⁸ A contrary rule has been laid down, however, under some statutes.¹⁹ It is too late after trial and conviction to raise the objection that a writ summoning the grand jury was not issued.²⁰

Requisites and validity.

The general rule is that slight irregularities or mere defects in the form of the writ are immaterial.²¹ The legality or competency of the grand jury has been held unaffected by the absence of a statement of the qualifications of the grand jurors,²² the failure to state the full or exact name of a grand juror,²³ the omission of the name of the town in the address of the venire,²⁴ or the affixing of an erroneous date.²⁵ It has been held immaterial also that the writ is signed by the clerk of the court without giving his official signature,²⁶ or that the mandatory direction of the writ is in the name of the clerk instead of the name of the court.²⁷ It has been held that, in the absence of a statute requiring it, the order for a grand jury need not state for what time or period it is to serve.²⁸

In some cases it has been held that the absence of the seal of the court issuing a venire facias is not a mere irregularity, but renders the venire void,²⁹ but in other cases the absence of the seal has been regarded as an irregularity only.³⁰

Where a venire facias is required to bear the test of a specified officer, a venire facias tested in the name of another is insufficient.³¹ The fact that a writ of venire facias contained a statement of qualifications not required of grand jurors by law has been held to be a material irregularity.³²

18. Va.—Curtis v. Commonwealth, 13 S.E. 73, 87 Va. 589.

19. Mo.—Samuels v. State, 3 Mo. 68.

20. Va.—Robinson v. Commonwealth, 14 S.E. 627, 88 Va. 900.

21. Ill.—People v. Birger, 160 N.E. 564, 329 Ill. 352.

22. Ala.—Stewart v. State, 13 So. 319, 98 Ala. 70.

23. Ala.—Stoneking v. State, 24 So. 47, 118 Ala. 68.

24. Mass.—Commonwealth v. Moran, 130 Mass. 281.

25. Va.—Davis v. Commonwealth, 15 S.E. 388, 89 Va. 132.

26. Neb.—Drake v. State, 17 N.W. 117, 14 Neb. 535.

Tenn.—State v. Cole, 28 Tenn. 626, 9 Humphr. 626.

27. Tenn.—State v. Cole, 28 Tenn. 626, 9 Humphr. 626.

28. U.S.—U.S. v. Lewis, D.C.Mo., 192 F. 633.

29. Me.—State v. Fleming, 66 Me. 142.

30. N.H.—State v. Bradford, 57 N.H. 188.

31. U.S.—U.S. v. Antz, C.C.La., 16 F. 119, 4 Woods 174.

32. Va.—Wash. v. Commonwealth, 16 Gratt. 530, 57 Va. 530.

33. Ky.—Commonwealth v. Barry, 3 Ky. 229, Hard. 229.

Return.

The rule is laid down both under statute³³ and at common law³⁴ that the sheriff must make a return to the court or some duly authorized official showing the names of grand jurors summoned and reciting such other facts as are required by law; but immaterial omissions or irregularities in the return will not affect the legality of a grand jury or validity of its action, where it appears that its members were legally drawn and actually attended in obedience to the summons they received.³⁵ The court may authorize the officer to amend his return according to the facts;³⁶ and it may permit him to complete his return by signing it.³⁷

§ 47. Who May Summon

At common law grand jurors were summoned by the sheriff, and this is still the rule in the absence of statute otherwise providing. Other officers may perform such duty, however, where the sheriff is unable to act.

Library References

Grand Jury § 9.

At common law grand jurors were summoned by the sheriff,³⁸ and, unless otherwise provided by statute, the sheriff generally is still the proper officer to summon grand juries.³⁹ Where the sheriff is not expressly required by law to summon the jury in person, it has been held that he may do so by deputy.⁴⁰

Officers other than the sheriff may be required to summon grand jurors by virtue of provision to that effect,⁴¹ or by reason of the disqualification of the sheriff or his inability to act.⁴²

N.J.—State v. Rickey, 9 N.J.L. 293.

34. N.J.—State v. Rickey, 9 N.J.L. 293.

35. Ill.—People v. Birger, 160 N.E. 564, 329 Ill. 352.

36. Ala.—Rampey v. State, 3 So. 593, 82 Ala. 31.

37. Mass.—Commonwealth v. Moran, 130 Mass. 281.

38. Conn.—State v. Kemp, 9 A.2d 63, 126 Conn. 60.

Fla.—Hicks v. State, 120 So. 330, 97 Fla. 199.

Ind.—Randolph v. State, 162 N.E. 656, 200 Ind. 210.

N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

39. W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

40. N.D.—Zinn v. District Court for Barnes County, 114 N.W. 475, 17 N.D. 128.

41. County clerk

N.Y.—Livoti v. Fitzgerald, 5 N.Y.S.2d 588, 255 A.D. 711, 255 A.D. 720, affirmed 18 N.E.2d 319, 279 N.Y. 696.

42. Tex.—Smith v. State, 280 S.W. 200, 103 Tex.Cr. 103.

It has been held that, if a grand juror receives notice and attends, it is immaterial by whom he was served.⁴³

§ 48. Federal Grand Jury

Under the Jury Selection and Service Act, when the court orders a federal grand jury to be drawn, summonses shall be issued. Jurors may be served personally or by mail.

Library References

Grand Jury ◊9.

Under the Jury Selection and Service Act, when the court orders a federal grand jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.⁴⁴

Each person drawn for jury service may be served personally, or by registered, certified, or first-class mail addressed to such person at his usual residence or business address.⁴⁵ If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal, who shall make such service.⁴⁶ If such service is made by mail, the summons may be served by the marshal or by the clerk, the jury commission or their duly designated deputies, who shall make affidavit of such service and shall attach thereto any receipt from the addressee for a registered or certified summons.⁴⁷

F. COMPLETION OF DEFECTIVE PANEL

§ 49. In General

A defective grand jury panel is to be completed in the manner prescribed by statute.

Research Note

Substitution of jurors on grand jury is considered *infra* § 57.

Library References

Grand Jury ◊8, 9, 12.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

It has been held that, in case of the nonattendance of a part of the regular venire, the court may at common law order the defective panel to be supplied from bystanders.⁴⁸ When the power is given a court to excuse one called to serve as a grand juror, authority to fill the vacancy thus occasioned with another juror possessing the requisite qualifications is also conferred by necessary implication.⁴⁹

Under statutes, provisions are made for summoning grand jurors selected either from the grand jury lists, from bystanders, from the body of the county or district, or in some other prescribed mode, for the purpose of completing defective panels where there has been a failure to summon or

procure the attendance of a sufficient number, or where jurors have been discharged or excused or the panel has otherwise been reduced below the number required by law.⁵⁰

Under a statute authorizing courts to supply deficiencies in the grand jury panel in certain specified contingencies only, a court cannot exercise such authority unless the contingencies named in the statute arise.⁵¹ It is essential to the legal existence and competency of a grand jury that the statutory provisions prescribing the method of selecting, drawing, and summoning persons to supply deficiencies in the grand jury panel be substantially complied with.⁵² Substantial compliance is usually sufficient; mere irregularities not amounting to a substantial departure from the mode prescribed by statute are held to be immaterial.⁵³

§ 50. Federal Grand Jury

Library References

Grand Jury ◊8, 9, 12.

In the case of a federal grand jury, if less than 16 summoned persons attend, the court shall order a sufficient number of persons to complete the grand jury.

In the case of a federal grand jury, if less than 16 of the persons summoned attend, they shall be

43. Ky.—Commonwealth v. Graddy, 61 Ky. 223, 4 Metc. 223.

44. 28 U.S.C.A. § 1866(b).

45. 28 U.S.C.A. § 1866(b).

46. 28 U.S.C.A. § 1866(b).

47. 28 U.S.C.A. § 1866(b).

48. Miss.—Dowling v. State, 13 Miss. 664.

49. Ind.—Burrell v. State, 28 N.E. 699, 129 Ind. 290.

50. Miss.—Atkinson v. State, 100 So. 391, 135 Miss. 462.

Tex.—Robinson v. State, 244 S.W. 599, 92 Tex.Cr. 527.

W.Va.—State v. Austin, 117 S.E. 607, 93 W.Va. 704.

51. Ala.—Trammell v. State, 44 So. 201, 151 Ala. 18.

52. Ind.—Crickmore v. State, 12 N.E.2d 266, 213 Ind. 586.

53. U.S.—Abramson v. U.S., C.C.A.Ky., 2 F.2d 595, certiorari denied 45 S.Ct. 509, 268 U.S. 688, 69 L.Ed. 1158.

service may be certified, or person at his⁵ If such sermons shall be commission or marshall, who service is made by the mar- mission or their make affidavit to any receipt d or certified

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placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury.⁵⁴

G. IMPANELING AND ORGANIZATION

§ 51. In General

Grand juries are to be impaneled in the manner prescribed by statute, but mere irregularities in impaneling ordinarily do not vitiate their action.

Library References

Grand Jury ⇨20.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The selection, from the whole number summoned, of those who are to be sworn as grand jurors and the formation of the grand jury by the court has been designated by the term "impaneling."⁵⁶ The manner of selecting the grand jury from the number summoned by the sheriff or other officer and in attendance as grand jurors is frequently regulated by statute or constitutional provisions,⁵⁷ provision being made in some instances for selection by lot.⁵⁸ A statutory requirement that the grand jury shall be drawn or selected in a particular manner from the grand jurors summoned may be dispensed with where the precise number required to fill the panel are in attendance.⁵⁹

It is essential to the legal existence of a grand jury that there be a substantial compliance with the mode or manner of impaneling prescribed by statute.⁶⁰ Arbitrary disregard of statutes in the organization of a grand jury renders the grand jury

Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.⁵⁵

without authority.⁶¹ Substantial compliance usually is sufficient; and, as a general rule, sometimes declared by statute, mere irregularities in impaneling a grand jury, not affecting the competency of any of the members, will not vitiate their action.⁶² It has been said that statutes relating to the organization of grand juries are directory and not mandatory.⁶³

Under some statutes, the entire process of impaneling a grand jury must be done in open court.⁶⁴

Collateral attack.

The validity of the organization of a grand jury, whether de facto or de jure, or of its acts, ordinarily cannot be questioned in collateral proceedings.⁶⁵

Amendment of record.

The court may permit the record to be amended so as to show a proper organization of the grand jury.⁶⁶

§ 52. Time of Appearance and Organization

The time when the grand jury is to be organized is generally prescribed by statute.

Library References

Grand Jury ⇨20.

The terms of court for which grand juries are to be summoned and the time when they are to

54. 18 U.S.C.A. § 3321.

55. 18 U.S.C.A. § 3321.

56. Mo.—State v. Hurst, 99 S.W. 820, 123 Mo.App. 39.

Wash.—State v. Superior Court of Whatcom County, 144 P. 32, 82 Wash. 284.

57. Ala.—Crowder v. State, 175 So. 330, 27 Ala.App. 522.

Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

Wis.—State v. Lawler, 267 N.W. 65, 221 Wis. 423, 105 A.L.R. 568.

58. Or.—State v. Lawrence, 7 P. 116, 12 Or. 297.

59. Ill.—People v. Kramer, 185 N.E. 590, 352 Ill. 304.

60. Ala.—Doss v. State, 123 So. 237, 23 Ala.App. 168, certiorari denied 123 So. 231, 220 Ala. 30, 68 A.L.R. 712.

Md.—State v. Vincent, 47 A. 1036, 91 Md. 718.

Miss.—Shepherd v. State, 42 So. 544, 89 Miss. 147.

Tenn.—State v. Edwards, 129 S.W.2d 199, 174 Tenn. 542.

61. Tex.—Gentry v. State, Cr.App., 770 S.W.2d 780, certiorari denied 109 S.Ct. 2458, 490 U.S. 1102, 104 L.Ed.2d 1013.

62. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423—People v. Birger, 160 N.E. 564, 329 Ill. 352.

Minn.—State v. Ginsberg, 208 N.W. 177, 167 Minn. 25.

Okl.—Blake v. State, 14 P.2d 240, 54 Okl.Cr. 62—Smith v. State, 287 P. 1103, 46 Okl.Cr. 160—Gravitt v. State, 279 P. 968, 44 Okl.Cr. 45—State v. Childers, 252 P. 6, 122 Okl. 64.

Tex.—Armentrout v. State, 135 S.W.2d 479, 138 Tex.Cr. 238.

63. Tex.—Gentry v. State, Cr.App., 770 S.W.2d 780, certiorari denied 109 S.Ct. 2458, 490 U.S. 1102, 104 L.Ed.2d 1013.

64. Hawaii—State v. Schmidt, 774 P.2d 242, 70 Haw. 443.

65. Cal.—In re Gannon, 11 P. 240, 69 C. 541.

66. Ill.—People v. Barnwell, 129 N.E. 538, 296 Ill. 67.

appear and be impaneled, or organized, are very generally prescribed by statute, a discretion in these respects being in many instances vested in the court.⁶⁷ In the absence of statutory provision requiring grand jurors to be summoned to appear or the grand jury to be organized on the first day of the term, the organization may take place at any time during the term.⁶⁸ Statutes providing for the organization of a grand jury on the first day of the term have been held directory.⁶⁹

That the grand jury was impaneled and sworn before the date set by the order of the court has been held to be immaterial, in the absence of a showing that defendant was prejudiced thereby.⁷⁰

§ 53. Number of Jurors

At common law a grand jury is composed of not less than 12 nor more than 23, but the number is now very generally regulated by constitutional or statutory provisions.

Research Note

Number of jurors who must be present at a proceeding is considered *infra* § 92.

Library References

Grand Jury ⇨3.

At common law a grand jury must be composed of not less than 12 nor more than 23 "good and lawful men;"⁷¹ but the number of persons necessary to be impaneled and sworn and to be present for the legal transaction of business is now very generally dependent on constitutional or statutory provisions, either confirming or imposing various modifications of the common-law rule.⁷²

The federal constitution imposes no limitation on the right of a state through its legislature to fix the number of grand jurors.⁷³ Where a state constitution fixes the number of grand jurors at a particu-

lar figure, the legislature has no power to change the number.⁷⁴ However, a state constitutional provision that the legislature shall have power to determine the number of grand jurors confers a discretion on the legislature as to the number and empowers it to fix the number at less than 12.⁷⁵

Where the constitution contemplates a common-law grand jury of not less than 12 nor more than 23, it is competent for the legislature, within the maximum limits prescribed by the common law, to increase or diminish the number of grand jurors without infringing the rights of the accused guaranteed by the constitution;⁷⁶ but a statute is void which fixes the number of grand jurors at less than the common-law minimum of 12.⁷⁷

Federal grand jury.

A federal grand jury shall consist of not less than 16 nor more than 23 members.⁷⁸ However, such a grand jury does not cease to exist when its membership falls below 16.⁷⁹

§ 54. Appointment, Qualifications, and Duties of Foreman

- a. In general
- b. Federal grand jury

a. In General

A grand jury is usually officered by a foreman who is appointed by the court or elected by the grand jurors.

Library References

Grand Jury ⇨21.

Statutes regulating the organization of grand juries usually make provision for the appointment

67. La.—State v. Washington, 120 So. 633, 167 La. 1021.

68. Ala.—Jackson v. State, 15 So. 344, 102 Ala. 167.

Wash.—State v. Gilliam, 104 P. 1131, 56 Wash. 29.

69. Ind.—Hughes v. State, 54 Ind. 95.

70. U.S.—U.S. v. Lewis, D.C.Mo., 192 F. 633.

71. Cal.—Fitts v. Superior Court in and for Los Angeles County, 57 P.2d 510, 6 C.2d 230.

Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423—People v. Brautigan, 142 N.E. 208, 310 Ill. 472.

Ohio—State v. Ross, 28 Ohio Dec. 267, 20 Ohio N.P., N.S., 369.

R.I.—State v. Muldoon, 20 A.2d 487, 67 R.I. 80—In re Opinion to the Governor, 4 A.2d 487, 62 R.I. 200, 121 A.L.R. 806.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

72. Ill.—People v. Price, 20 N.E.2d 61, 371 Ill. 137, certiorari denied Price v. People of State of Illinois, 60 S.Ct. 94, 308 U.S. 551, 84 L.Ed. 463—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

N.Y.—People v. Blair, 33 N.Y.S.2d 183, 17 Misc.2d 265.

Ohio—State v. Ross, 28 Ohio Dec. 267, 20 Ohio N.P., N.S., 369.

S.C.—State v. Bramlett, 164 S.E. 873, 166 S.C. 323.

73. Colo.—Parker v. People, 21 P. 1120, 13 Colo. 155.

74. Tex.—Ex parte Bustamente, 137 S.W.2d 29, 138 Tex.Cr. 229.

Rainey v. State, 19 Tex.App. 479.

75. Ohio—State v. Juergens, 379 N.E.2d 602, 55 Ohio App.2d 104, 9 O.O.3d 262.

S.C.—State v. Starling, 49 S.C.L. 120.

76. Fla.—English v. State, 12 So. 689, 31 Fla. 340, 31 Fla. 356.

77. Nev.—State v. Hartley, 40 P. 372, 22 Nev. 342.

78. Fed.Rules Cr.Proc., Rule 6(a)(1), 18 U.S.C.A.

79. U.S.—U.S. v. Jones, M.D.Fla., 676 F.Supp. 238.

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of a foreman.⁸⁰ However, it has been held that the action of the entire grand jury is not invalidated by the failure to appoint a foreman⁸¹ or by the absence of the foreman appointed.⁸² No objection to the failure to appoint a foreman can be taken where it is provided by statute that no objection going to the formation of a grand jury can be taken, except that the jurors were not drawn in the presence of the officers designated by law.⁸³

The foreman is to be appointed by the person or persons designated by statute;⁸⁴ under some statutes the court is required to appoint the foreman,⁸⁵ while under other statutes the grand jurors themselves are authorized to make the appointment.⁸⁶ In the absence of statute designating the appointing power, it appears to be a common practice for the court to appoint the foreman,⁸⁷ and it has been held that the judge of a court of general jurisdiction has inherent power to appoint the foreman and that this authority is not affected by the custom of permitting the members of the grand jury to elect him.⁸⁸ It is not unconstitutional for the court to delegate the task of selection to the jury supervisor.⁸⁹

After a grand jury has been impaneled and a foreman appointed, if the foreman is excused from the grand jury another foreman may be appointed, and the appointment of a new foreman is sometimes expressly authorized by statute.⁹⁰ Where the foreman regularly appointed is absent at the time action is being taken on an indictment or fails to act through incompetency or other cause, a foreman

pro hac vice may be appointed, and such appointment is sometimes also authorized by statute.⁹¹

Qualifications.

The foreman must be one of the grand jurors and, in the absence of statute, need have no qualifications other than those of ordinary grand jurors.⁹²

Powers and duties.

The foreman is, in the absence of the court, the presiding officer of the inquest; he is the organ through which its inquisitions and proceedings are reported to the court, and particular duties devolve on him distinct from those of the other members of the grand jury; the most important of his duties is to report all bills which are submitted to the grand jury and to indorse on such bills, as foreman, whether or not they are true.⁹³ The foreman is the spokesperson for the grand jury,⁹⁴ and has the same voting power as any other grand jury member.⁹⁵

b. Federal Grand Jury

In the case of a federal grand jury, the court shall appoint one of the jurors to be foreperson and another to be deputy foreperson.

In the case of a federal grand jury, the court shall appoint one of the jurors to be foreperson and another to be deputy foreperson.⁹⁶

The foreperson shall have power to administer oaths and affirmations and shall sign all indict-

80. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

Minn.—State v. Ginsberg, 208 N.W. 177, 167 Minn. 25.

81. Iowa—State v. Von Kutzleben, 113 N.W. 484, 136 Iowa 89.

82. Miss.—State v. Coulter, 61 So. 706, 104 Miss. 764.

83. Ala.—Shirley v. State, 40 So. 269, 144 Ala. 35.

84. Minn.—State v. Ginsberg, 208 N.W. 177, 167 Minn. 25.

85. Minn.—State v. Ginsberg, 208 N.W. 177, 167 Minn. 25.

86. Mass.—Commonwealth v. Sanborn, 116 Mass. 61.

87. Wis.—State v. Wescott, 217 N.W. 283, 194 Wis. 410.

88. Ga.—Peeples v. State, 173 S.E. 850, 178 Ga. 675—Johnson v. State, 171 S.E. 699, 177 Ga. 881.

89. Or.—Burson v. Cupp, 688 P.2d 1382, 70 Or.App. 246, review denied 695 P.2d 1371, 298 Or. 704.

90. Ala.—Jacobs v. State, 42 So. 70, 146 Ala. 103.

Iowa—Keitler v. State, 4 Greene 291.

91. La.—State v. Smith, 103 So. 534, 158 La. 129.

Minn.—State v. Ginsberg, 208 N.W. 177, 167 Minn. 25.

92. Iowa—Keitler v. State, 4 Greene 291.

Tenn.—State v. Collins, 61 Tenn. 151, 6 Baxt. 151.

93. Miss.—Cody v. State, 4 Miss. 27.

94. Tenn.—State v. Jefferson, Cr.App., 769 S.W.2d 875.

95. Tenn.—State v. Jefferson, Cr.App., 769 S.W.2d 875.

96. Fed.Rules Cr.Proc., Rule 6(c), 18 U.S.C.A.

Discretion

Empaneling judge is given discretion in selection of foreperson for grand jury.

U.S.—U.S. v. Browning—Ferris Industries of Georgia, Inc., D.C.Ga., 555 F.Supp. 595.

Criteria

Criteria used by empaneling judge to choose foreperson for grand jury, occupation, age, education, and observable command presence, were reasonable.

U.S.—U.S. v. Browning—Ferris Industries of Georgia, Inc., D.C.Ga., 555 F.Supp. 595.

Clerks and prosecutors

Absent any showing that any judge delegated or otherwise avoided his responsibility with regard to ultimate selection of grand jury forepersons and deputies, fact that clerks and prosecutors occasionally played role in selection of grand jury forepersons and deputies did not establish improper interference in selection of forepersons.

U.S.—U.S. v. Jenison, D.C.Fla., 485 F.Supp. 655.

ments.⁹⁷ The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court.⁹⁸

During the absence of the foreperson, the deputy foreperson shall act as foreperson.⁹⁹

§ 55. — Discrimination; Fair Cross Section.

- a. In general
- b. Showing of violation

a. In General

Discrimination in the selection of the grand jury foreman may violate equal protection, but generally does not violate due process, and accused generally lacks standing to challenge such discrimination where accused is not a member of the group discriminated against. The fair cross section requirement is inapplicable to the selection of the foreman.

Research Note

Discrimination and fair cross section requirement as affecting selection of members of grand jury are treated supra §§ 13-19.

Library References

Grand Jury ⇐21.

Discrimination in the selection of the grand jury foreman may violate the constitutional guaranty of equal protection.¹ Purposeful discrimination against blacks or women in the selection of federal grand jury foremen is forbidden by the Fifth Amendment.² Only purposeful discrimination vio-

lates equal protection,³ and criteria may be employed even if they have a disproportionate impact.⁴

Discrimination in the selection of grand jury foremen does not threaten the due process interests of accused.⁵ The role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself or invades due process interests.⁶ Discrimination in the appointment of grand jury foremen does not impair accused's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives.⁷ The due process concern that no large and identifiable segment of the community be excluded from jury service does not arise when the alleged discrimination pertains only to the selection of a foreman from among the members of a properly constituted federal grand jury.⁸

The fair cross section requirement does not apply to the selection of the foreman.⁹

Since discrimination in the selection of the foreman does not violate due process and only violates equal protection, a conviction should not be set aside where accused is not a member of the group discriminated against.¹⁰ This is true at least where selection of the foreman does not involve the selection of an additional member of the grand jury, and

97. Fed.Rules Cr.Proc., Rule 6(c), 18 U.S.C.A.

98. Fed.Rules Cr.Proc., Rule 6(c), 18 U.S.C.A.

99. Fed.Rules Cr.Proc., Rule 6(c), 18 U.S.C.A.

1. U.S.—Rose v. Mitchell, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

N.C.—State v. Cofield, 357 S.E.2d 622, 320 N.C. 297, appeal after remand 379 S.E.2d 834, 324 N.C. 452.

State constitutional provision

(1) Equal protection provision of state constitution requires that all grand jurors be considered for appointment as grand jury foreman.

N.C.—State v. Cofield, 379 S.E.2d 834, 324 N.C. 452.

(2) Method of selecting grand jury foreman that meets racially neutral standard must insure that all grand jurors are considered by presiding judge for his or her selection and that selection be made on racially neutral basis.

N.C.—State v. Cofield, 379 S.E.2d 834, 324 N.C. 452.

2. U.S.—Hobby v. U.S., N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

3. U.S.—U.S. v. Browning-Ferris Industries of Georgia, Inc., D.C.Ga., 555 F.Supp. 595.

4. U.S.—U.S. v. Browning-Ferris Industries of Georgia, Inc., D.C.Ga., 555 F.Supp. 595.

5. U.S.—Hobby v. U.S., N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

Ga.—Ingram v. State, 323 S.E.2d 801, 253 Ga. 622, certiorari denied 105 S.Ct. 3538, 473 U.S. 911, 87 L.Ed.2d 661, rehearing denied 106 S.Ct. 20, 473 U.S. 927, 87 L.Ed.2d 697, denial of habeas corpus affirmed Ingram v. Zant, 26 F.3d 1047, rehearing denied 36 F.3d 96, certiorari denied Ingram v. Thomas, 115 S.Ct. 1137, 130 L.Ed.2d 1097, rehearing denied 115 S.Ct. 1444, 131 L.Ed.2d 323.

6. U.S.—Hobby v. U.S., N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

7. U.S.—Hobby v. U.S., N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

8. U.S.—Hobby v. U.S., N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

9. U.S.—U.S. v. Sneed, C.A.Ga., 729 F.2d 1333.

U.S. v. Abell, D.C.Me., 552 F.Supp. 316, 68 A.L.R.Fed. 157—U.S. v. Musto, D.C.N.J., 540 F.Supp. 346, affirmed U.S. v. Aimone, 715 F.2d 822, certiorari denied Dentico v. U.S., 104 S.Ct. 3585, 468 U.S. 1217, 82 L.Ed.2d 883 and 104 S.Ct. 3586, 468 U.S. 1217, 82 L.Ed.2d 883.

N.J.—State v. Ramseur, 524 A.2d 188, 106 N.J. 123, denial of habeas corpus affirmed 983 F.2d 1215, certiorari denied 113 S.Ct. 2433, 508 U.S. 947, 124 L.Ed.2d 653.

Jury Selection and Service Act

U.S.—U.S. v. Geller, D.C.Pa., 568 F.Supp. 1121.

10. U.S.—Hobby v. U.S., N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

the role of the foreman is ministerial.¹¹ Thus, where accused is not a member of the group, accused lacks standing to challenge the discrimination.¹² Where accused is a member of the group, accused's equal protection challenge should be evaluated without reference to whether the foreman's duties are ministerial, and without inquiry into whether discrimination affected the outcome.¹³ However, some authorities suggest that no one can raise an equal protection challenge unless the foreman's duties are more than ministerial.¹⁴

Discrimination against blacks in the process of selecting a foreman cannot be corrected by the selection of a black person as foreman by a racially discriminatory method.¹⁵

b. Showing of Violation

In order to show that an equal protection violation has occurred in the context of grand jury foreman selection, accused

11. U.S.—*Hobby v. U.S.*, N.C., 104 S.Ct. 3093, 468 U.S. 339, 82 L.Ed.2d 260.

12. U.S.—*Sheffield v. Lack*, M.D.Tenn., 702 F.Supp. 634, affirmed 862 F.2d 316.

Tenn.—*State v. McKay*, 680 S.W.2d 447, certiorari denied *Sample v. Tennessee*, 105 S.Ct. 1412, 470 U.S. 1034, 84 L.Ed.2d 795 and 105 S.Ct. 1412, 470 U.S. 1034, 84 L.Ed.2d 795, dismissal of habeas corpus affirmed 1994 WL 568388, appeal denied, rehearing denied, affirmed 1995 WL 66563, affirmed 1996 WL 417664.

13. N.C.—*State v. Cofield*, 357 S.E.2d 622, 320 N.C. 297, appeal after remand 379 S.E.2d 834, 324 N.C. 452.

14. N.J.—*State v. Ramseur*, 524 A.2d 188, 106 N.J. 123, denial of habeas corpus affirmed *Ramseur v. Beyer*, 983 F.2d 1215, certiorari denied 113 S.Ct. 2433, 508 U.S. 947, 124 L.Ed.2d 653.

15. N.C.—*State v. Moore*, 404 S.E.2d 845, 329 N.C. 245.

16. U.S.—*Rose v. Mitchell*, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

Whether accused must be member of group see supra subdivision a of this section.

17. U.S.—*Rose v. Mitchell*, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

18. U.S.—*Rose v. Mitchell*, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

Criteria

In cases in which statistical difference between general population of particular group or class allegedly singled out for discriminatory treatment in selection of grand jury forepersons and percentage of same group or class represented in office of grand jury foreperson is arguably substantial, court must look beyond figures to other criteria such as number of years involved, size of sampling, and number of class in general population.

U.S.—*Bryant v. Wainwright*, C.A.Fla., 686 F.2d 1373, rehearing denied 691 F.2d 512, certiorari denied 103 S.Ct. 2096, 461 U.S. 932, 77 L.Ed.2d 305.

Period

(1) Absent sufficient evidence that selection process materially changed following elimination of allegedly racially biased venire, peri-

generally must show that the procedure resulted in substantial underrepresentation of an identifiable group.

In order to show that an equal protection violation has occurred in the context of grand jury foreman selection, accused generally must show that the procedure employed resulted in substantial underrepresentation of an identifiable group.¹⁶ The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or applied.¹⁷ Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as foreman over a significant period of time.¹⁸ Finally, a selection procedure that is susceptible of abuse or is not neutral supports the presumption of discrimination raised by the statisti-

ods of time before and after such venire change would not be treated separately for purpose of determining prima facie case.

U.S.—*Guice v. Fortenberry*, C.A.La., 722 F.2d 276, rehearing denied 726 F.2d 752.

(2) "Significant period of time" was not limited to passage of act, which directed nondiscriminatory random selection process for grand and petit jurors; to so limit relevant period would be to hold that defendant failed to state prima facie case simply because state had eliminated one admittedly discriminatory step in its foreman selection process.

U.S.—*Johnson v. Puckett*, C.A.5(Miss.), 929 F.2d 1067, certiorari denied 112 S.Ct. 274, 502 U.S. 898, 116 L.Ed.2d 226.

(3) Crucial period was when the new jury selection act went into effect.

Miss.—*Johnson v. State*, 404 So.2d 553, denial of habeas corpus reversed *Johnson v. Puckett*, 929 F.2d 1067, certiorari denied 112 S.Ct. 274, 502 U.S. 898, 116 L.Ed.2d 226.

Population

(1) Although the preference is for proof based on eligible population, proof of percentages in the total population is acceptable; however, evidence of a greater disparity is required when accused's case rests on total population figures.

U.S.—*U.S. v. Jenison*, D.C.Fla., 485 F.Supp. 655.

(2) Court should compare proportion in grand jury panels of the group allegedly discriminated against to the proportion called to serve as foremen.

Fla.—*Andrews v. State*, 443 So.2d 78.

(3) Relevant population included disqualified grand jurors from which selecting official had to choose.

U.S.—*U.S. v. Browning-Ferris Industries of Georgia, Inc.*, D.C.Ga., 555 F.Supp. 595.

Sample size

To present prima facie case of discrimination in selection of grand jury forepersons, test sample must be large enough to convince court that any disparity is not due to chance or inadvertence.

cal showing.¹⁹ Thus, it has been held that a prima facie case requires a showing of three things,²⁰ although there is authority to the contrary.²¹

The mere fact that a state has a history of discrimination is insufficient to establish a prima facie case.²²

Only if accused establishes a prima facie case does the burden shift to the government to rebut that prima facie case.²³ The prima facie case may be rebutted by evidence that neutral criteria were used.²⁴ Rebuttal testimony should be viewed with a great deal of scrutiny.²⁵

§ 56. Oath of Jurors

- a. In general
- b. Form of oath; mode of administering
- c. Record of oath

a. In General

Grand jurors must be sworn and the oath is to be administered by the officer designated by law.

Library References

Grand Jury ⇨22.

It is essential to the legal existence and competency of a grand jury that all the jurors be sworn.²⁶

U.S.—Bryant v. Wainwright, C.A.Fla., 686 F.2d 1373, rehearing denied 691 F.2d 512, certiorari denied 103 S.Ct. 2096, 461 U.S. 932, 77 L.Ed.2d 305.

19. U.S.—Rose v. Mitchell, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

Selection by judge

Selection procedure by which district judge impaneling grand jury selects forepersons is susceptible of discrimination, since district judge knows race and sex of grand jurors prior to selecting grand jury foreperson.

U.S.—U.S. v. Holman, D.C.Fla., 510 F.Supp. 1175.

20. U.S.—Ellis v. Lynaugh, C.A.5(Tex.), 873 F.2d 830, certiorari denied 110 S.Ct. 419, 493 U.S. 970, 107 L.Ed.2d 384—Bryant v. Wainwright, C.A.Fla., 686 F.2d 1373, rehearing denied 691 F.2d 512, certiorari denied 103 S.Ct. 2096, 461 U.S. 932, 77 L.Ed.2d 305.

21. Alternative showings

Defendant may establish prima facie case of racial discrimination in selection of grand jury foreman either by showing that selection procedure was not racially neutral or that relatively few blacks had served as foremen for substantial period in the past.

N.C.—State v. Phillips, 399 S.E.2d 293, 328 N.C. 1, certiorari denied 111 S.Ct. 2804, 501 U.S. 1208, 115 L.Ed.2d 977.

22. U.S.—Rose v. Mitchell, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

23. U.S.—Rose v. Mitchell, Tenn., 99 S.Ct. 2993, 443 U.S. 545, 61 L.Ed.2d 739.

24. U.S.—Johnson v. Puckett, C.A.5(Miss.), 929 F.2d 1067, certiorari denied 112 S.Ct. 274, 502 U.S. 898, 116 L.Ed.2d 226.

Reswearing.

It has been held that grand jurors when recalled need not be resworn.²⁷ However, where the grand jury serving a court has been discharged for the term, and the court has finally adjourned for the term, the court, unless authorized by statute, cannot require the attendance of such discharged jurors, so as to empower them, without being again sworn or charged, to perform the duties of a grand jury.²⁸

Who may administer oath.

In the absence of a statute designating the officer to administer the oath, any officer authorized to administer oaths generally may, at the direction of the court, lawfully administer the prescribed oath to the grand jury.²⁹ A grand jury may be lawfully sworn by one who is merely a de facto officer.³⁰

b. Form of Oath; Mode of Administering

The form of oath required of grand jurors must be substantially observed, and in the absence of statutory directions the mode of administering the oath is a matter of practice.

The form of oath administered to grand jurors is of ancient origin³¹ and generally remains substantially unchanged.³² There are, however, some stat-

Selection by grand jurors

Finding that state rebutted prima facie showing was sufficiently supported by evidence that foreman was selected by fellow grand jurors, and lack of evidence that jurors acted in other than racially neutral manner.

N.C.—State v. Phillips, 399 S.E.2d 293, 328 N.C. 1, certiorari denied 111 S.Ct. 2804, 501 U.S. 1208, 115 L.Ed.2d 977.

25. U.S.—Guice v. Fortenberry, C.A.La., 722 F.2d 276, rehearing denied 726 F.2d 752.

Mo.—State v. Garrett, 627 S.W.2d 635, certiorari denied 103 S.Ct. 208, 459 U.S. 906, 74 L.Ed.2d 166, habeas corpus granted Garrett v. Morris, 815 F.2d 509, certiorari denied Jones v. Garrett, 108 S.Ct. 233, 484 U.S. 898, 98 L.Ed.2d 191.

26. Miss.—Walton v. State, 112 So. 790, 147 Miss. 851.

Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

27. Fla.—Hick v. State, 120 So. 330, 97 Fla. 199.

Ill.—People v. McCauley, 100 N.E. 182, 256 Ill. 504.

Tex.—Gay v. State, 49 S.W. 612, 40 Tex.Cr. 242.

28. Ga.—Braxley v. State, 85 S.E. 888, 143 Ga. 658.

29. Ga.—Godbee v. State, 81 S.E. 876, 141 Ga. 515.

Ill.—Allen v. State, 77 Ill. 484.

30. Ga.—Godbee v. State, 81 S.E. 876, 141 Ga. 515.

Va.—Hord v. Commonwealth, 4 Leigh 674, 31 Va. 674.

31. U.S.—Hale v. Henkel, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652.

32. U.S.—Hale v. Henkel, N.Y., 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652.

utes prescribing its form.³³ The form of oath, whether that required at common law or by statute, must be substantially observed.³⁴

Affirmation.

It is provided under some statutes that if a grand juror has conscientious scruples against taking an oath he may make affirmation in lieu thereof.³⁵

Mode of administering oath.

In the absence of statutory provision, the mode of administering the oath is purely a matter of practice.³⁶ In the absence of a statute to the contrary, a grand juror may be sworn by holding up his hand instead of by laying his hands upon the Gospel.³⁷

c. Record of Oath

The administration of the oath to the grand jurors ordinarily should be shown by the record.

The record should show that an oath was administered to the grand jurors.³⁸ The swearing of the grand jury cannot be presumed from the fact that the record states that the grand jury was impaneled, or from the fact that the court charged the jury and sent it to its labors.³⁹

Where the record states that the grand jury was duly sworn, the presumption is that the legal oath was administered,⁴⁰ and that it was administered in the mode prescribed by law.⁴¹ The objection that the minutes do not show affirmatively that the foreman of the grand jury which found the indictment was duly appointed and sworn comes too late after plea and trial.⁴²

§ 57. Substitution of Jurors

A court having power to excuse or discharge a grand juror after the organization of the grand jury has power to substitute

another grand juror; this power of substitution is sometimes expressly conferred by statute. However, some authorities hold that substitution is improper.

Research Note

Completion of defective panel of potential jurors is considered supra §§ 49, 50.

Library References

Grand Jury ⇐12, 20.

Apart from any statutory provision, a court having power to excuse or discharge a grand juror after the organization of that body has power to substitute another qualified juror in his place.⁴³ In the absence of any statute prescribing the course to be pursued in procuring jurors to fill vacancies, the method to be used is within the sound discretion of the court.⁴⁴

Under some statutes, provision is made for the selection, drawing, summoning, and impaneling of additional grand jurors to supply a deficiency in the number of grand jurors resulting from discharge or excuse of jurors or other causes after the organization of the grand jury.⁴⁵ Such provisions have been held directory rather than mandatory.⁴⁶ It will be presumed, in the absence of evidence to the contrary, that in substituting new jurors the court acted in conformity with the statutes.⁴⁷

Under some statutes, substitutes should be taken from among the remaining members of the panel,⁴⁸ and such members should be summoned.⁴⁹ Under other statutes, where surplus jurors have been dismissed, new names should be drawn from the jury box.⁵⁰

Some authorities hold that the substitution of jurors is improper,⁵¹ and that a substituted juror is

33. Ill.—People v. Lieber, 192 N.E. 331, 357 Ill. 423.

Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

Wis.—State v. Lawler, 267 N.W. 65, 221 Wis. 423, 105 A.L.R. 568.

34. Ark.—Brown v. State, 10 Ark. 607.

35. Mass.—Commonwealth v. Smith, 9 Mass. 107.

36. Ark.—Brown v. State, 10 Ark. 607.

37. N.Y.—People v. Rose, 4 N.Y.S. 787, 52 Hun 33.

38. Ala.—Roe v. State, 2 So. 459.

Ill.—People v. Green, 161 N.E. 83, 329 Ill. 576.

39. Mo.—State v. Hurst, 99 S.W. 820, 123 Mo.App. 39.

40. W.Va.—State v. Angus, 74 S.E. 998, 70 W.Va. 772.

41. Ill.—People v. Dear, 121 N.E. 615, 286 Ill. 142, error dismissed 39 S.Ct. 493, 250 U.S. 635, 63 L.Ed. 1182—People v. Miller, 106 N.E. 191, 264 Ill. 148.

42. La.—State v. Owens, 58 So. 557, 130 La. 746.

43. Ark.—Sharp v. State, 3 S.W.2d 23, 175 Ark. 1083.

La.—State v. Henry, 3 So.2d 104, 197 La. 999—State v. Phillips, 114 So. 171, 164 La. 597.

Miss.—Posey v. State, 38 So. 324, 86 Miss. 141.

44. Filling vacancies from bystanders

Miss.—Posey v. State, 38 So. 324, 86 Miss. 141.

45. Ala.—Ex parte Lawler, 64 So. 102, 185 Ala. 428.

46. N.M.—State v. Apodaca, App., 735 P.2d 1156, 105 N.M. 650, certiorari denied 735 P.2d 535, 105 N.M. 618.

47. Tenn.—Turner v. State, 69 S.W. 774, 111 Tenn. 593.

48. Iowa—State v. Dohrn, 259 N.W.2d 801.

49. Iowa—State v. Dohrn, 259 N.W.2d 801.

50. Okl.—Grand Jury of Seminole County v. Dye, 571 P.2d 1200.

51. Pa.—Commonwealth v. Levinson, 389 A.2d 1062, 480 Pa. 273, 2 A.L.R.4th 964.

not even a de facto juror.⁵²

Federal grand jury.

In the case of a federal grand jury, if the court permanently excuses a juror, the court may impanel another person in place of the juror excused.⁵³ The court may direct that alternate jurors may be designated at the time a grand jury is selected.⁵⁴ Alternate jurors in the order in which they were designated may thereafter be impanelled if jurors are permanently excused.⁵⁵

§ 58. Increasing Number of Jurors

After a grand jury has been organized the court may, according to some authorities, increase the number of jurors.

Library References

Grand Jury ⇐12, 20.

According to some authorities, it is proper for the court to increase the number of grand jurors within the prescribed limits or to allow a grand juror to join the grand jury after it has been impaneled, sworn, and charged.⁵⁶ Such authority is sometimes conferred by statute.⁵⁷

The fact that one summoned to act as a grand juror, but who fails to appear until the grand jury is impaneled, sworn, and charged, is sworn as a grand juror and then excused without retiring with that body is a mere superfluous act, and does not affect the legality or competency of the grand jury as organized.⁵⁸

H. OBJECTIONS AND CHALLENGES TO GRAND JURY OR JUROR

§ 59. In General

A challenge is a preliminary objection taken to the jurors summoned and returned to serve as grand jurors.

Library References

Grand Jury ⇐17, 18.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW Electronic Research Guide following Preface.

The right to object to a grand jury presupposes an opportunity to exercise that right.⁵⁹

A challenge is a preliminary exception or objection taken to the jurors summoned and returned to serve as grand jurors.⁶⁰ It is a right only to object and not to select.⁶¹ The right of challenge is not a proceeding under which the trial judge may be himself put on trial, or required to pass on or consider the truth or falsity of charges of bias, partiality, or unfairness made against himself,⁶² nor

is the court obligated to pass on the guilt or innocence of accused.⁶³

Challenges to grand jurors are divided primarily into challenges to the array and challenges to the polls.⁶⁴

The burden is on the person challenging the grand jury to establish his cause of challenge.⁶⁵ The fact which is to constitute the ground for challenge must, as a general rule, be established in the manner in which other facts are proved.⁶⁶ Statutes sometimes require challenges to be supported by affidavit setting forth the ground of challenge.⁶⁷

It has been held that the right to be present at the impaneling of the grand jury and to make a challenge either to the polls or to the array is a substantial right, the denial of which by the court renders the grand jury incompetent to sit on the

52. Pa.—Commonwealth v. Levinson, 389 A.2d 1062, 480 Pa. 273, 2 A.L.R.4th 964.

53. Fed.Rules Cr.Proc., Rule 6(g), 18 U.S.C.A.

54. Fed.Rules Cr.Proc., Rule 6(c), 18 U.S.C.A.

55. Fed.Rules Cr.Proc., Rule 6(c), 18 U.S.C.A.

En masse impaneling of alternates proper

U.S.—U.S. v. Jones, M.D.Fla., 676 F.Supp. 238.

56. Miss.—Posey v. State, 38 So. 324, 86 Miss. 141.

57. Ala.—Osborn v. State, 45 So. 666, 154 Ala. 44.

58. Ala.—Compton v. State, 23 So. 750, 117 Ala. 56.

59. U.S.—Reece v. State of Georgia, Ga., 76 S.Ct. 167, 350 U.S. 85, 100 L.Ed. 77, rehearing denied 76 S.Ct. 297, 350 U.S. 943, 100 L.Ed. 822, opinion conformed to 91 S.E.2d 29, 213 Ga. 161.

60. Cal.—People v. Travers, 26 P. 88, 88 C. 233.

61. N.C.—State v. Mallard, 114 S.E. 17, 184 N.C. 667.

62. Colo.—People ex rel. Bonfils v. District Court of Second Judicial District, 66 P. 1068, 29 Colo. 83.

63. Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

64. Colo.—People ex rel. Bonfils v. District Court of Second Judicial District, 66 P. 1068, 29 Colo. 83.

65. Iowa—State v. Howard, 10 Iowa 101.

Tex.—Wright v. State, 158 S.W.2d 787, 143 Tex.Cr. 447.

66. Cal.—People v. Travers, 26 P. 88, 88 C. 233.

67. Ind.—McClary v. State, 75 Ind. 260.

case,⁶⁸ and that it is immaterial that the challenge of accused might have proved ineffectual.⁶⁹

§ 60. Panel or Array

- a. In general
- b. Grounds of challenge

a. In General

A challenge to the panel or array is a formal objection to the entire panel of grand jurors.

Library References

Grand Jury ⇨16, 17.

A challenge to the panel or array is a formal objection to the entire panel of grand jurors summoned and returned.⁷⁰ The basis of a challenge to a grand jury panel is that something has been done or omitted to the prejudice of the substantial rights of the challenging party.⁷¹ However, the court is not called on, nor does it undertake, to pass on the guilt or innocence of accused.⁷²

It has been held that accused has the right to challenge a grand jury on the ground that it was improperly selected,⁷³ and a right to challenge the array⁷⁴ on the ground that it was not selected in accordance with law,⁷⁵ and that this right arises under common law,⁷⁶ or is a constitutional right.⁷⁷

However, it has been said that it appears doubtful whether the right to challenge the array existed at common law.⁷⁸ Some authorities do not recognize the right of challenging the array.⁷⁹ Some statutes have either abolished the right to chal-

lenge the array altogether, or restricted the grounds of challenge within very narrow limits.⁸⁰

The right to challenge the array does not include the right to subject a grand jury or grand jurors to a voir dire.⁸¹ Investigation of a panel is proper only if there are reasonable grounds to suspect that the panel is improperly constituted.⁸²

Federal grand jury.

In the case of a federal grand jury, the array may be challenged on the ground that the grand jury was not selected, drawn, or summoned in accordance with law.⁸³ A motion to dismiss the indictment may be based on objections to the array, if not previously determined upon challenge.⁸⁴

b. Grounds of Challenge

Where statutes provide that a challenge to the array of grand jurors may be interposed for certain enumerated causes only, the courts have no power to allow challenges on other grounds.

At common law a challenge to the array of grand jurors was founded on some partiality or default of the sheriff, or his under officer.⁸⁵ A challenge to the array will lie for bias, partiality, or irregular action on the part of the sheriff, where, as at common law, the manner of forming a grand jury, so far as the selection, summoning, and return of the panel is concerned, is a matter within the discretion of that officer.⁸⁶ Where the method of selecting, drawing, and summoning grand jurors is prescribed by statute, objections to departures from the statutory directions may be raised by challenge to the array.⁸⁷ However, mere irregular-

68. Mo.—State v. Richetti, 119 S.W.2d 330, 342 Mo. 1015—State v. King, 119 S.W.2d 277, 342 Mo. 975.

Nev.—William J. Burns International Detective Agency v. Doyle, 208 P. 427, 46 Nev. 91, 26 A.L.R. 600.

69. Mo.—State v. Warner, 65 S.W. 584, 165 Mo. 399.

70. Colo.—People v. Second Judicial Dist. Ct., 63 P. 1068, 29 Colo. 83.

71. N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

72. Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

73. Conn.—State v. Avcollie, 453 A.2d 418, 188 Conn. 626, certiorari denied 103 S.Ct. 2088, 461 U.S. 928, 77 L.Ed.2d 299.

Motion to quash venire

Ala.—Mullins v. State, 130 So. 527, 24 Ala.App. 78, certiorari denied 130 So. 530, 222 Ala. 9.

74. Ill.—People v. Green, 161 N.E. 83, 329 Ill. 576.

Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

75. Pa.—Commonwealth v. Millhouse, 386 A.2d 581, 255 Pa.Super. 206.

76. Pa.—Commonwealth v. Millhouse, 386 A.2d 581, 255 Pa.Super. 206.

77. Even in case of investigating grand jury

Pa.—Commonwealth v. Polof, 374 A.2d 1299, 248 Pa.Super. 26.

78. Vt.—State v. Ward, 14 A. 187, 60 Vt. 142.

79. Vt.—State v. Ward, 14 A. 187, 60 Vt. 142.

80. Mo.—State v. Seidler, App., 267 S.W. 424.

N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

81. Pa.—Commonwealth v. Millhouse, 386 A.2d 581, 255 Pa.Super. 206.

82. Conn.—State v. Avcollie, 453 A.2d 418, 188 Conn. 626, certiorari denied 103 S.Ct. 2088, 461 U.S. 928, 77 L.Ed.2d 299.

83. Fed.Rules Cr.Proc., Rule 6(b)(1), 18 U.S.C.A.

84. Fed.Rules Cr.Proc., Rule 6(b)(2), 18 U.S.C.A.

85. N.D.—State v. Walla, 224 N.W. 211, 57 N.D. 726.

86. N.J.—State v. Kelly, 70 A. 342, 76 N.J.L. 576—Gibbs v. State, 45 N.J.L. 379, affirmed 46 N.J.L. 353.

87. Ohio—State v. Weible, 25 Ohio N.P.N.S. 564, 3 Ohio Law Abs. 766.

Pa.—Brown v. Commonwealth, 73 Pa. 321.

Lack of Notice

Fact that defendant was not given notice that grand jury was considering her case did not indicate grand jury was not selected,