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# Appointed but (Nearly) Prevented From Serving: My Experiences as a Grand Jury Foreperson

Phyllis L. Crocker\*

In summer 2003, I was a grand jury foreperson for the Cuyahoga County Court of Common Pleas in Cleveland, Ohio. The service of this grand jury, and my tenure as foreperson, were unique in the annals of grand juries. We were selected and sworn in the same manner as any grand jury, but heard cases for only one day of our four-month term—the last day. In the interim, the prosecutor filed cases in two courts, seeking to discharge us, as being “tainted” by our supervising judge’s initial instructions about our duties and the law.

I begin this essay with basic information about grand juries, then tell what happened to our grand jury, and conclude by reflecting on what I learned from this experience. My theme is the tension between the grand jury’s independence and the prosecutor’s desire to control it. The lesson I learned, intellectually and emotionally, is the depth and tenacity of the prosecutor’s assumption that he does control, and has the right to control, the grand jury process. I also learned some lessons about being a client, and believing in oneself and one’s principles.

## I. BACKGROUND ON CUYAHOGA COUNTY GRAND JURIES

A grand jury is an independent legal body charged with deciding whether an individual within the jurisdiction of the court will be indicted, i.e., formally charged with committing a felony. Every grand jury has a foreperson; in Ohio, the supervising judges select forepersons.<sup>1</sup> Traditionally, grand jury forepersons are community leaders, such as ministers, doctors, or teachers. They are not necessarily knowledgeable in the law, but knowledge of the law is not prohibited. Lawyers may serve as forepersons, as may law professors. Still, when I told friends and colleagues that I had been appointed foreperson, the general reaction was, “You can’t do that! You know too much!” What I think they meant was that I was too criminal-defense oriented: I teach criminal law courses and I have represented men on death row in Texas in their post-conviction appeals. Nonetheless, other law professors had also served as grand jury forepersons, including a Case Western University School of Law professor who co-authored the

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\* Visiting Professor of Law, Northeastern University School of Law, Associate Professor of Law, Cleveland-Marshall College of Law. J.D., 1985, Northeastern University School of Law. I am grateful to Judge Burt W. Griffin for asking me to serve as a grand jury foreperson. I thank Susan Becker, Jeffrey Alan Coryell, Kathleen Engel, Daniel J. Givelber, Jack Guttenberg, and Margery Koosed for commenting on prior versions of this essay.

<sup>1</sup> OHIO REV. CODE ANN. § 2939.02 (Anderson 2004).

leading treatise on Ohio criminal law practice, and a Cleveland-Marshall College of Law professor who had once been a criminal defense attorney.<sup>2</sup>

Apart from the appointed foreperson, the grand jury is composed of citizens from the community, drawn from the same pool as trial jurors. Like those asked to serve on trial juries, potential grand jurors are subject to voir dire. The supervising judge instructs the grand jury about its responsibilities. Unlike trial juries, however, the judge does not instruct the grand jury on the law that applies in an individual case—the prosecutor does that.

In Cuyahoga County, the term of each grand jury is four months.<sup>3</sup> The prosecutor's office presents fifty to seventy cases a day, two days a week. If grand jury members have questions about the facts, they may ask the witnesses; if they have questions about the law, they ask the prosecutor. Thereafter, the prosecutor leaves the room and the grand jury, in secret, discusses and votes on whether to indict.

While intellectually I knew that grand juries are supposed to be independent legal bodies, I did not appreciate the significance of that independence prior to my service. The reality is that grand juries depend greatly on prosecutors. Due to that dependence, grand juries rarely decline to indict, and are often criticized as mere rubber stamps for the prosecutor.<sup>4</sup> It is not surprising, however, that grand jurors rely on prosecutors. They have to hear and decide large numbers of cases in a short amount of time, yet have little knowledge about the criminal justice system, let alone the elements of criminal offenses. Grand jurors know what the judge states in the initial general instructions, and what the prosecutor tells them about the law as to specific offenses. This creates a singular reliance on the prosecutor.

Prior to my service, at least two Cuyahoga County grand jury forepersons had raised concerns about the indictment process.<sup>5</sup> Both were troubled by the abundance of low-level drug possession cases in which the prosecutor sought indictments, in particular, cases of possession of a crack pipe with cocaine residue. One foreperson was concerned that it appeared that the City of Cleveland prosecuted these cases as felonies, while the suburbs processed them as misdemeanors. The other was disturbed by the apparent racial bias of this

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<sup>2</sup> Lewis Katz, author of *BALDWIN'S OHIO PRACTICE: CRIMINAL LAW* (2003), and Jack Guttenberg, at Cleveland-Marshall College of Law.

<sup>3</sup> Four grand juries are empanelled each term.

<sup>4</sup> See, e.g., Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67 (1995) ("Despite its auspicious origins, the federal grand jury has become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions."); Andrew D. Leopold, *Why Grand Jurors Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263 (1995) ("The grand jury is frequently criticized for failing to act as a meaningful check on the prosecutor's charging decision; according to the clichés it is a 'rubber stamp,' perfectly willing to 'indict a ham sandwich' if asked to do so by the government.").

<sup>5</sup> Letter from The Rev. Marvin C. McMickle, Ph.D., Grand Jury Foreperson September Term 2001, to Presiding Judge McMonagle (Feb. 19, 2002); Memorandum from Dorothy McComb to Bill Monroe, Grand Jury Foreman, September Term 2002 (Dec. 3, 2002) (both on file with author).

practice.<sup>6</sup> One foreperson also expressed concern about the pressure to indict and the high number of cases on which they were expected to indict each day.<sup>7</sup>

These issues also troubled Judge Burt W. Griffin, the supervising judge for our grand jury. He decided to address these and other concerns through the instructions that he gave us. The prosecutor objected formally by filing two lawsuits challenging Judge Griffin's instructions and our grand jury hearing any cases. And the prosecutor objected informally in related negotiations to my serving as foreperson. Underlying the particular complaints the prosecutor raised was, I believe, his fundamental objection to Judge Griffin interfering with the way the prosecutor was accustomed to controlling the grand jury. In the next section I explain what happened in more detail, because the details best reveal the depth and tenacity of the prosecutor's assumptions about his control of the grand jury.

## II. THE TERM OF THE GRAND JURY

In April 2003, Judge Griffin asked if I would serve as foreperson of the grand jury he would supervise during the May 2003 Term. It was an honor to be asked, and it fulfilled one of my long-held wishes. The grand jury serves a crucial gate-keeping role in the criminal justice system, yet its proceedings are secret. As a law professor I teach about grand juries, but this was an opportunity to learn how the process really functions. I was thrilled, if somewhat daunted, by the prospect.

When Judge Griffin approached me, he explained the concerns other grand jury forepersons had raised. He told me he planned to prepare a special charge for our grand jury addressing these and other issues, including the independence of the grand jury. We also talked about my views on the death penalty. I am opposed to the death penalty, so I told him that I would not vote to indict a death penalty case.<sup>8</sup>

On April 30, 2003, prospective grand jury members assembled in Judge Griffin's courtroom. The prosecutors questioned us, principally about making the necessary time commitment. To my surprise, Judge Griffin announced that I had recused myself from any death penalty case that might be presented to the grand jury. At the time, I was not pleased with this statement—I had not agreed to do it—but it turned out to be wise.

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<sup>6</sup> The demographics of the county are such that primarily African-Americans face felony indictments in low-level drug possession cases in Cleveland, while primarily whites face misdemeanor charges for the same offense in the suburbs.

<sup>7</sup> See Memorandum from Dorothy McComb, *supra* note 5, at 4–5.

<sup>8</sup> In Ohio, the indictment must include the aggravating circumstances that make a person eligible for the death penalty. See OHIO REV. CODE ANN. § 2929.04 (Anderson 2004). Thus, the grand jury may affect whether a case proceeds as a death penalty case by refusing to indict on the aggravating circumstances. My opposition to the death penalty would keep me off a trial jury, but the grand jury does not decide whether the person should be sentenced to death. Still, I would not vote to make that a possibility.

Once the nine grand jurors and five alternates were selected and sworn in, Judge Griffin gave us copies of our ten-page set of instructions and read them to us. Apart from the usual instructions about procedures, secrecy, and related administrative issues, Judge Griffin addressed additional matters that, I believe, he hoped would enable the grand jury to exercise its independence. First, he explained the relationship of the burdens of proof required to indict and to find an accused guilty. The instructions stated, *inter alia*, that the grand jury “may issue an indictment for a particular offense if you are satisfied that the evidence probably shows that the defendant committed the offence beyond a reasonable doubt. . . . You have a duty not to indict if the evidence does not show that the defendant probably committed the offense.”<sup>9</sup> The instructions explained that, while the grand jury did not decide a person’s guilt, it should ensure that sufficient evidence existed to believe beyond a reasonable doubt that the accused committed the crime. Second, he described by example the basic elements of a crime. The instructions explained the relationship between the elements of the act, state of mind, and consequences of the act through an example of how a barroom fight could be a felonious, aggravated, or simple assault depending on the facts. Third, he identified an issue of prosecutorial discretion that concerned him and other grand juries. The instructions suggested that the grand jury might want to pay attention to the perceived problem of differential prosecution of low-level drug possession cases between the City of Cleveland and the suburbs.

Judge Griffin attached to the instructions the two grand jury reports that were critical of the system.<sup>10</sup> As Judge Griffin read the instructions, it was evident by watching the prosecutors’ body language that they were not pleased, although they said nothing at the time. No one expected what transpired next.

On Friday, May 2, 2003, I received a telephone call from an investigator for the Cuyahoga County Prosecutor’s Office asking to come to my office to discuss something that had come up in a case. It is embarrassing to admit, but my stomach was aflutter. Eventually he told me, in that telephone call, that he wanted to know who had faxed one of the reports criticizing the indictment process to Judge Griffin. I told him that I had, at the judge’s request.<sup>11</sup>

I know I should not have talked to the investigator. I was teaching Criminal Procedure at the time and in that class we discuss why people talk to police when they should not, how people think (wrongly) they can do no harm, and how statements made in those conversations can be used against people in ways they would never expect. So, intellectually, I knew better.

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<sup>9</sup> Judge Burt W. Griffin, *Grand Jury Charge*, May Term 2003, at 6 (on file with author).

<sup>10</sup> *See Id.*

<sup>11</sup> When Judge Griffin was preparing the instructions, he could not find one of the grand jury reports he had given me, so he called me and asked me to fax it to him. He attached that copy of the report to our grand jury instructions, with the Cleveland-Marshall fax number still appearing at the top of the page.

Nevertheless, I felt that the prosecutor's office should not have been investigating me. I was the foreperson of an independent legal body in the criminal justice system, to which the prosecutor would present cases. I do not believe the prosecutor had the right to question my actions in that capacity. Moreover, why was the prosecutor's office having an investigator call me? If the prosecutor had questions about attachments to the judge's instructions, he should have called Judge Griffin. Was he trying to intimidate me? Some suggested he would not be so foolish, but to a certain extent I think that is exactly what he was doing. Circumstances (i.e., the fax) suggested that I had had some independent communication with Judge Griffin and perhaps that violated the prosecutor's notion of who and what he controlled.

That same day, the prosecutor filed a motion to discharge our grand jury.<sup>12</sup> The prosecutor contended that our grand jury could not render effective service because Judge Griffin had improperly instructed us on the law. He raised numerous objections to the instructions, ranging from evidentiary to policy matters.<sup>13</sup> Most notably, the prosecutor maintained that the instructions raised the burden of proof from probable cause to proof beyond a reasonable doubt.<sup>14</sup> The prosecutor also objected to Judge Griffin telling the grand jury that I was its expert on the law.<sup>15</sup> Finally, the prosecutor characterized the discussion of differential prosecution of drug possession cases as "an act to prevent the prosecution of felonies under Ohio law."<sup>16</sup>

The prosecutor did not file the motion to discharge our grand jury with Judge Griffin, who had the power to correct any errors. Instead, he filed with Judge McMonagle, the Presiding Judge for the Cuyahoga County Court of Common Pleas, seeking to terminate our grand jury and empanel a new one. In the Sunday edition of the *Cleveland Plain Dealer* on May 4, 2003, the lead headline in the

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<sup>12</sup> In Re Grand Jury May Term, 2003 Mon./Wed., "B" Side, State's Objection to Grand Jury Instructions and Motion to Discharge/Terminate Grand Jury filed May 2, 2003 (on file with author) [hereinafter State's Objection].

<sup>13</sup> Many of the prosecutor's objections were on the ground that Judge Griffin stated terms that were not required by Ohio law; for example, the instruction addressed presenting evidence that negates an accused's guilt, allowing the grand jury to request additional evidence, and telling an accused that she had the right to testify. While Ohio law did not require these instructions concerning grand jury procedures, arguably Ohio law did not prohibit them.

<sup>14</sup> No court ever ruled on the merits of the prosecutor's objections, but I believe the prosecutor mischaracterized the instructions. Although they referred to proof beyond a reasonable doubt, the standard for indicting remained at a probable showing that the accused committed the crime. This was consistent with the language recommended by the Ohio Judicial Conference: "No public purpose would be served by indicting a person when it appears to you that the evidence is not sufficient to sustain a conviction. . . . On the other hand, it is equally important that indictments shall be returned against those who are probably guilty of criminal acts." OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS—CRIMINAL § 410.15 (2002) (Grand jury instructions).

<sup>15</sup> This was indeed an error that, I understand, from one of my lawyers, Judge Griffin readily admitted.

<sup>16</sup> State's Objection, *supra* note 12, at 15.

Metro Section read, "Prosecutor Claims Judge Tainted Grand Jury."<sup>17</sup> That set the tone for what followed.

On that Sunday, I took the unusual step of conferring with a lawyer about representing the grand jury with respect to the prosecutor's motion. Being a client was new territory for me. But this lawyer did all the right lawyerly things: he asked me to tell him the facts and then gave me a detached and considered opinion on how we could proceed. This was quite helpful, because I was feeling under attack, and not wholly capable of knowing how to proceed. He agreed to represent the grand jury if we asked.<sup>18</sup>

On Monday, May 5, 2003, the grand jury assembled to begin our term of service. I suspected that we would not hear any cases, since the prosecutor was seeking to disband us. Many of the grand jurors had no idea what was going on. I explained the situation to the other grand jurors, and I indicated that our first task was not to think about indictments, but whether to respond to the prosecutor's lawsuit. Our ensuing discussion was a highlight of this tale. The grand jurors were incredulous that the prosecutor sought to discharge us. Their immediate response was that they wanted to serve; it was an honor to have been selected. Several harkened back to the prosecutor's comment that jury service was one of the few ways, apart from military service, that citizens could serve their country. We quickly agreed to tell Judge McMonagle that we wanted to carry out our duty to hear cases, that the relevant parties should correct any problems with the instructions, and that we were not tainted because we had not yet heard any cases and could apply new instructions. We decided to talk to a lawyer about presenting our views to the court.

The lawyer I had consulted arrived to talk to us just as the supervising prosecutor for the grand jury arrived, also to talk to us. The supervising prosecutor was not pleased that a private attorney was present. He demanded to be part of our conversation, and said that everything had to be on the record—we could not meet in secret. The supervising prosecutor questioned whether we were even entitled to representation. This was one of the many times when it was wonderful to have an attorney. I was angry that the prosecutor was, as I saw it, trying to interfere with the grand jury. But the attorney calmly replied to the supervising prosecutor that we were on uncharted ground as to whether a grand jury could have a lawyer, but why not let the grand jury talk to him? We did ultimately meet with the lawyer, and without the prosecutor's company.<sup>19</sup> The lawyer agreed to represent us and advocate our position that we wanted to serve and could carry out our duty.

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<sup>17</sup> James F. McCarty, *Prosecutor Claims Judge Tainted Grand Jury*, CLEV. PLAIN DEALER, May 4, 2003, at B1.

<sup>18</sup> That same day I spoke to another attorney about representing me personally. Since I had been singled out by the prosecutor's office, it seemed possible that my interests and the grand jury's might diverge at some point.

<sup>19</sup> The court reporter later told us that the prosecutor had gone on the record to object to our meeting; to my surprise, he called our meeting *ex parte*. At the behest of the other grand jury



Later that day, our lawyer reported to us about a meeting that had taken place in Judge McMonagle's chambers. Our lawyer was not hopeful about a resolution of the prosecutor's lawsuit. The prosecutor had three conditions: the errors in the instructions must be cured; a new judge must preside over the grand jury; and I must no longer serve as foreperson.<sup>20</sup> I was surprised by the last condition, but I thought it fair to let the grand jury decide whether to proceed without me. Their immediate response was "if you go down, we all go down together." I found this an extraordinary moment of group cohesion: we had spent only one day together but already saw ourselves as a unit. Undoubtedly our allegiance to the group was hastened because we felt we were under attack. We saw ourselves as a functioning group, not a collection of individuals, with a shared sense of the importance and value of our service.

Nothing more transpired on our first scheduled day to hear cases, and we returned on May 7, 2003, our next scheduled day to serve. On the advice of counsel, we composed and sent to Judge Griffin a written request to resolve the prosecutor's objections, re-instruct us, and let us do our job. In response, Judge Griffin set a hearing for May 9th to hear the prosecutor's claims and to re-instruct us.

Later that morning, the assistant prosecutor who supervised grand jury proceedings came to visit us, as he said he did with all grand juries. First, however, he spoke to me in an outer office. He suggested that I had done research for Judge Griffin's instructions and he would be glad to hear my thoughts on ways to improve the grand jury process. He proposed that we have lunch sometime to discuss my ideas. I was astonished. The supervising prosecutor acted as though our grand jury would not serve. Otherwise, why was he proposing lunch with the grand jury foreperson? Did he do that with all forepersons? Was it not improper for a prosecutor to meet *ex parte* with the head of the body that would consider his requests for indictments? Certainly, a prosecutor could not have lunch with the trial jury foreperson during a trial. The supervising prosecutor did not seem to honor any proper sense of boundaries, other than those he himself set.

On May 8, 2003, the day before the hearing Judge Griffin had set, the prosecutor filed an Affidavit of Disqualification in the Supreme Court of Ohio.<sup>21</sup> This is the procedure a litigant may utilize if she believes that a judge is biased, prejudiced, or otherwise unqualified to preside over a court proceeding.<sup>22</sup> The

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members, I also went on the record to explain why we spoke to a lawyer. I am not sure what "record" these statements are part of, but the court reporter took down what we said.

<sup>20</sup> Later I learned that the prosecutor did not want me to continue because he believed that I had collaborated with Judge Griffin on the instructions, even though Judge Griffin told the prosecutor that I had not done so.

<sup>21</sup> Affidavit of Disqualification of Judge Burt W. Griffin, In re: Judge Burt W. Griffin, Supervising Judge of the Cuyahoga County Grand Jury, S. Ct. No. 03-AP-050 (May 8, 2004) (on file with the author) [hereinafter Affidavit of Disqualification].

<sup>22</sup> OHIO REV. CODE ANN. § 2701.03 (Anderson 2004).

Chief Justice may remove the judge if he finds appropriate grounds. Here, the prosecutor claimed that Judge Griffin was unqualified because he intentionally tainted the grand jury through his erroneous instructions.

The immediate effect of this new lawsuit was to divest judges in the Court of Common Pleas of jurisdiction over the pending legal challenges. No hearing before Judge Griffin would occur and Judge McMonagle would not proceed on the Motion to Discharge the Grand Jury. Despite this sudden derailment of the local proceedings regarding the grand jury, no lengthy delay was expected. Everyone thought that Chief Justice Thomas Moyer would expeditiously resolve the matter.

One might have also expected that, while waiting for the Chief Justice to rule, no further action would occur. However, though no official action took place, the next weeks were filled with informal negotiations as different local judges and lawyers attempted to broker a resolution of the dispute.

The negotiations focused on two issues: the content of the instructions and me. I never heard about the debates over the instructions; I did hear numerous proposals about me. The most difficult proposal for me, which came early on, was that I offer to resign as grand jury foreperson. Apparently, the prosecutor still believed that I had collaborated with Judge Griffin on writing the instructions; thus, I could not be an unbiased foreperson.<sup>23</sup> At one point, in mid-May, I did offer, in writing, to resign. This was the most difficult moment for me because I firmly believed that I had done nothing wrong, that I should not be an issue in this dispute, and that the prosecutor should not be able to control the judge's selection of a foreperson. Yet, I believed, for a short time, that the process would move forward if I resigned. Thankfully, Judge Griffin ignored my offer.

Other proposals made by judges or lawyers connected to the dispute involved meetings between different prosecutors and me. I did not agree to most of the proposed meetings for two reasons: first, I did not think I should be an issue; second, I could not identify the benefit of such meetings. Every time I heard that "I" was an issue, it felt like a ruse—it took the focus off of the grand jury instructions given by Judge Griffin, which I considered the critical issue. Of course, this was a somewhat naïve view: I was an issue, to the extent that I was acting independently of the prosecutor. As to meeting with the prosecutor, or one of his assistants, I was both baffled and wary. What could I say? Or, more to the point, what did the prosecutor want to hear me say? I was concerned that whatever I said would not satisfy the prosecutor and then could be used against me to claim that I was disqualified to serve as foreperson. My personal lawyer suggested that the point was to show my good faith, meaning that I was prepared to follow any new instructions, that I did not have a hidden agenda, and that I was a "nice person."

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<sup>23</sup> The prosecutor's Affidavit of Disqualification maintained that the judge's instructions were "a planned act in conjunction with the grand jury foreperson." See Affidavit of Disqualification, *supra* note 21, at 1. The fact that Judge Griffin had recused me from potential death penalty cases meant that the prosecutor could not claim that I was biased because of my views on the death penalty.

My lawyer's explanation raised another reason for not meeting with any prosecutor: the prosecutor had no right to review the judge's selection of a grand jury foreperson. But, apparently, the prosecutor felt entitled to challenge me if I failed to meet with his approval and show that I was a "nice person." This was wrong. The prosecutor did not have to like me, nor I him. All that was required was that we do our jobs and no objective fact suggested that I would not do that.

As time wore on, and more and different configurations of meetings with prosecutors were suggested, I did agree to one proposal. This one was for breakfast with a judge and one or two prosecutors. I agreed to meet as long as my personal lawyer was present. This arrangement would ease my concern about how the prosecutor might use whatever I said. I was told that the prosecutor's office did not agree to this proposal, but they would agree to my coming with the grand jury's lawyer.<sup>24</sup> Perhaps I continued to be naïve, but this astonished me. First, I wanted to keep the legal representation of the grand jury and of me separate, and second, the prosecutor surely did not get to choose my lawyer. To me, this final demand revealed the depth of the prosecutor's belief that he controlled all aspects of the grand jury process. That was the last attempt at informally resolving the issue of my serving as foreperson.

Apart from the general inclination of judges and lawyers toward negotiated settlements, one might wonder why, in this situation, so many efforts were made by so many people. In large part, it had little to do with the actual dispute, and more to do with the effect of the dispute on the criminal justice system. Pressure built up from our grand jury not hearing cases. We would have heard on average sixty cases a day, two days a week. By the end of May, we would have processed three hundred to four hundred cases. In our stead, the three other grand juries empanelled at the same time as ours, but supervised by different judges, had to hear an overload of cases. This put an unfair burden on them. Eventually, Judge McMonagle lifted the pressure by appointing an interim grand jury to hear cases until the issues about our grand jury were resolved.<sup>25</sup>

By early June, attempts to resolve the issues surrounding our grand jury had ceased, in part because of the interim grand jury, and in part because we were told Chief Justice Moyer, who had been out of town, would return on June 1, 2003. The parties had filed their briefs regarding the Affidavit of Disqualification, and expected Chief Justice Moyer to promptly rule. This did not happen.

By mid-July Chief Justice Moyer had not ruled, and I began to think that he might not. I speculated that perhaps he saw this as a small local dispute between the prosecutor and a judge that would end when the term of the grand jury ended, but I was wrong.

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<sup>24</sup> Although not said, the apparent objection to my counter proposal was who my lawyer was—one of the best criminal defense lawyers in the community.

<sup>25</sup> This raised a separate issue about whether any indictment from that grand jury was legal. Ohio law specifies how a grand jury must be selected, *see* OHIO REV. CODE ANN. § 2932.02 (Anderson 2004), and it is unclear if that procedure was followed with the interim grand jury.

On August 4, 2003, Chief Justice Moyer denied the Affidavit of Disqualification.<sup>26</sup> He held that the Affidavit was not the forum to decide the correctness of the grand jury instructions and that the prosecutor had not shown that Judge Griffin was unqualified. Therefore, he concluded, Judge Griffin could continue his role of supervising the grand jury.

I was on vacation when this occurred. On my return, I found out not only that Chief Justice Moyer had denied the Affidavit, but also that Judge Griffin and the prosecutor had both taken steps in response. On August 5th, Judge Griffin had set one hearing for August 20th to hear the prosecutor's objections to his instructions, and another on August 25th to re-instruct the grand jury. On August 12th, the prosecutor had subpoenaed Judge Griffin and me to a hearing in Judge McMonagle's courtroom also on August 20th. The prosecutor seemed to be reviving his Motion to Discharge the grand jury.

A flurry of activity ensued. Judge McMonagle recused himself from hearing the prosecutor's motion so a new judge was assigned to the case. My lawyer filed a motion to quash my subpoena, and Judge Griffin's lawyer filed a motion to quash his subpoena. A great deal of closed-door negotiations took place about the instructions. As my lawyer told me, we had become a footnote in the proceedings: finally, the issue was, as it should have been all along, the instructions. The prosecutor agreed to discuss the instructions with Judge Griffin, although he retained the right to contest the instructions and to move to discharge the grand jury. I remained doubtful that we would hear a case before our term expired on August 27th.

To my surprise the parties agreed on a new (and greatly modified) set of instructions. On August 25th, Judge Griffin re-instructed us, and on August 27th, the last day of our term, we heard cases. The experience of hearing cases was awesome in the best sense of the word; it was humbling, breathtaking, and overwhelming. I viscerally understood the power of the grand jury: we, and no one else, decided if a person should be indicted on felony charges. I also fully understood how ill-equipped we were to carry out that duty, independently. For our grand jury, Judge Griffin instituted one change that I cannot imagine proceeding without: he gave each of us copies of the Ohio Criminal Code provisions that define felonies. This meant that we could each refer to the language of the crimes charged, rather than simply rely on what the prosecutor told us. This was an essential tool for us to exercise our own judgment about whether to indict, yet it was the first time any grand jury had been given their own set of statutes.

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<sup>26</sup> Entry, In Re: Judge Burt W. Griffin, Supervising Judge of the Cuyahoga County Grand Jury, S. Ct. No. 03-AP-050 (August 4, 2003) (on file with the author).

## III. REFLECTIONS

My tale ends on a basically positive note: our grand jury heard cases; Judge Griffin implemented a key innovation by providing the grand jury with a tool to educate ourselves and develop some independence; and I am told that the new assistant prosecutor assigned to supervise grand juries wants every grand juror to have a copy of the relevant statutes. But I cannot forget what this grand jury went through to get to that point, nor that we heard cases for only a single day.

I began my tale by stating my theme—the tension between grand jury independence and the prosecutor’s control of the grand jury—and my lesson—experiencing the depth and tenacity of the prosecutor’s belief that he had the right to control the process. When I reflect on the term of our grand jury, I see both my theme and my lesson at every step. When the prosecutor objected to Judge Griffin’s instructions, he did not file a motion with Judge Griffin seeking to change them; he tried to make an end-run around Judge Griffin. He did not want to deal directly with the judge; he just wanted the instructions, and our grand jury, to go away. Apparently, the way to regain control was not to confront the issues raised by the instructions, but to quash them. First, the prosecutor sought to have the grand jury discharged. Then he sought to have Judge Griffin disqualified. Along the way, he sought to have me removed, although never formally, never by any motion in court, but by insinuating that I should or could be disqualified and somehow had to prove myself, on his unarticulated terms. All of those attempts failed. In the end, the prosecutor’s office worked with Judge Griffin on a new set of instructions, I remained grand jury foreperson, and we heard cases, if only for a day.

While I did not learn as much as I had hoped about how the grand jury operates, it was still a worthwhile experience for the judge, the grand jury, and myself. Now that I am not in the thick of it, it is easier to see that. I know I have a vested interest in finding value in this fairly sordid tale. But, I believe that for Judge Griffin it was important that he prevailed and retained supervision over this grand jury, and that he was able to institute some change in the process. For the other grand jurors, it was important to know that they were not seen as tainted and were allowed to carry out their duty. For me as grand jury foreperson, it was important to not give in and to take a stand for grand jury independence, which I believe I did in some small measure.

Still, my contribution, and the judge’s innovations, were really quite minor responses to much greater systemic problems with the grand jury process. While I believe in the grand jury in theory, my experience as a grand jury foreperson leads me to question, and ultimately to doubt, the continued vitality and viability of the grand jury.

The fundamental problem for each new grand jury is that its members do not know, nor are they given the means by which to learn, what it means to be an independent legal body. In many ways it is understandable that grand jurors do not recognize their independence: the grand jury is supervised by a judge, and receives

all of its information on the law and the facts of each case from the prosecutor. While the prosecutor has the obligation to seek justice, it also represents the State in the very cases in which it seeks indictments. This means that the prosecutor is not neutral. For the most part that partisan role is appropriate: we want the prosecutor to zealously represent its client, the State. It is, however, problematic in the grand jury context. The system enforces grand jury reliance on the prosecutor—the attorney for the State—as its source of knowledge. The grand jury is given no means by which to obtain knowledge about the process or the law apart from the prosecutor. Grand jurors are given no substantial training on the law. On the rare occasion that a member of the grand jury has independent knowledge of the legal system, as I discovered, it is not necessarily viewed as positive. The sheer number of cases a grand jury is expected to vote on each day further exacerbates the lack of knowledge and training. Even if grand jurors wanted to educate themselves, no time is permitted for that vital effort.

Many others before me have grappled with how, and whether it is possible, to foster real grand jury independence. In the late 1970s, Ovio C. Lewis, then a law professor at Case Western University School of Law, wrote a thoughtful critique of the grand jury system based on his service as a Cuyahoga County Grand Jury Foreperson.<sup>27</sup> He identified minimally necessary reforms for a grand jury to have “a modest chance to attain its reputed function,” including “additional resources, such as independent legal counsel, investigators, and clerical staff,” and “extensive training.”<sup>28</sup> He noted that the training should “apprise the grand jurors fully concerning their power and obligations.”<sup>29</sup> Ultimately, however, Professor Lewis concluded that “the reforms suggested would appreciably complicate grand jury proceedings . . . and the grand jury would only continue as ‘a pawn in the technical game instead of . . . a great historic instrument of lay inquiry into criminal wrongdoing.’”<sup>30</sup> Because of this, he saw abolition as “the only rational course of action.”<sup>31</sup>

Other scholars and grand jurors, more recently, have affirmed Professor Lewis’s criticisms, but not his conclusion.<sup>32</sup> Many critiques focus on the lack of

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<sup>27</sup> Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33 (1979) (discussing the history of the grand jury, other criticisms of grand juries, and the experience of his grand jury).

<sup>28</sup> He also identified the need to eliminate the secrecy rule, develop a system for citizens to bring complaints directly to the grand jury, allow a witness’s attorney to be present during questioning, improve the quality of evidence necessary to sustain an indictment, require transcripts of grand jury proceedings, and increase judicial supervision. *See Id.* at 64–66.

<sup>29</sup> *Id.* at 64 n.164.

<sup>30</sup> *Id.* at 66 (quoting *United States v. Johnson*, 319 U.S. 503, 512 (1943)).

<sup>31</sup> *Id.*

<sup>32</sup> *See, e.g.*, BLANCHE DAVIS BLANK, *THE NOT SO GRAND JURY* (1993) (suggesting reforms based on her service as a federal grand juror in New York); Susan W. Brenner, *Is the Grand Jury Worth Keeping*, 81 JUDICATURE 190 (1998); Leopold, *supra* note 4; *see also* Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J.

grand jury independence, identifying, as both Professor Lewis and I do, the problem of prosecutorial power over grand jury decision-making. Professor Leopold observed that a key problem is that grand jurors are not qualified to answer the basic question put to them: does probable cause exist to believe that the suspect committed the crime charged?<sup>33</sup> Leopold notes, “we are asking non-lawyers with no experience in weighing evidence to decide whether a legal test is satisfied, and to do so after the only lawyer in the room, the prosecutor, has concluded that it has.”<sup>34</sup> Professor Brenner makes a similar point: “Even if grand jurors for some reason do not identify with the prosecutor, their ignorance of the law makes it very difficult to challenge a prosecutor’s conduct of an investigation or wish to indict.”<sup>35</sup>

Leopold and Brenner call for reform of the system, not its abolition.<sup>36</sup> Brenner urges states, and the federal system, to adopt the procedure Hawaii has used since 1978—provide each grand jury with its own lawyer, to act as a legal advisor.<sup>37</sup> This would give grand jurors a more balanced perspective and invigorate their independence. Leopold sees legal counsel as being marginally useful,<sup>38</sup> he suggests, however, that the “natural, but radical implication of the desire for a decisionmaker with both expertise and independence from the government is to replace the grand jurors with lawyers who are randomly selected from the community.”<sup>39</sup> He acknowledges that while this would increase grand jury independence, it would also decrease the sense that the grand jury represents the community. Despite the limitations of the proposed reforms, both scholars conclude that the institution of the grand jury is too important to abolish.

While abolishing the grand jury sounds severe, I agree with Professor Lewis and believe it may be the more honest answer.<sup>40</sup> Grand juries simply do not have

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323 (2004) (proposing changes to grand jury instructions to restore its historical and constitutional independence, including the power to refuse to indict).

<sup>33</sup> Leopold, *supra* note 4, at 264.

<sup>34</sup> *Id.*

<sup>35</sup> Brenner, *supra* note 32, at 198.

<sup>36</sup> As Brenner notes, “Since we are, for practical purposes, stuck with the institution, we should pursue simple measures to enable grand juries to achieve their potential role as an important voice of the community.” Brenner, *supra* note 32, at 68. Leopold does not call for abolition, but cautions that “those who do ignore the grand juries deficiencies—and the unfairness that follows—should bear a heavy burden of justifying the conclusion that real change is not feasible. . . . [M]aintaining a grand jury in name only fails to carry that burden.” Leopold, *supra* note 4, at 324.

<sup>37</sup> Brenner, *supra* note 4, at 124–27.

<sup>38</sup> Leopold, *supra* note 4, at 314.

<sup>39</sup> *Id.* at 322.

<sup>40</sup> The alternative to indicting by grand jury is proceeding by preliminary hearing in which a judge hears evidence from both prosecution and defense and decides whether sufficient evidence exists to charge the defendant with the specified crimes. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 714–23 (4th ed. 2004). Currently, the federal government, the District of Columbia, and eighteen states proceed by grand jury indictment. *Id.* at 744.

the knowledge or time to exercise their independence in deciding whether to charge individuals from the community with the commission of crimes. This state of affairs has existed for so long that prosecutors not only take it for granted, but also balk when efforts are made to restore some of that independence. In this light, the prosecutor's objection to our grand jury hearing cases was unprecedented, but it is, perhaps, not surprising. This observation reveals the depth of the problem: to make grand juries independent would require not only the changes Professor Lewis identified, but a change in the mind-set of those who control the grand jury system. I say this not as an indictment of any particular prosecutor or judge, but as a comment on the degree of entrenchment of the grand jury system as it has come to exist. Sadly, I believe the challenge is too great and our collective resolve insufficient to carry out the depth and breadth of change required to revitalize the independence of the grand jury.