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Grand Jury Presentments: Protection of the Vindicated

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GRAND JURY PRESENTMENTS: PROTECTION OF THE VINDICATED

The power of a grand jury to investigate and reveal conditions in the community, and to accompany such revelations with appropriate recommendations, has long been the subject of extended and acrimonious dispute.[1] The findings of a grand jury are contained in what is usually called a presentment. *Presentment* has been variously defined,[2] but it generally consists of an informal accusation, criticism, or report not under oath, made publicly or secretly by a grand jury on its own knowledge. It can be based on sworn or unsworn testimony. Presentment may or may not be used to frame an indictment and need not necessarily be followed by one.[3] There is nothing that would preclude a positive or complimentary presentment of conditions or individuals, if the grand jury so desired.[4] Florida grand juries are specifically authorized to present any offenses against the criminal law.[5] In an early case the Florida Supreme Court defined a presentment as "a statement by the grand jury of an offense from their knowledge, without any bill of indictment laid before them, setting forth the name of the party, place of abode, and the offense committed, informally, upon which the office of the court afterwards frames an indictment."[6]

Formerly, the terms *presentment* and *indictment* may have been used synonymously.[7] This use is inferred by language used in the Constitution of the United States[8] and in the present Florida Consti-

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[1]*E.g., Ex parte* Robinson, 231 Ala. 503, 165 So. 582 (1936); Goodson v. State, 29 Fla. 511, 10 So. 738 (1892); Johnston v. State, 24 Fla. 162, 4 So. 535 (1888); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); see Comment, 8 MIAMI L.Q. 584 (1954); 8 U. FLA. L. REV. 343 (1955); 6 U. FLA. L. REV. 140 (1953).

[2]*E.g.*, Kirkland v. State, 86 Fla. 64, 97 So. 502 (1923); State v. Kiefer, 90 Md. 165, 44 Atl. 1043 (1899); Bennett v. Kalamazoo Circuit Judge, *supra* note 1; Jones v. People, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), *cert. denied*, 181 N.Y. 389, 74 N.E. 226 (1905).

[3]See cases cited note 2 *supra*.

[4]State v. Wright, 93 So.2d 104 (Fla. 1957); Ryon v. Shaw, 77 So.2d 455 (Fla. 1955).

[5]FLA. STAT. §932.15 (1957).

[6]Collins v. State, 13 Fla. 651, 663 (1869-'70-'71).

[7]Ivey v. State, 23 Ga. 576 (1857); Progress Club v. State, 12 Ga. App. 174, 76 S.E. 1029 (1913); Commonwealth v. Christian, 48 Va. 323 (1850).

[8]U.S. CONST. amend V: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment *or* indictment of a grand jury

tution.[9] Despite the fact that the two terms may still be used synonymously,[10] later interpretive decisions have separated them and rendered the question somewhat academic.[11]

In the case of *Collins v. State* the Court stated that presentments include indictments unless restrictively designated as "general presentments."[12] The Court further stated that under the Constitution of 1838 one might have been tried by presentment alone,[13] but that under the Constitution of 1868 both "presentment and indictment" were necessary.[14] In *Cotton v. State,*[15] decided under a present constitutional provision,[16] the Court by way of dicta stated: "Accused as he was of a capital crime, he had a right to object to being tried except on presentment *or* indictment by a grand jury."[17] However, in *Kirkland v. State,*[18] a presentment was defined as a grand jury instruction to the prosecutor to be used for framing a bill of indictment. The Court further stated that the Constitution recognized a distinction between an indictment and a presentment. While making this distinction, the Court did not say that an indictment must always follow a presentment. It is now generally conceded in most jurisdictions that a critical presentment is probably restricted to an accusation not amounting to an indictment.[19]

Although there appears to be some authority for distinguishing between a grand jury presentment and a report,[20] the better view

except . . . ." (Emphasis supplied.)

[9]FLA. CONST. Decl. of Rights §10: "No person shall be tried for a capital crime unless on presentment or indictment by a grand jury . . . ."

[10]Head v. State, 32 Ga. App. 331, 123 S.E. 34 (1924).

[11]*Ex parte* Bain, 121 U.S. 1 (1887); Application of United Elec. Radio and Mach. Workers, 111 F. Supp. 858 (S.D.N.Y. 1953); United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

[12]13 Fla. 651, 662 (1869-'70-'71).

[13]FLA. CONST. art. I, §16: "[N]o person shall be put to answer any criminal charge but by presentment, indictment, or impeachment."

[14]FLA. CONST. Decl. of Rights §8: "No person shall be tried . . . unless on presentment *and* indictment." (Emphasis supplied.) This seems to draw a clear distinction between the two.

[15]85 Fla. 197, 95 So. 668 (1923).

[16]See note 9 *supra.*

[17]85 Fla. 197, 202, 95 So. 668, 670 (1923).

[18]86 Fla. 64, 97 So. 502 (1923).

[19]*E.g.,* Kirkland v. State, *supra* note 18; State v. Kiefer, 90 Md. 165, 44 Atl. 1043 (1899); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); Jones v. People, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), *cert. denied,* 181 N.Y. 389, 74 N.E. 226 (1905).

[20]See Comment, 8 MIAMI L.Q. 584, 592 (1954).

is that the terms are used interchangeably.[21] The Florida courts apparently ignore any erstwhile distinction between the two terms.[22]

Historically, the grand jury served as a protector of the people by acting as a guard against governmental oppression;[23] it could also issue presentments commenting on matters of public interest. Notwithstanding this deep-seated tradition, the modern weight of authority has curbed the activity of grand juries when the bounds of propriety were exceeded,[24] and has restricted the scope of presentments. A presentment absent a subsequent indictment may result in the inequity of holding one up for public condemnation while simultaneously denying him a forum for retort, so that he is able neither to rebut nor to mitigate the harsh effects of unjust criticism. In *People v. McCabe*[25] the grand jury report was adjudged so improper as to be termed by the Court a "foul blow." The possible injury that can be inflicted by grand jury reports must be carefully considered and weighed against the desirability of having an informed public.[26]

Although other branches of government have investigatory powers, the grand jury by virtue of subpoena power, secrecy, and composition may be better suited to present local official or unofficial misconduct than legislative or executive committees.[27] However, the grand jury by definition should not include more than local problems.

An investigation by a grand jury must necessarily be somewhat independent, but the resulting presentment should be subject to some limitations. Certain limitations are inherent in a proper presentment. These are intangible factors, such as impartiality, evidentiary aspects, exclusion of motives of witnesses, thoroughness in order to avoid half-truths, and overzealous leadership. One limitation should be

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[21]*Ibid.* See also 24 AM. JUR., *Presentments and Reports* §36 (1939).

[22]State v. Wright, 93 So.2d 104 (Fla. 1957); State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957); Ryon v. Shaw, 77 So.2d 455 (Fla. 1955); Owens v. State, 59 So.2d 254 (Fla. 1952); *In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (1943).

[23]See *In re* Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952), tracing the history of the New Jersey grand jury to 1680.

[24]See *Ex parte* Robinson, 231 Ala. 503, 165 So. 582 (1936); *Ex parte* Faulkner, 221 Ark. 37, 251 S.W.2d 822 (1952); State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957); State *ex rel.* De Armas v. Platt, 193 La. 928, 192 So. 659 (1939); *In re* Hudson County Grand Jury, 14 N.J. Super. 542, 82 A.2d 496 (L. 1951).

[25]148 Misc. 330, 266 N.Y. Supp. 363 (Sup. Ct. 1933).

[26]See People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[27]See dissent of Harlan, J., in Hurtado v. California, 110 U.S. 516, 538 (1884).

that after all of these restrictions are properly observed and the presentment is readied for public pronouncement, a responsible and informed party, such as the prosecutor or the foreman of the jury, should take steps to ascertain that there are no pending cases within the jurisdiction of the court that could be influenced by an untimely presentment. Another suggested limitation is that a presentment should be made only when it is genuinely believed that a crime has been committed.[28] However, this would possibly impede fair comment[29] and should be considered as a guide rather than a rule of unstinting application. Finally, the life of a Florida grand jury in most counties[30] is normally limited to a single term of court,[31] but it can be discharged prior to that time at the discretion of the judge.[32] If found initially unnecessary, it is not mandatory that a grand jury be empaneled.[33] Thus, vigilante type grand juries that function for an abnormally long period of time and often provoke public indignation[34] probably cannot occur in Florida.

Although it is necessary to consult the law of the particular state in which the grand jury is located in order to determine what may properly be contained in presentments, as a general rule they have contained criticisms of community conditions,[35] unnamed public officials,[36] and designated individuals.[37] In addition to its powers of fact finding, analysis, and criticism by presentment, a grand jury in appropriate circumstances can make recommendations,[38] usually based on opinions formed during the investigation.

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[28]See Moore v. Delaney, 180 Misc. 844, 45 N.Y.S.2d 95 (Sup. Ct. 1943); Grand Jury Investigation, 173 Pa. Super. 197, 96 A.2d 189 (1953).

[29]See Ryon v. Shaw, 77 So.2d 455, 457 (Fla. 1955), 8 U. FLA. L. REV. 343.

[30]*But see* Fla. Laws 1951, ch. 26665 (grand jury in counties of 225,000 or more not discharged until succeeding grand jury empaneled; this now applies to Dade, Duval, and Hillsborough counties).

[31]FLA. STAT. §40.40 (1957).

[32]FLA. CONST. Decl. of Rights §10; see FLA. STAT. §905.09 (1957) (discharge and recall of grand jury).

[33]FLA. CONST. Decl. of Rights §10.

[34]See United States v .Johnson, 123 F.2d 111 (7th Cir. 1941), *rev'd,* 319 U.S. 503 (1943) (grand jury not a conservator of the peace).

[35]*In re* Report of Grand Jury, 152 Md. 616, 137 Atl. 370 (1927).

[36]Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418 (1939); *In re* Osborne, 68 Misc. 597, 125 N.Y. Supp. 313 (Sup. Ct. 1910); Comment, 52 MICH. L. REV. 711 (1954).

[37]*In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (1943).

[38]*In re* Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952); see Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933).

Remedies of the Presented

Since grand jury proceedings are ordinarily secret,[39] the person who is to become the subject of a presentment has no means of knowing that he may be criticized publicly in the near future; consequently he cannot come to his own defense before the presentment is made public. In view of this fact, the prosecutor, who attends and advises during the grand jury hearings,[40] must act in behalf of whoever is mentioned in the report as well as in behalf of the state. In this dual capacity, if he deems the report unfair to anyone he may take action on his behalf. He may ask the court to delay the filing of the report beyond the life of the grand jury, thereby causing its death,[41] or he may ask the court to refuse to file the report and then move to suppress it before it becomes public.[42] He may move that the grand jury be discharged prior to its normal termination, thereby avoiding a filing of the presentment.[43] Once the report is filed, the party presented or the prosecutor may move to expunge from the record either the whole report or certain parts of it.[44] If denied, the "presented" must resort to appeal.[45] As a practical matter, appeal is really no remedy, since the disputed presentment is made public at the trial level and the individual will be exposed to public criticism while awaiting judicial review of his motion. Even though the appellate court may strike all or portions of the presentment as entirely extralegal, this official vindication may be of little value to one who has been previously, though wrongfully, condemned.

In Florida the motions to suppress and to expunge are general remedies to be used to strike improper reports or portions thereof.

[39]FLA. STAT. §905.10 (1957) (oath of grand juror); §905.27 (testimony not to be disclosed, exceptions).

[40]FLA. STAT. §27.03 (1957) (duties before grand jury); §905.22 (swearing of witnesses); §905.19 (duty of prosecuting attorney); §932.17 (state attorney to issue subpoena); §932.18 (list of witnesses, minutes).

[41]Once a jury's term has expired it can take no further action. See note, 37 MINN. L. REV. 586 (1953).

[42]State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.Y. 141 (1914); Burke v. Oklahoma, 2 Okla. 499, 37 Pac. 829 (1894); State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932).

[43]United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

[44]State v. Wright, 93 So.2d 104 (Fla. 1957); State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957); Ryon v. Shaw, 77 So.2d 455 (Fla. 1955); Owens v. State, 59 So.2d 254 (Fla. 1952); *In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (1943).

[45]*Ibid.*

There is no apparent statutory authority for either. However, the Supreme Court, in *State v. Interim Report of Grand Jury*,[46] cited a federal case and indicated that the authority for these motions arises from the inherent power of the court to preserve the integrity of its records or to correct the action of one of its appendages in situations in which such action has been in excess of its powers or in violation of the court's rules. The Court marked out the boundaries of a proper presentment — one that would withstand the attack of a motion to expunge or suppress.

In re Report of Grand Jury[47] involved a grand jury report concerning a constable who had been indicted but never brought to trial. Eighteen months after the indictment a second grand jury called attention to it. The governor then asked that a third grand jury investigate the official misconduct of the constable; it was the report of this grand jury that caused the dispute. The report alleged several acts of misconduct, some of which were criminal, and then said:[48]

> " 'We have unanimously elected to ask for the immediate removal . . . rather than for prosecution chiefly because we are interested in the proper operation of that office in the future rather than any punishment of the individual. Furthermore, we realize that the chances of conviction of a law enforcement officer for nonfeasance, misfeasance and malfeasance are small and every effort in this State, which has ever been heard by any member of this Jury, has resulted only in expense and delay. We further recognize and submit that there are many acts of misconduct which warrant the removal of an officer for which he might not be prosecuted, much less convicted.' "

The Court held that the part of the presentment beginning with the word *furthermore* and ending with the word *convicted* was improper and should be expunged. The opinion further stated that a grand jury must be mindful of the confines of a proper presentment; and that it must not single out public officials to question their motives or to present them to the public in a scornful manner. It appears that the Court did not consider the character or motives of the constable to be assailed except as embodied in that segment of

[46] 93 So.2d 99, 103 (Fla. 1957).
[47] 152 Fla. 154, 11 So.2d 316 (1943).
[48] *Id.* at 155, 11 So.2d at 317.

the presentment expunged. Apparently the Court felt that the balance of the report did not hold him up to public ridicule but was properly confined to his official conduct as based on evidence extracted at the hearings. In addition to setting out the bounds of proper grand jury procedure, the opinion seems to settle the fact that the governor can employ a grand jury and its accompanying presentment to advise him in the proper exercise of his removal power.[49]

In *Owens v. State*[50] the grand jury investigated complaints concerning the issuing of revenue bonds and the awarding of a waterworks contract by a town council. The grand jury in its presentment severely criticized the town council and the manner in which it conducted municipal affairs. Although the report stated that no criminal violations were uncovered, it emphasized the importance of voting *competent* people into office. In denying a motion to expunge, the Court reaffirmed its language in *In re Report of Grand Jury* concerning the right and duty of a grand jury to make due presentments of general conditions and to serve in the role of guardian of the people. The Court discussed an Alabama case[51] which abbreviated the right of a grand jury to present legal evidence of a crime without following the presentment with an indictment. Apparently the case was cited to show that Florida differs with some states[52] as to the proper scope of a presentment.

In *Ryon v. Shaw*[53] a libel action was instituted against the members of a grand jury, grounded upon its report. The plaintiff did not file a motion to expunge. The report actually commended the plaintiff in part, but disparaged his ability to do a particular job that he was holding. In denying the cause of action for libel the Supreme Court referred to its holding in the *Owens* case, saying, "[W]hatever the delinquency may be, the Grand Jury has a right to investigate and make a fair report of its findings. The report complained of did not attempt to do more than this."[54]

In *State v. Interim Report of Grand Jury*[55] the grand jury in its presentment stringently criticized a circuit judge and three attorneys

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[49]FLA. CONST. art. IV, §15.

[50]59 So.2d 254 (Fla. 1952).

[51]*Ex parte* Robinson, 231 Ala. 503, 165 So. 582 (1936).

[52]See Rector v. Smith, 11 Iowa 302 (1860); *In re* Report of Grand Jury, 152 Md. 616, 137 Atl. 370 (1927).

[53]77 So.2d 455 (Fla. 1955), 8 U. FLA. L. REV. 343.

[54]*Id.* at 457.

[55]93 So.2d 99 (Fla. 1957).

he had appointed. The Supreme Court said that the report improperly contained the personal views of the jurors and their analysis of the alleged purposes motivating some of the persons involved. At the trial level, only one of the individuals involved was granted the right to expunge any comments from the record. This right was upheld in a separate decision.[56] The Court narrowed the question to whether the grand jury could investigate the official conduct "of the court of which it is an arm"[57] and present a contemptuous and slanderous report without simultaneously filing indictments. In labeling such action as a "foul blow"[58] the Supreme Court reversed the trial court, granted the motion to suppress made by the state's attorney, and ordered the objectionable matter expunged. It appears that under the circumstances of the case the presentment was improper because it was not followed by an indictment. In an attempt to avoid further litigation of this sort the Court stated: "For the future guidance of the grand jurors of this state . . . a grand jury 'will not be permitted to single out persons in civil or official positions to impugn their motives, or by word, imputation or innuendoes hold them to scorn or criticism.' "[59] However, the Court said that if a grand jury finds that neglect or incompetency is responsible for a condition that needs correction, the public welfare will allow a presentment that incidentally points to the responsible public official. The Court qualified as dictum its statement in *In re Report of Grand Jury*[60] that a grand jury had power to recommend suspension rather than indictment, even when criminal offenses were alleged. The Court also distinguished the two cases on the grounds that a constable was subject to removal by the governor, whereas a judge was not, and that the presentment in the case of the constable was filed only after a previous indictment had proved ineffective. The Court recognized the existence of legitimate areas in which a grand jury could criticize a public servant, but stated:[61]

> "The line of demarcation between a legitimate grand jury report and one which unfairly castigates a public official,

[56]State v. Wright, 93 So.2d 104 (Fla. 1957).

[57]93 So.2d 99, 101 (Fla. 1957).

[58]The Court based its language on People v. McCabe, 148 Misc. 330, 266 N.Y. Supp. 363 (Sup. Ct. 1933).

[59]93 So.2d 99, 102 (Fla. 1957).

[60]152 Fla. 154, 11 So.2d 316 (1943).

[61]93 So.2d 99, 103 (Fla. 1947).

without filing an indictment, may be difficult to draw in any given case, but that is no reason for ignoring and failing to observe any line."

As a result of these decisions, it appears that a grand jury presentment should not, and probably cannot, assault the judge or any judicial officer of the court of which it is an arm unless the grand jury deems indictment necessary. Despite the decision in *In re Report of Grand Jury,* there may be doubt as to whether there need not be a subsequent indictment of an executive officer removable by the governor when the facts alleged in a presentment show the commission of a crime. The language of Justice Buford's dissent in *In re Report of Grand Jury* and the decision in *State v. Interim Report of Grand Jury* indicate that when a crime is alleged an indictment must follow, even when the governor requests the presentment with a view toward removal. However, when a crime has not been committed it is proper for a state grand jury to present against public officials who are incompetently discharging their duties in the handling of public funds. It may investigate and present the general condition of county institutions and buildings. These presentments may also contain recommendations and a fair report of findings of the grand jury.

Conclusion

Generally, the grand jury presentment provides a desirable lay influence in the law. It provides the citizenry with a remedial recourse for correcting criminal as well as noncriminal conditions. In Florida these inquisitorial bodies seem to have broader general discretion to present than do many jurisdictions. However, judicial feeling is apparently moving in the direction of policies limiting the breadth of presentments as well as eliminating unmannerly and unwarranted criticism of specific individuals. These apparent limitations strike a desirable note, but the remedies available to those presented are still inadequate. Once the protective shroud of secrecy is lifted from the critical presentment, the presented will almost certainly suffer some permanent damage. A subsequent reversal of the trial court or the eventual granting of a particular motion in behalf of the accused cannot counteract the damage that has been done.

Definite changes should be made to insure that these disputed presentments remain secret until the remedy of appeal has been exhausted. Prior to offering the report for filing in open court, the

grand jury should inform an individual of the critical portion pertaining to him. If the presented wishes to take issue with it, he may move to suppress or expunge that part of the record before it becomes public. These motions, whether granted or refused by the trial court, should be made to operate as a stay of the public announcement of that particular portion until ruled on by the appellate court. Such a change would not only provide the presented with an adequate remedy but would also partially relieve the state's attorney from the dual burden of being the sole legal actor for the presented as well as adviser to the grand jury. These remedies would not impair the use of grand jury presentments, nor would the absence of recorded improper language affect the problem of predictability. Future grand juries still would be able to examine contested borderline language that had been ruled proper and left in the record.

Any provision would be adequate if it provided for secrecy until the court of last resort had acted upon the propriety of the presentment. Under present procedure, when the chastised finally takes stock of his vindicated position, he may have little left with which to rebuild the house that has been suddenly turned into glass by wrongful criticism. "The evil that men do lives after them, the good is oft interred with their bones"; there is no need for a grand jury to perpetuate improper language in the public records.

J. ROBERT MCCLURE, JR.