



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

Janet Gilligan Abaray, Chair
Hon. Patrick F. Fischer, Vice-chair

Part II

June 9, 2016

Ohio Statehouse
Room 018

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice Chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan B. Becker, Student Intern

DATE: July 2, 2015

RE: History and Use of Grand Juries

This memorandum is being provided to the Judicial Branch and Administration of Justice Committee as an aid to its review of Article I, Section 10, specifically, the use of the grand jury in criminal prosecutions.

The Grand Jury in Ohio

The Ohio Constitution provides for the use of the grand jury in Article I, Section 10, which states, in part:

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.

Section 10 also requires that the accused be allowed to appear and defend in person, and sets out the right to counsel, the right to demand details about the accusation, to have a copy of the charges, to face witnesses, to have defense witnesses compelled to attend, to have a speedy trial by an impartial jury, the right against self-incrimination (nevertheless allowing comment

regarding the accused's failure to testify), and the protection against double jeopardy. The section further specifies provision may be made by law for deposing witnesses. In short, the lengthy section encompasses many of the procedural safeguards enumerated in the United States Constitution, specifically in the Fifth and Sixth Amendments. ¹ Article I, Section 10 is original to the 1851 constitution, but was amended in 1912.

The grand jury process in Ohio is further controlled by Revised Code Chapter 2939. That chapter governs the size and selection of the grand jury; the use of additional or alternate jurors; specific terms of juror service, including compensation, the juror's oath, and the need to maintain secrecy; organizational matters such as the jury's use of a foreman and a clerk; procedural matters such as the jury's deliberations and the reporting of conclusions; and evidentiary matters, such as the procurement of witness attendance and testimony. Revised Code Chapter 2939 is provided as Attachment A to this memorandum.

The Use of the Grand Jury in the United States

In the United States, grand juries are used as a method for indicting persons accused of crimes. A prosecutor presents evidence and witnesses to a grand jury, which then votes if the evidence is enough to establish probable cause. The procedure is intended to protect the accused from frivolous criminal charges by ensuring that lay citizens decide if the prosecutor has made a correct decision. A grand jury is chosen by random selection from the district's voter rolls. It sits for a period of time – in the federal system for 18 months – hearing all the different charges brought by the prosecutor during that period. In the federal system, the jury is made up of between 16 and 23 members, with the need of 12 jurors to concur to indict the accused.² The process is kept in strict confidence, with the record of proceedings rarely being reviewed by anyone besides the prosecutor as a way of protecting the integrity of the grand jury process.

History

The grand jury system originated in 12th Century England, under the reign of King Henry II. At the time, Great Britain lacked a sophisticated policing mechanism. Grand juries were a way for citizens to note suspicious behavior and then, as jurors, report on suspected crime to the rest of the jury. This helped centralize policing power with the king, power that otherwise would have been held by the church or barons. By the 17th Century, grand juries began to be viewed as a way of shielding the innocent against criminal charges.³ Resembling the system used today, the government was required to get an indictment from a grand jury before prosecuting a person. This turn from the jury being a "tool of the crown" to "defender of individual rights" came after two refusals by a London grand jury to indict the Earl of Shaftesbury on a dubious treason charge in 1667, leaving the lasting effect of freemen being entitled to the right to have their neighbors review the charges against them before the government could indict them. American colonists followed this tradition, using the process to nullify despised English laws, as grand juries refused to indict those who took stances against the royalist government. The most famous example of this was newspaper editor John Peter Zenger who was arrested for libel in 1743 based on his criticisms of the New York royal governor. Three grand juries refused to indict

him, and although royal forces would still put him on trial after an information proceeding, a trial jury acquitted him.

After independence, the U.S. Constitution's framers considered grand juries to be so vital to due process that the institution was enshrined in the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *." Many states followed suit, protecting grand juries in their own constitutions. Ohio's version uses almost identical language: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury."⁴ Three other states, Alaska, Maine, and New York, also used the Fifth Amendment as their indictment clause model. The Ohio Supreme Court, following the language of the clause, has ruled the grand jury to be a required entitlement of the accused. *State v. Sellards*, 17 Ohio St.3d 169, 169, 478 N.E.2d 781 (1985).

From these two traditions flow the basic duties of grand jury today, often described as "the sword and the shield." First, the jury has a screening function, whereby the grand jury reviews evidence presented to them by a prosecutor to decide if there is probable cause for an indictment, thus "shielding" the accused from false charges. The grand jury also has an investigative function, in which it gathers evidence and issues subpoenas, using the "sword" to discover criminal conduct. While the latter has been used for sensational effect in political corruption cases, and in other cases lacking identifiable victims who would otherwise help investigators, it is the former most people think of when discussing grand juries, and it is the most common form.⁵

Criticism and Support

Grand juries have come under criticism since at least the 19th Century. At that time, the new Western states did not include grand juries in their constitutions, although this is likely because populations of those states were so dispersed that requiring citizens travel to a central location to form a grand jury would have been too onerous. Also at that time, many states removed the requirement from their constitutions, with one Michigan legislator declaring grand juries to be "akin to the star chamber."⁶

Both recently and historically, the use of the grand jury has been criticized as merely a reflection of the prosecutor's interest in securing or, in some instances, avoiding an indictment.⁷ While currently the focus of public attention, these concerns are not new. In 1973, U.S. Supreme Court Justice William Douglas noted that it was "common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting). Concerns remain that grand juries merely rubberstamp the decisions of prosecutors, leading to the famous quote by the New York state judge Sol Wachtler that a district attorney "could get a grand jury to indict a ham

sandwich.”⁸ There is near-unanimous scholarly agreement that the grand jury system is in need of reform or fundamentally broken.⁹ It is notable that the United Kingdom abandoned the system in the 1930s, and grand juries no longer are used by any common law country besides the United States.

Nevertheless, many argue that the grand jury process is important for reaching justice. Justice Learned Hand described grand juries as being the “voice of the community.” *In re Kittle*, 180 F. 946 (S.D.N.Y. 1910). Supporting community involvement in local criminal proceedings, Professor Ric Simmons of the Ohio State University Moritz College of Law has argued that, while federal grand juries might turn into rubber stamps, state grand juries using the correct processes could ensure the protection of defendants’ rights. According to Simmons, grand juries can provide the only lay perspective in a system where jury trials are becoming scarce.¹⁰ Simmons does suggest reform for the grand jury system where the prosecutor would only have one chance for an indictment and the process would have a higher evidentiary standard.

Legal Issues

There is no U.S. constitutional requirement that states have grand jury indictments for any crime. The Fifth Amendment’s guarantee of a grand jury has not been extended to the states through the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516 (1884). There have been no challenges to overturn *Hurtado*. Even during the Warren era, when the Supreme Court applied Fourteenth Amendment principles to much of the Bill of Rights, grand juries remain a requirement only in the federal criminal justice system. *Beck v. Washington*, 369 U.S. 541, 545 (1962). “Ever since *Hurtado v. California*, 100 U.S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions.” In *Alexander v. Louisiana*, 405 U.S., 625, 633 (1971), the Court stated it “has never held that federal concepts of a ‘grand jury,’ binding on the federal courts under the Fifth Amendment, are obligatory for the States.” The grand jury requirement, along with the Seventh Amendment, remain the last elements of the Bill of Rights that have not been incorporated by the Court to be applied to state government. As such, state grand jury procedure can be remarkably different from that of a federal grand jury, and is even completely abolished in some states.

While United States Supreme Court precedent has not required states to use grand juries, the court has strongly supported the federal grand jury system mentioned in the Fifth Amendment. The court has issued decisions protecting the grand jury’s ability to hear hearsay evidence (*Costello v. United States* 350 U.S. 359 (1956)), to hear evidence that otherwise would be excluded (*United States v. Calandra* 414 U.S. 338, (1974)), and allowing prosecutors not to present exculpatory evidence (*United States v. Williams*, 504 U.S. 36 (1992)). Ohio decisions have reflected the Supreme Court’s rulings in federal criminal cases. An Ohio appellate court simply quoted *United States v. Calandra* in deciding against a defendant. *State v. Muenick*, 26 Ohio App.3d 3, 498 N.E.2d 171 (1985). The Ohio Rules of Evidence explicitly do not apply to grand juries. Evid.R. 101(C)(2).

Moreover, the defendant is not allowed access to the records of the grand jury's proceedings. Ohio Crim.R. 16(J)(2) explicitly states that transcripts of grand jury testimony are not subject to disclosure but are governed by Crim.R. 6. Specifically, Crim.R. 6(E) states the deliberations and vote of the grand jury shall not be disclosed. *See also* R.C. 2939.11. In addition to these rules, the Ohio Supreme Court held in *State v. Patterson*, 28 Ohio St.2d 181, 185, 277 N.E.2d 201 (1971), that grand jury minutes are not released before or during trial unless "the ends of justice require[] it, such as when the defense shows that a particularized need exists * * * " (quoting *State v. Laskey*, 21 Ohio St.2d 187, 257 N.E.2d 54 (1970)). The balancing test is repeated in *In re Petition for Disclosure of Evidence Presented to Franklin County Grand Juries in 1970*, 63 Ohio St.2d 212, 407 N.E.2d 513 (1980). *See also* *Wiggins v. Kumpf*, 2d Dist. No. 26263, 2015-Ohio-201, 2015 Ohio App. LEXIS 174, 2015 WL 302839 (Montgomery Cty., Jan. 23, 2015).

While Ohio courts consistently follow jurisprudence relating to the federal system, this trend is not universal, as one-fifth of states with grand juries allow judicial review of grand jury conclusions. The most significant evidence of this trend is the system adopted in New York.¹¹

State Comparisons

States' use of the grand jury process falls into several categories. Some, like Ohio, require a grand jury for a variety of different crimes, while others require a grand jury only for capital crimes. Some states allow the legislature the option to abolish the grand jury system, some allow the legislature to choose between grand juries or the use of an information system, and some are completely silent on the issue. A complete list of state constitutional provisions relating to grand juries is provided as Attachment B.

Under a preliminary hearing system, the prosecutor files a document referred to as an "information." The defendant may then challenge the information in front of a judge. If the prosecutor can satisfy the judge that there is probable cause in the case, the defendant is held over to trial. Twenty-seven states allow any prosecution to be initiated by information.¹²

Colorado, Connecticut, Illinois, Indiana, Iowa, Nebraska, North Dakota, South Dakota, Utah, and Wyoming explicitly empower the legislature to abolish or modify the grand jury system. Though only Connecticut has used this power, all of these states have the option of changing to an information system at their choosing. Connecticut abolished their grand jury system and replaced it with an "adversarial probable cause hearing" by a constitutional referendum.¹³

Today, only 18 states require a grand jury indictment to initiate all serious criminal charges: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and West Virginia. Four states require grand jury indictments for crimes carrying a capital sentence or life imprisonment: Florida, Louisiana, Minnesota, and Rhode Island.¹⁴

Note that not all grand juries are required by state constitutional amendments. Eight states: Georgia, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, Tennessee, and

Virginia, require grand juries by statute, with their constitution either being silent, or allowing either indictment or information as chosen by the legislature.¹⁵

Grand Jury Discussion in the Ohio Constitutional Revision Commission

The Constitutional Revision Commission in the 1970s (“1970s Commission”) formed a special sub-committee of the Bill of Rights Committee to study both the grand jury and civil petit jury systems in Ohio.¹⁶

The Grand Jury and Civil Trial Jury Committee of the 1970s Commission discussed four questions relating to possible changes to the operation of grand juries in the Ohio constitution: 1) whether indictment by grand jury should only be mandatory in cases of impeachment, cases arising in the armed forces of the United States, or in the militia when in actual service during time of public danger, and capital offenses; 2) whether indictment by grand jury should be confined only to capital and a limited number of other offenses; 3) whether all grand jury witnesses should have the right to the assistance of counsel; and 4) whether the prosecuting attorney should be compelled to present evidence that tends to exculpate the defendant at grand jury proceedings. The committee heard from several witnesses on the topic.

One witness, an administrative judge with the Franklin County Court of Common Pleas, expressed his view that the grand jury is a “functioning and viable body,” and shared a letter he had received from a grand jury foreman who had found the experience to be very positive in helping his understanding of the criminal justice system. Another witness, who was executive director of the American Bar Foundation, presented a report listing arguments for and against grand juries. On the side opposing grand juries, he recognized that juries can serve as tools of the prosecutor, that there may not be enough constitutional safeguards when grand juries serve their investigatory function, and that they can be inefficient when combined with other screening processes like preliminary hearings. On the side supporting grand juries, he noted that they promote citizen participation and fulfill a need for prosecutors to have someone else make the charging decision. His conclusion was that grand juries should not be used for the vast majority of cases, and are best used when the prosecutor has a difficult choice on whether to prosecute.

The committee of the 1970s Commission also heard from a representative of the Coalition to End Grand Jury Abuse, who emphasized her organization’s position that grand juries lack independence. She recommended that all witnesses should have counsel available, all those subpoenaed should know ahead of time what they have been accused of, and grand juries should not collect facts. She added that transcripts of the hearing should be given to the defendant, and there should be limits on grand jury’s power to issue subpoenas. Speaking in support of grand juries, a county prosecutor also appeared before the committee, and described the typical grand jury experience in his county. He further described a unique case in which a white police chief shot an unarmed Africa-American suspect. He said there were calls for a murder prosecution but the prosecutor thought it was important that a grand jury made up of members of the community be allowed to make the final judgment about whether to indict. He said grand juries are particularly important in homicide cases. Considering possible reforms, the prosecutor said grand juries should not be required for some lesser offenses. He discredited a criticism that

prosecutors could use evidence in grand jury hearings that would not be admissible in court, as he said it would be pointless to go to trial with evidence that could not be used. Finally, he noted it can be important for grand juries to hear evidence that is helpful to the defendant.

Other witnesses expressed that having both a preliminary hearing procedure and a grand jury procedure is unnecessary, that exculpatory evidence as well as incriminating evidence should be presented to jurors, and that the General Assembly should be given the power to abolish the grand jury. Witnesses further opined that grand juries should be saved for only the most serious charges, such as capital murder or rape, and that defense attorneys should be given a copy of the grand jury proceedings, so as to ensure witnesses are giving the same story both then and at trial. One witness, a law professor, expressed that the best use of grand juries is in murder cases, cases with political ramifications, and sexual crimes, and that they are also useful for investigating political corruption and inspecting the conditions of jails and other public institutions.

The committee also heard from a representative of the Ohio Prosecuting Attorneys Association who said that, historically, the grand jury was a constitutional right of the defendant, and that removing the grand jury in order to streamline the criminal prosecution process would impinge that constitutional right. He said, as a practical matter, having the prosecutor present evidence that might exculpate the accused would put the burden on prosecutors to anticipate what evidence would be favorable to a defendant, which involved making subjective conclusions on matters of evidence in a hearing that is supposed to be investigatory, not adversarial, and would result in prosecutors going beyond their authority and doing the work of the defense. He also was critical of the suggestion that advisory counsel be afforded grand jury witnesses, an unnecessary provision because under current practice witnesses were not precluded from leaving the room and consulting with counsel. He said allowing advisory counsel to be present for the proceedings would only defeat one of the chief advantages of a grand jury proceeding: secrecy. Asked whether he thought prosecutors could be as diligent in suggesting the innocence of the accused as they are in attempting to establish guilt, the witness answered that the role of the prosecutor is not as a juror, but to take all the evidence available to the grand jury and let that body decide. He emphasized it is not the function of the prosecutor to determine probable cause, but to present what he or she feels may be a legitimate claim to the grand jury.

In his written remarks, the witness supported allowing grand jury proceedings for felonies other than capital offenses, such as those that may involve extreme deprivation of freedom, liberty, and property. He also advocated continuing to prohibit advisory counsel's presence in grand jury proceedings in order to preserve secrecy and the investigatory nature of the proceeding, as well as avoiding a requirement that prosecutors offer exculpatory evidence because it would burden the grand jury process with dilatory evidentiary appeals.

The committee of the 1970s Commission debated the merits of several of the proposed modifications. No members expressed any problem with requiring a grand jury indictment as the exclusive means of initiating the prosecution of a capital offense. Further, the committee agreed that the prosecutor should always have the option of taking a case to the grand jury instead of utilizing the information or a preliminary hearing. The committee wrestled with how to explicitly favor the use of the information, basically a preliminary hearing in which an individual

is actually accused, as the primary means of prosecuting non-capital crimes. The committee could not come to a consensus on how to make the information secret in the same way as is a grand jury proceeding. The committee ultimately chose to agree on the purpose of the provision and table discussion of procedure.

As for a provision requiring prosecutors to present exculpatory evidence on behalf of the accused, the committee agreed that there is a tendency for prosecutors to favor their own case rather than that of the accused. No agreement was reached as to specific language, although several alternatives were discussed.

Regarding a possible provision that would allow witnesses to have counsel present during grand jury proceedings, the committee agreed that there was currently no real right to counsel because it was ultimately up to the witness to make a decision as to when to seek the advice of counsel. Further, the committee proposed language instructing appropriate counsel to advise the client on “matters of self-incrimination,” and that every witness, not just the witness who was also the accused, should enjoy such a right. (There are cases in which it is unknown whether an individual is just a witness or if they are going to end up being the accused, so affording only the accused the right to have counsel present defeats the idea of secrecy in the grand jury proceeding.)

The committee of the 1970s Commission finally recommended that the information should be the primary method of initiating a criminal charge, unless the defendant asks for a grand jury. The committee also supported adoption of a provision that would allow for either a preliminary hearing or grand jury to establish probable cause; require the prosecutor to provide exculpatory evidence to a grand jury; and allow witnesses in front of the grand jury to have counsel with them.

Endnotes

¹ The Fifth Amendment to the U.S. Constitution provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

² Fed. R. of Crim. P. 6.

³ Beale, Sarah, et al., Grand Jury Law & Practice 1.2.

⁴ Ohio Const., Art. I, Sec. 10.

⁵ Beale, *supra*, 1.7.

⁶ Report of the Judiciary Committee of the House of Representatives on recommending the passage of the bill to provide for the trial of offenses upon information, Michigan House Document No. 4 (1859); Michigan House Journal (1859), 237; Michigan Senate Journal (1859), 567; Laws of Michigan (1859), No. 138, sec. 1, 7, as described in:

Younger, Richard D., *The Grand Jury Under Attack, Part I*, 46 J. Crim. L. Criminology & Police Sci. 26 (1955-56), pp. 35-36, available at:

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4344&context=jclc>, accessed July 1, 2015.

⁷ Recently, after the failure of grand juries to indict for the deaths of Eric Gardner and Michael Brown, there was public outcry that grand juries were archaic and serve no practical purpose. *See, e.g.*, Hazzard Corbell, LaDoris, “Grand Juries Should Be Abolished,” *Slate*, Dec. 9, 2014. Web. Available at:

http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_gardner_and_michael_brown.html, accessed July 1, 2015.

⁸ Kramer, Marcia and Frank Lombardi, “New top state judge: Abolish grand juries & let us decide,” *New York Daily News*, Jan. 31, 1985, p. 3. Available at: <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208>, accessed June 30, 2015.

⁹ *See* Decker, John F., *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L.Rev. 341 (2005), available at: <http://adams.law.ou.edu/olr/articles/vol58/decker583.pdf>, accessed July 1, 2015;

Washburn, Kevin K., *Restoring the Grand Jury*, 76 Fordham L.Rev. 2333 (2008), available at: <http://www.law.virginia.edu/pdf/workshops/0708/washburn.pdf>, accessed July 1, 2015;

Leipold, Andrew D., *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L.Rev. 260 (1995), available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2544&context=clr>, accessed July 1, 2015.

¹⁰ Simmons, Ric, *Re-Examining the Grand Jury: Is there Room for Democracy in the Criminal System?* 82 B.U. L.Rev. 1 (2002).

¹¹ *Id.*, at 27.

¹² *See* Beale, *supra*, at 8.2 (Pennsylvania has a unique system of allowing common pleas courts to replace the grand jury with prosecution by information at the permission of the state’s supreme court, with currently all lower courts choosing the information system.) Available at: <http://www.courts.phila.gov/pdf/report/ri/Grand-Jury-Subcommittee-Report.pdf>, accessed July 1, 2015.

¹³ Matthews, Jason K., *The Evolution of Connecticut’s Grand Jury System*, OLR Research Report, 2002-R-0088, Jan. 18, 2002. Available at: <http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0088.htm>, accessed July 1, 2015.

¹⁴ Professor James R. Acker argues that grand juries should be required for all possible death sentence cases to lower the chances of arbitrary uses of the punishment. *See* Acker, James R., *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisprudence of Death*, 21 Pac. L.J. 31 (1989).

¹⁵ Brenner, Susan & Lori Shaw, “Federal Grand Jury,” Web. Last modified Nov. 17, 2006. <http://campus.udayton.edu/~grandjur/stategj/abolish.htm>, accessed July 1, 2015.

¹⁶ Ohio Constitutional Revision Commission, Proceedings of the Grand Jury and Civil Trial Jury Committee, Volume 10, January 23, 1976, pp. 5245 et seq.

ATTACHMENT A**Ohio Revised Code Chapter 2939: GRAND JURIES****2939.01 Grand jury definitions.**

The definition of "magistrate" set forth in section 2931.01 of the Revised Code applies to Chapter 2939. of the Revised Code.

Effective Date: 10-01-1953

2939.02 Grand jury selection and composition.

Grand juries shall consist of fifteen persons who satisfy the qualifications of a juror specified in section 2313.17 of the Revised Code. Persons to serve as grand jurors in the court of common pleas of each county shall be selected from the persons whose names are contained in the annual jury list.

At the time of the selection of the persons who are to constitute the grand jury, the commissioners of jurors shall randomly draw from the annual jury list the names of not fewer than twenty-five persons. The first fifteen persons whose names are drawn shall constitute the grand jury, if they can be located and served by the sheriff, and if they are not excused by the court or a judge of the court. If any of the first fifteen persons whose names are so drawn are not located or are unable to serve and are for that reason excused by the court or by a judge of the court, whose duty it is to supervise the impaneling of the grand jury, the judge shall then designate the person whose name next appears on the list of persons drawn, to serve in the place of the person not found or excused and shall so continue to substitute the names of the persons drawn in the order in which they were drawn, to fill all vacancies resulting from persons not being found or having been excused by the court or the judge of the court, until the necessary fifteen persons are selected to make up the grand jury. If all of the names appearing on the list of persons drawn are exhausted before the grand jury is complete, the judge shall order the commissioners of jurors to draw such additional names as the judge determines, and shall proceed to fill the vacancies from those names in the order in which they are drawn.

The judge of the court of common pleas may select any person who satisfies the qualifications of a juror and whose name is not included in the annual jury list to preside as foreperson of the grand jury, in which event the grand jury shall consist of the foreperson so selected and fourteen additional grand jurors selected from the annual jury list.

Amended by 129th General Assembly File No.81, HB 268, §1, eff. 5/22/2012.

Effective Date: 10-01-1984

2939.03 Grand juror drawing, notification, exemptions.

Except for a foreperson selected by the judge of the court of common pleas under section 2939.02 of the Revised Code, a grand jury is drawn and notified in the same manner as other jurors are drawn and notified under Chapter 2313. of the Revised Code. Grand jurors so drawn and notified are not entitled to an exemption for any reason but may be excused from service or have their service postponed for the same reasons and in the same manner as other jurors under that chapter and not otherwise. Grand jurors are subject to the same fines and penalties for nonattendance and otherwise as are other jurors under that chapter. The duties and the powers of courts of common pleas, clerks of courts of common pleas, and commissioners of jurors in regard to grand jurors in all respects are the same as in regard to other jurors.

*Amended by 129th General Assembly File No.81, HB 268, §1, eff. 5/22/2012.
Effective Date: 04-16-1998*

2939.031 Additional or alternate jurors.

When it appears to the judge impaneling a grand jury that the inquiry is likely to be protracted, or upon direction of the judge, an additional or alternate juror shall be selected in the same manner as the regular jurors in the inquiry are selected. The additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings, shall attend the inquiry at all times and shall obey all orders and admonitions of the court or foreman. When the jurors are ordered kept together, the alternate juror shall be kept with them. The additional or alternate juror shall be liable as a regular juror for failure to attend the inquiry or to obey any order or admonition of the court or foreman. He shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the bill to the foreman.

If before the final submission of the bill to the jury, a juror dies or is discharged by the judge or foreman due to incapacity, absence, or disqualification of such juror, the additional or alternate juror, upon order of the judge or foreman, shall become one of the jury and serve in all respects as though selected as an original juror during the absence or incapacity of an original juror.

Effective Date: 10-14-1953

2939.04 Compensation - prohibition of repeated service in same term.

The compensation of grand jurors shall be fixed by resolution of the board of county commissioners, not to exceed forty dollars for each day's attendance, payable out of the county treasury. Except in counties of less than one hundred thousand population according to the last federal census, in which counties the judge of the court of common pleas shall make rules in the judge's own county applicable to subsequent grand juror and petit juror service, a person who has served as a grand juror at a term of court is prohibited from serving again, either as a grand juror or petit juror, in that jury year in which the service is rendered or in the next jury year. The person is entitled to a certificate of excuse or postponement in the same manner as a petit juror.

The court of common pleas may order the drawing of a special jury to sit at any time public business requires it.

Effective Date: 04-16-1998

2939.05 [Repealed].

Effective Date: 09-11-1961

2939.06 Oath or affirmation of grand jurors.

(A) When a grand jury is impaneled, the court of common pleas shall appoint one of the members of the grand jury as foreperson, and shall administer, or cause to be administered, to the jurors an oath in the following words to which the jurors shall respond "I do solemnly swear" or "I do solemnly affirm" :

"Do you solemnly swear or affirm that you will diligently inquire into and carefully deliberate all matters that shall come to your attention concerning this service; and do you solemnly swear or affirm that you will keep secret all proceedings of the grand jury unless you are required in a court of justice to make disclosure; and do you solemnly swear or affirm that you will indict no person through malice, hatred, or ill will; and do you solemnly swear or affirm that you will not leave unindicted any person through fear, favor, or affection, or for any reward or hope thereof; and do you solemnly swear or affirm that in all your deliberations you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, as you shall answer unto God or under the penalties of perjury?"

(B) If, on or after the effective date of this amendment, a court impaneling a grand jury uses the grand juror's oath that was in effect prior to the effective date of this amendment instead of the oath set forth in division (A) of this section, the court's use of the former oath does not invalidate or affect the validity of the impanelment of the grand jury, any proceeding, inquiry, or presentation of the grand jury, any indictment or other document found, returned, or issued by the grand jury, or any other action taken by the grand jury.

Effective Date: 03-24-2003

2939.07 Charge of jurors by judge.

The grand jurors, after being sworn, shall be charged as to their duty by the judge of the court of common pleas, who shall call their attention particularly to the obligation of secrecy which their oaths impose, and explain to them the law applicable to such matters as may be brought before them.

Effective Date: 10-01-1953

2939.08 Grand jury duty after charge.

After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county.

Effective Date: 10-01-1953

2939.09 Clerk - minutes.

The grand jury may appoint one of its members to be its clerk to preserve the minutes of its proceedings and actions in all cases pending before it. Such minutes shall be delivered to the prosecuting attorney before the jury is discharged.

Effective Date: 10-01-1953

2939.10 Prosecuting attorney to have access to grand jury.

The prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required. The prosecuting attorney may interrogate witnesses before the grand jury when the grand jury or the prosecuting attorney finds it necessary, but no person other than the grand jurors shall be permitted to remain in the room with the jurors while the jurors are expressing their views or giving their votes on a matter before them. In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly, or which a special prosecutor is required by section 177.03 of the Revised Code to investigate and prosecute, the attorney general or the special prosecutor, respectively, shall have and exercise any or all rights, privileges, and powers of prosecuting attorneys, and any assistant or special counsel designated by the attorney general or special prosecutor for that purpose, has the same authority. Proceedings in relation to such matters or cases are under the exclusive supervision and control of the attorney general or the special prosecutor.

Effective Date: 09-03-1986

2939.11 Official reporter.

The official reporter of the county, or any reporter designated by the court of common pleas, at the request of the prosecuting attorney, or any such reporter designated by the attorney general in investigations conducted by the attorney general, may take notes of or electronically record testimony before the grand jury, and furnish a transcript to the prosecuting attorney or the attorney general, and to no other person. The reporter shall withdraw from the jury room before the jurors begin to express their views or take their vote on the matter before them. Such reporter shall take an oath to be administered by the judge after the grand jury is sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to the grand jury, prosecuting attorney, or attorney general, unless called upon in court to make disclosures.

*Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.
Effective Date: 10-01-1953*

2939.12 Clerk of court to issue subpoenas for witnesses.

When required by the grand jury, prosecuting attorney, or judge of the court of common pleas, the clerk of the court of common pleas shall issue subpoenas and other process to any county to bring witnesses to testify before such jury.

Effective Date: 10-01-1953

2939.121 Employer may not penalize employee for being subpoenaed before grand jury.

No employer shall discharge or terminate from employment, threaten to discharge or terminate from employment, or otherwise punish or penalize any employee because of time lost from regular employment as a result of the employee's attendance at any proceeding before a grand jury pursuant to a subpoena. This section generally does not require and shall not be construed to require an employer to pay an employee for time lost resulting from attendance at any grand jury proceeding. However, if an employee is subpoenaed to appear at a grand jury proceeding and the proceeding pertains to an offense against the employer or an offense involving the employee during the course of his employment, the employer shall not decrease or withhold the employee's pay for any time lost as a result of compliance with the subpoena. Any employer who knowingly violates this section is in contempt of court.

Effective Date: 09-26-1984

2939.13 Oath of witnesses.

Before a witness is examined by the grand jury, an oath shall be administered to him by the foreman of the grand jury or by the judge of the court of common pleas or the clerk of the court of common pleas, truly to testify of such matters and things as may lawfully be inquired of before such jury. A certificate that the oath has been administered shall be indorsed on the subpoena of the witness or otherwise made by the foreman of the grand jury, judge, or clerk certifying the attendance of said witness to the clerk of the court.

Effective Date: 10-01-1953

2939.14 Witness refusing to testify.

If a witness before a grand jury refuses to answer an interrogatory, the court of common pleas shall be informed in writing, in which such interrogatory shall be stated, with the excuse for the refusal given by the witness. The court shall determine whether the witness is required to answer, and the grand jury shall be forthwith informed of such decision.

Effective Date: 10-01-1953

2939.15 Contempt proceedings against witness refusing to testify.

If the court of common pleas determines that a witness before a grand jury is required to answer an interrogatory and such witness persists in his refusal, he shall be brought before the court, which shall proceed in a like manner as if such witness had been interrogated and refused to answer in open court.

Effective Date: 10-01-1953

2939.16 Sickness, death, discharge, or nonattendance of a grand juror.

In case of sickness, death, discharge, or nonattendance of a grand juror after the grand jury is sworn, the court may cause another to be sworn in his stead. The court shall charge such juror as required by section 2939.07 of the Revised Code.

Effective Date: 10-01-1953

2939.17 Summoning new grand jury - immunity of witnesses.

After the grand jury is discharged, the court of common pleas, when necessary, may order the drawing and impaneling of a new grand jury, which shall be summoned and returned as provided by section 2939.03 of the Revised Code and shall be sworn and proceed in the manner provided by sections 2939.06 to 2939.24, inclusive, of the Revised Code. Whenever the governor or general assembly directs the attorney general to conduct any investigation or prosecution, the court of common pleas or any judge thereof, on written request of the attorney general, shall order a special grand jury to be summoned, and such special grand jury may be called and discharge its duties either before, during, or after any session of the regular grand jury, and its proceedings shall be independent of the proceedings of the regular grand jury but of the same force and effect.

Whenever a witness is necessary to a full investigation by the attorney general under this section, or to secure or successfully maintain and conclude a prosecution arising out of any such investigation, the judge of the court of common pleas may grant to such witness immunity from any prosecution based on the testimony or other evidence given by the witness in the course of the investigation or prosecution other than a prosecution for perjury in giving such testimony or evidence.

Effective Date: 09-16-1970

2939.18 Secrecy of indictment.

No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person not in custody or under bail, before such indictment is filed and the case docketed, except by the issue of process.

Effective Date: 10-01-1953

2939.19 Testimony of grand juror.

No grand juror may state or testify in court in what manner any member of the grand jury voted or what opinion was expressed by any juror on any question before the grand jury.

Effective Date: 10-01-1953

2939.20 Concurrence by twelve grand jurors for indictment.

At least twelve of the grand jurors must concur in the finding of an indictment. When so found, the foreman shall indorse on such indictment the words "A true bill" and subscribe his name as foreman.

Effective Date: 10-01-1953

2939.21 Quarterly visits to county jail.

Once every three months, the grand jurors shall visit the county jail, examine its condition, and inquire into the discipline and treatment of the prisoners, their habits, diet, and accommodations. They shall report on these matters to the court of common pleas in writing. The clerk of the court of common pleas shall forward a copy of the report to the department of rehabilitation and correction.

Effective Date: 07-06-1982

2939.22 Filing indictments with clerk of court of common pleas.

Indictments found by a grand jury shall be presented by the foreman to the court of common pleas, and filed with the clerk of the court of common pleas, who shall indorse thereon the date of such filing and enter each case upon the appearance docket and the trial docket of the term when the persons indicted have been arrested. The court shall assign such indictments for trial under section 2945.02 of the Revised Code, and recognizances of defendants and witnesses shall be taken for their appearance in court. When a case is continued to the next term of court, such recognizance shall require the appearance of the defendants and witnesses at a time designated by the court. Secret indictments shall not be docketed by name until after the apprehension of the accused.

Effective Date: 10-01-1953

2939.23 No indictment to be reported.

If an indictment is not found by the grand jury, against an accused who has been held to answer, such fact shall be reported by the foreman to the court of common pleas.

Effective Date: 10-01-1953

2939.24 Discharge of indicted person when no indictment returned.

If a person held in jail charged with an indictable offense is not indicted at the term of court at which he is held to answer, he shall be discharged unless:

- (A) He was committed on such charge after the discharge of the grand jury.
- (B) The transcript has not been filed.
- (C) There is not sufficient time at such term of court to investigate said cause.
- (D) The grand jury, for good cause, continues the hearing of said charge until the next term of court.
- (E) It appears to the court of common pleas that a witness for the state has been enticed or kept away, detained, or prevented from attending court by sickness or unavoidable accident.

Effective Date: 10-01-1953

2939.25 Attendance of witnesses at foreign grand jury proceedings definitions.

As used in sections 2939.25 to 2939.29, inclusive, of the Revised Code:

- (A) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.
- (B) "State" includes any territory of the United States and District of Columbia.
- (C) "Summons" includes a subpoena, order, or other notice requiring the appearance of a witness.

Effective Date: 10-01-1953

2939.26 Compelling witnesses to attend by foreign courts.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in this state in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing such judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will

give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate is prima-facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing. If the judge at the hearing is satisfied of the desirability of such custody and delivery, for which determination the certificate is prima-facie proof of such desirability, he may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as provided in this section, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Effective Date: 10-01-1953

2939.27 Certificate specifying number of days witness will be required.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Effective Date: 10-01-1953

2939.28 Witness not subject to arrest or the service of process.

If a person comes into this state in obedience to a summons directing him to attend and testify in this state, while in this state pursuant to such summons he is not subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, while so passing through this state he is not subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Effective Date: 10-01-1953

2939.29 Construction and interpretation.

Sections 2939.25 to 2939.28, inclusive, of the Revised Code shall be so interpreted and construed as to effectuate their general purpose, to make the law of this state uniform with the law of other states which enact similar uniform legislation.

Effective Date: 10-01-1953

ATTACHMENT B**50 State Survey of the Use of Grand Juries****ALABAMA**

Article I, Section 8

That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established.

ALASKA

Article I, Section 8

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

ARKANSAS

Article 2, Section 8

No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger * * *.

ARIZONA

Article 6, Section 17

The superior court shall be open at all times, except on nonjudicial days, for the determination of non-jury civil cases and the transaction of business. For the determination of civil causes and matters in which a jury demand has been entered, and for the trial of criminal causes, a trial jury shall be drawn and summoned from the body of the county, as provided by law. The right of jury

trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause or by the parties with the consent of the court in any criminal cause. Grand juries shall be drawn and summoned only by order of the superior court.

CALIFORNIA

Article I, Section 14

Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.

Section 23

One or more grand juries shall be drawn and summoned at least once a year in each county.

CONNECTICUT

Article I, Section 8

No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

COLORADO

Article I, Section 8

Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information.

Section 23

The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons.

DELAWARE

Article I, Section 8

No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger * * *.

FLORIDA

Article I, Section 15

No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

GEORGIA

Article I, Section 1, Paragraph (c)

The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors

HAWAII

Article I, Section 11

Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee.

IDAHO

Article I, Section 8

No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of public prosecutor.

ILLINOIS

Article I, Section 7

No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use. No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.

INDIANA

Article 7, Section 17

The General Assembly may modify, or abolish, the grand jury system.

IOWA

Article I, Section 11

All offences less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offence, unless on presentment or indictment by a grand jury, except in cases arising in the army, or navy, or in the militia, when in actual service, in time of war or public danger. The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of a grand jury.

KANSAS

[No constitutional requirement. Grand juries permitted by statute.]

KENTUCKY

Section 12

No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

LOUISIANA

Article V, Section 34(A)

There shall be a grand jury or grand juries in each parish, whose qualifications, duties, and responsibilities shall be provided by law. The secrecy of the proceedings, including the identity of witnesses, shall be provided by law. (B) Right to Counsel. The legislature may establish by law terms and conditions under which a witness may have the right to the advice of counsel while testifying before the grand jury.

MAINE

Article I, Section 7

No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offenses, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger.

MARYLAND

[No requirement in constitution. Requirement found in statute.]

MASSACHUSETTS

[No requirement in constitution. Requirement found in statute.]

MISSOURI

Article I, Section 16

That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: Provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime; and that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.

MICHIGAN

[Abolished the constitutional requirement for a grand jury in 1859. Grand jury permitted by statute.]

MINNESOTA

[Abolished the constitutional requirement of a grand jury in 1904. Grand jury permitted by statute.]

MISSISSIPPI

Article 3, Section 26

Notwithstanding any other provisions of this Constitution, the Legislature may enact laws establishing a state grand jury with the authority to return indictments regardless of the county where the crime was committed. The subject matter jurisdiction of a state grand jury is limited to criminal violations of the Mississippi Uniform Controlled Substances Law or any other crime involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a violation of the Mississippi Uniform Controlled Substances Law or a crime involving narcotics, dangerous drugs or controlled substances if the crime occurs within more than one (1) circuit court district of the state or transpires or has significance in more than one (1) circuit court district of the state. The venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

Section 27

No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

MONTANA

Article II, Section 20

(1) Criminal offenses within the jurisdiction of any court inferior to the district court shall be prosecuted by complaint. All criminal actions in district court, except those on appeal, shall be prosecuted either by information, after examination and commitment by a magistrate or after leave granted by the court, or by indictment without such examination, commitment or leave. (2)

A grand jury shall consist of eleven persons, of whom eight must concur to find an indictment. A grand jury shall be drawn and summoned only at the discretion and order of the district judge.

NEBRASKA

Article I, Section 10

No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; Provided, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system.

NEVADA

Article 1, Section 8(1)

No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature) except on presentment or indictment of the grand jury classic language.

NEW HAMPSHIRE

[No constitutional requirement. Grand jury permitted by statute.]

NEW JERSEY

Article I, Section 8

No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger.

NEW MEXICO

Article II, Section 14

No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of

war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

NEW YORK

Article I, Section 6

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her

official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law.

NORTH CAROLINA

Article I, Section 22

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

NORTH DAKOTA

Article I, Section 10

Until otherwise provided by law, no person, shall, for a felony be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases offenses shall be prosecuted criminally by indictment or information. The legislature may change, regulate, or abolish the grand jury system.

OHIO

Article I, Section 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.

OKLAHOMA

Section II-17

No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint

Section II-18

A grand jury shall be composed of twelve (12) persons, any nine (9) of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a district judge upon his own motion; or such grand jury shall be ordered by a district judge upon the filing of a petition therefor signed by qualified electors of the county equal to the number of signatures required to propose legislation by a county by initiative petition as provided in Section 5 of Article V of the Oklahoma Constitution, with the minimum number of required signatures being five hundred (500) and the maximum being five thousand (5,000); and further providing that in any calendar year in which a grand jury has been convened pursuant to a petition therefor, then any subsequent petition filed during the same calendar year shall require double the minimum number of signatures as were required hereunder for the first petition; or such grand jury shall be ordered convened upon the filing of a verified application by the Attorney General of the State of Oklahoma who shall have authority to conduct the grand jury in investigating crimes which are alleged to have been committed in said county or involving multicounty criminal activities; when so assembled such grand jury shall have power to inquire into and return indictments for all character and grades of crime. All other provisions of the Constitution or the laws of this state in conflict with the provisions of this constitutional amendment are hereby expressly repealed.

The Legislature shall enact laws to prevent corruption in making, filing, circulating and submitting petitions calling for convening a grand jury.

OREGON

Article VII, Section 5d (3)

Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

PENNSYLVANIA

Article I, Section 10

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia,

when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law.

RHODE ISLAND

Article I, Section 7

Except in cases of impeachment, or in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, no person shall be held to answer for any offense which is punishable by death or by imprisonment for life unless on presentment or indictment by a grand jury, and no person shall be held to answer for any other felony unless on presentment or indictment by a grand jury or on information in writing signed by the attorney-general or one of the attorney-general's designated assistants, as the general assembly may provide and in accordance with procedures enacted by the general assembly. The general assembly may authorize the impaneling of grand juries with authority to indict for offenses committed any place within the state and it may provide that more than one grand jury may sit simultaneously within a county. No person shall be subject for the same offense to be twice put in jeopardy. Nothing contained in this article shall be construed as in any wise impairing the inherent common law powers of the grand jury.

SOUTH CAROLINA

Article I, Section 11

No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. The General Assembly may provide for the waiver of an indictment by the accused. Nothing contained in this Constitution is deemed to limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

SOUTH DAKOTA

Article 6, Section 10

No person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor, except in cases of impeachment, in cases cognizable by county courts, by justices of the peace, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: provided, that the grand jury may be modified or abolished by law.

TENNESSEE

Article I, Section 14

That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

TEXAS

Article I, Section 10

* * * [N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

UTAH

Article I, Section 13

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

VERMONT

Chapter II, Section 39

All prosecutions shall commence, By the authority of the State of Vermont . All Indictments shall conclude with these words, against the peace and dignity of the State . And all fines shall be proportioned to the offences.

VIRGINIA

[No requirement in constitution. Requirement found in statute.]

WASHINGTON

Article I, Section 25

Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Section 26

No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

WEST VIRGINIA

Article III, Section 3-4

No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury.

WISCONSIN

Article I, Section 7

In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

WYOMING

Article I, Section 9

The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law. A grand jury may consist of twelve (12) persons, any nine (9) of whom concurring may find an indictment. The legislature may change, regulate or abolish the grand jury system.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice-chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice
Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan Becker, Student Intern

DATE: January 26, 2016

RE: Supplemental Memorandum Regarding the Use of
Grand Juries in the United States

At its July 2015 meeting, the Judicial Branch and Administration of Justice Committee discussed issues surrounding the use of the grand jury in criminal prosecutions across the United States. This memorandum is intended to provide supplemental research on that topic.

Preliminary Hearing

In 27 states, only an information filed by the prosecutor, with the opportunity for a preliminary hearing, is necessary to charge a person with a crime.¹ However, many of these states also allow a prosecutor to choose between presenting evidence to a grand jury and using an information with a preliminary hearing (though the information filing is far more common). In most of these states, a defendant can be denied a preliminary hearing if they have been indicted by a grand jury. *See, e.g., Martinez v. State*, 423 P.2d 700 (Alaska 1967). A grand jury may be preferred by a prosecutor for “saving time, limiting defense discovery, or reducing the number of times the victim must testify publicly.”² States with both an indictment and an information process may not systematically use one against certain classes of people. For instance, a prosecutor cannot choose an indictment over an information on the basis of a classification such as race, sex, or religion. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

¹ Sara S. Beale et al., *Grand Jury Law & Practice 2d*, 8.2.

² *Id.*

Constitutionally, the accused has a right to have either a grand jury or a judge establish probable cause before a case may go to trial. “[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.” *Hurtado v. California*, 110 U.S. 516, 538 (1884). The United States Supreme Court has ruled that a defendant has a constitutionally-protected right to have a preliminary hearing after the filing of an information. It also concluded that since the preliminary hearing only establishes probable cause, the accused is not entitled to the assistance of counsel. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Grand Jury Legal Counsel

There has been a small but vocal call for the appointment of legal counsel to serve as an independent advisor to grand juries. “The most important reform would be to give the grand jury an independent legal adviser, selected from outside the prosecutor’s office.”³ Currently, Hawaii is the only state to provide independent legal counsel to the grand jury, requiring it through a constitutional provision that reads:

Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

Haw. Const. art. I, § 11.

University of Dayton Professor Thaddeus Hoffmeister notes that Hawaii’s grand jury legal advisors consider their role to be highly effective in ensuring grand juries can make independent decisions.⁴ Susan W. Brenner, also a University of Dayton law professor, suggests that “Hawaii’s unique system is a solid model for federal grand juries and states wishing to re-establish the legitimacy and independence of grand juries.”⁵ Another writer considers the short period for serving on the jury as ensuring the advisor does not become “an entrenched party in the system.”⁶ The provision does not require the independent counsel to be present throughout the entire proceeding. *State v. Kahlbaun*, 64 Haw. 197, 638 P.2d 309 (1981). The purpose of

³ Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L.Rev. 1, 65 (2004).

⁴ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. Crim. L. & Criminology 1171 (2008).

⁵ Susan W. Brenner, *Forum: Faults, Fallacies, and the Future of Our Criminal Justice System: The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol’y & L. 67, 95 (1995).

⁶ Note, *What Do You Do With a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 S. Cal. L.Rev. 617, 637 (1998).



independent counsel is to provide a service for the grand jury, not the accused. *State v. Hehr*, 63 Haw. 640, 633 P.2d 545 (1981).

The only effort to provide counsel to a federal grand jury was made by then Senator Richard Nixon, who sought to give investigatory grand juries special counsel from outside the United States Attorney's Office.⁷ Nixon likely was thinking about the successful grand jury investigation into Alger Hiss, an investigation Nixon helped necessitate as a Congressman on the House Committee on Un-American Activities. The bill died in committee.⁸

Evidentiary Standards

There have been calls in the academic community for states to adopt tougher evidentiary standards than is required for federal grand juries. Professor John F. Decker argues for witnesses to have the right to counsel, the requirement of allowing exculpatory evidence, the exclusion of illegally or improperly obtained evidence, admonishments, the right for witnesses to appear, and the right to transcripts.⁹

Standards for protecting the accused that go beyond what is constitutionally required likely will be allowed by the courts. Ohio courts recognize the need for statutes that implement the constitutional guarantee of a speedy trial if they represent “a rational effort to enforce the constitutional guarantee * * *.” *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980). Courts also recognize that statutes can offer stronger protections to defendants than what is constitutionally required. *See, e.g., State v. Jones*, 37 Ohio St.2d 21, 24, 306 N.E.2d 409, 411, fn. 1 (1974) (R.C. 2935.20 offers the accused a stronger right to counsel than what is guaranteed by the federal Constitution). Any statute that excludes illegally or improperly obtained evidence, allows exculpatory evidence, and allows witnesses to have the right to counsel are likely to be seen as constitutional. Some states already require some exculpatory evidence to be given to the jury. *See, e.g., State v. Hogan*, 144 N.J. 216, 676 A.2d 533 (New Jersey 1996).

New York Grand Jury Procedure

The New York grand jury system offers some of the strongest protections for persons subject to grand jury investigations and can serve as an example for Ohio. Moritz College of Law Professor Ric Simmons finds New York grand juries to be “active and engaged, and they critically evaluate the cases that come before them.”¹⁰ Simmons calls for other states to follow the New York model by stopping prosecutors from re-presentation of the case if a grand jury investigation does not result in an indictment. He further advocates the New York practice of

⁷ Note, *Powers of Federal Grand Juries*, 4 Stan. L.Rev. 68, 75 (1951).

⁸ Note, *Reviving Federal Grand Jury Presentments*, 103 Yale L.J. 1333, 1345 n.60 (1999); Susan W. Brenner & Lori E. Shaw, *2 Fed. Grand Jury: A Guide to Law and Practice* (Supp. 2004), § 27:6.

⁹ John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L.Rev. 341 (2005).

¹⁰ Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L.Rev 1, 45 (2002).



banning hearsay testimony, allowing a suspect to testify in front of the grand jury, and providing judicial review of indictments, thus giving courts the power to reverse convictions if the indictment process was faulty. One commentator describes the New York process as relying on courts' willingness to be aggressive in protecting defendants' due process rights in the face of legislative silence on the matter.¹¹

Though these standards may appear tough, New York courts recognize that “[a] Grand Jury proceeding is not a ‘mini trial’ but a proceeding convened primarily to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution.” *People v. Lancaster*, 69 N.Y.2d 20, 30, 503 N.E.2d 990 (1986) [internal citations and quotation marks removed]. Nevertheless, in the New York grand jury, as in other states, there is not the back and forth of a trial, nor a requirement to call every possible witness. See *People v. Thompson*, 22 N.Y.3d 687, 8 N.E.3d 803 (2014).

Police Action and the Grand Jury

California currently has pending a bill requiring the Attorney General to appoint a special prosecutor to investigate all use of deadly force by police officers, giving the sole discretion to the prosecutor to file charges.¹² The bill, AB-86 as introduced by Democrat Assemblymember Kevin McCarty, is currently held under submission in committee.

In Ohio, however, the accused has a constitutional right to a grand jury. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985). Unless the accused waives his right to a grand jury, he is entitled to have the charges be brought forth in front of one. *Ex parte Stephens*, 171 Ohio St. 323, 170 N.E.2d 735 (1960).

New York Judge Aaron Short offers a different solution. He suggests that a judge should oversee a grand jury that is hearing a case against police officers and have the transcripts of those hearings to be open to the public. However, this proposal has not been adopted by the legislature.¹³

¹¹ Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 Pace L.Rev. 41, 92 (1994).

¹² Melanie Mason, “Tired of prayer vigils’: California debates 20 bills aimed at police force,” *Los Angeles Times* (May 3, 2015), <http://www.latimes.com/local/politics/la-me-pol-police-force-legislature-20150504-story.html> (last visited Jan. 27, 2016). Text of bill available at: http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB86 (last visited Jan. 27, 2016).

¹³ Aaron Short, “NY chief judge proposes sweeping grand jury reforms.” *New York Post*, (Feb. 17, 2015), available at <http://nypost.com/2015/02/17/ny-chief-judge-proposes-sweeping-grand-jury-reforms/> (last visited Jan. 27, 2016).





OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice-chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice
Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan Becker, Student Intern

DATE: January 25, 2016

RE: Overview of Portions of Article I, Section 10

Introduction

Recently, the Judicial Branch and Administration of Justice Committee has been addressing a portion of Article I, Section 10 as it relates to the use of grand juries in criminal investigations. As the committee is aware, Section 10 contains other rights of accused individuals. This memorandum provides a brief discussion of these other aspects of Section 10 to allow the committee to consider next steps in its review of Section 10.

Adopted in 1851, Section 10 is a combination of Sections 10 and 11 of Article VIII of the 1802 constitution. Section 10 reflects many of the rights found in the Fifth and Sixth Amendments to the United States Constitution, and usually is interpreted to have the same meaning.¹

Section 10 provides, in full:

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof

¹ See generally Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 100 (2nd prtg. 2011).

necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

By comparison, the Fifth Amendment to the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Discussion

For ease of review, the various component parts of Section 10 are discussed below as separate concepts.

- *In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel*



The accused has the right to counsel in cases where there is possibility of incarceration with conviction. This right is also found in the Sixth Amendment of the U.S. Constitution. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court ruled that this right applies to the states through the Fourteenth Amendment. The Ohio Supreme Court recognized this in *State v. Gibson*, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976), and Ohio courts analyze the right to counsel through the same constitutional lens. See, e.g., *State v. Ebersole*, 107 Ohio App.3d 288, 668 N.E.2d 934 (3rd Dist.1995). Ohio also has statutes offering more-detailed protections to the accused than those suggested by the state constitutional right. See R.C. 2935.14, R.C. 2935.20.

- *To demand the nature and cause of the accusation against him; and to have a copy thereof*

Modeled after the Sixth Amendment protection, at the request of the defendant, a copy of the indictment must be presented to him before trial. *Fouts v. State*, 8 Ohio St. 98 (1857). The process for informing the defendant of the accusation is found in statute. See R.C. Chapter 2941. Allegations regarding alleged defects in the service of the indictment must be given before the trial or before the defendant pleads guilty. *Boyer v. Maxwell*, 175 Ohio St. 318, 194 N.E.2d 574 (1963).

- *To meet witnesses face to face*

The accused has the right to confront witnesses against him in trial. The right is similar to the Sixth Amendment right, which was held applicable to the states by *Pointer v. Texas*, 380 U.S. 400 (1965), as part of the incorporation trend started by *Gideon, supra*. The Ohio Supreme Court recently noted that “Section 10, Article I provides no greater right of confrontation than the Sixth Amendment.” *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775 (2010), quoting *State v. Self*, 56 Ohio St.3d 73, 79, 564 N.E.2d 446, 453 (1990). While there is no distinction between the provisions as to who may be confronted, there is a difference between the two provisions as to the manner of confrontation. The Ohio Constitution contains the extra phrase “face to face,” which is not found in the U.S. Constitution. “Face to face” has been interpreted to mean that the defendant may face his accuser “where reasonably possible.” *State v. Storch*, 66 Ohio St.3d 280, 612 N.E.2d 305 (1993) (A child abuse victim may suffer from such harm from testifying “face to face” that his out-of-court statements may be presented as evidence; however, there is a presumption that the child will have to testify).

- *To have compulsory process to procure the attendance of witnesses in his behalf*

The accused has the right to use the court’s powers to require witnesses to appear on his behalf. This right also is found in the Sixth Amendment. A defendant may not call a witness if the witness is only going to assert the Fifth Amendment privilege. *State v. Kirk*, 72 Ohio St.3d 564, 651 N.E.2d 981 (1995), limiting *City of Columbus v. Cooper*, 49 Ohio St.3d 42, 550 N.E.2d 937 (1990). In considering whether a confidential informant must testify for the defendant, the court must weigh the defendant’s right to compulsory process against the government’s interest in confidentiality. *State v. Brown*, 64 Ohio St.3d 649, 597 N.E.2d 510 (1992).



- *Speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed*

The accused has the right to a speedy trial, in front of the public, with an impartial jury from the county where the offense takes place. What constitutes a speedy trial is controlled by statute. See R.C. 2945.71, R.C. 2945.72. Again in this instance, Ohio courts adopt the Sixth Amendment standard based on the concept that the Fourteenth Amendment applies the Bill of Rights to the states. *Klopper v. State of North Carolina*, 386 U.S. 213 (1967).

The courts do not distinguish the federal and state right. *State v. Ladd*, 56 Ohio St.2d 197, 383 N.E.2d 579 (1978). Thus, Ohio courts use the four standards found in the Supreme Court's decision in *Barker v. Wingo*, 407 U.S. 514 (1972) to determine if there has been a violation of this right. That standard involves consideration of the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. Nevertheless, courts will usually only need to consider the statutory requirements for a speedy trial. *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980).

A defendant may waive his right to a speedy trial, but only in writing or made in open court on the record. *State v. King*, 70 Ohio St.3d 158, 637 N.E.2d 903 (1994). A defendant may have his trial moved to a different county if a fair and impartial jury is unlikely to be raised in the county of the alleged crime. *State v. Lundgren* 73 Ohio St.3d 474, 653 N.E.2d 304 (1995).

- *But provision may be made by law for the taking of the deposition by the accused or by the state to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court*

Added in 1912 to explicitly enable the use of depositions in criminal matters, this provision merely gives power to the legislature to write laws for the taking of a deposition and does not require any deposition to be made. *Yunker v. State*, 8 Ohio App. 157 (3rd Dist.1917). The purpose of the provision is to "perpetuate testimony which would not be available at the time of trial." *State v. Anthoulis*, 62 Ohio App. 113, 121, 23 N.E.2d 312, 316 (7th Dist.1939). The right does not limit the ability to take pretrial discovery depositions. *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga Cty.*, 9 Ohio St.2d 159, 224 N.E.2d 906 (1967).

- *No person shall be compelled, in any criminal case, to be a witness against himself*

Part of the Ohio Constitution since 1854, this clause is similar to the 1802 constitution's Article VIII, Section 11. It protects the accused from being forced to testify when the testimony would incriminate him. The self-incrimination protection in Section 10 is "virtually identical" to the U.S. Constitution's Fifth Amendment right. *State v. Evans*, 144 Ohio App.3d 539, 550, 760 N.E.2d 909, 917 (1st Dist.2001). The clause has been interpreted by Ohio courts as being in line with the Fifth Amendment, although the Ohio protection may be more stringent in *Miranda* warning cases than the U.S. Supreme Court has held, requiring even probation officers to explain



the right against self-incrimination in certain circumstances. *State v. Roberts*, 32 Ohio St.3d 225, 231, 513 N.E.2d 720, 725 (1987). *See also, State v. Gallagher*, 46 Ohio St.2d 225, 348 N.E.2d 336 (1976).

- *But his failure to testify may be considered by the court and jury and may be the subject of comment by counsel*

Because referring to the accused's failure to testify has been held unconstitutional, this portion of Section 10, which generally protects against self-incrimination, warrants closer inspection.

This language was added to the constitution in 1912 because convention delegates were concerned that the rights of criminals had been over-emphasized by the original document.² Thus, they added to Section 10 this clause, as well as adding the right for both the defendant and prosecutor to take depositions. Concern over the clause has arisen because it contradicts U.S. Supreme Court precedent and is probably unenforceable under the Fifth Amendment.

In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court reflected negatively on this type of amendment. California at the time had a constitutional clause similar to Ohio's: "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." In *Griffin*, the prosecutor had included in his closing statement remarks about the defendant's refusal to testify. The Supreme Court held this to be unconstitutional under the Fifth Amendment, applicable to the states through the Fourteenth Amendment. The Court concluded that counsel and judges are unable to comment on the refusal to testify by the defendant, as doing so weakens the defendant's Fifth Amendment privilege against self-incrimination.

Since *Griffin*, Article I, Section 15 of the California Constitution, has been altered. The revised section, adopted in 1974, says only that persons may not "be compelled in a criminal cause to be a witness against themselves."

The Ohio Supreme Court has recognized the supremacy of the *Griffin* decision and now uses the federal standard and its own precedent when deciding if the prosecutor improperly commented on a defendant's refusal to testify. *See, e.g., State v. Lynn*, 5 Ohio St.2d 106, 214 N.E.2d 226 (1966); *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047 (2004); *State v. Webb*, 70 Ohio St.3d 325, 638 N.E. 2d 1023 (1994). *See also* 27 Ohio Jur. 3d Criminal Law: Procedure Sec. 1302. The courts do not mention Section 10's "subject of comment" clause.

Carter v. Kentucky, 450 U.S. 288 (1981) clarified any possible confusion as to whether *Griffin* only applied only to prosecutors by stating that judges could not implicitly disparage the defendant's refusal to testify. In *Carter*, the judge denied the defendant's request that the judge explicitly instruct the jury not to infer guilt by his refusal to testify at trial. The U.S. Supreme

² *Id.* at 106.



Court reversed, holding that a defendant's privilege not to testify means all effort should be made to limit comment on it:

A trial judge has a powerful tool at his disposal to protect the constitutional privilege – the jury instruction – and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Id. at 303.

Carter suggests that neither a judge nor a jury may consider the defendant's failure to testify – or at least that neither a judge nor a jury can be directed to do so by a state's constitution.

The Education and Bill of Rights Committee of the 1970s Ohio Constitutional Revision Commission (1970s Commission) noted that *Griffin* may have voided some of the clause.³ Deciding that *Griffin* only explicitly overruled the aspect of the section permitting counsel to comment on the accused's failure to testify, the committee decided to recommend an alteration to Section 10 that would remove that portion of the clause, based on its conclusion that it “offends the Fifth Amendment right against self-incrimination.”⁴ Because the decision in *Carter* to include judges in the restriction came six years after the Education and Bill of Rights Committee's decision, the focus in the 1970s Commission was mainly on prosecutorial conduct. A research report provided to the committee suggested that the committee should consider removing the whole clause because of *Griffin*.⁵

In its final report, the 1970s Commission recommended removing the phrase “and may be the subject of comment by counsel,” leaving intact “but his failure to testify may be considered by the court and jury.”⁶ Despite this recommendation, there is no indication that any revision to Section 10 was ever proposed to voters.

³ Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 9, Education and Bill of Rights Committee Report, 4395, 4419 (Aug. 14, 1975), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Jan. 25, 2016).

⁴ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Final Report, 34 (June 30, 1977) (“Final Report”), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Jan. 25, 2016).

⁵ Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 9, Education and Bill of Rights Committee Report, *supra*, at 4675.

⁶ Final Report, *supra*, at 32-33.



➤ *No person shall be twice put in jeopardy for the same offense*

This portion of the section mirrors the right promised in the Fifth Amendment to the U.S. Constitution. Again the federal right is available through the Fourteenth Amendment, as held in *Benton v. Maryland*, 395 U.S. 784 (1969), which prohibits a person from being tried twice for the same crime. The test established in *Blockburger v. United States*, 284 U.S. 299 (1932) holds that a defendant can be convicted of two separate crimes if “[e]ach of the offenses requires proof of a different element.” *Id.* at 304. If committing one offense does not require commission of the other offense, the actions are distinguishable and the defendant may be charged with both.

The Ohio Supreme Court follows the *Blockburger* test in successive prosecutions, but in cumulative punishment cases follows the statutory requirements. *State v. Lovejoy*, 79 Ohio St.3d 440, 683 N.E.2d 1112 (1997). “We initially note that the Fifth Amendment’s Double Jeopardy Clause * * * and Ohio’s counterpart are sufficiently similar to warrant consultation of federal jurisprudence when analyzing Ohio’s proscription against placing persons ‘twice * * * in jeopardy for the same offense.’” *State v. Rance*, 85 Ohio St.3d 632, 634, 710 N.E.2d 699, 702 (1999). While the test used in *Rance* was overruled in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (2010), it was for reasons unrelated to the similarity of the Fifth Amendment and the state constitutional provision. The difference between the two opinions was on statutory analysis. R.C. 2941.25, governing when two offenses are allied offenses of similar import and so subject to merger, controls the question of whether separate charges are distinguishable.

In *Johnson*, the Ohio Supreme Court reconsidered *Rance* as being unworkable, holding instead that “the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other * * * . If the multiple offenses *can* be committed by the same conduct, then the court must determine whether offenses *were* committed by the same conduct.” (Emphasis added). *Id.*, 128 Ohio St.3d at 163, 942 N.E.2d at 1070.

Conclusion

As observed by the 1970s Commission, a potential change to Article I, Section 10, would be to recommend removal of the clause allowing a criminal defendant’s failure to testify either to be mentioned by counsel, or to be considered by the court and jury, as this portion of the provision is now recognized as contravening the U.S. Constitution. In addition, the committee may wish to consider potential changes to other aspects of the section, including the grand jury process. The recommendations of the 1970s Commission relating to Article I, Section 10, are attached for the committee’s convenience. Staff is pleased to provide additional research on Article I, Section 10 should the committee require it.



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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

July 14

September 8

October 13

November 10

December 8