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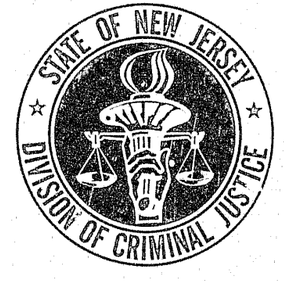

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* ALTERING THE ROLE OF THE GRAND JURY: PROSECUTION BY INFORMATION AND THE GRAND JURY'S RESIDUAL FUNCTION *

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This article represents the culmination of an extensive study concerning the viability of the grand jury in New Jersey. This periodical has already published the results of our initial efforts which reviewed the grand jury system within the perspective of its historical purposes and various alternatives offered by other jurisdictions. Baime, 3 *Crim. Justice Quar.* 114 (1975). This article focuses on the dual charging system which allows for either initiation of prosecution by an information, or in appropriate cases, by the grand jury. As will be demonstrated, this dual system will best protect the interests of justice in New Jersey.

A. Prosecution by Information: A Constitutional Amendment to Permit the Practice.

This article does not adopt a preference for prosecution by indictment or by information. Rather, we stress the need for elimination of duplicative procedures. We stress that adopting a preference for informations will require in-depth empirical studies as to finances, efficiency, and other important aspects of any elemental systemic alteration. In short, the feasibility of such a radical change must involve studies within the expertise of other disciplines. Those types of studies are beyond the scope of this article. Consistent with our goals, however, we will here assume that prosecution by information is desirable in New Jersey. Hence, we will examine generally those characteristics of a system of prosecution by information which we consider optimal. We will note inherent difficulties in the establishment of this type of system, and where possible, we will offer solutions with respect to those problems.

As an initial observation, it must be emphasized that establishment of a prosecution-by-information process for New Jersey requires an amendment to the State Constitution. *State v. Rochester*, 105 N.J.Super. 529, 556-57 (Law Div. 1967), aff'd 54 N.J. 85, 87 (1969). Our Constitution currently provides that "no persons shall be held to answer for a criminal offense, unless on the presentment or indictment of a Grand Jury. . . ." *N.J. Const.* Art. 1, par. 8. Consequently, all "crimes," *i.e.*, misdemeanors and high misdemeanors, may be prosecuted only by indictment.[1] Therefore, constitutional amendment is necessary.[2]

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* This article is derived from a report submitted by the New Jersey Supreme Court Criminal Practice Committee, Joseph P. Lordi, Chairman. Since this report has not been adopted by the Supreme Court it should not be viewed as an official pronouncement of that Court or of the Criminal Practice Committee. This article is also derived from the sources utilized in the Report of the New Jersey Bar Association's Committee On The Grand Jury, Honorable John Francis, Chairman.

1 *E.g.*, *Sawran v. Lennon*, 19 N.J. 606 (1957); *State v. Maier*, 13 N.J. 235 (1953).

2 Constitutional amendment is, of course, a lengthy cumbersome process. Any amendment may be proposed only in the Senate or the General Assembly. *N.J. Const.* Art. IX, par. 1. If "three-fifths of all the members of each of the respective houses" agree to the amendment, it is then submitted to the people. *Id.* If a majority agrees to the amendment, but if a three-fifth majority is lacking, the amendment is to be reintroduced in the next legislative year. *Id.* When an amendment passes the Legislature, it is to be submitted to the people at the next general election, in the manner provided by statute. *N.J. Const.* Art. IX, par. 4. See *N.J.S.A.* 19:3-6. No rejected amendment may be resubmitted before the third general election thereafter. *N.J. Const.* Art. 9, par. 7

The form of a proposed amendment should be sufficiently broad to reflect basic value judgments as to the nature of the information procedures. Two questions which can only be resolved by such judgments are immediately evident. The first is whether all crimes are to be prosecuted on information. The second is whether a judicial determination as to sufficient cause to proceed to trial is to be made in lieu of grand jury indictment.[3] This section discusses the first issue, *i.e.*, whether all crimes are to be prosecuted by information.

This first question presents several possible permutations. A system could be constructed in which the indicting grand jury is completely abolished.[4] Alternatively, a system could be instituted in which both indictments and informations are used. The latter alternative is utilized in the majority of states, and has definite advantages to an "information only" procedure. Although the advantages of retaining indicting grand juries will be discussed later, it must be noted here that such benefits exist, thereby making dual systems preferable, should prosecution by information be found acceptable. Finally, as a last alternative, a few states require that "capital" offenses be prosecuted only on indictment. It should be noted that the New Jersey court rules forbid waiver of indictment in cases where the death penalty is involved. *R.* 3:7-2.

Although the precise reasons for requiring indictments in capital cases are not precisely discernible, a few basic historic justifications are self-evident. There may well have been public sentiment against imposing the death penalty in cases where the "community" had not brought the charges. Also, as our historical analysis has revealed, prosecution by information was frequently a political weapon used against opponents of the King. Since many common law felonies were punishable by death, prosecution by information was a devastating royal weapon. Residual distrust for the mechanism is an historical fact. The royal prosecutor's role in notorious cases initiated by information undoubtedly led to a similar distrust in relation to his American counterpart's role in commencing capital cases. It is therefore hardly surprising that a few jurisdictions even today prefer capital cases to be commenced by "community consensus," albeit *pro forma*. It would appear, however, that the historical rationale has lost its validity. There is currently no death penalty in New Jersey.[5] Should one be reestablished it is unlikely that improper motivations would lead the prosecutor to initiate[6] by information significant capital cases. To the contrary, it is probable that an

3 The Federal Constitution does not require that a judge rule on the propriety of an information. In *Gerstein v. Pugh*, 421 U.S. 103 (1975), the Supreme Court stated that:

> In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U.S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U.S. 586 (1913).

Consequently, the decision to require a magistrate's approval before an information may be prosecuted represents a judgment to grant defendants a greater degree of protection than that afforded by the Federal Constitution.

4 Although no state has yet adopted such a system, it appears that Pennsylvania has moved in that direction. Any County Court of Common Pleas may provide for the institution of a prosecution by information system in its county if the Pennsylvania Supreme Court approves the proposed system. *Pa. Const.* Art. 1, §10 (as amended, November 6, 1973). By statute, no grand jury is to be impanelled for the purpose of considering indictment in any judicial district where prosectuion may be commenced by information. 17 *Pa. Stat. Ann.* §275. See also *Pa. R. Cri. P.* 3(h) (informations replace indictment "in counties in which the indicting grand jury has been abolished"). However, grand juries may still be impanelled to investigate offenses "or for any other purpose as provided by law." *Id.* See generally *Commonwealth v. Webster*, 456 Pa.____, 337 A.2d 914 (1975) (system consonant with requirements of equal protection).

5 *State v. Funicello*, 60 N.J. 60 (1972)..

6 While there is no way of definitely supporting our hypothesis, we would emphasize that this appears to be the case at least in California. Virtually all California prosecutions are initiated by information. See Judicial Council of California, *1974 Report to the Governor and the Legislature*, at p. 43. However, when Sirhan Sirhan was prosecuted for the murder of Senator Robert Kennedy, the Los Angeles County District Attorney sought an indictment rather than an information. See *People v. Sirhan*, ____ Cal. 3d ____, 102 Cal. Rptr. 385, 472 P.2d 1121 (1972). Even so, California statistics for 1972 showed that only 15.9% of all willful homicide cases were prosecuted by indictment. Judicial Counsel Report, *supra* at p. 45.

indictment would be sought in sensitive cases. However, as the number of murders resulting from "street crime" increases, there will be less reason to submit this variety of cases to a grand jury. The prosecution would not be notorious or complicated, and should therefore be processed in a routine manner. That is, they would be prosecuted by information except, as noted, in sensitive cases. The availability of the grand jury should thus make unnecessary a constitutional directive for indictment in even capital cases.

In proposing an amendment to permit prosecution by information, we would suggest maximum flexibility with respect to its provisions. Thus, it would permit prosecution by information in all cases. This would in no way permanently establish an absolutely dual system. Statutes or court rules could remove certain classes of cases from either the indictment or the information procedure.[7] At a later point, we will further discuss the probable need for some guidelines in determining the use of either process. Those guidelines are premised on the nature of the prosecution rather than on the potential punishment as indicative of the procedure to be employed in commencing any given criminal case.

In concluding this section, it must be remembered that the information is not a vehicle for untrammelled prosecutorial discretion. It is a charging device which can safeguard the rights of the citizen as well as, and perhaps even better than, the indictment. Consequently, the terms of the New Jersey amendment should recognize that function. Subtle semantic changes often connote great mutations in meaning. Rather than an amendment which provides that "all crimes may be prosecuted by indictment or information," we believe that the terms of the present provision should be retained, adding only that information constitutes a permissible means of initiating prosecutions. The provision would emphasize the **right** to prosecution by information and would state that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury *or on information filed in the manner prescribed by law.*" Such an amendment would, as suggested, emphasize the information as an important guarantee. It would also allude to other positive prescriptions concerning the manner in which informations are to be filed.

B. Prosecution by Information: A Constitutional Guarantee For a Screening Procedure.

The grand jury's most important theoretical function has been to protect the innocent from unfair accusation. Any system which establishes prosecution by information should offer a substitute protection. The most commonly accepted substitute is the establishment of a preliminary hearing procedure in which a magistrate determines whether or not a case is to proceed to trial.[8] The nature of the magistrate's decision should roughly parallel the task of the grand jury.[9] Consequently, it follows that the magistrate should decide whether or not sufficient cause exists to prosecute

7 As noted, R. 3:7-2 forbids the use of accusations in cases where the death penalty may be imposed. A defendant facing a possible death penalty therefore may not waive indictment. In a dual system of prosecution, accusations might be permitted where a defendant waives either indictment or information. Hence, the court rule would have to be amended to reflect the permissibility of informations but not accusations in capital cases. Also, the present rule is representative of the type of limitation which could be placed on the use of informations if any such limitations are deemed necessary.

8 According to two law professors, ". . . the preliminary hearing may well be the most important procedural mechanism in the administration of criminal justice in this Country . . . ." Graham and Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations," (Pt. 2), 18 U.C.L.A. L. Rev. 916, 953 (1971) (hereinafter cited as Graham and Letwin).

9 *E.g.*, National Advisory Commission Criminal Justice Standards and Goals, *Court*, (1973) Standard 4.4, commentary at p. 75. See, *e.g., Jaffe v. Stone*, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941); *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922). See generally note, "The Preliminary Hearing – An Interesting Analysis," 51 Iowa L. Rev. 164 (1965).

the complaint. While various specific aspects of the preliminary hearing will be discussed in greater detail in subsequent sections, general observations must be noted for purposes of possible constitutional recognition.

There does not appear to be any federal constitutional requirement that a state must provide a preliminary hearing as part of a prosecution-by-information system. All that the Constitution requires is that no person be deprived of liberty or be subjected to any significant restraints without a judicial determination of probable cause. *Gerstein v. Pugh, supra*, 420 U.S. at 120. This determination is akin to issuance of an arrest warrant by a judicial officer.[10] It need not occur in an adversarial or even a formal *ex parte* hearing setting. *Id.* Moreover, *Gerstein v. Pugh* applies only to cases where no arrest warrant has been issued by a judge and where the accused is in pretrial custody. Quite obviously, the probable cause determination may be made in a setting vastly different from those models explored in other jurisdictions.[11] Thus, it appears that a state may proceed against an individual on a prosecutor's information, without judicial approval, and without any hearing whatsoever if the individual has been arrested pursuant to a warrant issued by a judge, or if the individual has not been placed in custody, or if a summary probable cause determination has been made.

Yet, removal of the grand jury's traditional aegis should not leave a void in the criminal process. If the grand jury is not to determine the existence of sufficient cause to prosecute, it seems clearly desirable that some other institution make that determination. It would therefore appear that such a decision should be made by a judge rather than by the prosecutor alone. A judicial finding would obviate the potential for abuse which led to initial American resentment against prosecution by information.[12] Under these circumstances, it seems reasonable to include a check on prosecutorial discretion in the constitutional amendment we have suggested. Additionally, it should be noted that the State Constitution's civil liberty guarantees might mandate a magisterial screening procedure despite the lesser strictures of the Federal Constitution.[13] Any such problem could be avoided by inclusion of a guarantee in the proposed amendment to *N.J. Const.* Art. I, Par. 10.

Finally, as a pragmatic matter, it would seem safe to assume that the public would more readily accept a prosection-by-information system if its enactment included a substitute for the grand jury. Therefore, we recommend that any amendment establishing prosecution by information contain a provision guaranteeing that no case be prosecuted without the express approval of a judge upon a finding of "sufficient cause to proceed."[14]

10 In New Jersey, a clerk or deputy clerk may issue a warrant. R. 3:3-1(a). We question whether such a procedure satisfies the requirements of *Gerstein v. Pugh, supra.*

11 *Gerstein v. Pugh, supra*, 421 U.S. at 122, expressly recognizes that the probable cause determination may be made on an *ex parte* application, without hearing, on submission of documents, even when a suspect is in custody.

12 Even so, there has been criticism of the preliminary hearing on the ground that courts agree with prosecutors as frequently as grand juries. For example, one court lamented that "[i]n most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouncement -- an order holding the defendant for trial . . . ." *People v. Gibbs*, 255 Cal. App.2d 739, 743, 63 Cal. Rptr. 471, 475 (3d Dist. 1967). See Davis, *Discretionary Justice* (1969) at 27, 144, 188 *et seq.* (1969); Dession, "From Indictment to Information - Implication of the Shift," 42 Yale L. J. 163, 192 (1932).

13 While it is not yet entirely clear whether the State constitutional guarantees are stricter than their federal counterparts, recent cases tend to indicate a trend in that direction. See, *e.g., State v. Krol*, 68 N.J. 236 (1975); *State v. Johnson*, 68 N.J. 349 (1975).

14 At the present time, we do not feel that it would be useful to engage in any substantive analysis of the standard's meaning. We suggest that while the standard could roughly approximate that applied by grand juries to indict, it should not be called "probable cause." Use of the latter term might engender comparison with arrests and searches. The magistrate's role at the preliminary hearing differs greatly from his role in issuing a warrant. Even if "sufficient cause" were tantamount to "probable cause," the evidence before the hearing magistrate would so differ from an application for warrant or bail hearing that the finding at the preliminary would be different in a pragmatic sense. See generally, Graham & Letwin, part I, at 685-727.

As we have emphasized, there is no definite, constitutionally prescribed manner in which the decision to permit further proceedings need be made. Although we recommend that an adversarial preliminary hearing structure be established, we are loath to suggest that it be included in the constitutional amendment. At this time, an adversarial preliminary hearing seems to be the best vehicle for the protection of the rights of the citizen, as well as providing the best results for the State. However, the establishment of an adversarial preliminary hearing procedure does not involve the transcendent importance of a magistrate's finding of sufficient cause. Indeed, it is possible to posit circumstances where the preliminary hearing may not serve some of the goals it should be designed to achieve.[15] We believe that the decision to establish an adversarial preliminary hearing structure should be made in a non-constitutional setting. It seems that this is a matter within the unique expertise of both the Legislature, which reflects changing social attitudes, and of the judiciary, which knows its own capabilities in terms of resources. Continuing input from the Bar, as well as the general public, will demonstrate the need or lack of need for adversarial preliminary hearings at any given time. Again, we stress the current apparent necessity for adversarial preliminary hearings, but we also recognize that changing times may alter that view.[16]

History has proven the need for judicial intervention in systems where prosecution by information is permitted. This need appears to have remained unchanged since the earliest uses of informations. The preliminary hearing, on the other hand, engenders doubt as to its essential value. Therefore, we suggest that the constitutional amendment include a guarantee that no case be prosecuted except upon a court's determination of sufficient cause to proceed, but the provision should remain silent as to the need for adversarial preliminary hearings.[17] In conclusion, the amendment might provide that "no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury or on an information filed in the manner prescribed by law *and for which a judge finds a basis supported by sufficient cause.*"

C. The Form and Contents of a New Jersey Information.

This section concerns a far more technical aspect of prosecution-by-information that the two preceeding parts. We will discuss here the actual suggested contents of an information. This may seem to be a rather minor concern, but it must be realized that an information is not an indictment. Conceivably, an information could differ in form and content from an information. Since it is, nevertheless, a substitute for an indictment, its function will be basically identical, and we recommend no basic changes at this time.[18]

In New Jersey, the primary purpose of an indictment is to inform the defendant of the nature of the charges against him so that he may adequately prepare his defense.[19] Its secondary function is to protect the defendant from being the subject of another indictment for the same offense.[20] An indictment must allege all the essential

15 For example, a defendant might make a tactical error by testifying and demonstrate such low credibility that a magistrate finds sufficient cause even though the State's case is marginal.

16 In this respect, we recognize that the time may someday arrive when a system such as Rhode Island's becomes attractive. See Chapter II, B4, *supra; R.I. Gen. Laws Ann.* §312-12-1.1 *et seq.*

17 Compare *Calif. Const.* Art. I, §14.

18 We would note, however, that if a system similar to Rhode Island's is adopted, it might be necessary to further detail specifics of the offense.

19 *E.g., State v. Rios*, 17 N.J. 572 (1955); *State on Complaint of Brumel v. Brumel*, 14 N.J. 53 (1954); *State v. LeFante*, 12 N.J. 505 (1953); *State v. Winne*, 12 N.J. 152 (1953).

20 *Id.*

elements of the offense charged and sufficient facts to support a conviction. It must also include the statute allegedly violated, and conclude with the allegation that the offense was committed "against the laws of the State of New Jersey and contrary to the peace and dignity of the same."[21]

Clearly, an information must serve the same functions as the indictment. Likewise, the minimum legal requisites should be identical. In this regard, there appears to be no reason to suggest that the information's contents differ from those of the indictment. The only change required is the deletion of the initial wording which states that the "grand jurors of the State of New Jersey for the County of _____ do present that . . . ." This would require a change to reflect the fact that the prosecutor is informing the defendant and the court that he has reason to believe that the defendant committed the offense at a specified place, on a certain date, in violation of a criminal statute. We will not recommend any specific formulations, but again suggest that the indictment format could be adapted to the information.

D. Filing the Information.

An information is usually a final charging document as is the indictment. A complaint is usually the initial charging document. The pretrial procedural system typically transforms the contents of the complaint into the information. An issue which arises from the alteration is the point at which this transformation is to occur. There are two possibilities as to the time when an information may be filed *i.e.*, either before[22] or after[23] the preliminary hearing.

In states where the information is filed before the preliminary hearing, it supersedes or even replaces the complaint.[24] In states where the information is filed after the preliminary hearing, the hearing's outcome determines the contents of the information, including a final statement of the offense charged.[25] In either case, the prosecutor retains broad discretion in conforming the eventually filed information to the evidence adduced at the preliminary hearing.[26] Likewise, in both cases the court obviously retains final authority to determine the nature of the charges. In New Jersey, criminal charges are filed either by complaint or indictment.[27] We see no reason to change that procedure. Since the complaint is often prepared by a police officer, the statute designated may not be correctly set forth in the complaint. A prosecutor would waste needless time by attempting to mold the complaint into an information which is unsupported by the evidence actually adduced at the examination. For example, a situation might arise in which an officer files a complaint for assault with an offensive weapon. (*N.J.S.A.* 2A:90-3). The prosecutor might examine the police reports and file an information which alleges assault with intent to kill (*N.J.S.A.* 2A:90-2) because he is unsure of the strength of the State's evidence as to a weapon. Conceivably, the preliminary hearing might adduce evidence negating the existence of either offense, but support a charge of threatening to take a life. *N.J.S.A.* 2A:113-8. The prosecutor's restructuring of the complaint would be an unnecessary stage in the procedure.

21 *Id.*

22 *E.g., Fla. R. Crim. P.* 3.131; *Iowa Code Ann.* §§754.1, 769; *La. Code Crim. Proc.* Art. 384 *Mich. Stat. Ann.* §§28.941, 28.942. See *Minn. R. Crim. P.* 2.01; 4.01 (called a complaint).

23 *E.g., Ariz. R. Crim. P.* 5.4(a); *Ark. Rev. Stat. Ann.* §43-86a; *Calif. Penal Code* §738; *Colo. Rev. Stat. Ann.* §16-5-201(b), §16-5-205; *Ind. Rev. Stat.* §2-704a; *Kan. Stat. Ann.* §§22-2901(1); 22-2902(1); *Md. Code*, Art. 27, §592(a).

24 *Iowa Code Ann.* §754.1 *et seq.*

25 *E.g., Ariz. R. Crim.* p. 5.4(b).

26 See, *e.g., Idaho Code Ann.* §19-1420.

27 R. 3:2 (complaint contents); R. 3:4-1 (issuance of complaint). See R. 3:6-8 (indictment can be kept secret except for purposes of obtaining a warrant).

Consequently, we recommend that no information be filed formally until after the preliminary hearing.[28]

E. The Preliminary Hearing: A Functional Analysis

As we have emphasized, the preliminary hearing seems to represent a reasonable alternative to the grand jury's deliberation and indictment functions. In fact, as our historical and national surveys reveal, the preliminary hearing may well be superior to the indictment process.

A grand jury must determine whether sufficient cause exists to hold a defendant to answer for an offense. It performs this task by hearing evidence. Even a putative defendant may not cross-examine witnesses before the grand jury. Nor may his attorney be present if he himself is subpoenaed.

These characteristics have often been cited as creating the potential for vast abuses.[29] The grand jury is frequently characterized as the prosecutor's "rubber stamp." It is also sometimes compared to the Star Chamber. Our historical survey tends to show that many of these fears are justified, although contrary indications surely are evident. The secrecy requirement often protects the innocent individual who is investigated and subsequently found to be innocent by the grand jury. Also, as a general rule, grand juries have remained true to their mission and have protected the innocent.

Any proposed preliminary hearing should be geared to incorporate the best attributes of grand jury deliberations and to avoid the worst. We hope that at least some of these results are accomplished by the nature of the preliminary hearing we recommend.

In our view, a preliminary hearing ought to be an adversarial proceeding.[30] It should be held in open court on the record.[31] We recommend that any preliminary hearing procedure adopted in New Jersey should include several basic requirements. The preliminary hearing should be a public proceeding. Strictly drawn exceptions may be made to the public nature of these proceedings. For example, the prosecution may wish to close the courtroom when a sex offense is being heard to protect a witness of tender years. So too, the accused may wish to envelop the hearing in secrecy to avoid prejudicial publicity. Similarly, the court, in the exercise of its inherent discretion, might decide that the proceedings should be closed to the public for a variety of reasons.[32] We contemplate, however, that the typical preliminary hearing will be public. Thus, objections to grand jury secrecy are met while the salutary elements in nondisclosure may be available when necessary. Since the ultimate decision of whether the case should be tried lies with the court, objections of undue prosecutorial influence and prosecutorial abuses for improper motive are immaterial objections. Furthermore, the defendant will be present and may take an active role in his defense at a relatively early stage. Cross-examination of prosecution witnesses and the opportunity to present

28 This recommendation is in accord with the National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973) Standard 4.8 at p. 87: "The initial charging document, as amended at the preliminary hearing, should serve as the formal charging document for trial."

29 See generally Chapter 2, *supra.*

30 We tentatively reject Rhode Island's procedure as granting too little to defendants in return for the loss of indictments. Further, study, however, should not be foreclosed by this judgment.

31 The making of stenographic record is within the discretion of the hearing magistrate. *E.g., Calif. Penal Code* §869. We believe that the record should be guaranteed. See, *e.g., Ariz. R. Crim. P.* 5.3(a).

32 Our current Municipal Court rules provide a paradigm for a procedure excluding the public at preliminary hearings:

> The court, in its discretion and with the defendant's consent, may exclude from the courtroom during the trial or hearing of any matter involving domestic relations, bastardly cases, sex offenses, attempted suicide, school truancy and parental neglect any person not directly interested in the matter being heard or tried. R. 7:4-4.

defense witnesses are two further guarantees which would tend to effectuate the goal of filtering out frivolous cases.[33]

To this point, we have concentrated on demonstrating the suitability of the adversarial preliminary hearing to achieving the basic goal of grand jury proceedings, *i.e.*, protecting the innocent. Other functions are also served by the hearing, which do not apply to the grand jury. Most obvious are the discovery aspects of a hearing.[34] From the defense viewpoint, at least some prosecution witnesses will testify as they might be expected to at trial. Actual examination and cross-examination is clearly superior to documentary discovery. Both parties have an opportunity to "dry run" their respective cases.[35]

Other, more general, functions are performed by preliminary hearings. Although we stress the need for empirical study, the preliminary hearing has the potential to speed the time involved in prosecuting a criminal case. In Los Angeles County, it is estimated that the average preliminary hearing consumes approximately 30 minutes.[36] A case may undoubtedly be presented to a grand jury in a shorter time. However, a preliminary hearing produces a transcript which may be submitted to a County or Superior Court judge in lieu of trial.[37] Likewise, a strong prosecutorial presentation at the preliminary hearing stage may well lead to a plea bargain which the mere return of an indictment would not.[38] Again, further studies are necessary but it is suggested that the results contemplated above are quite possible.

Arguments surely might be made against adoption of the preliminary hearing. It could be contended that it merely shifts the consumption of time to an earlier stage. This possiblity even more strongly indicates the need for further research. Even so, we submit that the adversarial preliminary hearing is a viable alternative to the indicting grand jury. Its benefits appear to outweigh its burdens. Finally, the preliminary hearing appears to offer more by way of ultimate protection to both the citizen and the State than does the grand jury.

F. The Preliminary Hearing: Which Court?

An important question in any proposal to establish a system of prosecution by information in a preliminary hearing context must concern the court in which such proceedings are to be conducted. Several alternatives are presented, *e.g.*, Municipal Court, County District Court, County Court, or Superior Court. The considerations, as with the filing of informations, are basically logistical and financial. As with many of this article's suggestions, further empirical analysis is required.

We are compelled to acknowledge at this juncture that regardless of which court conducts preliminary hearings, the cost to the taxpayer will probably exceed that attendent to a grand jury system. The court system will need to be expanded to cope with the increased workload engendered by preliminary hearings. This entails expenditures for the salaries of judges, court personnel, reporters, prosecutors, and public defenders. Finally, ancillary costs, such as physical plant, and supplies will also be increased. Partially mitigating these expenditures will be the absence of "lost earnings" to individual grand jurors. All these factors must be considered in empirical form before any conclusion as to financial feasibility is made. We note the problem

33 See Graham and Letwin, *supra*, 18 U.C.L.A. Rev. at 661-68.

34 *Id.* at 916-31.

35 See *id.* at 931-39.

36 *Id.* at 659.

37 *Id.* at 931-39. This practice may be on the decline.

38 *Id.* at 948-53.

only to draw attention to its existence. Consequently, we will now return to the question of which court is best suited for holding probable cause hearings.

Municipal courts are unsuited for such hearings. Municipal judges are generally part-time. They have neither the time nor the resources to preside over preliminary hearings. Even if municipal courts are consolidated into the County District Court system,[39] and should the judges be given full time status, other potential problems preclude utilization of the municipal court as the preliminary hearing forum. Basically, the Municipal Courts cannot serve the purpose since they are too geographically decentralized. Transportation of prisoners, as well as travel of prosecutors and public defenders, militate against the possibility in terms of finances and time consumption. A centrally located court surely would be more effective.

Our preference for centralization leads us to conclude that County District Courts are best suited for conducting preliminary hearings. No doubt, more County District Courts judgeships would need to be created. We must once more emphasize the need for further study. A cost benefit analysis is necessary to make a proper decision.

G. The Preliminary Hearing: Format and Governing Law.

We have recommended that New Jersey informations be filed only after a preliminary hearing. This hearing would be formal, in open court, on the record, and of an adversarial nature. These basic characteristics should guarantee a viable alternative to grand jury indictment. We will now describe more fully general procedures and governing rules which might be adopted. Further study of currently existing systems, however, is necessary.

New Jersey has adopted a procedure akin to the preliminary hearing. The New Jersey analogue is called a "probable cause hearing" and is governed by *R.* 3:4-3. That rule provides:

> If the defendant does not waive indictment and trial by jury but does waive a hearing as to probable cause, or if the defendant does waive indictment and trial by jury but the judge is not an attorney, the court shall forthwith bind him over to await final determination of the cause. If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, the court shall hear the evidence offered by the State within a reasonable time and the defendant may cross-examine witnesses against him. If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause, otherwise, the court shall discharge him; provided however, that if the offense charged is indictable, a court shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecutor may appear on the docket as to when and how such notice was given. After concluding the proceeding the court shall transmit, forthwitn, to the county prosecutor all papers in the cause in the event the the defendant is not discharged; provided however, that when the county prosecutor so requests the court shall forward the papers to him even though the defendant is discharged. The court shall admit the defendant to bail as provided in *R.* 3:26, and any bail taken by him shall be transmitted to the county clerk.

39 A proposal to consolidate the Municipal Courts into the County District Court System is currently being studied by another sub-committee.

The rule provides probable cause hearings only where no indictment has yet been returned. The state may vitiate a defendant's right to a hearing by procuring an indictment.[40] The only time limitation with respect to conducting a probable cause hearing is a "reasonable" one. Confrontation and cross-examination of the State's witnesses are guaranteed rights. Although the rule does not specifically so state, its terms contemplate that probable cause proceedings are to be heard in inferior courts.[41] The provision as to a judge who is not an attorney implies a municipal judge. Hence, the current New Jersey procedure possesses the basic, general characteristics we have emphasized: adversarial in nature, in open court, and on the record. However, if the preliminary hearing procedure is adopted, we would recommend elimination of the probable cause hearing as a duplicative procedure.

If the New Jersey preliminary hearing is to substitute for the grand jury proceeding, we must posit more specific procedures. Since we have suggested that the information be filed only after the preliminary hearing, the provision which vitiates the right after indictment will not apply.[42] Every individual who is the subject of a criminal complaint would have the right to a preliminary hearing.[43]

The next consideration is establishing a time frame for the preliminary hearing. This time frame must conform to federal constitutional speedy trial guarantees. Since a complaint will have been filed before the preliminary hearing, the dictates of *Barker v. Wingo*, 407 U.S. 514 (1972) clearly apply. *United States v. Dillingham* 96 S.Ct. 303 (Dec. 1, 1975). Moreover, our Supreme Court in the future might well adopt a rule which would mandate trial within a definite time after complaint or indictment. Thus, the preliminary hearing should be held as soon as possible after the arrest is made. Our current court rules provide for initial appearance shortly after arrest at which time the defendant is informed of the charges and advised of his rights.[44] It is at this appearance that counsel is appointed or the defendant allowed time to retain counsel. In our suggested procedure, the preliminary hearing would be the next stage, thereby requiring a time interval between the initial appearance and preliminary hearing. Aside from the fact that defendant has either been jailed or freed on bail, among the controlling factors should be the time needed to obtain counsel. Additionally, time is necessary to permit counsel to defend adequately.

If a defendant appears with counsel at the initial appearance, or if the public defender immediately accepts the case, a shorter time will be necessary for preparation

40 Accord *State v. Cox*, 114 N.J. Super. 556 (App.Div. 1971); *State v. Boykin*, 113 N.J. Super. 594 (Law Div. 1971).

41 An arresting officer is to take the defendant before the court named in the warrant or, if the arrest has been made without a warrant, "before the nearest available committing judge." R. 3:4-1. "An arrest warrant may be issued by a judge of a court having jurisdiction in the municipality in which the offense is alleged to have been committed or in which the defendant may be found. . . ." R. 3:3-1. The rules thus contemplate Municipal and County District court judges as the probable cause hearing judges. We note that this rule creates the potential for the logistical problems we mentioned earlier.

42 Theoretically, that result could be accomplished under *Gerstein v. Pugh*. See generally R. 3:4-1 *et seq.* (first appearance); R. 3:26-1 *et seq.* (bail); R. 7:5-1 *et seq.* (Municipal Court bail).

43 Accord, *e.g., Ariz. Const.*, Art. 2, §20; *Ark. Rev. Stat. Ann.* §§43-601 *et seq. Calif. Const.*, Art. I; §14. *Penal Code* §682 *Md. Dist. R.* 741(c).

44 R. 3:4-1 ("without unnecessary delay"). Several states have established definite time limitations for that period between arrest and first appearance. *E.g., Ariz. R. Cri. P.* 4.1(c) (24 hours); *Fla. R. Cri. P.* 3.130 (24 hours); *Ga. Code Ann.* §27-210 (72 hours where arrest pursuant to warrant), §27-212 (48 hours where warrantless arrest); *Ind. R. Cri. P.* 9-701 (48 hours); *La. Code Crim. Proc.* Art. 230.1A (144 hours); *Md. Dist. R.* 709(a)(1) (24 hours) or 709(a)(2) (first session of court after arrest on warrant or "charging" in warrantless arrest); *Minn. R. Crim. P.* 401(5)(1) (38 hours); *N.Y. Crim. Pro. L.* §§180.10 *et seq.* (72 hours). *Ohio R. Crim. P.* 5 (24 hours); *Ore. Rev. Stat.* §135.070 (5 days). As ancillary to abolishing the current probable cause hearing, it might be necessary to increase the importance of the "first appearance." One of the charges might be adoption of a time limit here.

and for the hearing than if defendant appears without counsel. Likewise, a distinction should be made to give "jail" cases priority over "bail" situations. *Cf. Gerstein v. Pugh, supra*. This, however, creates an inherent contradiction, for a defendant who is free on bail will probably be able to obtain counsel more readily than a jailed defendant. We believe that this problem should be resolved in favor of the jailed defendant, and that the time sequence mandate faster preliminary hearings for those in jail. Although further study is necessary to determine more precise time limits, some general observations and suggestions may be made.

We believe that a date certain for the preliminary hearing should be set at the initial appearance. The setting of this date should guarantee efficient processing of cases. Delaying tactics are inevitable on both sides, but they can be reduced to a minimum by strict time requirements.

In California, a defendant is given two to five days to procure counsel. Then, counsel is afforded at least two days to prepare for the hearing. *Calif. Penal Code* §§859b, 860. The *Model Code*, however, mandates that a defendant be given a preliminary hearing within 10 days of the initial appearance if the accused is in jail and within 30 days if he is not. *Model Code* §310.5(3). However, the *Model Code*'s "initial appearance" is a lengthy, complex procedure with adjournments available for a number of reasons, including the procurement of counsel. *M.C.* §§310.1(8), 310.2(1). We prefer California's system, but would establish definite time limits as suggested in the *Model Code*.

The initial appearance should not resemble the preliminary hearing. The purpose of the initial appearance should be to inform the defendant of the charges against him and advise him of his rights, including the appointment of counsel. We believe that the preliminary hearing should be held within 14 calendar days of the initial appearance if the defendant is in jail,[45] and within 30 calendar days if he is not.[46]

We now examine the actual hearing. In so doing, it must be recalled that the primary function of the hearing is to serve as an effective substitute for the grand jury. The preliminary hearing, also offers other potential benefits. These include early resolution of evidentiary and constitutional issues which may make conviction at trial impossible. Conceivably, this might result in fewer trials. These obvious benefits to defendants are balanced by those to the State. As we have noted, defendants may plea bargain more readily after a finding of sufficient cause. Further, defendants may submit on the transcript, thus avoiding full scale jury trials.

Consequently, we believe that the *Rules of Evidence* should apply at preliminary hearings.[47] Application of the evidence rules will better reflect the strengths and weaknesses in the State's case. In such a manner the screening function would be enhanced, resulting in fewer trials. Thus, marginal cases based on evidence of dubious admissibility would not proceed further. While we recommend application of the *Rules of Evidence* to preliminary hearings, we recognize that there might be some limited circumstances in which such rules could be relaxed. For example, laboratory reports might be admitted without calling the expert.[48] Alternatively, stipulations of this sort might be encouraged by a provision that no stipulation at a preliminary hearing be considered a waiver at trial.

45 Accord, National Advisory Commission, Standard 4:8 at p. 87.

46 Accord, *e.g., Model Code* §310.5(3).

47 *E.g.*, compare *Ariz. R. Crim. P.* 5.4(c) (–3) (expert reports; documentary evidence without foundation if substantial basis to believe foundations will be laid at trial admissible, hearsay where cumulative or where declarant will be available at trial, all admissible) with *Conn. Gen. Stat. Ann.* §54-76a (rules of evidence).

48 We would hesitate to posit any other relaxations at this time. If any leeway is to be permitted, we would recommend further study of the Arizona rule noted above.

One other area should be discussed. We offer for consideration the possibility that evidentiary objections or constitutional grounds be allowed at the preliminary hearing. That is, a defendant could move to exclude evidence based upon allegedly unlawful searches and seizures, *Miranda* problems and suggestive and unreliable identifications.[49] We do not suggest that the denial of a defendant's evidentiary objections at the preliminary hearing should bind the trial judge. If a defendant's objection is denied, he might then either submit on the transcript or demand a full evidentiary hearing as of right

We recommend that the defendant should be permitted to testify and to produce witnesses in his own behalf. Likewise we believe that the State should be given the express right to appeal an adverse decision. Since the defendant would not yet have been placed in jeopardy, there is no legal reason to refuse to permit such an appeal. Concomitant with the State's right to appeal should be an express provision prohibiting the prosecution from either seeking an indictment where a judge has refused to issue an information and from attempting to seek another information on the same evidence. Additionally, we suggest that, as with California's system, the hearing be completed at one session.[50] Also, as in California, the prosecutor should be given 15 days from the finding of sufficient cause to file an information or a dismissal will be automatic.[51]

In sum, we have concluded that the New Jersey preliminary hearing should be a speedy, efficient, protective procedure which closely resembles the trial. We believe that the procedures we have recommended will result in a more efficient administration of criminal justice. These suggestions raise many questions. We recommend that our proposal be the subject of further study.

H. The New Jersey Grand Jury in a Dual Prosecution System.

We do not suggest abolition of the grand jury. Its unique role in the criminal process must be preserved. Several compelling reasons exist for the retention of the grand jury. The grand jury's investigative powers, the need for secrecy in some cases, its ability to process multi-defendant cases, and a potential unwillingness of prosecutors to seek informations in sensitive cases all militate against abolishing the institution.

Aside from the functional reasons noted above, the grand jury also serves as a vehicle for citizen participation. It is consistent with the nature and goals of our democratic society to retain this mechanism. The grand jury is essential in affirming the public confidence in government. We therefore recommend that any system of prosecution by information include a role for the grand jury. Indeed, if the majority of routine cases is prosecuted by information, the grand jury would be able to focus on complex investigations, on combatting official misconduct, and on reflecting community consensus in sensitive cases.

I. Guideline for Prosecutors: Indictment and Information.

A prosecutor faced with a decision to seek an indictment or information should be guided by some informal guidelines. Several classes of cases seem uniquely suited to prosecution by indictment: 1) cases involving complex investigations; 2) cases in which the statute of limitation is about to run; 3) cases of official corruption; 4) cases where informants' or undercover operatives' identities must be kept secret; and 5) cases involving sex crimes, especially child abuse cases.[52]

49 See *Minn. R. Crim. P.* 11.02, 11.03 (omnibus hearing).

50 *Calif. Penal Code* §861.

51 *Calif. Penal Code* 739.

52 See California Judicial Council, 1974 Report to the Governor and Legislature at p. 45 citing Los Angeles District Attorney, *Departmental Organization Manual* at p. 45.

THE GRAND JURY: PROPOSALS FOR REFORM

A. Prosecutorial Discretion

The existing grand jury system is frequently characterized as inefficient and cumbersome. Prosecutors have often claimed that the volume of matters required for grand jury presentation precludes careful consideration of each case. Many prosecutors are of the view that once a complaint is filed, the matter must be presented to a grand jury. Often, prosecutors feel compelled to indulge in a charade by presenting a frivolous matter to a grand jury and recommending that a "no bill" be returned. In short, the sheer weight of statistics with respect to the matters presented often denies the grand jury the opportunity to carefully review each case.

We suggest that the grand jury system can be strengthened by enabling prosecutors to administratively terminate prosecutions prior to the grand jury stage. See Formal Attorney General Opinion, No. 11, which holds that a prosecutor possesses this ability. It has been recommended that prosecutorial screening of cases ought to occur when there is a reasonable likelihood that the admissible evidence would be insufficient to either obtain a conviction or to sustain it on appeal. A more difficult problem is presented by technical violations of the law. Many have adopted the position that a prosecutor "may refuse to present a matter to a grand jury even when there exists probable cause to believe that a criminal offense has been committed."[53] The American Bar Association has noted that "a prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest, decline to prosecute notwithstanding that evidence may exist which would support a conviction."[54] In a similar vein, the National Advisory Commission of Criminal Justice Standards has taken the view that "an accused should be screened out of the criminal justice system when the benefits to be derived from prosecution or diversion would be outweighed by the costs of such actions."[55]

It is apparent that the overwhelming demands which are being made on the criminal justice system by the increasing volume of cases mandate the exercise of prosecutorial discretion. Of course, discretion must be exercised at various stages of criminal proceedings. Recently, it has been proposed that every exhaustive effort be made to eliminate the filing of criminal complaints in frivolous cases. *R.* 3:2 provides that "the complaint shall be a written statement of the essential facts constituting the offense charged made upon oath before a judge or other person empowered by law." The Rule is silent with respect to whether a prosecutor may prevent the filing of frivolous criminal complaints. Nevertheless, our survey reveals that prosecutors believe that they lack the power to preclude a citizen or a police officer from filing a complaint. The filing of a criminal complaint often has an adverse effect upon the accused and his family. Thus, a cogent argument can be made that prosecutors ought to be authorized to screen criminal complaints. Another subcommittee is presently reviewing such a proposal.[56] We note it here simply to suggest that prosecutorial

53 Note, "Prosecutorial Discretion," 1 Crim. Justice Q. 154, 157 (1973).

54 *A.B.A. Standards*, §3.9 (1971).

55 *National Advisory Commission on Criminal Justice Standards, Standard* 1.1

56 The following rule was recently proposed by the Essex County Prosecutor:

In any county where the Assignment Judge and County Prosecutor have determined that filing of complaints charging indictable offenses shall be pursuant to the provisions of this rule in the county or a subdivision thereof, the Assignment Judge by order shall direct each municipal court judge and each clerk of said court to require compliance with the provisions of this rule as a condition precedent to filing any complaint charging an indictable offense.

(a) No complaint charging an indictable offense shall be filed in any municipal court, unless the County Prosecutor shall consent to said filing in writing, or orally if circumstances do not permit written

screening at the earliest stage of a criminal proceeding would, in all likelihood, strengthen the grand jury by decreasing the number of matters presented to it.

Many have advocated the exercise of prosecutorial discretion after criminal complaints have been filed both prior to and following probable cause hearings. A recent amendment to *R.* 3:25-1 provides that "a complaint may be dismissed prior to trial only by order" of the assignment judge or the judge to whom it has been assigned for disposition. Although the amendment appears to require judicial approval as a prerequisite to dismissing a complaint, the Commentary which accompanied its submission to the Supreme Court by the Criminal Practice Committee noted that it was not intended to preclude the exercise of prosecutorial discretion. Simply stated, the amendment, standing alone, was not intended to prohibit a prosecutor from administratively dismissing a criminal prosecution. Formal Attorney General Opinion 11, 1976 upholds the power of a prosecutor in this regard.

Perhaps a more difficult obstacle is presented by *N.J.S.A.* 2A:158-5 which provides that "each prosecutor . . . shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." Despite the seemingly mandatory nature of the statute, our courts have explicitly recognized that prosecution of criminal cases is not a ministerial function and that a "county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction." *State v. Winne*, 12 N.J. 152, 174 (1953). It is thus incumbent upon prosecutorial authorities to exercise discretion based upon their "judgment and conscience . . . in accordance with established principles of law." *State v. LaVien*, 44 N.J. 323, 237 (1965).[57]

Despite the almost universal acceptance of the settled principle that prosecutors possess broad discretionary powers, the boundaries of such authority are vague and remain largely undefined. No one currently disputes the fact that the exercise of discretion implies "conscientious judgment, not arbitrary action" and that a prosecutor's range of choices, not unlike those within the judicial domain, depends upon the "particular circumstances of the case." *State v. Shiren*, 9 N.J. 445, 452 (1952). See also Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion." 19 U.C.L.A.L.Rev. 1 (1971); Killer, *Prosecution: The Decision to Charge a Suspect with a Crime*, Chap. 20 (1970). A prosecutor is protected from civil and criminal liability to the extent that discretionary decisions are made in good faith. *State v. Winne, supra* at 162-163. *Cf. In re Investigation Regarding Ringwood Fact Finding Comm.*, 65 N.J. 512 (1974); *State v. Laws*, 51 N.J. 494, 510 (1968), *cert.* denied 393 U.S. 971 (1968). Further, although a prosecutor has broad discretion in selecting matters for prosecution, it is not unregulated or absolute and it may, in appropriate circumstances, be reviewed for arbitrariness or abuse. *In re Investigation Regarding Ringwood Fact Finding Comm., supra* at 516.[58]

56 (cont.)
consent prior to filing; in the event of an oral consent, the County Prosecutor shall file written consent as soon as practicable thereafter.
(b) Any private citizen aggrieved by the refusal of the County Prosecutor to consent to the filing of a complaint charging an indictable offense may apply to the municipal court for a hearing, on notice to the County Prosecutor, at which hearing the County Prosecutor may attend and participate. The municipal judge may take testimony from said citizen and any other witnesses produced by said citizen. The hearing may be held with or without notice to the prospective defendant, as the court, in the interest of justice, may deem fit. In the event the hearing is on notice to the prospective defendant, the prospective defendant may cross-examine the witness produced. If at the conclusion of the hearing the court determines that the citizen should be permitted to file a complaint, then such complaint shall be accepted for filing by the clerk of the court.

57 In other jurisdictions see *United States v. Cox*, 342 F.2d 167 (5 Cir. 1965); *Moses v. Kennedy*, 219 F.Supp. 762 (D.D.C. 1963); *Pugach v. Klein*, 193 F.Supp. 630 (D.D.C. 1961); *Williams v. Cave*, 138 Kan. 586, 27 P.2d 272 (S.Ct. 1933); *State ex rel. McKittrick v. Wallach*, 353 Mo. 312, 182 N.W.2d 313 (S.Ct. 1944).

58 See also *State v. Convers*, 58 N.J. 123, 146-47 (1971); *State v. Ashby*, 43 N.J. 273, 276 (1964).

As we have noted previously, many prosecutors question whether they are empowered to administratively terminate prosecutions without grand jury action. No doubt the problem is more acute once a municipal court judge finds that probable cause exists. *R.* 3:4-3 provides that "[i]f. from the evidence, it appears . . . that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause. . . ." Perhaps it is significant that the rule does not state that the defendant is bound over for grand jury action. It has thus been argued that "[t]he determination of probable cause by the municipal court judge . . . does not require any specific course of action by the prosecutor in order to terminate criminal proceedings, for there is no applicable court rule or statute governing such a disposition.[59]

In our view, the power of a prosecutor to terminate a prosecution, both before and after a probable cause hearing, ought to be clarified. We urge study of a proposal which would make explicit the prosecutor's legal obligation. The following amendment to *N.J.S.A.* 2A:158-5 ought to be considered:

N.J.S.A. 2A:158-5A Discretion In The Charging Decision:
De Minimis Infractions

1 – Notwithstanding the provisions of *N.J.S.A.* 2A:158-5 a prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute notwithstanding that evidence may exist which would support a conviction. A prosecutor may decline to prosecute an offense if, having regard to the nature of the conduct charged and the attendant circumstances, he finds that the defendant's conduct:
   a. Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
   b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
   c. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense.

2 – Among the factors which a prosecutor may properly consider in exercising his discretion are:
   a. The prosecutor's reasonable doubt that the accused is in fact guilty;
   b. The extent of the harm cause by the offense;
   c. The disproportion of the authorized punishment in relation to the particular offense or the offender;
   d. Possible improper motives of a complainant;
   e. Cooperation of the accused in the apprehension or conviction of others:
   f. Availability and likelihood of prosecution by another jurisdiction.

The proposed statute would amend *N.J.S.A.* 2A:158-5 and clarify a prosecutor's role in charging criminal offenses. The proposed bill employs the language of Section 2C:2-11 of the Proposed New Jersey Penal Code. That provision permits assignment judges to dismiss *de minimis* infractions. Also contained in the bill are the standards approved by the American Bar Association.[60]

59 Note, "Prosecutorial Discretion," *supra* at 162.

60 *A.B.A. Standards*, §3.9 (1971).

B. Selection of Grand Jury Members.

Prior to 1969, grand jurors in New Jersey were selected by a process referred to as the "key man" system. Grand jury commissioners were invested with broad discretion in devising methods to select the grand jury venire. In general, the system required the jury commissioners to solicit names of prospective jurors from various civil organizations, churches and labor unions. Although the "key man" method of grand jury selection was in extensive use in many jurisdictions and withstood constitutional attack in numerous cases,[61] it was the subject of a great deal of criticism. Thus, in 1969, our Supreme Court directed that as a matter of policy, future grand juries were to be selected on a random basis. This policy was articulated in *State v. Rochester*, 54 N.J. 85 (1969),[63] where the Court directed that voter registration lists be employed. *Id.* at 92. The new policy was instituted in the hope that "it would achieve its high democratic goals while retaining, and perhaps even strengthening the just and effective aspects of our historic grand jury system." *Id.*

It is a well established principle of our jurisprudence that juries as instruments of public justice must be truly representative of the community.[64] This does not mean that every jury must contain representatives of all the economic, social, religious, racial, political and geographic groups of the community.[65] In an unbroken line of cases, the courts have uniformly rejected the contention that approximately proportional representation of the various identifiable groups within the community is required.[66] Nevertheless, it is incumbent upon jury commissioners to select grand jury venires which closely mirror the demographic characteristics of the community.[67] The guarantee establishes a protective mechanism against dishonest or excessively zealous prosecutors and an incompetent or unduly passive judiciary. Further, the diffusion of citizen responsibility for the determination of the culpability of any member of society is a value deserving of constitutional protection.[68]

61 See *Scales v. United States*, 367 U.S. 203 (1961); *United States v. Butera*, 420 F.2d 564, 573 (1 Cir. 1970); *Sanders v. United States*, 415 F.2d 621, 623-24 (5 Cir. 1969); *Mobley v. United States* 379 F.2d 768, 773 (5 Cir. 1967); *Pope v. United States*, 372 F.2d 710, 721-24 (8 Cir. 1967); *United States v. Hoffa*, 349 F.2d 20, 29 (6 Cir. 1965); *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597, 599 (9 Cir. 1960), *cert.* denied 365 U.S. 828 (1961).

62 See *State v. Rochester*, 54 N.J. 85 (1969).

63 See also *State v. Smith*, 55 N.J. 476 (1970); *State v. Forer*, 104 N.J.Super. 481 (Law Div. 1969); *State v. Hughes*, 128 N.J.Super. 363 (App.Div. 1974), certif. denied 66 N.J. 307 (1974); *State v. Robinson*, 128 N.J.Super. 525 (Law Div. 1974).

64 See *e.g., Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Strauder v. West Virginia*, 101 U.S. 303 (1880).

65 See *Dow. v. Carnegie-Illinois Steel Corp.*, 224 F.2d 414, 424 (3 Cir. 1955).

66 See *Brown v. Allen*, 344 U.S. 428, 497-98 (1953); *United States v. DiTommaso*, 405 F.2d 385, 390 (4 Cir. 1968), *cert.* denied 394 U.S. 934 (1969); *Carmical v. Craven*, 314 F.Supp. 580, 583-84 (N.D. Calif. 1970); *United States v. Cohen*, 275 F.Supp. 724, 723 (D.Md. 1967), aff'd 405 F.2d 385 (4 Cir. 1967), *cert.* denied 394 U.S. 934 (1968); *United States v. American Oil Co.*, 249 F.Supp. 130, 138 (D.N.J. 1965), motion for rehearing denied, 286 F.Supp. 742, 744-55 (D.N.J. 1968); *State v. Rochester*, 54 N.J. 85, 88 (1969); *State v. Forer, supra*. As stated by the Supreme Court of the United States in *Swain v. Alabama*, 380 U.S. 202 (1965):

> *[T]he defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire of jury roll from which petit jurors are drawn.* (Citations omitted). Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. 'Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color proportional limitation in not permissible.' (Citation omitted). We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as ten percent. (380 U.S. at 208, 85 S.Ct. at 829). (Emphasis added).

67 See *Thiel v. Southern Pacific*, 328 U.S. 217, 220 (1946). See also *Hernandez v. Texas*, 347 U.S. 475 (1954); *Cassell v. Texas*, 339 U.S. 282 (1950).

68 See *Williams v. Florida*, 399 U.S. 78, 96 (1970); Heller, *The Sixth Amendment to the Constitution of the United States* (1965).

Inauguration of the random selection system was designed to serve these historic purposes. Its implementation has tempered, but has not wholly abated criticism of present grand jury selection procedures on grounds of racial and socio-economic exclusion. At present, our statutes (*N.J.S.A.* 2A:68-1, *et seq.*) do not set forth the procedures to be employed by jury commissioners in selecting prospective grand jurors. We suggest that a study be conducted to determine whether the present method of grand jury selection is achieving the objective of obtaining a venire which fairly reflects a cross-section of the community. We note that voter registration lists might not, under rare circumstances, accomplish this end. Other possible sources, such as city directories, may be used to supplement voter lists.[69] In any event, empirical analyses of our system should be made in order to determine whether currently utilized selection procedures effectively insure representative grand juries.

We also recommend increasing the amount of compensation provided to grand jurors. *N.J.S.A.* 22A:1-1 provides that petit and grand jurors shall receive a per diem allowance of $5. In addition, travel expenses to the extent of two cents per mile are permitted. This statute, which was enacted in 1953, ought to be amended. Amendatory legislation increasing juror fees would enable poor and working class persons to serve on grand juries with less financial sacrifice. Further, increasing grand juror fees would have an impact on their willingness to serve.

C. Number of Grand Jurors.

We recommend a reduction in the number of grand jurors on each panel. At present, *N.J.S.A.* 2A:73-1 provides that a grand jury shall not "exceed" twenty-three individuals. In like manner, *R.* 3:6-1 provides that the "assignment judge of each county shall order . . . one or more grand juries . . . not exceeding twenty-three members." An indictment or a presentment may be returned "only upon the concurrence" of twelve or more jurors. See *R.* 3:6-8 and *R.* 3:6-9 respectively. Our courts have noted that a grand jury may consist of less than 23 members. See *State v. Zeller*, 77 N.J.L. 619 (E. & A. 1909); *State v. Robinson*, 82 N.J.L. 76 (S.Ct. 1911). Obviously, twenty-three is not a "magic number". Considerable resources could be saved if the panel was reduced to a lesser number. The Rule requiring the concurrence of a majority of jurors would be retained. The resulting monetary saving could be utilized to increase juror fees which, as noted above, would greatly contribute to insuring that the grand jury reflects a cross-section of the community.

D. Training and Supervision of Grand Jury.

A common complaint with respect to grand juries is that they tend to "over-charge." Although no empirical studies exist supporting this belief, the experience of many prosecutors has been that grand juries often return indictments in marginal cases where the likelihood of ultimate conviction is minimal. This is true despite the routine instruction to the grand jury, which recites the standard of proof required for the return of an indictment, *i.e.*, "evidence, which if unexplained or uncontradicted, would carry the case to a jury and justify the conviction of the accused."[70] Many have argued that the proclivity of grand juries to indict is caused by their lack of understanding with respect to other phases of the criminal justice system. A recent study of a grand jury in Harris County, Texas, disclosed that the typical grand juror does not understand his basic function until the third full working session.[71] The

69 See 28 *U.S.C.* §1863.

70 *Trap Rock Industries, Inc. v. Kohl*, 59 N.J. 471, 487 (1971).

71 Carp, "Harris County Grand Jury: A Case Study," 12 *Houston L. Rev.* 90 (1974).

author concluded that approximately 116 cases are presented to a grand jury before its members fully comprehend their primary responsibility.

We suggest that grand jurors should be given a mandatory training period to acquaint them with the criminal justice system. The assignment judge should be required to instruct the grand jury more thoroughly with regard to its rights and obligations. We further recommend that the Administrative Office of the Courts prepare a printed manual to be distributed to grand jurors fully advising them of their responsibilities. The availability of the court for instructions independent of the prosecutor should be emphasized. The assignment judges should be specifically authorized to instruct the jury with respect to the particular offense charged in the complaint. See, *e.g.*, *State v. Ellenstein*, 121 N.J.L. 304 (S.Ct. 1938). Further, *R.* 3:6-6(a) should be amended to permit the assignment judge to be present for the purpose of delivering such instructions when the grand jury is "in session" except when it is receiving evidence or deliberating. At present, that Rule provides as follows:

> (a) Attendance at Session. The prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors, the clerk and the prosecuting attorney may be present while the grand jury is deliberating. The grand jury, however, may request either the prosecuting attorney or the clerk to leave the jury room during its deliberations.

It may be argued that the Rule does not prohibit the assignment judge from being present when the grand jury is not receiving evidence or deliberating. However, we submit that *R.* 3:6-6(a) is ambiguous and that it should be clarified to permit the assignment judge to instruct the grand jury at its request or that of the prosecutor.

Although prosecutors disagree, it is a common complaint that grand juries have become a "rubber stamp" and do not exercise sufficient independent judgement in deciding whether to return an indictment. It seems an entirely salutary practice for the assignment judge to charge the grand jury after it has heard all the evidence, so that it can reach its decision with an impartial view of the law fresh in its members' minds, free from any prosecutorial "pressures" which may be exerted.

Another issue deserving of study is whether a separate office of counsel to the grand jury should be created for presenting matters to that body and assisting it in performing its function. It bears repeating that the grand jury is an arm of the court and is a judicial body.[72] It is an integral part of our court system and it performs quasi-judicial functions.[73] Not until 1812 were prosecutors appointed to present matters to the grand jury.[74] We suggest that a "grand jury advisor" might be a viable means of insuring the independence of that body. In any event, we recommend that the concept be studied.[75]

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72 *In re Jeck*, 26 N.J.Super. 514 (App. Div. 1953).

73 *State v. Smith*, 102 N.J.Super. 325 (App.Div. 1968), aff'd 55 N.J. 476 (1970).

74 *L.* 1812, p. 23.

75 We note in this context that the following bills are being considered by the Legislature:

Senate Bill No. 423:

Be it enacted by the Senate and General Assembly of The State of New Jersey:

1. The Chief Justice of the Supreme Court shall, from a list of attorneys selected by the Administrative Office of the Court, appoint on an experimental basis and as hereinafter provided, attorneys for grand juries empaneled under the laws of this State to advise and assist such grand juries as hereinafter provided. Every attorney so selected shall be qualified by substantial experience in the field of criminal law, and shall not be associated with the office of the Attorney General or of the prosecutor of the relevant county. Said attorney shall be responsible solely to the Chief Justice.
2. The Chief Justice shall appoint such attorneys pursuant to section 1 of this act to advise and assist grand juries in one county of the first class and one county of the second class to be determined by the Chief Justice.

E. Evidence Before the Grand Jury.

It is beyond cavil that reception before a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve to vitiate the resulting indictment.[76] In most jurisdictions, including

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75 (cont.)

3. The Chief Justice shall assign an attorney to each grand jury sitting in cases involving crimes punishable as high misdemeanors in the counties selected pursuant to section 2 of this act. In all other cases in the counties so selected, the provisions of this statute shall be read to the grand jury, and an attorney assigned if it so requests. Subject to such rules as may from time to time be prescribed by the Chief Justice, the attorney for the grand jury to which he is assigned to provide legal advice and assistance of counsel to the grand jury in the performace of its functions and duties, and to answer any and all questions put to him by the grand jurors. He shall have access to all evidence and files of the prosecutor in each case presented to the grand jury and shall advise the grand jury upon any matter which he deems material and which is found therein, or upon any matter of fact or law which he deems material to the proposed indictment, including suggestions concerning further investigations. The attorney shall not be an advocate for any defendant, nor for the State, and shall not have any direct role in the deliberations of the grand jury except to answer questions put to him by grand jurors and as hereinbefore provided. Upon the impaneling of every grand jury in the counties selected pursuant to section 2 of this act, the members thereof shall be notified that the attorney is available to answer any questions which a member of the grand jury may desire to propound, including, but not limited to, questions seeking explanation of proposed indictments, concerning the evidence or legal implications thereof, or the degree or the weight of evidence concerning a proposed indictment.
4. There shall be appropriated such sums as may be necessary for the implementation of this act.
5. This act shall take effect immediately and shall terminate and be of no further force and effect on December 1, 1978, unless extended by the Legislature.

Senate Bill No. 1082:

1. The Governor, with the advice and consent of the Senate, shall appoint for a term of 3 years, attorneys for grand juries impaneled under the laws of this State, to advise and assist such grand juries as hereafter provided. The number of such attorneys to be appointed shall be determined with the advice of the assignment judges of the Superior Court of each county. Every attorney so appointed shall be qualified by substantial experience in the field of criminal law, or be a teacher of the law in such field; provided, however, that such attorney shall not engage in the private practice of law during his appointment nor be associated with the office of the Attorney General or of the prosecutor of the relevant county. Said attorney shall be responsible solely to the assignment judge, and shall be compensated at a rate to be fixed by the Legislature. He may employ such assistants and staff as may be deemed necessary by the assignment judge and within the limits of appropriations therefor.
2. The attorney for the grand jury shall be present at all sessions of each sitting grand jury to which he is assigned to provide legal advice and assistance of counsel to the grand jury in the performance of its functions and duties, and to answer any and all questions put to him by the grand jurors. He shall have access to all evidence and files of the prosecutor in each case presented to the grand jury and shall advise the grand jury upon any matter found therein, or upon any matter of fact or law which he deems material to the proposed indictment, including suggestions concerning further investigations. The attorney shall not be an advocate for any defendant, nor for the State, and shall not have any direct role in the deliberations of the grand jury except to answer questions put to him by grand jurors. Upon the impaneling of every grand jury, the members thereof shall be notified that the attorney is available to answer any and all questions which any member of the grand jury may desire to propound, including but not limited to, questions seeking explanation of proposed indictments, concerning the evidence or legal implications thereof, or the degree or the weight of evidence concerning a proposed indictment.
3. The costs of the legal services provided pursuant to the provisions of this act shall be paid by the State out of funds appropriated for this purpose to the Department of Law and Public Safety, Division of Criminal Justice.
4. This act shall take effect 90 days following its enactment.

STATEMENT

This bill would strengthen the grand jury system by providing competent legal assistance to every grand jury convened in this State. Whereas detractors have suggested that the grand jury be abolished, this bill would assure that the grand jury would operate as originally intended, that is, as a protection against malicious indictment. By providing the grand jury with an independent attorney employed by the court and unconnected with the prosecutor's office, this bill would restore the grand jury as a more meaningful investigative body and protector of individual liberty.

76 See *e.g.*, *United States v. Calandra*, 414 U.S. 343 (1974); *United States v. Blue*, 384 U.S. 251 (1966); *Lawn v. United States*, 355 U.S. 339 (1958); *Costello v. United States*, 350 U.S. 359 (1966); *Holt v. United States*, 218 U.S. 24 (1910). One line of cases, however, has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See *e.g.*, *Goldberg v. United States* 472 F.2d 513, 516 (2 Cir. 1973); *Jones v. United States*, 342 F.2d 863 (D.C.Cir. 1964); *United States v. Tane*, 329 F.2d 848 (2 Cir. 1964); *United States v. Lawn*, 115 F.Supp. 674 (S.D.N.Y. 1953), appeal dismissed *sub nom; United States v. Roth*, 208 F.2d 467 (2 Cir. 1953). For example, the court in *Goldberg v. United States, supra*, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of *Bruton v. United States*, 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. *Goldberg v. United States, supra* at 516.

New Jersey, the grand jury is not limited to receiving evidence admissible at trial.[77] As a general rule, the competency of evidence presented to the grand jury may not be the subject of judicial inquiry.[78]

The reason for the rule is obvious. Traditionally, the grand jury "has been accorded wide latitude to inquire into violations of [the] criminal law."[79] "It is a grand inquest, a body with powers of investigation, the scope of whose inquiries is not to be limited... by doubts whether any particular individual will be found properly subject to an accusation of crime"[80] It has been recognized that "the grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."[81] Significantly, the grand jury is not an "officious meddler,"[82] for its investigatory function "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed."[83] "Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[84]

One caveat is plainly in order. The policy prohibiting dismissal of an indictment by virtue of the introduction of inadmissible evidence does not apply to what has been characterized as "grand jury misconduct." Our courts have held that "in order to promote the purity of the administration of justice and for greater security of the citizen,"[85] an indictment may be quashed by virtue of misconduct by the grand jury. Misconduct occurs when the grand jury "indifferently and openly without having some evidence,"[86] brings charges against an individual by returning an indictment. However, an indictment will not be dismissed as long as some legal evidence was presented which supports the charges.[87]

Although the great weight of authority supports the rule in New Jersey, many have argued that it ought to be modified. It has been suggested that the failure to apply any evidentiary controls results in unnecessary trials and permits improper rummaging into the personal lives of witnesses.[88] In this context, it is to be observed that Congress is presently considering two bills which, if enacted, would require that an indictment be based upon legally sufficient evidence.[89] So too, several states have, by statute, limited the power of the grand jury to receive inadmissible evidence.[90] We suggest that this issue should be studied to determine whether our present rule is to be retained.

F. Gathering of Evidence.

Although no New Jersey case has expressly dealt with the subject, it would appear that the subpoena power is not inherent in the general authority of prosecutors to

77 See *e.g., State v. Chandler*, 98 N.J.Super. 241 (Cty.Ct. 1967); See also *State v. Ferrante*, 111 N.J.Super. 99 (App.Div. 1970); *State v. Garrison*, 130 N.J.L. 350 (S.Ct. 1943); *State v. Donovan*, 129 N.J.L. 478 (S.Ct. 1943); *State v. Ellenstein*, 121 N.J.L. 304 (Sup.Ct. 1938); *State v. Dayton*, 23 N.J.L. 49 (S.Ct. 1850).

78 *State v. Chandler, supra.*

79 *United States v. Calandra, supra* at 341.

80 *Blair v. United States*, 250 U.S. 273, 282 (1919).

81 *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972).

82 *In re Addonizio*, 53 N.J. 107, 124 (1968).

83 *United States v. Stone*, 429 F.2d 138, 140 (2 Cir. 1970).

84 *Branzburg v. Hayes, supra* at 701.

85 *State v. Dayton, supra* at 88.

86 *State v. Donovan, supra* at 479.

87 *State v. Smith, supra* at 343.

88 See Clark, *The Grand Jury: The Use and Abuse of Political Power*, p. 145 (1975). See also Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1149, 1171 (1960); Comment, 58 Mich. L. Rev. 1218 (1960); Note, 72 Yale L.J. 18 (1973).

89 *H.R.* 2986 and *H.R.* 6006.

90 See, *e.g., Cal. Penal Code* §936.6 (1970); *Nev. Rev. Stat.* §172.135 (1967); *N.Y. Crim. P. Law* §190.30 (1971).

detect and investigate criminal activity. Neither *N.J.S.A.* 2A:158-5 nor *R.* 1:9-1 and 2, expressly authorize prosecutors to subpoena witnesses or materials.[91] Further, the comment which accompanies *R.* 1:9-1 states that the subpoena authority "is applicable only to court proceedings."[92] It thus appears that, in the absence of a specific grant of authority,[93] prosecutors lack the power to summon witnesses and demand documentary evidence for strictly investigative purposes. Our courts have noted in this regard that "[i]f the prosecutor has before him any evidence "of criminal activity," his course should be to "present the facts to the grand jury, and if in its opinion an investigation should be made, subpoenas can be issued in the regular way. . . ."[94]

Despite this admonition, the subpoena, while technically a directive by the court to appear, has traditionally been employed by prosecutors as a distinct investigative tool. Often witnesses are summoned for private interviews with the prosecutor and do not thereafter appear and testify before the grand jury. It has been suggested that the grand jury subpoena has been abused in this manner. In a somewhat similar context, the American Bar Association has criticized "the practice of some prosecution offices of summoning persons for interviews by means of documents which in format and language resemble official judicial subpoenas or similar judicial process, although the prosecutor lacks subpoena power."[95] Noting that "[s]uch practices are improper"[96] and that "they amount to a subversion and usurpation of judicial power,"[97] the American Bar Association has characterized such activity as "unprofessional conduct."[98] Absent specific statutory subpoena power, "a prosecutor's communication requesting a person to appear for an interview would be couched in terms of a request."[99]

It would appear that if the grand jury is to be employed as an investigative body, it should have authority with respect to the parameters of its inquiry. It has been proposed that the issuance of subpoenas could be voted upon by some portion of the grand jury.[100] A cogent argument can be made that the function of the grand jury can be meaningful only "if it is active over and beyond voting solely on whether to indict.[101] By requiring an affirmative vote of the grand jury as a prerequisite to the issuance of a subpoena, the dominance of the prosecutor and the consequent passivity of the jurors would be reduced. We thus recommend study of procedures by which the grand jury would be given greater control over the subpoena process.

We also urge that consideration be given to conferring upon the prosecutor the power to issue subpoenas. This has been accomplished by legislation in several states.[102] The prosecutor would be granted the power to subpoena witnesses outside the presence of the grand jury, so that he alone would conduct the initial exploratory

91 Compare R. 7:3-3 which permits law enforcement officers to issue subpoenas with respect to non-indictable offenses.

92 It is to be noted that subpoenas for taking depositions are governed by R. 4:14-7. Subpoenas requiring appearances before the ethics committe, the unauthorized practice committee and the committee on character and fitness are governed by R. 1:20-6, R. 1:22-6 and R. 1:25, respectively.

93 In some states, statutes have expressly conferred subpoena powers on the prosecutor. See, *e.g., Pollard v. Roberts*, 283 F.Supp. 248 (E.D. Ark. 1968), aff'd 393 U.S. 14 (1968).

94 *Brier v. Smith*, 104 N.J. Eq. 386, 391 (Ch. 1929). See also *State v. Eisenstein*, 16 N.J.Super. 8 (App.Div 1951), aff'd o.b. 9 N.J. 347 (1952).

95 Commentary, *A.B.A. Standards* §76 (1970). See also *United States v. Thomas*, 320 F.Supp. 527 (D.C. Cir. 1970).

96 Commentary, *A.B.A. Standards* §76 (1970).

97 *Id.*

98 *A.B.A. Standards* §76 (1970).

99 Commentary, *A.B.A. Standards* §76 (1970).

100 Both *H.R.* 2986 and *H.R.* 6006 require that a subpoena issue only upon the affirmative vote of twelve or more grand jurors. See also Clark, *The Grand Jury*, p. 141 (1975).

101 *Id.*

102 *Pollard v. Roberts, supra.*

investigation to determine whether the matter ought to be presented.[103] Only when he had developed sufficient information would the case be presented for the grand jury's consideration. As noted by one author, "[t]his suggestion would absolve the grand jurors of the difficult task of being investigators and then having to shift to evaluating the evidence.[104] To strengthen the independence of the grand jury, full authority to initiate investigations could be given to the prosecutor with the corresponding power commensurate with his responsibility. This would not detract from the investigatory function of the grand jury. Rather, it would grant to the prosecutor effective powers to screen possible subjects for grand jury inquiry. On the other hand, once the matter is presented to the grand jury, that body would have greater control over the metes and bounds of its investigation.

Similar questions have been raised with respect to the granting of immunity. *N.J.S.A.* 2A:81-17.3 provides that "[i]n any criminal proceeding before . . . a grand jury, if a person refuses to answer a question . . . on the ground that he may be incriminated thereby and if the Attorney General, in writing, requests the court to order that person to answer the question, the court shall so order and that person shall comply with the order." In return, the witness is to be granted "use plus fruits" immunity. See also *N.J.S.A.* 2A:81-17.29 *et seq.*, as amended, regarding public employees. Several commentators have suggested that the grand jury be permitted to vote upon the question of granting immunity to a witness.[105] We question the viability of this proposal. Nevertheless, prosecutors have been criticized with respect to their discretionary authority.[106] Suffice it to say, the question has evoked strong emotions on both sides of the issue. Thus, we recommend further consideration of proposals modifying present procedures to permit the grand jury to vote upon questions relating to the grant of immunity.

G. Presenting Exculpatory Evidence.

As we have noted previously, the original function of the grand jury in England was to consolidate the royal power and to present matters for criminal prosecution. Nevertheless, perhaps the most significant function of the grand jury in modern times is not only to examine the commission of crimes, but also "to stand between the prosecutor and the accused and to determine whether the charge [is] founded upon credible evidence or [is] dictated by malice or personal ill will."[107] Succinctly stated, our Constitution, which requires indictment for criminal offenses, presupposes a grand jury "acting independently of either prosecuting attorney or judge,"[108] whose mission is to clear the innocent, no less than to bring to trial those who may be guilty. It has been suggested that the grand jury's ability to fulfill its public responsibilites is compromised to the extent that the prosecutor is not currently required to present all exculpatory evidence to it for its consideration. It is highly unlikely that the grand jury will learn of exculpatory evidence unless the prosecutor brings it to its attention. Yet, under our present system, the grand jury is not required to hear evidence which might be favorable to the defendant. Hence, the tenable possibility exists that an individual may be compelled to undergo the trauma of a felony trial based upon an *ex parte* proceeding from which he and all his evidence are excluded.

103 Clark, *The Grand Jury*, *supra*, 142.

104 *Id.* at 143. *Cf.* Antell, "Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 183 (1965).

105 *Id.* at 142.

106 *Id.*

107 *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

108 *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973).

In other jurisdictions, it has been held that "if the district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obliged to inform the grand jury of its nature and existence."[109] This rule appears to be consistent with the prosecutor's principal responsibility.[110] "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."[111] So too, such a rule would insure the grand jury's role as a protective bulwark standing solidly between the ordinary citizen and an over-zealous prosecutor. Nevertheless, a requirement that all known exculpatory evidence must be presented to the grand jury might well be unworkable. Under such a rule, a prosecutor might be compelled to present all eye-witnesses to a crime, thereby unduly lengthening grand jury proceedings. We suggest, however, that this issue be given further consideration.

H. Right of Target Witnesses to Appear.

In New Jersey, it is unnecessary to advise a witness of his Fifth Amendment privilege against self-incrimination if he is called before a grand jury conducting a general investigation. "Where the inquiry is in fact a general investigation not aimed at the witness and the witness fails to claim the privilege, his testimony can be used against him and can even be the basis of an indictment.[112] In contrast, the broad latitude afforded the questioning of a "non-target" witness does not apply to one who is the focus of a grand jury investigation. Rather, in New Jersey, a target witness must be warned of that fact.[113] A witness becomes a target of an investigation when he is called in order to obtain evidence to fix a criminal charge.[114] It is not necessary for a witness to have had formal charges filed against him in order for him to be considered such a target. It is only necessary that an intent to indict him at the time of questioning is present. In *State v. Sarcone*, 96 N.J.Super. 501 (Law.Div. 1967), a trial court held that the appearance of a target witness or a putative defendant before a grand jury, absent the warnings and a subsequent waiver, mandates a dismissal of a resulting indictment.[115] This holding was overruled by the Appellate Division in *State v. Vinegra*, 134 N.J.Super 432 (1975) and is now pending on appeal in the Supreme Court.

It has been suggested that a putative defendant be permitted to appear at his request before the grand jury. Several states allow the accused the right to testify prior to indictment although no duty exists on the part of the prosecutor to so inform the individual.[116] Other jurisdictions require that public officers accused of official misconduct must be informed of the charge and be permitted to appear and testify before the grand jury.[117] Still other states afford the accused the opportunity to be present and to question other witnesses, but not the right to introduce evidence in his behalf.[118] We suggest that this area be the subject of further inquiry. It is to be noted in this regard that several bills permitting a target witness an opportunity to appear before the grand jury on his own initiative are presently pending before Congress.[119]

109 See *Johnson v. Superior Courts*, 15 Cal. 3d 248, ___ Cal. Rptr. ___, ___ P.2d ___ (1975).

110 See *Disciplinary Rule* 7-103.

111 *Canons of Professional Ethics*, Canon 5. See also *State v. Farrell*, 61 N.J. 93, 104 (1972).

112 *State v. Fary*, 19 N.J. 431 (1955).

113 *State v. Sarcone*, 96 N.J.Super. 501 (Law Div. 1967).

114 *Id.*

115 *Contra: United States v. Corrallo*, 413 F.2d 1306, 1328-1330 (2 Cir. 1969); *Blackwell v. United States*, 405 F.2d 625 (5 Cir. 1969), *cert.* denied 395 U.S. 962 (1969); *United States v. Capaldo*, 402 F.2d 821, 823-824 (2 Cir 1968), *cert.* denied 394 U.S. 989 (1969); *United States v. Levenson*, 405 F.2d 971, 979 (6 Cir. 1968), *cert.* denied 395 U.S. 958 (1969).

116 See *e.g.*, *N.Y. Crim. P. Law*, §190.50 (1971); *Okla. Stat. Ann.* tit. 22, §335 (1969).

117 *Ga. Code Ann.* §40.1617 (1957), §89-9908 (1971).

118 *State v. Menillo*, 159 Conn. 264 (1970).

119 *H.R.* 2986; *H.R.* 6006.

I. Right of Witnesses to Have Counsel Present.

At present, a witness appearing before the grand jury has no right to be accompanied by counsel.[120] As noted previously, *R.* 3:6-6(a) closely restricts those permitted to be present during the grand jury's inquiry.[121] Legal commentators, however, have suggested that grand jury investigations constitute a "critical stage " of criminal proceedings and, thus, witnesses ought to be permitted to be accompanied by counsel.[122] Analogizing the grand jury's function with that of a preliminary hearing (see *Coleman v. Alabama*, 399 U.S. 1 (1969), but see *United States v. Mandjuano* ____ U.S. ____ (1976)), it has been contended that "[i]f the accused is in need of a lawyer to argue the probable cause issue before a judicial officer, the presence of counsel is even more indispensable when a body of laymen is called upon to apply this legal standard."[123] The attorney's role would be limited "to advising the witness with respect to questions put to him. . . ."[124] Any further participation would be barred "so that critics of this reform [could not] claim that the grand jury would be unable to function swiftly. . . ."[125] It is to be observed that several states have enacted statutes authorizing the presence of counsel during the grand jury's investigation.[126]

Those opposing such legislation argue that grand jury proceedings are not criminal prosecutions. Further, the presence of counsel might well impair the independence of grand jury members. Enactment of such a proposal might cause intolerable delays and transform the grand jury proceeding into a mini-trial.

In any event, we recommend that the suggested reform be the subject of further study. Perhaps, the right to have counsel present should be adopted only with respect to putative defendants or target witnesses. The fact that legislation exists in other jurisdictions affording the right to an attorney suggests that the question warrants impartial inquiry.

J. Oath of Secrecy.

The ancient doctrine of grand jury secrecy "has its origins in the early history of the common law,"[127] and is "older than our nation itself."[128] Our courts have strictly adhered to the traditional policy of secrecy and have deviated from that course only in rare instances when justice plainly demanded it.[129] The doctrine is thus deeply

120 *State v. Cattaneo*, 123 N.J.Super. 167, 172 (App.Div. 1973). See also *Kirby v. Illinois*, 406 U.S. 682 (1972); *In re Groban*, 352 U.S. 330 (1957); *United States v. Morado*, 454 F.2d 167 (5 Cir. 1972); *United States v. DiMichele*, 375 U.S. 959 (3 Cir. 1967), *cert.* denied 389 U.S. 838 (1967).

121 R. 3:6-6(a) provides as follows:

(a) Attendance at Session. The prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors, the clerk and the prosecuting attorney may be present while the grand jury is deliberating. The grand jury, however may request either the prosecuting attorney or the clerk to leave the jury room during its deliberations.

122 See Clark, *The Grand Jury, supra*, 126; Dash, "The Indicting Grand Jury: A Critical Stage." 10 *Amer. Crim. L. Rev.* 807 (1972).

123 Dash, "The Indicting Grand Jury: A Critical Stage," *supra*, 815.

124 Clark, *The Grand Jury, supra*, 126.

125 *Id.*

126 See *e.g., Kan. Stat. Ann.* §22-3009 (1970); *S.D. Comp. Laws* §23-30-7 (1972); *Utah Code Ann.* §77-19-3 (1973); *Wash. Rev. Code Ann.* §10.27.120 (1972).

127 *State v. Farmer*, 45 N.J. 520, 522 (1965).

128 The requirement of secrecy in ancient common law was so strict that if a grand juror disclosed to an indicted person the evidence presented against him, he was held to be accessory to the crime if the crime was a felony and a principal if it was treason. 4 *Blackstone Commentaries*, 126. Grand jury secrecy was firmly established in the Earl of Shaftesbury Trial, 1681.

129 *State v. Farmer, supra; State v. DiModica*, 40 N.J. 4040 (1963); *State v. Clement*, 40 N.J. 139 (1963); *State v. Moffa*, 36 N.J. 219 (1961); *In re Presentment by Camden Cty. Grand Jury*, 34 N.J. 378 (1961).

rooted in our jurisprudence[130] and is reflected in our existing court rules. *R.* 3:6-7 specifically states that "the requirement as to secrecy of the grand jury shall remain as heretofore" and "all persons other than witnesses . . . shall be required to take an oath of secrecy before their admission thereto." Further, *R.* 3:13-3 and *R.* 3:17, the only specified exceptions to the rule of secrecy, refer only to pretrial discovery of grand jury minutes by a criminal defendant.

The reasons supporting the traditional policy of secrecy "are manifold . . . and are compelling when viewed in the light of the history and *modus operandi* of the grand jury."[131] They have been aptly summarized in the oft-quoted language of the Court of Appeals for the Third Circuit in *United States v. Rose*, 215 F.2d 617, 628-29 (3 Cir. 1954). Succinctly stated, the secrecy doctrine is designed to (1) prevent the escape of those whose indictment may be contemplated, (2) insure the utmost freedom to the grand jury during its deliberations, and to prevent persons subject to indictment or their friends from importuning grand jurors, (3) prevent subornation of perjury; (4) encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes, and (5) protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation.[132]

As we have noted, our rules generally adhere to the doctrine of secrecy. However, *R.* 3:6-7 specifically exempts witnesses from the oath requirement. It has been suggested that the values to be protected by the secrecy doctrine, as noted above, are subverted to the extent that witnesses are permitted to discuss what transpired during the grand jury's investigation. There is no case law in New Jersey containing an historical exposition of witness secrecy in grand jury proceedings. Dicta in several decisions supports the view that a witness who has been examined before a grand jury is under no legal obligation to refrain from recounting what was said to and by him while there.[133] Nevertheless, it might well be argued that *R.* 3:6-7 does not preclude the assignment judge from requiring that the secrecy oath be administered with respect to witnesses. *R.* 3:6-7 requires that persons mentioned in *R.* 3:6-6(a) must be sworn to secrecy, but witnesses **need not** be so bound. (Emphasis ours).

We suggest that this question be studied. It is to be noted that the Supreme Court Committee recently considered the issue of whether witnesses should be required to take an oath of secrecy. The Committee agreed with the policy against prohibiting witnesses from divulging what transpired during the grand jury's investigation.[134] However, the question is a difficult one and therefore should be reviewed.

K. The Role of the Prosecutor.

It has been said that "[t]he integrity of the criminal justice system cannot be sustained unless it is complemented by an independent grand jury process which shields both the accused and the investigators from any questioning of their impartiality."[135] Much of the criticism of the grand jury system has focused upon the ability of the prosecutor to dominate its investigations and mold the results of its

130 *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *United States v. Proctor & Gamble Co.*, 350 U.S. 677, 683 (1968); 4 *Blackstone Commentaries* 301, *et seq.*; 1 Pollack & Maitland, *History of English Law* 130 (1895). See generally, 8 Wigmore, *Evidence* §2360 (McNaughton rev. 1961).

131 *Pittsburgh Plate Glass Co. v. United States, supra* at 399.

132 See also *United States v. Amazon Industrial Chemical Corp.* 55 *F.R.D.* 254, 261 (D.C. Md. 1931).

133 *State v. Borg*, 8 N.J. Misc. 349 (S.Ct. 1930); *State v. Fish*, 90 N.J.L. 17 (S.Ct. 1917), rev'd on other grounds 91 N.J.L. 228 (E. & A. 1917).

134 "Report of the Supreme Court's Committee on Criminal Practice," 98 *N.J.L.J.* 321 (1975).

135 Boylan, "On Restructuring the Grand Jury System," 88 *N.J.L.J.* (1975).

inquiries.[136] Prosecutors respond by noting that grand juries do, in fact, act independently. In point of fact, prosecutorial impropriety with respect to the grand jury function is rare in this State. We emphasize that the primary problem confronting the grand jury at present is the great volume of matters which must be presented to it. Simply stated, prosecutors, often overwhelmed by statistics, rarely have the motivation to "control" the grand jury.

Nevertheless, public confidence in our grand jury system can best be maintained by eradicating the potential for abuse. We suggest that the following proposals be considered. First, the prosecutor should not be permitted to circumvent the accused's right to a probable cause hearing by making an immediate presentation to the grand jury. *R.* 3:4-3 requires a hearing as to probable cause within a "reasonable time" following the filing of a complaint if "an indictment has [not yet] been returned against the defendant." A probable cause hearing is not constitutionally guaranteed except where the accused is detained.[137] Further, such a hearing is not an essential part of the prosecution and, as noted, can be superseded by the grand jury's prior return of an indictment.[138] Nevertheless, probable cause hearings assist the prosecutor in evaluating and in screening cases. So too, they are beneficial to the accused by virtue of the discovery advantages they afford. Moreover, such hearings may be employed as vehicles for plea bargaining since both the prosecutor and the accused can better evaluate the merits of their respective positions following presentation of evidence. In any event, our rules provide for such hearings and, thus, prosecutors should not be permitted to unilaterally compromise the defendant's right as set forth in *R.* 3:4-3.

Second, we suggest limiting the number of times that a prosecutor may resubmit a matter to another grand jury. At present, the return of a "no bill" by one grand jury does not preclude the prosecutor from presenting the case to another, perhaps more cooperative, one. The "potential for nullifying one grand jury's action by reinstituting the matter, without new evidence, before a different . . . grand jury recurs throughout the history of this institution, and the theme has its modern equivalent".[139] It would appear that, at the very least, the prosecutor should be required to advise the grand jury that a matter has been previously presented and that a "no bill" has been returned. Another alternative might be to require the prosecutor to apply to the assignment judge and to indicate that "new" evidence has been discovered which warrants resubmission of the matter to a different grand jury. We urge further consideration of this problem.

Third, we suggest consideration of a rule which would require that all comments of the prosecutor appear on the record. Presently, a defendant is not entitled to discovery of the "off the record" remarks of a prosecutor.[140] It bears repeating in this context that a prosecutor's duty before the grand jury is to present the evidence and to explain the law. A prosecutor should not, by his words or conduct, invade the province

136 See Puff and Harreden, "Grand Jury in Illinois: To Slaughter a Sacred Cow," 1973 *U.Ill.L.F.* 635 (1973). See also Wickersham, "The Grand Jury - Weapon Against Crime and Corruption," 51 *A.B.A.J.* 1157 (1965).

137 See *Gerstein v. Pugh, supra.*

138 See *State v. Cox*, 114 N.J.Super. 556 (App.Div. 1971); *State v. Boykin*, 113 N.J.Super. 594 (Law Div. 1971). The Supreme Court's Special Committee on Calendar Control has recommended the elimination of probable cause hearings (Report, 94 *N.J.L.J.* 185, 198 (1971)). Wholly apart from the merits of this proposal (see Editorial, 94 *N.J.L.J.* 212 (1971)) (criticizing the Committee's recommendation and advocating retention of the probable cause proceeding), *Gerstein v. Pugh, supra* compels at least some abbreviated hearing to determine probable cause when the accused is in custody.

139 Clark, *The Grand Jury, supra*, 11-12 *Cf. Johnson v. Superior Court, supra.*

140 *State v. Fisher*, 112 N.J.Super. 319 (Law Div. 1970). But see *State v. Hart*, ___ N.J.Super. ___ (App.Div. 1976).

of the grand jury.[141] That is not to say that a prosecutor may not "summarize for the benefit of the grand jury the evidence that has been heard.[142] In at least one jurisdiction, it has been stated that a prosecutor's "request for an indictment . . . amount[s] to nothing more than a formal indication of the government's position" and, hence, is not objectionable.[143] Other states have disagreed and have expressed the view that it is improper for a prosecutor to inform the grand jury of his personal opinion as to guilt or innocence.[144] In New Jersey a prosecutor may not offer such an opinion. *State v. Hart*, ____ N.J.Super____ (App.Div. 1976). in any event, the question whether prosecutorial comments to a grand jury ought to be on the record should be reviewed.[145]

Finally, New Jersey's practice of permitting the prosecutor to be present in the grand jury room while deliberations are taking place[146] should be reconsidered.[147] In many jurisdictions, the prosecutor is barred from the grand jury room while the jurors are deliberating.[148] Although the prosecutor should be available to respond to questions at all times, his presence during the grand jury's deliberations is of doubtful value. We suggest study of a proposal which would bar the prosecutor from the grand jury room during deliberations.

CONCLUSION

The most obvious conclusion to be drawn from this article is the need for further study. As we have emphasized, we have no empirical foundation upon which to construct either a reformed or a new system for initiating prosecutions. Our research has necessarily been limited to secondary sources and to existing empirical data compiled in other jurisdictions. Any changes of the magnitude we contemplate must be preceded by careful and extensive economic, demographic, and social analyses. In short, a complete feasibility study is indicated.

We offer several hypotheses for futher consideration. Our models have been drawn from those now in operation in other jurisdictions and from those created by legal commentators. We have been able to ascertain those systemic characteristics which seem paradigmatic. A paradigm, though, is useful only until its efficacy has been tested. We therefore conclude that no basic changes should be effected until more detailed studies are made.

141 *State v. Joao*, 491 P.2d 1089 (Haw. 1971). *Commonwealth v. Favulli*, 352 Mass. 95, 224 N.E.2d 422, 430 (1967). *Cf. State v. Manney*, 24 N.J. 571, 581 (1957) where it is stated: "The presence of the prosecutor in the grand jury room during deliberations or voting [is] not considered a proper basis for quashing an indictment *in the absence of any participation or effort to influence on his part*." (Emphasis ours).

142 *United States v. United States District Court*, 238 F.2d 713, 721 (4 Cir. 1956), *cert.* denied *sub nom. Valley Bell Dairy Co. v. United States*, 352 U.S. 981 (1957).

143 *United States v. Rintelen*, 235 F. 787 (S.D.N.Y. 1961).

144 *United States v. Bruzgo*, 373 F.2d 383 (3 Cir. 1967); *State v. Bojorguez*, 111 *Ariz.* 549, 535 P.2d 6 (1975); *State v. Good*, 10 *Ariz. App.* 556, 460 P.2d 662 (Ct. of App. 1969); *State v. Crowder*, 193 N.C. 130, 136 S.E. 337 (1927); *Hammers v. State*, 337 P.2d 1097 (Okla. Crim. App. 1959).

145 It is to be noted that a rule could be adopted requiring the stenographer to record all prosecutorial comments, but compelling, as a prerequisite to discovery, a showing of good cause by the accused.

146 See R. 3:6-6(a). See also *State v. Manney, supra* at 581; *State v. McFeeley*, 136 N.J.L. 102 (S.Ct. 1947); *State v. Ellenstein*, 121 N.J.L. 304 (S.Ct. 1938).

147 See Boylan, "On Restructuring the Grand Jury System," *supra.*

148 See, *e.g., Ark. Stat. Ann.* §43-919 (1964); *Ohio Rev. Code Ann.* §2929.10 (1971); *Tenn. Code Ann.* §40-1610 (1955).

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