

## **CONTROLLING LEGAL AUTHORITIES**

**The legal controlling authority condemning Tennessee's method of allowing criminal court judges to "handpick" county grand jury foremen is found in two U.S. Supreme Court cases:**

- (1) Rose v. Mitchell (1979)**
- (2) Hobby v. United States (1984)**

### **Tersely:**

"The Supreme Court has held that discrimination in the selection of the grand jury's foreperson does not require the dismissal of an indictment if the foreperson was selected from among the grand jury by its own members, as long as the grand jury pool was selected in an unbiased manner from a cross-section of the community (*Hobby v. United States, 1984*). A federal grand jury foreperson is not in a position to sway the outcome of the case.

**However, in Hobby (1984) SCOTUS said, [using Tennessee's method of selection] the foreman was not selected from among the local grand jury but instead from outside of it by a judge. Furthermore, the foreman had significant power in issuing subpoenas that could be [used to] influence the substance of an indictment."**

**"The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion."**

***This did [and still does] constitute a due process violation!.*** (Zalman, Marvin, Criminal Procedure:

Constitution and Society, 3<sup>rd</sup> Edition, Prentice Hall (2002), pg. 225).

In **Rose (1979)** SCOTUS excoriated Tennessee's method of selecting grand jury foremen:

**"The exclusion from grand jury service of [any group] otherwise qualified to serve, impairs the confidence of the public in the administration of justice...[such exclusion] destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process...as this court repeatedly has emphasized, such discrimination not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."**

In **Hobby (1984)** SCOTUS repeated it is **"impermissible"** (present tense) for Tennessee criminal court judges to handpick Tennessee county grand jury foreman.

## REMEDIES

### **Rose v. Mitchell (1979) exhorts:**

Tennessee's method of the selection of grand jury foremen was "subject to abuse." Further Rose states: "...a conviction based on an indictment [or presentment] where the foreman was chosen in a discriminatory fashion is void just as would be a conviction where the entire grand jury is discriminatorily selected, whether or not there is a showing of actual prejudice."

### **Vasquez v. Hillery (1986) asserts:**

"Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would



have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal."


FROM ROSE J. MITCHELL (1979)

The only difference between this case and our previous cases voiding a conviction due to discriminatory selection of members of the grand jury is that in this case it has been shown only that the grand jury foreman, who did not vote on the indictment, was chosen in a manner prohibited by the Equal Protection Clause. I agree with the Court of Appeals that given the vital importance of the foreman in the functioning of grand juries in Tennessee,<sup>1</sup> a conviction based on an \*590 indictment where the foreman was chosen in a discriminatory fashion is void just as would be a conviction where the entire grand jury is discriminatorily selected, whether or not there is a showing of actual prejudice, see \*\*3018 *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed. 2d 536 (1972); *Arnold v. North Carolina*, 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77 (1964); *Eubanks v. Louisiana*, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958); *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950); *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947); *Hill v. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942); *Pierre v. Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); *Bush v. Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883).

TAKE NOTE OF THE SEVERAL CITATIONS







# CRIMINAL PROCEDURE

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THIRD EDITION



MARVIN ZALMAN

THIRD EDITION

**CRIMINAL PROCEDURE**  
**CONSTITUTION AND SOCIETY**

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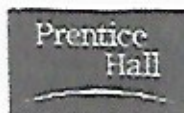
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The underlying policy of unbiased grand jury selection was forcefully stated in Justice Blackmun's opinion in *Rose v. Mitchell* (1979):

Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

The Supreme Court has held that discrimination in the selection of the grand jury's foreperson does not require the dismissal of an indictment if the foreperson was selected from among the grand jury by its own members, as long as the grand jury pool was selected in an unbiased manner from among a cross-section of the community (*Hobby v. United States*, 1984). A federal grand jury foreperson is not in a position to sway the outcome of a case. On the other hand, in *Rose v. Mitchell* (1979), the foreman was not selected from among the local grand jury but instead from outside of it by a judge. Furthermore, the foreman had significant power in issuing subpoenas that could be influence the substance of an indictment. This did constitute a due process violation.

### Grand Jury Functions and Powers

The grand jury operates as a "sword," to investigate cases with broad subpoena powers, and a "shield," to screen cases brought by the prosecutor by determining whether or not there is sufficient evidence to prosecute. If the jury finds, by a majority vote, that probable cause exists it votes a true bill of indictment, specifying the charges on which the defendant must stand trial. The function of a pretrial screen is to prevent oppressive, unjust, hasty, malicious, or ill-founded prosecutions.

**GRAND JURY INVESTIGATION** The grand jury has several powers that give it enormous advantages in conducting investigations. In theory, as independent citizens can investigate any crime or government misdeed that comes to its attention. In practice, the grand jury is dependent upon the prosecutor to bring cases and gather evidence, and its power

investigation. There is a general obligation to obey grand jury subpoenas. In *Branzburg v. Hayes* (1972), the Supreme Court held that a news reporter does not have a First Amendment privilege to withhold information or to avoid testifying before a grand jury when the reporter promised not to reveal a source who may have been involved in criminal activity. The Court made it clear that if a grand jury was called as a pretext to harass a reporter, federal courts could act to protect them under the First Amendment. Failure to obey a subpoena can be punished with a contempt of court charge. Testimony before the grand jury is under oath, so false or contradictory statements can be used later to impeach the witness or be used as a basis for a perjury prosecution. A grand jury does not need probable cause that a witness or evidence is necessary to the case in order to subpoena someone, but courts may overrule a subpoena if (1) the requested evidence is not relevant to the investigation or (2) the request for documents is too vague or unreasonable.<sup>19</sup>

**IMMUNITY** A related power of the grand jury is the ability to grant immunity to witnesses who refuse to testify on Fifth Amendment self-incrimination grounds (Chapter 8). Immunity granted by a state court or grand jury also prohibits federal prosecution, and federal immunity prevents prosecution (*Murphy v. Waterfront Commission*, 1964). The scope of immunity may be either narrow or broad. Prosecutors in *Counselman v. Hitchcock* (1892) granted a limited form of use immunity to grand jury witnesses. This prevents the use and derivative use of testimony in future prosecutions, but does not bar future prosecutions of the defendant if evidence is obtained from an independent source. The Supreme Court held in 1892, that such immunity was not sufficient to protect the witness's privilege against self-incrimination. In response to *Counselman*, Congress adopted a transactional immunity statute that provided that a witness required to testify was granted immunity "for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence." The Court began to shift its ground in *Murphy v. Waterfront Commission* (1964), leading Congress to again narrow its immunity statute. The Supreme Court upheld the constitutionality of the narrower use immunity in *Kastigar v. United States* (1972). This narrow reading of the privilege against self-incrimination is another indication of the Burger Court reflecting the Crime Control Model of criminal justice.



SATURDAY, 30 JUNE 2018

Typed out exactly, unedited.

2002

Zalman needed better editors.

Edited, the paragraph should read:

"The Supreme Court has held that discrimination in the selection of the grand jury's foreperson does not require the dismissal of an indictment if the *foreperson* was selected from among the grand jury by its own members, as long as the grand jury pool was selected in an unbiased manner from a cross-section of the community (*Hobby v. United States*, 1984). A federal grand jury foreperson is not in a position to sway the outcome of the case. On the other hand, in *Rose v. Mitchell* (1979), the foreman was not selected from among the local grand jury but instead from outside of it by a judge. Furthermore, the foreman had significant power in issuing subpoenas that could [~~the word "be"~~ *is deleted*] influence the substance of an indictment. This did constitute a due process violation."

~or~

"The Supreme Court has held that discrimination in the selection of the grand jury's foreperson does not require the dismissal of an indictment if the *foreperson* was selected from among the grand jury by its own members, as long as the grand jury pool was selected in an unbiased manner from a cross-section of the community (*Hobby v. United States*, 1984). A federal grand jury foreperson is not in a position to sway the outcome of the case. On the other hand, in *Rose v. Mitchell* (1979), the foreman was not selected from among the local grand jury but instead from outside of it by a judge. Furthermore, the foreman had significant power in issuing subpoenas that could be *used* ~~to~~ influence the substance of an indictment. This did constitute a due process violation."

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as to why they should be excused from serving on the grand jury. Bystanders may be used if there are not enough people.<sup>3</sup> From all the qualified persons the judge selects twelve persons to comprise the grand jury.<sup>4</sup> It is common practice to select alternates from the original panel should a regular member later become unavailable.<sup>5</sup>

The above procedure varies between counties and between judges. The controversial issue, however, is not the mechanics of selection<sup>6</sup> but whether it results in systematic exclusion of identifiable groups. This is discussed in connection with motions to dismiss indictments.<sup>7</sup>

#### § 9:8 Foreman—Selection—Duties

The foreman of the grand jury is "hand picked" from the population of the county by the judge empanelling the grand jury.<sup>1</sup> The term of office of the grand jury foreman is two years,

persons who have been convicted of conspiracy to take human life or do injury to persons or property. This is directed to the "whitecaps" of the reconstruction era, *Jenkins v. State*, 99 Tenn. 569, 42 S.W. 263 (1897). See also § 16:19, Disqualifications of individual jurors—Incompetency—Bias, regarding competency and special disqualifications.

<sup>3</sup>T.C.A. § 40-12-101. Before the grand jury may consist entirely of bystanders, the regular panel must first be exhausted, *Turner v. State*, 111 Tenn. 593, 69 S.W. 774 (1902).

<sup>4</sup>The selection is required to be made by drawing from a box, slips of paper containing the names of the jurors. Tenn. R. Crim. P. 6(a)(1).

<sup>5</sup>See Tenn. R. Crim. P. 6(b)(1), as to vacancies on the grand jury.

<sup>6</sup>See § 16:17. In general, see also *State v. Wiseman*, 643 S.W.2d 354 (Tenn. Crim. App. 1982) (irregularities do not affect indictment, absent fraud).

<sup>7</sup>§ 16:20, Constitutionality of selection procedures.

#### [Section 9:8]

<sup>1</sup>Tenn. R. Crim. P. 6(g). See also *Mitchell v. Rose*, 570 F.2d 129 (6th Cir. 1978), judgment rev'd, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979), concerning the constitutional problems with the Tennessee method of foreman selection: "And one may assume for purposes of this case that the Tennessee method of selecting a Grand Jury foreman is susceptible of abuse." 443 U.S. at 566, 99 S.Ct. at 3005, 61 L.Ed.2d at 756. See also § 16:20, Constitutionality of selection procedures regarding systematic exclusion. *State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999) (grand jury forepersons held merely ministerial and administrative role, and thus, evidence of disparity between racial composition of population and those who had served as forepersons of grand juries over specified time period did not alone require that defendant's indictment be quashed in absence of any proof that discrimination tainted entire grand jury).

but he may qualify for selection if relieved.<sup>4</sup>

The foreman is selected in conjunction with the subpoenas, the grand jury indictments,<sup>7</sup>

#### § 9:9 Oath

After the foreman is selected, the oath is administered, and the grand jury is charged as witnesses.

<sup>2</sup>Tenn. App. 1972 (3)

<sup>3</sup>Tenn. App. 1972 (3)

<sup>4</sup>Tenn. 3994 (1873);

<sup>5</sup>Tenn.

<sup>6</sup>Tenn.

<sup>7</sup>T.C.A. U.S. 545, 99

other chairperson the decision-

[Section 9:8]

<sup>1</sup>Tenn. and other (repealed).

<sup>2</sup>State given after trial

<sup>3</sup>Tenn.

<sup>4</sup>Prior matters. The jury and reissues, comment

<sup>5</sup>T.C.A.



but he may be reappointed.<sup>2</sup> The foreman must have all the qualifications of a regular grand juror.<sup>3</sup> A new foreman may be selected if the regular foreman is unable to serve or has been relieved.<sup>4</sup>

The foreman has certain specified duties including cooperation with the district attorney in ferreting out crime, issuing subpoenas for witnesses,<sup>5</sup> swearing witnesses,<sup>6</sup> endorsing indictments,<sup>7</sup> and, in general, insuring the smooth operation of the grand jury as a whole.<sup>8</sup>

### § 9:9 Oath of jurors—Charge

After the grand jury is formed, all members, including the foreman, take an oath which is set forth in the rules.<sup>1</sup> Following the oath<sup>2</sup> the grand jury is charged by the court concerning its powers and duties.<sup>3</sup> The judge may "expound the law" to the grand jury as he deems proper.<sup>4</sup> The judge must, however, charge as to the function of the district attorney questioning witnesses only at the request of the grand jury.<sup>5</sup>

<sup>2</sup>Tenn. R. Crim. P. 6(g); *Nelson v. State*, 499 S.W.2d 956 (Tenn. Crim. App. 1972) (reappointment).

<sup>3</sup>Tenn. R. Crim. P. 6(g); *Nelson v. State*, 499 S.W.2d 956 (Tenn. Crim. App. 1972) (reappointment).

<sup>4</sup>Tenn. R. Crim. P. 6(b)(2); *State v. Collins*, 65 Tenn. 151, 1873 WL 3994 (1873); *State v. Gautney*, 607 S.W.2d 907 (Tenn. Crim. App. 1980).

<sup>5</sup>Tenn. R. Crim. P. 6(g).

<sup>6</sup>Tenn. R. Crim. P. 6(j)(4).

<sup>7</sup>T.C.A. § 40-13-105.

<sup>8</sup>*Mitchell v. Rose*, 570 F.2d 129 (6th Cir. 1978), judgment rev'd, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) (the foreman "like every other chairperson is in a position to guide, whether properly or improperly, the decision-making process" of the grand jury).

#### [Section 9:9]

<sup>1</sup>Tenn. R. Crim. P. 6(a)(4). Under prior law, the oaths for the foreman and other members were different, see T.C.A. §§ 40-1508 to 40-1509 (repealed).

<sup>2</sup>*State v. Gouge*, 80 Tenn. 132, 1883 WL 3799 (1883) (charge must be given after the oath).

<sup>3</sup>Tenn. R. Crim. P. 6(a)(5).

<sup>4</sup>Prior law required a charge on a multiplicity of offenses and other matters. The Rules Commission deemed these matters to be often unnecessary and removed the requirement of such special charges. Tenn. R. Crim. P. 6, comments.

<sup>5</sup>T.C.A. § 8-7-503.