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THE GRAND JURY IN ALASKA: TENTATIVE RECOMMENDATIONS TO THE JUDICIAL COUNCIL

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NOTE: The recommendations in this report are not final. The purpose of this publication is to stimulate further discussion of the grand jury process and to precipitate a speedy resolution of the issues. The Judicial Council has accepted these tentative recommendations pending further discussions by bar associations, legislative committees, the judiciary, and the public.

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I. DESCRIPTION OF THE GRAND JURY PROCESS

In 1166 the Norman king, Henry II, proclaimed the Assize of Clarendon. By this decree he ordered that "in every county and hundred" there be convened a jury for royal criminal inquiry. Sixteen of the "most lawful men" in each hundred and vill met to decide whether, since the King's accession, "there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers or thieves." (Innocence or guilt in the 12th century was frequently determined by ordeal of water.) Through this assize Henry extended the royal prerogative into the English counties and enriched the crown with chattels forfeited by convicted felons. Legal historians trace the origins of the grand jury system directly to the Assize of Clarendon.[1*]

By the time of the adoption of the American Bill of Rights, the grand jury had gained an accepted place in English criminal jurisprudence. The Fifth Amendment to the United States Constitution reads in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . [2]

Later, in the early 20th century, the United States Supreme

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* Footnotes are printed at the end of the Report.

Court wrote in Hale v. Henkel:

> [T]he most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill-will. 3

Thus the grand jury progressed in legal purpose from a tool of the King to the people's protector, interposed between the vindictive or ambitious prosecutor and the (possibly innocent) citizen.

In view of the origin of the grand jury as an instrumentality of the royal prerogative, it is ironic that critics indict it for no longer performing its supposedly "original" functions.

> This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymeade. Today it is but a convenient tool for the prosecutor--too often used solely for publicity. An experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury. 4

The speaker, in 1972, was the Hon. William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois. After 32 years of experience on the bench, Judge Campbell was said to have tried more cases than any other judicial officer in the entire federal system.

If Judge Campbell is correct, then we have come full-cycle; and the grand jury may have returned to its original role as servant of the King rather than protector

of the people. However, the grand jury system as it functions in the United States District Court in Chicago may or may not bear significant resemblance to its counterpart in Anchorage, Fairbanks, Juneau, Nome or Ketchikan. This paper will examine the operation of the grand jury under current Alaska practice and discuss some possible alternatives.[5]

Article I, §8 of Alaska's Constitution was modeled after the Fifth Amendment to the federal Constitution, incorporating the grand jury solidly into the structure of our state's system of criminal justice.

The grand jury in Alaska consists of from 12 to 18 people empowered by law "to inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court."[6] In addition to the power to indict, the grand jury "shall have the power to investigate and make recommendations concerning the public welfare or safety."[7] Although criminal indictments against individuals sometimes result as by-products of so-called "probes" by investigative grand juries, it will be convenient for most purposes to treat the two functions separately in our discussion. (See Chapter IV for discussion of the investigative function of the grand jury.)

Although the statutes speak of the duty to inquire into "all crimes," the Alaska Constitution mandates the indictment process only for "felonies," or crimes which may be punished by imprisonment for a term exceeding one year.[8] When the grand jury performs its routine law enforcement

function of hearing evidence against suspected felons, the prosecutor drafts a proposed indictment. If a majority of the total number of the jurors concurs that the suspect named in the indictment should be held for trial, then the words "a true bill" are endorsed on the document and it is signed by the foreman. If a majority does not agree, then the indictment is termed "not a true bill."[9] In either case it is filed with the clerk and presented to the judge. If the grand jury has found "not a true bill," and if the defendant has not already been held to answer for the charge by the lower court, then "the indictment and the minutes of the evidence in relation thereto shall be destroyed by the grand jury."[10] The office of the Superior Court Clerk in Anchorage reputedly has devised a "fail safe" system for disposing with the electronically recorded tapes of grand jury sessions resulting in "no bills."

A case may reach the grand jury be either of two routes: It may come up through the district court system by way of preliminary examination, or it may by-pass the district court and be initiated directly before the grand jury itself. Under present law, the defendant does not have a constitutional right to a preliminary hearing for establishing "probable cause" if a grand jury indictment has already been returned on the same charge.[11] Hence, in Anchorage, where a grand jury is usually in session every week, prosecutors prefer to initiate felony cases directly before this body, thus both saving work and avoiding the exposure of prosecution

witnesses to questioning by defense attorneys. Police officers bring those cases which they have fully investigated to an "intake officer" in the district attorney's office. It is the job of this prosecutor to screen the work product of the police, normally eliminating some cases, charging some cases as misdemeanors, and bringing the balance to grand jury as proposed felonies.

The district attorney's intake officer is himself responsible for presenting the evidence to the grand jury in those cases which he chooses to prosecute as felonies. He reads the police reports, decides what evidence he needs and from whom, and then instructs the police officers to locate the necessary witnesses, documents and exhibits in support of each prosecution. The district attorney usually need not take the case before the grand jury until he has properly prepared the groundwork. In fact, there are many cases in which months elapse between the investigative work and the presentation of the matter to the grand jury. The grand jury route is not usually employed in emergencies. All cases resulting in true bills are returned in open court before the presiding judge, who then directs that warrants be issued for the arrest of the defendants named. The defendants arrested pursuant to these warrants are brought immediately to Superior Court and so avoid the district court level entirely.

The other principal route taken by felony prosecutions is by way of the district court system as a first

step. If, for example, a defendant is arrested while apparently fleeing the scene of a crime, he must be taken before a district judge or magistrate within 24 hours of the arrest.[12] He must be given a preliminary examination pursuant to Criminal Rule 5.1 within 10 days after the initial court appearance if he is still in custody, or within 20 days if he has been released. At the preliminary examination the prosecutor presents witnesses to a district court judge who must then determine whether there is probable cause to believe a crime was committed and, if so, whether there is probable cause to believe the defendant was the culprit. At this hearing the defendant's lawyer is afforded an opportunity to cross examine the prosecution witnesses, probing for weaknesses or inconsistencies in their stories. The defense may also call its own witnesses.

If the district court judge determines there is indeed probable cause, then the defendant is "held to answer" for the charges and the prosecution continues. However, even if the defendant is discharged by the judge for lack of probable cause, still the prosecutor is not prevented from taking his case before a grand jury to seek an indictment.[13] On the other hand, should the defendant be held to answer at a preliminary hearing, the prosecutor then has a strict legal duty to take the case to the grand jury.[14] This will normally result in a true bill and the defendant's subsequent appearance before the Superior Court for all further stages of the case.

If by some chance a majority of grand jurors cannot agree on whether to indict, then the case is closed. The prosecutor is precluded from submitting the matter to another grand jury unless he obtains a special court order.[15] No instance in Alaska in which a grand jury refused to indict and the case was subsequently resubmitted by order of the court was found during the research phase of this Report.

The prosecutor may, if he disagrees with the grand jury, refuse to sign the indictment and thus halt the prosecution. This inherent power of the prosecutor has been upheld by the United States Court of Appeals for the Fifth Circuit.[16]

> The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary powers of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.

The court of appeals held that the doctrine of separation of powers dictated this decision; and that the courts "are not to interfere in the free exercise of the discretionary power of the attorneys for the United States in their control over criminal prosecutions."

Assuming that a true bill is found and that it is signed by all necessary parties, the indictment which is ultimately presented to the court should consist of a "plain, concise and definite written statement of the essential facts constituting the offense charged."[17] Defects in language or technical errors of form will not affect the

validity of an indictment unless the defendant can show that these errors or defects actually prejudiced his case in some manner. It is important that the indictment be clear enough and complete enough to inform the defendant of the nature and cause of the accusation against him so that he can effectively prepare a meaningful defense. The indictment, if it is clear, will serve also to protect his right not to be tried twice for the same offense.[18] A precise indictment prevents unfair surprise at the trial by limiting the prosecutor's proof only to the operative facts alleged.

In theory, the grand jury is simply an "arm of the court." It is entirely dependent upon the court to enforce its directives. By court rule the presiding superior court judge in each judicial district must order a grand jury to be summoned as often as the "public interest requires," but at least once each year.[19] The grand jury may be discharged at any time, completely at the will of the presiding judge. It cannot serve more than five months unless for good cause the judge extends the period.[20]

In Anchorage the grand jury is generally rotated every 90 days, and is convened in a special room set aside for this purpose in the court building. Unless some special investigation is under way, weekly sessions usually last between one and three days. An informal telephone contact between the district attorney's office and the presiding judge determines how many days the grand jury will be required to sit, depending upon the weekly case load.

Anyone is qualified to serve as a grand juror if he is over 19, a United States citizen and a state resident, reads or speaks English, and is "in possession of his natural faculties."[21] However, persons who have served as jurors within the previous year, or who have lost their civil rights on account of felony convictions, are disqualified.[22]

The names of potential jurors are taken from one or more lists compiled in each judicial district. These lists are themselves derived from other lists comprising all of the registered voters in the area, persons who have purchased resident trapping, hunting or fishing licenses, or those who have filed state income tax returns.[23] The purpose of the inclusion of these diverse sources is to insure that the grand jury is drawn from a truly representative cross section of the community.[24]

According to Criminal Rule 6 grand juries are to be convened in Ketchikan, Sitka, Juneau, Anchorage, Kenai, Kodiak, Nome or Fairbanks. The particular site selected for the convening of a grand jury is determined by the senate election district in which the crime allegedly has been committed. The Rules also contain a special provision that the presiding judge of the judicial district may convene a grand jury at a site other than that dictated by the election district of the crime, if the judge determines that such is "necessary in the interest of justice."[25] It has become common practice for substantially all grand juries in the Third Judicial District to be convened in Anchorage, regardless

of the senate election district in which the crime is alleged to have taken place. It is believed more economical and convenient to summon a few jurors from, for example, Kodiak, to come to the Anchorage area, than to require all the attorneys, judges and clerks to travel out to Kodiak for a grand jury proceeding.

Summonses are issued to prospective grand jurors, who are then ordered to assemble in a courtroom where the process of "qualification" is commenced. An assistant district attorney is always present at this proceeding, as is a member of the public defender's staff. The reason for the presence of these attorneys is so that challenges may be made by either side to the legal qualifications of any juror. The judge will generally ask whether there is anyone present for whom jury duty would constitute a particular burden or hardship. Any apparently legitimate excuse is usually accepted; it is not very difficult, in actual practice, to avoid jury duty. The persons who finally sit on the jury panel are chosen from among the remaining qualified jurors by a random drawing.[26]

Each juror selected must take an oath to "diligently inquire" of all matters which may come to his attention and "true presentment make." The jury is also sworn "to preserve the secrecy required by law."[27] The presiding judge of the court then appoints the foreman of the grand jury. This appointment confers upon the foreman the legal power to administer binding oaths to witnesses.[28]

The judge then instructs the jury as to their duties under the law. These instructions are couched in quite general terms and closely paraphrase the statutes and rules governing grand jury proceedings. Among these instructions the jury is told that "when there is a doubt from the evidence presented whether the facts constitute a crime or whether an offense is subject to prosecution by reason of lapse of time or former acquittal or conviction," the jury may "make a presentment of fact to the court."[29] The presentment should avoid naming any individual. After the judge considers the presentment, it is his duty to instruct the jury as to the applicable law.

Historically, all proceedings before the grand jury were cloaked in total secrecy. It was extremely difficult for the defendant to learn what actually occurred before that body or what factors may have affected the secret group decision to indict him. Often no record of the proceedings was preserved, so that if any improprieties occurred, the defendant was generally completely unable to learn of them, much less prove them in court. The concurrence of total secrecy and the lack of records could easily lead to injustice and abuse. This is the situation still extant in many of the United States District Courts, including that in Anchorage.

In Burkholder v. State,[30] the Alaska Supreme Court wrote that although "the policy of secrecy may have some valid basis while the grand jury is deliberating, there

appears to be no justification for secrecy when the deliberations have been completed, the indictment has been returned and the defendant has been arrested and is ready for trial."[31] Accordingly, all proceedings before the grand jury are kept secret only until the defendant has been brought into court and arraigned on the indictment. Once this has occurred, the defendant is entitled to "discover" the full basis for the accusation against him.

All proceedings before the grand jury must be electronically recorded according to the provision of Criminal Rule 6(j). The normal practice is for the defendant's attorney to request a cassette tape recording of all proceedings concerning his client. The defendant is also entitled to inspect any and all exhibits submitted to the grand jurors. The electronically recorded cassette may be purchased for the sum of $5.00 per tape. If, after listening to the tape, the lawyer wants to have a transcript made to preserve the testimony in writing, he is entitled to order one.

Criminal Rule 6(k) provides that only certain persons are allowed to be physically present in the room when the grand jury is in session. These are limited to the prosecuting attorney, the particular witness who is testifying at the time, an interpretor (if one is necessary), and the deputy clerk of the court, (who is there only to operate the tape recording apparatus). The grand jury is not to disclose the nature of its deliberations, nor is it to disclose the vote of any individual juror to anyone. However, it may

disclose other "matters occurring before the grand jury" to the prosecuting attorney, "for use in the performance of his duties." The practical import of the preceding sentence is difficult to grasp, for, except during the vote, the prosecuting attorney is himself present along with the grand jury at all times. Criminal Rule 6(i) states that the prosecuting attorney "shall attend their sittings to advise them of their duties and to examine witnesses in their presence." (Emphasis added)

Criminal Rule 6(l) provides for the secrecy of grand jury proceedings. This rule binds to silence all jurors, attorneys, interpretors and clerks or stenographers. It is noteworthy, however, that the witnesses before the grand jury are in no way required to maintain secrecy. In fact, the rule states: "No obligation of secrecy may be imposed upon any person except in accordance with this rule." This means that no prosecutor or judge can legally require any grand jury witness to keep silent with regard to occurrences inside the jury room once that witness sets foot outside the door. Each and every witness may be freely questioned by anyone standing in the corridor, and may freely answer all such questions. Nothing prevents any witness from divulging his knowledge of the proceedings to the news media.

Criminal Rule 6(p) provides that the grand jury has no obligation to hear evidence on behalf of the defendant, "but it may do so." Appearances of defendants before grand juries are rather uncommon. Occasionally, but this is

exceptional, a person learns that the grand jury is considering whether or not to indict him and he will offer to come forward and volunteer his testimony to clear himself. Whether or not the grand jury will listen to his version of the facts depends upon many variables and no general rule may be stated. Criminal Rule 6(q) provides that when the grand jury "has reason to believe that other available evidence will explain away the charge, it shall order such evidence to be produced . . . ."

The prosecutor usually commences the proceedings before the grand jury by reading a proposed indictment which he has prepared. He may also state the names of the witnesses he intends to call in support of his indictment. If he is experienced in grand jury matters, and if he is prepared, he has at least read summaries of the anticipated testimony. In Anchorage most prosecutors normally do not interview the witness in advance of their grand jury appearances except in particularly important cases.

Forearmed with at least a general knowledge of the nature of the witnesses' testimony, and having prepared an outline of the elements he needs to establish to make his case before the grand jury, an experienced prosecutor will attempt to ask many "leading questions." A leading question is one which in itself contains and suggests the facts it seeks to elicit by the answer. For example, "Did the defendant have a loaded gun in his hand when he walked into your house?" By asking questions like this the prosecutor keeps

the witness from rambling. By making sure that the answers are short and relatively devoid of detail, the prosecutor limits the defense attorney to only a bare minimum of information when the latter listens to the tape recordings of the grand jury proceedings. Leading questions also tend to discourage the grand jurors themselves from taking over the questioning process. A discursive witness stimulates more juror curiosity.

The experienced prosecutor is conscious at all times of what is being preserved on the tape recording of the proceedings. He knows that a court may be called upon at a later time to scrutinize the evidence and to determine its sufficiency. For this reason he must be careful to establish each and every element of the offense in question. On the other hand, the experienced prosecutor is also careful not to establish a record so complete that the defendant's lawyer is provided with information helpful to his case.

By what standards are the grand jurors to judge when they have heard enough evidence to allow them lawfully to vote for a true bill? How much proof is required, and proof of what quality? Criminal Rule 6(q) provides that they "shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant." In the charge to the grand jury which is normally used in Anchorage, they are instructed that when the evidence taken together "if unexplained or uncontradicted" would "warrant a conviction of the accused

by a trial jury," then they ought to vote for a true bill.

The problem with both the rule and the charge is that the grand jury is instructed by reference to a standard applicable to a trial jury, but nowhere is the grand jury informed of what that standard actually is. Another potential problem lies in some apparently conflicting language in supreme court decisions relating to the grand jury standard of proof. In the case of Maze v. State[32] though the Court did not specifically define the burden of proof, it noted that the grand jury had to find something more than "sufficient cause" before it was entitled to return a true bill. However, in the case of Doe v. State,[33] there is dictum suggesting that "probable cause" is the standard of proof. Nevertheless, from the language of the rule itself, especially when combined with the opinion in Maze, the general feeling among Anchorage prosecutors is that more than probable cause is required to return an indictment. In Alaska, the basic principal would seem to be this: Public prosecutions for felony crimes ought not to be commenced unless the district attorney has sufficient evidence to warrant a conviction before a trial jury for the same offense.

The federal courts employ a "probable cause" standard. However, in practice, federal indictments are nearly invulnerable to any attack if they are "valid on their face," and if the grand jury which returns them was "lawfully constituted."[34] In his concurring opinion in State v. Parks, Justice Rabinowitz criticized the federal

rule, implying that as long as we have the grand jury system, archaic though it may be, it ought at least to be governed by meaningful standards.

> Yet it seems to me that our system of criminal law must include procedures whereby cases in which there is an absence of reliable evidence can be detected and filtered out prior to the trial stage. Before an individual suffers any of the serious inconveniences which are apt to ensue upon the return of a felony indictment (arrest, loss of job, humiliation, etc.), there should be a reliable determination made as to the probability of his guilt. 35

The specific question of whether or not hearsay evidence is good enough for grand jury purposes was answered by the Alaska Court in recent years. Under current practice hearsay may be used, but only if it is reliable hearsay, and only under circumstances constituting sufficient justification for its use.

The reliability problem arises because the witness who testifies to hearsay did not himself see or hear anything directly relevant to the matter at issue. A hearsay witness testifies only to what someone else saw or heard and subsequently reported. The person on the witness stand can be questioned to determine whether or not he is reporting accurately that which he heard said. But the weakness still remains in the original observer who may have observed poorly, misremembered, or lied.

Therefore, our Supreme Court has held that hearsay is admissible before the grand jury only so long as there is at least some evidence on the record to support the reliability

of the original observer. There should also be evidence to indicate that this person really was an original observer and in a position to know the actual facts.[36] Even when the reliability problem is solved, a prosecutor still may not use hearsay evidence any time he chooses. He must have some compelling justification for the use of hearsay in place of live testimony. He must state on the record the facts that demonstrate this justification. He must also persuade the grand jury that although competent testimony is presently unavailable, he has reason to expect that it will be available at the time of trial. A typical example of a compelling justification for hearsay, coupled with the expectation of being able to produce competent evidence at a later date occurs when the original observer is temporarily out of the state at the time of the grand jury session.

In summary, the grand jury process in Alaska has been modernized to prevent some of the historical abuses and dangers which may still plague its federal counterpart. However, with these safeguards have come certain problems in judicial efficiency engendered by the relative increase in the system's vulnerability to attack by defense counsel.

II. THE INVESTIGATIVE FUNCTION OF THE GRAND JURY

One very significant aspect of the grand jury not yet discussed is its investigative function, and its power to make reports on non-criminal matters affecting the public safety and welfare.[37]

The true investigative grand jury is convened to inquire into a particular area of suspected criminal activity such as organized crime, labor racketeering, or political chicanery. Typically, vigorous use is made of the subpoena power and, in the federal system, of the device of a grant of immunity.[38] (Immunity from prosecution is conferred upon a witness pursuant to a special statute in order to vitiate any possible claims on his part that compelling him to answer certain questions might tend to incriminate him in contravention of his Fifth Amendment rights.) This enables the grand jury to obtain testimony from persons who might otherwise assert the Fifth Amendment and refuse to speak. The State of Alaska has no immunity statute.

The phenomenon of the "crusading grand jury" first caught hold in the 1930's when corruption was uncovered in the municipal governments of Atlanta, Chicago and Cleveland. Thomas E. Dewey probed organized crime in New York City. Minneapolis, Boston, San Francisco and Philadelphia began similar investigations.[39] The most recent and significant

of all such grand jury investigations was the one convened for the Watergate case.

The investigative grand jury is not without drawbacks. There is a danger that an investigative grand jury may turn into a vicious "witchhunt" or a wholesale "fishing expedition." It may be manipulated by unscrupulous prosecutors, or may "run away," transported by a sense of its own power. Innocent people may suffer irreparable harm to their reputations merely on account of having been called as witnesses before the proceedings.

> Summoned before the grand jury, the witness is faced with a "barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective." This questioning is conducted by a prosecuting attorney and thus embodies all of the characteristics of a judicial, criminal proceeding. Faced with such questioning, the witness standing alone, is likely to become confused. Nevertheless, he is required either to invoke his Fifth Amendment right to remain silent, which may create suspicion and subject him to a contempt charge, or to make a statement which might be used against him in a subsequent trial. Is there any wonder why so much litigation concerning grand jury proceedings has arisen? 40

The Alaskan grand jury has another lawful function which is to report upon the operations of various agencies of government. Such reports and recommendations as result are binding on no one. State law does not require direct action of any kind. However, if such reports are published and widely circulated, they often have some impact. A recent example of such a report was that of the Anchorage

grand jury dated November 8, 1974, inspired by the escape of a prisoner from the Eagle River correctional institution.

The function of the investigative grand jury and its role in Alaska are quite separate from the routine criminal indictment process. The national experience suggests the investigative grand jury may have substantial utility as a safeguard against administrative or governmental abuse. However, the potentially destructive effects of a "runaway" grand jury, or of an investigation initiated or guided by malice, indicate the wisdom of provision for greater judicial control over this function.

III. ANALYSIS OF CRITICISM OF THE GRAND JURY PROCESS

The purpose of a grand jury system, in theory, is to serve as a screen or safeguard between the prosecuting attorney and the prospective felony defendant. The first question for analysis is whether or not the grand jury effectively performs its intended function.

In addition, several distinct but related questions relative to the operation of the grand jury process have been raised and should be analyzed:

(1) The grand jury indictment process is said to have become a focal point for technical and procedural attacks by defendants, designed to cause delays in the process of justice.

(2) It is charged that prosecutors may use the grand jury to avoid accepting due responsibility for the decision whether or not to prosecute in certain close or "sensitive" cases.

(3) The grand jury is accused of unfairness to defendants because they are not allowed to be present at the proceedings to confront the witnesses against them.

(4) The grand jury is criticized as no longer playing a useful part in the adjudicative process and having become, in effect, little more than an historically-based ritual.

Is the grand jury effective to protect the private citizen against malice or bad judgment on the part of prosecutors?

District attorneys strongly argue that grand juries are frequently composed of independent-minded citizens. They contend that although the grand jury gives the appearance of acting as a "rubber stamp" in a great many cases, this is only because such cases are truly "open and shut," leaving very little room for honest disagreement on the evidence. They claim, however, that in difficult cases involving ambiguous facts or arguably justifiable motivations for the defendant's conduct, the grand jury takes an active role in scrutinizing the evidence conscientiously. Prosecutors claim many marginal presentations result in no true bills, demonstrating the grand jury to be an independent body capable of effective and autonomous decisions. If this is true, then perhaps the grand jury is still doing its job in this regard.

Defense attorneys maintain the role of the prosecutor before the grand jury entails a form of conflict of interests which, they charge, cannot help but lead to undue influence over the jury. On the one hand, the prosecutor is a state officer with the duty of bringing to justice those whom he believes have committed crimes. On the other hand, he is an officer of the court and the only "official" present at the proceedings. The district attorney is entitled to give the grand jury legal advice, and even to express his opinions provided he does not make prejudicial comments beyond the limits of the admissible evidence.[41] Exactly how strongly the prosecutor may argue in attempting to influence the jury's vote is

not completely clear under present law. But even if the prosecutor remains temperate and keeps his comments strictly in line with the evidence, his official status, legal background, and the very fact he is able to select the testimony presented all indicate a great deal of control over the decision-making process of the jury.

Of course, power or control need not have sinister implications. But, if prosecutorial control is truly as great as would appear, then the grand jury can no longer be effective as a check on the powers of the district attorney. Whether or not district attorneys in Alaska often abuse their powers is another question. Few concrete instances of abuse in the routine criminal indictment process were identified. Nevertheless, if the potential for abuse is inherent in the institution itself, and in the manner of its functioning, one can justifiably conclude that the grand jury's theoretical screening purposes are not operating effectively in practice.

1. The Grand Jury as a Cause of Delay.

Because the grand jury indictment is the "cornerstone" of any felony charge, it is the duty of a criminal defense attorney to seek out defects in that indictment and to attack the procedures resulting in its return. Supreme Court decisions and recent changes in the Rules of Criminal Procedure have improved grand jury proceedings by requiring indictments be supported by rational and reliable evidentiary foundations and by providing an opportunity for court review of the grand jury record. However,

by establishing workable rules and ending secrecies, a broad field was provided for procedural and evidentiary attacks upon the process by attorneys for the defense. Motions to dismiss the indictment may be asserted upon many different grounds and are among the most cherished weapons in the defense attorney's arsenal. Defense counsel may allege (1) that the indictment "fails to state a crime," (2) that the indictment fails to show jurisdiction in the court, (3) that the evidence presented to the grand jury was insufficient, (4) that hearsay evidence was presented to the grand jury with insufficient justification for its use, (5) that there was insufficient showing of the reliability of the hearsay informant, (6) that the police or the prosecutor himself tampered with deliberations of the grand jurors, (7) that the judge gave incorrect instructions to the jury, (8) that unauthorized persons were admitted to the grand jury's presence, etc. The grounds for possible defense challenge are extremely numerous.

If defense counsel succeeds in his attack, the superior court orders the indictment dismissed. The prosecutor must then begin over again at the grand jury level and hope he does a better job next time--or has better luck. In the recent series of Kenai prosecutions, for example, three different grand juries were convened to hear the same evidence three times repeated. Each session was lengthy in itself. One defense attorney estimated it would take over sixteen hours of listening time to review selected portions of the tape resulting from one session alone. Literally thousands of hours each year are devoted by prosecutors

to responding to the various legal attacks brought by defendants' lawyers directed at alleged defects in the grand jury process.

2. Improper Prosecutorial Use of Grand Juries.

Some defense attorneys claim prosecutors occasionally use the grand jury as a convenient escape route in order to enable them to "pass the buck" in cases where the evidence is doubtful, but where a victim, or community sentiment, seems to call for action. It is maintained that by deferring to the judgment of the grand jury in these cases, the prosecutor thereby avoids the responsibility of making an independent decision and possibly subjecting himself to later criticism.

When confronted directly with these allegations, other prosecutors strongly disagreed. It was emphasized that the district attorney in Alaska is not an elected official and hence is relatively immune from public pressure. These prosecutors claimed any attempt to "wash out" a case would be a very dangerous tactic, since it might "backfire" and result in an unwanted grand jury indictment. The grand jury's stamp of approval, it was argued, would make a bad case much more difficult to dismiss quietly. These prosecutors also claimed that the active role of police agencies in assisting to prepare grand jury cases makes it difficult for an assistant district attorney to do any less than a careful and sincere job of presenting the evidence to a grand jury. The police would simply not stand for one of their cases being "washed out."

But this reply is not entirely responsive to the charge that a district attorney may avoid independent responsibility by

deferring to the judgment of the grand jury. The prosecutor, as an attorney and an officer of the court, should exercise his independent judgment and refrain from presenting a case to the grand jury if he personally doubts the sufficiency of the evidence.[42] Since the prosecutor is presumably a responsible public official trained in the law and paid to use his judgment, he ought to avoid placing himself in the position of arguing a case which he himself would not have chosen to prosecute in the first instance. However, the district attorney who takes this position may risk bad relations with the police or with others in his office. The path of least resistance is often provided by the availability of a grand jury.

3. The Defendant is Excluded from the Process.

One of the most frequent arguments of the criminal defense bar is that the grand jury is unfair to the accused. Defense attorneys contend there is injustice inherent in any procedure which affects the defendant and yet excludes him from participation. They also argue that one-sided presentations permit weak and doubtful cases to reach the superior court level where they are permitted to drain resources before finally resulting in dismissals, acquittals or charge reductions.

Prosecutors counter these assertions by pointing out the grand jury was never intended as more than an investigating or accusatory organ. They correctly assert that the defendant is given a full opportunity to participate in all stages of the proceedings subsequent to the indictment. They argue

that if defendants were allowed full participation before the grand jury law enforcement interests would suffer.

The grand jury and the trial jury are two distinct organs of the court designed and intended to serve different functions. It seems unwarranted and wasteful to expect the grand jury to duplicate the role of a trial jury. Nevertheless, it cannot be doubted that a one-sided presentation allows numerous cases, which should have been screened out earlier, to rise to the superior court level.

4. The Grand Jury Does Not Advance the Adjudication.

One of the arguments voiced on both sides of the adversarial fence maintains that the grand jury is at best "dead weight" and persists merely by virtue of historial accident. Even where no delaying motions are filed, it is asserted the grand jury still does nothing affirmative to further the progress of an individual case, but merely constitutes an empty ritual.

The Alaska Constitution and Statutes require that unless a defendant waives indictment, he cannot be prosecuted for a felony until a majority of grand jurors concur in the return of a true bill. However, since the defendant takes no part in the indictment process, and since the available evidence points to the prosecutor as the dominant, if not overwhelming, force before the grand jury, the real value of this supposed "right" may be questioned. Perhaps the greatest value to the defendant inheres in the possibility of his launching many technical, legal assaults upon the indictment

or the proceedings which resulted in its return. While doubtlessly providing intellectual stimulation for the lawyers, the expense and delay generated by extensive motion practice is bound to impede the smooth flow of the criminal justice system. Rather than advance the litigation, the indictment process frequently accomplishes the opposite result. A weak case for the defendant which should, on its facts, lead to a swift guilty plea, will often be protracted by numerous defense motions directed not at the facts of the case but at alleged technical errors concerning the grand jury procedure. Even if no such motions are filed, the parties are little closer to concluding the litigation as a result of indictment. If the state's case is a strong one, normally providing good incentive for defense bargaining, the defendant's attorney cannot depend upon learning of this fact merely by listening to grand jury tapes. Until the defendant's lawyer has had an opportunity to cross-examine the witnesses, he is justified in reserving his judgment. A careful defense attorney will not advise his client to plead guilty based on a one-sided presentation of the evidence.

Alaska adopted the grand jury system from the federal Constitution, which was in turn based upon the English common law model. The Alaska Supreme Court has rejected as fundamentally unfair the old-fashioned federal procedures. In eliminating the requirement of secrecy, and in establishing rational evidentiary standards, the court has accomplished a great deal toward mitigating the inherent defects of an ancient procedure. However, these reforms were not effected without some concomitant increase

in exposure to potential delaying tactics, clogging the process of justice. One may question whether further reforms and revisions upon the original grand jury model will be productive at this juncture. It may now be worthwhile to consider alternative devices to the grand jury.

IV. PROCEEDINGS BY PROBABLE CAUSE HEARING OR BY INFORMATION

Alaska Rule of Criminal Procedure 5.1 provides for a form of probable cause hearing there denoted the "preliminary examination." The procedure is quite simple and direct. The prosecutor calls his witnesses before a judge with no jury. The witnesses are questioned as to facts which the prosecutor hopes will show probable cause to believe that a crime was committed and probable cause to believe that the defendant was the one who committed it. The defendant himself is present with his attorney and an opportunity is provided for cross-examination of the witnesses. The defendant may testify and call his own witnesses, but he need not do so.

Some prosecutors oppose the substitution of probable cause preliminary hearings for grand jury proceedings by claiming that defense counsel may gain "unfair" advantage through cross-examination of prosecution witnesses. In effect, these prosecutors charge that preliminary hearings are fine playgrounds for skillful defense attorneys, allowing them to gain tactical advantages which do not further the cause of justice, and which make it more difficult for the prosecutors to win cases at trial.

It is perhaps easier for a prosecutor to obtain a felony indictment from a panel of grand jurors than to convince an attorney-judge of the strength of his case after prosecution witnesses have been effectively cross-examined. However, be-

cause a particular procedure may be easier for the prosecutor is not to say that procedure is most productive of justice. If more careful preparation is necessary for preliminary examination than for grand jury proceedings, then perhaps such groundwork simply ought to be done. In any event, more widespread use of the preliminary hearing process would tend to encourage a greater degree of thoroughness and better preparation in the criminal bar generally. This in turn would insure the court of more information, and of information of higher quality.

Prosecutors assert that under present rules barring the use of hearsay from preliminary examinations, unjust results may often occur because of the unavoidable absence of crucial prosecution witnesses. (For instance, a case may depend upon the testimony of an FBI fingerprint expert who is unavailable to attend the preliminary hearing because he is in Washington, D.C.) There may well be merit in this assertion. However, there is no reason why the rules governing the admission of evidence at preliminary examinations could not be modified to allow for the limited use of reliable hearsay testimony in much the same way as is permitted under present practice before the grand jury.

If the probable cause hearing eventually does replace the grand jury as the normal and customary procedure in felony cases, what might be the economic and administrative consequences of this shift? First of all, at the district court level, more judicial time would be required on the

bench to preside at such hearings. Mr. James E. Arnold, the Trial Court Administrator for the Third Judicial District, has roughly estimated that in the City of Anchorage the district court would be required to hear anywhere from 12 to 20 probable cause hearings per week. These hearings would in turn necessitate the hiring of one additional district judge who might have to devote up to one-half of his available time to the new procedures. The judge would require back-up from a deputy clerk who would likewise devote about one-half of her time to preliminary examinations alone. Additionally, Mr. Arnold estimates two new transcribers might be required to type transcripts of preliminary hearing proceedings. More pages of transcripts would be generated because each preliminary hearing would tend to be more lengthy than its grand jury counterpart. The total number of transcript orders may not increase; but the length of each order would probably be greater.

Mr. Arnold estimates that the grand jury in fiscal year 1973-1974, in the Third Judicial District, cost roughly $28,300, counting jury fees alone. He would add to this sum another $10,000 for "miscellaneous costs." Such costs include transportation, lodging and meals attributable to grand jurors summoned from outlying areas. Another cost not amenable to expression in monetary terms is the inconvenience caused to the many private citizens summoned for grand jury duty. Mr. Arnold estimates that in the short run, balancing the expenses set forth above against those of hiring an additional judge and back-up staff, a system of probable cause hearings would

require the added expenditure, in the Third Judicial District, of approximately $10,000-15,000. However, it is believed these expenses would be recouped in the long run.

A system of probable cause hearings would in most cases result in greater efficiencies and better economics. Such a system would improve the quality of justice. Every lawyer, whether prosecutor or defense attorney, has a natural tendency to view his own cases in the most optimistic light. He sees the strong points of each case and often minimizes or overlooks its weaknesses. The grand jury in most instances does nothing to advance a case along the road to final disposition because the one-sided presentation does not allow for a realistic assessment of the probability of success. Nor does it serve to bring both sides together in court early in the proceedings to confront each other and begin working for a final resolution. Preliminary hearings further both of these objectives.

Those who express concern over the possibility that probable cause hearings may be converted by defense counsel into lengthy "mini trials," thus monopolizing judicial time, tend to overlook the [illegible] protracted grand jury proceedings and the many motions which occupy so much judicial and lawyer time under present practices. The drains on judicial resources produced by current practices are less productive of truth than would be equivalent investments of time and effort devoted to a preliminary hearing procedure.

One [illegible] factor [illegible] into the system, and [illegible] self-imposed limitations upon the

length of probable cause examinations is attorney caseload. The overwhelming bulk of the criminal defense business in Alaska is handled by the chronically understaffed and overworked Public Defender Agency. It is not unusual for a single assistant public defender in Anchorage to carry a constant caseload of 50 felonies per week. This beleaguered lawyer simply does not have the time to convert every routine preliminary hearing into a full-blown trial. Although there will be certain cases in which the attorney may properly feel very extensive cross-examination is warranted, these major cases will be exceptions to the rule. The rule must allow for such exceptions in the interest of justice if the ultimate aim of the process is truth. A good judge, who is properly in control of his courtroom, will not permit irrelevant and rambling cross-examination; nor will he arbitrarily curtail meaningful questioning even if such does occupy the time of the court. This is why courts are in business.

If a comprehensive system of preliminary examinations is adopted, district judges should be empowered to reduce felony charges to misdemeanors at such hearings. Effective guidelines could be developed to give the district judge broad discretion in this regard. Such decisions by the court might be made unreviewable. Alternatively, they might become unreviewable only in the event the defendant pleaded guilty to a reduced charge within a specified period of time. Although this system would impose a greater burden upon the district courts, the superior court caseload would be lessened correspondingly.

The adoption of the routine use of probable cause hearings would assure the development of fuller factual records and, in appropriate cases, encourage guilty pleas at early stages in a proceedings. Those cases not resulting in reasonably prompt guilty pleas could be advanced more swiftly on the trial calendar since much of the essential pre-trial preparation would have been accomplished through the preliminary hearing itself. For example, there may be numerous instances where motions to suppress evidence pursuant to Rule 37 could be submitted for decision based upon the transcript of the preliminary hearing, eliminating the requirement of an additional court procedure. Too, less time need be occupied at omnibus hearings with "discovery" motions by defendants.

Another factor militating in favor of probable cause hearings is improvement of the attorney-client relationship. The client sees his lawyer go to court for him and, hopefully, make a sincere effort to convince the judge to reduce or dismiss the charges. This happens early in the case and inspires confidence. Too, the client will be less able to hide the facts from his attorney or, by lying, to lead him down a fruitless path--only to see the road terminate after much wasted time and effort. The preliminary examination will set the record straight and thus lay a firm groundwork for the conduct of subsequent proceedings in the case. Ultimately, this should lead to swifter and more just results in a large proportion of cases.

The election of preliminary examination procedures

in lieu of the grand jury will result in benefits to the appearance of justice and public confidence in the criminal process. Most cases are concluded by negotiated guilty pleas arrived at through the bargaining process. Since experience teaches that most trials should be avoided, plea bargaining is useful and desirable. However, both plea bargaining and the system of grand juries share the same inherent defect: too many facts may be concealed from the court and public. The preliminary examination forces facts out into the open immediately. If the defendant eventually decides to plead guilty, it will be more difficult for him to deny his guilt in subsequent proceedings, or to accuse his lawyer of "selling him out." The defendant will directly perceive the strengths and weaknesses in the state's case and will be in a position to make a better-informed decision whether or not to stand trial.

The so-called "information system" is an alternative to the grand jury often proposed by district attorneys. An "information" is simply a charging document, similar to an indictment, but filed in court by the prosecutor himself and based upon his own conclusions without any grand jury or judge to "screen" the evidence. Prosecutors who support the information system concede that in most cases the grand jury acts only to "rubber stamp" the district attorney's decision. If this is so, they argue, we should recognize realities by eliminating the unnecessary intermediate phase and simply allowing the prosecutor to file his felony charges directly.

Although it may be correct that grand juries are

not fulfilling their intended screening functions, still, a screening process is useful and desirable in eliminating a weak or doubtful prosecution and serving as a check upon the district attorney. The grand jury may not be doing its intended job; but this is an insufficient reason for abandoning the effort entirely. The framers of the Constitution manifested a concern for providing some check on the public prosecutor; although the present system is ineffective, the alternative of no check whatsoever seems unacceptable from either the standpoint of justice or from that of efficient administration.

V. RECOMMENDATIONS

A. The Grand Jury Indictment Process is No Longer Fulfilling Its Intended Functions and Should Be Replaced by a Probable Cause Hearing Procedure.

The accepted function of the grand jury as a safeguard interposed between the district attorney and the defendant is not generally being fulfilled in actual practice. Grand juries are cumbersome, and not inexpensive. They do not appear to advance the progress of most cases toward final resolution. The grand jury system generates a great number of technical legal attacks unrelated to the truth or falsity of the charges against the defendant. These motions to dismiss the indictment cause a great deal of delay and obstruction in the criminal adjudicative process.

A preliminary hearing procedure should be adopted to replace the grand jury in all felony cases, unless such procedures are affirmatively waived by the defendant. Such probable cause hearings should have the following beneficial impacts upon the system as a whole:

(1) The delays and inefficiencies generated by motions against grand jury indictments would be eliminated. There would be no appeal from the decision of the district judge rendered at a probable cause hearing.

(2) Improper prosecutions or cases which are too faulty or weak to succeed will be dismissed by the district judge at the probable

cause hearing. Others will be immediately reduced to misdemeanor charges. This will accomplish a substantial savings of superior court time and effort. Defendants will be present with counsel at all stages of the probable cause hearing and thus unable to complain of any unfairness.

(3) The probable cause hearing will allow the facts of a case to be brought out in a relatively complete form, thus creating an accurate record at the outset of the proceedings and permitting each attorney to evaluate accurately the probability of his ultimate success. This in turn would result in a greater number of prompt dispositions by negotiated plea.

(4) The public nature of the probable cause hearing would result in a greater level of confidence in the criminal justice system than was possible under a secret grand jury system. Better attorney-client relationships might also result as a by-product of this system.

B. The Transition from Grand Jury to Probable Cause Hearing in Felony Cases Should Leave Intact the Constitutional Investigative and Reporting Role of the Alaskan Grand Jury.

This Report has focused principally on the indictment function of the grand jury in felony cases and has dealt only very briefly with the investigative and reporting functions of this body. Although further study of the role of the investigative grand jury in Alaska would be useful and should be undertaken in the future, based on the national experience, the evidence tends to favor retention of these limited functions at least for the present.

C. Implementation of Transition to Probable Cause Hearing System.

The goal of effectively supplanting the grand jury with preliminary examination procedures in all felony cases could be accomplished by either of two means: Article I, §8, of the Alaska Constitution could be amended to eliminate reference to the grand jury except in its investigating and reporting roles. Those sections of Title 12, Alaska Statutes, which pertain to the grand jury's role in felony prosecutions would need repeal, as would certain provisions of the Rules of Criminal Procedure.

Alternatively, it might be possible to accomplish the desired result of maximizing preliminary hearings and minimizing grand juries by means of a Rule change only. For example, the proposal set forth below, while not intended as anything more than a rough outline, might prove feasible.

* * * * *

I. Preliminary Examination A Matter of Right.

All persons charged with crimes punishable by imprisonment for terms in excess of one year are entitled within _____ days of their request therefor to a preliminary examination before a district court judge or magistrate. The judge or magistrate shall advise each felony defendant of his rights in this regard at the initial court appearance and shall not accept any waiver of the right of preliminary examination unless defense counsel has had an opportunity to consider the decision and has concurred in

such waiver.

II. Effect of Intervening Indictment.

If the defendant is indicted by a grand jury before he is afforded the opportunity either to request or to waive a preliminary examination, then, at the time of arraignment on such indictment, the defendant shall be afforded the opportunity to request a preliminary examination, which examination shall be held within ____ days of the arraignment.

III. Waiver of Grand Jury Indictment.

At the time a felony defendant makes his initial court appearance accompanied by counsel, he shall be advised as follows:

1. He has a constitutional right to a grand jury indictment.

2. He has a right under these Rules to a preliminary examination before a district judge or magistrate if he requests such examination.

3. If he requests a preliminary examination, such request effectively operates to waive his right to grand jury indictment. Unless the defendant has already been indicted by a grand jury, he is not entitled both to a preliminary examination and to grand jury indictment.

4. The defendant may elect to waive both his right to preliminary examination and his right to grand jury indictment. In such event the prosecution shall proceed by information only.

The foregoing is intended to outline the possible procedure whereby defendants are given the opportunity to choose

between a preliminary hearing and the grand jury process. Underlying this proposal are at least two fundamental assumptions: (1) That given the choice, most defense counsel will elect an opportunity to view and cross-examine prosecution witnesses in lieu of an ex parte grand jury proceeding; and (2) That prosecutors will cease to employ the grand jury since it will no longer serve to cut off the right to preliminary examination. Even after the defendant has been indicted, he may still obtain a preliminary examination where he was never initially given the opportunity to choose between the two procedures. Based on these two assumptions, it is predicted that the grand jury system will simply fall into general disuse except for the rare case where either or both of the parties for some reason believe the grand jury will serve a useful function--perhaps to provide "community input" in controversial cases. In other cases it may be expected that the defendant will waive both grand jury and preliminary examination, thereby consenting to a proceeding by information. This would be expected to occur primarily in situations where prosecutor and defense attorney have conferred prior to arrest and perhaps already settled upon a negotiated disposition of the case.

FOOTNOTES

L. Pluckett, A Concise History of the Common Law (5th Ed. 1956); I, Holdsworth, A History of English Law, 312-27 (7th Ed. 1966).

2. A presentment is an accusation initiated by the grand jury itself, as opposed to an indictment, which is initiated by the prosecutor. A presentment may be regarded as an instruction to the prosecutor to indict. This procedure is now obsolete. See, Dession and Cohen, The Inquisitorial Functions of Grand Juries, 41 Yale L. J., 687, 705.

3. 210 U.S. 43, 50 L. Ed. 652, 659 (1906).

4. 65 F.R.D. 229, 253 (1972).

5. No state is required by the federal Constitution to preserve the grand jury system. Each state may devise its own alternatives. Hurtado v. California, 110 U.S. 516 (1884). About half the states have abolished the grand jury, as has England. Administration of Justice (Miscellaneous Provisions) Act of 1933. Under the Uniform Code of Military Justice, a preliminary hearing takes the place of the grand jury. Military Justice Act of 1969, Article 31 (Title 10 USC §832).

6. AS 12.40.030.

7. Id.

8. Alaska Constitution, Article I, §8; Crim. R. 7(a).

9. Crim. R. 6(n).

10. Id.

11. Martinez v. State, 423 P.2d 700 (Alaska 1967); Maze v. State, 425 P.2d 235 (Alaska 1967).

12. Crim. R. 5(a).

13. AS 12.40.050.

14. AS 12.40.070(1).

15. AS 12.40.080.

16. U.S. v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965).

17. Crim. R. 7(c).

18. 8, R. Cipes, Moore's Federal Practice, par. 7.04.

19. Crim. R. 6(d).

20. Crim. R. 6(s).

21. AS 09.20.010.

22. AS 09.20.020.

23. AS 09.20.050.

24. See Alvarado v. State, 486 P.2d 891 (Alaska 1971).

25. Crim. R. 6(b)(2).

26. AS 09.20.070.

27. Crim. R. 6(e).

28. Crim. R. 6(g).

29. Crim. R. 6(o).

30. 491 P.2d 754, 755 (Alaska 1971).

31. The reasons for secrecy listed by the court were:

> (1) so the defendant would not flee, having heard his case was being considered.
> (2) to give the jurors a sense of "utmost freedom" in their deliberations and discussions.
> (3) to avoid the possibility of tampering with the witnesses or subornation of perjury.
> (4) to encourage informers to speak.
> (5) to protect an innocent suspect who is cleared.

32. 425 P.2d 235, 237 (Alaska 1967).

33. 487 P.2d 47, 54 (Alaska 1971).

34. Costello v. U.S., 350 U.S. 359, 100 L. Ed. 397 (1956).

35. 437 P.2d 642, 646 (Alaska 1968).

36. Taggard v. State, 500 P.2d 238 (Alaska 1972).

37. AS 17.40.030; .070.

38. Organized Crime Control Act of 1970, §201(a); 18 USC §§6001-05.

39. Note, An Examination of the Federal Grand Jury in New York, 2 Columbia Journal of Law and Social Problems 83, 89, 1966.

40. See generally, L. Boudin, The Federal Grand Jury, 61 Georgetown L. J. 1, 4 (1972).

41. See §3.5(b), ABA Standards of the Prosecution Function, (Approved Draft 1971). This standard appears to have been adopted in Alaska in the case of Anthony v. State, 421 P.2d 486 (Alaska 1974).

42. The Code of Professional Responsibility, DR 7-103(a) provides: "A public prosecutor shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."