

filed as a public record, or be subject to subpoena or otherwise be made public.
(L.1970, c. 996, § 1.)

Historical and Statutory Notes

Derivation. Code Crim.Proc. 1881,
§ 253-a, added L.1964, c. 350, § 3.

Practice Commentaries

by Peter Preiser

In 1961 the Court of Appeals held that neither the New York Constitution nor any New York statute furnished the grand jury with power to issue reports. *Wood v. Haggles*, 9 N.Y.2d 144, 212 N.Y.S.2d 33, 173 N.E.2d 21. The Court also explained that the state constitutional provision guaranteeing the power of grand juries "to inquire into the wilful misconduct in office of public officers" (art. I, § 6), adopted in 1938, only guarantees power to inquire into and prefer criminal charges (9 N.Y.2d at 151). In a passage worth remembering, Judge Fuld's opinion for a closely divided court contained the following observation regarding the danger posed by permitting such reports to be published (*id.* at 154):

In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted. An indictment charges a violation of a known and certain public law and is but the first step in a long process in which the accused may seek vindication through exercise of the right to a public trial, to a jury, to counsel, to confrontation of witnesses against him and, if convicted, to an appeal. A report, on the contrary, based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body occupying a position of respect and importance in the community, its potential for harm is incalculable. A grand jury report—which as a judicial document obviously differs radically from newspaper charges of misconduct—carries the same sense of authoritative condemnation as an indictment does, without, however, according the accused the benefit of the protections accorded to one who is indicted.

The Legislature reacted three years later, and in 1964 enacted section 253-a of the Code of Criminal Procedure which was carried forward, substantially verbatim, to become the present

CPL § 190.85. As a perusal of this section and of CPL § 190.90 reveals, Judge Fuld's message did not go unheeded: the legislative grant of power to grand juries is carefully laced with due process safeguards.

Nevertheless, even these extensive measures did not prove to suffice. The statute was held to be deficient because of failure to provide that a person named in a grand jury report has a right to review the grand jury testimony upon which the report is based as an aid to preparing the answer he or she is entitled to file under subdivision three. Judge Fuld, now Chief Judge, writing once again for a closely divided Court, held that the "demands of due process, a regard for fundamental fairness" require no less, and if such disclosure would be "inimical to the public interest . . . the court must reject and seal the report". The Court stopped short, however, of invalidating the statute: it merely read the requirement into the procedure. See *In re Second Report of November, 1968, Grand Jury of Erie County*, 1970, 26 N.Y.2d 200, 309 N.Y.S.2d 297, 257 N.E.2d 859.

The evidentiary standards for a vote to issue a grand jury report are basically the same as for an indictment (see *Matter of Additional Grand Jury, Orange County, May-June 1990 Term*, 182 A.D.2d 688, 582 N.Y.S.2d 729 [2d Dept.1992]). The district attorney has the duty of instructing the grand jury on the law and must also instruct the grand jury on the People's burden of proof (see *Hynes v. Shea*, 152 A.D.2d 485, 544 N.Y.S.2d 131 [1st Dept.1989]; *Matter of Report of Special Grand Jury of Nassau County, New York, Panel 3, Second Term 1982*, 102 A.D.2d 871, 477 N.Y.S.2d 34 [2d Dept.1984]). In this connection, note that the instructions on the law must include a statement of the law regarding the duties of the public servant's office, because "[w]ithout a charge as to the substantive aspects of the official's duties, it [is] not only impossible for the grand jury to determine that the public official was guilty of misconduct, nonfeasance or neglect, but impermissible as well, for [then the grand jury is allowed] to simply substitute its judgment for that of the public servant" (*Matter of June 1982 Grand Jury of Supreme Court of Rensselaer County*, 98 A.D.2d 284, 285, 471 N.Y.S.2d 378 [3rd Dept.1983]; see also *Matter of Report of Special Grand Jury of Monroe County*, 77 A.D.2d 199, 433 N.Y.S.2d 300 [4th Dept. 1984]).

Practice Commentaries Cited

Matter of Report of October 1975 Grand Jury of the Supreme Court of Ulster County, 1976, 55 A.D.2d 707, 388 N.Y.S.2d 949.
Matter of Special Grand Jury, 1985, 129 Misc.2d 770, 494 N.Y.S.2d 263.
In re the Matter of Four Reports of the Nassau County Grand Jury, 1976, 87 Misc.2d 453, 382 N.Y.S.2d 1013.

evidence will largely consist of the defense evidence, if any, defendant. Verdicts in such cases are a question of credibility. There is undoubtedly no question of credibility. This would include criminal records of the other matter going to their credibility. 17, 77 S.Ct. 1007, 1 L.Ed.2d 1103; People v. Wein, 18 N.Y.2d 162, 172, 272 N.Y.S.2d 753,

before that where public officer such as a witness, in the performance of his public duty, is called upon to make available to the court any information in the Police Department's possession in connection with the defendant's guilt, including the defendant's credibility of such officer. The court cannot, however, preclude the possibility of defense discrediting if it exists.

of the process to uncover anything legitimate must there be a halt upon the threshold. Holding Corp., 256 N.Y. 374 at p. 382, 176

It be ascertained by motion to quash. It is upon the trial. However, similar to the defendant's it is appropriate that such records be made available, in the first instance. They should be made available, who can examine the records and in the event they find any relevancy under the circumstances.

of the Police Department to quash the records. The Police Department is directed to produce the records of officers involved to the trial judge sealed, and the records should be made available to the trial judge in aid of cross-examination to impeach the witnesses. to be served on the Police Department.

Grand jury which had filed report of various findings and recommendations in connection with proceedings conducted by it requested that the report be filed as public record. The Supreme Court, John H. Doerr, J., held that grand jury had power under Constitution to file the report but that where the report was critical of identified or identifiable persons, it could not legally be accepted and filed as public record.

Report permanently sealed.

1. Grand Jury \Rightarrow 2

Constitutional article to effect the power of grand jury to inquire into willful misconduct in office of public officers and to find indictments or to direct the filing of informations in connection with such inquiries shall never be suspended or impaired by law does not preclude enactment of legislation authorizing grand jury report charging noncriminal misconduct. Const. art. 1, § 6.

2. Grand Jury \Rightarrow 42

Where grand jury report containing various findings and recommendations in connection with proceedings conducted by it was critical of identified or identifiable persons, the report could not be accepted and filed as public record. CPL 190.85, subs. 1(a-c), 2(b), 4.

Michael F. Dillon, Dist. Atty. of Erie County (Joseph S. Forma, Buffalo, and Richard Weiss, Amherst, of counsel), for the Grand Jury.

MEMORANDUM

JOHN H. DOERR, Justice.

The May 1972 Grand Jury in and for the County of Erie, State of New York, has filed a report of various findings and recommendations in connection with proceedings conducted by that body, and now requests an order accepting and filing such report as a public record, while authorizing and directing the District Attorney to transmit copies thereof to all public officials having a proper interest therein.

The Grand Jury was empaneled by this Court on May 1, 1972, and its existence was extended by successive orders to September 30, 1973.