

A Report to the Judges of the
Third Judicial Circuit Court

In re: Grand Jury Investigation

On or about March 30, 1972 pursuant to a request by the Grand Jury, Judge Thomas J. Foley, presiding over the Grand Jury, appeared before that body and was informed that they desired to investigate the shooting and altercation on Rochester Street involving members of the Wayne County Sheriff's Department and members of the Detroit Police STRESS Unit.

Prior to March 30, the news media had carried reports indicating the Grand Jury planned to look into this matter, and that the decision had been made without consultation with or the knowledge of the Prosecutor's Office. Initially, the Prosecutor was quoted as saying that he would cooperate with the Grand Jury in any way he could.

In the March 30, 1972 meeting the Grand Jury asked Judge Foley to contact the Attorney General and request the assistance of that office in the investigation. The Grand Jury specifically requested a named assistant to the Attorney General who had appeared on prior occasions before them.

Their reason for not utilizing the Prosecutor's Office was twofold:

- (a) The fact that the Prosecutor's Office had previously reviewed the shootings and reached certain conclusions with respect thereto; and

(b) The statement of a Prosecutor's Assistant, Mr. James Garber, that, ineffect, the Grand Jury would be "investigating what we have already done," and, therefore it "would obviously present some problem" to have an assistant from the Wayne County Prosecutor's Office inter-rogate his superiors.

Pursuant to the Grand Jury's request, Judge Foley con-tacted the Attorney General personally and was assured by him that the named assistant and one other would be sent to assist the Grand Jury on April 10, 1972.

On the morning of April 10, 1972 the Foreman of the Grand Jury informed Judge Foley that the assistants had not appeared. Judge Foley then contacted the Attorney General's Office and was told by a spokesman that the Attorney General had changed his mind and a letter of explanation would follow.

In view of the Attorney General's refusal to provide assistance, the Grand Jury then asked Judge Foley to provide special counsel to assist them.

The prospect of having Special Counsel was also reported in the news media, and the Prosecuting Attorney publicly oppose such an appointment claiming the Court lacked authority to appoint a Special Prosecutor.

On April 19, 1972 at about 11 a.m. Judge Foley entered an order for the appointment of a Special Prosecutor without naming any specific person.

Later in the day of April 19, 1972 or early on April 20, 1972, Judge Foley was notified by the Foreman of the Grand

Jury that the Grand Jury had changed its mind and no longer desired a Special Prosecutor.

On April 21, 1972 the Foreman called Judge Foley and informed him that the Grand Jury had withdrawn its request for a Special Prosecutor as the result of "undue influence" having been exerted on the Grand Jury. She requested to meet with Judge Foley to amplify her remarks.

Stories of this nature were carried in the news media.

On April 22, 1972 both local newspapers and local radio broadcasts carried announcements that the Foreman of the Grand Jury planned to resign her post because of claimed "undue influence" by the Prosecutor's Office.

Judge Foley, however, declined to meet with the Foreman individually, but scheduled a meeting with the full Grand Jury on April 24, 1972 and asked the Presiding Judge, Joseph A. Sullivan, to be present.

The meeting was held as scheduled 15 of the 17 members of the Grand Jury being present. Representatives of the Prosecutor's Office appeared and requested to be present at this meeting but, in view of the nature of the charges they were not permitted to remain. The Prosecutor's Office was told that an opportunity would be afforded for a hearing in rebuttal if desired. (On May 19, two of the Prosecutor's assistants made a reply on behalf of the Prosecutor.)

A verbatim transcript of the meeting with the Jury has been made and copies furnished to the Supreme Court, Court of Appeals, and the Prosecuting Attorney.

The purpose of the inquiry, as the transcript shows, was not to determine the wisdom or propriety of the Grand Jury looking into the STRESS shootings, nor was it to determine whether the Prosecutor had reached a correct conclusion in his appraisal of the incident, or whether he was correct or incorrect in his decision to prosecute those named in warrants he recommended. Much less did the inquiry have anything to do with the merits of the STRESS program.

The inquiry by Judges Foley and Sullivan dealt only with the very narrow issue of whether there was any substance to the claim that the Grand Jury had been improperly influenced to abandon its investigation into the shooting.

The inquiry by the court disclosed that the Grand Jury wanted to investigate the shooting involving Detroit Police Officers and Wayne County Deputy Sheriffs; that the Grand Jury decided a Special Prosecutor was needed since the Grand Jury "did not have any support" from the Attorney General with respect to legal assistance.

The Grand Jury asked an Assistant Prosecuting Attorney who had worked with the Grand Jury, to bring in the records pertaining to the shooting.

The Grand Jury also told the Assistant they did not want anyone in the room with them when they discussed the matter.

On Wednesday morning, April 19, 1972, at about the time Judge Foley was announcing the entry of his order for the appointment of a Special Prosecutor, the Prosecuting Attorney and Mr. Garber appeared uninvited before the Grand Jury.

Instead of making the records available, as the Grand Jury had requested, the Prosecutor and his assistant began a presentation before the Grand Jury. The presentation included:

- (1) An outline of the purported duties, jurisdiction, and powers of the office of Prosecuting Attorney as it related to the Grand Jury;
- (2) The purported functions, duties and jurisdiction of the Grand Jury and its alleged inability to function properly without the presence of the Prosecuting Attorney.
- (3) The alleged adverse effect a mere Grand Jury investigation would have on the pending criminal actions arising out of the shootings;
- (4) A recitation of the results of the investigation of the shootings by police agencies and the Prosecutor's Office;
- (5) An assurance that the matter had been completely and thoroughly investigated and that no good, but possibly irreparable harm, could come from a Grand Jury investigation of the same matter;
- (6) That such an investigation would be extremely lengthy and exhausting and might have an adverse effect on the health of Grand Jurors;
- (7) A cautioning of the Grand Jury that even the fact that the Prosecutor had appeared before the Grand Jury was "super secret;"
- (8) A statement by the Prosecutor that the Grand Jurors would be charged with "contempt" if any of the statements

made by the Prosecutor relating to an individual or individuals involved in the shooting incident "gets out of this room."

(Out of deference to the Prosecutor's apprehensions that the full text of his statements before the Grand Jury would somehow prejudice pending cases, we refrain, at this time, from publishing the full text of the transcript. If we have misconceived his position, he is, in our view free to publish the full text.)

In view of the chronology of events preceding this presentation it seems quite clear that the Prosecutor did not approve of the Grand Jury's decision to investigate the shooting and hoped by his presentation to dissuade the Jury from further pursuing the matter. Temporarily he was successful.

We assume that the Prosecutor and his assistants were honestly of the opinion that the Rochester Street incident had been thoroughly investigated and that further inquiry would serve no useful purpose. Indeed it may be perfectly proper for the Prosecutor to express such opinion to the Jury.

In this case, however, the Prosecutor did not rest with the expression of an opinion.

In the course of attempting to divert the Jury from their announced course of action, the Prosecutor and his assistants made numerous misstatements of law with respect to the jurisdiction of the Prosecuting Attorney and the Courts, and the immunity and subpoena powers as they relate to grand jury proceedings. In addition, off-the-record statements were made to individual jurors by an assistant prosecutor registering the displeasure of the Prosecutor's Office with the Jury's actions. Many received telephone calls at home from the assistant questioning the wisdom of their actions. Some were frightened by the "shrill" tone and content of the Prosecutor's assistant's statements reflecting marked displeasure with the Jury's actions.

It is quite clear that as a result of the erroneous advice and the deportment of the Prosecutor's Office above mentioned, a number of the jurors concluded that it would be legally impermissible and practically speaking futile to attempt to continue the investigation in the face of the Prosecutor's opposition.

When the Jury was advised to the contrary by the Court, it is significant that that body immediately decided to resume its investigation into the shooting and reiterated its request for special counsel.

The court's investigation, it must be recalled, was undertaken in response to statements, publicly aired, that the Prosecuting Attorney improperly influenced the Grand Jury to abandon the investigation into the Rochester Street shooting. The court's investigation was undertaken not to review the Prosecutor's action with respect to warrants, but to preserve the independence and freedom of inquiry essential to the proper functioning of a Grand Jury.

This purpose has been accomplished. The Grand Jury now is assured of plenary power to conduct a full and untrammelled investigation into any suspected wrong doing with the assistance of impartial counsel. That assurance, in part, is a result of this Court's position that Grand Jury secrecy provisions were not intended to and do not insulate any person, public or private, against inquiry into allegations of misconduct. That principle has been unanimously reaffirmed by both Appellate Courts of this state.

In our opinion, the Citizens Grand Jury has a right to investigate suspected wrong doing regardless of whom else might have made an investigation. There was no abuse of the Grand Jury's discretionary power in attempting to investigate the Rochester Street incident. The Citizens Grand Jury was reasonable in seeking counsel who had not already reached a judgment concerning the Rochester Street incident. It is regrettable that the Attorney General saw fit to decline the Grand Jury's request for counsel. In our view there was no legal inhibition precluding his assistance.

It is also regrettable that the Prosecutor sought to dissuade the Citizens Grand Jury from undertaking its own investigation. Such efforts by the Prosecutor and his staff were inimical to the legal tradition of Grand Jury independence.

In addition other specific acts of the Prosecutor and his assistants were, in our opinion, overzealous and improper, including for example, telephone communication with individual Grand Jurors at their homes; insistence on being present during informal discussions among Grand Jurors and suggesting that there would be no more Citizens Grand Juries if this Grand Jury went forward with its plans to investigate the Rochester Street incident.

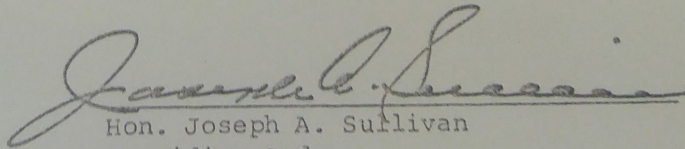
However, we do not find that the Prosecutor engaged in any criminal conduct, and we assume he acted in good faith. The Prosecutor seems to have believed that investigative efforts of the Grand Jury would impede the pending prosecution.

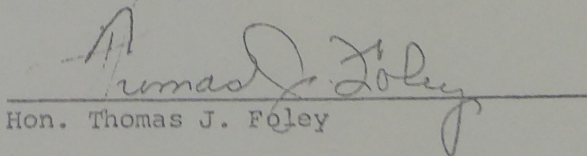
Perhaps equally important, he evidently felt that the planned investigation, with a Special Prosecutor, was an encroachment on his jurisdiction.

Certainly the Prosecutor has discretion to present facts and persuasive arguments to the Grand Jury. However, the mode, manner, and timing of his efforts; his reliance on erroneous statements of law and deportment which inspired fear in the minds of grand jurors, in our judgment amount to improper conduct and an abuse of discretion.

We are therefore referring this matter together with the transcripts to the Attorney General for such action as he may deem appropriate in the exercise of his supervisory powers over County Prosecutors.

The Citizens Grand Jury is now free to pursue its own independent investigation, advised by unbiased counsel. This is in keeping with the laws and traditions of our country which hold that no public official and no public event, possibly involved with criminal wrong doing, is beyond scrutiny of the Grand Jury.


Hon. Joseph A. Sullivan
Presiding Judge


Hon. Thomas J. Foley

Dated:

June _____ 1972