REPORT OF THE STATEWIDE

GRAND JURY COMMISSION

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 29

COMMONWEALTH OF VIRGINIA
Richmond, Virginia
1980

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Report of the Statewide
Grand Jury Commission
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
December, 1979

To: Honorable John N. Dalton, Governor of Virginia
and
The General Assembly of Virginia

Representation having been made to the General Assembly of 1978 of the sucessful use of the grand jury on a statewide basis in other states, particularly in the investigation of organized crime and political corruption, House Joint Resolution No. 57 was adopted on March 11, 1978, the text of which is as follows:

HOUSE JOINT RESOLUTION NO. 57

Creating the Statewide Grand Jury Study Commission; allocating funds.

WHEREAS, other states have authorized grand juries with the power to investigate and indict for criminal offenses on a Statewide basis; and

WHEREAS, the type of grand jury has proved a formidable weapon to combat criminal activity which crosses jurisdictional boundaries, political corruption, distribution of narcotics, antitrust violations, land fraud and other crimes; and

WHEREAS, the present grand jury system in Virginia is under severe handicaps in effectively investigating such types of criminal activities; and

WHEREAS, in the interest of improving still further the adminstration of criminal justice in Virginia, a comprehensive study should be undertaken of the grand jury system in Virginia, both special and regular, as well as a review of the statutes granting immunity to witnesses appearing before them; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Statewide Grand Jury Study Commission is hereby created, for the purpose of undertaking a comprehensive study of the grand jury system in Virginia, witness immunity, and all other matters relating to the subejct, with the view toward facilitating grand jury investigations into criminal activity which crosses jurisdictional boundaries, political corruption, distribution of narcotics, antitrust violations, land fraud and other crimes. The Commission shall be composed of three members of the Committee for Courts of Justice of the House of Delegates, to be appointed by the Chairman thereof; three members of the Committee for Courts of Justice of the Senate, to be appointed by the Chairman thereof, and three attorneys for the Commonwealth from the State at large, to be appointed by the Speaker of the House of Delegates nad one to be appointed by the Committee on Privileges and Elections of the Senate. The Commission shall select its chairman.

Legislative members of the Commission shall receive compensation as provided by § 14.1-18 and all members of the Commission shall be reimbursed for their actual expenses incurred by them in the performance of their duties in the work of the Commission. For such other expenses as may be required, including secretarial and other professional assistance, there is hereby allocated from the general appropriation to the General Assemlby a sum sufficient not to exceed five thousand dollars. All agencies of the State shall assist the Commission in its study.

The Commission shall complete its study and report to the Governor and the General Assembly no later than November one, nineteen hundred seventy-nine.

Purusant to the directive of the resolution, the Chairman of the Committee for Courts of Justice of the House of Delegates, Delegate George E. Allen, Jr., of Richmond, appointed Delegates C. Hardaway Marks, Hopewell, Theodore V. Morrison, Jr., Newport News, and A. L. Philpott, Henry.

Senator William F. Parkerson, Jr., Henrico, Chairman of the Committee for Courts of Justice of the Senate, appointed himself, and Senators Frederick T. Gray, Chesterfield and J. Harry Michael, Jr., Charlottesville. The Speaker of the House of Delegates appointed Commonwealth's Attorneys Aubrey M. Davis, Jr., Esquire, Richmond, J. Patrick Graybeal, Esquire, Montgomery, and Gammiel G. Poindexter, Esquire, Surrey. The Senate Committee on Privileges and Elections appointed Robert F. Horan, Esquire, of Fairfax.

The Commission, at its organizational meeting, elected Delegate Philpott as its Chairman, and Senator Michael as Vice-Chairman.

Public hearings were held in Richmond and Virginia Beach, at which experts on the subject from other states, a number of Virginia's Commonwealth Attorneys, police officials and members of the public were heard. The Commission has explored the subjects assigned to it, and now makes its report.

The Commission is indebted to the staff of the Crime Commission, in assisting it in organizing some of the meetings; to John Morris, Esquire, Assistant State Attorney from the State of Florida, Captain Rex F. Hoskins, Virginia State Police Criminal Intelligence Unit, James A. Cales, Jr., Esquire, Commonwealth's Attorney for the City of Portsmouth, Joseph H. Campbell, Esquire, Commonwealth's Attorney for the City of Norfolk, William H. Fuller, III, Esquire, Commonwealth's Attorney for Danville, and Andre Evans, Esquire, Commonwealth's Attorney for Virginia Beach.

1. Statewide Grand Jury

The first priority in the work of the Commission was to determine the need for a state-wide grand jury system. The Commission finds that at this time no need has been demonstrated that such a system should be established in Virginia, and therefore, recommends against it.

Several instances were cited to the Commission as to criminal activity in Virginia which is multi-county or multi-city in nature. In each case, the law-enforcement officials: attorneys for the Commonwealth, sheriffs and police, were able to cooperate effectively through the present machinery of special and regular grand juries, so that the cases were brought to a satisfactory conclusion. Although some witnesses urged the adoption of a statewide grand jury system, no one testified as to any case lost, or any failed investigation, due to lack of authority for the statewide grand jury. The majority of the Commonwealth's Attorneys appearing before the Commission generally felt that such a system was not needed.

The practical problems and policy questions which must be resolved in order to produce a workable statewide grand jury system are formidable.

A major problem is that of staffing and funding.–The state of Florida spent $300,000.00 on an eighteen month investigation in 1977 and appropriated an equal amount for the biennum 1978-1979. For this, it employed one secretary and two lawyers. Law enforcement officers of the several political subdivisions furnished investigative services, so that this was not budgeted in this cost. This appropriation went to defray the salaries of the lawyers and the secretary, and to pay the per diem and expenses of the grand jury. A large sum of money, which the Commission did not attempt to estimate, would be required to start up the system in Virginia, and large sums would be required in the annual budget to sustain the system. Obviously, these expenses would not be justified in light of the undemonstrated need for a special statewide grand jury system.

Other major policy and political questions which exist in setting up a statewide grand jury system, if the need for one was demonstrated are (i) who should have the appointing power; (ii) who should the power to activate or convene it; (iii) should the investigative power of the jury be limited to specific crimes; (iv) should its term be limited; (v) should it have power to return indictments; (vi) who would be in charge of the business of the grand jury, and who would select that person. In view of the conclusion of this Commission against the establishment of the system, the Commission shall not have to meet these problems.

2. Other Matters Considered by the Commission

In the course of its hearings, various proposals were made by witnesses which were felt by then to be needed in the effective prosecution of crime, particularly organized crime. They are:

(a) a general immunity statute

(b) availability of grand jury transcripts to the Commonwealth after indictment

(c) sealed indictments

(d) prohibition of attorneys accompanying witnesses in the grand jury room

(e) expansion of wire tap law

(f) anti-racketeering law

(g) mandatory joint trials, unless severance is indicated by good cause

(h) witnesses before grand jury should not be permitted to have the same attorney.

These proposals are discussed hereafter, with the recommendation of the Commission as to each

(a) General Immunity Statute

The General Assembly has seen fit to provide immunity from prosecution in order to compel testimony from witnesses in (i) drug cases (§ 18.2-262); (ii) in offenses in which the Alcoholic Beverage Control Law is involved (§ 4-94); (iii) in bribery (§ 18.2-445); (iv) in certain cases involving prostitution (§ 48-l5); (v) in election law offenses (§ 34.1-281) and (vi) and in cases in which perjury is charged (§ 18.2-437).

The Commission is reluctant to recommend passage of a statute allowing such immunity from prosecution of any and all crimes. There is too much potential for abuse. The General Assembly should exercise its power to provide immunity only on a case by case basis as the need is shown therefore.

(b) Availability of Special Grand Jury Transcipts to Commonwealth

The Commission recommends that the transcripts of the special grand jury minutes be made available to the Commonwealth, after an indictment has been made, on the basis of the report of the grand jury.

In some cases, the special grand jury makes investigations and findings in which the Commonwealth's Attorney has not participated. The Commonwealth's Attorney, by law, (§ 19.2-210) is prohibited from being present during the grand jury sessions, with certain exceptions, so that in order for him to be fully prepared to try the case after indictment, he should have available to him all of the testimony and other evidence presented to the special grand jury. * See dissenting statement of Delegates A. L. Philpott and Theodore V. Morrison, Jr.

The Commission considered the desirability of allowing the defense, upon good cause shown, the same right. Rule 3A:14 of the Rules of the Supreme Court of Virginia allow discovery. Lowe v. Commonwealth , 218 VA 670; 239 S.E. 112 holds that suppression by the Commonwealth of evidence favorable to the accused upon request violates due process when the evidence is material either to guilt or innocence. This rule, balanced against the very real desirability of protecting the identity of certain witnesses to keep them from harm, convinces the Commission that the defense should not be allowed to have the actual transcript.

Legislation is appended as an Appendix to this report to accomplish this purpose. ***See separate report of A. L. Philpott and Theodore V. Morrison.

(c) Sealed Indictment

The Commission concludes that a law allowing the sealing of indictments for the purpose of

secrecy prior to the arrest of the accused is not necessary. The Court has sufficient power to enforce a limited amount of secrecy, and the public has a right to know what is occuring in the courts. Therefore, the Commission recommends against this proposal.

(d) Expansion of Wire Tap Law

The General Assembly enacted Chapter 6 of Title 19.2 in 1973, authorizing the limited interception of wire or oral communications. The bill at that time was subject to intensive, heated debate, and as it emerged from the legislative process, three types of offenses only are subject to wiretapping; extortion, bribery, and drug offenses, or conspiracy to comit any of them.

Each succeeding session, of the General Assembly has brought attempts to broaden the statute, to no avail. Wiretapping is a drastic process, and efforts to enlarge police powers in that area should be undertaken with extreme caution. For this reason, the Commission recommends no expansion of the wiretap law.

At the same time, the Commission does not feel that any powers previously granted in that area should be diminished. When the marijuana laws were liberalized in 1979, inadvertantly, marijuana offenses were taken from the class of drug offenses subject to interception. The Commission recommends that felony marijuana offenses be made subject to wire or oral communication interception. A bill draft incorporating this recommendation is attached as an appendix to this report.

(e) Anti-Racketeering Law

A study of a proposal of this magnitude was not permitted within the scope of the General Assembly charge to the Commission, nor did the Commission have the time to complete such an undertaking if it had the power. However, it is understood by the Commission that the Crime Commission will make certain proposals along this line, particularly in the area of "loan sharking."

(f) Witnesses Before Grand Jury should not be Permitted to have the same Attorney.

The Commission feels that no hard and fast rule or policy should be made in this area. Persons accused of, or under investigation for, criminal activity should be free to select an attorney of their own choosing. If a conflict of interest appears to exist, or develops, the Rules of Ethics should govern the situation. That failing, the Court in which the proceedings are pending, has ample power to deal with abuses. Therefore, the Commission recommends against any changes in the law along these lines.

(g) Prohibition of Attorney Accompanying Witness into Grand Jury Room.

A person accused or suspected of crime has the right to have counsel of his own choosing at any stage of the proceeding. This is a basic right. It is difficult to determine when the investigative stage ends and the accusatory process begins. The court has the power to control or correct abuses that may develop or exist. Therefore, the Commission recommends against this proposal.

(h) Mandatory Joint Trials, Unless Severance is Indicated for Good Cause.

§ 19.2-263 allows a person, indicted jointly with others for a felony, to be tried separately at his election, if a jury trial is asked for.

This places an unnessary burden and expense upon the Commonwealth. No problem has been found in having joint trials in federal cases, and no major problem has surfaced to the knowledge of the Commission in other states permitting this. Therefore the Commission recommends that joint trials should be had in all cases except in cases in which one of the persons so indicted has confessed and will be a witness for the Commonwealth. Other cases in which a situation might exist in which justice would require separate trials may surface so, that the Court's discretion should be exercised. Legislation to accomplish this purpose is attached as an appendix to this report.

Respectfully submitted,

A. L. Philpott
See Separate Report

J. Harry Michael, Jr.

Aubrey M. Davis, Jr.

Frederick T. Gray

J. Patrick Graybeal
See Separate Report

Robert F. Horan
See Separate Report

C. Hardaway Marks
See Separate Report

Theodore V. Morrison
See Separate Report

William F. Parkerson

Gammiel G. Poindexter

Dissenting Statement of A. L. Philpott,

Theodore V. Morrison and C. Hardaway Marks

We dissent from that part of the report which recommends that grand jury transcipts and reports be made available to the Commonwealth. The statutes (§§ 19.2-212 and 19.2-213) which provide for the confidentiality of these materials were adopted after a great deal of study and debate on the part of the General Assembly. The salutory policy of protecting the integrity of the deliberations of the special grand jury and the safety of its witnesses overrides any inconvenience which may be caused the Commonwealth in preparing its case.

We further dissent from that part of the report which recommends that those accused and indicted jointly with others for a felony shall be tried jointly unless one of those indicted is to be a witness for the Commonwealth.

It seems to us that the present law protects the rights of the accused when he is given the right to elect to be tried separately, and this should be the right of the accused rather than discretionary with the court. The evidence against one accused may be overwhelming and inferentially connect the other accused in the criminal act. It appears that the danger of the jury being unable to separate the evidence as between the two persons accused would require tha the accused be given the option of a separate trial if he so desires.

Dissenting Statement of J. Patrick Graybeal

and Robert F. Horan, Jr.

We dissent from that portion of the report which rejects the proposal for a general immunity statute. It is strikingly incongruous that immunity can be granted to compel the testimony of a witness in a case of bribery or prostitution but not murder or rape. A carefully drawn statute which would authorize the Commonwealth to make a motion to immunize a witness, and would permit a court to grant same after a hearing and a showing of need, is a reasonable step. The suggestion of "too much potential for abuse" simply does not hold water. No such abuse has been seen under existing immunity statutes in Virginia, and no reason is offered as to why it would be more probable simply because the crime might be murder or rape rather than election or ABC laws (both of which carry immunity provisions under present law).

We dissent also from that portion of the report which supports the practice of allowing the attorney for a witness to be present in the Grand Jury room. We are aware of no other state which allows this practice. It is little short of unbelievable that under present law, the Commonwealth Attorney (who would have to prosecute any discovered violations) has no right to participate in a special grand jury unless asked, and yet any lawyer for any witness can appear as a matter of right.

We agree wholeheartedly with the conclusion of the Commission that a state-wide grand jury is not needed in Virginia. The present special grand jury provision works effectively in most instances. However, we also believe that its structure must be overhauled if it is to be used to handle a true organized crime problem. Among the things which would have to be changed in order to handle such investigations is the provision which does allow defense attorneys in the grand jury. In a true organized crime set-up this would put the fox in the chicken coop.

APPENDIX I

A BILL to amend and reenact §§ 19.2-212 and 19.2-213 of the Code of Virginia, which provide for transcripts of special grand jury testimony and reports of such jury.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-212 and 19.2-213 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-212. Provision for court reporter; use and disposition of notes, tapes and transcriptions.—A court reporter shall be provided for a special grand jury to record, manually or electronically, and transcribe all oral testimony taken before a special grand jury, but such reporter shall not be present during any stage of its deliberations. The notes, tapes and transcriptions of the reporter are for the ~~sole~~ use of the special grand jury, and the contents thereof shall not be divulged by anyone except as hereinafter provided. After the special grand jury has completed its use of the ~~said~~ notes, tapes and transcriptions, the foreman shall cause them to be sealed, the container dated, and delivered to the court.

The court shall cause the sealed container to be kept safely. *If as a result of the work of the special grand jury, any indictment is returned by a regular grand jury, the court shall, on motion of the attorney for the Commonwealth, make such notes, tapes and transcriptions available for the sole use of the attorney for the Commonwealth.* If any witness testifying before the special grand jury is prosecuted subsequently for perjury, the court, on motion of either the attorney for the Commonwealth or the defendant, shall permit them both to have access to the testimony given by the defendant when a witness before the special grand jury, and ~~the~~ ~~said~~ *such* testimony shall be admissible in the perjury case.

If no prosecution for perjury is instituted within three years from the date of the report of the special grand jury, the court shall cause the sealed container to be destroyed.

§ 19.2-213. Report by special grand jury.—At the conclusion of its investigation and deliberation, the special grand jury shall file a report of its findings with the court *and the attorney for the Commonwealth* , including therein any recommendations that it may deem appropriate, after which it shall be discharged. Such report shall be sealed and not open to public inspection, other than by order of the court.

APPENDIX II

A BILL to amend and reenact § 19.2-66 of the Code of Virginia, which provides when the Attorney General or Commonwealth's attorney may apply for an order authorizing interception of communications.

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-66 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-66. When Attorney General or Commonwealth's attorney may apply for order authorizing interception of communications.–The Attorney General in any case where the Attorney General is authorized by law to prosecute or pursuant to a request in his official capacity of an attorney for the Commonwealth in any city or county may apply to a judge of competent jurisdiction for the jurisdiction where the proposed intercept is to be made for an order authorizing the interception of wire or oral communications by the Department of State Police, when such interception may reasonably be expected to provide evidence of the commission of a felonious offense of extortion, bribery, or any felony violation of § 18.2-248 *or 18.2-248.1* , or any conspiracy to commit any of the foregoing offenses. The Attorney General may apply for authorization for the observation or monitoring of the interception by a police department of a county or city. Such application shall be made, and such order may be granted, in conformity with the provisions of § 19.2-68.

APPENDIX III

A BILL to amend and reenact §§ 19.2-262 and 19.2-263 of the Code of Virginia, which provide for waiver of jury trial; number of jurors in criminal cases; how jurors selected; juries for trials where persons jointly indicted.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-262 and 19.2-263 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-262. Waiver of jury trial; numbers of jurors in criminal cases; how jurors selected from panel.—(1) In any criminal case in which trial by jury is dispensed with as provided by law, the whole matter of law and fact shall be heard and judgment given by the court. In appeals from juvenile and domestic relations district courts the infant, through his guardian ad litem or counsel, may waive a jury.

(2) Twelve persons from a panel of twenty shall constitute a jury in a felony case. Seven persons from a panel of thirteen shall constitute a jury in a misdemeanor case.

(3) The parties or their counsel, beginning with the attorney for the Commonwealth, shall alternately strike off one name from the panel until the number remaining shall be reduced to the number required for a jury.

(4) In ~~any case in which persons indicted for felony elect to be tried jointly~~ *cases in which the accused is indicted jointly with others for a felony* , if counsel or the accused are unable to agree on the full number to be stricken, or, if for any other reason counsel or the accused fail or refuse to strike off the full number of jurors allowed such party, the clerk shall place in a box ballots bearing the names of the jurors whose names have not been stricken and shall cause to be drawn from the box such number of ballots as may be necessary to complete the number of strikes allowed the party or parties failing or refusing to strike. Thereafter, if the opposing side is entitled to further strikes, they shall be made in the usual manner.

§ 19.2-263. Trials of persons jointly indicted.— ~~If~~ A person, indicted jointly with others for a felony, ~~elects to~~ *shall* be tried ~~separately~~ *jointly, unless a person indicted with him is to be a witness for the Commonwealth, in which case such person may elect to be tried separately. The court may order separate trials in other cases for good cause shown. If separate trials are ordered* , the panel summoned for their trial may be used for him who is first tried and the court shall cause to be summoned a new panel for the trial of the others, jointly or separately, as they may ~~elect~~ *be entitled* .