

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036-6690

COMMITTEE ON CRIMINAL LAW

LAWRENCE B. PEDOWITZ
CHAIR
299 PARK AVENUE
NEW YORK, N.Y. 10171
(212) 371-9200

JOHN F. SAVARESE
SECRETARY/TREASURER
299 PARK AVENUE
NEW YORK, N.Y. 10171
(212) 371-9200

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Ralph J. Marino
Majority Leader
New York State Senate
Albany, New York 11247

Manfred Ohrenstein
Minority Leader
New York State Senate
Albany, New York 11247

Mel Miller
Speaker
New York State Assembly
Albany, New York 11247

Carl D. Rappleyea
Minority Leader
New York State Assembly
Albany, New York 11247

Gentlemen:

This letter is submitted on behalf of the Criminal Law Committee of the Association of the Bar of the City of New York. We write to offer our comments regarding pending legislative proposals for grand jury reform -- specifically the Senate proposal (S.6806 and 70299) and the Assembly proposal (A.9596).

The Criminal Law Committee of the Association of the Bar of the City of New York is comprised of current and former federal and state prosecutors, defense attorneys and judges. It is the Committee of the Association having primary jurisdiction for reviewing and commenting on substantive developments in the criminal law, and on the impact of these developments on the administration of justice.

The Senate proposal would abolish a defendant's right to be prosecuted for felony charges by grand jury indictment and permit prosecutors instead to file superior court informations supported by witness affidavits. The Assembly proposal would abolish grand jury indictment in virtually all cases where an arrest has been made and substitute a

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preliminary hearing procedure whereby a judge, after hearing witness testimony, would determine whether there exists reasonable cause to believe that the defendant committed the crimes charged in a prosecutor's information.

Each proposal can be viewed as promoting important interests and values. The Senate proposal arguably promotes efficiency; the Assembly proposal would promote the early and vigorous review of criminal charges by defense attorneys. On balance, however, we oppose both proposals, because we believe that other interests and values outweigh those seemingly promoted by these proposals.

The Senate Proposal

We are concerned that the Senate proposal will eliminate from the judicial system one of the grand jury's most important functions, i.e., its role in tempering justice with mercy where a defendant chooses to testify and tell his or her story to a grand jury. Even when there may be a legally sufficient basis for an indictment, a grand jury may decide that there are sympathetic or extenuating circumstances and decline to indict. This mercy-dispensing function of the grand jury is real and tangible, not merely theoretical. Our committee members have witnessed it on many occasions, and believe it contributes substantially to humanizing the criminal justice system.

The rights of defendants are also protected when prosecuting attorneys screen their cases carefully and quickly -- a requirement of the current grand jury system. Our current system -- coupling the requirement of a grand jury indictment in a felony case with the rule that such an indictment must be obtained within 120 hours or the defendant will be released on his own recognizance -- provides a powerful incentive to prosecutors to screen cases carefully and quickly. As a result, a very large number of felony arrests made by the police are treated as lesser felonies, reduced to misdemeanors or even dismissed outright after review by prosecutors.

A system based on affidavits supporting superior court informations, as provided for in the Senate proposal, might not engender as much care on the part of prosecutors. Affidavits could easily become formulaic, computerized forms with little genuine content. Even worse, there might be

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cases where a busy prosecutor would not speak to or interview the witnesses whose affidavits would be filed in court. The screening of felony cases might effectively be left to police officers, rather than prosecutors who must now screen cases carefully before bringing them to a grand jury.

The Senate proposal might also hamper the ability of prosecutors to secure the cooperation of witnesses. The use (and the threat of use) of the subpoena power is extremely important in securing the cooperation of witnesses. That power, however, is the power to subpoena a witness to appear before a grand jury, not to appear in the prosecutor's office. Thus, if the Senate proposal were to become law, a prosecutor would not be able to subpoena a witness to the prosecutor's office to prepare the necessary affidavits.

The Assembly Proposal

We also oppose the Assembly proposal -- which would substitute preliminary hearings for grand jury indictments -- because we believe it is impractical.

If this were a world of unlimited resources, legislation requiring a preliminary hearing in every felony case could be assessed on its substantive merits or demerits alone. For example, advocates of requiring a preliminary hearing in every felony case argue as to the merits of the proposal that preliminary hearings would allow for the early, careful and searching review of felony charges, provide for early discovery and facilitate pleas of guilty by defendants who might otherwise have doubted that their accusers would come to court. Opponents of a preliminary hearing system counter by questioning the need for and desirability of early discovery and arguing that a preliminary hearing system would sacrifice the confidentiality interests and safety of grand jury witnesses and increase fears of retaliation, because the preliminary hearing would result in victims, within days of a criminal attack, coming face-to-face with the persons who have victimized them and being cross-examined by their attorneys.

We believe, however, that the legislature need not address itself to this substantive debate, because this is not a world of unlimited resources. Given the vast number of felony cases prosecuted in this City and State (over 17,000 felonies were indicted in New York County alone last year), a

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requirement that a preliminary hearing be held in each felony case would place an intolerable burden on the criminal justice system. A preliminary hearing requirement would necessitate holding a hearing in each such felony case, with full cross-examination of witnesses. Unless the legislature were prepared immediately to increase vastly the funding available for judges, prosecutors and courtroom facilities (and there is no suggestion today that it is), we believe this requirement would lead to a total breakdown in the system.

We appreciate the opportunity to submit our comments, and would be pleased to answer any questions you may have.

Respectfully submitted,

Committee on Criminal Law
Lawrence B. Pedowitz, Chairman

Stuart E. Abrams
William I. Aronwald
Barry A. Bohrer
David M. Brodsky
Hon. Zachary W. Carter
Pamela Rogers Chepiga
Denise Cote
Rhea Dignam
John Gleeson
Lawrence Goldman
Jo Ann Harris
T. Anthony Hayles
Jack S. Hoffinger**
Frederick J. Jacobs***

Harlan A. Levy*
Jeffrey E. Livingston
Roanne Mann
Lawrence M. Martin
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Hon. Harold J. Rothwax
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Minna Schrag
William J. Schwartz
Howard S. Sussman
Hillard Wiese
Dennison Young, Jr.
Lawrence J. Zweifach

*Chairman of subcommittee on grand jury reform, who was primarily responsible for drafting these comments.

**Member of subcommittee on grand jury reform.

***Abstention based on legislative involvement.