

**INDEPENDENT COMMITTEE REPORT TO THE MINNESOTA
SUPREME COURT FROM THE SUPREME COURT ADVISORY
COMMITTEE ON RULES OF CRIMINAL PROCEDURE**

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**INDEPENDENT COMMITTEE REPORT TO THE MINNESOTA
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AUTHOR
ARTHUR R. MARTINEZ

As a member of the Advisory Committee for the Rules of Criminal Procedure, I find it necessary to advise the court to the proposed change of Rule 18.04 allowing parents, guardians or a support person with a minor testifying before a grand jury. Under the current law this would allow an unauthorized person in a grand jury room. The Rules Committee did not want this to be submitted as a "Minority Report." As a result, this is entitled an "Independent Committee Report."

The intent of this report is to advise the Supreme Court why the proposed change would not better the practice of criminal law in the State of Minnesota. I agreed with the rest of the report submitted to you.

GRAND JURY PRACTICE

The grand jury is the accusatory body that must determine whether an accused should be charged. In Minnesota, crimes carrying life sentences must be presented to a grand jury for indictment. MINN.R.CRIM.P. 17.01. A prosecutor has discretion to bring other crimes to a grand jury. *Id.* The grand jury serves two purposes: 1) to bring to trial those who are properly charged with a crime; and 2) to protect the citizen against unfounded accusations of a crime. *See In re Grand Jury of Hennepin County Impaneled on November 24, 1975*, 271 N.W.2d 817 (Minn. 1978); *State v. Richards*, 464 N.W.2d 540 (Minn. Ct. App. 1990).

In order for the grand jury to fulfill its accusatory function in a neutral manner, secrecy of the proceedings is paramount. *United States v. American Medical Ass'n*, 26 F.Supp. 429, 431 (D.D.C. 1939). Secrecy protects the ultimate truth-finding function of the grand jury. *Id.* In

grand jury proceedings, secrecy is the best method to ensure that the grand jury remains independent from governmental action and influence. This need for the grand jury to be free from any influence is the underlying rationale for the absolute prohibition of unauthorized persons in the grand jury's presence. This underlying principle is what has driven this Court in its decision over the course of nearly a century. This principle should not be compromised to allow a parent, guardian, or support person into the grand jury room in order for a minor to testify. Grand jury proceedings allow many other types of reliable hearsay evidence to support an indictment, without the need for direct testimony. *See* 8 HENRY W. MCCARR ET AL., MINNESOTA PRACTICE SERIES § 13.10 (3d ed. 2001).

I. HISTORY OF THE NEED FOR SECRECY IN GRAND JURY PROCEEDINGS.

For nearly a century, Minnesota courts have applied the same standard in regards to dismissing an indictment based on the presence of unauthorized persons during grand jury proceedings. Beginning in 1920, this Court set the standard for how to remedy the presence of unauthorized persons. The Court of Appeals applied this standard in 1986. In 1989, this Court again affirmed its position that the presence of unauthorized persons was grounds for dismissal of the indictment without any showing of prejudice to the accused.

A. Early Jurisprudence.

Early in the twentieth century, this Court addressed the issue of an unauthorized presence in front of the grand jury in *State v. Ernster*, 147 Minn. 81, 179 N.W. 640 (1920). On April 28, 1920, various officers of the Commonwealth Mortgage Company were indicted with having unlawfully appropriated to themselves a large amount of the company's bonds, negotiable paper, and securities. *Id.* at 640. Prior to the indictment, a committee of three, appointed by a previous grand jury, came before the grand jury, then in session, and made statements regarding

investigations by the former grand jury relative to the defendants' transactions with the company.

Id.

The Court's discussion focused on the influence that the presence of the unauthorized persons had on the mind of the grand jury.

Here, evidence, illegal or hearsay, to be sure was given the grand jury, and *the case was discussed when persons not authorized to be present were present*. The minds of the jury must have considered and laid hold of the case when they heard what *purported to be the facts or evidence in respect to it*. On the testimony above referred to we think it clearly appears that the indictment should have been quashed. The common law respecting grand jury functions, as supplemented by our statutory enactments, clearly intends that there *shall be no star chamber proceedings at which persons may come*, either by delegations or singly, to advise or urge action on the part of the jury, whether to indict or to find a no bill. It is supposed that witnesses only shall appear, one at a time, and give competent evidence, and upon evidence so given, and that alone, the jury are to determine whether a person should be accused of crime. If those interested in prosecuting may send a delegation to the grand jury to induce the finding of a bill, so may the criminal send his delegation and lawyer to persuade that no bill be found.

Id. at 641-42 (emphasis added).

The Court further enunciated the ultimate purpose of the grand jury, and how that purpose is best accomplished.

The grand jury is supposed to be a fearless and impartial investigator of crime, and to the [sic] more fully accomplish this purpose the law seeks to provide against every influence of outsiders, and specifies that the mere presence of an unauthorized person when a witness testifies, or when the case is discussed, or the vote taken is fatal to the indictment.

Id. at 642.

The Court concluded that any presence of an unauthorized person rendered the indictment null. The grand jury essentially could not perform its impartial function. The presence of an unauthorized person presumptively prejudiced the accused. This is the stance the Court has carried through the remainder of the century.

B. Court of Appeals Applying Supreme Court's Holding.

In 1986, the Minnesota Court of Appeals had the opportunity to revisit the subject of the presence of unauthorized persons and to apply the standard the Minnesota Supreme Court set forth in *Ernster*, 147 Minn. 81, 179 N.W. 640 (1920). In *Dwire v. State*, the defendants, officers of America Energy Farming Systems, Inc., were indicted for multiple counts of theft and diversion of corporate property. 381 N.W.2d 871, 872 (Minn. Ct. App. 1986). During the grand jury proceedings, Linda Shamla, a paralegal from the county attorney's office, testified before the grand jury. *Id.* Ms. Shamla interviewed many witnesses and prepared reports concerning her undercover investigation of America Energy Farming Systems, Inc. *Id.* After Ms. Shamla testified to the grand jury, she remained in the grand jury room during the testimony of other witnesses. *Id.* She marked and handed exhibits to the prosecutor during the testimony of seven grand jury witnesses. *Id.* The grand jury transcript includes many references to "Miss Shamla indicating on exhibit." *Id.*

The court in *Dwire* relied heavily on the reasoning in *Ernster*, 147 Minn. 81, 179 N.W. 640 (1920). However, the court's main focus was on whether the indictment must be dismissed absent a showing of prejudice. *Id.* at 874. The court articulated the rationale for the "per se" rule of dismissal.

This principle is based "upon *the fundamental conception that proceedings before the grand jury must be in secret.*" This rule of secrecy imposed on the hearings and deliberations of the grand jury derives from two significant considerations. The first is a decision to "save individuals from notoriety unless probable cause is found against them and an indictment is returned and disclosed." The second, of special significance to the matter before us, is to *shield grand jury proceedings from any outside influence having the potential to "distort their investigatory or accusatory functions."* Such protection embraces jurors and witnesses alike, and is designed primarily to *prevent attempts to overawe them by, among other things, the presence of numbers of prosecution witnesses while evidence is being taken.*

Dwire, 381 N.W.2d at 874-75 (citing *Commonwealth v. Pezzano*, 387 Mass. 69, 73, 438 N.E.2d 841, 844 (1982) (citations omitted)) (emphasis added).

The court was concerned with maintaining the secrecy of the proceedings, “A detailed inquiry into prejudice inevitably frustrates the secrecy of grand jury testimony.” *Id.* at 875 (citing *United States v. Treadway*, 445 F.Supp. 959, 963 (N.D.Tex. 1978)). The limitation on who may be present serves the dual purpose of safeguarding the secrecy and privacy of the grand jury proceedings and of protecting the grand jurors from the possibility of undue influence or intimidation from unauthorized persons. *Id.* at 876 (citing *United States v. Echols*, 542 F.2d 948, 951 (5th Circ. 1976)).

The court was also concerned with upholding the integrity of the criminal rules. The court stated that to require a defendant to show prejudice “would be to undermine the purpose, effectiveness and value of the Criminal Rules by judicial legislation which, in effect, would be saying that the Rules do not mean what they clearly and unequivocally state.” *Id.* at 875 (citing *United States v. Carper*, 116 F.Supp. 817, 820 (D.D.C. 1953)). The court worried that a “Pandora’s box” of imprecisions would open if the rule was not strictly construed. *Id.* at 876. The court stated, “The rule is clear and precise; there is no need to graft onto it a judicial cloud of confusion.” *Id.*

In order to maintain the neutrality and secrecy of the grand jury, the appellate court reasoned that a “per se” rule of dismissal was the appropriate remedy for the presence of unauthorized persons in grand jury proceedings. Further the court was loath to extend the scope of authorized persons in the grand jury room to anyone who was not listed in the statute. The Minnesota Supreme Court followed that reasoning three years later in *State v. Johnson*, 441 N.W.2d 460 (Minn. 1989).

C. **The Current State of the Law.**

In *Johnson*, Justice Yetka expressed this Court's concern with special relationship that prosecutors have with the grand jury. *Id.* at 462. The Court stated that the historical function of the grand jury was to shield the accused from prosecutors and ensure that a charge was based on credible facts, but then as time passed the grand jury developed the unfortunate function of protecting prosecutors from making politically unpopular decisions. *Id.* The primary focus of this Court was to keep the grand jury as free from taint and improper influence as possible, especially in light of the tendency for prosecutors to view the grand jury as a tool for their own convenience. *Id.* Prosecutors were urged, by this Court, to exercise extreme caution to maintain the grand jury's independence, particularly because due to the unique relationship with the grand jury, opportunities for influence and manipulation of the process are omnipresent. *Id.*

In *Johnson*, the grand jury foreperson, at the county attorney's suggestion, telephoned a previous grand jury foreperson to discuss the procedural nature of the proceedings. *Id.* at 463. This Court stated that while the telephone conversation was not as inherently prejudicial to the process as the actual presence of an unauthorized person, nevertheless, the opportunity existed for the former foreperson to influence the proceedings, and that unauthorized contact raises a presumption of prejudice to the defendant. *Id.* In *State v. Cox*, this Court held that "private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending . . . is, for obvious reasons, deemed presumptively prejudicial." 322 N.W.2d 555 (Minn. 1982) (adopting holding from *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). This presumption is rebuttable if the prosecution can prove that the contact was harmless. *Id.* at 464.

In conclusion, after *Johnson*, the presence of an unauthorized person taints an indictment and no showing of prejudice is necessary for dismissal.

II. ACTUAL TESTIMONY IS NOT ESSENTIAL TO SUPPORT AN INDICTMENT.

The Committee has made the proposed rule change due to their concern over whether a minor will testify before a grand jury without the presence of a parent, guardian or a support person. However, the testimony of a minor is not essential to obtain an indictment, as hearsay statements are admissible in the grand jury. An indictment must be based on evidence “admissible at trial,” except that hearsay for foundational purposes and certain hearsay reports, statements and summaries, including the oral summary of the police officer in charge of the investigation, are admissible. 8 HENRY W. MCCARR ET AL., MINNESOTA PRACTICE SERIES § 13.10 (3d ed. 2001); *see also State v. Scruggs*, 421 N.W.2d 707 (Minn. 1988) (holding that statements of witnesses were sufficient to support defendant’s murder indictment despite contention that statements were inadmissible hearsay). In order to give continuity and coherence to the accounts of the witnesses called, the usual practice is to have the investigating detective relate in narrative fashion the investigation of the case.

The testimony of a minor child is not pivotal for an indictment. Summaries of interviews, videotapes, and other reports are admissible to the grand jury.

CONCLUSION

The need to amend Rule 18.04 is contrary to nearly a century of precedence created to protect the citizens and Grand Juror's of Minnesota. Further, it prevents the opening of a "Pandora's box" of litigation. Therefore, I respectfully request the proposed amendment of Rule 18.04 for the Minnesota Rules for Criminal Procedure be denied.

August 1, 2002

RESPECTFULLY SUBMITTED,



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SUPREME COURT ADVISORY COMMITTEE
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