

# BEAT THE HEAT

**HOW TO HANDLE ENCOUNTERS WITH  
LAW ENFORCEMENT**



**BY KATYA KOMISARUK**

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by Katya Komisaruk

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CHAPTER

# GRAND JURIES

## WHAT A GRAND JURY DOES

Grand juries are one of the good intentions paving the road to our current legal system. Unlike a trial jury, which decides whether a suspect is guilty, a grand jury merely decides whether there's probable cause to prosecute a suspect on felony charges. The goal was to create a filter to catch unjustified felony cases and stop them at an early stage, so that the suspect wouldn't be wrongfully prosecuted (and have to spend unnecessary time in jail and unnecessary money on lawyers).<sup>1</sup> But it all went very wrong.

Grand juries are generally composed of six to twenty-three members, depending on the jurisdiction. In the federal system and in most states, grand jurors serve for eighteen months and judge many different cases (but they usually meet just once a week or even once a month). At a grand jury hearing, the only official is the prosecutor—there's no judge and no defense attorney. The jurors sit there listening to witnesses and reviewing exhibits in a prospective or pending felony case, and then vote on whom to prosecute.<sup>2</sup> Once the grand jury decides there's probable cause, the prosecutor can issue an indictment (in-dī't mənt), a document specifying the felony charge(s) against a particular defendant.

The prosecutor selects all the witnesses and other materials, and then presents them to the grand jury. Defense attorneys aren't even allowed in same room as the grand jury, let alone permitted to put on defense witnesses, question the prosecution witnesses, or make any statements to the jurors. So grand juries nearly always just "rubber stamp" the cases brought before them. For example, in fiscal year 2000, federal grand juries voted to indict a total of 59,472 suspects<sup>3</sup> and chose not to indict 29 suspects<sup>4</sup>—only one out of every two thousand suspects was left un-indicted. An additional factor in grand juries' unwholesome compliance with prosecutorial plans is the frequent lack of diversity among the jurors. Occasionally—but not often enough—this is brought to light by a case challenging the constitution-

ality of a grand jury that doesn't reflect the demographics of its county or federal district.<sup>5</sup>

Some people who are called as witnesses at grand jury hearings, are prosecuted afterward. If you're ordered to appear before a grand jury, immediately seek the advice of an attorney who has experience in grand jury matters. Unfortunately, as a grand jury witness, you're not entitled to a court-appointed attorney, even if you're low-income. Nonetheless, it's really important to get a lawyer: you don't want to gamble when the stakes are this high and the game is rigged.

## BEING SERVED WITH A SUBPOENA

A subpoena<sup>6</sup> (sə-pē'nə) is an order requiring you to be present at a legal proceeding, such as a trial or a grand jury hearing. (See sample grand jury subpoena, page 118.) Usually you're summoned just to testify, but sometimes you're required to bring documents or other items with you. A subpoena with an order that you bring something is a subpoena duces tecum (dū'səs tāk'ōm).<sup>7</sup> If you don't appear when you're told (bringing any specified items), a judge can have you taken into custody and brought to the hearing from jail.

Once in a great while, a lawyer may be able to persuade a judge to "quash" a grand jury subpoena, but the subpoenas are nearly always upheld.

A subpoena must be served on you before you're bound by it. Normally, grand jury subpoenas are delivered to you, in person, by a law enforcement officer, who can come and find you at your home, work, school, etc.

## APPEARING BEFORE A GRAND JURY

Although your lawyer can't accompany you into the grand jury room, she can wait outside the door, ready to advise you. A grand jury witness is legally entitled to get legal advice before answering each and every question. For example, a person can write down the first question

1. Grand juries are mandated by the Fifth Amendment to the U.S. Constitution, which also includes protection against self-incrimination, the right to due process, and other eroded liberties.

2. There are "special grand juries" that actively investigate crime or corruption, but these are rarely instituted, compared to regular grand juries.

3. Sourcebook of criminal justice statistics Online, "Grand jury and grand juror utilization in U.S. District Courts," Table 1.74, <http://www.albany.edu/sourcebook/1995/pdf/t174.pdf> (accessed October 16, 2003).

4. Bureau of Justice Statistics, U.S. Department of Justice, Compendium of Federal Justice Statistics, 2000, "Basis for declination of prosecution by U.S. Attorneys," Table 2.4, 30, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0002.pdf> (accessed October 16, 2003).

5. Racially biased grand juries are sufficiently frequent and widespread that in 1977, the U.S. Supreme Court set forth specific grounds for determining whether a grand jury has been improperly composed (*Castaneda v. Partida*, 430 U.S. 482 (1977)).

6. Subpoena is a Medieval Latin word combining *sub* (under) + *poena* (penalty); that is, "under penalty of law."

7. More Latin: *duces* (you must bring) *tecum* (with you).

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as soon as it's asked, leave the room and talk to his lawyer, and then go back into the hearing room and give his response to that question. Then he would listen to the *next* question, write it down, go out and talk to his lawyer, and come back to give his response. Then he would write down the *third* question, go talk to his lawyer, and so on...

Once you're in front of a grand jury, you can testify or you can "take the Fifth" (exercise your right to remain silent).

If you decide to testify, don't expect to get away with evading any of the questions or saying, "I can't remember" over and over. The person doing the questioning will be a prosecutor who's used to squeezing details out of reluctant witnesses.

If you do take the Fifth, you won't have to say so more than a few times. Once you've exercised your right to remain silent in response to several questions, and it's clear that you're not going to give any further answers, you'll be excused. However, there's a hitch. Sometimes, the prosecutor grants immunity to a witness who's exercising her right to remain silent, to try to force her to testify. It doesn't matter whether or not you've requested immunity. The prosecutor or judge can just impose immunity on you—and then you're no longer entitled to the protection of the Fifth Amendment (because if you're immune, what you say can't be used against you).

However, there are two kinds of immunity. The good kind is called "transactional immunity" and it means that you can't be prosecuted for the incident(s) you testify about. The bad kind is "use immunity" and it means that the prosecutor can't use your *own* testimony against you—but he can use *other people's* testimony and evidence against you. So if the prosecutor makes a bunch of people testify, they'll likely end up providing enough evidence to convict each other. Naturally, grand jury witnesses are almost always given use immunity, not transactional immunity.

If you refuse to testify after being granted immunity, you'll normally be held in contempt and locked up. Some people who've chosen not to comply have had to stay in custody until all the grand jury proceedings were ended or the case was over. This can take months or even years.

Since their inception, both in England and in the United States, grand juries have been used against political dissidents, the jurors often being hand-picked to ensure indictment. A modern variation on this abuse of power relies on political activists' reluctance to inform on their comrades. Activists are subpoenaed with the expectation that they will refuse to testify, and thus end up in jail for lengthy periods (thereby immobilizing that activist and deterring others).<sup>8</sup>

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8. For a comprehensive, yet stirring, article on the history and corruption of grand juries, see Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 *Journal of Criminal Law & Criminology* 1159 (1984); also posted on the Just Cause Law Collective website: <http://www.lawcollective.org/>.

United States District Court

Eastern

DISTRICT OF

South Virginia

TO: Christine Smith

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

PERSON

DOCUMENT(S) OR OBJECT(S)

YOU ARE COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

<p>PLACE</p> <p>UNITED STATE DISTRICT COURT 401 Courthouse Square Iskandaria, South Virginia 20500</p>	<p>COURTROOM</p> <p>GRAND JURY ROOM</p> <hr/> <p>DATE AND TIME</p> <p>4/1/03 9:30 A.M.</p>
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YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See attachment.

Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

<p>MAGISTRATE JUDGE OR CLERK OF COURT</p> <p>BARTLEBY T. SCRIVENER, CLERK OF THE COURT</p> <p>(By) Deputy Clerk</p> <p><i>B.T. Scrivener</i></p>	<p>DATE</p> <p>March 15, 2003</p>
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This subpoena is issued on application of the United States of America

I. JAVERT  
UNITED STATES ATTORNEY

ATTORNEY'S NAME, ADDRESS and PHONE NUMBER

I. JAVERT  
400 Courthouse Square  
Iskandaria, South Virginia 20500  
(202) 456-1111

ATTACHMENT

You are hereby required to bring with you and produce the following documents and things referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003. These documents and things should include, but not be limited to, the following:

1. Any and all hardcopy or electronic letters, notes, email, or other correspondence referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
2. Any and all photographs, videotapes, audiotapes, voice messages, or other recordings referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
3. Any and all hardcopy or electronic diaries, journals, calendars, appointment books, address books, or address lists used at any time after January 1, 2002.
4. Any and all agendas, notes, or attendance lists from meetings referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
5. Any and all organizational staff lists, membership lists, mailing lists, email lists, telephone trees, or schedules used at any time after January 1, 2002.
6. Any and all personal or organizational budgets, financial records, bank statements, credit card bills, receipts, pay stubs, or records of donations after January 1, 2002.
7. Any and all fundraising letters or other correspondence relating to fundraising, grant applications or grants, or lists of individual or institutional donors after January 1, 2002.
8. Any and all posters, handbooks, handouts, leaflets, postcards, or other printed material referring or relating to protest activities or preparation for protest activities on March 20 and 21, 2003.
9. Any and all banners, signs, armbands, costumes, masks, puppets, or other props relating to protest activities or preparation for protest activities on March 20 and 21, 2003.