

Opinion No. 82-14

September 13, 1982

OPINION OF: Jeff Bingaman, Attorney General

BY: Fred C. Smith, Deputy Attorney General; Art Encinias, Assistant Attorney General

TO: Honorable Edmund H. Kase III, District Judge, Division I, Seventh Judicial District, Socorro, New Mexico 87501

CRIMINAL PROCEDURE; CONSTITUTION

District court has limited discretion to convene a grand jury upon citizen petition pursuant to Article II, Section 14, New Mexico Constitution.

QUESTIONS

Does the district court ever have discretion to decline to convene a grand jury when presented with a petition authorized by Article II, Section 14 of the New Mexico Constitution?

CONCLUSIONS

Yes.

ANALYSIS

The New Mexico Constitution Article II, Section 14 states:

"A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or **a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the lesser of two hundred registered voters or five percent of the registered voters of the county**, or a grand jury may be convened in any additional manner as may be prescribed by law. [Emphasis added.]"

OPINION

Regarding the calling of a grand jury upon the filing of a petition, the language of the constitutional provision appears to be mandatory. A petition which contains the requisite number of valid voter signatures requires the district court to order a grand jury convened. However, it is just as clear that in New Mexico, a grand jury may not lawfully inquire into any matter whatsoever. Specific areas of inquiry by a grand jury are established by statute.

Section 31-6-9 NMSA 1978 indicates the scope of grand jury inquiry:

"The district judge convening a grand jury shall charge them with their duties and direct them to any special inquiry into violations of law that he wishes them to make. The grand jury need not make special inquiry into the general existence or occurrence of violations of any particular statute, notwithstanding any other provision of law. The grand jury is obliged, and the district judge shall charge that they are, to inquire into:

A. any public offense against the state committed and triable in the county which is not barred from prosecution by statute of limitations and upon which no valid indictment of information has theretofore been filed:

B. the condition of every person imprisoned in the county not lawfully committed by a court and not indicted or informed against; and

C. the condition and management {**300*} of every public jail or prison within the county."

The law therefore contemplates grand jury inquiry into violations of law, public offenses against the state, the condition of certain imprisoned persons and the condition and management of public jails or prisons. **See, State v. Watkins**, 92 N.M. 470, 590 P.2d 169 (Ct. Appl. 1979); **Clinton v. Superior Court In and For Los Angeles County**, 73 P.2d 252 (Cal.App. 1937).

Additionally, the law authorizes accusation and presentment by a grand jury for the removal of local elected officials upon certain enumerated grounds. Section 10-4-3 NMSA 1978. In the same manner, a grand jury may initiate the removal of a District Attorney. Section 36-1-10 NMSA 1978. Moreover, a grand jury can inquire into indebtedness of state institutions in excess of appropriations. Section 23-1-8 NMSA 1978.

Beyond these specific and specified areas of inquiry, a grand jury is limited in its power to investigate and consider other matters. The grand jury has no authority, for example, in civil matters. Annotation, 120 A.L.R. 437. A grand jury may not inquire into matters that occur outside the county boundaries. Section 31-6-9, NMSA 1978. Absent an indictment against a person holding public office or a presentment for the removal of a local elected officer, a grand jury "shall not denigrate that person's moral fitness to hold public office. . ." Section 31-6-10 NMSA 1978.

The New Mexico Supreme Court has confirmed these limitations upon the grand jury in its approved Criminal Uniform Jury Instruction 60.00, designed to explain proceedings to the grand jury. In the section entitled "Limits of Investigation," the approved instruction reads:

"The indiscriminate summoning of witnesses, on the mere chance that some crime may be discovered, is forbidden. The grand jury has no right to conduct an investigation into the personal affairs of citizens. It may not investigate the function, operation and

housekeeping of any branch of government, except the jails or prisons within the county. It is not a function of the grand jury to criticize or regulate agencies of government or private persons or institutions except jails or prisons."

This instruction to the grand jury sets limitations in accord with the general law prohibiting criticism of individuals or governmental agencies. **See**, Meyer, "Grand Jury Reports: An Examination of the Law in Texas and Other Jurisdictions," 7 St. Mary's L.J. 374 (1975); **People v. Superior Court**, 531 P.2d (Ca. 1975); Annotation, 63 A.L.R. 3d 586.

The limitations rest on the theory that the grand jury is a function of the courts; that is, of the judicial branch of government. It is unseemly, and, arguably, unconstitutional for the courts to intrude upon an area assigned to another branch of government. **See** New Mexico Constitution Article III, Section 1; **State ex. rel. Chapman v. Truder**, 35 N.M. 49, 289 P. 594 (1930).

The New Mexico Constitution Article II, Section 14 does not delineate the scope of inquiry by a grand jury; it merely addresses the methods by which a grand jury may be convened. Because the constitutional provision is silent on the subject, it should not be interpreted as intending to expand, contract or otherwise affect the scope of grand jury inquiry as already established by law, rule and custom.

A grand jury inquiry, whether convened by order of the district court as deemed necessary, by petition or by any other means prescribed for by law, may not exceed the limitations imposed upon *{*301}* that inquiry by existing law.

The critical question becomes whether a district court must convene a grand jury when presented with a petition, otherwise valid, which states no grounds falling within the traditional areas of grand jury inquiry as set out in the New Mexico Constitution, statute or common law.

It is, essentially, a question of judicial discretion. Judicial discretion, while difficult to define with precision, must always rest on principle and regular procedure for the accomplishment of the ends of right and justice and cannot be arbitrary, vague or fanciful. **See Pankey v. Hot Springs Nat'l Bank**, 42 N.M. 674, 84 P.2d 649 (1938).

New Mexico courts have had no occasion to address this question. However, a survey of the law in other jurisdictions reveals that grand juries have been closely controlled by the courts so as to prevent inquiry beyond lawful limitations.

Colorado recognizes the district court's authority to review petitions seeking to convene a grand jury and its discretion to deny a petition which is insufficient in content. **Ross v. Ogburn**, 646 P.2d 390 (Colo. 1982).

Arizona limits grand jury investigations to criminal offenses. **Wales v. Tax Commission**, 100 Ariz. 1981, 412 P.2d 472 (1966), states the basis for this view as follows:

"Investigations [by grand juries] for purely speculative purposes are odious and oppressive and should not be tolerated by law. Before they may be instituted there must be knowledge or information that a crime has been committed. There is no power to institute or prosecute an inquiry on chance or speculation that some crime may be discovered.

Such investigations are plainly tyrannical, leading themselves to abuses for politically or maliciously inspired purposes. They are beyond the scope of the inquisitorial powers of a grand jury and are not to be allowed."

Arizona drew this quotation from a Pennsylvania case, **Petition of McNair**, 324 Pa. 48, 187 A. 498 (1936) which further observed:

"A grand jury's investigation cannot be a blanket inquiry to bring to light supposed grievances or wrongs for the purpose of criticizing an officer or a department of government, nor may it be instituted without direct knowledge or knowledge gained from trustworthy information that criminal conspiracy, systematic violations of the law, or other criminal acts of a widespread nature prevail, and at least one or more cognate offenses should exist on which to base a general investigation. The investigation cannot be aimed at individuals primarily, as such nor at the commission of ordinary crimes, but should be of matters of criminal nature wherein public officers or the interests of the general public are involved.

Where it is made to appear to a court, as above indicated, that there exists a system of crime among public officers, or criminal conspiracies respecting public business, safety, or health, or other criminal acts affecting these functions or of a widespread nature, jeopardizing or demoralizing public security or health, the judge may properly order such investigation. [Citations omitted.]"

Pennsylvania has steadfastly followed this view in deciding questionable petitions for grand jury investigations. **See Investigation by Dauphin County Grand Jury**, 332 Pa. 289, 2 A.2d 783 (1938) [Petition which does not charge the commission of a crime is not adequate basis for convening grand jury]; **Petition of Grace**, 397 Pa. 724, 154 A.2d 592 (1959) [Grand jury not instrument of {*302} reform, but arm of criminal court]; **Commonwealth v. Barger**, 375 A.2d 756 (Pa. Super. 1977). [Immediate need, in addition to purpose to uncover criminal acts, required to trigger grand jury investigation]; **Commonwealth v. Bestwick**, 396 A.2d 1311 (Pa. Super. 1978) [Grand jury not to review quality of government administration but can investigate alleged illegalities in governmental agency]; **Commonwealth v. Bestwick**, 414 A.2d 1373 (Pa. Super. 1980) [Court may hold hearing to aid in determining sufficiency of petition].

Only the Oklahoma courts have concluded that constitutional language similar to New Mexico's compels a district court to convene a petitioned grand jury. **Harris v. Harris**, 541 P.2d 171 (Okla. 1975). In that case, petitioners sought grand jury investigation into "all aspects" of municipal agencies, including the police and the mayor's office, but alleged no crime. The court noted that Oklahoma statutes specifically charged the grand jury to inquire into "the willful and corrupt misconduct in office of public officers of every description . . ." and authorized the grand jury to issue written reports as to any public office or public institution investigated by them. 22 O.S. 1971, Sections 338 and 346. In light of statutory authority, the **Harris** court found that the petition adequately stated a basis for investigation.

New Mexico, however, does not so charge the grand jury nor does it permit the grand jury to investigate public officers or institutions, except jails or prisons, or public officials except for grounds on which to base an indictment or a presentment. A grand jury may not criticize nor regulate governmental agencies nor denigrate persons holding office except for removal actions or by indictment for criminal conduct. In these respects, the Oklahoma case law is distinguishable from the New Mexico context.

From this examination of the prevailing law, grand juries have been limited in their exercise of investigative powers to those matters which fall within the traditional areas of grand jury inquiry as established by state law.

For example, a New Mexico grand jury may not be convened or charged to investigate allegations of crime that inarguably occur outside the territorial boundaries of the state when no contacts with this jurisdiction are apparent. For a district court to convene a charge a grand jury to inquire into such matters would be unlawful and an abuse of discretion, even if sought by an otherwise valid citizen petition.

Just as clearly, for a district court to refuse to convene and charge a grand jury to inquire into matters clearly within the grand jury's power and authority, even if inartfully stated in the citizen petition, would be contrary to the constitutional mandate and a clear abuse of discretion.

Once a district court is satisfied that the citizens' petition meets the constitutional requirements and states matters reasonably within the cognizance of a grand jury, a district court shall convene and instruct a grand jury to make such inquiry; or, may, pursuant to Section 31-6-1 NMSA 1978, instruct a sitting grand jury to make additional inquiry into the matters stated in the petition.

It is the opinion of the Attorney General that a district court to which an otherwise valid citizen petition for grand jury is presented possesses the discretion to determine whether the matters stated in the petition are reasonably within the lawful scope of grand jury inquiry. Only where the petition clearly seeks to involve a grand jury in matters beyond its purview may the court refuse to present those matters to a grand jury or to convene a grand jury where no regularly sitting grand jury is available.

{*303} This opinion does not affect the independent power of the district court to convene a grand jury upon its proper order. New Mexico Constitution Article II, Section 14. Where a grand jury is convened by proper order there is nothing to prevent the district court from presenting additional matters, whether or not contained in a citizen's petition, to a grand jury for its consideration pursuant to appropriate charge and instruction by the court.

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