

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1993

Amending Criminal Rule 6 and
Criminal Rule 6.1 concerning
grand jury.

IT IS ORDERED:

1. Criminal Rule 6 is amended to read as follows:

Rule 6. The Grand Jury.

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(i) **Preparing Indictments and Presentments.** The prosecuting attorney shall prepare all indictments and presentments for the grand jury, and shall attend its sittings to advise it of its duties and to examine witnesses in its presence.

(j) **Investigation of Crime Initiated by Grand Juror.** If a grand juror discloses to other grand jurors that he or she has reason to believe a crime has been committed that is triable by the court and proposes that the grand jury investigate that crime, the grand juror shall also disclose the belief to the prosecuting attorney. If approved by a majority of the grand jurors, the grand jury may investigate the facts and circumstances relating to the belief with the assistance and oversight of the prosecuting attorney, in accordance with Rule 6.1(d) and (e)(1)-(2).

[re-letter following subsections]

* * * *

(p) **Questions to the Superior Court.**

(1) Whenever there is doubt from the evidence presented

(i) whether the facts constitute a crime, or

(ii) whether a defendant is subject to prosecution by reason of either a lapse of time or a former acquittal or conviction, then the grand jury by a concurrence of at least five members may, after consulting the prosecuting attorney, present the facts of the case to the court with a request for instruction on the law.

(2) The foreperson shall make the presentation of facts and the request for instruction on the law to the court in the presence of the grand jury.

(3) The presentation to the court shall not mention the names of individuals. Any written document containing the presentation of facts and request for instruction on the law shall not be filed with the court, nor shall it be kept by the court beyond the time that the grand jury is discharged.

(4) When the presentation of facts and request for instruction is made, the court shall give such instruction on the law as it considers necessary.

[re-letter following subsections]

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2. Criminal Rule 6.1 is amended to read as follows:

Rule 6.1. Grand Jury Reports – Public Welfare or Safety.

(a) **Authority to Investigate and Issue Reports.**

A grand jury is constitutionally authorized to investigate and make reports and recommendations concerning the public welfare or safety. An issue concerns the public welfare or safety, and

therefore is within the scope of a grand jury's investigative authority, when

- (1) the investigation of the issue could further a public policy of the state;
- (2) the outcome of the investigation could reasonably be expected to benefit a large number of people, rather than to benefit only an individual or small group of individuals; and
- (3) the issue involves a matter of general importance to a large number of people, rather than to an individual or a small group of individuals.

An issue that concerns primarily a private matter rather than one that concerns the general public is not generally an issue concerning the public welfare or safety within the scope of a grand jury's investigative authority. An indictment is not a "report" as used in this rule and Criminal Rule 6.

COMMENTARY to Rule 6.1(a):

The grand jury is constitutionally authorized to investigate matters of public welfare or safety and to issue reports on the results of such investigations; subsection (a) generally describes the reasonable scope of that authority. Adherence to subsection (a) will ensure that an investigative grand jury is justified and that the grand jury's use of State of Alaska resources is reasonable and appropriate.

To be investigated, a matter must concern the public welfare or safety; for example, systemic issues or an ongoing, recurring issue impacting the general public could be within the scope of a grand jury investigation. But purely private matters such as, for example, an investigation into any individual court case of any

type (whether currently open or closed), or an investigation into the Department of Law's decision not to prosecute a particular incident as a crime, or an investigation into any private dispute between or among citizens that could appropriately be the basis for a civil or other court case, are not generally matters of public welfare or safety within the scope a grand jury's investigative authority.

(b) Grand Juror Requests to Investigate a Matter of Public Welfare or Safety.

(1) An individual grand juror may propose to the prosecuting attorney that the grand jury investigate a matter concerning the public welfare or safety. If the prosecuting attorney has a reasonable basis to believe that (A) the matter proposed concerns the public welfare or safety and is within the grand jury's authority as described in subsection (a), and (B) the proposal is not patently groundless, made for purposes of delay or harassment, or otherwise proposed in bad faith, the prosecuting attorney shall, within a reasonable period of time considering resources and Department of Law priorities, describe the proposal to the grand jury for its consideration. If a majority of the grand jurors, after a reasonable time for consideration, determines that the matter proposed should be the subject of an investigation, then the prosecuting attorney shall facilitate the grand jury's investigation of the matter and provide assistance and oversight to the grand jury for preparation of the report.

(2) If a proposed grand jury investigation concerns possible misconduct on the part of the prosecuting attorney or others in the Department of Law such that having the prosecuting attorney oversee the investigation would create an appearance of

impropriety or a conflict of interest, the prosecuting attorney shall immediately advise the Attorney General of the potential conflict. The Attorney General, in his or her discretion, may appoint a neutral prosecutor to assist the grand jury and oversee the preparation of the grand jury report.

(3) If an individual grand juror has a reasonable and good faith basis to believe that having the prosecuting attorney oversee the investigation creates an appearance of impropriety or a conflict of interest because the investigation involves possible misconduct by that prosecuting attorney or others in the Department of Law, the grand juror may notify the superior court. The grand juror shall orally describe the basis for his or her belief to the court in the presence of the grand jury. Any further inquiry or proceedings conducted by the superior court relating to a matter raised under this paragraph shall be confidential.

(c) Citizen Requests to Initiate Investigative Grand Jury.

(1) If a citizen who is not serving as a grand juror believes that a matter of public welfare or safety should be investigated by a grand jury, the citizen may direct the citizen's concern to the Attorney General for consideration and for possible review and investigation by a grand jury.

COMMENTARY to Rule 6.1(c)(1):

The grand jury process may broadly be considered a function of both the judicial branch and the executive branch. The court system convenes a grand jury, provides a clerk for recording the sessions, and provides logistical support such as a physical space for the sessions. But grand jury sessions are led by and conducted by the Department of Law, i.e., the executive branch. The court system does not play a role in presenting evidence or moderating

proceedings (except for the limited and rare situation in which a grand jury seeks a clarification of law, as provided in Criminal Rule 6(p)); a judge is not present for grand jury sessions while evidence is being presented or when any particular case or matter is being discussed or considered. This limited judicial branch role and expansive executive branch role with respect to grand jury proceedings is unchanged when the grand jury fulfills its investigative function. Decisions as to what to present to the grand jury, including whether to present a matter requested by a citizen to the grand jury for investigation, rest with the executive branch. A grand jury has the constitutional authority to investigate appropriate matters when properly presented. This, in itself, does not mean that an individual citizen has a right to present any matter directly to the grand jury for consideration, or to seek a court order requesting or requiring that a grand jury conduct any investigation. A citizen seeking to have a grand jury investigate a matter of public welfare or safety may bring that issue to the attention of the Attorney General or his or her designee. It is up to the Attorney General or designee to review the matter and determine whether an investigation would be a valid and appropriate use of the grand jury's authority, as described in this rule. The Attorney General or designee has discretion in making that determination, akin to the discretion that the Attorney General and designees regularly exercise in the course of their roles, for example in determining whether a particular incident should be pursued in a criminal prosecution. If the Attorney General or designee determines that the matter brought forward by a citizen is appropriate for a grand jury investigation, the prosecuting

attorney will describe the issue to the grand jury and facilitate the investigation, following the procedures in subsection (b).

(2) If a grand jury investigation initiated by a citizen request concerns possible misconduct on the part of the prosecuting attorney or others in the Department of Law such that having the prosecuting attorney oversee the investigation would create an appearance of impropriety or a conflict of interest, the process set forth in paragraphs (b)(2) and (3) of this rule applies.

(3) A citizen who proposes an investigation under this subsection is not authorized to attend the grand jury investigative sessions unless the prosecuting attorney or a majority of the grand jurors conducting the investigation requests the citizen to do so for particular testimony or for a particular purpose.

(d) Majority Required.

(1) A grand jury may initiate an investigation of a matter only upon the concurrence of a majority of the total number of grand jurors on the panel at the commencement of the proceedings at which the prosecuting attorney presents the matter.

(2) A grand jury report may be made only upon the concurrence of a majority of the total number of grand jurors on the panel at the commencement of the proceedings resulting in the report. The report must be signed by the foreperson. A grand jury report may include allegations of criminal conduct.

(e) Subpoenas; Evidence; Proceedings.

(1) While conducting an investigation and preparing a report concerning the public welfare or safety as described in this rule, a grand jury may issue a subpoena to compel testimony from witnesses or to compel the production of documents only with the

approval of a majority of the grand jurors, after due consideration of the reasonableness of the proposed subpoena, the necessity of the anticipated testimony or documents, and the anticipated burden on and inconvenience to the recipient of the subpoena. If the prosecuting attorney reasonably believes that a subpoena approved by a majority of grand jurors was not approved in good faith, would be unreasonably burdensome on the recipient, is not reasonable, or is not necessary, the prosecutor may, without consent from or authorization by the grand jury, inform the superior court and seek a judicial determination whether the subpoena shall issue.

(2) The presentation and admissibility of evidence during an investigative grand jury must comply with Criminal Rule 6(s).

(3) A grand jury fulfilling an investigative function on a particular matter under this rule may not also issue any indictment related to the same facts and circumstances that were the subject of that grand jury's investigation.

(f) **Initial Judicial Review.** The grand jury shall present any proposed report to the presiding judge of the judicial district. The judge shall examine the report and the grand jury record before the grand jury is discharged. The judge may order production of audio copies or transcripts of the grand jury proceeding and may request the prosecuting attorney to submit a summary of the evidence presented to the grand jury. The judge shall make specific findings on the record as required by the following subparagraphs.

(1) The judge shall determine first whether the investigation was conducted in accordance with subsections (a) – (e) and whether

the report satisfies the requirements of subparagraphs (d)(2). If it does not, the judge shall proceed under subparagraph (f)(3).

(2) The judge shall then determine if publication of the report would improperly infringe upon a constitutional right of any person, including but not limited to improper interference with a person's right to privacy or right to a fair trial in a pending or planned criminal proceeding. The judge shall make an ex parte on the record inquiry of the prosecuting attorney about any planned or pending criminal prosecutions related to the subject of the grand jury report.

(3) If the judge determines that the report does not meet the standards of subsections (a)-(e), the judge shall return the report to the grand jury with an explanation of the reasons for returning the report. The grand jury may conduct further proceedings, revise the report, or seek appellate review of the judge's decision not to release the report.

(g) Judicial Review If Report Adversely Reflects on Identifiable Person. If the judge determines that the standards of paragraph (f) are satisfied, the judge shall determine whether any part of the report may reflect adversely on any person who is named or otherwise identified in the report. "Person" includes a natural person or an organization, but does not include a governmental subdivision or agency. If the report may adversely reflect on any identifiable person, the judge shall proceed under the following subparagraphs (g)(1)–(5).

(1) The judge shall order that notice of the report be provided to the person. The notice must advise the person of his or her rights as provided in this paragraph.

(2) The person may move, within ten days of notice of the report, for a hearing. The hearing will be held in camera and on the record.

(3) The person must be given a reasonable period of time prior to the hearing to examine the grand jury report and the record of the grand jury proceedings. A person receiving notice or a copy of the report and record may not disclose any matter occurring before the grand jury except as permitted by the court. Each person receiving these materials must be advised of this obligation.

(4) The person named or otherwise identified in the report may be represented by counsel at the hearing and may present argument as to whether the standards stated in subparagraph (g)(5) are satisfied. The prosecuting attorney may be present at this hearing and may also present argument. Neither side may present evidence nor examine witnesses, except that the named or otherwise identifiable person may submit a written response to the grand jury report which the person may request that the court issue with the report under paragraph (h).

(5) The judge shall determine at the close of the hearing whether that part of the report which may adversely reflect upon a named or otherwise identified person is supported by substantial evidence or, if raised at the hearing, whether the report satisfies the requirements of paragraph (f) of this rule and paragraph (g) of Criminal Rule 6. If the judge finds that these requirements are not satisfied, the judge shall return the report to the grand jury with an explanation of why the report has not been released. The court may request that the grand jury consider further evidence as to the named or otherwise identifiable person. The grand jury may

conduct further proceedings, revise the report, or seek appellate review of the decision not to release the report.

(h) Release of Report.

(1) The court shall withhold publication of the report until the expiration of the time for making a motion for a hearing under paragraph (g). If such a motion is made, publication must be withheld pending a ruling on the motion or pending any review under paragraph (i). All proceedings under this rule are confidential until the judge orders the report released.

(2) If the judge finds that the standards of paragraphs (f) and (g) are met, the judge shall order the report released. The judge may order that a response to the report by a person named or otherwise identified, or other additional materials, be attached to the report as an appendix. The report and any appendices will be filed with the clerk of the court and made available for public inspection. The court shall also direct that copies of the report and any appendices be sent to other persons as reasonably requested by the grand jury.

(3) if the report includes allegations of criminal conduct, the prosecuting attorney may decide to pursue an indictment or other charge based on the allegations in the report and on any other evidence the prosecuting attorney deems appropriate. If the prosecuting attorney intends to pursue an indictment, the prosecuting attorney shall inform the court, but the prosecuting attorney may not pursue an indictment related to the same facts and circumstances that were the subject of a grand jury's investigation with the same grand jury panel. The court may withhold publication of the report for a reasonable time, if the court determines that withholding the publication of the report is

necessary to preserve the investigative and prosecutorial function relating to the alleged criminal conduct.

(i) **Appeal.**

(1) A judicial determination under paragraph (h) of this rule is a final order for purposes of appeal. Such an appeal is governed by Appellate Rule 216 except that the appeal is to the Supreme Court. Any named or otherwise identifiable person, the state, or the grand jury by majority vote may seek review of the presiding judge's decision.

(2) The grand jury will be permitted access to the record of the in camera hearing to assist it in determining whether to pursue appellate review. The grand jury shall maintain the confidentiality of this record.

3. Criminal Rule 38.1 is amended to read as follows:

Rule 38.1. Telephonic Participation in Criminal Cases.

* * * *

(c) The provisions of Criminal Rule 6(v) govern telephonic participation in grand jury proceedings.

DATED: November 29, 2022

EFFECTIVE DATE: December 1, 2022

/s/
Chief Justice Winfree

/s/
Justice Maassen

/s/
Justice Carney

/s/
Justice Borghesan

/s/
Justice Henderson