

In _____ County criminal court

Brief in support of pre-plea remedy and avoidance

In the matter of true bills _____,
State of Tennessee v. _____

1. The indictments on ___ counts against the accused, _____, come from a grand jury that is illegally and unconstitutionally constituted because it is not a body of people “who represent a fair and impartial cross section of the citizens of the county, each with his or her own individual thoughts, experiences, and reactions” (38 Am Jr 2d § 3. Qualifications of grand jurors).
2. Because of the role of this court, and the other two criminal court judges in Hamilton County, in this court’s control of the 13th voting member of the grand jury, it has been for at least 100 years in Tennessee that the grand jury serves the convenience of the state and is incapable of halting the systemic abuses of justice widely reported in Hamilton County.
3. No grand jury indictment in Hamilton County is impartial, and by implication fair and just, giving every criminal defendant his due process. There is nothing in this 13-person body could be a hindrance to justice as required before God in the oath of office and under the state or federal constitutions.
4. Is the Hamilton County grand jury able to “guard the rights and liberties of the people by protecting them against unfounded criminal prosecutions” (38 Am Jur 2d § 25)? Accused in this case contends it cannot, as follows:

Grand jury must be unbiased

5. The grand jury is supposed to be unbiased and nondiscriminatory. **Bias** is “inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction,” says Black’s revised 4th. **Discrimination** is “a failure to treat all equally; favoritism” and “in constitutional law, the effect of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found,” Black’s says.
6. The state constitution in the bill of rights promises the people in criminal cases “an impartial jury” in section 9, and that “[t]hat no person shall be put to answer any criminal charge but by presentment, indictment or impeachment” in section 14. The courts are open and every man “shall have remedy by due course of law, and right and justice administered without sale, denial, or delay,” section 17.
7. One duty with which the grand jury is charged is inquiring “into any report of a criminal offense brought to its attention by a member of the grand jury” and to “inquire into any state or local officers’ abuse of office” (Rule 6(e) of criminal procedure, The grand jury).
8. This aspect of the grand jury brings to light its jealousy for the rights of the people, that it intends to do violence to those officials who would be abusers acting outside of law and beyond authority. The grand jury is the people’s means to prevent and halt abuse by police, sheriffs, jailers, commissioners, councilmen and others who use state power for evil. The spirit of guardianship that combats private criminality should be the same that informs the grand jury about violence and partiality imposed on the public by government employees.
9. Tenn. Code Ann. § Title 22 breathes the spirit of evenhandedness in creating the grand jury in the interest of due process. People of “unsound mind and habitual drunkards are banned.” Bias against police is prohibited: “That a state of mind exists on the juror’s part toward law enforcement or which will prevent the juror from acting impartially shall constitute such cause [for discharge]” (Tenn. Code Ann. § 22-1-106). Jury commissioners selecting names of people

for jury service “shall unlock the jury box and break the seal thereof, and after well shaking the same, cause to be drawn therefrom in the presence of the board and the clerk, by a child under ten (10) years of age or by a person who is securely blindfolded, that number of names [that] the presiding judge of the court shall have directed to be drawn, to constitute the regular panel of grand and petit jurors for such term of court” (Tenn. Code Ann. § 22-2-304, earlier version). Current statute removes the child but injects a rationale for the random selection of jurors, empaneled by —

automated means in such a manner as to assure proportionate distribution of names selected without opportunity for the intervention of any human agency to select a particular name and in a manner that causes no prejudice to any person.

10. Is impartiality protected by this court naming the grand jury foremen outside the necessity of random selection so carefully described here? Is it possible for a grand jury of citizens to be unbiased and free of discrimination when you have named the party titled “foreman”?

High court upholds random selection

11. Several cases bring accused to consider the rights of the people to due process in Tennessee and the justice of judge-picked grand jury foremen.
12. The justices in *Hobby v. United States*, 468 U.S. 339 (1984) uphold the random selection process as the bedrock of justice in rejecting a challenge to the federal courts’ process of naming grand jury foremen. In federal courts the foreman is named at random pursuant to the federal rule of civil procedure 6(c). It provides “the court shall appoint one of the jurors to be foreman and another to be deputy foreman.” The judges name one person from the jury pool to be foreman. If the 13 selected randomly for the venire are the commonist and plainest, he likely will be as reflective of larger society as they. That person’s job is largely ministerial, “‘minding the store,’ just as a secretary or clerk would keep records of other sorts of proceedings. But the ministerial trappings of the post carry with them no special powers or duties that meaningfully affect the rights of persons that the grand jury charges with a crime, beyond those possessed by every member of that body,” the Hobby court says.

13. There is discrimination, the judges admit, in the foreman's selection by a judge. But that does not "impair the defendant's due process interest in assuring that the grand jury includes persons with a range of experience and perspectives." The foreman's selection by the judge does not work to exclude any "large and identifiable segment of the community" from jury service (citing *Peters v. Kiff*, 407 U.S. at 407U.S. 503). The judicial role in picking one person from a randomly selected pool "is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." So long as the person selected by the judge as foreman was first randomly selected — *he or she is a genuine grand jury member* — no harm is done to equal protection and due process, Hobby says.
14. Five years prior the court had opined in *Rose v. Mitchell*, 443 U.S. 545 (1979) regarding judicial selection of grand jury foremen in U.S. district courts. This opinion in a Tipton County, Tenn., murder case upholds the federal courts' method of foreman selection and says that the operation of judicial discrimination in selection a person from the randomly selected venire is not an offense to the equal protection clause of the federal constitution. The ruling upholds discrimination as insignificant and harmless because of the underlying impartiality of the foreman's having been already selected at random from the eligible population.
15. In federal courts, the foreman's role is administrative. The assignment is not understood to be influential among the other members of the body.
16. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice, and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.' *Smith v. Texas*, [311 U. S. 128](#), [311 U. S. 130](#) (1940) *** . The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the

democratic ideal reflected in the processes of our courts.’ Ballard v. United States, [329 U. S. 187](#), [329 U. S. 195](#) (1946).”

17. The largest blot on the American system of justice is race loathing despite a war fought over slavery.
18. The justices “cannot deny that, 114 years after the close of the War Between the States *** , racial and *other forms of discrimination* still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious. We therefore decline ‘to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice,’ Cassell v. Texas, 339 U.S. at [339 U. S. 290](#) *** , and we adhere to our position that discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction.”
19. Rose v. Mitchell discusses the problem state judges have in applying the precepts the high court lays out.

Federal habeas review is necessary to ensure that constitutional defects in the state judiciary’s grand jury selection procedure are not overlooked by the very state judges who operate that system. There is strong reason to believe that federal review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective. The educative and deterrent effect of federal review is likely to be great, since the state officials who operate the system, judges or employees of the judiciary, may be expected to take note of a federal court’s determination that their procedures are unconstitutional, and must be changed.

20. Grand jury partiality had been brewing for some time. Judge Swinford, in Hale v. Henderson 349 F.Supp. 567 (1972), agrees with a petitioner’s thesis about Tennessee’s grand juries. “[A]lthough the petitioner may well have brought to light constitutional shortcomings in the general method of selection of grand jury foremen for the State of Tennessee,” he begins, “the particular facts of his case do not entitle him to relief.”
21. Judge Swinford telegraphs future litigants and appellants how to attack the status quo:
 - i. Under the law of Tennessee, grand juries are composed of 12 jurors selected at random from the venire, and one foreman appointed by the Judge having

criminal jurisdiction in that county. Tennessee Code Annotated sec. 40-1506 (hereinafter T.C.A.). The Judge may *within his discretion* select the foreman from the community at large, and his selection may be *completely divorced from the selection of the venire* and the selection of the other jurors. T.C.A. sec. 40-1506. An indictment may not be returned by fewer than 12 votes, but the foreman is *possessed of all of the powers of the other members of the jury*, including the right to vote. T.C.A. sec. 40-1706 and 40-1506. The petitioner has not contended that the method of selection of the venires from which the grand juries are chosen has been such as to systematically exclude members of racial groups; he contends that the selection of the foremen, who are, as mentioned, voting members of the grand juries, is *not safeguarded by a racially neutral and random method, but is wholly within the discretion of the criminal Judge*. He further contends that since 1940 there have been no black grand jury foremen, thus demonstrating a prima facie case of racial discrimination under the law of *Coleman v. Alabama*, [389 U.S. 22](#), 88 S.Ct. 2, 19 L.Ed.2d 22 (1967). The petitioner *argues* that inasmuch as a voting part of the grand juries have been improperly chosen, the whole of the grand juries have been tainted; *which is to say that a grand jury that is 1/13 unconstitutional cannot render constitutionally valid indictments*. [Emphases added]

- ii. The petitioner's entitlement to relief must depend on the particular facts of his case, and although *his argument with respect to the method of selection for grand jury foremen is well taken*, it is the opinion of the court that he cannot successfully assert that his right to equal protection of the law has been abridged by the purposeful exclusion of blacks from any part of the grand jury which returned the indictment upon which his conviction was based. [Emphasis added]
- iii. Notwithstanding the petitioner's argument that grand jury foremen have been arbitrarily appointed and that over a period of history all grand jury foremen so appointed have been white, it appears that the particular grand jury indicting the petitioner was composed wholly of men selected from the venire. The grand jury indicting the petitioner was not chaired by the regular foreman, but by the foreman pro tempore, *who was chosen from a body of grand jurors which were selected from the venire*. [Emphasis added]

22. In other words, this defendant's foreman *just happened to have been selected from the randomly selected venire*. Judge Swinford describes a problem that, had facts been different, might have led him to start the process of overturning Tennessee's system.

23. Apparently, the day-to-day operation of courts in Hamilton County since Hobby and Rose has made it impossible to step back, make review and reorganize. No one is charged with heeding these supreme court opinions.

24. No member of the practicing bar has suggested Tennessee's grand jury system is defective and "must be changed," as Rose puts it. No governor nor legislative panel has proposed reform. Well

over 100 years ago, Tennessee grand juries met constitutional muster — but no longer, it would appear.

The Crabtree firing

25. The grand jury in Hamilton County has operated scandalously in several cases on which I have reported, rejecting constitutionally guaranteed, God-given, inherent and unalienable rights.
26. It has ignored judges' violation of their rules of ethics forbidding partiality and allowed the spirit of "constabulary latitudinarianism" (Martynn v. Darcy, 333 F. Supp. 1236 (E.D. La. 1971)) to bless widespread ultra vires activity by officers and courts.
27. The local press has reported on systemic violations of Tenn. Code Ann. § Title 55, motor and other vehicles (ultra vires enforcement of freight regulation on nonshippers); of Tenn. Code Ann. § 39-1-301, requirement of culpable mental state (this law universally ignored except in murder cases); of Tenn. Code Ann. § 40-7-103, grounds for arrest by officer without a warrant and others (government operates under a system of general warrants).
28. The local press has reported cases of perjury by police officers (Hanson Melvin), theft of a car by the sheriff's department May 30, 2019, or 514 days ago (Jon Luman), judicial favoritism for police officers (Diana Watt), fraud deep in the bowels of the department of safety and homeland security and other matters that suggest the people have no protector in the grand jury.
29. The press in Hamilton County has reported police beatings, tasings, false arrests, body cavity searches and summary executions by municipal employees of members of the public — all without a peep from the grand jury. It took a traffic arrest Title 55 *baptism* to wake the people from their torpor in State of Tennessee v. Daniel Wilkey.
30. The 2010 firing of Marsha Crabtree highlights the problem of bias and discrimination explored in Hobby and Rose.
31. With bias and favor in play with the *naming* of a foreman, so, too, in her *firing* after 20 years on the job.

32. Published statements by Mrs. Crabtree and by judges Rebecca Stern, Don Poole and Barry Steelman on Jan. 21, 2011, hint at the problem of making the foreman a political appointee and fixture not subject to changing venires. The judges accuse her of “increasing negativity, criticism and lack of objectivity” after she admits she often “reached burnout.” Their statement shows awareness of the problem inherent in judicial bias vis a vis the high duty of an impartial judiciary.

The Grand Jury serves as a screening mechanism to ensure that sufficient evidence exists when a person has been accused. Objectivity and impartiality in this role are essential. Because the decisions of the Grand Jury result in criminal charges, loss of liberty and often prolonged incarceration prior to any determination in Criminal Court of whether or not a person is actually guilty, lack of impartiality of its leader could cause one to question the *fairness of decisions* and detrimentally impact the administration of justice.” (emphasis added)

33. Mrs. Crabtree’s grievance was against “the revolving door in the criminal courts” with the “same defendants *** on the grand jury dockets year after year. *** [Grand jury] reports quickly passed into oblivion and the system continued its ‘catch & release’ program, with the criminals continuing to victimize the citizens and challenge law enforcement, confident that little if anything would happen to them when they were caught. They have no fear of the courts — why should they?” She says. “I was the only person they could get rid of — and they finally did just that.” (“Longtime Grand Jury Foreman Says Criticism Of Judges Led To Her Replacement [;] Judges Say Marsha Crabtree Became Increasingly Negative, Lacked Impartiality,” Chattanooga.com, Friday, Jan. 21, 2011).

34. Mrs. Crabtree had become a political institution in her own right, for good or ill. Mrs. Crabtree no longer served the people and their interest, but that of the state and the courts.

35. Her partiality made her insufferable to the court, her person had become odious. She held on many years because she did “not want to leave the others who worked with me in the lurch with no trained replacement for me – or someone with absolutely no knowledge of the functions and responsibilities.”

Persistent scandal among foremen

36. In a constitutional system, no one person would be on the job long enough to obtain such insights as Mrs. Crabtree obtained, nor have any seniority. Foremen would come and go with the changing venire, and judges would make do with the great unwashed body of people representing a cross-section of the citizenry.
37. Across the state, published reports about grand jury foremen show the dangers of the current system.
38. ► Stan Fossick, 80-plus years old, has known Davidson County judges since high school, donates to judicial campaigns, is married to a 20-year police department employee, and has been tapped by judges as foreman of 42 grand juries, the most of anyone named in 92 quarterly reports since 1993 according to the Tennessean. His reports contain strong praise for police and courts.
39. ► In 2013, it was found that grand jury foreman Eugene Grayer in Davidson County is a convicted felon, resulting in the court of appeals having to review 919 indictments. He'd had a three-month term starting in July 2011, the AP reported, and is barred by law from serving. "Nashville DA says grand jury foreman was felon," Travis Loller, The Associated Press, Jan. 31, 2013.
40. ► In Monroe County, Gary Pettway is reported as having served 28 years without an appointing order. "A chief clerk in Monroe County, TN has admitted *** there has been no duly-appointed grand jury foreman in Monroe County, TN for at least the last 27 years. *** Monroe County Chief Court Clerk Martha M. Cook has stated in a letter to Walter Francis Fitzpatrick, III dated September 16, 2011 that no appointing orders exist for the grand jury foreman dating back to at least 1985. Although Gary Pettway had been acting as foreman for at least 20 consecutive years between 1990 and 2010, Cook has stated that the court has no official appointing order or evidence that he was ever sworn in," according to The Post & Email.

41. ➤ The partiality of the grand jury Tennessee has received press attention from the Tennessean newspaper. “Nashville’s grand jurors questioned their own partiality. Here’s why” (Dave Boucher and Stacey Barchenger, The Tennessean, July 28, 2017.) The grand jury heard 29,225 sets of accusations by police, DAs, investigators and state actors, but not from others such as Dawn Deaner, a public defender. It refused to issue indictments in 1.2 percent of cases.
42. ➤ In McMinn County, a judge named a man to serve as foreman for a single day, March 18, 2014, to handle, 15 minutes after his appointment, the indictment of grand jury reform activist Mr. Fitzpatrick on charges of aggravated perjury, stalking, harassment, and extortion. The prosecution for which Mr. Fitzpatrick served a term in prison, was highly irregular, according to extensive press reporting. I have interviewed Mr. Fitzpatrick extensively about his work; his conviction appears full of small-town insularity and malice.
43. ➤ McMinn named former TBI head and former Chattanooga chief of police Larry Wallace as foreman Feb 8, 2017. Mr. Wallace, a resident of Athens, began a law enforcement career in 1964 with the city police department. In 1967, he was appointed to the Tennessee highway patrol and became a special agent with the TBI in 1973. He later took a leave of absence from the bureau and was twice elected McMinn County sheriff. A trade group tapped him sheriff of the year in 1979. In 1980, Mr. Wallace returned to the TBI and four years later was promoted to special agent in charge of the criminal investigation division. In 1987 he was appointed colonel and a commanding officer of the THP. The following year, Wallace was named deputy commissioner of the Tennessee Department of Safety.
44. So much for grand jury members reflecting the interests of the people as custodian of their rights as against modern policing and lawyering.

Foreman Moore practicing lawyer

45. Can the Hamilton County grand jury be impartial when steered by two lawyers, who are officers of the court and members of the judicial branch of government?

46. ➤ The first guarantor of impartiality is Jerry Sloan of the district attorney's office. Grand jury members rely on him to "explain" the law, they say in the above-cited report:

To execute the primary duty of the Grand Jury, that of determining probable cause for each case we heard, we *relied heavily on the knowledge and experience of our embedded Assistant District Attorney, Jerry Sloan*. Mr. Sloan carefully explained nuances of criminal statutes, ensured we understood the nature of the charges brought against the accused, and often patiently took the time to explain other complexities not apparent to the average lay person. His inputs to the process were invaluable to us. [Emphasis added]

47. ➤ The second guarantor is attorney Hugh Moore, foreman, whose credentials fill a 30-page CV from 2012 that recounts a colorful career, including his chivalrous treatment of the Knights of Malta in a federal patent case. Mr. Moore was your partner and colleague at Chambliss Bahner and Stophel. You selected him for myriad reasons — professional and personal. You figure in three cases about which he tells — *United States v. Swafford et al.*, 2006, regarding alleged illegal sales of iodine; *In Re: Jackie L. McConnell*, a walking horse trainer in administrative proceedings before the USDA; and a second administrative law case, *Truman Arnold Companies d/b/a TAC Air v. Chattanooga Metropolitan Airport Authority*.

48. In 1970 he'd entered government service as trial attorney at the U.S. justice department. From 1973 to 1976 he was an assistant district attorney in Chattanooga — **a prosecutor**.

49. Accused believes attorneys as a class are prejudicial to his own working-class of people, and cannot be rightly named to a grand jury that is expected to be impartial. With a lawyer in control of one grand jury and a judicial appointee in charge of the other, how can accused be confident that the grand jury is able to defy the state, thwart corrupt conveniences of government and uphold liberty by investigating city councils, police departments and sheriff's departments?

50. One report of a lone resister / criminal defendant exposes how grand juries have been turned away from their function of government spoiler. The local grand jury report cites "a case in which

a defendant obviously refused to plead guilty to a charge in Sessions Court, for whatever reason, and by rule the case was bound over to the Grand Jury. This required the arresting officer, in this case a Tennessee Highway Patrol officer, to testify before the Grand Jury. The charge — violation of the seatbelt law. The jury understands that the rules and processes provide for this action and that is the simple beauty of American justice, however the Grand Jury also feels that there needs to be some common sense applied to the burgeoning load of cases that come before the Grand Jury. *** [A] Highway Patrol Officer was taken off duty to appear before the Grand Jury for less than one minute. In total, more than 17 persons were involved in the testimony directly, and many more indirectly. This was an expensive proposition.” (“Concurrent Grand Jury Says Law Needs To Be Changed So Grand Juries Deal With Serious Felony Cases,” Chattanooga.com, May 11, 2017)

51. This story shows how grand jurors, under “leadership” of their minders, become peevisish against what the constitution calls the “free people” of the state of Tennessee. They become upholders of government efficiency and find their meaning and purpose by complying with their betters.

Grand jury system violates due process

The grand jury of Hamilton County is an investigatory body and is supposed to be independent of the state. It has ignored detailed reporting by press in Hamilton County of law enforcement violence and lawlessness and done nothing to halt *ultra vires* activity by officers.

52. Does the naming of the foreman by criminal court judges and their holding office for many years — apart from the randomly selected venire — impose a system of bias and discrimination on the grand jury that injures defendants’ rights to due process and an impartial system of justice, thereby abrogating the grand jury’s role as guardian of the people’s rights and liberties?
53. Accused says that, yes, the grand jury that indicted him is at least 1/13th unconstitutional, as Judge Swinford suggests. It is controlled by the judges obliquely and by prosecutors directly.

54. The indictment against the accused is hence unjust, and must be thrown out on the basis of the grand jury's improper formulation, said charges to be dismissed forthwith and the record of the case ordered expunged.

Respectfully submitted,

sui juris

CERTIFICATE OF SERVICE

I hereby certify that this pre-plea remedy and avoidance was served this _____ day of _____ by first-class U.S. mail to:

_____, district attorney general at the following address:

Accused