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## Lawyer Attacks Nassau Grand Jury Selection

BY VESSELIN MITEV

ASKING grand jurors if they are "willing to serve" is not the same as asking them to volunteer to serve on a grand jury, Nassau County's commissioner of jurors yesterday told a Long Island judge.

Commissioner Thomas G. DeVivo Jr. testified at a hearing before County Court Judge Jerald S. Carter to determine whether a long-standing practice of asking summoned grand jurors in Nassau County to raise their hands or step forward if they are willing to serve violates judicial rules guaranteeing randomly selected juries.

"What they are really asking is, do these people have the time commitment to come to court five days a week for four consecutive weeks," Mr. DeVivo said on the stand.

Defense attorney Brian J. Griffin, a partner in Foley, Griffin, Jacobson & Faria in Garden City, brought the challenge after his client, Robert Wolfson, was indicted last year on drug charges. He is awaiting trial.

Mr. Griffin questioned the randomness of the juror selection process at what he called the "most critical juncture" of a criminal charge, the seating of a grand jury, which may issue a formal charge after a clandestine proceeding.

If Judge Carter finds that the process is improper, other defense attorneys could challenge their clients' indictments on similar grounds.

Mr. DeVivo, a witness for the Nassau County District Attorney's Office which defends the selection process, yesterday told the court that jury summons and questionnaires are distributed randomly from source lists. For each grand jury term, a computer using a mathematical algorithm selects a pool of 250 potential jurors. From those, some are granted postponements or are disqualified. The remaining candidates are asked whether they are "willing to serve" and those that indicate affirmatively are seated first, Mr. DeVivo said during cross examination by Mr. Griffin.

Mr. DeVivo took issue with Mr. Griffin's description of the inquiry as asking for "volunteers," prompting Mr. Griffin to pull out a copy of Webster's dictionary and read aloud the definition of the word, which includes a "willingness to undertake a service."

The inquiry, countered Mr. DeVivo, is "limited to (a) at that time and (b) [to the] time commitment at that time." Further, he retorted, "random" is defined as an event having "no discernible order."

At that point, Judge Carter leaned forward to interject, saying he would not allow a hearing of such magnitude, which could impact "hundreds of indictments," to be muddled by arguments about definitions of words and other "legal semantics."

"Let's get to the point of the motion," the judge urged.

Definitions aside, continued Mr. Griffin, the inquiry effectively "systematically excluded" those grand juror candidates that did not indicate a willingness to serve on one of two 23-member panels.

"I will not categorize it as not choosing at random," replied Mr. DeVivo, who described the inquiry as "strictly an accommodation" in rec-

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ognition of the long period of service required, typically 19 consecutive business days. Those granted postponements have to appear to serve on a grand jury panel within three to six months, he said, giving them a chance to arrange their absence from work or other obligations.

According to the grand juror handbook issued by the Office of Court Administration, in order to qualify as a New York grand juror, one has to be at least 18 years of age, a U.S. citizen, a resident of the county for which the summons is issued, able to understand English, and have no prior felony convictions. The actual selection process of jurors is left up to each county's commissioner of jurors or the judge presiding over grand juries.

In Nassau, the grand juror selection process is handled by Anna Janaka, a 19-year court veteran who took the stand after Mr. DeVivo, also as the prosecution's witness. The bulk of her testimony mirrored that of the commissioner, with her acknowledging that she asks jurors whether they are "willing to serve."

"How else would I ask 'are you willing to serve at this time?'" asked Ms. Janaka, who said she does not solicit or encourage volunteers for the panel.

A grand jury made up largely of self-selected jurors may not adequately "represent the true cross-section of the jury pool," said Mineola solo practitioner William McCabe, who is not involved with the case. The appearance of impropriety may stem from the idea that those who indicate their willingness to serve may have a similar worldview, or the "same thinking pattern," said Mr. McCabe, who has a criminal defense practice.

He noted that "willingness to serve" is not indicated anywhere on the summons or the questionnaire sent out to residents.

Assistant District Attorneys Brian Murphy and Tammy Smiley represented the district attorney's office at the hearing. The office referred questions to the Office of Court Administration. David Bookstaver, a spokesman for the OCA, said he could not comment on ongoing litigation.

The hearing is scheduled to resume tomorrow.

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