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Via Email

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Email: RuleComments@akcourts.gov

Re: *Comments regarding the Proposed Rule Change to Alaska Criminal Rule 6.1.*

Dear Ms. Steinberg:

In my capacity as Alaska Attorney General, and on behalf of the Department of Law, I submit the following comments regarding the Alaska Supreme Court's consideration of proposed changes to Alaska Criminal Rule 6.1, which of course pertains to the role of the investigative grand jury to investigate matters of public welfare and safety and to issue reports and recommendations. This subject has generated significant public attention and has raised important questions about the investigative grand jury's proper role under the Alaska Constitution, the respective powers of the branches of government, and the administration of justice.

Within the current procedural framework, Alaska law recognizes two distinct grand jury functions. First, the grand jury serves its traditional role in determining whether sufficient evidence exists to return an indictment in criminal cases. Second, Article I, section 8 of the Alaska Constitution preserves the grand jury's separate constitutional authority to investigate matters of public welfare or safety and to issue reports and recommendations. Criminal Rule 6.1 implements that investigative and reporting function, as distinct from the grand jury's indictment function.

Under current Rule 6.1, there are two different paths by which a matter may be brought forward for possible investigative grand jury review. First, an empaneled grand juror may propose to the prosecuting attorney that the grand jury investigate a matter concerning public welfare or safety. In that setting, the rule directs the prosecuting attorney to evaluate whether there is a reasonable basis to believe the proposed matter falls within the grand jury's authority and is not patently groundless, made for delay or

harassment, or otherwise brought in bad faith. If those criteria are satisfied, the prosecuting attorney is required by the rule to describe the proposal to the grand jury for its consideration and, if the grand jury elects to proceed, facilitate the investigation.

Second, where the request comes not from an empaneled grand juror but from a citizen outside the grand jury, current Rule 6.1 takes a different approach. It provides that the citizen may direct the concern to the Attorney General for consideration and possible review and investigation by a grand jury. The rule and commentary indicate that a citizen has no right to present a matter directly to the grand jury or to obtain a court order requiring a grand jury investigation. In that respect, the current rule places citizen petitions within the Attorney General's complete prosecutorial discretion. It is this feature of the present system, in particular, that has drawn public concern, and those concerns deserve careful consideration.

In light of that controversy, my office has undertaken a comprehensive review of the issues. That review includes the Department's own experience administering investigative grand juries and legal research, the Alaska Supreme Court's precedents interpreting the grand jury's constitutional role, the viewpoints of Alaskans who have engaged with or petitioned the grand jury, and academic research addressing the original understanding of the grand jury's investigative power. Most notably, recent scholarship by Professor Richard Garnett and Savannah Shoffner, published in the *Harvard Journal of Law and Public Policy*,[1] provides perhaps the most detailed examination of the text, history, and traditional function of the investigative grand jury.

All of this confirms that the investigative grand jury was originally understood to serve as an intermediary between the people and the government—an institution through which citizens could raise concerns of public importance and through which the community could speak with some authority. Historically, this reporting function was not dependent on executive branch screening or prosecutorial discretion.

If the Supreme Court is interested in amending Rule 6.1 to align with this original understanding, I would recommend a simple path to doing so: the Court could adopt a framework in which the investigative grand jury operates completely within the judicial branch, supported by court-appointed counsel, without requiring the involvement of executive branch attorneys. Such an approach would preserve the grand jury's

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[1] Savannah Shoffner & Richard W. Garnett, *The Original Meaning and Understanding of the Investigative Power of the Grand Jury in the Constitution of Alaska,* Harv. J.L. & Pub. Pol'y *Per Curiam* No. 4, Spring 2026, at 1, https://journals.law.harvard.edu/jlpp/the-original-meaning-and-understanding-of-the-investigative-power-of-the-grand-jury-in-the-constitution-of-alaska-savannah-shoffner-richard-garnett/.

independence while avoiding separation of powers concerns. Such a change may also address some of the public concerns expressed about the current rule.

The current proposal, however, departs from the existing framework and is inconsistent with the original understanding. Instead, it removes the Attorney General's discretion to screen petitions while retaining the Attorney General's obligation to staff, advise, and facilitate grand jury investigations. This combination—removing prosecutorial discretion while preserving executive responsibility—creates a hybrid model that raises significant constitutional, legal, and practical concerns. In our system, the executive branch is charged with investigation and prosecution, and that responsibility carries with it the authority to decide what matters warrant the use of those tools. The proposed rule would sever that link—requiring the Department of Law to facilitate investigations it cannot define, limit, or decline, while remaining accountable for the legal consequences that may follow. If the Court wishes to return the investigative grand jury to its historical role as a reporting body, that can be done within the judicial branch. But this proposal, as drafted, places the executive in the middle without the authority necessary to carry out its constitutional responsibilities.

I now turn to the specific problems with the current proposal, and I am hopeful that the Supreme Court will modify the Committee's proposal to address these concerns.

A. The proposed changes violate the Separation of Powers Doctrine.

The Alaska Constitution vests legislative power with the legislature, executive power in the governor, and judicial power in the courts. One branch of government may not encroach upon or exercise the powers of another branch. *Bradner v. Hammond*, 553 P.2d 1, 7–8 (Alaska 1976). The doctrine "limits the authority of each branch to interfere in the powers that have been delegated to the other branches" with the purpose to "preclude the exercise of arbitrary power and to safeguard the independence of each branch of government." *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007). The separation of powers doctrine limits the ability of the judicial branch to direct the activities or resources of another branch of government.

The Alaska Constitution vests in the Governor the responsibility of executing the laws of the state and the Office of the Attorney General is a part of the executive branch. AS 44.23.020. The grand jury, on the other hand, is an arm of the judicial branch. *O'Leary v. Superior Ct., Third Jud. Dist.,* 816 P.2d 163, 166 (Alaska 1991).

1. The Proposed Rule Authorizes the Judiciary to Direct Actions of Executive Branch Attorneys

Even though the grand jury is an arm of the judicial branch, the proposed rule vests the judiciary with the power to direct executive branch attorneys to "provide advice and assistance to the grand jury". Proposed rule 6.1(b)(2) mandates that "an attorney

assigned by the Attorney General shall provide advice and assistance to the grand jury on whether to investigate a matter concerning the public welfare or safety." If the grand jury chooses to investigate, the Attorney General designee "shall facilitate the grand jury's investigation and provide assistance and advice to the grand jury for preparation of any report." This goes beyond the requirements of AS 12.40.070, which only requires the prosecuting attorney to assist the grand jury in its criminal indictment functions.

The appointment of executive officers is an executive function, and the "blending of governmental powers" is not "inferred in the absence of an express constitutional provision." *Bradner*, 553 P.2d at 6–7. The Constitution does not grant the judicial branch the authority to compel work of executive branch attorneys as is envisioned by the proposed rule.

2. The Proposed Rule Authorizes the Judiciary to Direct Executive Branch Decisions

Proposed Rule 6.1(b)(3) similarly requires the Attorney General to "appoint independent counsel" when the Attorney General determines a conflict of interest exists.[2] The rule also authorizes a presiding judge to "enter an appropriate order" regarding potential conflicts of interest if a single juror raises an issue. *See* Proposed Rule 6.1(b)(3). Troublingly, this authority appears to empower the presiding judge to direct the Attorney General to prosecute a matter and to direct the executive branch to take particular action in a case. This is unconstitutional. *See e.g., Public Defender Agency v. Superior Court*, 534 P.2d 947, 951 (Alaska 1975) (holding that superior court usurped the executive branch by ordering the Attorney General's Office to prosecute a civil action for child support).

3. The Proposed Rule Authorizes the Judiciary to Direct Executive Branch Resources

In the same vein, proposed Rule 6.1(e) discusses the grand jury's ability to summon evidence for its presentations. Though it does not explicitly identify how this is to occur, the proposed rule appears to require the appointed attorney to facilitate the investigation. It is widely known that the Department of Law maintains limited investigative resources, such as collecting and analyzing evidence. The Department normally relies upon traditional law enforcement to facilitate such investigative operations. This current tension is managed through the exercise of prosecutorial discretion. The executive branch—through prosecutorial discretion—controls its own limited resources. The current rule recognizes this discretion. *See* current Rule 6.1(b)(1)

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[2] The proposed rule does not define the term "independent counsel", but presumably, it means the Attorney General's Office must hire outside counsel with its own funds.

and (c). The practical implications of this proposed change are not insignificant. The proposed rule amounts to an unfunded mandate that does not account for its financial implications to the executive branch. It also provides no mechanism for the Attorney General to evaluate necessary personnel, funding, or operational capacity to comply with the timelines or other obligations imposed by the court. It fails to recognize these additional responsibilities could wholly displace or overwhelm core executive responsibilities, including ongoing prosecutions. To illustrate this, prior investigative grand juries have required significant attorney time, the retention of costly outside counsel (a process that itself requires time and effort), and assistance from the Department of Public Safety (DPS) to serve subpoenas and collect evidence. These are not minor administrative tasks; they are resource-intensive endeavors.

This responsibility underscores the separation of powers doctrine's vital role in protecting one branch of government from imposing obligations that undermine the constitutional functions of another.

The proposed rule contemplates that the judicial branch is the appropriate body to refer a matter to the grand jury, and in that light, it should bear the entire responsibility—and the cost. Such an approach would be consistent with the original understanding of the grand jury's reporting power. The delegates to the Alaska Constitutional Convention sought to ensure that the grand jury could issue reports on matters of public concern free from governmental interference or screening. This original understanding can be honored by returning the responsibility of the grand jury to the judiciary.

The judiciary already possesses the authority to implement this framework through its own administrative rules. Alaska Administrative Rule 12(e) authorizes courts to appoint counsel when "the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410 . . . but in the opinion of the court is required by law or rule." Appointment under Administrative Rule 12(e) would allow the court to proceed in the manner it believes is constitutionally appropriate without directing executive branch attorneys to serve the grand jury. Accordingly, we recommend that Rule 6.1 be amended to substitute "12(e) counsel" for the Attorney General in proposed Rule 6.1.

B. The proposed change to Rule 6.1 removes previous guidance for advising the grand jury as to what constitutes a matter involving public welfare or safety.

The proposed rule deletes language that defines what constitutes a matter that "concerns the public welfare or safety." *See* Proposed Rule 6.1(a). This problem is particularly acute in a system where the Department of Law would be required to facilitate investigations without the ability to define or screen their scope. Specifically, the proposed rule deletes current subsections (a)(1)–(a)(3) and the existing commentary, which provides examples as to what constitute "concerns of public welfare or safety." The current commentary provides an example of how "systemic issues or an ongoing,

recurring issue impacting the public could be within the scope of a grand jury. But purely private matters, such as, for example, an investigation into any individual court case, (whether open or closed)," generally fall outside the grand jury's investigative authority. *See* current Commentary to Rule 6.1(a).

The Committee's proposed deletions eliminate the analytical framework that guides the grand jury's work. Without precise language, there is no standard for evaluating the threshold question of scope, whether an investigation should be authorized, and under what circumstances the grand jury should issue a report. Under the current rule, for example, criminal defendants may not use the grand jury process to challenge or relitigate criminal convictions after direct appeals and post-conviction litigation. Such action may not be prohibited under the proposed rule. The potential consequences of removing these guardrails include risks of repetitive litigation, undermining finality, and potential infringement on victims' constitutional protections.

Also, the expectations of the assigned attorney—*i.e.*, 12(e) counsel, *see above*—should be clearly established and should include precise language regarding scope, standards, and any limitations imposed upon the grand jury investigation. Additionally, guidance should include whether such tasks as drafting subpoenas, coordinating witnesses, facilitating questioning, are the legal advisor's responsibility, in addition to providing guidance on the governing law.

Without clarity on what constitutes a matter of public welfare or safety, the investigative grand jury process has the potential to be weaponized by disgruntled citizens on issues that would be better handled by other agencies or courts. Rules or commentary as to what constitutes a matter that "concerns public welfare or safety" should be maintained.

C. The proposed rule does not limit successive petitions.

In the absence of screening authority, this lack of finality would expose grand juries—and the Department if it is involved—to repeated, resource-intensive proceedings over the same matters. For well-established reasons, the law does not permit parties to relitigate the same claim repeatedly. Whether in civil litigation or criminal proceedings, doctrines of finality apply. The doctrine of *res judicata* (claim preclusion) bars relitigating claims that have been resolved by final judgment and precludes parties from advancing legal theories or causes of action that could have been raised previously. This doctrine exists to promote finality, conserve judicial resources, and ensure litigation reaches conclusion. Similarly, principles of double jeopardy prohibit the government from reasserting charges that have been dismissed with prejudice or resolved by acquittal.

The proposed rule contains no comparable limitation. Whether by design or oversight, the absence of any mechanism for finality creates a serious risk that proceedings will

never reach closure—or that the Department will be forced into recurring litigation against those repeatedly seeking investigations. When coupled with the separation of powers issue in commandeering Department of Law resources discussed above, the proposed rule creates a never-ending financial obligation. The proposed rule must be modified to limit successive grand jury petitions.

D. The proposed rule eliminates the need for compliance with basic rules of evidence during a grand jury presentation.

Under current Rule 6.1(e)(2), the grand jury must comply with Criminal Rule 6(s), which requires that all evidence presented to the grand jury must be legally admissible at trial. The proposed rule eliminates this requirement. *See* proposed deletion of Rule 6.1(e)(2). In its place, the proposed rule states that "inadmissible evidence may be presented to the grand jury . . . ." Proposed Rule 6.1(e)(3). This change represents a significant departure from previously settled law. And it would take on added significance where executive branch attorneys are required to participate in and advise proceedings that may implicate future criminal prosecutions.

In *O'Leary v. Superior Court,* the Alaska Supreme Court rejected the argument that the grand jury operates free from legal constraint, holding that "[t]he anti-suspension clause does not prohibit reasonable procedural rules governing the issuance of grand jury reports." *Id*. at 170. The grand jury's authority is subject to legal controls, including compliance with procedural and evidentiary rules. *Id*. at 168–69. The grand jury does not operate in a legal vacuum. *Id*. at 170.

By expressly authorizing the presentation of inadmissible evidence to the grand jury without limitation, the proposed rule endorses what the Alaska Supreme Court previously rejected. And while the grand jury's factual findings under the proposed rule must be based on admissible evidence, any meaningful limit to the grand jury's report are, at best, implicit. *See* Proposed Rule 6(e)(3). Even if the grand jury adopts factual findings based upon admissible evidence, the ultimate report may still be based on hearsay layered upon hearsay—rumor and conjecture—without a mechanism to ensure the evidence was reliable upon its presentment.

The proposed rule should clarify what evidentiary rules are applicable when presentations are made to the grand jury, and what rules are not. Otherwise, the proposed rule places the legal advisor in an untenable position. The legal advisor becomes the gatekeeper between competing constitutional interests: on one hand, the grand jury's investigative authority; on the other, the due process and privilege rights of witnesses and named individuals who are the subject of the investigation. If the grand jury is not subject to any evidentiary limitations—including the privilege against self-incrimination, the clergy privilege, the marital privilege, and other recognized protections—then the legal

advisor would have no principled basis to intervene, regardless of the constitutional implications.

Consider a practical example. Suppose a grand jury independently initiates an investigation into a cold-case homicide. It could subpoena a suspect to testify. Under the proposed language, there is no clear limitation on compelling that testimony, nor any safeguard preventing the possibility that the witness could be immunized in a manner that compromises future prosecution. *See e.g., Pinkerton v. State*, 784 P.2d 671 (Alaska App. 1989) (holding that the government is required to give target warnings to potential criminal defendants appearing before the grand jury). The absence of more clearly defined evidentiary limits creates real and foreseeable risk to both witnesses and subjects of an investigation.

I appreciate the Court's efforts in grappling with this important area of constitutional law that has long eluded a lasting and manageable solution. However, the Court's currently proposed framework—aside from departing from the original understanding of the clause—raises the problems I discuss above as to separation of powers, public welfare and safety, successive petitions, and evidentiary compliance. For those reasons, the court should reconsider the proposed changes to Criminal Rule 6.1. Thank you for taking into consideration these comments. If you have any questions, please feel free to contact my office.

Sincerely,

Stephen J. Cox
Attorney General