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SECRECY AND THE GRAND JURY IN SOUTH CAROLINA

SCOPE

The requirement of secrecy in grand jury proceedings has probably given the laymen who compose these bodies more difficulty than any other phase of their work. The grand jury as a vital part of the legal process has been defended by the late L. D. Lide, judge of the Twelfth Judicial Circuit.¹ It also has been upheld by another prominent circuit judge, G. Duncan Bellinger of the Fifth Circuit, but Judge Bellinger added that the jury is "hampered by existing procedure."²

The questions most frequently raised, which will be discussed here, are: (1) persons permitted to be present in the grand jury room; (2) the effect of transcribing testimony; (3) the effect of the presence of unauthorized persons; (4) indicting for perjury the person who swears to one set of facts in the grand jury room and another in open court, and (5) what and how the grand jury can reveal what it has heard.

As the title indicates, this study is concerned primarily with South Carolina law, although reference will be made to the rules in other jurisdictions. The writer is informed that legislation has been prepared for submission to the General Assembly in 1955 which would make South Carolina law, in many respects, conform to the federal rules, and for this reason a separate section has been included on the applicable federal law.

GENERAL CONSIDERATIONS

Recently, the Richland County grand jury, in the course of two separate investigations, has appealed for legislation to permit it to have legal counsel and a stenographer.³ The members pointed out that they are unskilled in the interrogation of witnesses, and that in a lengthy investigation they have no way to refer to testimony of previous witnesses to check for inconsistencies or obtain leads for questions.

In one investigation, in an honest attempt to perform their duties as best they could, the members of the Richland County grand jury

1. LIDE, *THE TRIAL JUDGE IN SOUTH CAROLINA* 12 (1953).

2. *THE STATE* (Columbia, S. C.), May 29, 1953, p. 1, col. 6.

3. *THE STATE* (Columbia, S. C.), Oct. 25, 1954, p. 1, col. 5; *Id.*, May 29, 1953, p. 1, col. 8.

may have exceeded their authority, by revealing to members of Columbia City Council information about city affairs obtained from other witnesses.⁴ No authority can be found for this act, even though Council members were taken into the jury room one at a time and sworn to secrecy. And yet, the jurors felt they had learned of a situation about which Council should know, and that Council was the proper agency to deal with the matter. Under such circumstances, what can a grand jury do?

STATUTORY PROVISIONS

In common with several other states and the federal courts, South Carolina has no statutory form of oath for grand jurors, and no provision for secrecy in their proceedings.

The grand jury in this state is authorized by the Constitution of 1895,⁵ which merely continued the existing law providing for a jury of 18 qualified electors, 12 of whom must concur in the jury's findings. Statutory provisions are meager, and none of them mention secrecy.⁶

Clerks of Court administer the common law form of oath as follows:

You, as foreman of this Grand Inquest, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own, you shall well and truly keep secret. You shall present no one for envy, hatred or malice; nor shall you leave any one unrepresented for fear, favor, affection, reward, or hope of reward; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God.⁷

After this oath is taken by the foreman, the other jurors take a short oath to the effect that the oath which the foreman has taken on his part, each of them shall well and truly observe.

This is substantially the same oath administered to the grand jury in the 17th century,⁸ although a somewhat similar oath appears to have been used as far back as the reign of Ethelred II (A.D.

4. *Id.*, Oct. 29, 1954, p. 1, col. 1.

5. Article 5, § 22.

6. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 38-401 to § 38-410.

7. MILLER'S COMPILATION OF RULES OF COURT 159 (Charleston, 1848); EARL'S FORM BOOK 336 (Walhalla, 1911).

8. BOOK OF OATHS 206 (London, 1649).

978-1016).⁹ However, secrecy was not a requisite, or even a right, of the grand jury until late in the 17th century when the famous *Lord Shaftesbury's case*¹⁰ was tried, and the grand jury insisted on hearing witnesses in private, after which it refused to indict the earl for high treason.

SOUTH CAROLINA CASE LAW

Surprisingly few cases have arisen in South Carolina on the invasion of the secrecy of the grand jury, possibly because the doctrine of *Lord Shaftesbury's case*, *supra*, has been so firmly imbedded in the legal minds of this state.

The leading case in this jurisdiction is *State v. Rector*,¹¹ in which the Supreme Court held that the trial judge could take no steps toward obtaining information as to the number of jurors concurring in an indictment, and whether the necessary number included an unqualified member.

Leaving no doubt about the standing of secrecy in this state, the court said:

As long as the grand jury has been known to our judicial system, and that body came with the organization of our first Courts, their acts and proceedings have been regarded almost sacredly secret.

It is plain that the general rule observed in all jurisdictions to which there is no exception, except where made by proper legislation, forbids any inquiry into the proceedings of the grand jury.

The court suggested that a juror who violated his oath might be liable to criminal charges as an accessory after the fact.

But this doctrine had been staunchly announced as far back as 1833, when the court held that it was a violation of a juror's duty to give an affidavit as to the form in which the grand jury received certain evidence, saying that "the nature of a juror's oath sufficiently indicates they are not to communicate to others that which passes among the jury in their consultation."¹²

In *State v. Addison*,¹³ the court quashed an indictment where private counsel employed to aid the prosecution entered the grand

9. WILKIN'S LEGES ANGLIAE SAXONICAE 117 (1721).

10. 8 How. St. Tr. 774 (1681).

11. 158 S.C. 212, 155 S.E. 385 (1930).

12. *State v. Boyd*, 2 Hill 288 (S.C. 1833).

13. 2 S.C. 356 (1870).

jury room while the jurors were deliberating to advise them of their duty. Nine years later, however, an exception was made when the court refused to quash an indictment where the jury called the solicitor in to ask his advice on the form of the presentment, after it had agreed.¹⁴ In that case, Mr. Justice Haskell said that the solicitor “is a sworn officer of the state, and responsible for the proper discharge of the duties of his office; he is presumed to have the power to discriminate between matters on which he should or should not communicate with the grand jury, and error must be shown and not presumed.”

In that case, the court distinguished *State v. Addison, supra*, noting that here the grand jury had completed its deliberations. By way of dicta, the court added that it was the “right and duty” of the solicitor to communicate with the grand jury at any time as to the manner in which its business is to be conducted.

The leading case on the powers and duties of the grand jury is *State v. Bramlett*,¹⁵ which is practically a text book on the subject. In that case, the court held that the grand jury has no right, *inter alia*, to discuss evidence heard *ex parte*; and the jurors also have no authority to present any person by name with words of censure without also presenting him for indictment or finding a true bill against him.

FEDERAL RULES

The applicable federal statutory provisions are found in the Rules of Criminal Procedure¹⁶ and provide that attorneys for the government, witnesses under examination, interpreters when needed, and stenographers may be present in the grand jury room during the taking of testimony, but that no one may be present when the jury is deliberating or voting.¹⁷ The district courts may administer oaths of secrecy in their discretion, but there is no statutory form or requirement that an oath be given.¹⁸

But as far back as 1881 and uniformly since, federal courts have held that the grand jury may be released from its oath of secrecy in a proper case where justice requires this step.¹⁹ In *United States*

14. *State v. McNinch*, 12 S.C. 89 (1879).

15. 166 S.C. 323, 164 S.E. 873 (1932).

16. 18 U.S.C.A. § 3771.

17. *Id.*, Rule 6(d).

18. *Id.*, Rule 6(e); *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Pa., 1933); *Goodman v. United States*, 108 F. 2d 516, 127 A.L.R. 265 (9th Cir. 1939); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L.Ed. 1129 (1940).

19. *United States v. Farrington*, 5 Fed. 343 (1881).

v. American Medical Association,²⁰ the court held that the jury is not released from its oath by operation of indictment, arrest of the accused or the expiration of the jury term, but may only be released from its oath by the court when justice requires. This decision appears to modify and restrict earlier decisions to the effect that secrecy may be withdrawn after the indictment is published and the defendant apprehended.²¹

The federal courts have held that grand jurors may be required to testify as to evidence given before the grand jury.²²

Federal courts have taken a middle-of-the-road policy as to how strictly the secrecy requirement should be construed. They have held that the presence of one witness while another witness was testifying was a substantial deprivation of the defendant's rights and sufficient to set aside an indictment.²³ But where testimony was taken in the grand jury room by a duly appointed stenographer and then transcribed by public stenographers, the court held this was not enough, without a showing of prejudice, to invalidate the indictment on the grounds that the secrecy of the grand jury had been violated.²⁴ But the presence of an unauthorized stenographer is sufficient to vitiate the indictment.²⁵

OTHER JURISDICTIONS

Many jurisdictions have adopted statutory forms of oaths for grand juries, inserting after the words "keep secret," some such phrase as "unless called upon to give evidence thereof in some court of law in this state,"²⁶ or "unless called on in a court of justice to make disclosures."²⁷ Still others abandon altogether the requirement for secrecy in the oath, although still adhering to the common law principles.²⁸

In making the sweeping statement in *State v. Rector, supra*, that no jurisdiction would inquire into grand jury proceedings in the absence of legislation, the South Carolina court appears to have overlooked completely an old case in the sister state of North Carolina.

20. 26 F. Supp. 429 (D.D.C. 1939).

21. *Metzler v. United States*, 64 F. 2d 203 (9th Cir. 1933); *Atwell v. United States*, 162 Fed. 97, 89 C.C.A. 97, 17 L.R.A. (N.S.) 1049, 15 Ann. Cas. 253 (1908).

22. *United States v. Porter*, Fed. Cas. No. 16,072, 2 Cranch, C.C. 60, 2 D.C. 60 (1812).

23. *United States v. Edgerton*, 80 Fed. 374 (1897).

24. *United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254 (1932).

25. *Latham v. United States*, 226 Fed. 420 (5th Cir. 1915).

26. GEORGIA CODE ANN. § 59-203 (1939).

27. WYOMING REVISED STATUTES ANN. § 61-107 (1931).

28. CODE OF VIRGINIA 1950 § 19-127.

In that jurisdiction in 1846, the court said in a shocked tone that it would be a monstrous miscarriage of justice for a Court of Law to give its blessings to perjury by preventing a grand juror from testifying against a witness who swore to one set of facts before the grand jury and another in open court, and held that the grand juror could be required to testify as to evidence heard in secret.²⁹ That the juror could not testify against the person who committed perjury before the grand jury was the early English view, but was thrown out in its first test.³⁰ A number of American and English cases have since held that a witness may be indicted for perjury on the testimony of grand jurors.³¹

At the same time, North Carolina has upheld the secrecy of the grand jury. In *State v. Branch*,³² a case remarkably like *Lord Shaftesbury's* case, the trial judge required the grand jury to come into open court and hear testimony publicly. The indictment was promptly quashed by the North Carolina Supreme Court.

While it appears to be universally held that the presence of an unauthorized person during the deliberations of the jury will be grounds for abatement,³³ there is a split of authority as to whether the presence at other times is sufficient to quash, the majority taking the view that it is not unless prejudice is shown or is probable.³⁴ The minority holds that the participation of any unauthorized person at any stage of the proceedings is grounds for abatement without a showing of prejudice.³⁵

But at the same time, most jurisdictions hold that it is the duty of the state's attorney to examine witnesses for the jury when requested,³⁶ even in the absence of a statutory provision. But none of these will extend the right to a private prosecutor even though

29. *State v. Broughton*, 29 N.C. 96, 45 Am. Dec. 507 (1846).

30. 4 Bl. Com. 126, Christian's note (1800).

31. *United States v. Charles*, Fed. Cas. No. 14,786, 2 Cranch C. C. 76 (D.C. Cir. 1813); *Rex v. Hughes*, 1 Car. & K. 519 (1844); *People v. Young*, 31 Cal. 563 (1867); *State v. Fassett*, 16 Conn. 457 (1844); *State v. Offutt*, 4 Blackf. 355 (Ind. 1837); *Commonwealth v. Hill*, 11 Cush. 137 (Mass. 1853); *Huidekoper v. Cotton*, 3 Watts 56 (Pa. 1834); *State v. Terry*, 30 Mo. 368 (1860); *Crocker v. State*, Meigs 127 (Tenn. 1838); *Thomas v. Commonwealth*, 2 Robinson 795 (Va. 1843); 1 Chitty Cr. Law § 322 (1816).

32. 68 N.C. 186, 12 Am. Rep. 633 (1873).

33. *State v. Wetzel*, 75 W.Va. 7, 83 S.E. 68, Ann. Cas. 1918A, 1074 (1914).

34. *Sadler v. State*, 124 Tenn. 50, 136 S.W. 430, Ann. Cas. 1912D, 976 (1911); L.R.A. 1916D, 1123. In *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73 (1880), the court held that an interpreter who was also a prosecuting witness being present was not grounds for abatement.

35. See note 25 *supra*, as to clerk's presence; *Coblentz v. State*, 164 Md. 166 A. 45 (1933) (attorney for plaintiff suing defendant).

36. *Gitchell v. People*, 146 Ill. 175, 33 N.E. 757 (1893); *State v. Coulter*, 104 Miss. 764, 61 So. 706 (1913); *State v. Wetzel*, *supra*, note 33.

appointed to assist the state,³⁷ nor even to the assistant solicitor,³⁸ and most certainly not to a private prosecutor not duly appointed.³⁹

Some jurisdictions have refused to quash indictments where the jury had a stenographer present even though none was authorized.⁴⁰ Where the jurisdiction allows state's attorneys or clerks to be present, the provision of secrecy also includes them.⁴¹

The juror, or other authorized person covered by the provision, may be liable, as the South Carolina court suggested, to criminal charges as an accessory after the fact for violating the jury's secrecy,⁴² or he may be held in contempt.⁴³

CONCLUSION

The reasons for surrounding the proceedings of the grand jury with secrecy have led to diverse theories,⁴⁴ but the chief reasons advanced today are that it encourages witnesses to testify fully without fear of reprisal, or that it protects the jury itself from undue influence in making its decisions. Undoubtedly, both of these considerations contain some merit. But carried to extremes, the secrecy provision brings with it about as many evils as it cures.

In adhering to the "almost sacredly secret" doctrine announced in *State v. Rector*, *supra*, South Carolina has closed the door on the possibility of a stenographer for the grand jury, which the juries themselves say is a crying need. This jurisdiction will allow the solicitor to enter the room to instruct the jurors on the law, but even under the *McNinch* case it is extremely doubtful that the court would go so far as to permit the questioning of witnesses for the jury by the prosecuting attorney. While most jurisdictions hold that prejudice must be shown where others are in the jury room unless the jury is actually deliberating or voting, under *State v. Boyd* in this state it would appear that the presence of others at any stage of the proceedings is grounds for abatement, the taking of testimony being considered as a part of the jury's "consultation."

37. *Coblentz v. State*, *supra*, note 35; *Wilson v. State*, 70 Miss. 595, 13 So. 225 (1893); *Hartgraves v. State*, 5 Okla. Crim. Rep. 226, 114 P. 343 (1911).

38. See note 35 *supra*.

39. *Collier v. State*, 104 Miss. 602, 61 So. 689 (1913).

40. *Richards v. State*, 108 Ark. 87, 157 S.W. 141 (1913); *State v. Bowman*, 90 Me. 363, 38 Atl. 331 (1897); *State v. Brewster*, 70 Vt. 341, 40 Atl. 1037 (1898).

41. 1 GREENLEAF ON EVIDENCE § 252 (16th ed. 1899).

42. *State v. Rector*, *supra*, note 11; *Sands v. Robison*, 12 Smedes and M. 704, 51 Am. Dec. 132 (Miss. 1849).

43. 17 L.R.A. (N.S.) 1049.

44. *Huidekoper v. Cotton*, note 31 *supra*; *Crocker v. State*, note 31; 4 Bl. Com. 126, Christian's Note (1800); EDWARDS, THE GRAND JURY 116 (1906).

Probably the worst result of the *Boyd* decision is that one referred to by the North Carolina Supreme Court in *State v. Broughton*, the protection of those who swear falsely before the grand jury. Under the decisions in this state there appears to be no way to prevent this.

As to the action of the Richland County grand jury in informing Columbia City Council of what it had heard, *State v. Bramlett* would appear to prohibit this, as would the *Boyd* case. The *Bramlett* case held that the jury has no right to “discuss” evidence heard *ex parte*, and the *Boyd* case that it may not “communicate to others” what it has heard. Apparently the only way the grand jury could have communicated this matter to anyone would be to present someone for indictment, or return a true bill against someone.

The federal rule seems to be a salutary one, and South Carolina could well consider legislation adopting some of its provisions. If, as the *McNinch* case said, the solicitor is a sworn officer of the state presumed to be performing his duties in a proper manner, why should he not be permitted to be present during the questioning of difficult witnesses when requested? There also appears to be no harm in having a stenographer to transcribe lengthy testimony, especially since the cloak of secrecy in such case would extend to both the solicitor and stenographer.

Provision might also be made for a trained investigator for the grand jury, or in the alternative, to grant the jury the right to communicate to the proper agency what it thinks should be investigated and why. It is obvious that many things will come to the attention of the grand jury from time to time which it is not equipped to investigate fully, and in which it lacks sufficient information to present anyone by name.

To prevent the possibility of perjured testimony in the grand jury room with immunity for the guilty person, the federal rule appears sound—leave it to the discretion of the trial court to release the jurors from their pledge of secrecy in a proper case, when justice requires.

J. REESE DANIEL.