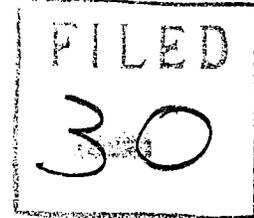


GRAND JURY:
PROSECUTING ATTORNEY:

Jackson County Prosecuting Attorney may not receive funds from county in addition to those provided in contingent fund statute, Section 13470, R. S. Missouri, 1939. County court may not appropriate money to grand jury for investigation.

May 8, 1950



Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"On May 8, 1950, the Honorable R. G. Cowan of the Jackson County Circuit Court will impanel a grand jury for the May term of court. The question has been raised as to what county funds may be made either directly available to that grand jury or through the office of the Prosecuting Attorney of Jackson County for the purpose of enabling the grand jury to conduct certain investigations now contemplated.

"Section 13470, R.S. 1939, apparently provides for a maximum contingent fund of \$2,500.00 per year, said sum to be available to the prosecuting attorney of class one counties for 'payment of the incidental expenses in bringing parties and witnesses from other states or counties and in properly preparing cases for trial, attending trial on changes of venue, attending at the taking of depositions, in printing briefs, * * * and generally such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office.'

"It is requested that an official opinion of your office be furnished on the following question:

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"1. As to whether there is a contingent fund law now in effect, and if so, whether said law limits the maximum amount, available to the prosecuting attorney's office to the amount of \$2,500.00 per year; whether grand jury investigations might properly be interpreted into the meaning of Section 13470, and also whether or not the grand jury would be able to expend moneys out of this fund without accounting to the prosecuting attorney's office.

"2. As to whether or not Jackson County, Missouri, can lawfully appropriate any sum of money to the Prosecuting attorney's office in excess of \$2,500.00, and if not, whether Jackson County, under the present budget law, can make any sum available to a grand jury by merely making a flat appropriation and if so, from what fund."

Your first question is whether or not there is a contingent fund law now in effect. Section 13470, R. S. Missouri, 1939, provides:

"The treasurer of said county shall set aside the prosecuting attorney's fees, so turned into the treasury of said county, to be used as a contingent fund for the prosecuting attorney for the payment of the incidental expenses in bringing parties and witnesses from other states or counties and in properly preparing cases for trial, attending at the taking of depositions, in printing briefs, and appearing before the appellate courts of the state, and generally such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office. Such fund shall be paid out as needed to the prosecuting attorney by the said county treasurer out of said fund in the treasury of said county, not exceeding two thousand five hundred dollars in any year, upon warrant of the prosecuting attorney, approved and signed by the judges of the

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criminal court of said county. At the end of each year said county treasurer shall pay into the general revenue fund of said county any balance that may be in his hands from fees, so collected, exceeding the sum of one thousand dollars."

This section was originally part of an act found in Laws of 1911, page 392. That act consisted of four sections which, in the Revised Statutes of Missouri, 1939, were Sections 13467, 13468, 13469 and 13470. The 1911 act by its title amended Article 3 of Chapter 104, R. S. Missouri, 1909, entitled, "Salaries of County Officers in Counties of 150,000 to 500,000 Inhabitants."

Several changes were made in what was in the 1939 revision Section 13467. (See Laws of 1919, page 671; Laws of 1929, page 374; Laws of 1933, page 373 and Laws of 1941, page 533.) None of the other sections of the original 1911 act were changed until 1945. At that time pursuant to Section 8 of Article VI, Constitution of Missouri, 1945, dealing with classification of counties, an act was passed (Laws of 1945, page 576) repealing Sections 12957, 12958, 12959, 12961, 12977 and 12987, relating to the salary and duties of assistants to the prosecuting attorney in the class of counties within which St. Louis County fell, and also Sections 13467 and 13468. Three new sections were enacted in lieu of the repealed sections known as 12957, 12958 and 12959, and applicable to first class counties. These sections deal with the number, compensation and duties of assistant prosecuting attorneys in first class counties.

The Sixty-third General Assembly also amended Section 13469, which provides for the payment of fees earned by the prosecuting attorney's office into the county treasury to make that section applicable in all first class counties. (Laws of 1945, page 1566.)

House Bill No. 922 of the Sixty-third General Assembly proposed the repeal of Section 12986, providing a contingent fund for the prosecuting attorney in counties with a population from 100,000 to 400,000, and also Section 13470. That bill was vetoed by the Governor because it provided that the fund should be set aside by the county clerk instead of by the county court. (House Journal, Sixty-third General Assembly, page 4525.)

At the Sixty-fifth General Assembly the committee on legislative research, in its report to the General Assembly on the proposed revision of the state statutes, made the following recommendation (Appendix to Report No. 11, Part I, page 119):

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"Section 12986 provides for a contingent fund for the prosecuting attorney in counties having a population of 100,000 to 400,000. Section 13470 also provides for such a fund in counties of the first class. This latter section adequately covers the former inasmuch as only one first class county (St. Louis) comes within the 100,000 to 400,000 population group.

"To the extent to which the sections conflict, that is as to the amount of fund, section 12986 providing for a sum of \$2500, and section 56.22 (13470) providing that all fees turned into the treasury by the prosecuting attorney shall constitute the fund, section 13470 should govern inasmuch as it refers to section 13469 which was basically changed in its application by re-enactment in 1945 (p. 1566), thus making sections 13469 and 13470 the most recent law. Therefore, the repeal of section 12986 is suggested."

Pursuant to the recommendation of the committee, House Bill No. 2014, which became effective on April 14, 1950, repealed Section 12986.

There has been no effective express repeal of Section 13470. It will be noted that Section 13470 provides:

"The treasurer of said county shall set aside the prosecuting attorney's fees, so turned into the treasury of said county, * * *"

(Underscoring ours.)

The underscored portion refers to the fees turned into the treasury under section 13469. That section applies to first class counties, and the reference to "said county" in 13470 must be to the counties included in Section 13469 to-wit: first class counties. Therefore, we feel that Section 13470, R. S. Missouri, 1939, is now in effect and applies to all first class counties which is the class to which Jackson County belongs.

This section definitely fixes a maximum charge the prosecuting attorney may spend for the purposes therein specified from the fund arising from the fees received by his office. The section quoted

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above expressly provides that a sum "not exceeding \$2,500.00 in any year" shall be paid from the fund for the purposes specified. This clearly fixes that figure as a maximum amount. Whether or not it also limits the amount which the prosecuting attorney may receive from other public funds will be discussed further below.

As to whether or not expenditures for grand jury investigations might be included in Section 13470, the answer appears to us to be in the affirmative. The fund there provided may be used by the prosecuting attorney for "generally such expenses as he may be put to in the vigorous prosecution of the duties of his office." Presentation of matters to the grand jury is one of the duties of the prosecuting attorney. (Sections 3912 and 3913, R. S. Missouri, 1939.) Any obligations incurred in the performance of such duty would certainly appear to be within Section 13470.

As for your inquiry regarding direct use of the fund by the grand jury, we think it clear that the fund is provided for the use of the prosecuting attorney only. There is nothing in Section 13470 which might in any way be construed to permit the direct use by the grand jury of the fund there provided.

Considering the first part of your second question, we find no statutory provision authorizing the Jackson County Court to provide you with funds for the purposes here in question. In the case of *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W. (2d), 1. c. 999, the court stated:

"It has been written a county court is only the agent of the county which no powers except those granted and limited by law and, like other agents, it must pursue its authority and act within the scope of its powers. * * *"

In that case the court further stated, 210 S.W. (2d) 1. c. 1000:

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see *Laws of Missouri, 1945*, pp. 574, 578, and 583, *Mo. R.S.A., Sections 12906 et seq., 12957 et seq., 13547.353 et seq.* The Legislature

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has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. * * *

(Underscoring ours.)

We have in the present situation a statute authorizing a setting aside for the use of the prosecuting attorney of a sum not to exceed \$2,500.00 per year. Inasmuch as the Legislature has provided a fund for use by the prosecuting attorney, we feel that the prosecuting attorney must look to that fund alone for expenditures for the purposes therein provided, and that the county court, lacking any statutory authority, may not grant the prosecuting attorney additional funds for such purposes. (See Alexander v. Stoddard County, 210 S.W. (2d) 107.)

As for the county court's furnishing funds directly to the grand jury, the statutes are silent on this matter. There are, of course, statutes providing for the pay of witnesses before the grand jury, (Section 13421, R. S. Missouri, 1939.) and for the pay of grand jurors. (Section 714, R. S. Missouri, 1939.) Whether or not the grand jury may receive from the county funds to use in their operations has not been passed upon by the courts of this state. However, furnishing a grand jury funds for its own use in conducting an investigation has been held to be not a proper expenditure by courts in other states. In the case of Allen v. Payne (Cal.), 36 P. (2d) 614, the court stated:

"The facts are undisputed, and the only question is one of law, whether the grand jury has the power to employ persons to investigate

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crime, and make the compensation of the investigators a charge upon the county. Petitioner contends that the power exists by implication from the character of our grand jury, as provided for in the Constitution. It is argued that since the nature of the grand jury is not specifically defined in the Constitution, it is the body as known to the common law, with the same powers, including the power to institute its own investigations. See *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652. Section 922 of the Penal Code, also relied upon, provides: 'If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who must thereupon investigate the same.'

"From the time of the adoption of our Constitution to the present, the accepted practice has been to leave the detection of crime in the hands of sheriffs and district attorneys, and in our opinion, the departure from that practice finds no support in authority or legislative policy. The ferreting out of evidence of crime is a statutory duty expressly imposed upon certain officers, having the equipment and qualified personnel to perform it. This being so, there is no reason to resort to the very vague justification of 'inherent' or 'implied' powers. The existence of the power in other competent agencies tends to negative an implied power in the grand jury, which is obviously not equipped to exercise it. The grand jury's function of 'investigating' crime may be readily distinguished from detection."

The case of *William J. Burns International Detective Agency v. Doyle*, 46 Nev. 91, 208 P. 427, 26 A.L.R. 600, involved an action on a contract with members of a grand jury for employment of a private detective to assist in its investigation. The court held the contract contrary to public policy. A concurring opinion discussed the functions of a grand jury as follows: (208 P. 1. c. 430)

"The question is new in this jurisdiction, and, after most diligent research, I have been unable to find in the decisions of

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other courts any precedent for such a contract of employment by a grand jury, for the reason, I assume, that the method of procedure adopted by the grand jury in the exercise of its inquisitorial powers is most extraordinary and unusual.

"It is deemed proper to state that an impression widely prevails that grand juries, in the exercise of their inquisitorial powers, may assume the role of prosecutors in their commendable earnestness and zeal to bring to light for examination, trial and punishment violators of public authority, our Constitution, and laws. But such is not the law. Grand juries are not prosecutors. It is pointed out in a leading text on criminal procedure, that, when liberty is threatened by excess of authority, then a grand jury, irresponsible as it is, and springing from the body of the people, is an important safeguard of liberty. If, on the other hand, public order, and the settled institutions of the land, are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking without check of the popular impulse, may, through its inquisitorial powers, become an engine of oppression and of great mischief to liberty as well as to order. In the time of James II. the grand jury was called into existence to serve as a barrier against oppressive state prosecutions. Under our government the only valid basis upon which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused, and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality. 2 Whart. Crim. Proc. 10th Ed. Kerr, Section 1295.

"'Grand juries,' it has been said, 'are high public functionaries, standing between accuser and accused. They are the great security to the citizens against vindictive prosecution, either by government or political partisans, or by private enemies. In their independent action the persecuted have found the most

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fearless protectors; and in the record of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice. These elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authorities, and not resting in their own cognizance sufficient to authorize presentment. Nor should courts give unadvisedly aid or countenance to any such innovations.'

"These high ideals are condensed in a solemn obligation, to be administered to the foreman and taken by all the members of the grand jury before entering upon the discharge of their duties. It is true that in the discharge of their oaths they are required to make diligent inquiry into all offenses committed and triable and can obtain legal evidence. But I am of the opinion that, in the exercise of their inquisitorial powers, they are not required, neither are they empowered, to employ third parties to aid, assist and participate in the prosecution of their trust, outside of those public officers upon whom the law imposes the duty. * * *"

(Underscoring ours.)

In view of the foregoing, we feel that the county court would not be authorized to appropriate directly to the grand jury any funds for the use of the grand jury in conducting its own investigation.

CONCLUSION

This department is of the opinion that Section 13470, R. S. Missouri, 1939, which provides a contingent fund for use of the prosecuting attorney in certain counties, is now in effect and is applicable to all first class counties to which Jackson County belongs, and that said law limits the maximum amount available to the prosecuting attorney's office in first class counties to the

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sum of \$2,500.00 per year; that expenditures by the prosecuting attorney in connection with grand jury investigations may properly be made from the fund provided by Section 13470, but that the grand jury is not authorized to expend money directly out of said fund.

We are further of the opinion that the Jackson County Court is not authorized to appropriate to the prosecuting attorney funds in addition to those provided by Section 13470 for use in connection with grand jury investigations, and that the Jackson County Court may not make an appropriation of a flat sum available to a grand jury.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General