GRAND JURY: Notes taken before grand jury cannot be furnished to Attorney General of the United States or anyone other than the prosecuting officer of the county.

Supreme Court Rule 24.24 should be cited when this opinion is sent out. 4-7

March 28, 1942

FILE 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Re: Sikeston, Missouri-Cleo Wright Matter.
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> "This confirms my request made to you last Saturday afternoon for an official opinion as to whether it will be permissible under the law for the notes which Assistant Attorney General Harry Kay took in the Grand Jury room, or the typewritten statement which he prepared from said notes, to be delivered to Honorable Frances Biddle, Attorney General of the United States.
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> "Attached hereto is copy of self-explanatory letter of March 21 this morning received from General Biddle with respect to the Sikeston matter."

The question you present is one which has not been directly passed upon by the courts of this state. In answering it, therefore, we must reason from general principles of law involved and from precedents in other jurisdictions.

It has been the policy of the law from early times that the proceedings of a grand jury are secret. Professor Wigmore in his work on Evidence, Section 2360, says:

> "That the proceedings of the grand jury, in hearing testimony and in deliberating, must be held in privacy, has been the customary practice from early times."

The reasons ascribed by that author for the secrecy of grand jury proceedings are:

> "(a) The grand jurors themselves are to be secured in freedom from the apprehension that their opinions and votes may be subsequently disclosed by compulsion.
>
> "(b) The complainants and the witnesses summoned are to be secured in freedom from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the State may secure willing witnesses.
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> "(c) The guilty accused is not to be provided with such clues as will enable him to flee from arrest or to suborn false testimony or tamper with witnesses.
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> "(d) The innocent accused, who is charged by complaint before the jury, but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused."

This policy of the law and the reasons therefor were firmly established in the common law of England and have been recognized by the courts of this country from the beginning of our jurisprudence. Reference to the early statutes of Missouri will show that the legislature of this state from the beginning undertook to guarantee the secrecy of grand jury proceedings. Reference to the present statutes will show that the secrecy of grand jury proceedings is still the policy of the law of this state.

Section 3905, R. S. Mo. 1939, provides the form of oath to be administered to grand jurors. This oath is substantially in the form used in the early days in England (Wigmore on Evidence, Section 2360), and contains the following:

> " * * * the counsel of your state, your fellows and your own, you shall truly keep secret. * * *"

Section 3906, R. S. Mo. 1939, requires that witnesses before a grand jury, in addition to being sworn to tell the truth, shall also be required to take the following oath:

> "You do further solemnly swear, or affirm, that you will not after your examination here, directly or indirectly, divulge or make known to any person or persons the fact that this grand jury has or has had under consideration the matters concerning which you shall be examined, or any other fact or thing which may come to your knowledge while before this body, or concerning which you shall here testify, unless lawfully required to testify in relation thereto."

A violation of this oath by a witness subjects him to prosecution for a crime. (Section 3907, R. S. Mo. 1939.)

Section 3923, R. S. Mo. 1939, provides as follows:

> "No member of a grand jury shall be obliged or allowed to testify or declare in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question."

In fact, all statutes which permit in any way the divulging of what transpired before a grand jury are considered by the courts as modifications of the common law rule that all such proceedings are absolutely secret.

In the recent case of State v. McDonald, 119 S. W. (2d) 286, [illegible], the Supreme Court of Missouri in passing upon statutes which provide that a grand juror may be compelled to testify in certain instances as to what transpired before the grand jury, said:

> "So far as here involved the common law rule preserving the secrecy of grand jury proceedings has been modified by statute in this state only to the extent indicated."

Likewise, in the case of State v. Thomas, 99 Mo. 235, 258, the court said:

> "The ancient rule excluding the evidence of a grand juror as to any matter that transpired in the jury room, while the grand jury was in secret session in the discharge of its duties, founded upon considerations of public policy, the nature of the tribunal, and a tender regard for a juror's conscience, has been much relaxed in modern practice in those states in which the limitations upon such disclosures are measured only by the oath of secrecy which the grand juror is required to take, notable illustrations of which will be found in the following cases, as well as cogent reasons therefor: (Citing cases.)
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> "The evil sought to be remedied, by this legislation, was the immunity, which witnesses might enjoy under the old rule, from prosecution for perjury for swearing falsely before the grand jury, and from the discredit which would follow upon the deliverance, on trial, in open court, of evidence different from that delivered under oath before the grand jury. * * * * * *

> The extent, to which these common-law rules of exclusion has been relaxed, is to be measured by the terms of the statute, and extends only so far as, first to permit a grand juror, who has heard a witness testify before the grand jury, to give evidence of what that witness testified to, upon a complaint against such witness for having committed perjury in such testimony, or upon his trial for such perjury, and, second, when a witness, who has testified before the grand jury, is being examined in the trial court, in regard to the same matter, and has testified thereto, and it is sought to impeach his evidence (after laying a proper foundation therefor) by showing that he testified differently before the grand jury. * * *"

It should be observed here that the notes taken by the Assistant Attorney General of testimony heard before the grand jury are in no way "official notes." Section 3911, R. S. Mo. 1939, reads as follows:

> "Every grand jury may appoint one of their number to be a clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall be given to the attorney prosecuting in the county."

The foregoing is the only provision in our statutes which authorizes or directs anyone to make minutes and notes of the evidence heard before the grand jury. We do not mean to say that there would be anything improper in the prosecuting attorney, his assistant, or any grand juror other than the clerk taking notes of evidence heard before the grand jury. Such notes would likely assist the grand jury in keeping facts, figures and dates before them, and no rule of secrecy would be violated by the mere making of such notes. However, it is clear that notes made by a grand juror other than the clerk, or by a prosecuting officer, are not recognized as official notes of the grand jury, and there is no provision that they be preserved.

The notes made by the clerk of the grand jury are for the assistance of the attorney prosecuting in the county. The Supreme Court in the case of State v. Whelehon, 102 Mo. 17, 22, in referring to the section of the statutes providing for the taking of notes by the clerk of the grand jury, said:

> "That section merely authorizes the grand jury to appoint one of their number clerk to preserve the minutes of their proceedings and of the evidence given before them, which minutes the statute declares shall be given to the attorney prosecuting in the county. This provision is enacted with the view to the convenience and information of prosecuting officers and to enable them to prepare and try the causes."

The courts of our state have ruled that such notes and minutes cannot be introduced or used as evidence in court. In the case of State v. Thomas, 99 Mo. 235, 261, the Supreme Court said:

> " * * * The minutes of the evidence kept by one of their number, unsanctioned by the oath of anybody, cannot be made a substitute for this fair, just and orderly way of getting at the evidence that was actually given before the grand jury.
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> "While the statute permits 'every grand jury to appoint one of their number to be clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall be given to the prosecuting attorney' (sec. 1780, supra), it has nowhere authorized the admission of these minutes as evidence, anywhere, or for any purpose. They are not required to be signed, and are not sworn to by anybody. They are not the statement, deposition or affidavit of the witness, but simply

> a memorandum, by which, perhaps, a grand juror's memory might be refreshed, but upon which could not be shifted the responsibility of the juror's oath as to what the witness did actually testify. * * *"

From the foregoing, we believe two things are evident: (1) That it is the policy of the law of this state to make the proceedings of grand juries absolutely secret except in certain particulars where the common law rule has been relaxed or modified by statute, and (2) that notes or minutes made by the clerk of the grand jury are for the use of the attorney prosecuting in the county and do not become a matter of public record.

Turning now to the statutes, we find that in certain particulars the common law rule as to secrecy of grand jury proceedings has been modified or relaxed. Section 3922, R. S. Mo. 1939, reads as follows:

> "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense."

Likewise, Section 3924, R. S. Mo. 1939, provides in part as follows:

> "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; * * *"

It will be observed that the foregoing sections do not lift the veil of secrecy of grand jury proceedings so as to permit grand jurors to testify in <u>any</u> court proceeding, but only

in certain designated cases and proceedings. The courts have held that these sections do not permit a grand juror to testify in civil cases between individuals. For instance, in the case of Tindle v. Nichols, 20 Mo. 326, the court held that in an action for slander on a charge of false swearing before a grand jury, a grand juror could not testify as to evidence given before the grand jury touching the matter at issue.

Likewise, in the case of Beam v. Link, 27 Mo. 261, which was an action for malicious prosecution in which it was alleged that the defendant appeared before the grand jury and without probable cause caused plaintiff to be indicted for perjury, the court held that a grand juror could not testify and disclose the name of any witness who appeared before the grand jury.

It is apparent, therefore, that not only by common law, but by positive statutes, grand jurors in this state cannot disclose any evidence given before the grand jury, nor the name of any witness who appeared before that body, except when called upon as a witness in certain specific cases. It follows, therefore, that members of the recent grand jury in Scott County, Missouri, could not lawfully furnish to any person any evidence given before said grand jury, nor the names of any witnesses who appeared before them. The only question which remains now is as to whether the same prohibition applies to an Assistant Attorney General or the Prosecuting Attorney who attended the grand jury during its sessions.

By Section 3912, R. S. Mo. 1939, it is made the duty of the prosecuting attorney, when required by the grand jury, to attend the grand jury for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter, and by Section 3913 the prosecuting attorney is given the right to appear before the grand jury whenever he desires to (except, of course, during the deliberations and voting by the jurors). In the case of State ex rel. Graves v. Southern, 344 Mo. 14, 124 S. W. (2d) 1176, the Supreme Court held that a circuit judge could not exclude the prosecuting attorney from the grand jury room. These provisions show that the prosecuting attorney is in reality an integral part of the grand jury--an arm of that body, so to speak.

By Section 12898, R. S. Mo. 1939, it is made the duty of the Attorney General, or one of his assistants, to aid any prosecuting or circuit attorney in the discharge of his duties in the trial courts and in examinations before grand juries. In the case in question, as Your Honor knows, we did have a written direction to aid the Prosecuting Attorney of Scott County in connection with grand jury proceedings then contemplated. In addition, an order was made by the circuit court authorizing an Assistant Attorney General to appear before the grand jury. Therefore, the law which is applicable to prosecuting attorneys in this connection is likewise applicable to an assistant attorney general who assists him.

There is no statute which requires the prosecuting attorney to take an oath before commencing his duties in connection with the grand jury that he will not disclose what transpires before the grand jury, nor is there any statute which positively forbids his disclosing evidence which he hears before the grand jury. The statutes are silent as to his obligations in regard to such matters. It might be suggested, therefore, that since there is no substantive law which prohibits the prosecuting attorney from divulging evidence which he heard before the grand jury, he is free to divulge such evidence. However, such a suggestion would at once provoke a question as to why the law is so specific and exact in prohibiting members of the grand jury and witnesses before same from divulging evidence heard in the grand jury proceedings, and yet leave the prosecuting attorney free to divulge the very things which such laws seek to keep secret. The statutes which seal the lips of the grand jurors and witnesses (except in a few specific cases) would be useless if the prosecuting attorney were free to reveal the very things which those statutes require to be kept secret. The purposes for which grand jury proceedings are kept secret would be thwarted if the prosecuting attorney were left free to divulge secrets of the grand jury proceedings.

The courts of Missouri, as stated above, have not ruled definitely upon the question at hand, but in the early case of Tindle v. Nichols, 20 Mo. l. c. 330, the Supreme Court, in discussing the right of a grand juror to divulge the secrets of the grand jury, said this:

> "Any person who may be present on the occasion is bound not to disclose what may transpire, and the jurors themselves

> are by the terms of their oath, laid under the same obligation; and if they transgress it they are finable."

Again, in the case of State v. Pierson, 337 Mo. 475, 85 S. W. (2d) 48, the Supreme Court of this state had before it the question of the right of a defendant to inquire into the nature and amount of testimony which the grand jury heard as a basis for returning an indictment. In the course of the opinion the court said (337 Mo. l. c. 480):

> "Defendant sought to prove by the foreman of the grand jury that had returned the indictment that no witness had testified 'to any facts concerning an incendiary origin of the fire' and that 'the only evidence that the fire was of incendiary origin was the written statements' of Cotham and Meadows, who did not personally appear before the grand jury. The court sustained the State's objection and refused to permit the grand juror to relate what testimony had or had not been heard by the grand jury.
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> "Defendant called the circuit attorney and assistant circuit attorney, each of whom had attended the grand jury sessions at times during its investigation of the alleged offense, and by each attempted to prove in substance and effect the same thing he had offered to prove by the grand juror. The court refused to permit the witnesses to state what evidence had or had not been given. It did permit them to say whether or not the grand jury had heard any evidence, but declined to go into the question of the sufficiency thereof to justify an indictment."

While the court did not definitely rule upon the exact question we have before us here, we think the ruling of the court in that case does show the attitude of our own Supreme Court toward protecting the secrecy of grand jury proceedings, and we think the holding is susceptible of the inference

that the prosecuting attorney or his assistant stands in the same position with regard to divulging the secrets of grand jury proceedings as do the individual grand jurors.

The courts of other states, however, have passed upon the question at hand, and we call attention to some of them. In the early case of State v. Hamlin, 47 Conn. 95, the court announced the doctrine that the rule as to secrecy of grand jury proceedings applied to all persons who are before the grand jury in its proceedings, including the prosecuting officer. The court in that case said, l. c. 115:

> "It was contended upon the argument in the case of The State v. Fassett, that the witnesses called before the grand jury, as they were not sworn to secrecy, might testify to what took place before that body, although the grand jurors might not. In answer to that claim, Chief Justice Williams said: 'Such a practice would nullify the rule. If it be the object of the law to keep secret the proceedings before the grand jury, it is necessary that the law should impose silence upon those whom it compels to be before them. If it intends they shall be public, then the doors of the grand jury room as well as of the court room should be open to all. If others called there by law may testify to what took place within those walls, it would be idle to close the mouths of the grand jury. * * * And we can have no hesitation in saying that the principle which would prevent disclosure by a grand juror must extend to all persons required by law to be present; for such persons are equally interested in the administration of the penal law. 1 Greenl. Ev., sec. 288. They are not permitted to disclose who agreed to find the bill of indictment, or who did not agree; nor to detail the evidence on which the accusation was founded. Sykes v. Dunbar, Selw. N. P., 815 (1059); * *.'"

Again, in the case of State v. Kemp, 126 Conn. 60, 9 A. (2d) 63, the same rule was announced in the following language (9 A. (2d) l. c. 68):

> "The purpose of the requirement of secrecy is to prevent the knowledge of matters taking place in the grand jury room from reaching others than those having an official part in the proceedings. The state's attorney and his assistants are just as much bound to preserve that secrecy as are the members of the grand jury." (Underscoring ours.)

In the early case of Clark v. Field, 12 Vt. 485, it was said:

> "It is the duty of the jurors, the attorney for the state, and witnesses, not to divulge what passes in the grand jury room, unless required so to do in a court of justice."

Likewise, in the case of State v. Richard, 23 So. 331 (La.), the court said:

> "The practice of admitting the presence of the prosecuting officer at times during the proceedings must, in the order of things, require secrecy of him as well as of the members of the grand jury. The rule as to secrecy includes the grand jurors themselves and the prosecuting officer."

To the same effect are the cases of State v. Britton, 60 So. 379 (La.), and State v. Hopkins, 40 So. 166 (La.).

In the case of Gitchel v. People, 146 Ill. 175, 187, the court said:

> "The same principle, which forbids disclosure by the grand jurors, applies to all persons authorized by law to be present in the grand jury room, whether it be their clerk, or the officer in charge, or the prosecuting attorney."

The foregoing case was followed on this proposition in the later case of People v. Nall, 242 Ill. 284.

From all of the above, we believe it is inescapable that testimony taken before a grand jury must be kept secret by grand jurors and all others who are required to be present before the grand jury except where the statutes require such persons to divulge such evidence when called as witnesses in certain specific cases.

Reference was made in the letter of Attorney General Biddle to the practice in some states of furnishing grand jury notes to his office when the judge in whose jurisdiction the grand jury functioned so ordered. There are some states where statutes provide that notes of the grand jury can be furnished to others upon order of the proper judge. For instance, in New York the Code of Criminal Procedure provides for the taking of testimony given before a grand jury by a stenographer duly appointed for that purpose, and furnishing the District Attorney a copy of such testimony. The section further provides that no other person can see said testimony or take a copy of same except upon the order of court. (See Dworetzky v. Monticello, 12 N.Y.S. (2d) 270.) Upon the authority of such statute, the minutes of grand juries have been furnished the Attorney General of the United States upon order of the court. (See in re Attorney General of the United States, 291 N.Y.S. 5.) As pointed out above, no such provisions are found in the statutes of Missouri.

CONCLUSION

It is, therefore, the opinion of this office that it is not permissible under the law of this state for the notes which an Assistant Attorney General took in the grand jury room to be delivered to the Attorney General of the United States or to any other person other than the prosecuting officer of the county in which the grand jury was convened.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General

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