

NOTES

Inspection of Grand Jury Minutes by Criminal Defendants

INTRODUCTION

The grand jury has performed a vital function in Anglo-American law for many centuries. An indictment returned by a grand jury has long been one of the principal modes of accusation in criminal cases.¹ Traditionally, the proceedings of the grand jury have been kept secret, insofar as practical, in order to insure to the grand jury the greatest possible independence and facility in conducting its investigations.² The rationale commonly given in support of this policy is that grand jury secrecy: (1) prevents suspects from covering up illegal operations or escaping prior to arrest; (2) prevents defendants from fabricating perjured defenses; (3) guards against defamation of suspects who may never be indicted; (4) allows grand jurors freedom to express their opinions and to cast their votes without fear of disclosure; (5) protects both grand jurors and witnesses from being subjected to pressures from suspects and thus elicits more accurate disclosures.³

Probably there are few authorities who would dispute the need for secrecy while the grand jury is still in session and before the accused is arrested. But as one court observed, "The problem arises as to whether there is a reason for the prolongation of this policy after the grand jury has been discharged and the defendant is actually

1. Orfield, *Criminal Procedure from Arrest to Appeal* 137 (1947). In 1933 England abolished the grand jury, with insignificant exceptions. *Id.* at 140.

2. E.g., *Costello v. United States*, 350 U.S. 359 (1956); *Goodman v. United States*, 108 F.2d 516 (9th Cir. 1939); *Latham v. United States*, 226 Fed. 420 (5th Cir. 1915); *Atwell v. United States*, 162 Fed. 97 (4th Cir. 1908); *State v. Hamlin*, 47 Conn. 95 (1879); *Jenkins v. State*, 35 Fla. 737, 18 So. 182 (1895); *Gitchell v. People*, 146 Ill. 175, 33 N.E. 757 (1893); *State v. Bowman*, 90 Me. 363, 38 Atl. 331 (1897); *Low's Case*, 4 Me. 439 (1827); *Coblentz v. State*, 164 Md. 558, 166 Atl. 45 (1933); *Hooker v. State*, 98 Md. 145, 56 Atl. 390 (1903); *Bennett v. Stockwell*, 197 Mich. 50, 163 N.W. 482 (1917); *United States v. Tallmadge*, 14 N.M. 293, 91 Pac. 729 (1907); *People v. Hulbut*, 4 Denio 133 (N.Y. Sup. Ct. 1847); *State v. Broughton*, 29 N.C. 96 (1846); *Gordon v. Commonwealth*, 92 Pa. 216 (1879); *Ex parte Gould*, 60 Tex. Crim. 442, 132 S.W. 364 (1910); *State v. Wetzel*, 75 W. Va. 7, 83 S.E. 68 (1914); 1 Holdsworth, *History of English Law* 322 (3d ed. 1922); 8 Wigmore, *Evidence* §§ 2360-63 (3d ed. 1940).

3. See *Coblentz v. State*, 164 Md. 558, 166 Atl. 45 (1933); *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960); *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959).

on trial.”⁴ Others have noted that under modern rules of discovery in criminal cases, defense counsel are able, by indirection, to obtain the substance of the grand jury testimony by taking depositions from the witnesses whose names appear on the indictment. Yet it is not considered inconsistent with the witnesses’ oaths of secrecy to permit defense counsel to take such depositions.⁵ Further, since the public prosecutor may use the grand jury minutes in the preparation of his case, would not fundamental concepts of fair play dictate that these same minutes be made available to the defendant in the preparation of his defense or in search for material to use in impeaching prosecution witnesses? Many of these considerations have troubled the courts in recent years when passing upon defendants’ motions to inspect grand jury minutes, and it is the purpose of this note to explore and define those situations in which the traditional rule of total secrecy has given way to a particularized need of a criminal defendant to have the grand jury minutes made available to him.⁶

I. STATUTORY MODIFICATION

Most of the states and the federal government have set forth requirements relating to grand jury secrecy in their statutes and have carved out limited exceptions to the traditional total-secrecy rule.

A. *Limitations on Grand Jurors and Court Officers*

Generally, an officer of the court or a grand juror may not disclose information concerning an indictment (or presentment) unless the defendant has been put in custody or is under recognizance. This prohibition does not apply to one who has to disclose such information in the discharge of his official duty or in response to a court order.⁷

4. *State v. Morgan*, supra at 290, 354 P.2d at 1004.

5. *Ex parte Welborn* 237 Mo. 297, 141 S.W. 31 (1911).

6. The more modern view is aptly stated by the court in *State v. Faux*, 9 Utah 2d 350, 353, 345 P.2d 186, 187-88 (1959):

It will be noted that after the indictment is returned and an accused is arrested, the reasons for secrecy have largely been spent. As the writer views it, the furnishing of a defendant with a basis for preparation of perjured testimony has little or no validity. If he will engage in such unlawful machinations, the time element is not going to prevent it and other processes of law must cope with such unlawful conduct. As to an indicted defendant and the testimony which has been given against him, the only remaining reason of any importance for preserving secrecy relates to the protection of the witnesses and the effect disclosure of their testimony prior to the trial may have on future witnesses before Grand Juries.

7. Fed. R. Crim. P. 6(e); Ala. Code tit. 30, § 95 (1958); Alaska Comp. Laws Ann. § 66-8-54 (1949); Ariz. R. Crim. P. § 149; Ark. Stat. Ann. §§ 43-928, 43-1026 (1947); Cal. Pen. Code §§ 168, 924 (Deering 1961); Del. Super. Ct. (Crim.) R. 6(e); Fla. Stat. Ann. § 905.26 (1944); Hawaii Rev. Laws § 279-1 (1955); Idaho Code Ann. § 18-4402 (1948); Ill. Ann. Stat. ch. 38, § 720 (Smith-Hurd

Nor may an officer of the court or a grand juror disclose any evidence given before the grand jury, except when lawfully required to testify as a witness in relation thereto.⁸ These statutory mandates are found in a majority of the states and in the federal rules. But they are, at best, ambiguous, and it has been for the courts to decide when an officer of the court or a grand juror may be lawfully required to testify as a witness in relation to the grand jury proceedings.

A great many states have specifically delineated certain situations in which a court may lawfully require the testimony of a grand juror. Thus, most statutes provide that a grand juror may be required by court order to disclose the testimony of any witness examined before the grand jury for the purpose of ascertaining whether it is consistent with the testimony given by that witness before the court, or to disclose the testimony given before him by any witness upon a charge against such witness of perjury before the grand jury.⁹ But still the

Supp. 1960); Ind. Ann. Stat. § 9-907 (1956); Iowa Code Ann. § 771.23 (1950); Kan. Gen. Stat. Ann. § 62-925 (1949); Me. Rev. Stat. Ann. ch. 148, § 7 (1954); Mass. Ann. Laws ch. 277, § 12 (1956); Mich. Stat. Ann. § 28.958 (1954); Minn. Stat. Ann. § 628.67 (1947); Miss. Code Ann. § 2444 (1942); Mo. Rev. Stat. § 540.320 (1959); Mont. Rev. Codes Ann. § 94.6427 (1947); Neb. Rev. Stat. § 29-1414 (1956); Nev. Rev. Stat. §§ 172.370, 199.390 (1959); N.M. Stat. Ann. § 41-6-42 (1953); N.Y. Pen. Law § 1782 (Dennis 1940); N.D. Cent. Code § 12-12-10 (1960); Ohio Rev. Code § 2939.18 (Baldwin 1958); Okla. Stat. Ann. tit. 21, § 582 (1958); Ore. Rev. Stat. § 132.420 (1959); Utah Code Ann. § 77-21-48 (1953); Wash. Rev. Code Ann. § 10.28.215 (1961); Wis. Stat. Ann. 255.19 (1957); Wyo. Stat. Ann. § 7-110 (1957).

8. Fed. R. Crim. P. 6(e); Ariz. R. Crim. P. § 107; Ark. Stat. Ann. § 43-928 (1947); Cal. Pen. Code § 924.1 (Deering 1961); Del. Super. Ct. (Crim.) R. 6(e); Fla. Stat. Ann. § 905.27 (Supp. 1960); Hawaii Rev. Laws § 279-1 (1955); Idaho Code Ann. § 18-4403 (1948); Iowa Code Ann. § 771.23 (1950); Kan. Gen. Stat. Ann. § 62-925 (1949); La. Rev. Stat. Ann. § 15.471 (1951); Mich. Stat. Ann. §§ 28.944, 28.944(1) (1954); Minn. Stat. Ann. § 613.60 (1947); Miss. Code Ann. § 1790 (1942) (but rule applies only within six months after court adjourns); Mo. Rev. Stat. § 540.320 (1959); Mont. Rev. Codes Ann. § 94.3554 (1947); Nev. Rev. Stat. § 199.390 (1959); N.Y. Pen. Law § 1783 (Dennis 1940); N.D. Cent. Code § 12-12-11 (1960); Okla. Stat. Ann. tit. 21, § 583 (1958); Tenn. Code Ann. § 40-1611 (1955); Tex. Pen. Code Ann. art. 314 (1952); Utah Code Ann. § 76-28-47 (1953). See also Wash. Rev. Code Ann. § 10.28.210 (1961).

9. Ala. Code Ann. tit. 30, § 87 (1958); Alaska Comp. Laws Ann. § 66-8-35 (1949); Ark. Stat. Ann. § 43-930 (1947); Cal. Pen. Code § 924.2 (Deering 1959); Idaho Code Ann. § 19-1112 (1948); Ind. Ann. Stat. § 9-817 (1956); Kan. Gen. Stat. Ann. § 62-923 (1949); Ky. Crim. Code § 113 (Carroll 1927); Mich. Comp. Laws § 767.19 (1954); Minn. Stat. Ann. § 628.65 (1947); Mo. Rev. Stat. § 540.300 (1959); Mont. Rev. Codes Ann. § 94.6325 (1947); Nev. Rev. Stat. § 172.330 (1959); N.M. Stat. Ann. § 41-5-30 (1953); N.Y. Code Crim. Proc. § 266; N.D. Cent. Code § 29-10-30 (1960); Okla. Stat. Ann. tit. 22, § 342 (1951); Ore. Rev. Stat. § 132.220 (1959); S.D. Code § 34.1226 (Supp. 1960); Tenn. Code Ann. § 40-1612 (1955); Utah Code Ann. § 77-19-10 (1953); Wis. Stat. Ann. § 255.21 (1957).

guidelines may not be completely clear to a court. Since the testimony of a grand juror as to what a witness said smacks of hearsay, would it not be more reliable to make the minutes themselves available? Also, if the statute is construed as authority for using the minutes themselves for impeachment purposes, or upon a trial for perjury, at what stage is such a use proper? Before the trial or only after testimony of the witness whose testimony the defendant seeks to impeach?

It is these questions and others which will be explored in a later part of this note. Georgia, for instance, goes a bit further and allows grand jurors to disclose "everything which occurs in their service whenever it becomes necessary in any court of record, . . ." but excludes communications among the grand jurors themselves.¹⁰ Florida and Arizona specifically allow testimony of a grand juror for impeachment purposes and upon a trial for perjury "or when permitted by a court in the furtherance of justice."¹¹ Other states and the federal government place no statutory limit upon the testimony of a grand juror and simply provide that he is permitted to testify when required by a court in connection with a judicial proceeding.¹²

However, every state, by statute or judicial decision, absolutely excludes from disclosure the deliberations, votes or communications among the grand jurors themselves.¹³ This prohibition is lifted only

10. Ga. Code Ann. §§ 59-302, 59-303 (1949).

11. Ariz. R. Crim. P. § 107; Fla. Stat. Ann. § 905.27 (Supp. 1959).

12. Grand jurors are competent witnesses both for the state and for the defense in any prosecution for perjury. La. Rev. Stat. § 15.471 (1951). A grand juror is permitted to testify when required by a court in connection with a judicial proceeding. Fed. R. Crim. P. 6(e); Del. Super. Ct. (Crim.) R. 6(e); Hawaii Rev. Laws § 279-1 (1955); Miss. Code Ann. § 1790 (1942); Tex. Pen. Code Ann. art. 314 (1952).

13. Fed. R. Crim. P. 6(e); Ariz. R. Crim. P. § 106; Ark. Stat. Ann. § 43-927 (1947); Cal. Pen. Code § 924.2 (Deering 1959); Del. Super. Ct. (Crim.) R. 6(e); Fla. Stat. Ann. § 905.24 (1944); Idaho Code Ann. § 19-1112 (1948); Ill. Ann. Stat. ch. 38, § 720 (Smith-Hurd Supp. 1960); Ind. Ann. Stat. § 9-816 (1956); Iowa Code Ann. § 771.23 (1950); Kan. Gen. Stat. Ann. § 62-924 (1949); Ky. Crim. Code § 112 (Carroll 1927); La. Rev. Stat. Ann. § 15.471 (1951); Me. Rev. Stat. Ann. ch. 148, § 7 (1954); Mass. Ann. Laws ch. 277, § 13 (1956); Mich. Stat. Ann. § 28.959 (1954); Minn. Stat. Ann. § 628.64 (1947); Miss. Code Ann. § 1790 (1942); Mo. Rev. Stat. § 540.310 (1959); Mont. Rev. Codes Ann. § 94.6325 (1947); Neb. Rev. Stat. § 29-1415 (1956); Nev. Rev. Stat. § 172.330 (1959); N.M. Stat. Ann. § 41-5-29 (1953); N.Y. Code Crim. Proc. § 265 (Dennis); N.D. Cent. Code § 29-10-29 (1960); Ohio Rev. Codes Ann. § 2939.19 (Baldwin 1958); Okla. Stat. Ann. tit. 22, § 341 (1937); S.D. Code § 34.1226 (Supp. 1960); Tenn. Code Ann. § 40-1611 (1956); Tex. Code Crim. P. art. 374; Utah Code Ann. § 77-19-10 (1953); Wash. Rev. Code § 10.28.100 (1956); Wis. Stat. Ann. § 255.20 (1957); Wyo. Stat. Ann. § 7-111 (1957).

No grand juror shall be permitted to state or testify in any court how *he* or *any other juror* voted on any question before them or what opinion was expressed

when a grand juror is charged with perjury before his fellow grand jurors.¹⁴

B. Disclosure of the Minutes

In three jurisdictions today a criminal defendant has an absolute right to inspect the grand jury minutes.¹⁵ In Iowa, for instance, "The clerk of the court must, within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy."¹⁶ In other jurisdictions, no absolute right to disclosure of the minutes exists except as to prosecutors. Release to criminal defendants is hedged about with restrictions and left largely to the discretion of the court. For instance, in Missouri:

No disclosure shall be made of the deliberations of the Grand Jury nor of any opinion, statement or vote of any grand juror. Stenographers' transcripts or clerks' minutes showing testimony of witnesses appearing before the Grand Jury may be made available to the Attorney General, prosecuting attorneys, circuit attorneys and their assistants for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the Grand Jury only when so directed by the court, upon a finding of necessity to meet the ends of justice, preliminary to or in connection with a judicial

by himself or any other grand juror regarding such question. Ariz. R. Crim. P. § 106; Fla. Stat. Ann. § 905.25 (1944); Kan. Gen. Stat. Ann. § 62-924 (1949); Mich. Stat. Ann. § 28.959 (1954); Mo. Rev. Stat. § 540.310 (1959); Ohio Rev. Code § 2939.19 (Baldwin 1958); Wash. Rev. Code § 10.28.100 (1956); Wis. Stat. Ann. § 255.20 (1957); Wyo. Stat. Ann. § 7-111 (1957). The Missouri Supreme Court speaks for many jurisdictions when it states that although the grand jury secrecy rules have been,

relaxed at least as to pertinent parts of the evidence of witnesses endorsed on indictments, taken down by an authorized stenographer, our conclusion is that it is the intent of our statutes to keep secret the proceedings of the grand jury concerning which the grand jurors are specifically prohibited from testifying and that transcripts, notes and minutes cannot be used to disclose such matters.

State ex rel. Clagett v. James, 327 S.W.2d 278, 284 (Mo. 1959).

14. Alaska Comp. Laws Ann. § 66-8-36 (1949); Ark. Stat. Ann. § 43-931 (1947); Cal. Pen. Code § 924.3 (Deering 1959); Idaho Code Ann. § 19-1113 (1948); Ind. Ann. Stat. § 9-818 (1956); Iowa Code Ann. § 771.25 (1950); Ky. Crim. Code § 114 (Carroll 1927); Minn. Stat. Ann. § 628.66 (1947); Mont. Rev. Codes Ann. § 94.6326 (1947); Nev. Rev. Stat. § 172.340 (1959); N.M. Stat. Ann. § 41-5-31 (1953); N.Y. Code Crim. Proc. § 267; N.D. Cent. Code § 29-10-31 (1960); Okla. Stat. Ann. tit. 22, § 343 (1937); Ore. Rev. Stat. § 132.210 (1959); S.D. Code § 34.1227 (Supp. 1960); Utah Code Ann. § 77-19-11 (1953).

15. Cal. Pen. Code § 938.1 (Deering 1959); Iowa Code Ann. § 772.4 (1950); Ky. Crim. Code § 110 (Carroll 1927).

16. Iowa Code Ann. § 772.4 (1950).

proceeding either civil or criminal or when permitted by the court upon a particularized showing by the defendant that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury. Disclosure shall not be permitted by inspection of transcripts of testimony for purposes of discovery or as a substitute for taking depositions of witnesses endorsed on an indictment and no inspection of clerk's minutes shall be permitted.¹⁷

C. Oaths of Witnesses and Grand Jurors

Where there has been a relaxation of the strict rule of secrecy of grand jury minutes, it has normally come about through interpretation of a statute which binds a *witness* to secrecy as to his testimony before the grand jury "unless lawfully required to testify in relation thereto."¹⁸ Judicial interpretation of this latter phrase has placed disclosure of grand jury minutes within the sound discretion of the trial court.¹⁹ One group of jurisdictions prescribes an oath for grand jury witnesses, the secrecy portion of which is very similar to that required in Arizona:

You will keep your own counsel and that of your fellows and of the state and will not, except when required or permitted in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor will you disclose anything which you or any other grand juror may have said, or how you or any other grand juror may have voted on any matter before you.²⁰

Others follow a pattern similar to that of Florida²¹ or Missouri.²²

17. Mo. R. Crim. P. 24.24. This court rule was formulated in the decision in *State ex rel. Clagett v. James*, 327 S.W.2d 278 (Mo. 1959). Similar statutory provisions may be found in Mich. Stat. Ann. § 28.946(1) (1954) and Utah Code Ann. § 77-19-9 (1953).

18. E.g., Mo. Rev. Stat. § 540.110 (1959) (oath of witness).

19. *State v. Pierson*, 343 Mo. 841, 123 S.W.2d 149 (1938); *State v. Lack*, 118 Utah 128, 221 P.2d 852 (1950); *State v. Goyet*, 119 Vt. 167, 122 A.2d 862 (1956).

20. Ariz. R. Crim. P. § 91. See Cal. Pen. Code § 911 (Deering 1959); Idaho Code Ann. §§ 19-1011-1012 (1948); Nev. Rev. Stat. §§ 172.140-150 (1959); N.D. Cent. Code § 29-10-14 (1960); Okla. Stat. Ann. tit. 22, §§ 324-25 (1937); S.D. Code §§ 34.1210-11 (Supp. 1960); Utah Code Ann. §§ 77-18-4, 77-18-5 (1953).

21. "[T]he counsel of the State of Florida, your fellows and your own, you shall keep secret, unless required to disclose the same by some competent court." Fla. Stat. Ann. § 905.10 (1944). See Ga. Code Ann. § 59-208 (1949); Neb. Rev. Stat. §§ 29-1404-1405 (1956); Ohio Rev. Code § 2939.06 (Baldwin 1958); Tex. Code Crim. Proc. art. 365 (1954); Wyo. Stat. Ann. §§ 7-101-102 (1957).

22. Mo. Rev. Stat. § 540.080 (1959). See Ala. Code Ann. tit. 30, § 73 (1958); Alaska Comp. Laws Ann. § 66-8-3 (1949), Colo. Rev. Stat. Ann. § 78-6-5 (1953); Conn. Gen. Stat. § 1-25 (1958); Ind. Ann. Stat. § 9-807 (1956); La. Rev. Stat.

A fourth group of jurisdictions prescribes an oath that does not mention a requirement of secrecy at all.²³

II. JUDICIAL INTERPRETATION

With such a complex maze of statutory mandates concerning disclosure of grand jury minutes and testimony of witnesses and grand jurors, it is not surprising that an equally complex mass of ambiguous judicial decisions has grown up from these statutes, particularly in view of the fact that the great majority of jurisdictions allows the trial judge rather broad discretion in granting or denying motions to inspect made by criminal defendants. It will be noted, however, that certain patterns begin to emerge upon close scrutiny of the case law and that when a trial judge grants or denies a motion to inspect, an appellate court will be loath to upset his decision if it falls within the pattern observed in that state, even though the language of many decisions does not always seem to indicate that the patterns have been recognized or defined. Appellate review of the question normally arises in one of two ways: (1) normal appeal by a criminal defendant upon conviction when one of the assignments of error is the refusal of the trial court to grant inspection of the grand jury minutes for one purpose or another; and (2) writ of prohibition initiated by prosecutors in response to the granting of the minutes to a criminal defendant. The *mode* of appeal, however, has had no discernable effect on the tenor of the decisions.

In general, the factors which guide the trial judge in granting or denying motions to inspect the grand jury testimony are: (1) the purpose of the request; (2) the crime with which the accused is charged; and (3) the stage of the proceedings at which the request is made. These factors, however, do not operate independently, and it may often be that the time element will be important only when the request is made for a given purpose or purposes.

§ 15.204 (1950); Me. Rev. Stat. Ann. ch. 148, § 2 (1954); Mass. Ann. Laws ch. 277, § 5 (1956); Mich. Stat. Ann. § 28.949 (1954); Minn. Stat. Ann. § 358.07 (1957); Miss. Code Ann. § 1780 (1942); N.H. Rev. Stat. Ann. § 600.3 (1955); N.J. Rev. Stat. § 2A-73-3 (Supp. 1960); N.Y. Code Crim. Proc. §§ 245-46; N.C. Gen. Stat. § 11-11 (1953); Ore. Rev. Stat. § 132.060 (1959); R.I. Gen. Laws Ann. § 9-10-20 (1956); Tenn. Code Ann. §§ 40-1508-1509 (1955); Vt. Stat. Ann. tit. 12, § 5802 (1958); Wash. Rev. Code § 10.28.050 (1956); Wis. Stat. Ann. § 255.11 (1957).

23. See Ark. Stat. Ann. § 43-904 (1947); Del. Code Ann. tit. 10, § 4518 (1953); Ill. Ann. Stat. ch. 78, § 18 (Smith-Hurd 1935); Iowa Code Ann. §§ 770.13-.14 (1946); Kan. Gen. Stat. Ann. §§ 62-905-906 (1949); Ky. Rev. Stat. Ann. § 29.225 (1955); Mont. Rev. Codes Ann. § 94.6312 (1947); N.M. Stat. Ann. §§ 41-5-9-10 (1953); Va. Code Ann. § 19-127 (1950); W. Va. Code Ann. § 5290 (1955).

A. *Inspection for Purpose of Impeachment of Prosecution Witnesses*

It is a universally accepted rule of evidence that when a witness has testified to a material issue in the case, his testimony may be impeached by showing that he has previously made statements, whether under oath or not, which are inconsistent with his present testimony.²⁴ Thus, if a criminal defendant can show that the present testimony of a prosecution witness is inconsistent with that given by him before the grand jury, he may be well on the way to acquittal.

The vast majority of jurisdictions grant to a criminal defendant the right to inspect relevant portions of the grand jury transcript for impeachment purposes, but limit and restrict the privilege severely as to the time of the grant and the portion of the minutes which are to be made available.²⁵ The Florida case of *Minton v. State*²⁶ is typical of the majority view on this question. There, in a prosecution for violation of gambling laws, a denial of defendant's motion to inspect the grand jury minutes for impeachment purposes was affirmed on appeal, when the request was made *during* trial, but without a preliminary showing by defendant of possible inconsistency. The court indicated that the accused would be entitled to inspect the grand jury testimony of a prosecution witness when a proper showing is made in order to lay the foundation for impeachment of such witness' direct testimony given at the trial, but that mere surmise or speculation that a witness' testimony at the trial is inconsistent with that given before the grand jury will not suffice. Upon a proper preliminary allegation of inconsistency, the trial judge would make an *in camera* inspection of the minutes to search for inconsistencies and give to defendant those portions which seem inconsistent to the trial judge. The court apparently predicated its approval of this screening process by the trial judge upon an earlier Florida decision, *Vann v. State*,²⁷ where this procedure was used, following the lead of

24. *Missouri Pacific Trans. Co. v. Norwood*, 192 Ark. 170, 90 S.W.2d 480 (1936); See Dec. Dig. Witnesses 347.

25. E.g., *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397 (4th Cir. 1958); *Parr v. United States*, 265 F.2d 894, 902 (5th Cir. 1959); *United States v. Alu*, 246 F.2d 29 (2d Cir. 1957); *United States v. Rose*, 215 F.2d 617, 629-30 (3d Cir. 1954); *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951); *United States v. General Motors Corp.*, 15 F.R.D. 486 (D.C. Del. 1954); *Minton v. State*, 113 So. 2d 361 (Fla. 1959); *Trafficante v. State*, 92 So. 2d 811 (Fla. 1957); *Vann v. State*, 85 So. 2d 133 (Fla. 1956); *People v. Harrison*, 317 Ill. App. 460, 46 N.E.2d 103, *aff'd*, 384 Ill. 201, 51 N.E.2d 172 (1943) (*dictum*); *State v. Mucci*, 25 N.J. 423, 136 A.2d 761 (1957); *State v. Harries*, 118 Utah 260, 221 P.2d 605 (1950) (overruled and extended by *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959) which held right of inspection exists both before and during trial).

26. 113 So. 2d 361 (Fla. 1959).

27. 85 So. 2d 133 (Fla. 1956).

many federal courts. The procedure used in the second circuit is outlined in *United States v. H.J.K. Theatre Corp.*:

The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant that part of the witness' Grand Jury testimony which contradicts the witness' trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal.²⁸

However, exactly how the defendant is supposed to make a showing of possible inconsistency before having access to the grand jury minutes is not made clear in these cases, and it would seem that such a rule might produce a prolonged and jerky trial if the trial judge, on motion, stops the proceedings after the testimony of each prosecution witness to search the grand jury minutes for inconsistencies.

The federal courts are in line with the prevailing view, being, perhaps, even more strict. In *Pittsburgh Plate Glass Co. v. United States*,²⁹ the Supreme Court upheld the trial court's rejection of the request of certain defendants in an anti-trust prosecution for a transcript of the grand jury testimony of the government's chief prosecuting witness. The request was made *during* the trial, after direct examination of the witness, and after he disclosed that he had testified on the same subject matter before the grand jury. The court here would require the defendant to show a particularized need which outweighs the traditional policy of secrecy. The court, however, pointed out that a trial judge *does* have discretion to grant minutes during trial for impeachment purposes if an *in camera* inspection is made and the defendant has shown a need for it. The defendants in this case merely contended that they had an absolute right to the minutes, since they dealt with the subject matter of the case and of the testimony of the state's principal witness. Justice Brennan, in a stinging dissent, joined by three other justices, pointed out that once the trial is under way, the reasons for secrecy disappear and the defendants, as a matter of basic fairness, should be allowed to determine whether or not the grand jury transcript contains inconsistent statements. The supreme court of New Mexico, in commenting on this case said:

It is most difficult to understand how a defendant, who has never had access to testimony before a grand jury, can show a particularized need for such testimony, for it can only be after seeing the same that it can be determined whether there is a conflict. If the defendant has a right at all to see the grand jury

28. 236 F.2d 502, 507 (2d Cir. 1956).

29. 360 U.S. 395 (1959).

testimony of a witness who is in the process of testifying at the trial, he should certainly have the right to make his own determination whether the prior testimony was conflicting or impeachable. This, of course, should be limited to the witness' testimony as to the specific offense, and should not be construed as granting to the defendant the right to examine all the grand jury testimony, and it is for this reason that the inspection of the trial judge may become necessary.³⁰

Even though a denial of the transcript to a defendant is usually justified in terms of a particularized need not having been shown, some other factual limitation is normally present which militates against the request, usually that the request was made before trial,³¹ which, as a practical matter, makes it impossible for a defendant to show a particularized need, since he can not yet know to what the prosecution witnesses will testify. Yet, many still feel that the defendant already has enough advantage in a criminal trial without giving him the grand jury transcript, whether for impeachment purposes or any other. Learned Hand, in a 1923 case,³² aptly expressed this philosophy:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.³³

Thus, beyond the primary limitation that the request must be made *during trial*, the "particularized need" test pointed out in the *Pittsburgh Plate Glass* case becomes, in reality, a rule in which philosophical concepts of justice and fair play are balanced against some

30. *State v. Morgan*, 67 N.M. 287, 289, 354 P.2d 1002, 1005 (1960).

31. See *United States v. Stromberg*, 22 F.R.D. 513, 519 (S.D.N.Y. 1957); *Minton v. State*, 113 So. 2d 361 (Fla. 1959); *Commonwealth v. Ries*, 337 Mass. 565, 150 N.E.2d 527 (1958); *Hanes v. State*, 341 S.W.2d 428 (Tex. Crim. 1960); *State v. Harries*, 118 Utah 260, 221 P.2d 605 (1950); *State v. Goyet*, 119 Vt. 167, 122 A.2d 862 (1956).

32. *United States v. Garsson*, 291 Fed. 646 (S.D.N.Y. 1923).

33. *Id.* at 649.

long felt need of the judiciary to maintain the secrecy of grand jury minutes. Even if a court feels that the defendant may have a real need for the transcript in order to show inconsistent statements of a state's witness, this does not mean that the whole transcript will be turned over to him. The minutes are available only as to those witnesses who have testified at the trial and will not be granted simply to aid defense counsel in cross-examination of other prosecution witnesses.³⁴ Further, where inspection for impeachment is allowed, defendant is entitled to see only the relevant parts of the testimony, and the determination of relevancy is normally made by the trial judge in a screening procedure.³⁵ Finally, unless the testimony sought to be impeached is material to the issues of the case, a trial judge is justified in denying an inspection of the minutes.³⁶

But the guiding criteria in granting grand jury minutes for impeachment purposes are by no means uniform, and there are signs that the heretofore impregnable barrier to pretrial inspection of the minutes is softening, due in part, perhaps, to increasingly liberal rules of discovery. A 1959 Utah decision, *State v. Faux*,³⁷ stands out as representing a distinct break from the traditional holdings and a sizable step toward a more liberalized concept of discovery in criminal cases. This case involved a city commissioner of Salt Lake City who had been indicted by a grand jury for misconduct in office. Defendant requested, and obtained, *prior* to trial, for impeachment purposes, the transcript of the grand jury witnesses who were listed on the indictment. The district attorney obtained an alternative writ of prohibition and, upon seeking an order from the Utah Supreme Court to make the order permanent, the writ was recalled, the court holding that defendant was not required to wait until the prosecution witnesses had testified at the trial before obtaining a transcript of their testimony for impeachment purposes.³⁸ As in most states, the Utah statute provides for release of grand jury minutes *during* trial when the question of inconsistency arises but is silent as to *pre-trial* in-

34. *State v. Hayes*, 127 Conn. 543, 579-80, 18 A.2d 895, 914 (1941); *Richards v. State*, 144 Fla. 177, 197 So. 772 (1940).

35. *United States v. Zborowski*, 271 F.2d 661 (2d Cir. 1959); *State v. Hayes*, *supra* note 34 at 579-80, 18 A.2d at 914; *Trafficante v. State*, 92 So. 2d 811 (Fla. 1957); *Vann v. State*, 85 So. 2d 133 (Fla. 1956); *People v. Dales*, 309 N.Y. 97, 127 N.E.2d 829 (1955); *State v. Harries*, 118 Utah 260, 221 P.2d 605, 614-15 (1950); *State v. Ingels*, 4 Wash. 2d 676, 104 P.2d 944, 954 (1940).

36. *Arnold v. State*, 179 Ark. 1066, 20 S.W.2d 189 (1929) (alleged inconsistency was immaterial to issues of case in murder prosecution and establishment of *contra-fact* would not have changed the result); *Nisbet v. State*, 336 S.W.2d 142 (Tex. Crim. 1959).

37. 9 Utah 2d 350, 345 P.2d 186 (1959).

38. *Ibid.*

spection.³⁹ The court recognized that grand jury proceedings have historically been kept secret and that it was proceeding in opposition to the decided weight of authority. But, upon the assumption that old law is not necessarily good law, it overruled its former holding on this question⁴⁰ and emphatically established the defendant's right to pre-trial inspection of grand jury minutes for impeachment purposes. The court outlined the traditional reasons given by most courts for preserving the secrecy of grand jury minutes,⁴¹ such as the prevention of the flight of suspects, prevention of tampering with the grand jury and the avoidance of fabricated, perjured defenses. But it was noted, quite logically, that after arrest of the accused, the reasons for secrecy have largely been spent, and that withholding grand jury transcripts will not prevent the fabrication of perjured defenses by unscrupulous defense counsel, since to one who is willing to engage in such unlawful defense techniques, the time element will make no difference. The court also quickly pointed out how the rule in the majority jurisdictions, requiring inspection on motion of the minutes for possible inconsistencies *after* the testimony of each prosecution witness, is a cumbersome proposition:

It should require no elaboration to demonstrate how cumbersome and difficult it would be to compel counsel to wait until each witness had testified upon direct examination, then procure the transcript pursuant to the order authorized by the statute, and thereafter determine whether impeachment should be pursued. It is obvious, of course, that the defense cannot know whether the prior testimony of the witness was inconsistent with the testimony given at the trial unless he knows what the testimony before the Grand Jury was. It is quite unlikely that a witness would voluntarily reveal that he had previously testified differently. To give the defendant the theoretical right to use the transcript to impeach the witnesses and then make it so difficult to use as to be ineffectual would be but an empty delusion, unworthy of our standards of fairness to both sides in such a trial.⁴²

The court also exposed a procedural inequity which seems to have gone unnoticed by other courts in passing on this question. Where one is charged by the usual method of filing a complaint, he is entitled to a preliminary hearing which affords him an opportunity to know that to which the witnesses against him will testify. But where one is indicted by a grand jury, he is not afforded a similar privilege.

39. Utah Code Ann. § 77-19-10 (1953).

40. *State v. Harries*, 118 Utah 260, 221 P.2d 605 (1950), where the court held that the trial judge had committed no error in *not* furnishing defendant with the grand jury transcript before trial for impeachment purposes.

41. *State v. Faux*, 9 Utah 2d 350, 353, 345 P.2d 186, 187. See text accompanying note 3 *supra*.

42. *Id.* at 353-54, 345 P.2d at 188.

Why should the form of the accusation control the accused's rights to know the nature of the testimony which is to be used against him?

Even though this court was willing to grant pre-trial inspection for impeachment purposes, it indicated that the privilege is to be restricted to only those parts of the transcript which are relevant and in which some material inconsistency in testimony is found.⁴³ Further, there is no court, including the court in the instant case, which will permit the release of the deliberations or votes of the grand jurors, such matters normally being specifically protected by statute.⁴⁴

B. Inspection for Purposes of Trial Preparation

If it appears to the trial judge that the defendant's request is not motivated by a search for *specific* impeaching material, and if the trial is not one for perjury before the grand jury, the courts are in almost unanimous agreement that a defendant may not have access to the grand jury testimony for use in preparing his defense, or as a substitute for discovery techniques.⁴⁵ Further, it apparently makes no difference whether the request is made before or during trial,⁴⁶ since the "particularized need" test assumes much greater proportions in a request of this kind. This specificity requirement has found particular favor in the federal courts.⁴⁷ The need which necessitates inspection must be compelling and specific, not a mere "fishing" expedition, and the showing of that need must be sound. Yet most

43. *Id.* at 356, 345 P.2d at 187.

44. See authorities cited note 13 *supra*.

45. *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960); *United States v. Rose*, 113 F. Supp. 775 (M.D. Pa. 1953); *United States v. Oley*, 21 F. Supp. 281 (E.D.N.Y. 1937) (dictum); *State v. Hayes*, 127 Conn. 543, 18 A.2d 895 (1941); *Commonwealth v. Galvin*, 323 Mass. 205, 80 N.E.2d 825 (1948); *State v. McDonald*, 342 Mo. 998, 119 S.W.2d 286 (1938); *Conway v. Quinn*, 168 S.W.2d 445 (Mo. Ct. App. 1942); *People v. McOmber*, 206 Misc. 465, 133 N.Y.S.2d 407 (1954); *People v. McCarthy*, 188 Misc. 132, 67 N.Y.S.2d 560 (1947); *In re Martin*, 170 Misc. 919, 11 N.Y.S.2d 607 (1939); *People v. Mitchell*, 140 Misc. 869, 251 N.Y. Supp. 716 (1931); *State v. Selby*, 126 N.E.2d 606, 607 (Ohio Com. Pl. 1955); *State v. Rhoads*, 81 Ohio St. 397, 91 N.E. 186 (1910); *State v. Harries*, 118 Utah 260, 221 P.2d 605 (1950); *State v. Krause*, 260 Wis. 313, 50 N.W.2d 439 (1951); *Steensland v. Hoppmann*, 213 Wis. 593, 252 N.W. 146 (1934); *Havenor v. State*, 125 Wis. 444, 104 N.W. 116 (1905); cf. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958); 23 C.J.S. Criminal Law § 956 (1961); 14 Am. Jur. Criminal Law § 210 (1938).

46. *Commonwealth v. Gedziun*, 261 Mass. 299, 159 N.E. 51 (1927).

47. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Killian*, 275 F.2d 561 (7th Cir. 1960); *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960).

of these same courts have evolved an exception to this doctrine (or specific statutory authority exists) whereby one accused of perjury or subornation of perjury allegedly committed before a grand jury has the right to inspect, in advance of trial, the transcript of testimony given before the grand jury on which the perjury charge is based, in order to prepare his defense.⁴⁸ This is a rule of basic fairness, for aside from the fact that most persons would not remember their word-for-word testimony before a grand jury, it is entirely possible that a given statement might take on a wholly different meaning when lifted from the context of the full testimony before the grand jury than when viewed in that context.⁴⁹ Then, too, the traditional taboos against lifting the veil of grand jury secrecy are said not to be violated, since all the defendant desires is a transcript of his *own* testimony.⁵⁰

One of the leading cases on this question is *United States v. Remington*,⁵¹ in which the defendant was tried and convicted of perjuring himself before a grand jury for testifying that he had never been a member of the Communist Party. The trial court refused to permit defendant to inspect his own grand jury testimony. The second circuit court of appeals, in reversing the conviction, said:

The court denied the defendant's motion to inspect the minutes of his own testimony before the grand jury. We think inspection before trial should have been allowed. As already stated, the essential issue in perjury is whether the accused's oath truly spoke his belief; all else is contributory to that issue. In deciding it the jury was entitled to know, and the accused was entitled to show, what had gone before the critical question and answer,

48. *United States v. Zborowski*, 271 F.2d 661 (2d Cir. 1959) (held reversible error for trial judge to deny motion of defendant charged with perjury before the grand jury to inspect that part of the transcript which contained the testimony of the government's principal witness. Apparently the federal rule is not settled where impeachment is concerned. There is a requirement of a showing of good cause in non-perjury prosecutions before a trial judge may grant the grand jury minutes to a defendant for impeachment purposes (*Pittsburgh Plate Glass v. United States*, supra note 47), but the minutes are readily available to a defendant in a perjury prosecution where he seeks to impeach the government's witnesses.) *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954); *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951); *Gordon v. State*, 104 So. 2d 524, 537 (Fla. 1958); *State v. Ingels*, 4 Wash. 2d 676, 104 P.2d 944 (1940) (defendant given only part of his testimony alleged to be false); see *State v. Brinkley*, 354 Mo. 337, 189 S.W.2d 314 (1945).

49. In *Fotie v. United States*, 137 F.2d 831, 842 (8th Cir. 1943), it was said: "A charge of perjury may not be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different from that which its context clearly shows."

50. *United States v. Rose*, 215 F.2d 617, 630 (3d Cir. 1954).

51. 191 F.2d 246 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952).

since this might throw light on how he understood the question and what he meant by his answer. For example, if he had previously testified that he never had a Party card, that might indicate that he believed that without a card he could not be a member. His memory of what he said is no adequate substitute for the minutes themselves. It is one thing to deny the defense access to grand jury minutes which it intends to use for the relatively negative purpose of impeaching a witness; it is quite a different thing to deny an accused access to the minutes of his own testimony which may afford him an affirmative defense.⁵²

Whether one agrees that it is a good policy to grant the grand jury minutes to one accused of perjury or not, the fact remains that the courts have not confined themselves in these cases to merely granting the testimony of the *defendant* before the grand jury. A recent New Jersey case, *State v. Moffa*,⁵³ involving a prosecution for perjury and subornation of perjury, evidently ignored the general prohibition against releasing more testimony than that of the defendant himself, and granted, *before* trial, the testimony of the state's principal witness for *impeachment* purposes, citing the earlier New Jersey case of *State v. Mucci*⁵⁴ as authority. But the court failed to note that in the *Mucci* case the minutes were requested *during* the actual trial and after it was disclosed that the state's witnesses had been provided with their own grand jury testimony before trial for purposes of refreshing their recollection. The court in *Moffa* also cited *United States v. Remington*⁵⁵ as authority for the proposition that the federal courts have decided that testimony of a defendant before a grand jury is available to him in the preparation of his defense,⁵⁶ but it failed to note that the *Remington* decision is not concerned with the release of the minutes for *impeachment* purposes and expressly limits the release of grand jury testimony to the relevant segments of the defendant's testimony upon which a charge of perjury is based.

The present position of the federal courts in granting grand jury transcripts for *impeachment* purposes during a *perjury* trial is not clear. In *United States v. Zborowski*,⁵⁷ the Second Circuit Court of Appeals reversed a conviction for perjury allegedly committed before the grand jury, where the trial judge, during trial, failed to grant to defendant for impeachment purposes the grand jury testimony of the state's principal witness. Evidently, defendant's request for a transcript, without any showing of particularized need or any preliminary showing of possible inconsistency, should have placed the

52. *Id.* at 250.

53. 64 N.J. Super. 69, 165 A.2d 219 (1960).

54. 25 N.J. 423, 136 A.2d 761 (1957).

55. 191 F.2d 246 (2d Cir. 1951).

56. *State v. Moffa*, 64 N.J. Super. 69, 74, 165 A.2d 219 (1960).

57. 271 F.2d 661 (2d Cir. 1959).

trial judge under a duty to inspect the minutes for possible inconsistencies, which he refused to do. The court said: "It offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the trial judge."⁵⁸ This court did not make it clear whether the transcript should have been granted because the defendant was on trial for perjury or because the testimony sought to be impeached was that of the state's principal witness. At any rate, there is a substantial doubt that this case would now represent the federal rule, in view of the *Pittsburgh Plate Glass* case discussed earlier.⁵⁹ It is certain that a federal court under the *Pittsburgh Plate Glass* case would require some showing of particularized need or possible inconsistency, but whether such a requirement would be eased in a perjury prosecution is an open question.

C. Pre-Trial Inspection Upon Allegation by Defendant of Insufficient Evidence to Support the Indictment

It is an almost universal rule that a trial court may refuse to grant the grand jury transcript to a defendant upon his allegation that the indictment is based on insufficient evidence.⁶⁰ This is due primarily to the presumption that the grand jury acted on sufficient evidence, and the only question is whether the grand jury had before it any evidence at all.⁶¹ It is difficult to find fault with the majority position on this issue, since to grant the minutes in such a situation would, in effect, put the trial judge in the position of passing on the sufficiency of evidence which he did not hear and would result in trying the accused before the grand jury. Missouri, on the other hand, makes a distinction between "insufficient evidence" and "no legal evidence." In *State v. James*,⁶² a motion to inspect the minutes was denied on a plea of insufficient evidence, but granted on a plea of no legal evidence, even without a showing of facts substantiating the latter

58. Id. at 666.

59. See text accompanying note 29 supra.

60. *United States v. Herzig*, 26 F.2d 487, 488 (S.D.N.Y. 1928); *Kastel v. United States*, 23 F.2d 156, (2d Cir. 1927); *United States v. Foster*, 80 F. Supp. 479 (S.D.N.Y. 1948); *United States v. Oley*, 21 F. Supp. 281 (E.D.N.Y. 1937); *United States v. Lydecker*, 275 Fed. 976 (W.D.N.Y. 1921); *State v. Shawley*, 334 Mo. 352, 67 S.W.2d 74, 82 (1933); *State v. Grady*, 84 Mo. 220, 224 (1884); *State v. Reyes*, 209 Ore. 595, 308 P.2d 182 (1957) (defendant not allowed minutes at end of trial to show insufficient evidence before grand jury to warrant indictment as ground for motion to quash); *Broadhurst v. State*, 184 Ore. 178, 196 P.2d 407 (1948), cert. denied, 337 U.S. 906 (1949).

61. Ibid.

62. 327 S.W.2d 278 (Mo. 1959).

plea. Although the granting of the minutes may be justified where there is no legal evidence on which to base it, such as where the testimony was entirely hearsay, it is submitted that the form of the allegation of the defendant in his motion to inspect should not control. The position of the court in the *James* case apparently overrules a 1956 Missouri decision, *State v. McQueen*,⁶³ which required a preliminary showing of facts substantiating the allegation of no legal evidence before the minutes could be granted.

The rule in New York appears to be a little more liberal. There, the grand jury transcript may be granted when it is sought in order to enable the accused to move to dismiss the indictment.⁶⁴ But there exist requirements of good faith and some reasonable ground to believe that the indictment may be quashed.⁶⁵ Evidently, all the defendant need do in moving for inspection of the minutes is to plead good faith and allege that the indictment is based on insufficient or incompetent testimony. The court would then examine the minutes, and, if it determines that such evidence in fact formed the basis for the indictment, would turn them over to defendant to use as a basis for a motion to dismiss the indictment.⁶⁶

D. Inspection of Transcript Where Used by Prosecution to Refresh Recollection

The courts have generally been willing to grant relevant portions of the grand jury transcript to the defendant when the prosecution, either before or during trial, has used it to refresh the recollection of a state witness or for cross-examination of the defendant.⁶⁷ The rationale is similar to that given when granting minutes to persons accused of perjury before the grand jury; that is, the selective use of testimony from the grand jury record is often misleading when taken out of context. Also, many states have statutes which provide, in effect, that whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question must be put to the witness concerning a writing until it has been shown to him.⁶⁸ The

63. 296 S.W.2d 85 (Mo. 1956).

64. *People v. Bareika*, 9 App. Div. 2d 1002, 195 N.Y.S.2d 97 (1959).

65. *People v. Carver*, 173 Misc. 71, 17 N.Y.S.2d 81 (1940).

66. *Ibid.*

67. *People v. Stevenson*, 103 Cal. App. 82, 284 Pac. 487 (1930); *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960); *State v. Mucci*, 25 N.J. 423, 136 A.2d 761 (1957); *People v. Dales*, 309 N.Y. 97, 127 N.E.2d 829 (1955); *People v. Miller*, 257 N.Y. 54, 177 N.E. 306 (1931); *People v. Nicoll*, 3 App. Div. 2d 64, 158 N.Y.S. 2d 279 (1956).

68. See, e.g., Cal. Code of Civ. Proc. § 2054 (Deering 1955).

rule applies with equal force where the grand jury minutes are used by the prosecutor to impeach his *own* witness.⁶⁹

The California decision of *People v. Stevenson*⁷⁰ is illustrative of this policy. There the prosecutor had used the grand jury transcript in his questioning of various witnesses and had read into evidence excerpts from it. Even though no indictment was returned against the defendant, the transcript contained evidence received by the grand jury during its investigation of the charge against him, which eventually resulted in the filing of the information against the defendant by the district attorney. In reversing the conviction for the trial court's failure to grant the transcript to defendant, the court indicated that:

Both the law and common fairness to the defendant—and the former should always include the latter—required that the defendant be accorded an opportunity to examine and, if he was so advised, to make use of the document as to which the state had examined these witnesses. . . . Were the rule otherwise it might easily be possible for the party having such document in his possession to select, call the witness' attention to and read before the court or jury portions of the testimony at the former hearing which seemingly contradicted the testimony of the witness given in the pending proceeding, without the adverse party having any opportunity to discover other statements in the transcript which might explain the apparent discrepancy.⁷¹

But this reasoning loses much of its force when the transcript is not read into evidence nor used at the trial to refresh the recollection of the witnesses, but is merely given to the prosecution witnesses *before* trial to refresh their recollection, as it was in the case in *State v. Mucci*.⁷² This court held that where the state's witnesses were together in the county prosecutor's office in the courthouse on the morning of the trial and were provided by the county detective with a transcript of their testimony given to the grand jury some two years before and the witnesses severally read and then discussed such testimony, and the witnesses, with their recollections so refreshed, thereafter testified, there was prejudicial and reversible error in the refusal to allow defendant to inspect the testimony given to the grand jury and to use it in cross-examination of the witnesses. The state contended that since the witnesses had not refreshed their respective recollections while on the stand but had testified from their independent memories, defendant had no right to the minutes. The state's

69. *People v. Kraus*, 377 Ill. 539, 37 N.E.2d 182 (1941).

70. 103 Cal. App. 82, 284 Pac. 487 (1930).

71. *Id.* at 88, 284 Pac. at 490.

72. 25 N.J. 423, 136 A.2d 761 (1957).

contention was well supported by case law,⁷³ but no case cited by counsel involved an out-of-court refreshing of recollection which was immediately prior to the trial, as was the situation here. On this basis, the court concluded that furnishing the minutes to the state's witnesses immediately prior to trial was tantamount to the same use during the trial, so that the witnesses were not, in reality, testifying from their own memory but from the grand jury transcript, which they had, in effect, just memorized. The court did not mention the traditional policy of grand jury secrecy and did not indicate what portions of the transcript would be made available to the defendant.

CONCLUSION

Although the traditional policy of grand jury secrecy still holds sway in the courts, there is an increasingly liberal attitude toward furnishing criminal defendants with grand jury transcripts. One may safely predict that in most jurisdictions a defendant will be granted relevant and material portions of the testimony of state witnesses for impeachment purposes when the motion is made after the direct testimony of the witness and when there is some preliminary showing of inconsistency. Criminal defendants are also certain to be granted their own grand jury testimony when they face trial on a charge of perjury before the grand jury because of such testimony. There is, however, no satisfactory answer when a request for grand jury minutes is made for impeachment purposes during a trial for perjury committed before the grand jury. The courts are demonstrably more liberal in granting the minutes when this situation arises and require less of a prior showing of possible inconsistency before the minutes will be released but, as yet, no generalized rule can be formulated.

This liberalization of disclosure has not yet gone so far that a defendant may secure the minutes as an aid in preparing his defense, and it is doubtful whether the courts will ever be prepared to go this far, particularly in view of the extensive discovery tools available in almost every state and in the federal courts.

Finally, due to the inherent dangers of taking statements out of context, a criminal defendant may depend on a limited disclosure of grand jury minutes when the prosecutor, in impeaching defense witnesses, reads pertinent parts of the transcript into the record or uses the transcript as a basis for formulating questions propounded to his own or to defense witnesses.

73. *Lennon v. United States*, 20 F.2d 490 (8th Cir. 1927); *State v. Kwiatkowski*, 83 N.J.L. 650, 85 Atl. 209 (1912); *State v. Magers*, 36 Ore. 38, 58 Pac. 892 (1899); *State v. Paschall*, 182 Wash. 304, 47 P.2d 15 (1935).

Perhaps the most significant trend emerging in this field is the dissatisfaction with the rule which restricts disclosure of grand jury minutes to those cases where the witness whose testimony is sought to be impeached has already testified and defendant has made some preliminary showing of inconsistency. It has often been pointed out quite forcefully that once the defendant has been arrested and the grand jury discharged, most of the reasons for grand jury secrecy have disappeared, and that it is manifestly unfair to require a defendant to wait until after the direct testimony of the witness before granting him impeachment material. Grand jury secrecy is no less impaired by disclosure of the minutes during trial than it is before trial, and it is submitted that pre-trial disclosure for impeachment purposes could be profitably permitted by the courts without disturbing the sanctity of the grand jury and without giving to defendant any undue advantage not already possessed by the prosecutor.