

Alabama Rules of Criminal Procedure

Rule 12. Selection of venire; the grand jury and petit jury panels.

Rule 12.6. Persons authorized to be present during sessions of grand jury.

No person other than the grand jurors, the witnesses under examination, the district attorneys or assistant district attorneys, or others authorized by law to present evidence to the grand jury, a grand jury reporter or stenographer, and an interpreter, if any, shall be present during sessions of the grand jury; provided, however, that this rule shall not be construed as prohibiting the use of sound recording devices by the district attorney while witnesses are giving their testimony before the grand jury. No person other than the grand jurors shall be present during their deliberation and voting.

Committee Comments

Rule 12.6 permits only the witness being examined, the district attorney, assistant district attorneys, and any other person authorized to present evidence, such as the attorney general, the official reporter and an interpreter, if any, to be present in the grand jury room with grand jurors during sessions of the grand jury.

Ala.Code 1975, § 12-16-209, requires that the district attorney be present during the grand jury proceedings when so requested by the grand jury, and allows the district attorney to be present whenever he deems it necessary to examine witnesses, give legal advice, or to present any other information. However, the statute specifically prohibits the presence of the district attorney when the grand jury is deliberating and/or voting. Ala.Code 1975, § 36-15-13, authorizes the attorney general to appear before any grand jury in Alabama.

Local acts may authorize the district attorney to employ all shorthand reporters necessary to properly report the proceedings before the grand jury and to transcribe the same.

It is the duty of the court reporter to attend before the grand jury when required by the prosecutor, for the purpose of taking down and transcribing the testimony of witnesses before that body, to take an oath to faithfully discharge the duties imposed on him, and not to divulge any secrets that may come to his knowledge before the grand jury. *Thayer v. State*, 138 Ala. 39, 35 So. 406, 407 (1902). The presence of the court reporter in the grand jury room during the examination of witnesses is not a ground for a plea in abatement to an indictment, since the Alabama Legislature has authorized such presence. *Smith v. State*, 142 Ala. 14, 39 So. 329 (1904).

Although the presence of a court reporter in the grand jury room during the examination of a witness is not authorized by statute in every circuit, there have been indications that the Alabama Court of Criminal Appeals and the Alabama Supreme Court would not disapprove of the practice in any case. *State ex rel. Baxley v. Strawbridge*, 52 Ala.App. 685, 296 So.2d 779 (1974). Noting that in *Smith v. State*, supra, the Alabama Supreme Court had not condemned transcribing of testimony given before the grand jury, the Court of Criminal Appeals stated, "We fail to see any valid distinction between a process whereunder a reporter takes shorthand notes and transcribes them for the District Attorney and one entailing a direct electronic recording." The Alabama Supreme Court upheld the decision of the Court of Appeals, stating, "Even had a stenographer been present, and retired from the presence of the grand jury before it began its deliberations, no error to reverse would have resulted in the absence of a showing of prejudice to the accused." *In re State ex rel. Baxley v. Strawbridge*, 292 Ala. 506, 507, 296 So.2d 784 (1974).

Rule 12.6 allows an interpreter to be present during sessions of the grand jury when needed. There is no other authority in Alabama for such a rule. The Advisory Committee believes the situation to be sufficiently analogous to the presence of a court reporter to be permissible.

Rule 12.6 does not permit a person under investigation to bring an attorney into the grand jury room. The Supreme Court of the United States said by way of dictum in *In re Groban*, 352 U.S. 330, 333, 77 S.Ct. 510, 513, 1 L.Ed.2d 376 (1957), "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel...." The United States Court of Appeals for the Fifth Circuit recognized that "at this time there is no constitutional right to be represented by counsel while the Grand Jury is deliberating." *Harry v. Beto*, 438 F.2d 116, 117 (5th Cir.1971). The same rule was recognized in *In re Grumbles*, 453 F.2d 119, 122 (3rd Cir.1971), cert. denied, 406 U.S. 932, 92 S.Ct. 1806, 32 L.Ed.2d 134 (1972); *Gollaher v. United States*, 419 F.2d 520, 524 (9th Cir.1969), cert. denied, 396 U.S. 960, 90 S.Ct. 434, 24 L.Ed.2d 424 (1969); *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir.1968), cert. denied, 395 U.S. 958, 89 S.Ct. 2097, 23 L.Ed.2d 744 (1969). Many states do not recognize the right of a witness to be accompanied by counsel while being examined by a grand jury. See, e.g., *State v. Cobbs*, 164 Conn. 402, 324 A.2d 234, 241 (1973); *State v. Cattaneo*, 123 N.J.Super. 167, 302 A.2d 138, cert. denied, 63 N.J. 324, 307 A.2d 97 (1973); *People v. Waters*, 313 N.Y.S.2d 124, 27 N.Y.2d 553, 261 N.E.2d 265, 266 (1970); *Chesley v. State*, 3 Md.App. 588, 240 A.2d 342, 343 (1968); *Maiden v. State*, 84 Nev. 443, 442 P.2d 902, 903 (Nev.1968); *Allred v. State*, 187 So.2d 28 (Miss.1966). See Rule 6(d), Fed.R.Crim.P.

Although the rule excluding unauthorized persons from grand jury sessions is intended to be strictly adhered to, there appears to be no sanction for its violation, absent a showing of prejudice to the accused. Thus, where an

attorney assisted the prosecutor authorized to be present before the grand jury by examining witnesses, there was no ground for quashing the indictment, since it appeared that the unauthorized attorney “gave the jury no counsel, expressed to them no opinion unfavorable to the appellant, did no act affecting their deliberations, [and] the appellant has suffered no injury from his presence in the jury room.” *Blevins v. State*, 68 Ala. 92, 95 (1880). Nor was the indictment invalid where the bailiff was present in the grand jury room, since the bailiff was an officer appointed by the court to wait upon the grand jury and there was no evidence that the bailiff “gave the grand jury any counsel or expressed to them any opinion unfavorable to the defendant or did any act affecting their deliberations,” and he was not present during their deliberations. *Rush v. State*, 253 Ala. 537, 542, 45 So.2d 761 (1950). In *In re State ex rel. Baxley v. Strawbridge*, supra, the Alabama Supreme Court cited 4 A.L.R.2d at p. 395 with approval:

“ ‘The prevailing view, apart from statutes expressly affecting the question, is that the presence of an unauthorized person during grand jury proceedings, is, at most, a mere irregularity, not sufficient to constitute a ground for setting aside the indictment returned by the grand jury, unless prejudice to the accused is shown.’ ”

292 Ala. at 507, 296 So.2d 784.

However, the rule should be strictly adhered to because of strong public policy that grand jury deliberations should be surrounded by secrecy. There are many reasons for this policy. One is to prevent an accused from being afforded an opportunity to escape before an indictment is returned. Another is to protect the grand jury in their deliberations, so that they may freely state their opinions and cast their votes. *Blevins v. State*, supra; *Rush v. State*, supra. In addition, it is desirable to protect the good name of those not indicted, and to keep prosecution witnesses from being harassed or intimidated in order to keep them away from the trial of the indictment before a petit jury. *State ex rel. Baxley v. Strawbridge*, 52 Ala.App. 685, 690, 296 So.2d 779 (1974). Furthermore, if the actions of the grand jury were made public, an accused would be given an opportunity to destroy, remove, or conceal evidence. A potential witness, if embarrassed, frightened or recalcitrant, could become unavailable before being subpoenaed to appear.

The last sentence of Rule 12.6 prohibits any person other than the grand jurors from being present during their deliberation and voting. This is in keeping with Alabama law, Ala.Code 1975, § 12-16-209, which says that even the district attorney cannot be present at the deliberations and voting; Ala.Code 1975, § 12-16-214; cf., *Blevins v. State*, supra; *Rush v. State*, supra. Grand jury secrecy is covered by Ala.Code 1975, §§ 12-16-214 through -226.