

Alabama Rules of Criminal Procedure

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

Rule 12.7. Appearance of persons under investigation.

(a) APPEARANCE. A person under investigation by the grand jury may be compelled to appear before the grand jury, or, upon that person's written request, may be permitted to appear before the grand jury. Unless immunity has been granted to the witness as provided in section (b) hereof, the witness shall be advised that he or she has the right to remain silent, that anything the witness says may be recorded and used against him or her in a court of law, that the witness has the right to consult in private with an attorney outside the grand jury room at reasonable intervals while giving testimony, that, if the witness is unable to employ counsel because of indigency as defined in Rule 6.3(a), the court will appoint an attorney to represent the witness, and that the witness can at any time stop giving testimony and refuse to answer further questions.

(b) IMMUNITY, PRIVILEGE, AND COMPULSION OF TESTIMONY. In any investigation before a grand jury, the court, on written motion of the district attorney may, in writing, order that any material witness be granted immunity from prosecution for the offense or offenses under investigation and any related or lesser included offense or offenses thereof, and, if the witness accepts the immunity agreement, be compelled to testify truthfully as other witnesses. If a witness refuses to accept the immunity agreement, he or she may not be compelled to testify as to matters which might tend to incriminate the witness. In considering whether to grant immunity, the court shall take into consideration the possibility that the testimony of the witness may tend to incriminate him or her for another offense or offenses against the State of Alabama, or for an offense or offenses over which the United States government, or another state or territory of the United States, or a foreign jurisdiction with which the United States has treaties of extradition has jurisdiction. In such case, the court shall grant immunity only if the district attorney has procured binding assurance from the appropriate officials that the witness shall be granted immunity from prosecution for such other offense or offenses and any related or lesser included offenses thereof. Immunity granted by court order pursuant to this rule may be pleaded in bar of any prosecution of the witness for any offense for which immunity was granted.

Committee Comments

Rule 12.7(a) applies only to persons under investigation by the grand jury and does not reach persons not under suspicion and called only as witnesses.

The first sentence provides for compulsory attendance before the grand jury of a person under investigation. Authority for this rule is found in Ala.Code 1975, § 12-16-197, which directs the prosecutor, the foreman of the grand jury, or the clerk of the court to issue subpoenas for any witnesses the grand jury desires to have appear before it, and provides that a proceeding be had against any defaulting witnesses. The proceeding contemplated by the statute is one of contempt. See *Newsum v. State*, 78 Ala. 407 (1885).

Rule 12.7(a) also permits a person under investigation by the grand jury to appear before that body upon written request. The rule is discretionary and is not intended to create an absolute right on the part of a person under investigation to appear before the grand jury. Federal courts have long held that a potential defendant has no absolute right to appear before a grand jury. See, e.g., *Duke v. United States*, 90 F.2d 840, 841 (4th Cir.1937), cert. denied, 302 U.S. 685, 58 S.Ct. 33, 82 L.Ed. 528 (1937); *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 605 (2d Cir.), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944).

There are several states that do not recognize a right on the part of a potential defendant to appear before the grand jury. See, e.g., *State v. Salazar*, 81 N.M. 512, 469 P.2d 157, 158 (N.M.1970); *State v. Panagoulis*, 253 Md. 699, 253 A.2d 877, 883 (1969); *Maiden v. State*, 84 Nev. 443, 442 P.2d 902 (1968); *Allred v. State*, 187 So.2d 28 (Miss.1966); *People v. Dupree*, 156 Cal.App.2d 60, 319 P.2d 39, 42-43 (1957).

However, at least one state does recognize such a right. In *People v. Waters*, 313 N.Y.S.2d 124, 27 N.Y.2d 553, 261 N.E.2d 265, 266 (1970), the court held that a defendant's right to appear before a grand jury, granted by the code of criminal procedure, is a personal right and does not extend to allow an appearance by counsel. Another state, while denying that a right to appear exists, recognizes that a defendant should be allowed the privilege of being present in the grand jury room during the taking of evidence. *State v. Menillo*, 159 Conn. 264, 268 A.2d 667, 672 (1970).

The Advisory Committee is of the opinion that the better practice is to allow the grand jury, in its discretion, to either permit or disallow the person under investigation to appear before the grand jury. As one court stated, "The grand jury has in all ages stood between the accused and his unjust accusers." While there is no right to cross-examine witnesses or to introduce evidence in rebuttal, "one accused of crime may often times, by himself testifying before the grand jury clear up the charges against him so that no indictment is returned." *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir.), cert. denied, 395 U.S. 958, 89 S.Ct. 2097, 23 L.Ed.2d 744 (1968).

A person under investigation is given a right under the rule to consult with an attorney outside the grand jury room as a means of enforcing the right against

self-incrimination. This is the practice in federal courts. See, e.g., *In re Grumbles*, 453 F.2d 119, 120 n. 1 (3d Cir.1971), cert. denied, 406 U.S. 932, 92 S.Ct. 1806, 32 L.Ed.2d 134 (1972); *United States v. Corallo*, 413 F.2d 1306, 1330 (2d Cir.), cert. denied, 396 U.S. 958, 90 S.Ct. 431, 24 L.Ed.2d 422 (1969); *United States v. Leighton*, 265 F.Supp. 27, 38 (S.D.N.Y.1967), and it is anticipated that the procedure will operate in the same way under this rule.

Rule 12.7(b) provides for a grant of immunity by the grand jury to persons under investigation who are called to appear before the grand jury. There are no provisions in Alabama law providing such immunity. Art. 8, § 189, Alabama Constitution of 1901, provides that in investigation and criminal proceedings for violations of the election law no person other than a defendant may refuse to testify on the ground of self-incrimination, but such persons may not be prosecuted for any offense arising out of the transactions concerning which he testified. Ala.Code 1975, § 12-21-223, provides that where two or more persons are jointly indicted, the court may order one party discharged from the indictment in order to testify, but such order "operates as an acquittal of such defendant provided he does testify." Ala.Code 1975, § 28-4-318, provides in the context of investigation of violation of liquor laws that "[a] witness must not be prosecuted for any offense as to which he testifies before the grand jury; and the solicitor or any member of the grand jury may be a witness to prove that fact."

A similar rule is in effect under the federal system. 18 U.S.C. 6002 (1970) provides:

"Immunity generally.

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

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"...and the person presiding over the proceeding communicates to the witness an order issued under this part ..., the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal cases except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The difficult part of a rule granting immunity is the scope of the immunity. On one hand, it is not permissible for the state to coerce testimony under a grant

of immunity which removes the protection of the Fifth Amendment and then use information gained to prosecute for related offenses. On the other hand, a defendant should not be permitted to avoid prosecution by testifying beyond the scope of the immunity granted him. Thus, the scope of the immunity to be granted takes into consideration incrimination for other offenses in Alabama, the United States, other states, and United States territories and foreign jurisdictions with whom the United States has treaties providing for extradition. It should also be clear that a witness who has been called to appear before a grand jury without a grant of immunity may not waive his right to remain silent and still obtain de facto immunity by testifying voluntarily. Likewise, a witness appearing under a specific grant of immunity could not voluntarily give incriminating testimony about offenses beyond the scope of the immunity granted and thereby obtain a de facto extension of the immunity into a broader area than intended by the court.

Because the grant of immunity from prosecution may, in a significant sense, affect the substantive rights of the parties, the issue arises of whether this rule is procedural or substantive in scope. This question seems to be answered in *Ex parte Graddick*, 501 So.2d 444 (Ala.1986), and *Ex parte Gipson*, 375 So.2d 514 (Ala.1979), wherein the court set forth the procedure for granting immunity. Rule 12.7 is patterned after the procedure set out in *Ex parte Graddick*, 501 So.2d 444 (Ala.1986).

See *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).