or give evidence. A witness may be twice found in contempt, and twice jailed, for refusing to answer identical or similar questions before two grand juries investigating the same or related incidents.

Counsel. Lawyer, attorney.

Eighth Amendment. The amendment to the U.S. Constitution that concerns the right to bail and prohibits "cruel and unusual punishment." It reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Electronic Surveillance. More commonly called wiretapping, electronic surveillance is a form of spying on people; for the most part it is forbidden, and when it is permitted it is subject to strict controls. For this reason wiretapping has proved an important area of grand jury litigation. A witness has the right to refuse to answer questions or provide any evidence which is "the fruit" of illegal electronic surveillance. Thus, if a witness provides information alleging that a grand jury subpoena is the result of illegal surveillance of certain telephone numbers, the government must check the records of all agencies involved in the investigation and state under oath whether there was surveillance of those lines.

Exculpatory Evidence. Evidence that would tend to show the innocence of the accused.

Exemplars. Samples of physical evidence, usually not involving information or testimony. Fingerprints, handwriting, hair, and voice samples are the most common kinds of exemplars a grand jury witness may be asked to provide; participation in a physical lineup is another. In theory this kind of evidence is "nontestimonial," so the witness has no Fifth Amendment right to refuse to give it.

Ex Parte. For the benefit of one party (the prosecution or the defense) to the exclusion of—including the challenge by—the other. A prosecutor may respond to a defense attorney's request for particular evidence against a defendant by claiming that it is available but cannot be revealed for "security" reasons. The judge may then grant an *ex parte* session with the prosecutor, so that the evidence is shown only to the judge and not to anyone else, including the defendant and his or her attorney.

False Statement. A statement which is not truthful, but which is not made under oath. It is a crime to make a false statement to a government agent (e.g., telling an FBI agent that you have never seen the person depicted in a photograph shown to you, when in fact you do know the person). The crime of making a false statement has the same five year penalty as the crime of perjury, which involves making a false statement under oath (usually in court). In order to qualify for criminal prosecution as a false statement, the falsity must be knowing and

deliberate, and the statement must be material, i.e., significant to the course of the investigation.

Fifth Amendment. The amendment to the Constitution that contains two provisions of great importance to grand jury witnesses: One requires that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." This means that the grand jury is the only legitimate way to begin criminal proceedings in the federal system. The other pertinent part of the Fifth Amendment, of even greater significance to witnesses, is the phrase that states: "Nor shall [any person] be compelled in any criminal case to be a witness against himself." The Fifth Amendment is the legal basis for a witness's refusal to testify or cooperate in an investigation.

First Amendment. The constitutional amendment that protects the right of people to assemble, associate, read and print literature, worship and practice religion, criticize the government, and organize for change without interference from the government. When a judge decides that activities protected by the First Amendment are involved, he or she must give particular attention to claims that the grand jury is being used improperly.

Fourth Amendment. The constitutional amendment that protects the right of citizens to privacy and freedom from unreasonable searches and seizures. It is most often asserted when the issuance of a grand jury subpoena follows a physical search of the witness's home, office, or other place of business, or when there is reason to believe the subpoena is the result of illegal electronic surveillance. It may be asserted also when the private papers, journals, or diaries of a witness are subpoenaed, or when a large number of papers and records of a political organization or business are subpoenaed. Such subpoenas may amount to a "general warrant," which is prohibited by the Fourth Amendment.

Grand Jury. A group of people (in federal proceedings not less than 16 nor more than 23) called together by the court to hear and examine evidence concerning complaints and accusations of criminal conduct. At the conclusion of a grand jury investigation the grand jurors can either indict or not indict. See also *Special Grand Jury.*

"Grumbles" Motion. Named for two grand jury witnesses, Patricia and Donald Grumbles, a *Grumbles* motion is one for release, usually filed several months after a witness has been in jail for refusing to testify before a grand jury. It challenges a witness's continued imprisonment on the ground that he or she has shown an absolute determination not to cooperate, and thus, further incarceration can only be for an illegal purpose.

no related state proceeding is pending. I have been advised by my attorneys that I have no adequate remedy at law.

(7) For all of these reasons I respectfully ask this Court to put an end to the efforts of the U.S. Attorney and the Department of Justice to shut down HCAP's programs and to declare the subpoena in question invalid.

(8) I certify that the foregoing statements are true, and I am aware that any willfully false statements subjects me to punishment.

.....
Jane Doe

Sworn to before me this
.. day of June, 1984

.....
Notary Public

Glossary

Adjudicate; Adjudication. Literally, what a judge does; to make a judicial decision, to come to a final determination of an issue in the case; to issue a judicial order; to resolve a legal conflict by means of a judicial decision.

Affidavit. A written statement of facts sworn to by the witness *(affiant)* before a notary public.

Appeal. To ask a higher court to review and reverse a lower court decision. In federal court this means going from the district court to the circuit court of appeals, and from the circuit court to the United States Supreme Court.

Appellant. The person asking the higher court to review the lower court decision.

Bail. A sum of money to be posted with the court to guarantee that a person released from custody will appear in court for trial or further hearings. In some instances property or another form of security may be posted instead of money, or a person may be released on "personal recognizance"—the person's promise to appear in court. Grand jury witnesses who have been held in contempt are eligible for bail, but frequently are not released on bail.

Brief. A written statement by the counsel arguing a case in court. A brief contains a summary of the facts of the case, the law that applies, and an argument of how the law supports counsel's position.

Contempt. Deliberate disobedience of a court order. In grand jury cases this is usually an order to appear and give testimony or evidence before the grand jury. A grand jury witness may be found in civil contempt or criminal contempt.

Civil Contempt is *not* a criminal charge, but it can result in the witness's going to jail for up to 18 months. The purpose of an adjudication of civil contempt is to "coerce" the witness into cooperation, not to punish the witness.

Criminal Contempt is a criminal charge. It can result in incarceration for any period of time the judge believes appropriate to punish the witness's disrespect for the order to cooperate with the grand jury.

Reiterated Contempt refers to an adjudication of contempt for a refusal to cooperate with a second grand jury investigating the same subject as an earlier grand jury before which the witness has refused to testify

spheres or controlling the use that may be made of certain information.[50]

The foregoing motions may be made separately or as part of a motion to quash. Creative attorneys may be able to develop other grounds or other motions suitable for use at this stage of the proceedings.

§1.10. First Appearance Before the Grand Jury.

§1.10(a). Procedure. On the date scheduled for his or her appearance the witness comes to the federal courthouse with his or her lawyer, friends, and supporters. If a motion to quash or some other preliminary motion has been made, the witness will usually proceed to the courtroom of the judge who is supervising grand jury matters for argument and/or determination of the motion. If the decision is reserved by the court the matter will be adjourned and the witness will be given a new date to return. In most instances a decision is made on the date of appearance or shortly thereafter, due to the court's reluctance to delay grand jury matters. If the motion(s) is (are) denied from the bench, the witness will be told to report immediately to the grand jury room.

If no preliminary motion has been filed, the witness reports either to the hallway outside the room where the grand jury is sitting or to the U.S. Attorney's office. The witness will not find his or her name on any docket sheet or court calendar. A small room is generally made available to the witness and counsel for consultation, though they may have to share it with other attorneys and their clients. There the witness waits to be summoned. The public is not present, and usually the proceedings are not announced as in ordinary court proceedings. This nonpublic aspect of the grand jury process makes it all the more frightening.

Eventually the witness is asked to enter the grand jury room. He or she enters without attorney or friends, who must remain in the hall or witness room. This procedure is said to preserve grand jury secrecy. And although the prosecutor may sometimes seek to intimidate the witness by instructing that he or she is bound to secrecy, the secrecy rule does not apply to witnesses.[51]

Inside the room the witness finds the grand jurors (anywhere from sixteen to twenty-three), one or more prosecuting attorneys, usually

[50] *See* Chapter 3, Injuction and Intervention, and Chapter 6.
[51] *See* Chapter 11, Grand Jury Secrecy.

a court reporter, and perhaps a bailiff. No judge is present—the judge sits in his courtroom, elsewhere in the building, possibly not even on the same floor, although it is he who must rule on all objections. The grand jurors are generally not introduced to the witness, nor is he or she told anything about the subject of the investigation or the reason for being subpoenaed. The witness is sworn in and the questioning commences. The witness has brought a pencil and piece of paper with him or her, and carefully writes down every word that is said, also noting the number of grand jurors and the identity of all other persons present, to the extent that he or she is able to do so. The first questions usually demand name and address, and the witness answers these unless the lawyer has told him or her not to. Then the substantive questions follow. When the first question after name and address has been asked, the witness requests permission to leave the room to consult with his or her attorney. Generally permission is granted and the witness leaves the room.

When the witness enters the witness room the attorney should note the time. The witness then relates what has occurred and the attorney or legal worker makes detailed notes. These notes serve as the only record of the proceedings, because no transcript is provided.[52] Attorney, witness, and others present then discuss the appropriate response—what privileges and objections to assert and how to phrase them, and the witness takes notes and prepares his or her answer. Generally the witness will raise the Fifth Amendment at this stage of the proceedings in response to each question, for if it is not raised it may be waived,[53] while if immunity is granted other objections and privileges can still be raised.

The presence of one or two persons other than the witness and the lawyer in the witness room should be encouraged, to assist the legal representation, to help with note-taking, to help the witness feel less alone, and to help assure that the best decisions are made. All discussions are protected by the attorney-client privilege.

As the witness leaves the room, the person taking notes again writes down the time, so that any allegations of purposeful delay may be rebutted. The witness then reenters the grand jury room and reads his or her response. The next question is then asked, and the witness repeats the same procedure. He or she should not under any circum-

[52] *See* Chapter 11, Grand Jury Secrecy.
[53] *See* Chapter 8, Fifth Amendment and Immunity.

When a grand jury is resummoned during the term, vacancies existing thereon may be filled from the by-standers. Dorman v. State, 56 Ind. 454.

All vacancies on a grand jury may be filled from the by-standers. Burrell v. State, 129 Ind. 290.

It will be presumed that talesmen were properly selected under the direction of the court when the contrary is not shown. Kessler v. State, 50 Ind. 229.

Failure of the court to interrogate a by-stander called as a juror, as to his qualifications, will be immaterial if he is in fact qualified. Sage v. State, 127 Ind. 15.

§ 2103. Oath of Jurors.—The following oath must be administered to the grand jury:

"You, and each of you, do solemnly swear or affirm that you will diligently inquire, and true presentment make, of all felonies and misdemeanors, committed or triable within this county, of which you shall have or can obtain legal evidence; that you will present no person through malice, hatred or ill-will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof, but in all your indictments you will present the truth, the whole truth and nothing but the truth; that you will not disclose any evidence given or proceeding had before the grand jury. Those of you who swear, so help you God, and those of you who affirm do solemnly affirm under the pains and penalties of perjury." (1905 p. 584 § 93.)

The grand jury, where it deems the evidence insufficient to warrant the return of an indictment, has no right, by a so-called report, to accuse the judge of conspiring to protect criminals, and such accusation is not privileged. Coons v. State, 191 Ind. 580, 134 NE 194.

The oath of the jurors does not prevent them from being used as witnesses as to what occurred before the grand jury. Burnham v. Hatfield, 5 Blkf. 21; Shattuck v. State, 11 Ind. 473; Burdick v. Hunt, 43 Ind. 381; Hinshaw v. State, 147 Ind. 334.

It will be presumed that grand jurors were sworn when the contrary does not appear. Holloway v. State, 53 Ind. 554.

§ 2104. Oath of New Juryman.—If after the grand jury are sworn, any person be afterward appointed as a grand juror, the oath, as prescribed in the preceding section, must be administered to him. (1905 p. 584 § 94.)

§ 2105. Charge by Court—Foreman.—The grand jury, being impaneled and sworn, must be charged by the court. In such charge, the court must plainly instruct them as to their duties, and give them such information as it may deem proper in relation to any charges and crimes returned into court, or likely to come before the grand jury. Thereupon the court shall appoint one of such grand jurors as foreman. (1905 p. 584 § 95.)

The failure to instruct does not affect the validity of an indictment. Stewart v. State, 24 Ind. 142.

That the grand jury was properly impaneled, sworn, and charged is presumed unless the record show otherwise. Holloway v. State, 53 Ind. 554.

It is the duty and right of the judge to instruct the grand jury as to their duties and to give them such information as to the law as he may deem proper in relation to any charges and crimes that may come before the jury. State v. McCoy, 89 App. 330, 166 N.E. 547.

§ 2106. Clerk—Stenographer.—The grand jury must select one of its number as clerk, who must take minutes of the proceedings, except the votes of the individual members on the finding of an indictment, and also of the evidence given before the grand jury, which shall be preserved for the use of the prosecuting attorney: Provided, however, That such grand jury may by unanimous vote and the consent of the court employ a stenographer at not to exceed five dollars per day, to take the minutes and evidence under the supervision of such grand jury and the clerk selected by it. Such stenographer before entering upon his or her duties shall subscribe to an oath, to be administered by the clerk of such court, that he or she will in no way reveal any of the proceedings had before such grand jury. (1905 p. 584 § 96.)

Stenographer taking report of evidence, abatement of indictment. State v. Bates, 148 Ind. 610; Courtney v. State, 5 App. 356.

It is not necessary that the testimony of witnesses be written out in full, nor need the testimony be signed by the witnesses. Hinshaw v. State, 147 Ind. 334.

Defendants have no right to demand an inspection of the minutes of evidence taken by grand juries. Thrawley v. State, 153 Ind. 375.

§ 2107. Challenge—Causes For.—A person held to answer a charge for a felony or misdemeanor may challenge an individual grand juror, before the jury is sworn, for one or more of the following causes only:

First. That such individual grand juror is a minor.

Second. That he is not a freeholder or a householder of the county.

Third. That he is an alien.

Fourth. That he is insane.

Fifth. That he is the prosecuting witness upon a charge against the defendant.

Sixth. That he is a witness on the part of the prosecution.

Seventh. That such a state of mind exists on his part in reference to the party charged that he can not act impartially and without prejudice to the substantial rights of the challenger.

Eighth. That he holds his place in the grand jury by reason of the corruption of the officer who selected and impaneled the grand jury.

Ninth. That he is in the habit of becoming intoxicated.

Tenth. That he has requested, or caused any officer or his deputy to be requested, to place him upon the grand jury. (1905 p. 584 § 97.)

This section does not permit one who is indicted to challenge a member of the grand jury after in-

§ 2044. Warrant by Governor.—Upon the demand of the governor of the state or territory where such offense is alleged to have been committed, for the surrender of such fugitive from justice, pursuant to the constitution and laws of the United States, it shall be the duty of the governor to issue his warrant, as provided in section twenty-six of this act, and like proceedings shall be had as if such fugitive had been originally demanded by the governor of the state or territory where such offense is alleged to have been committed, as provided for in this act. (1905 p. 584 § 37.)

§ 2045. Discharge in Absence of Agent.—If the person so recognized shall appear before the court, judge or justice of the peace upon the day fixed in such bond, he shall be discharged unless he shall be demanded by some person authorized by the warrant of the governor to receive him: Provided, That whether the person so charged shall be recognized, or committed or discharged, any person authorized by the warrant of the governor may at all times take him into custody, and take him before the proper court or officer for examination, as provided in section twenty-six, and such arrest shall be a discharge of the recognizance if there was one given. (1905 p. 584 § 38.)

§ 2046. Costs—Affiant's Liability—Release.—In case no agent of the state appear and demand such person within the period prescribed by this act, the person filing the affidavit upon which such person was apprehended shall be answerable for all the actual costs and charges, including the support in jail while confined, which support shall not exceed forty cents per day. In case such agent appears, and such fugitive is turned over to him, he shall be responsible for all the costs incurred in apprehending, receiving and keeping the fugitive, and upon failure or refusal to pay the same, such fugitive shall be discharged. In case the governor of the state from which such person is a fugitive shall inform the governor of the state that he does not desire the arrest or further apprehension of such person, the governor of this state shall at once so notify the court, judge or justice before whom such person is held for examination, who shall thereupon discharge such person from custody. (1905 p. 584 § 39.)

§ 2047. Practice on Examination.—Such examination of such fugitive or fugitives as herein provided, before the court, judge or justice of the peace, shall in all respects not herein otherwise provided, be governed by the law regulating criminal cases. (1905 p. 584 § 40.)

§ 2048. Damages—Affiant's Liability.—In case such person is wrongfully held or detained under the provisions of this act, the person filing the affidavit shall be responsible in damages for any injury sustained, to be recovered as in other civil cases. (1905 p. 584 § 41.)

§ 2049. Fugitives from Justice—Mileage and Expense for Returning.—When any person has committed a crime in any county in the State of Indiana, which is punishable by imprisonment in the state's prison, and has fled to any other county, state, territory, or country and the governor has issued a requisition for such person or a grand jury indictment or affidavit charging said person with said crime has been filed, the judge of the circuit, superior, criminal or city court, or the justice of the peace before whom the said indictment or affidavit is filed, shall issue a warrant for the arrest of said criminal, and designate an agent in said warrant to make the arrest and return the criminal to the court, upon the request of the prosecuting attorney or his deputy for the county in which the crime was committed. The agent shall return the criminal by the shortest possible route and shall receive the following mileage. Eight cents (8c) for each mile of the first two hundred miles traveled; seven cents (7c) for each mile of the next three hundred miles traveled, six cents (6c) for each mile of the next five hundred miles and over traveled, and five cents (5c) per mile for each mile traveled by the prisoner while in the custody of the agent. The said agent shall be reimbursed for all money legally expended to obtain possession of said criminal upon presentation of receipts covering the same together with a sworn statement by him that such items of expenditure are true and correct. Such sum shall be paid out of the county treasury of the county in which the said crime was committed upon certificate of the judge or justice of the peace before whom said indictment or affidavit is on file, stating that the said criminal has been brought before him and arraigned and on the verified statement of said agent certified to by the said judge or justice of the peace, filed with the auditor of the said county who shall draw his warrant therefor. And the county council shall make such appropriation as shall be necessary to carry out the provisions of this act: Provided, That if any such agent shall, without fault of such agent, be unable to apprehend and produce such fugitive from justice, such agent shall, notwithstanding, be entitled to receive the mileage, other than the mileage of the prisoner, as hereinbefore provided, and in addition thereto shall be reimbursed for all money legally expended in his attempts to obtain possession of such fugitive. (1923 p. 564 § 1; 1921 p. 17 § 2; 1909 p. 165 §1; 1905 p. 584 § 42.)

Construing as a whole the statutory provisions relating to the apprehension and extradition of fugitives from justice, it was not the legislative intent to include justices of the peace as "judges" before whom the proceedings provided by said section are authorized for the apprehension of fugitives from

testimony. The type of questioning, however, for that type of witness should not be leading, but rather require a factual, specific answer by the witness. Care should be taken not to ask ambiguous questions or those which the witness can attach more than one meaning. This must be done if the prosecutor can hope to seek perjury charges against a witness who changes his answer. The case law in this area places the burden on the prosecutor to pin the witness down regarding this answer.

2. [4.6] Hearsay and Effect of Incompetent Witnesses

In *Costello v. United States,* 350 U.S. 359, 100 L.Ed. 397 (1956), the United States Supreme Court held that the presentation of hearsay evidence alone is sufficient to support the return of an indictment by a grand jury.

The Illinois Supreme Court was presented the issues of whether an indictment can be based solely on hearsay evidence and whether a grand jury has to be informed of the hearsay nature of the evidence. *See People v. Creque,* 72 Ill.2d 515, 382 N.E.2d 793, 22 Ill.Dec. 403 (1978). The Supreme Court upheld its previous decisions that the presentation of hearsay evidence alone is sufficient to support the returning of an indictment by a grand jury. The court further held that the prosecutor does not have to affirmatively disclose to the grand jury the hearsay nature of its evidence, as long as there is no attempt by the prosecutor to mislead the grand jury.

The prosecutor should carefully read *People v. Curoe,* 97 Ill.App.3d 258, 422 N.E.2d 931, 52 Ill.Dec. 722 (1981), which involved the dismissal of charges based upon the unsworn summary of evidence by a prosecutor before a prior grand jury.

The prosecutor should be aware that an indictment can be attacked when the witness appearing before the grand jury is incompetent. Obviously, if only one witness should testify before a grand jury, and if it is shown by defense that such witness is incompetent, the court has the duty to dismiss the indictment. *People v. Bladek,* 259 Ill. 69, 102 N.E. 243 (1913).

Hearsay evidence, however, is not incompetent evidence. The courts have defined incompetent evidence as that which is given by a witness who is disqualified by law. Even if one of the witnesses presented to the grand jury is found to be incompetent, the indictment should not be dismissed. *People v. Jackson,* 64 Ill.App.3d 307, 381 N.E.2d 316, 21 Ill.Dec. 238 (1978); *People v. Price,* 371 Ill. 137, 20 N.E.2d 61 (1939).

3. [4.7] Use of Subpoena

As a general rule, the appearance of a witness before the grand jury is secured by virtue of the service of a subpoena upon the witness. Subpoena power of a grand jury is derived through the authority of the court.

The view that the grand jury's subpoena power should not be restrained was upheld in *People v. Florendo,* 95 Ill.App.3d 601, 420 N.E.2d 506, 51 Ill.Dec. 92, 94 (1981), where the court said:

> **we have the interest of the public in maintaining the breath of the grand jury's power to conduct investigations and ferret out criminal activity in society, which power is to be given the broadest scope possible consistent with constitutional limitations.**

The prosecutor should note the footnotes in the Florendo case in which the court stated that in its view future grand jury subpoenas should state the nature of the investigation instead of the usual "against John Doe." The court went on to say that this might not be required where there are compelling reasons against it and suggested that this area could be ripe for legislative scrutiny. 420 N.E.2d at 93 – 94, n. 2.

Whether the subpoena is for records or personal appearance, the procedure for failure to comply is contempt of court which should be brought before the supervising judge who impanels the grand jury.

There are occasions when a witness will be invited to testify before a grand jury and a subpoena is not issued. This should be a tactical consideration in any case involving a public official who may complain of abuse of the grand jury or political motives of the prosecutor's office.

Have Spencer bring serial numbers with him that were missing from the Bank.

Prosecution of a criminal case
Picano
Loose leaf

Same
Charles J.
Aron

The prosecutor
KB16
.R79
1965

The prosecutors desk book
Healy

present, but consideration should be given to the motions a prosecutor may face alleging misconduct. Similarly, a prosecutor should never request the court reporter to go "off the record" during the questioning of a witness.

The grand jury system is constantly under attack by its critics who seek to abolish it or further limit its powers. The prosecutor must avoid any potential abuses of such an important aid to the investigation indictment of criminal charges if the grand jury system is to remain functional.

C. [4.4] Advising Grand Jury of Statutory Duties and Authority

After a grand jury is impaneled and sworn, the court is required to instruct the jurors as to their duties. *Ill.Rev.Stat.*, c. 38, ¶112-2(b). The judge usually reads to the grand jury those sections of the statute that outline the duties that will assist the jurors. At that first session of the grand jury, the prosecutor who is designated to present matters to the grand jury is introduced.

Once the grand jury has been impaneled, sworn, instructed and is present in the grand jury room, the prosecutor addresses the jurors. At this time the prosecutor should advise the jurors of the structure of the criminal justice system and their function and role in that structure.

The jurors should also be advised that they are performing a very important service to their community in their roles as grand jurors.

The grand jurors should be advised that they must carry out their statutory obligation and duties as part of the criminal justice system with independence and integrity. The prosecutor should advise the jurors that they are not "rubber stamps," but must carry out their statutory duties as a part of the criminal justice system that seeks to protect the rights of all persons — including those who might be the subject of a criminal offense.

Most importantly, the juror should be advised that their role is one of an accusatory body. They determine who is to be held for trial

on criminal charges by returning a "true bill." This is accomplished when a quorum of at least 16 jurors deliberate on a matter and 12 concur in returning a "true bill." When there is no agreement of at least 12 jurors, then the jurors should return a "no bill," representing their deliberations.

D. Presentation of Evidence to Grand Jury

1. [4.5] Witnesses Generally

As in the trial of a felony case, the key to the presentation of evidence to a grand jury is preparation. When an indictment is sought, the witnesses who appear before the grand jury should be closely interviewed and informed of the questions which are to be asked. The questions should be direct and simple. Since the prosecutor can lead the witness, the questions should be phrased to elicit a "yes" or "no" response. The method prevents the witness from inadvertent or inconsistent answers and avoids confusion by the witness.

The grand jury is not meant to be an adversary system, and the technical rules of evidence and questioning that apply to trial do not generally apply. The prosecutor should not allow counsel for any witness to enter objection to questions on any grounds. See *Ill.Rev.Stat.*, c. 38, ¶112-4.1. Any refusal to answer a question put to a witness must be made by that witness and no one else. The witness may, of course, consult his attorney for any counsel. It is not good practice, however, to ask irrelevant or harassing questions of a witness.

It is a good policy to start the grand jury's period of service with simple, direct cases. Then the prosecutor can read the statute covering the offense for which the indictment is being sought to the grand jury and can also make a short statement of what is going to be presented. The witnesses should be called one at a time into the grand jury room. After all the witnesses have testified, the grand jury should again be reminded that their function is to find probable cause based upon the testimony presented.

A prosecutor should keep in mind that along with presenting witnesses necessary to obtain a "true bill," it might be advisable to put in defense witnesses or a reluctant witness in order to "lock in" that

It should also be considered where the public official witness may not be the subject of the investigation but merely possesses records that are sought.

When books or records are required by the grand jurors, a subpoena duces tecum can be served on the custodian of the records. It is not unusual for certain records to be delivered to the prosecutor before a matter is presented to the grand jury. In forgery cases, it is common for banks to furnish bank records to the prosecution in order to expedite a matter for the grand jury. Obviously, wherever there is a reluctance on the part of the custodian of the records to cooperate, a subpoena duces tecum should be used and the records presented directly to the grand jury.

The prosecutor must inform the grand jury of its rights to secure evidence, testimony, or witnesses. This language is found at *Ill.Rev.Stat.*, c. 38, ¶112-4(b), which states in part:

> **(b) The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney.**

The grand jury may also be used to obtain handwriting exemplars (*People ex rel. Hanrahan v. Power*, 54 Ill.2d 154, 295 N.E.2d 472 (1973)) fingerprints (*In re the Grand Jury Investigation of Swan*, 92 Ill.App.3d 856, 415 N.E.2d 1354, 48 Ill.Dec. 70 (1981)) and voice exemplars (*United States v. Dionisio*, 410 U.S. 1, 35 L.Ed.2d 67 (1973)).

III. LIMITATIONS OF GRAND JURY

A. [4.8] Probable Cause Determination

The grand jury should be repeatedly told that its function is to determine whether evidence before it constitutes probable cause that a person has committed an offense. *Ill.Rev.Stat.*, c. 38, ¶112-4(d). It is not unusual to have a grand jury drift toward the guilt or innocence

issue. It is, therefore, important that the prosecutor explain this duty openly and honestly so that the jurors do not think that they are being deprived of essential evidence.

Jurors should not be prevented from questioning witnesses in certain areas and can actually be helpful in pursuing a specific line of questioning. Care should be exercised regarding a grand juror's inquiry passing beyond what is material and only seeks to embarrass or harass the witness.

A grand juror may seek to question the motives of a witness who invokes the Fifth Amendment privilege. It is the prosecutor's duty to advise the grand juror as the constructional rights of an individual who invokes the Fifth Amendment and to prevent any miscarriage of justice. The role of legal advisor to the grand jury demands that he see that this body functions within the limits of the law.

B. [4.9] Investigative Function

Along with its function as a charging body, the grand jury is an important tool to the prosecutor in conducting investigations. As previously discussed, the grand jury's subpoena power can be used to collect evidence, secure testimony of witnesses and require witnesses to produce documents.

Witness immunity can also be an aid to the grand jury investigation. The prosecutor must be aware that immunity given to a witness under *Ill.Rev.Stat.*, c. 38, ¶106, gives the witness absolute protection against charges arising for anything the witness testifies about. The courts have liberally construed this section in the favor of the witness and the burden is upon the prosecutor to limit the questions. *See People ex rel. Cruz v. Fitzgerald,* 66 Ill.2d 546, 363 N.E.2d 835, 6 Ill.Dec. 888 (1977).

It is suggested that the context of the immunity order and the subject matter of the questioning be put on the record prior to questioning the witness.

This section expands the right to counsel to all witnesses and not just "targets" or those who will be charged with a crime. The prosecutor should take note that the statute does not permit counsel for the witness to "participate in any other way" and any attempts to make arguments, speeches or objections to questions asked should be dealt with immediately. The prosecutor should first read the statutory language on the record and advise counsel for the witness as to his limited role. The prosecutor should then state that any further violation will be treated as contemptuous.

B. [4.3] Prosecutor's Role in the Grand Jury

The grand jury in Illinois is a creation of the Illinois Constitution and is not wholly identifiable with any branch of government. In the grand jury's function of the consideration of returning indictments, the grand jurors are to act independently of the prosecutor and the court. In viewing the grand jury functionally, the body may be considered an arm of the court, because the grand jury derives its power from the court. Included in these powers are the use of process and the power to compel testimony. Thus, the grand jury is subject to the supervisory power of the court in the prevention of abuses of its process or authority.

The Supreme Court of Illinois stated in *People v. Polk*, 21 Ill.2d, 174 N.E.2d 393, 395:

> **Neither the Illinois constitution nor the legislature has attempted to define the powers of the grand jury. It has its origin in the common law and has existed for many hundreds of years. Its construction, organization, jurisdiction and method of proceeding were all well known features of the common law before the organization of the State of Illinois and have been recognized and adopted in all our constitutions and in legislation as it existed at the organization of the State.** *People ex rel. Ferrill v. Graydon,* **333 Ill. 429, 432, 164 N.E. 832. While the grand jury is a necessary constituent part of a court having general criminal jurisdiction (***People v. Sheridan,* **349 Ill. 202, 181 N.E. 617) its powers are not dependent upon the court but are original and complete. Its duty**

> **is to diligently inquire into all offenses which shall come to its knowledge whether from the court, the State's Attorney, its own members, or from any source, and it may make presentments of its own knowledge without any instruction or authority from the court.** *People ex rel. Ferrill v. Graydon,* 333 Ill. 429, 164 N.E. 832.

The role of the prosecutor and his relationship with the grand jury has received criticism and caused the recent amendments to Article 112. The grand jury was meant to be an independent body and not an extension of the prosecutor's office. However, the realities of the necessary interaction between the prosecutor and the grand jury create difficulties in keeping the grand jury independent of the prosecutor.

The prosecutor comes to the grand jury as the advocate of the People of the State of Illinois. He chooses the evidence to be presented and acts as legal advisor to the grand jury. The prosecutor also prepares and issues subpoenas. There is a fine line between guiding a grand jury and becoming the overriding power in its decision making.

A prosecutor must be aware of the many forms of prosecutorial misconduct which may result in the dismissal of an indictment. See *Grand Jury Manual* (1975) sponsored by Bar Association of the Seventh Federal Circuit, or Representation of Witnesses before Federal Grand Juries (National Lawyers Guide, 1977).

The statutory provision regarding the presence of a court reporter and the necessity of a transcript being made of the testimony offered to a grand jury is clear.

Ill.Rev.Stat., c. 38, ¶112-6(a), recites in part that "If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court *shall appoint* such reporter." [Emphasis added.]

The legislature also added ¶112-7 to *Ill.Rev.Stat.*, c. 38, which states: "A transcript shall be made of *all questions asked of and answers given* by witnesses before the grand jury." [Emphasis added.]

There is no requirement that a court reporter be present when the prosecutor is addressing the grand jury without a witness being

§ 13. Free Access to Jails and Poor Houses

The grand jury is entitled to free access to all jails and institutions for the poor located within the county. IC 35–1–15–22.

§ 14. Offenses Known to Jury Members

If any member of the grand jury knows of an offense that has been committed, he must submit his information to the grand jury for investigation. IC 35–1–15–15.

§ 15. Concurrence of Five Jurors Required for Indictment

At least five of the grand jurors must concur in the finding of an indictment. IC 35–1–16–1.

§ 16. Indictment Signed by Foreman and Prosecuting Attorney

When an indictment is returned, the court must determine that it is signed by the grand jury foreman and the prosecuting attorney. IC 35–1–16–2.

§ 17. Place of Meeting

While it is more common for the grand jury to meet in the court house, there is no requirement that the jury meet at any specified place. Reed v. State, 198 Ind. 338, 152 N.E. 273 (1926).

§ 18. Oath Administered to Witnesses By Foreman

Pursuant to IC 35–1–15–14:

> The foreman of the grand jury is authorized to administer all oaths to witnesses.

§ 19. Role of Prosecuting Attorney

IC 35–1–15–23 authorizes the prosecuting attorney to be present in the grand jury room for the purposes of giving information relative to any matter properly before the jury and to act as the jury's legal advisor. Of course, it is also perfectly appropriate for the jury to seek legal advice from the court as well as the prosecuting attorney. In addition to the prosecuting attorney, the only other person authorized to appear before the grand jury is a stenographer employed pursuant to IC 35–1–15–10.

The prosecuting attorney is authorized specifically to interrogate witnesses before the grand jury. Of course, the jurors themselves are free to question the witnesses directly at any time.

Neither the prosecuting attorney nor any other person is permitted to be present with the grand jury during their deliberations or vote on any indictment.

ly with the prosecutor and the members of the grand jury, and neither the attorney general of the state nor any other person may bring a case before the grand jury independently of the prosecutor. See In re State Bd. of Accounts v. Holovachka, 236 Ind. 565, 142 N.E.2d 593 (1957) (a special prosecutor may be appointed to investigate criminal activity of the regular prosecutor). The prosecutor is authorized to appear before the grand jury. IC 35–1–15–23.

A plea in abatement was sustained where the prosecutor was present during the deliberations of the grand jury and urged the jury to find an indictment. A motion to dismiss would be proper under present procedure. Williams v. State, 188 Ind. 283, 123 N.E. 209 (1919). But allegations of undue influence were found insufficient where the defendant alleged that the prosecutor had too many witnesses outside the grand jury room and too many deputy prosecutors present during the investigation. Mitchell v. State, 233 Ind. 16, 115 N.E.2d 595, certiorari denied 74 S.Ct. 786, 347 U.S. 975, 98 L.Ed. 1114 (1953).

The prosecutor may aid the grand jury in determining what crime is constituted by given facts and he may submit to the jury a specially prepared indictment for their approval. Turpin v. State, 206 Ind. 345, 189 N.E. 403 (1934).

§ 20. Subpoena of Witnesses by Prosecuting Attorney

The prosecuting attorney is authorized to subpoena grand jury witnesses. IC 35–6–1–1 provides:

> In addition to duties and powers now conferred by law upon prosecuting attorneys within the state of Indiana, they shall have authority within their respective jurisdiction to cause to be issued by the clerk of the circuit court having jurisdiction of the offense, a subpoena for any and all witnesses having knowledge of the commission of any crime in the state, before the beginning of the term of court in the county, requiring such witnesses to appear before any regular session of the grand jury of such county to be thereafter impaneled.

The subpoena is obtained by the filing of a praecipe with the clerk. IC 35–6–1–2 provides:

> The prosecuting attorneys within the state in their respective jurisdictions, when in their opinion it is necessary to further the ends of justice, to issue a subpoena, provided in section one of this act, shall file with the clerk a praecipe containing the names of all the witnesses he

K. The Crime Was Committed by a Number of Persons

It is one matter for a witness to make adequate observations, in a time of stress, of the physical characteristics of a single criminal. It is quite another matter for him to perform the same feat when the crime involved is committed by four, five or more persons. Of course, even when a number of persons participate in the crime, the witness may direct his attention to but one or perhaps two of them. When he purports to identify a number of men as those who were involved in a crime which was committed in a short period of time, there is a strong ground for doubting the accuracy of any or all of the identifications. Even if he identifies but one, if his original statements to the police make it clear that he attempted to observe all of them, then his identification is subject to the criticism that it may be the product of divided attention.[102] The longer the duration of the crime, however, the less reason for making this criticism.

L. The Witness Fails to Make a Positive Trial Identification

It has already been observed that the mere fact that a witness's identification is stated in positive terms and with absolute certainty is not an adequate gauge of its accuracy. The converse, however, is not quite true, for when the witness himself expresses doubts, the law must share them; when he himself states that he may be in error, the law must agree and act with caution.

Obviously, not every identification is a positive one, whether made at a police station, in the courtroom or elsewhere. The discussion here will be concerned with the degree of certainty expressed by the witness when making his trial identification, but in order to place this discussion in its proper context, some preliminary remarks may be appropriate. The trial identification may sometimes be either more or less positive than was the original identification. Where it is more positive, it is often because some suggestive influence has since been exerted upon the witness or because, having set the machinery of the law into motion, he has convinced himself that he could not have done so erroneously. Such

102. See, e.g., People v. Cramer, 298 Ill. 509, 131 N.E. 657 (1921).

a situation poses a problem for defense counsel, who must see to it that the jury is made aware of the lack of certainty originally expressed by the witness.

Where the trial identification is less positive than the original identification, the cause is usually to be found in the passage of time, although sometimes the witness has come to believe conscientiously that his original identification was too hastily made and was completely mistaken.[103] Here, where the mere passage of time has caused the witness to become less positive, the problem is that of the prosecutor, who must make the jury aware of the positive nature of the original identification. In some jurisdictions, however, we have seen that the rules of evidence may prevent him from doing this, with the result that the jurors are deprived of information which would greatly assist them in weighing the evidence of identification. Indeed, where one who has previously identified the defendant is unable to do so at the trial,[104] and there is no other evidence, the case may never even get to the jury in those jurisdictions. These, however, are problems to be considered later. Here, we are concerned with the usual situation, where the witness is as certain (or as uncertain) of his trial identification as he was of his original identification. The basic question here is: what degree of certainty is or should be required in order to sustain a conviction where the only evidence of guilt is that of identification?

On the subject of what the present rule is, no adequate answer may be given, for the point rarely arises and, when it has, courts have reached different conclusions. In a Pennsylvania robbery prosecution, for example, the only evidence of guilt was the identification of the defendant by the female victim of the crime. On the witness stand, she was not positive of her identification, stating that she had "just one little doubt." Her original identification had

103. Such a situation is by no means a novel one. On August 6, 1679, Michel Le Tellier, Chancellor of France, wrote to Henri d'Aguesseau, a French statesman, and expressed his view that "there is no impropriety in a witness, after having said . . . that he saw the accused in the action . . ., stating his doubt, at the confrontation which is made between him and the said accused, whether he is the same person he intended to speak about." 2 Correspondance administrative sous Louis XIV 215, quoted in Esmein, A History of Continental Criminal Procedure 277 (1913).

104. See, e.g., People v. Spinello, 303 N.Y. 193, 101 N.E.2d 457 (1951), where a witness was unable to make a positive trial identification, although he had originally been positive.

in nature and such statutes have the full force and effect of the law, but the Supreme Court of Indiana also has the power to adopt rules of court controlling the practice and procedure in all the courts of the state. *Id.* By statute it is provided that the Supreme Court shall have the power to adopt rules controlling practice and procedure in all the courts of this state and that all statutes in conflict with such rules shall be deemed superseded to the extent of such conflict. It may also be argued that the rule making power is inherent in the judiciary and that this statute is a mere recognition of that power and, therefore, confers nothing upon the court which it did not already possess. To the extent of any conflict between the statutes and the rules, the statute is deemed superseded.

In the area of change of venue and change of judge, it has been held that only the legislature may create the substantive rights to such a change, but the Supreme Court may properly adopt rules of court regulating the method and time of asserting such rights. State ex rel. Blood v. Gibson Cir. Ct., 239 Ind. 394, 157 N.E.2d 475 (1959). Thus, the right to a change of venue from the county or a change of judge is not a right in the absolute sense but is a right which must be exercised in accordance with the applicable statutes and rules of court governing such right. State ex rel. Goins v. Sommer, 239 Ind. 296, 156 N.E.2d 885 (1959). There are no common law rules in Indiana relating to change of venue from the county or change of judge. The whole field is occupied by the statutes and court rules and nothing is left for the common law. State ex rel. Fox v. LaPorte Cir. Ct., 236 Ind. 69, 138 N.E.2d 875 (1956).

In addition, trial courts may adopt local rules of court concerning change of venue and change of judge, but within a much narrower realm of discretion. Local rules of court may not conflict with either the statutes or the Supreme Court rules and may not have the effect of limiting in any way the statutory right to a change. See State ex rel. Chambers v. Heil, 229 Ind. 176, 96 N.E.2d 225 (1951); Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925); Asher v. State, 198 Ind. 23, 152 N.E. 171 (1926).

The criminal change of judge and change of venue statutes and rules apply in scope to both felonies and misdemeanors, see State ex rel. Grimm v. Noble Cir. Ct., 242 Ind. 152, 177 N.E.2d 335 (1961), but do not include juvenile cases. Juvenile cases are considered civil actions for purposes of change of venue and change of judge. State ex rel. McClintock v. Hamilton Cir. Ct., 249 Ind. 333, 232 N.E.2d 356 (1968); State ex rel. Dunn v. Lake Juv. Ct., 248 Ind. 324, 228 N.E.2d 16 (1967). But see State ex rel. Jones v. Geckler, 214 Ind. 574, 16 N.E.2d 875 (1938).

The Supreme Court rules regulating change of venue and change of judge are applicable to all cases tried after the effective dates of the rules regardless of when the crime occurred or the date the defendant was charged with the crime. Cockrum v. State,

250 Ind. 360, 234 N.E.2d 479 (1968). Because rules of procedure do not affect substantive rights, it is not an ex post facto application of law to apply a procedural rule to a criminal transaction which occurred before the rule was adopted. For discussion of ex post facto laws see Commentary on Federal Constitutional Issues and Remedies at the beginning of the first volume of the Penal Code, *infra*.

§ 2. Text of Criminal Rule 12—Change of Venue in Criminal Cases

In all cases where the venue of a criminal action may now be changed from the judge, such change shall be granted upon the execution and filing of an unverified application therefor by the state of Indiana or by the defendant. Upon the filing of a properly verified application, a change of venue from the county shall be granted in all cases punishable by death and may be granted in all other cases when in the court's discretion cause for such change is shown to exist after such hearing or upon such other proof as the court may require. Provided, however, that the state of Indiana or the defendant shall be entitled to only one change from the judge and the defendant shall be entitled to only one change from the county.

In any criminal action, no change of judge or change of venue from the county shall be granted except within the time herein provided.

An application for a change of judge or change of venue from the county shall be filed within ten days after a plea of not guilty, or if a date less than ten days from the date of said plea, the case is set for trial, the application shall be filed within five days after setting the case for trial. Provided, that where a cause is remanded for a new trial by the Supreme Court, such application must be filed not later than ten days after the party has knowledge that the cause is ready to be set for trial.

Provided, however, that if the applicant first obtains knowledge of the cause for change of venue from the judge or from the county after the time above limited, he may file the application, which shall be verified by the party himself specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten days, and the ruling of the court may be reviewed only for abuse of discretion. All pleadings, papers and affidavits filed at any hearing held pursuant to this rule shall become a part of the record without further action upon the part of either party.

CHAPTER 5

CRIMES

Art.
1. Against the State §§ 2397 to 2401.
2. Against the Person §§ 2402 to 2432.
3. Against Property §§ 2433 to 2515.
4. Against Public Peace §§ 2516 to 2574.
5. Against Public Morals §§ 2575 to 2618.
6. Against Public Justice §§ 2619 to 2653.
7. Misconduct of Public Officials §§ 2654 to 2682.
8. Against Public Health §§ 2683 to 2716.
9. Against Purity of Elections §§ 2717 to 2744.
10. Against Honest Dealing §§ 2745 to 2789.
11. Against Public Policy §§ 2790 to 3010.

ARTICLE 1

Against the State

§ 2397. Treason — Definition — Punishment.—Whoever levies war against this state, or knowingly adheres to its enemies, giving them aid or comfort, is guilty of treason against the State of Indiana; and, on conviction shall suffer death, or be imprisoned in the state prison during life. (1905 p. 584 § 345.)

§ 2398. Misprision of Treason.—Whoever, having knowledge that any person has committed treason or is about to commit treason against this state, wilfully omits or refuses to give information thereof to the governor or some judge of the state, as soon as may be, is guilty of misprision of treason; and, on conviction, shall be imprisoned in the state prison for any period not exceeding twenty-one years, and fined in any sum not exceeding ten thousand dollars, and shall also be disfranchised and rendered incapable of holding any office for any period not less than ten years. (1905 p. 584 § 346.)

§ 2399. Prohibiting the Display of Certain Banners, Emblems.—The display or exhibition at any meeting, gathering or parade, public or private, of any flag, banner or emblem symbolizing or intended by the person or persons displaying or exhibiting the same to symbolize a purpose to overthrow, by force or violence, or by physical injury to personal property, or by the general cessation of industry, the government of the United States or [of] the State of Indiana, or all government, is hereby declared to be unlawful. (1919 p. 588 § 1.)

§ 2400. Prohibiting the Inciting of Violence.—It shall be unlawful for any person to advocate or incite or to write or with intent to forward such purpose to print, publish, sell, or distribute any document, book, circular, paper, journal or other written or printed communication in or by which there is advocated or incited the otherthrow by force or violence, or by physical injury to personal property, or by the general cessation of industry, of the government of the United States, of the State of Indiana, or all government. (1919 p. 588 § 2.)

§ 2401. Penalty for Violation.—That any person or persons convicted of violating any section of this act shall be fined not more than $5,000 or imprisoned for not more than five years, or both. (1919 p. 588 § 3.)

STATUTE

ARTICLE 2

Against the Person

§ 2402. Murder first degree.—Whoever, purposely and with premeditated malice, kills any human being, is guilty of murder in the first degree, and on conviction shall suffer death or be imprisoned in the state prison during life: Provided, Whoever, in the perpetration of or attempt to perpetrate a rape, arson, robbery or burglary, kills any human being, is guilty of murder in the first degree, and on conviction shall suffer death. (1929 p. 136 § 4.)

Constitutionality. This section (1929, c. 54, § 4) is not unconstitutional as denying accused due process of law, or because it makes the death penalty mandatory. Mack v. State, — Ind. —, 180 N.E. 279.

Premeditation, deliberation, malice or intent to kill are not necessary elements of the crime of murder in the perpetration of a robbery. Mack v. State, — Ind. —, 180 N.E. 279.

Allegation of purpose to kill is not necessary where it is alleged that life is taken in the commission of a felony. Stephenson v. State, — Ind. —, 179 N.E. 633.

The word "purposely" used in the statute predicates intent when used in the indictment. Landreth v. State, 201 Ind. 691, 171 N.E. 192.

§ 2403. Prohibition of Sentence for Lesser Offense, Suspension or Commutation.—No person who is found guilty of any offense prescribed in this act shall be sentenced for a lesser offense than the offense charged in the indictment. No court hearing any case on any charge contemplated in this act shall have any authority to suspend or commute any sentence imposed for the commission of any such crime. (1929 p. 136 § 5.)

The limitation on the power of the judge of the trial court to sentence a convicted defendant for a lesser offense than the one charged, means that when a defendant is on trial charged with the commission of one of the offenses enumerated in the particular act, he cannot be found guilty of another offense necessarily included therein. Ramsey v. State, — Ind. —, 183 N.E. 648.

§ 2404. Finding of Guilt on Offense Charged—Fixing of Penalty.—If any person charged with any of the offenses enumerated in this act is found guilty of the offense so charged, the jury, or the court trying the case, shall find the defendant guilty of the offense so charged, and of no lesser offense, and the trial judge shall fix the penalty for the crime of which the defendant is found

son, is guilty of malicious mayhem, and, on conviction, shall be imprisoned in the state prison not less than two years, nor more than fourteen years, and be fined not more than two thousand dollars. (1905 p. 584 § 355.)

Under an indictment for malicious mayhem, there may be a conviction for simple mayhem, or for an assault and battery. State v. Fisher, 103 Ind. 530.

§ 2414. Simple Mayhem.—Whoever, violently and unlawfully, deprives another of the use of any bodily member, or unlawfully and wilfully disables the tongue or eye, or cuts, bites or slits the nose, ear or lip of another, is guilty of simple mayhem, and, on conviction, shall be fined not less than five dollars, nor more than two thousand dollars, and shall be imprisoned in the county jail not less than twenty days nor more than six months. (1905 p. 584 § 356.)

Persons in defense of their own persons may commit the acts constituting simple mayhem when necessary for self-protection, without being criminally liable therefor. Hayden v. State, 4 Blkf. 546.

There may be a conviction for simple mayhem, or of an assault and battery, under an indictment charging malicious mayhem. State v. Fisher, 103 Ind. 530.

§ 2415. Injury of Person with Acid.—Whoever, being over fourteen years of age, purposely or premeditatedly puts upon or against the person of another any acid, corroding or other irritating substance, with intent to injure such person, shall be fined not more than one thousand dollars, to which may be added imprisonment in the state prison not more than fifteen years nor less than one year. (1907 p. 42 § 1.)

§ 2416. Robbery—Assault and Battery with Intent to Commit Robbery—Physical Injury Inflicted in Robbery or Attempt—Penalties.—Whoever forcibly and feloniously takes from the person of another any article of value, by violence or by putting in fear, is guilty of robbery, and, on conviction, shall be imprisoned in the state prison for any determinate period not less than ten years nor more than twenty-five years, and be disfranchised and rendered incapable of holding any office of trust or profit for such period as the court may determine. Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit robbery, shall, on conviction, suffer the same penalty as prescribed for robbery. Whoever inflicts any wound or other physical injury on any person with any firearm, dirk, stiletto, bludgeon, billy club, blackjack or any other deadly or dangerous weapon or instrument while engaged in the commission of robbery, or while attempting to commit robbery, shall, on conviction, be imprisoned in the state prison for life. (1929 p. 136 § 1.)

See § 2298 and note citing Chism v. State.

Upon a plea of guilty of inflicting wound with deadly weapon while engaged in commission of a robbery, the fact that the court neither advised the defendants of their right to be represented by counsel nor inquired as to their understanding of the effect their pleas is such an error as entitles defendants to withdraw their pleas after judgment and stand trial. Harris v. State, — Ind. —, 181 N.E. 33.

It is not essential to a conviction for the crime of robbery that the property be taken from the body of the person wronged; it is sufficient if taken from his personal presence or personal protection. Chizum v. State, — Ind. —, 180 N.E. 674; Mahoney v. State, — Ind. —, 180 N.E. 580.

§ 2417. Public Offenses—Crime of Bank Robbery Defined—Penalty.—Whoever, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money, bonds or other valuables, or shall by intimidation, fear, or threats compel or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, whether he succeeds or fails in the perpetration of such larceny or felony, shall be deemed guilty of the crime of bank robbery, and, upon conviction, shall be imprisoned for life or for any determinate term of years not less than ten years, and shall be disfranchised and rendered incapable of holding any office of honor or trust for any determinate period. It shall be the duty of the judge of the court trying any case under this section, upon a plea of guilty or upon conviction to fix a term of imprisonment at life, or a definite term of years. The indeterminate sentence law of the State of Indiana shall not apply to sentences for the crime herein defined. (1927 p. 470 § 1.)

§ 2418. Kidnapping.—Whoever kidnaps, or forcibly or fraudulently carries off or decoys from any place within this state, or arrests or imprisons any person, with the intention of having such person carried away from any place within this state, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnapping, and, on conviction, shall be imprisoned in the state prison during life. (1929 p. 477 § 1; 1905 p. 584 § 358.)

The legislature in placing, as a matter of public policy, the punishment for the crime of kidnapping at life imprisonment, has not violated the constitutional inhibition against "cruel and unusual punishment." Cox v. State, — Ind. —, 181 N.E. 469.

The fact that former kidnapping statutes require a taking out of the state or from a place of residence cannot serve to limit the construction of the term "from any place within this state." Cox v. State, 202 Ind. 684, 177 N.E. 898.

Forcible removal of a child from the place where she was playing to a point more than ninety feet down an alley was sufficient to bring the act within the terms of the statute. Cox v. State, 202 Ind. 684, 177 N.E. 898.

An assignment of error that the penalty inflicted

Introduction

The grand jury as an institution began in England in the 12th century. It was carried forward into American law, and the Fifth Amendment to the U.S. Constitution provides that no person can be brought to trial for an "infamous" crime (a felony) unless first indicted by a grand jury. The function of a grand jury was to protect a citizen from unfounded charges; this was accomplished by screening evidence to determine if an indictment was warranted. Thus, the grand jury acted as a shield between the government and a potential defendant.

Over the years, however, the traditional function of the grand jury has shifted; it has become primarily an investigatory tool of the government. The powers of the grand jury—such as its virtually unlimited subpoena power and the near total secrecy in which its proceedings are conducted—were seized upon by prosecutors for their own purposes. Witnesses, as opposed to potential defendants, became the real targets of the grand jury.

Dominant among the new targets of the federal grand jury have been political dissenters. Although the grand jury was used in the 1850s in efforts to capture escaped slaves, and again in the 1930s against the Puerto Rican Independence Movement, its role as a political weapon began in earnest in 1970. Scores of people active in the Antiwar and Women's Movements were subpoenaed to appear before grand juries in all parts of the country and were asked questions about their families, friends, and political activities. This campaign continued through the mid-1970s, when several activists in the Puerto Rican Independence Movement were subpoenaed and jailed in grand jury investigations in Chicago, New York, and Puerto Rico. After a brief period of inactivity, the grand jury is once again targeting political movements. Between 1980 and 1983, nearly twenty people were jailed for contempt arising out of investigations into the Puerto Rican, Black, and Native American Movements. Coupled with the new FBI guidelines, executive orders permitting the CIA to undertake domestic investigations, and the use of "RICO" (the

tions of the jurors before they are sworn. King v. State, 236 Ind. 268, 139 N.E.2d 547 (1957); Hardin v. State, 22 Ind. 347 (1864); Hudson v. State, 1 Blackf. 317 (1824). If the grand jury is one that is governed by the Uniform Act, then a timely motion to dismiss is appropriate. See IC 33-4-5.5-16. The right to appear before the grand jury is a statutory rather than constitutional right. Sisk v. State, 232 Ind. 214, 110 N.E.2d 627, certiorari denied 74 S.Ct. 60, 346 U.S. 838, 98 L.Ed. 360 (1953). IC 35-1-15-12 provides:

> Such challenge may be oral. If the facts alleged be denied, the challenge must be tried at once by the court, and the juror challenged may be examined as a witness to prove or disprove the challenge, and he is bound to answer every question pertinent to the inquiry therein. The challenger, and other witnesses then present, may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge; but the matter must be summarily heard, and the court must allow or disallow the challenge.

IC 35-1-15-13 provides:

> If a challenge be allowed to a grand juror, for any of said causes he must be forthwith discharged from the grand jury, and his place shall be filled from among the bystanders.

Failure to request an appearance at the impaneling of the jury is a waiver of the right to challenge. The issue cannot be raised later by motion to dismiss if the defendant had ample opportunity to appear and challenge. Sisk v. State, 232 Ind. 214, 110 N.E.2d 627, certiorari denied 74 S.Ct. 60, 346 U.S. 838, 98 L. Ed. 360 (1953). But if the jury is sworn before the defendant has reason to know that an indictment may be returned against him he may not appear and challenge but the issue may be raised by motion to dismiss, King v. State, 236 Ind. 268, 139 N.E.2d 547 (1957); Pointer v. State, 89 Ind. 255 (1883); Hardin v. State, 22 Ind. 347 (1864). See also IC 33-4-5.5-16.

After the jury has been sworn a motion to dismiss may be used to raise any cause for challenge of a juror except the seventh statutory cause which is the bias and prejudice of a juror. See *Stevens v. State, supra;* Mack v. State, 203 Ind. 355, 180 N.E. 279, 83 A.L.R. 1349 (1932); Pontarelli v. State, 203 Ind. 146, 176 N.E. 696 (1931); Williams v. State, 188 Ind. 283, 123 N.E. 209 (1919); Hauk v. State, 148 Ind. 238, 46 N.E. 127, rehearing denied 148 Ind. 238, 47 N.E. 465 (1897). This issue may be raised only by challenge before the jury is sworn. But if the juror was

motivated by "malice, hatred and ill will" in violation of the statutory oath, a motion to dismiss may be used. State ex rel. Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947). Prior case law held that the qualifications of a grand juror cannot be raised by a motion to dismiss, Johnson v. State, 213 Ind. 659, 14 N.E.2d 96 (1938); Katzen v. State, 192 Ind. 476, 137 N.E. 29 (1922); Donahue v. State, 165 Ind. 148, 74 N.E. 996 (1905); Mathis v. State, 94 Ind. 562 (1883), a motion in arrest of judgment, Ford v. State, 112 Ind. 373, 14 N.E. 241 (1887), or an original action in the Supreme Court for a writ of mandamus and prohibition. State ex rel. Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947).

§ 8. Impanelment and Oath

The record must show that the grand jury was duly impanelled and sworn. Conner v. State, 19 Ind. 98 (1862); Springer v. State, 19 Ind. 180 (1862); Conner v. State, 18 Ind. 428 (1862). However, the indictment itself is part of the record and recitals contained therein that the grand jury was lawfully impanelled and sworn are sufficient. Henning v. State, 106 Ind. 386, 6 N.E. 803, rehearing denied 106 Ind. 386, 7 N.E. 4 (1885); Padgett v. State, 103 Ind. 550, 3 N.E. 377 (1885); Stout v. State, 93 Ind. 150 (1883); Bailey v. State, 39 Ind. 438 (1872). The record need only show that the grand jury was sworn; it is not necessary to set out the oath in *haec verba*. Hudson v. State, 1 Blackf. 317 (1824). The form of the oath is prescribed by statute: IC 35-1-15-7. IC 35-1-15-8 provides:

> If after the grand jury are sworn, any person be afterward appointed as a grand juror, the oath, as prescribed in the preceding section, must be administered to him.
>
> The following oath must be administered to the grand jury:
>
> You, and each of you, do solemnly swear or affirm that you will diligently inquire, and true presentment make, of all felonies and misdemeanors, committed or triable within this county, of which you shall have or can obtain legal evidence; that you will present no person through malice, hatred or ill-will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof, but in all your indictments you will present the truth, the whole truth and nothing but the truth; that you will not disclose any evidence given or proceeding had before the grand jury; that you will keep secret whatever you or any other grand juror may have said or in what manner you or any

> other grand juror may have voted on a matter before the grand jury. Those of you who swear, so help you God, and those of you who affirm do solemnly affirm under the pains and penalties of perjury.

Irregularities in the impanellment and swearing of the grand jury must be raised by motion to dismiss. For decisions under prior law see, *e. g.*, Johnson v. State, 213 Ind. 659, 14 N.E.2d 96 (1938); Bottorf v. State, 199 Ind. 540, 156 N.E. 555 (1927); Henning v. State, 106 Ind. 386, 6 N.E. 803, rehearing denied 106 Ind. 386, 7 N.E. 4 (1885); State v. Freeman, 6 Blackf. 248 (1842). See also Mack v. State, 203 Ind. 355, 180 N.E. 279, 83 A.L.R. 1349 (1932); Katzen v. State, 192 Ind. 476, 137 N.E. 29 (1922); State v. Jackson, 187 Ind. 694, 121 N.E. 114 (1918); Donahue v. State, 165 Ind. 148, 74 N.E. 996 (1905); State v. Wingate, 4 Ind. 193 (1853). The motion must show fraud or corruption or prejudice to the defendant's substantial rights. Badgely v. State, 226 Ind. 665, 82 N.E.2d 841, certiorari denied 69 S.Ct. 650, 336 U.S. 922, 93 L.Ed. 1084 (1949).

§ 9. Excuse from Jury Duty

Every person summoned to serve as a grand juror must appear unless he can show good cause for non-attendance. See IC 35-1-15-5.

§ 10. Filling Vacancy on Jury

Whenever a vacancy occurs on a grand jury, the vacancy is to be filled pursuant to IC 35-1-15-6.

§ 11. Instructions by the Court

The grand jury, being impaneled and sworn, must be charged by the court. In such charge, the court must plainly instruct them as to their duties, and give them such information at it may deem proper in relation to any charges and crimes returned into court, or likely to come before the grand jury. Thereupon the court shall appoint one of such grand jurors as foreman. IC 35-1-15-9 provides:

> The grand jury, being impaneled and sworn, must be charged by the court. In such charge, the court must plainly instruct them as to their duties, and give them such information as it may deem proper in relation to any charges and crimes returned into court, or likely to come before the grand jury. Thereupon the court shall appoint one of such grand jurors as foreman.

honest mistake. If the date of the documents was crucial and the witness attempted to mislead the grand jury, however, the testimony would be perjurious.

Presentment. A written statement issued by the grand jury, pertaining to an offense under its investigation, without an indictment laid before it by the government.

Prima Facie. At first glance; on the face of it. Used to describe an assertion or statement of facts which requires the opposing party to answer it with equally detailed facts.

Privilege. Exemption from testifying before a grand jury or participating in other judicial proceedings because of a particular relationship to another witness (usually the target of the investigation), which would otherwise be impossible to maintain or severely endangered. Of particular interest to grand jury witnesses are the following acknowledged privileges: attorney-client privilege; marital privilege; priest-penitent privilege.

Purge. A civil contempt prisoner must be released from custody once he or she "purges" the contempt by cooperating with the grand jury. The purge may involve "cooperating fully" rather than merely answering the specific question or giving the specific evidence which the witness had previously refused to give.

Quash. To quell completely, to stamp out. In grand jury matters, to nullify the effect of, as in "to quash a subpoena." A judge grants or denies the attorney's motion to quash a subpoena. *Quash* is also the name of a newspaper on grand jury matters.

Recalcitrant Witness. Technical term for one who refuses to obey an order to testify or provide physical evidence or documents.

Remand. To send back. An appeals court can remand a case to a lower court for further action.

Respondent. Person responding to a legal proceeding; the opponent to a legal motion or appeal.

RICO. Acronym for a federal statute called the "Racketeering Influenced and Corrupt Organizations Act," passed as part of the Omnibus Crime Control Act of 1970. RICO gave prosecutors the power to impose use immunity (see *Immunity* entry) on witnesses and greatly broadened the scope of federal grand juries. Clearly, RICO was passed in an effort to keep "organized crime" from infiltrating "legitimate business," but in recent years it has been used to prosecute political activists, motorcycle gangs, and other kinds of organizations (including sheriff's offices) not contemplated when the statute was enacted.

Rule 6(e) (of the Federal Rules of Criminal Procedure). Grand jury proceedings are guided by both the Federal Rules of Criminal Procedure

and the Federal Rules of Civil Procedure. Both sets of Rules are written down in books found in every law library. Rule 6(e) concerns the secrecy of grand jury proceedings; it permits witnesses to discuss their grand jury experiences, but prohibits prosecutors, grand jurors, and investigators from revealing what transpires in the grand jury room.

Sixth Amendment. The constitutional amendment that protects the right to effective assistance of counsel and prohibits attorneys and people working with them from disclosing anything they learned in the course of an attorney-client relationship. The Sixth Amendment right to counsel gives witnesses the right to have lawyers with them in the courtroom, and to consult with their lawyers after every question asked inside the grand jury room. It also protects the right of a witness to have time to hire a lawyer, or to ask the court to appoint one, and to give the lawyer time to interview the witness, study the case law, and prepare motions prior to the witness's appearance.

Special Grand Jury. Ordinarily a grand jury hears evidence (usually in the form of summaries of reports and interviews by investigating agents) about a large number of incidents that detail criminal behavior for which the prosecutor wants to bring criminal charges against those responsible. After the grand jury hears the evidence about a particular incident, it will vote on whether to indict a specific person or persons. A regular grand jury will hear thousands of cases in very little time. A special grand jury may be called when there is a particular problem involving the likelihood of a complex set of facts that may take a long time to sort out. A special grand jury may be convened to consider evidence on one or more of these cases for a period of up to 36 months. A regular grand jury's term ends automatically 18 months from the date it was convened, but the term of a special grand jury can be extended for an additional 18 months.

Stay. A temporary halt in the proceedings, or a temporary suspension of an order until further decision from a higher court. For example, a finding of contempt and an order to jail a witness may be stayed pending appeal to a circuit court of appeals.

Subject. A person who may become a target of the grand jury. See also *Target.*

Subpoena. A command to appear in court or before a grand jury. The subpoena must be issued by the court, signed by a proper official, and personally delivered to the witness, unless the witness agrees that someone else can accept it for him or her. The subpoena must be issued in the name of the grand jury, but it may be delivered by an FBI agent. A subpoena is not a warrant authorizing an arrest or a warrant authorizing an agent to enter a house or office. It cannot

Immunity. In federal grand jury proceedings "immunity" almost always means the government's promise not to use any evidence given by the witness, or any evidence "derived therefrom," in a later prosecution of the witness for the crime about which he or she has given evidence before the grand jury. In essence, "immunity" strips the witness of the Fifth Amendment right to remain silent, requiring the witness to choose between cooperating with the investigation (usually by answering questions) or going to jail. If the government ever wants to prosecute the witness for the matter about which he or she has given evidence, it will have to prove that the prosecution has sources of evidence not "derived from" the witness's testimony.

In Camera. In the judge's chambers, without the public and the press. A witness may or may not be allowed to attend *in camera* proceedings. A court reporter should be present to record everything that takes place during *in camera* proceedings. An *ex parte in camera* proceeding is one in which the prosecutor shows material to the judge without revealing its contents to the public, the press, or the witness and his or her lawyer.

Incriminate; Incrimination. The Fifth Amendment privilege to be free from "self incrimination" protects against much more than confessions of guilt. Traditionally it has protected individuals from having to disclose anything that might make them be looked upon less favorably by the community. Today, it is interpreted more narrowly to mean that the witness must have a reasonable belief that something he or she might say could be used as a link in a chain of evidence that could lead to criminal prosecution.

Inculpatory Evidence. Evidence suggesting that the accused is guilty.

Indictment. The formal document used to begin criminal proceedings against someone. Also called a "true bill." In theory the grand jury's job ends with the issuance of an indictment.

Injunction. A judicial order requiring the person to whom it is directed to stop or refrain from doing something. Grand jury lawyers may ask a judge to enjoin the grand jury proceedings or to enjoin the U.S. Attorney from making certain press statements, or to stop agents of the FBI harassing a witness or a group of people. Injunctions are usually sought as extreme measures to remedy particularly serious violations of law or civil rights. In the grand jury context injunctions are considered extreme measures to be used only to correct the most dramatic violations of law or rights. They may be initiated by an emergency procedure called a "temporary restraining order," which prohibits the continuation of the behavior complained about until a hearing can be held to determine whether the injunction should be issued.

Intervention. A person or group not subpoenaed may file a motion with the court supervising the grand jury, asking permission to "intervene" in motions filed by the witness. This may involve a group or business of which the witness is a member, or a person whose records or possessions have been subpoenaed from an agency with little direct stake in them (e.g., a subpoena to a bank, school, hospital, or social agency for records pertaining to a client). The party seeking to intervene must convince the court that his or her own rights will be seriously damaged if the subpoena is enforced or complied with, and that the witness subpoenaed is not in a position to adequately protect the rights of the party asking to intervene. Parties who are denied permission to intervene may appeal that ruling immediately, without waiting until the witness is held in contempt. Virtually no other grand jury ruling may be appealed before the witness is held in contempt.

Jurisdiction. The legal right of a court to exercise its authority over subject matter, a person, or a place. It can refer to a geographic "jurisdiction"—e.g., the Southern District of New York or the Northern District of California. Or it may refer to the appropriateness of a grand jury investigation into a matter which would appear to fall under state, not federal, law (e.g., most homicides are the subject of state jurisdiction, while robbery of federally insured banks is usually a matter for federal jurisdiction).

Litigate. To pursue a matter in court through argument, evidence, motions, hearings, etc.

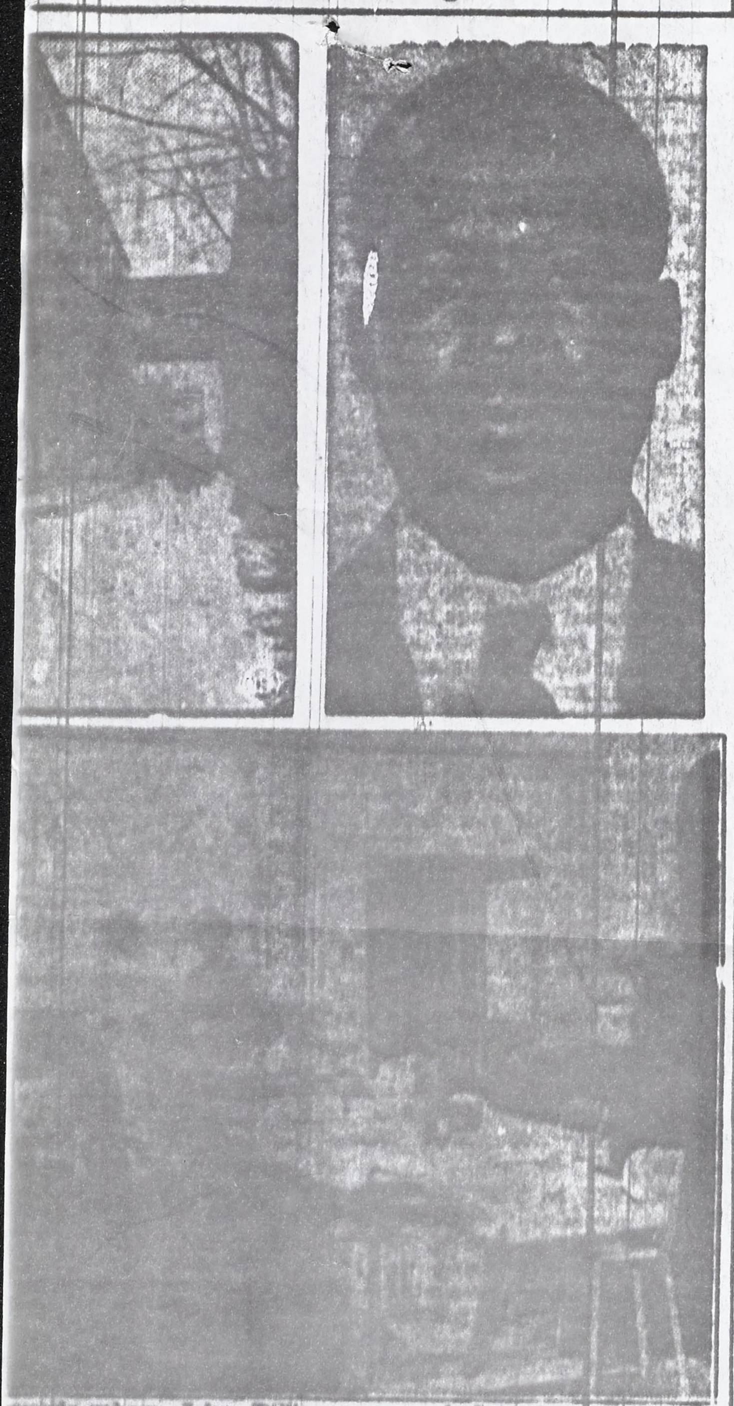
Magistrate. In a general sense a magistrate is a public officer, possessing such power (legislative, executive, or judicial) as the government appointing him ordains. In a narrow sense a magistrate is regarded as an "inferior judicial officer." United States magistrates are judicial officers appointed by judges of federal courts; they have some but not all the powers of a judge. In federal district courts magistrates may conduct many of the preliminary or pretrial proceedings in both civil and criminal cases. In addition, U.S. magistrates have jurisdiction to try minor offenses.

Motions. Oral or written requests for a judicial order or ruling on a particular legal issue. The motion to quash a grand jury subpoena is a very common motion, filed to challenge the legality of requiring the witness to appear and give evidence before the grand jury.

Nontestimonial Subpoena. See *Subpoena Duces Tecum.*

Perjury. The willful making of a false statement about a "material" subject while under oath. A subject is material if it is significant to the investigation. For example, false testimony that certain documents were written on a particular date would not be perjurious if the date was not important to the investigation, or if the witness made an

Killer Sought With Dillinger



...guards whom John Dillinger escaped Saturday morning in
...ller upper right, in the most sensational jail break in the
...d in the areaway between the jail on the left and the crim-
...er left hand photo is shown Ed Saager, garage attendant
...d released with the other hostage, Deputy Sheriff George
...own the jail kitchen as it looked shortly after Dillinger and
...of jail employes and trusties into the pantry, shown in the

...s he seemed to want to in-
...uments, he looked down the
...of the old jail cautiously.
...Ernest Blunk, the criminal
...fingerprint expert, passing
...the receiving room, which
...between the outside office
...e old jail.
'...ll that fellow back here,' Dil-
...ordered.
'...Blunk, come here,' I call-
'...a minute,' Blunk replied.
...k soon came back. Before
...ld see Dillinger or do any-
...o stop it, the supposed pistol
...oved in his back and he, too,
...rced into the cell with us.
...made me call Win Bryant,
...the vigilante guards who was
...ed outside the old jail, near
...ceiving room, adjoining the
...Then he put Blunk to work."

Blunk's Own Story

...k's own story of his experi-
...ith Dillinger follows:
...en I saw Cahoon, he was at
...t of the stairs leading into
...jail from the new jail. I
...'t see Dillinger, but I soon
...he was concealed behind
...idn't know what happened
...got back to the new jail
...oked into the barrel of what
...ed to be a .45 automatic Dil-
...poked at me. I was unarm-
...made me go into the cell
...am, Bryant, the trusty, por-
...d the other prisoners he had
...d so that they would be out
...way. They evidently knew
...was up.
...by one he had me call Lew
...the jail warden, Kenneth
...Matt Brown and Marshall
...y, guards, from the outer
...of the jail building.
...h time I was sent on the 'er-
...he followed me to about mid-
...the corridor of the old jail,
...ng behind me out of sight
...ith that 'gun' in my back.

Guards Obeyed Orders

...made me call Baker from the
...ll and the others from the
...corridor.
...dless to state, I was too
...cell to do anything except
[illegible]
...idea was to do exactly as he
...I believed he wouldn't kill
...he got a break.
...inger asked Houk about the
...the front rooms. He asked
...about the machine
...the office.
...he asked who among the
...prisoners and trusties wanted
...the break with him. Mer-
...Youngblood, Gary murder
...Jim Posey; Fred Beaver
...Carson, Hammond fel-
...prisoners, started out to make
...break, but backed out when we
...down to the jail garage. Dil-
...r put them in the drying room
...others when he finally went
...Main Street garage.

Jelnick Refuses

...e asked Henry Jelnick, a Gary
...ery prisoner, to go along, but
...told him he was afraid to
...he break.
...ll that I have told occurred in
...a few minutes. I couldn't tell
...rately now when it was I was
...d back to the cellblock, when I
...d the others or when the actual
...k happened. It all went too
...and we all were too frightened.
...Making me go ahead of him,
...ager went down the old jail
...ider and to the receiving room.
...he made me have the turnkey
...the doors. He forced the turn-
...to go into the office room out-
...and face the wall with hands
...Warden Hiles, a national

guardsman, came into the office from a front room. He was disarmed and forced to face the wall.

"Hiles's .45 automatic was the first real gun Dillinger got, as far as I can recall. Then he went into the office and grabbed the two machine guns that were lying on the sill of the office windows. He gave one of these to Youngblood and took the other for himself.

Move Into Kitchen

"Still making me go ahead, Dillinger took us into the kitchen. Three more persons, including the chef, were in the kitchen. Baker's mother-in-law, Mrs. Blanche Linton, came in.

"Mrs. Linton appreciated the situation as soon as she saw Dillinger and the Negro. 'Oh, you won't kill me,' she cried, sobbing and weak with fright.

"'No,' Dillinger replied, 'not if you behave yourself.'

"Then Mrs. Baker rushed into the kitchen. She apparently knew what was going on and intended to spread the alarm as soon as she found someone.

"When she saw Dillinger with the machine gun in his hand she became hysterical, crying and screaming at the same time.

"Dillinger told her to keep quiet. She still cried loudly and he turned to me. 'Come on, Blunk,' he said coolly. 'Make her keep quiet or I'll give it to you—then her.'

"I calmed Mrs. Baker a little. Dillinger and Youngblood kept everybody covered as he proceeded with his break. He told Mrs. Baker he wouldn't harm her if she was a good little girl.

Leads Way to Garage

"From the kitchen, Dillinger forced me to lead down to the jail garage, which is underneath the new jail addition.

"He intended to use one of the sheriff's cars in the jail garage, but he couldn't find any keys.

"Then he made a trip back into the jail, leaving Youngblood covering the few of their captives who were not locked up or herded into the laundry drying room, adjoining the kitchen.

"He went back to the felony cell-block to ask about auto keys of Baker and Cahoon. He was unable to learn the whereabouts of the keys and immediately asked me about the nearest garage. I told him the Main Street was the nearest. He asked where the Main Street garage was located. I told him next to the criminal court.

"It was then he left the jail, still making me walk in front of Youngblood and him. He went out the kitchen door, on the south side of the jail building, east to the street at the rear, South East street, and then in a short, circuitous route to the rear door of the Main Street garage.

Holds Up Garage

"He pushed me ahead into the garage and ordered those in there to stick up their hands. Ed Saager, a garage mechanic, was working under one of the cars. He ordered Saager to get up and stick 'em up.

"Saager didn't know Dillinger and he apparently believed one of the jail guards was playing a joke on him when Dillinger poked him with the machine gun. Finally, I told Saager he'd better do as he was told. Saager got up and stuck up his hands.

"Dillinger asked which was the fastest car in the garage. 'That Ford V-8,' Saager said, pointing to Mrs. Holley's sedan. 'Get in and drive, Blunk,' he ordered. I got in. He and Youngblood made Saager get in, too. Dillinger sat beside me in the front seat with Youngblood beside Saager in the rear seat.

"We drove out the front door of the garage on Main street and north out of the town. I ran a red light on the way through the business district.

Start Trip West

"As we started out, Dillinger started asking questions about the highways. He wanted to turn west on state road 8, but I had passed that, by that time. Then he ordered me to turn west on the macadam road at Clark's filling station, just north of the Pennsylvania tracks at the edge of town. I did this.

"He still was cool as could be. He hummed, whistled and sang 'The Last Roundup.' We didn't sing, though.

"As we were driving away from Crown Point he showed me the dummy gun. 'You wouldn't think a guy could make a break with a pea shooter like this, would you?' he asked, laughingly displaying the dummy. I looked at it, but I couldn't see much besides the machine gun. Every time we hit a bump, the barrel of that machine gun jabbed me in the side.

"He told me to avoid the traveled highways and towns. St. John was the only town we passed through from the time we started until he left me and Saager near Peotone, Ill.

"In all we never passed more than 10 moving automobiles and trucks during the trip. We passed parked cars of C. W. A. workers in Illinois.

Auto Is Ditched

"Near Lilly Corners, about nine miles northwest of Peotone, the car skidded on a turn. I tried to right it, but I couldn't. Finally Dillinger told me to slam on the brakes so that the rear end would take the ditch alongside the highway. I did and we ditched.

"We were in the ditch for at least 40 minutes. He made Saager get out and put on the chains. While Saager put on the chains, Youngblood kept him covered with the machine gun. Dillinger took care of me.

"I didn't know where we were heading. Before we left the jail building, I asked Dillinger to let me get my hat and coat. He told me that if his plans worked out, we'd be in a warmer climate so soon that I wouldn't need an overcoat. Before we left he got Sam Cahoon's raincoat and hat from a hook in the kitchen.

"The Negro talked very little. Dillinger told me he had planned the break from the first day he was in the Crown Point jail.

Discloses Jail Plans

"He told me that he never would have gone to trial in Lake criminal court. He said that he would have taken a continuance and a change of venue if he had to, to delay the trial when it came up.

"'That's the last jail I'll ever be in,' he boasted. 'It was a bum rap, anyway.'

"When we neared Peotone Dillinger suddenly ordered me to stop the car. 'You're not going to kill us, are you?' I asked, fearing his intentions. 'No, I'm not,' he replied. 'What kind of a mug do you think I am?'

"I said to him that I didn't think he would kill us, for he had been well-treated in the jail.

"'Yes, that's right,' he said. 'I've been treated all right in the jail, but if I ever get a chance at that rat, Claudy, I'll bump him off.'"

W. H. Claudy is the former deputy warden of the Michigan City prison where Dillinger served time for robbery. Claudy was ousted by the state government for alleged laxity in connection with the escape of 10 convicts from the penitentiary last fall.

Shakes Hands, Leave

"When Dillinger made us get out of the car he told us to keep walking and to avoid the highways. He also told us to keep our mouths shut. He gave Saager $4, which, he said, was to pay our fare back to Crown Point. He said he had $15 or $16 with him.

"He simply said 'Good-by,' as he drove away after shaking hands with us.

"He appeared to be confused about directions as he started to drive away, but soon he turned south and out of sight. We walked only a short distance before we got a ride into Peotone with a farmer named Ed Rust. Then I called the sheriff in Crown Point and the rest of my story is known."

Blunk did not return to Crown Point until nearly midnight Saturday night, after having aided in the search of Illinois highways conducted by the highway police in Kankakee.

Saager, however, returned about 4 o'clock Saturday afternoon. Saager told substantially the same story of the auto flight to Peotone.

Didn't Recognize Dillinger

"I didn't know Dillinger or the Negro," Saager related. "When they walked into the garage I saw Blunk and two other men, the latter carrying machine guns. I figured it probably was a rush call of some kind that Blunk was going on, with two of the guards. Men with machine guns have been common in Crown Point since Dillinger was locked up in the county jail.

"I don't know what would have happened if Blunk hadn't told me to do as Dillinger ordered in the garage.

"I didn't realize who Dillinger was until I heard some of his conversation with Blunk as we drove out of Crown Point. Then I thought I was in for trouble. I was afraid I'd never live to see my wife and little son again."

Saager told the same story of the trip across Indiana and into Illinois as related by Blunk. Saager added, however, that he believed Blunk's fright over the experience caused him to ditch the car.

Both Blunk and Saager said Dillinger toted the machine gun and automatic, while Youngblood carried a machine gun and two revolvers, taken from jail guards before the flight began.

They also commented on Dillinger's frequent smiles. They said they spoke of the smiles to Dillinger and that he replied:

"I can smile now, for my plans have clicked," Dillinger said. "I've planned this ever since I was put in that damned jail."

Mention St. Louis

St. Louis was mentioned guardedly by Dillinger and Youngblood during the trip, leading Blunk and Saager to believe that city was their destination.

Blunk also said that Youngblood apparently knew of Dillinger's break plans. He could not give any specific illustration of remarks upon which to base th belief.

Blunk and Saager said Dillinger made no mention of his former confederate, John Hamilton, accused with him of perpetrating the $20,000 First National bank robbery in East Chicago when Policeman W. P. O'Malley was killed Jan. 15.

Blunk also related that as they drove out of Crown Point, they passed the Commercial bank. "Maybe we ought to stop there and pick up a little cash," Dillinger remarked jokingly, eyeing the bank. "Sorry we haven't got time."

Blunk was asked if he believed Dillinger actually planned the break or if, on the other hand, the hoodlum started the break and then continued it to completion by sheer luck.

"I don't know," Blunk replied. "I do know, though, that he didn't know the jail building layout thoroughly, for he didn't know he would have to go through the office to reach the kitchen."

Blunk also said that before Dillinger left Saager and him near Peotone he returned the jail keys he had with him to the fingerprint expert. Youngblood, however, kept keys to the new jail. Sheriff's deputies had to break into the rooms occupied by trusties late Saturday night before they could be questioned.

Trusty Guards gate

The turnkey in the receiving room suspected that something was amiss in the felony cell block, he related to prosecutor's investigators.

"Blunk kept coming to the old jail door and calling the warden and others," related the turnkey, John Jablowcsyn, 1119 Field, Hammond, a trusty serving a larceny sentence. "Finally I told one of the men Blunk had called that there was something wrong back there in the new jail.

"I don't know who it was I told of my suspicions. Anyway, he didn't realize the danger until it was too late and he couldn't do anything about it.

"I never saw Dillinger at all until he finally came out to the receiving room with the other prisoners and Blunk.

"Then he made me face the wall and hold up my hands. He took my keys away from me and grabbed the machine guns. I was locked up with the others in the felony cell block."

Jablowcsyn told investigators that during the last few moments of the break preliminaries he was alone in the outer rooms. He admitted that he could have escaped himself or obtained the machine guns from the office and engineered a wholesale jail delivery.

"But I'm a trusty, you know," he explained.

Nearly Foiled Break

Another one of Dillinger's prisoners who didn't know the hoodlum's identity or desperate character was the jail cook, William Zeiger. ... break.

Zeiger didn't learn of Dillinger's identity until the gangster had left the jail building and had gone to the Main street garage, he said.

"I was busy in the kitchen when Dillinger walked in with the other prisoners and Blunk," Zeiger said. "I know something was wrong when I saw the machine guns and was ordered to stick up my hands.

"Dillinger quickly herded us into the drying room. The room is none too big and soon it was crowded as Dillinger pushed one and then another into it.

"I got too warm. I shoved open the door, which was not locked, and asked, 'What's the idea?' Dillinger didn't take the trouble to reply, but hastily ordered Blunk and the Negro out of the side door of the kitchen, locking it behind them. Mrs. Baker and the others who were in the room with me immediately rushed for telephones."

Didn't Lock Door

Zeiger said Dillinger never troubled to look up his prisoners in the drying room at any time. He merely shoved them in and went about his break business.

In the room with Zeiger were Mrs. Baker, her mother, Mrs. Linton; John Hudak and Bud Chandler, jail garage mechanics; two trusties who were working in the kitchen with the cook and the three prisoners who at the last moment decided against making the break with Dillinger.

Another persons who might have thwarted the break is Robert Volk, Crown Point mail carrier, who, armed with a .45 service revolver, was in the Main street garage when the flight started.

"I heard Dillinger order Saager to get him the fastest car in the garage. Dillinger didn't say another word. Then Blunk shouted: 'Look out, he means business.' He was scared. So were we.

"I had my service pistol slung over my shoulder in a holster, but with those two machine guns trained on me I couldn't make a move.

Done in a Hurry

"The whole thing didn't take more than a minute in the garage. Two mechanics elsewhere in the garage didn't know anything about the incident until it was too late.

"As soon as the car got out the garage, I ran to the front office. Loren Raver, a salesman, was there. I told him Dillinger had escaped in the sheriff's car. He picked up the telephone and asked for the sheriff's office.

"That won't do any good," I told him. "They're probably all bumped off in there.

"I grabbed the phone to call Gary police, hoping to head Dillinger off on the north. Then I hurried next door to the criminal court building where guards were stationed.

"I told them Dillinger had escaped. 'Go on and get out of here,' they told me, evidently thinking my alarm was a joke.

"Then I went to the front part of the jail building, housing the sheriffs residence quarters. I went to a window and a deputy came to it. He told me he couldn't get out, that the whole lot was locked in.

"It was at least 10 minutes before they were able to get out of the front part of the building and later before those in the cells were freed."

Nearly Balked

Clyde Rothermel of Gary, owner of the Main street garage, Saager's employer, related how the automatic doors on the garage almost proved Dillinger's undoing.

"I had gone to the basement to adjust the compressor which operates the doors," Rothermel said. "I was in the basement when I heard footsteps going over the elevator at the rear of the storage room. Those footsteps were Dillinger, the Negro and Blunk, but, of course, I didn't know that until too late.

"When Blunk drove the car out of the garage, Dillinger ordered Saager to open the automatic doors. Saager pushed the button that releases the doors. Only one door would open because of the trouble downstairs. The other door had to be opened by hand before they could drive out."

Rothermel said that as soon as he came upstairs from the basement he heard Volk's message and immediately had the remaining mechanics get the sheriff's squad cars ready and running for a search.

Rothermel also revealed that Dillinger took possession of Sheriff Holley's car just after the tank had been filled with gasoline. The sheriff's personal car is "gassed" every morning, Rothermel said. "If Dillinger had been a little sooner, he might have run out of gas on his trip," Rothermel said.

Marshal Sees Flight

Joe Erlenbach, Crown Point town marshal, witnessed the flight from the garage. Erlenbach, armed with a revolver as usual, saw Blunk driving the sheriff's car at breakneck speed from the garage and through the red traffic light at the southeast corner of the public square.

"I thought Blunk was driving on an emergency call and never paid any attention," Erlenbach said.

He stated that he didn't learn about Blunk's companions until later.

In his story of the flight, Blunk explained that after getting out of the Crown Point city limits, Dillinger ordered him to hold his speed down to 40 miles an hour and to keep off of all main highways.

The warden's wife said she had gone from her quarters in the jail building to the jail and had been told by her husband of Dillinger's break attempt. Baker, locked in the felony cell block, was able to tell her of what had occurred through the peephole in the consultation room, a unit of the new jail, which adjoins the cell block, she said. Dillinger then was in the kitchen and jail garage.

"I hurried to the front office as fast as I could," Mrs. Baker said. "I meant to spread the alarm, but Dillinger collected me with the others. I was mighty frightened."

Dillinger Tips Reach State Police at Rate

Indianapolis, March 5.—Tips on the whereabouts of John Dillinger are pouring into the Indiana state police headquarters here from all parts of the country at the rate of one every five minutes, State Safety Director Al Feeney said this afternoon.

The tips come by long distance telephone, by telegraph, by mail, and by person.

"We investigate every tip that looks at all reasonable," Feeney said.

Some of the tips describe Dillinger as masquerading as an army officer, as a coal miner, as an overalled farmer and even as a woman. He has been reported seen in almost every section of the state, and has enough armament to equip the entire national guard according to all the reports.

Today's Markets

Chicago, March 5.—In the absence of anything in President Roosevelt's N. R. A. address today that seemed to apply directly to grain markets, wheat and other cereals underwent downturns.

A decrease of 2,575,000 bushels in the United States wheat visible supply total was of some effect too in imparting comparative firmness to prices toward the last. Today's reduction of the visible supply left the total supply at the lowest level since July 1920.

Wheat closed easy, at the same as Saturday's finish to ¼-½ down, corn ¼-½ down, [illegible] down, and provisions unchanged to 7 cents decline.

CHICAGO GRAIN

Chicago, March 5.—Grain close: Wheat—No. 2 hard, [illegible]. Corn—No. 2 mixed, [illegible]. Oats—No. 2 white, [illegible]. Buckwheat—No. 1, [illegible]. Rye—None. Barley—[illegible]. Timothy seed—[illegible]. Clover seed—[illegible].

CHICAGO LIVESTOCK

Chicago, March 5.—Livestock: Hogs—Receipts, [illegible]. Cattle—Receipts, [illegible]. Sheep—Receipts, [illegible].

CHICAGO PRODUCE

Chicago, March 5.—Produce: Butter—Receipts, [illegible]. Eggs—Receipts, [illegible]. Cheese—[illegible]. Live poultry—[illegible]. Potatoes—Arrivals, [illegible].

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