IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No: 16-2001-CF-2576-AXXX
Division: CR-G

WILLIAM JOE JARVIS

vs.

STATE OF FLORIDA

DEFENDANT-APPELLANT JARVIS'S MOTION FOR PRODUCTION OF GRAND JURY RECORDS

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TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other

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WILLIAM JOE JARVIS, Defendant-Appellant, ("Jarvis"), by and through his undersigned counsel, WILLIAM MALLORY KENT, hereby moves this Honorable Court to enter an order directing the State Attorney for the Fourth Judicial Circuit, in and for Duval County, to produce for inspection by the Court and counsel for Jarvis, all records relating to the grand jury proceedings conducted in this case during the *Fall Term, 2002*, and in particular all records relating to the return of the *Amended Indictment* on April 10, 2003, including, but not limited to, a transcript of the entire proceedings before the grand jury during the Fall Term, 2002, leading up to the return of the Amended Indictment.

This case was initially premised on an information charging Jarvis with murder. Thereafter on April 5, *2001*, a grand jury, over which the record foreperson was one W. Weston (the "Weston Grand Jury"), meeting during the Fall Term, *2001*, returned a four count indictment against Jarvis, charging Jarvis in count one with first degree murder of Lillian Jarvis, in violation of Florida Statutes, § 782.04(1)(a) and § 775.087, in count two with first degree arson, in violation of Florida Statutes, § 806.01(1)(a), in count three with discharge of a destructive device injuring Marjorie Harris, in violation of Florida Statutes, § 790.161(3), and in count four, with discharge of a destructive device injuring Daniel Showalter, in violation of Florida Statutes, § 790.161(3). The state was represented by then Assistant State Attorney Tatiana Radi Salvador at the Weston Grand Jury. The only witness listed on the original indictment was Jacksonville Sheriff's Officer M. P. Bialkoski, badge number 7230.

The term of the Weston Grand Jury expired and the Weston Grand Jury was discharged.

Thereafter, on April 10, *2003*, a different grand jury, meeting during the Fall Term, 2002, two years after the first grand jury returned the original indictment, under Betty Hodges Shannon as foreperson (the "Shannon Grand Jury"), returned an *Amended Indictment.* The Amended Indictment was identical to the original

indictment except for one change in count two, whereby the state added to the charging language in count two a clause intended to trigger the application of the mandatory sentencing provisions of § 775.087. Otherwise the indictment was undisturbed. The state was represented by then Assistant State Attorney Jay Taylor at the Shannon Grand Jury. The only witness listed on the amended indictment was Jacksonville Sheriff's Officer M. P. Bialkoski, badge number 7230.

Jarvis proceeded to trial on the *Amended Indictment* and was convicted and sentenced under the *Amended Indictment*.

However, under Florida law there is no such thing as an amended indictment. *In re Florida Rules of Criminal Procedure*, 196 So.2d 124, 140 (Fla. 1967), *Akins v. State*, 691 So.2d 587 (Fla. 1st DCA 1997). Likewise, an indictment returned after the grand jury has been discharged is invalid. *Hicks v. State*, 120 So. 330 (Fla. 1929).

Therefore the indictment that Jarvis was tried and convicted under would on its face appear to be void.

The only way that the *Amended Indictment* could have been valid would have been if the indictment in fact were not an *amended indictment,* but instead had been a superseding, second indictment, obtained after the *entire case had been represented to the Shannon Grand Jury.* This is the teaching of the Florida Supreme Court in *Smith v. State*, 424 So.2d 727, 728 (Fla. 1983):

Initially, the new indictment was captioned "Amended Indictment." Appellant moved to dismiss on the ground that a grand jury may not amend an indictment. Thereafter, the state moved to have the word "amended" stricken from the caption, asserting that it was a clerical error. The trial court denied appellant's motion and granted the state's. The court determined that the second grand jury had independently examined the evidence and had filed a new, rather than an amended, indictment. At the beginning of the trial the state filed a notice of *nolle prosequi* with regard to the first indictment. *Appellant is correct in his argument that a grand jury has no authority to amend an indictment to charge an additional or different offense. See Fla.R.Crim.P. 3.140(j) and Committee Note (1968); State v. Black, 385 So.2d 1372, 1375-77 (Fla.1980) (England, J., concurring).* However, a grand jury may file a completely new indictment regarding the same alleged criminal actions, even though a prior indictment is pending. *See* Committee Note, Fla.R.Crim.P. 3.140(j) (1968); *Eldridge v. State,* 27 Fla. 162, 9 So. 448 (1891).

So, *a grand jury may charge a defendant with an additional or different offense by filing a second indictment. Although it may appear that the*

> *result is the same, the process is significantly different.* ***Before filing the second indictment, the grand jury must independently evaluate the case. This requirement ensures that the grand jury itself finds the filing of additional or different charges appropriate.*** Since there is nothing in the record which refutes the trial court's finding that the second grand jury independently reviewed the evidence before returning the second indictment, there is no basis for us to disturb the court's ruling.

[emphasis supplied]

There is nothing in the current record to establish, however, that the state represented the entire case, *de novo*, to the Shannon Grand Jury, instead, from all that is in the record, and from the face of the indictment, the state failed to proceed in this fashion, and instead only *amended* the existing original indictment. If so, the indictment was void, and Jarvis's conviction must be vacated.

A judgment that is void, mere *brutum fulmen*, can be set aside and stricken from the record on motion at any time, and may be collaterally assailed. *Einstein v. Davidson*, 35 Fla. 342, 17 So. 563 (Fla. 1895); *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337 (Fla. 1910); *Lucy v. Deas*, 59 Fla. 552, 52 So. 515 (Fla. 1910), *Malone v. Meres,* 91 Fla. 709, 720, 109 So. 677, 682-682 (Fla. 1926). Article I, Section 15(a) of the

Florida Constitution prohibits any person from being tried for a capital crime without presentment or indictment by a grand jury. In this case, if the state failed to represent the entire case to obtain the so-called amended indictment against Jarvis, Jarvis was deprived of his constitutional right to be prosecuted for a capital crime only by indictment by a grand jury, his amended "indictment" that he was tried upon would be void, and his conviction would have to be vacated.[1]

The First District Court of Appeal entered an order dated May 13, 2004 in the appeal of this matter, First District Court of Appeal case number 1D03-5498, in which the District Court relinquished jurisdiction to this Court for the purpose of Jarvis filing the appropriate motions to challenge the indictment on this basis.

We submit that unless the state produces for inspection by the Court and Jarvis complete records of the grand jury proceedings, including a transcript of the Shannon Grand Jury proceedings against Jarvis, Jarvis is entitled on the current record to a dismissal of the amended indictment and to have his judgement and conviction in this case vacated.

This Court is authorized under Florida Statutes, § 905.27(1) to order the disclosure of the Shannon Grand Jury proceedings. *Cf. State v. Drayton*, 226 So.2d

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[1] The amendment to the indictment voided the prior indictment as well. *State ex rel Wentworth v. Coleman*, 163 So. 316 (Fla. 1935).

469 (Fla. 2nd DCA 1969) (noting that the purpose and policy for grand jury secrecy is essentially accomplished once the indictment has been returned, the defendant taken into custody and the grand jury dismissed, and allowing *in camera* inspection as an initial step to grand jury disclosure to the defense).

In *In re Report of the Grand Jury, Jefferson County, Florida, Spring Term, 1987*, 533 So.2d 873 (Fla. 1st DCA 1988), the First District Court of Appeals was confronted with a somewhat similar situation. An original indictment was repressed on an undefined technical ground and was followed by a superseding indictment. The defendant moved to dismiss the superseding indictment arguing that the prosecutor had tainted the second grand jury by disclosing the fact of the first indictment to the second grand jury. The trial court dismissed the indictment on this basis. In reversing the order dismissing the superseding indictment, the court of appeals noted that the state attorney had alleged that the second grand jury had in fact returned the superseding indictment on the basis of independent evidence and the state was prepared to call a grand juror to testify that independent evidence had been presented to the second grand jury:

> The trial court erred in *presuming* that the second grand jury based its report only on the first grand jury's report, and not on independent evidence, especially *in light of the State Attorney's statement to the*

contrary and his willingness to call one of the grand jurors to so testify.

The State Attorney could have been adequately disciplined for his conduct without unnecessarily interfering with the grand jury proceedings. [footnote 4][2]

In Jarvis's case, the state likewise should be compelled to disclose the evidence that was presented to the Shannon Grand Jury to prove that the amended indictment was based on independent evidence *if that can be proved*. If the state fails to make such a presentation, then Jarvis is entitled to have the indictment dismissed and his

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[2] [Footnote 4 In *U.S. v. Phillips,* 664 F.2d 971 (5th Cir.1981), *cert. den., Meinster v. U.S.,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982), the court held that it was improper for government attorneys to present to a successor grand jury a summary of the evidence which had been presented to a prior nonindicting grand jury without obtaining a court order, but that it would dismiss an indictment for such a disclosure only when there is a showing that substantial rights of the defendant were impaired or that the integrity of the grand jury proceedings was impugned.

In *U.S. v. Malatesta,* 583 F.2d 748 (5th Cir.1978), *on rehearing on other grounds,* 590 F.2d 1379 (5th Cir.1979), *cert. den., Bertolotti v. U.S.,* 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979), the prosecutor read the transcript of one grand jury proceeding to another grand jury to expedite its hearing of the case and offered to present any witnesses the grand jury desired to hear in person. The court held that this was not a disclosure permitted under the federal rule and that a court order should have been obtained, but that it did not impair any substantial rights of the defendants or impugn the integrity of the grand jury proceeding so as to require dismissal of the indictment. The court noted that in the usual case the rule prohibiting disclosure of grand jury materials may be adequately enforced by a contempt citation.]

conviction vacated.

The Florida Supreme Court has held that once the grand jury investigation has ended it is proper to require disclosure of grand jury testimony in the interest of justice. *Keen v. State*, 639 So.2d 597 (Fla. 1994). We submit that justice requires the disclosure of the grand jury proceedings in this case on this record and that Jarvis has made a sufficient showing of particularized need to require the production. At a minimum, this Court should conduct an *in camera* inspection of the grand jury proceedings to determine whether *Smith* was complied with, that is, whether there was a representation of independent evidence to support the finding of the indictment by the Shannon Grand Jury. *Cf. State v. Reese*, 670 So.2d 174 (Fla. 4th DCA 1996).[3]

[3] To determine whether a defendant has shown the particularized need that *Dennis* requires [*Dennis v. United States,* 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973 (1966)], the trial court has the discretion to conduct an in-camera inspection of the grand jury testimony. *Miller v. Wainwright,* 798 F.2d 426 (11th Cir.1986), *vacated and remanded,* 480 U.S. 901, 107 S.Ct. 1341, 94 L.Ed.2d 513, *reinstated,* 820 F.2d 1135 (11th Cir.1987).

WHEREFORE, based on the authorities cited herein, Defendant-Appellant Jarvis respectfully requests this honorable Court require the state to produce the entire record of proceedings of the Shannon Grand Jury in this case, including, but not limited to, a transcript of the proceedings and the clerk's notes.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been delivered by United States mail to Assistant State Attorney Jay Taylor, Duval County Courthouse, Jacksonville, Florida 32202, this the 3rd day of June, 2004.

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William Mallory Kent