72D CONGRESS
*1st Session*

SENATE

DOCUMENT
No. 77

# CHARGES AGAINST OFFICIAL ACTS OF JUDGE A. M. CRISTY, OF HAWAII

LETTER

FROM

RUDOLPH BUKELEY TO
SENATOR KENNETH McKELLAR, OF TENNESSEE

TRANSMITTING

CERTAIN INFORMATION CONCERNING CHARGES AGAINST JUDGE A. M. CRISTY

PRESENTED BY MR. McKELLAR

APRIL 4, 1932.—Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1932

# CHARGES AGAINST OFFICIAL ACTS OF JUDGE A. M. CRISTY OF HAWAII

HONOLULU, HAWAII, *March 12, 1932.*

Hon. KENNETH MCKELLAR,
*United States Senate, Washington, D. C.*

SIR: I inclose copy of charges that were made by me as a member of the Territorial grand jury, to the other members, against the illegal and intimidating acts of Judge Cristy.

Said charges are notated as to page and line in the copy of the court record, in which supporting evidence will be found. This is being forwarded to you under separate cover.

The Attorney General's department recently sent out from Washington an investigating committee, under Mr. Seth Richardson, to investigate conditions in Hawaii, and I understand that their findings will be submitted to the Senate of the United States.

Having reason to believe, however, from remarks made by Mr. Richardson to other residents, that these charges, which were presented by me to the Department of Justice on February 26, will be ignored, or at best receive an official coat of whitewash, I am forwarding the data direct to you, not only for your own information but for such action as you may deem advisable.

On February 25, a Mr. MacFarlane, one of Seth Richardson's assistants, telephoned to me, requesting that I make an appointment to come to his office; this was set for the following day at 3 p. m.

I duly kept this appointment, to be told on my arrival that they were leaving "within the hour" for one of the other islands and that Mr. Richardson therefore could not see me. He turned me over to one of his assistants, a Mr. J. V. Murphy.

I properly held, and Mr. Murphy agreed with me, that his official duties being limited to an investigation of local police conditions, I had better await the return of Mr. Richardson. I handed him, however, a detailed copy of my charges, duly signed, and advised him that I would call on Mr. Richardson and substantiate the same at any time that might be convenient to him.

I might add that I have since learned that Mr. Richardson did not actually leave for the other islands until three days later; since his return he has made no attempt to have me call, and has absolutely ignored the fact that I have presented these charges, and desire to give corroborative evidence from the court records.

Mr. Richardson has now left Hawaii, having completed his "investigation."

I am, of course, a perfect stranger to you, and believe therefore that I should give you details as to my standing as a citizen in this community and as to my activities as an American citizen.

I was born in England in 1878, coming to the United States in 1896, and since October, 1906, have lived continuously in Hawaii. I became a naturalized American citizen in 1908. During the war I was unable to join the Regular Army, and therefore applied for foreign service with the American Red Cross, and served with that branch for one year in Siberia, where I was placed in charge of an allied typhus-fighting expedition, having some 45 men under my command, and taking a bath and hospital train into the interior, traveling between Vladivostok and the Ural front, washing and delousing troops and refugees, also visiting and giving aid to the various prison camps along the line. For my services I received citations from the Kolchak Government, from the representatives of the various Allies, and was highly recommended by Washington headquarters of the American Red Cross at Washington.

My services were given without pay, and in order to serve I resigned my position as cashier of the First National Bank of Hawaii, a Government depositary. Upon my return in July, 1919, I was elected a vice president and director of the First National Bank, which position I resigned at the end of 1920, in order to enter the life-insurance field.

During my 26 years of residence in Hawaii I have often served as both trial and grand juror, several times being foreman of trial juries, and in 1930 I served as foreman of the Federal grand jury.

I have always considered jury service as a civic duty, but I shall not again serve as a juror, as I can not conscientiously take the solemn oath required, when in my opinion, I see the law prostituted by the very court which has been sworn to uphold the law.

As to my integrity and standing, I unhesitatingly refer to Thomas A. Buckner, president of the New York Life, who is a warm and intimate friend of mine, and who will, I know, vouch for my bona fides.

My fight against Judge Cristy was not carried on single handed, but many prominent citizens who served on the same jury agreed with my stand, bitterly resenting his actions. Amongst them I might mention Arthur F. Wall, president Wall & Dougherty (Ltd.); Robert McCorriston, vice president Bank of Hawaii; Marmion M. Magoon, local business man; John Cliff, contractor; W. C. Laird, retired rancher; Ralph C. Scott, manager Bishop insurance agency; E. E. Bodge, vice president Von Hamm Young Co. (Ltd.).

This last-named juror was recently appointed a member of the newly created police commission, serving without pay, and for that reason, despite his statement that he was willing to serve and did not seek to be excused—having voiced his objections to the high-handed methods of Judge Cristy, was illegally and peremptorily excused from further jury service, while we were still considering our verdict and after all the evidence in the case had been heard.

This action on the part of Judge Cristy forms the basis of one of my charges, the same being absolutely illegal according to our Territorial laws.

Under separate cover I am forwarding complete copies of the court records, and in the margin, opposite my various charges, I have annotated in red ink the page and line where will be found supporting proof of the same in the court record. I have also underlined in red



such other pertinent matters so as to save you the time necessary to read the entire record.

My charges, therefore, are not a matter of personal opinion; they are based on actual facts, which will be supported by other grand jurors, and in most instances are supported by the court record itself.

I also inclose copy of the London Weekly Times of January 21, 1932, which referring to a similar attempt by the prosecuting counsel refers to the praise of the King's counsel at the independent attitude taken by the jurors, in refusing to be intimidated.

I also inclose copy of the Panel, which is published by the Association of Grand Jurors of the County of New York, in which appears comment on Judge Cristy's action.

Referring, however, to said article, regarding the right of the grand jury to "refuse to indict," my charges as to Judge Cristy's actions go even further; he not only violated this right, but he took it upon himself to decide and order that we could not consider the question of manslaughter—in other words, without having heard the evidence in the case, he illegally restricted the grand jury as to the form of indictment which we should be permitted to consider. (See court records.)

And yet, my dear Mr. Senator, I fully believe that Seth Richardson intends to ignore these charges, and for that reason I send the complete record to you, asking for the justice which I believe the representative of the Department of Justice refuses to grant me; at least he has definitely refused to hear me on the question.

I am sending a copy of this article to the president of the Panel as he has commented on this phase of the case, saying, "The fight on the indictment will be a landmark in American criminal jurisprudence."

I have followed, through copies of the Congressional Record, the stand that you have always taken for independence and justice, and in forwarding these charges and supporting documents believe that the matter can rest safely in your hands, if you should decide to inquire why my presentation of the charges has been deliberately ignored.

I hold myself in readiness to furnish you with such other evidence as you may desire, in the form of sworn statements of other grand jurors, but believe that the copy of the court record will satisfy you as to the justice of the stand that I have taken in submitting the matter to you.

Respectfully,

RUDOLPH BUKELEY.

(Mr. Franson, the appointed foreman, is a white man of rather weak character, who holds a minor clerical position and is married to a Hawaiian.)

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HONOLULU, HAWAII, *January 25, 1932.*

MR. HARRY FRANSON,
*Foreman Members of the Grand Jury.*

GENTLEMEN: I charge that by his action in having a secret conference with the foreman of this grand jury, without advising the rest of its members, or without disclosing what information was demanded by or received by him;

That by arbitrarily and summarily refusing to accept our report;

That by his further charge to the grand jury after all evidence had been submitted and discussed, and after we had been advised that there was no additional evidence by the prosecuting officer, and after a vote had been taken and a decision arrived at, of which he had been advised;

That by the language in which said charge was couched and by the attitude and manner in which it was delivered;

That by his arbitrarily and summarily ordering an adjournment for several days, refusing to acknowledge the protest of Juror Bodge who advised him that he had been called into court to receive a report;

That by his arbitrarily and summarily refusing to listen to me when I advised him that I had been deputized by the grand jury to ask him to come and advise with us, simply stating to my objections as to his attitude "you have been adjourned until Tuesday";

That by his further advising and instructing us that the question of manslaughter was not before us, and that we could not consider the same;

That by his illegally and arbitrarily excusing Juror Bodge (who had been appointed a police commissioner) from further service, despite the statement by Juror Bodge that he did not desire to be excused and was willing to serve;

That by his advising us that parliamentary procedure need not govern our discussions and action;

That by his again arbitrarily and summarily adjourning us for two hours and refusing to accept our report after the foreman had been ordered to present the same, and then had stated in open court "I have nothing to report"; and

That by his refusing to listen to Juror Scott, who expostulated at this arbitrary adjournment, stating "But, your honor, the foreman was instructed to present a report";

That by his own admission "this court refused at the last session to receive and file a report, feeling that it was necessary for the jury further to consider the facts and the law";

That by his veiled threat "the deliberations of this jury are not completely sealed from any investigation—so don't for a moment go under the misapprehension that there is no way in the world by which matters which are pertinent to the administration of justice can not be investigated and disclosed";

That by these and other acts Judge Cristy has violated my rights as a grand juror.

This is written in no spirit of antagonism or personal animus; I have always had and still have the highest respect for the integrity and honesty of purpose of Judge Cristy, according to his lights; but I also, imbued with the same principles and ideals, challenge the right of any man, court, or tribunal to attempt to swerve me from my strict and honest understanding of the oath that I have taken as a grand juror, or to attempt to usurp and prostitute my rights as a grand juror.

I bitterly resent what I consider to be a deliberate and unlawful attempt on my rights as a grand juror, and further as a deliberate attempt at intimidation.

I therefore serve notice on you, gentlemen, that after this case shall have been finally decided by us, and said decision shall have been accepted by Judge Cristy, I shall request that I be excused from further service as a grand juror in Judge Cristy's court, as I do not feel that I can give to the Government loyal and faithful service or be further bound by my oath, when I see the court itself flagrantly and deliberately, in my opinion, prostitute the very laws that it is sworn to uphold. I also wish to advise you further that I shall, upon the arrival of Mr. Seth Richardson, the special representative of the Attorney General's Department in Washington, ascertain from him whether it is legally possible for me to present these charges, without violating my oath as to secrecy of grand jury proceedings, and that further I shall attempt to have you gentlemen cited to appear as witnesses to prove and testify to the actions of Judge Cristy to which I am taking exception.

Yours very truly,

RUDOLPH BUKELEY.

I am disclosing none of the secret conferences of the grand jury, as everything to which I refer took place in open court and has been reported at great length in the local press.

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ASSOCIATION OF GRAND JURORS OF NEW YORK COUNTY,

*New York City, January 30, 1932.*

*The Editor of the Panel:*

Judge A. M. Cristy, of Honolulu, on January 26, 1932, practically insisted, after it had desired to return "No bill," that the grand jury indict Mrs. Granville Fortescue and others for the alleged murder of Joseph Kahahawai, one of five men accused of having raped Mrs. Thomas H. Massie, after which the grand jury returned an indictment for murder in the second degree. Judge Cristy's action has brought strongly to the fore the complete independence of the grand jury and its importance in criminal proceedings.

Defense attorneys will attack the indictment on the ground that the judge exceeded his authority when he undertook to influence the action of the grand jury.

The right of the grand jury to refuse to indict, even in the face of ample evidence of crime, when it feels that its sense of social or political justice as a cross section of the community has been outraged, was clearly set forth by Mr. John D. Lindsay, former assistant district attorney for New York County, New York City, in an article on the first page of the March-April, 1931, issue of the Panel, organ of the Association of Grand Jurors of New York County. The grand jury was further discussed in an editorial in the same issue by Thomas S. Rice, associate editor of the Panel, member of the statutory Crime Commission of New York State from 1926 to 1931, and member of the American Bar Association. The New York Law Journal reprinted Mr. Lindsay's article in full on April 24, 1931, and also published that day a commendatory editorial.

The Massie case is already a cause célèbre. The fight on the indictment will be a landmark in American criminal jurisprudence.

Under the circumstances I take the libery of sending you herewith a copy of March-April, 1931, issue of our publication containing Mr. Lindsay's highly illuminating article about the remarkable powers

of the grand jury, which are seldom appreciated even by grand jurors or lawyers.

The Panel is published by our association without subscriptions and without advertising, as a civic duty. It is distributed free to about 7,000 of the leading lawyers, judges, prosecutors, criminologists, penologists, police officials, editors, social workers, and others in the United States, with many copies going abroad, and is on file at all of the leading law universities and public libraries.

Trusting that Mr. Lindsay's article will shed light on a little known subject, I am.

Very truly yours,

ROBERT APPLETON,
*President.*

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[From the Panel, March–April, 1931]

GRAND JURY AS THE PEOPLE—A REPLY TO PROFESSOR MOLEY

(By John D. Lindsay, former assistant district attorney for New York County)

Periodically since New York became a State of the Union we have had movements to abolish the grand jury and have prosecutions for serious crimes originate with informations filed by public prosecutors. England has had the same movements since the reign of Henry VIII.

What we need is not abolishment of the grand jury, but grand jurors of high character, well informed upon their powers and responsibilities, unaffected by political ties and willing to assert themselves by exercising their vast powers with discretion.

In passing upon whether a prosecution shall lie the grand jury is literally "government of the people, by the people, for the people."

Prof. Raymond Moley, of Columbia University, has recently returned to the theme of abolishing the grand jury. With my limited space I can not undertake to answer in detail arguments he has presented in thousands of words, but I may say right here that I believe he does not have a true understanding of the grand jury as it has ever been in English history, and as it could be now in the United States.

Arguments for abolition of the grand jury are usually:

The grand jury is a useless expense and causes unnecessary delay in the trial of serious crimes because the grand jury rubber stamps what may be the wishes of the public prosecutor in respect to whether an indictment should be found.

The grand jury does not protect the innocent from harassment because it can be induced by the public prosecutor to indict anyone against whom he may have a personal or political grudge.

The grand jury accomplishes nothing on its own account in exposing evils and finding indictments, because it does not exert itself and proceeds only on the advice or at the suggestion of the public prosecutor.

GRAND JURORS, NOT SYSTEM, AT FAULT

In fairness to those of that school it might be said that when the grand jury, as is too often true, is nothing more than a rubber stamp for the public prosecutor, it is wasting time and money, but no matter how supine the grand jury may appear in any county of the United States it is always potentially the most powerful instrumentality in our system of criminal law, and is the only voice of the people in initiating or refusing to initiate prosecutions. Wherever the grand jury system functions weakly the fault lies not in the system but in the ignorance or indifference of the grand jurors.

Shall we dismiss the police because they catch relatively few criminals and at times become neglectful of their duties? Shall we do away with public prosecutors because some are unable or unwilling to prosecute successfully criminals who are caught? Certainly not, and neither should we abolish the grand jury because its powers have fallen into disuse.

From earliest times the grand jury has not been simply a factor in the prosecution of criminals. It has stood in the place of the public. It has embodied



the ancient concept in English law that no power on earth except the public could say that a person should be charged with a crime. No king, no attorney general, no crown counsel for the county ever could or can now charge a person with a serious crime in England. That right was and is reserved to the public alone.

GRAND JURY IS THE PUBLIC

I can not emphasize too strongly that the grand jury is the public, and reflecting public sentiment, may refuse to charge a crime even though it has ample facts upon which to bring an indictment.

The grand jury is absolutely independent. It is chosen from the people of the neighborhood, nowadays the people of the county. The people, that is, the grand jury, have the power on their own initiative to inquire into all crimes committed within their neighborhood (county) and to say whether the facts adduced are prima facie evidence of a crime, or whether the act should be treated as a crime. The people of the neighborhood—the grand jury—have a right to conduct an investigation into any evil conditions of a criminal nature among themselves as the result of reasonable information derived from any source whatever.

It was the attempt of the King to dictate to grand juries which hastened the downfall of the Stuarts in England in 1688. The grand jurors of Middlesex in 1681 refused to indict Lord Shaftsbury at the wish of Charles II, and when the Lord Chief Justice berated them for their action he was taken before the bar of the House and warned never again to attempt to coerce a grand jury.

Ordinarily the grand jury is drawn from "men of character and position" in the community. It is not merely a part of the court, as most grand jurors themselves believe. It can accept or reject the admonitions or advice of judge or public prosecutor. What few grand jurors know is that the grand jury can not be dismissed before the end of its term.

CITIZEN MAY ASK AN INDICTMENT

The common-law power of the grand jury to investigate, of its own motion, crimes triable within the county, and on information derived from whatever source, is crystallized in the New York State Code of Criminal Procedure, as was set forth in the November–December, 1930, and January–February, 1931, issues of the Panel, but what was not set forth in those articles was that any citizen may present a bill of indictment to the grand jury and ask that it be acted upon regardless of the wishes of the judge or the public prosecutor.

One of the earliest developments of the grand jury theory was that no officer of the government should be a member. The grand jury represents the people, and officials are jealously excluded. It is untrammeled by official connections. It comes from the people of the neighborhood (county) in which the crime was committed and from precommon law days has been "the people," not an arm of the sovereignty, in a criminal prosecution. It shares with the office of sheriff the distinction of being an institution of the locality.

PREPOSTEROUS POWER FOR ONE MAN

To leave in the hands of a prosecutor elected or appointed by political favor, and in modern times too frequently the direct representative of a local political dictator, the exclusive right to say who shall be haled to court for trial on serious charges, or what evils shall be investigated or ignored, is too preposterous for words.

Those who applaud Professor Moley's arguments in favor of abolishing the grand jury do not comprehend the ultimate possibilities of such a move.

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The Times, weekly edition, January 21, 1932]

HONOLULU MURDER CHARGE—NAVY TO GIVE UP THE ACCUSED

[From our New York correspondent]

After a Cabinet conference, at which a wide divergence of opinion between the Navy Department and the Department of the Interior appeared, the Secretary of the Navy has agreed to instruct the naval authorities at Pearl Harbor to hand over to the civil authorities of the Territory Mrs. Fortescue, Lieutenant Massie, and the two bluejackets accused of the murder of the Hawaiian, Kahahawai,

provided that the Territorial authorities guarantee their proper protection before and during the trial.

The Department of Justice in Washington is instituting an inquiry—to be conducted both openly and by secret agents—into the existing condition of law enforcement in the Territory, but it appears improbable that any results will be available for at least six weeks. A group of Honolulu business men has persuaded members of the legislature to petition Mr. Lawrence Judd, Governor of the Territory, for a special session of the legislature to discuss crime in the Territory. They appear to be moved by the fact that a large number of hotel reservations for the winter season have already been canceled because of the publicity given to conditions in the Territory, and to fear that unless it can be shown that something drastic is being done the tourists business will suffer heavily.

FUNCTIONS OF GRAND JURY—BILLS THROWN OUT AT OLD BAILEY

At the central criminal court last week the grand jury threw out the bill for murder against Joseph William McGowan, 20, french polisher, who was committed for trial from Old Street police court charged with the murder of Florence Emily Gamman. The grand jury returned a bill for manslaughter.

The grand jury also threw out the bill for murder against Dorothy Moore, 23, cook, who was committed for trial from Croydon, charged with the murder of a newly born child. The grand jury returned a bill for infanticide.

The recorder (Sir Ernest Wild, K. C.), in discharging the grand jury at the conclusion of their duties, said they realized the great importance attached to their work. They had shown their discrimination by reducing two charges, thus showing how greatly the liberty of the subject was maintained by the grand jury. The recorder added that grand juries protected our liberties and made our administration of justice the admiration of the world.

## Supplemental Instructions Given to the Territorial Grand Jury on Friday, January 22, 1932, by the Hon. Albert M. Cristy, Judge of the Second Division, First Judicial Circuit Court, Territory of Hawaii

(At 3 o'clock p. m. Judge Cristy and the court reporter entered the grand jury room.)

The Court. I understand you want some instructions and charges as to matters of law?

A Juror. Yes. There was some question about the wording in this indictment for kidnaping, whether it must be by "force and arms." The question—there has been no evidence to show there were any firearms or that there was any force connected with this man being taken into the automobile.

The Court. The court instructs you on that, that that is the technical phrase in the law. That does not in any respect necessitate actual evidence of firearms in that sense, and force may be force in the sense of coercion or force in the sense of a tussel, so as far as the technical wording of the indictment in that connection it is the opinion of the court at the present time that language is quite proper in connection with any matter of this character, if the evidence is sufficient from credible witnesses to indicate that the crime of kidnaping has been perpetrated in the community. So that answers your question in that respect. Is there any other specific question of law the grand jurors would like to have answered?

A Juror. On the penalty; in 1915 it says five years for kidnaping. That was extended later.

The Court. The penalty has been extended. Of course the question of penalty is not a matter that you need to worry about. It is life or any number of years, in the discretion of the court, subject to the usual executive handling of it. Any other matters?



A Juror. There is one more question. The indictment calls for four names. Any of those names can be deleted?

The Court. The question there is a question of general character as to the duties of grand jurors on evidence that may be presented before them of a credible character. If there is prima facie evidence to indicate to the minds of an ordinary cool-headed individual that a number of persons by various methods throughout the transaction of the perpetration of a crime have been connected with it, that is sufficient, and the question of degree of culpability may be safely left to a trial jury. Do not confuse that in your own mind.

In sitting as a grand jury, the primary purpose of the grand jury, as expressed in the original charge, is, in the first instance, to prevent malicious or frivolous charges being brought against innocent people; and the second part of your duty, however, and the graver responsibility, is that every person who by credible evidence has been shown to be connected with any crime, that is violation of any statute of the Territory of a criminal nature, has been shown to be committed and by credible evidence of parties they are shown to be connected with it, if it is shown the charge is not frivolous, that those persons should be compelled to stand their trial in the ordinary course of regular procedure. The duties of the grand jury have been so performed when they so present the matters to the court. They have thereby protected innocent people as to whom no connection has been shown; they have prevented such people from being put to the expense and disgrace of a trial. On the other hand, in connection with the general duties of grand jurors, let me again remind you in a cool, unimpassioned fashion, without any desire to interfere with your discretion as representatives of the community, let me remind you of those things in your oath, that you should present no one through envy, hatred or malice, and, on the other hand, you should leave no one unpresented through fear, favor, affection, gain, reward or hope therefor.

These are the responsibilities which the community, by drawing you as grand jurors, has placed upon you, and in that same connection they have not suggested you should search for any fanciful defenses for those who have been indentified with a crime that has been committed to your satisfaction on credible evidence, and they should answer therefor, and their guilt or innocence be determined by a trial jury. What may be done as to defenses, which are personal to persons accused, the grand jury is not concerned with, after they have convinced themselves by the testimony of witnesses who have been produced here, whom they believe to be credible, that a crime has been committed, and that persons identified with that crime by the testimony of those credible witnesses are persons who should answer in the usual course of orderly procedure, when that duty has been performed. That is what you are here for, to be a part of the judicial structure, and if you will view your duties along those lines I think you will find yourselves in very little difficulty. Are there any other questions?

(Court and court reporter retire.)

(Judge Cristy and the court reporter reentered the grand-jury room at 3.30 o'clock p. m.)

The Court. Under the statute it is provided that the court may at any time, if necessity requires, further charge you upon your duties.

From information conveyed to the court by your foreman at the court's request that he thought you were about ready for a partial report the necessity presents itself to the court to, in very simple language, further charge you upon the situation in the Territory of Hawaii in regard to crime in general, and in connection with your duties. I do not want any juror under any circumstances to feel that this court is interfering in any respect with your conscience nor with your deliberations or conclusions on facts, but perhaps the structure of the criminal procedure might be placed before you for the enlightenment of those of you whom the court will ask to think it over—the protection of the grand jury required by the Constitution I have explained to you. In other words, for the protection of innocent people against the hasty action of single individuals a grand jury has been used by the common law and adopted by the Constitution in our procedure here. On the other hand, that structure is not intended in any way to suggest that matters of guilt or innocence in the strict technical sense, conviction and punishment, should be tried out and determined by the grand jury.

A grand jury's function is quite preliminary from the standpoint of the community, and it is a very careful and serious situation that the grand jury has to face in connection with the administration of criminal law, and I want to be sure that in connection with the information given to the court that you gentlemen realize and thoroughly study over the conclusions and after effects, not on single individuals who may or may not have taken the law into their own hands, but upon the community at large, and the further administration of orderly criminal jurisdiction here; that in your conclusions and presentments and your failures of presentments you will understand and take the full responsibilities upon your shoulders for that result in connection with crimes that you may have been recently considering. The court desires you to connect that duty with the administration of all criminal statutes here in the Territory, the after effects that may flow therefrom, and, after taking that into consideration, your action thereon, after full and careful and quiet consideration with your own consciences, the results are then presented to the court.

The court at this time is not prepared to receive a report, but is going to ask each one of you jurors that whatever proceedings you have had before you, and whatever you have considered, that you take that matter with yourselves, with the usual caution of disclosing the same to others, and reflect upon it, and reflect upon the consequences of any actions on your part. The primary question before the grand jury is, first, Have any of the statutes of the Territory been violated; has a crime been committed as defined by the statutes, not as defined by individual men? If credible evidence is produced before you, there is but one conclusion on that. If the evidence produced before you is not credible, that is another question entirely. After you have determined in your own minds as grand jurors whether a criminal statute of the Territory has been violated and a crime has been committed, the only remaining question before you is: Has credible evidence identified those who are prima facie responsible for that crime? The question as to whether they should or should not be convicted, from the matter of personal considerations, the question of whether from some inner feeling of your own you might feel you might have committed the same thing, is not the question, because whether you committed it, or I committed it, if a crime has been committed we do it with the laws that are there to be administered before us. Whether or not we shall suffer punishment therefore is, first, within the question of conviction, and, second, a question of executive power.



So, the structure of our Government is, first, from the standpoint of the grand jury, to find as to whether a crime has been committed, and the perpetrators thereof known, and the rest of procedure is orderly and proper trial, with such defenses as may be permissible to be admitted and considered by the trial jury, and the question of whether or not the perpetrators shall be punished is a question within the executive power of the Territory. If a crime has been committed and the identity of the criminals known, that is, criminals in the sense of the technical provisions of the law, and the grand jury for reasons refused under their oath to present an indictment therefore, I present to you the question of anarchy in this community. Are you willing to take the responsibilities for that situation? You know our racial structure. Whether that is involved in any particular case and in the particular case before you is for your consideration, and not mine. But, really, gentlemen, it is a very serious situation which I want you not to act hastily on, and to reflect upon. If there is any juror who can not conscientiously carry out his oath of office, he should resign immediately from the grand jury. We are embarking upon a very necessary tour of duty. It is one that I do not relish any more than you do.

I will ask the grand jury to stand adjourned until Tuesday morning at 10 o'clock and return for further consideration upon the matters presented before you. You are excused until Tuesday morning at 10 o'clock. There are the usual restrictions as to the secrecy of your proceedings.

Juror BODGE. Do I understand you are not accepting this report?

The COURT. There has been nothing presented to me. The court refuses to accept any further report until the grand jury deliberates further upon matters of serious import to the Territory. After Tuesday I will talk to you. I will ask you to seriously deliberate upon it until you return for your deliberations at 10 o'clock on Tuesday next.

(Judge Cristy and the court reporter retired from the jury room.)

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SUPPLEMENTAL INSTRUCTIONS GIVEN TO THE TERRITORIAL GRAND JURY BY THE HON. ALBERT M. CRISTY, JUDGE OF THE SECOND DIVISION OF THE FIRST JUDICIAL CIRCUIT COURT, ON TUESDAY, JANUARY 26, 1932, AT 10 O'CLOCK A. M.

The COURT. Before you begin your deliberations this morning there are two or three matters that the court desires to call to your attention. The first matter is, the court has received since the last session of the grand jury a communication from the police commission that was created by an act signed subsequent to your last session, informing the court that Mr. Bodge has been appointed to the commission and has accepted it, and suggested the impropriety of

a commissioner on that body further deliberating as a grand juror. The court has communicated with Mr. Bodge and has informed him that the court feels the same way, that Mr. Bodge, as a person, might be subjected to considerable criticism in occupying both positions, and I am therefore prepared to excuse him from acting on this body. So, Mr. Foreman, if you will note on the minutes that Mr. Bodge has been excused.

Mr. BODGE. I would like the other members of this jury to understand I am not trying to evade any duty. I am perfectly willing to serve on this jury. I am not claiming any exemption, but the judge has ruled it would be improper for me to serve on both of these bodies, and I should like to say I did not know this appointment was going to be made. The first I knew of it was after the court adjourned on Friday. I was not conferred with at all, and when I conferred with the governor later he said he had tried to get me but was unable to do so. I want it understood that I am not trying to evade any duty.

The COURT. The court understands that, and I think your fellow jurors understand that. It would be a matter that would be improper if it came up with any individual, and it came up after the court adjourned the jury until this morning, so I think the matter is completely clarified as far as the jury is concerned and as far as the court is concerned.

Juror BODGE. I want to have it understood that I am perfectly willing to serve.

The COURT. The court understands that.

Further, gentlemen, there are matters which the court, under its prerogative as taken last week, further wishes to charge and instruct this jury. Incidents occurring outside the grand-jury room and before your consideration of the present cases began, indicate to the mind of the court the possibility that one or more of you entered upon the grand-jury session in the matters now pending with your minds so fixed and determined on personal views of law and fact that you were prepared to prevent any indictment in matters now pending so far as you are able to, notwithstanding what the evidence might be and notwithstanding what the court should advise the jury the law might be.

This is said without any accusation on the part of the court as to any member of this jury that you in any respect were deliberately holding the laws and the court in contempt. I am not making any such accusation. However conscientious the decision on those matters might have been, the court is not attempting to criticize that situation in the mind of any particular juror, but the law applicable to any case presented before you ordinarily is explained by the prosecuting attorney. If there is any question about it, the instructions of the court as to the law are final, so far as you are concerned. In other words, you are the judges of the credibility of witnesses and the existence of prima facie facts, but the law you must take from the court to be the law, notwithstanding what you, as individuals, think the law is or should be. Any juror who is unwilling to follow the law of any case as propounded by the court because of any fixed idea, however conscientiously arrived at, has but one honorable way of meeting such dilemma; that is to make his conscientious difficulties known to the court and be excused from this body.



So, right here, gentlemen, I want to emphasize if that situation does exist in the mind of any juror, that by reason of his conscientious convictions he is not prepared and has not been prepared or is not now prepared to take the law from the court and apply it on the facts before him then the court is willing to excuse any such juror without attempting to criticize the juror for his own opinions.

Juror BUKELEY. As far as I am individually concerned, from the very beginning of my listening to the charge of Judge Davis, from the time I took that oath, which I have studied over and over again, from the instructions which I have studied over and over again, I have been imbued with no idea but to take out of my mind anything I heard prior to the time the case started, and I have been actuated by nothing but the solemn oath I have taken and the instructions.

The COURT. The instruction of the court is, therefore, gentlemen, that if you have found yourselves in that curious dilemma, which sometimes happens with the conscientious citizens of the community, the court is prepared in the same way to meet any such juror with the situation as I have outlined it.

Further, upon the duties of the grand jurors, under the laws of the Territory of Hawaii no man may legally take the life of another except in legitimate self-defense, unless he be an officer of the law in the performance of a duty requiring or justifying such action. No person can invoke the law of self-defense who has created the difficulty by his own illegal acts. That is, if I, not being an officer of the law and in the performance of my duty, without authority, seek to deprive another of his liberty, I can not justify the killing of such person in order to prevent his regaining his liberty.

Under the laws of the Territory the taking of human life by private citizens, in the nature of a lynching or its equivalent, is prima facie murder. Under the statutes of the Territory of Hawaii all who take part in the commission of any offense or being present, aid, incite, countenance, or encourage others thereto shall be deemed principals therein. Any person who himself, not being present in the commission of any offense, abets or aids another in the commission of such offense, or encourages or hires another, and in pursuance thereof the offense is committed, shall be deemed an accessory before the fact to the commission thereof. The statutes further provide—

> every person concerned in the commission of an offense, whether he directly commits the act constituting the offense, or, being present, aids, incites, countenances or encourages another thereto, is accessory before the fact to the commission thereof within the definition of section 3918, and may be indicted and tried as if he had directly committed the offense.

Further, where it appears that two or more persons have conspired together to commit a felony, such as, for example, kidnaping, and while the conspiracy is still in force, and in furtherance thereof one of the conspirators, known or unknown, kills another, the offense is murder in such degree as may be justified by the law, and all conspirators in that offense would be indictable for the crime of murder.

> Murder is the killing of any human being with malice aforethought, without authority, justification, or extenuation by law, and is of two degrees, the first and second.

When the act of killing another is proved, malice aforethought shall be presumed, and the burden shall rest upon the party who commits the killing to show that it did not exist, or a legal extenua-

tion or justification therefor. The proofs of the justification or extenuation or proof of malice aforethought or the absence thereof is a matter for the trial jury and not for the grand jury.

The court has requested the prosecuting attorney to present before you for your further deliberations three indictments, one for first-degree murder, one for second-degree murder, and one for kidnaping, under the instructions given this morning and the instructions given heretofore.

The jury room will be closed and you will proceed with your further deliberations. Before so doing may I ask you gentlemen, as representatives of the Government and the community, to lay aside all race prejudice, to rise above such trivial or personal matters, and apply yourselves coolly and impartially to the question of whether this Government shall exist, and how it shall exist.

Juror BUKELEY. May I ask one more question, as a matter of information? Is it not a fact that on Friday we were adjourned by order of the court?

The COURT. The adjournment was by order of the court.

Juror BUKELEY. And we did not take a recess.

The COURT. The court ordered an adjournment to this morning at 10 o'clock.

Juror BUKELEY. Would it be possible that you make a statement to that effect, as the newspapers seem to have it differently?

The COURT. The court is not responsible for any statements appearing in the newspapers, but this is a proceeding in open court this morning. I notice members of the press are here. There is no reason why the fact should not be known, as it is known, that the court upon its own motion on Friday adjourned this grand jury to 10 o'clock this morning for further procedure.

The court room will be cleared and the grand jury will resume its deliberations.

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SUPPLEMENTAL INSTRUCTIONS GIVEN TO THE TERRITORIAL GRAND JURY BY THE HON. ALBERT M. CRISTY, JUDGE OF THE SECOND DIVISION OF THE FIRST JUDICIAL CIRCUIT COURT, TERRITORY OF HAWAII, ON TUESDAY, JANUARY 26, 1932

(At 10.55 o'clock a. m. Judge Cristy and the court reporter entered the grand jury room.)

The COURT. I understand you have some questions of further instructions?

A JUROR. Yes; your honor. The question has come up by one of the jurors whether we have the right to reconsider what we have done Friday.

The COURT. My instruction to you is that this is not a parliamentary body. At any time when 12 jurors are in agreement on bringing in an indictment and so vote, the indictment is ready for returning to the court. This is not a matter of putting motions or who put them or parliamentary tactics. It is primarily a question of deliberation by the jurors themelves.

A JUROR. In view of the fact that one of the jurors has been taken away from us are we entitled to continue with the primary problems put before us, especially as there was no legal notice given the court?



The COURT. So long as there are more than 13 members of the jury present who have heard the evidence submitted before the grand jury, the grand jury is still a legal body to return such indictments as are before them upon the evidence, and as are justified by the evidence. The withdrawal of a juror is not the same as in a trial jury, where there are only 12 to start with and there must be 12 to end with. The absence of a juror who heard part of the evidence at the beginning of the presentation and by unavoidable conditions is excused by court or foreman from the next session, would not prevent deliberations by the remaining members of the grand jury upon that matter, so long as there are at least 13 members of the jury present, and the 12 jurors who heard the evidence throughout agree upon an indictment, that is sufficient as far as the legality of the indictment is concerned. The situation that arose as to Mr. Bodge is a matter that neither Mr. Bodge nor the court nor the jury had any prior notice of. If it had been known that he was under consideration, and, if appointed, would accede to the appointment, of course that excuse would have been made prior to the original session, but the fact that he has heard part of the present proceedings and is not with the jurors now, that is immaterial from the point of the present proceedings.

A JUROR. If we had several indictments to work on and a vote has been taken on one, is it possible, after recording that vote, to reopen the matter and vote again?

The COURT. The court has resubmitted the question to you on the question of three indictments, so as to the question of consideration and further report to the court it is entirely an open matter for the jurors themselves. It is not a question of reconsidering, because from the standpoint of law until the matter is reported to the court in open court and that report filed by the court there is nothing finished, and the grand jurors can take many ballots before arriving at a final result which the court accepts and files. Does that clarify the issue or can I state it differently to you? The question is not closed until the report is presented and filed by the court. The matter is still open, and before the grand jury, until that report is in. So it is not a question of parliamentary tactics. It is a proposition purely and simply at any time prior to the final report to the court that there are 12 jurors in agreement on the question of indictment, and those 12 jurors signify their assent to the indictment.

There are three indictments left with you now, whereas, I understand, you had only two at the last session. First, in the matter of additional evidence, if there is any point in the evidence on which the jurors want further light, reexamination of a witness who has been before you, it is always permissible to notify the prosecuting attorney of that fact, if he has the evidence, to present it. As to the form of the indictments themselves, if the grand jury report, for instance, an indictment of second-degree murder, that ends the consideration of the matter of first-degree murder, because the one includes or excludes the other. If an indictment for first-degree murder is returned, that ends the consideration of the second-degree murder, so if a crime is included or excluded by one, the return of one is sufficient. As far as the indictment for kidnaping is concerned, that does not come within the charge of murder.

A JUROR. Some of the jurors have been censuring the foreman for reporting to you Friday.

The COURT. The foreman did nothing that he was not required to do by the court. What happened was that the foreman, upon announcing to the court that the report was ready, was asked whether or not an indictment or true bill was ready. Upon answering in the negative the court announced to the foreman that the report would not be received, so that the grand jury could, after cool and calm reflection, have time to consider it, so there would be no question that the matter had been calmly and coolly considered, and the court adjourned you until this morning.

In closing, let me suggest that as a matter of both law and common sense, if there is any hidden or open idea in the mind of any juror that this court has any desire to coerce the minds of this jury, let me suggest to you that this court is under a duty just as solemn as the jurors, and that the jurors shall not usurp the function of the court. The grand jury has just one duty, which has been fully explained. and under no circumstances can the court sit idly by. The executive has obligations which the grand jury should not allow themselves to usurp, any more than the court can usurp your function as to whether there is credible evidence submitted to you to return an indictment.

Further, let's get down to common sense on the situation. You are all religious men, as I know, and God has not left this world for an instant, and if you will sit with your God and your conscience under the evidence, your duties will clarify themselves in your own minds.

A JUROR. I think the question was whether we proceed with a further indictment or reconsider those points in the past.

The COURT. The question is the consideration of the indictments before you. It is not a question of reconsideration, it is a question of whether or not 12 members of this jury are in agreement on any of the forms of indictment presented before you.

A JUROR. We voted on a couple of them, and I insist the foreman was instructed to report to the court, and I thought that was finished. He reported to you in your chambers. Have we the right to bring in a bill or no bill?

The COURT. The court is not coercing your consideration of the facts. I do want to clarify the situation of last Friday. No matter is finished by this grand jury until a report is received in open court and filed, and this court refused at the last session to receive and file a report, feeling it was necessary for the jury to further consider the facts and the law, so there is no finished business until the jury is ready to make a report in open court and the court receives and files that report. So the matter is before you on the evidence that has been formally submitted, or, on additional evidence, if there be additional evidence desired. That work will not be finished until the report is ready to be filed. If you have reached a conclusion before, that matter is back to you for further consideration, and the thing will not be finished until your report is received and filed.

A JUROR. The record of our minutes would have no bearing on the matter?



The COURT. No bearing whatever. If the indictment is returned——

A JUROR. Your honor commented on our being God-fearing men, and of intelligence and common sense. It seems to me that under our oath as jurors some of us do not seem to understand or purposely evade our oath of office.

The COURT. Those matters I will have to leave with you in your own consciences. Frankly, this is a thing for your information, and you will please not take it as a threat from the court, but a thing you are entitled to know. The deliberations of this jury are not completely sealed from any investigations; that if it appears from this court on proper motion that there has been a situation requiring action by the court, the court can require evidence to be taken as to what transpired in the grand jury room. So, don't for a moment go under the misapprehension there is no way in the world by which matters which are pertinent to the administration of justice can not be investigated and disclosed. I am not saying that in any way for the purpose of attempting to coerce you, but so you may understand that the grand jury is a body for one purpose and one purpose alone, that is to listen to the evidence and perform the duties necessary under the evidence, or notify the court that the evidence is not sufficient to sustain the bill as laid down by the law. I think that is the purpose, and if you will fearlessly accept it and calmly consider it, you will be able to finish your deliberations.

A JUROR. After listening to your instructions, the vote we took this morning for reconsideration was unnecessary?

The COURT. Apparently.

A JUROR. What I understand we have before this grand jury is three indictments, one for murder in the first degree, one for murder in the second degree, and one for kidnaping, and this grand jury is to proceed with those three indictments?

The COURT. Exactly.

A JUROR. We voted on two of them. Do we have to vote again?

The COURT. If there is further deliberation and after further consideration some decide to join with the majority or the minority, that is up to you. Those indictments are here and just as much alive as they ever were when you first began to sit, and what is to be done with them is not finished until the final deliberation is ended and the consideration of this morning, together with any other consideration that may be necessary, is ended, and your judgment this morning is called upon as clearly and distinctly as your judgment last Friday. In other words, this is a new day, and if further reflection on the evidence before you and instructions as to the law have altered the judgment of any juror as to what his duty is under the circumstances, he should record that deliberate judgment this morning. That is as clearly and frankly as I can state it, I think.

A JUROR. If we voted a "no bill" on all three charges, should we vote on manslaughter?

The COURT. The question of indictment as to manslaughter has not been submitted to you.

A JUROR. One thing, that just raised another point. I understood from Mr. Wight that the submitting of these indictments was made a matter of convenience to us; it was the grand jury's province to bring an indictment on some count, and this was more or less to save time. If they decided on manslaughter or murder, he would have to draw the indictment. Now you mention we have three. Should the jury bring in a "no bill" on that count and we adjourn to another day?

The COURT. That depends on the evidence. If the county attorney informs the court of evidence which would only substantiate an indictment by the grand jury on the matters before you, this grand jury would have to stand the charge as being derelict in its duty.

A JUROR. In case the grand jury is discharged, has any member of the grand jury the right to show the records as to how he stood, as a protection for himself and the community in which he lives?

The COURT. The only answer I can give to you on that is that the community and the court know that it requires the vote of 12 men to bring in an indictment, and if, for reasons that are legitimate and not within the instructions the court has given this jury, the jury is unable to get 12 men to do what might thereafter appear to be a miscarriage of justice, the juror will have to content himself for the time being with the fact and the knowledge that the community has not gone insane, and will recognize the fact that there are some on one side and some on another, and any censure that might be raised, if censure was necessary, which the court is not indicating any opinion on, it would be of course directed toward those who had committed the censorious act. Whether ultimately the facts as to the sheep and goats, if that condition prevailed, were opened, is a matter for time hereafter to tell and not for the time being. It is a law in the jurisdiction, Mr. Fernandez, which perhaps you have familiarized yourself with:

> Any grand juror, or any person who shall appear before any grand jury, and who, after being sworn according to law as a witness before the grand jury, shall afterwards divulge either by word or sign, any matter about which the witness may have been interrogated, or any proceeding or fact the witness may have learned by reason of being a witness, shall be guilty of a misdemeanor, and, upon conviction, shall be fined—

And so forth—

> *Provided, however*, That this chapter shall not apply to persons required before a judicial tribunal.

Perhaps that statute may inform your minds on the matter before you. Any other question on the matter of law?

(Judge Cristy and the court reporter left the jury room at 11.20 a. m.)

(Judge Cristy and the court reporter reentered the grand jury room at 12 o'clock noon.)

The FOREMAN. I have no report to make.

The COURT. The grand jury will be adjourned, to reassemble this afternoon at 2 o'clock.

A JUROR. The foreman has been requested to submit a report from this jury, and you have been brought into the room for that purpose.



The COURT. The foreman reports he has no report to make. You will resume at 2 o'clock this afternoon.

(Judge Cristy and the court reporter left the jury room.)

A. M. CRISTY, *Judge*.

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In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Territory of Hawaii, *v.* Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones, defendants. No. C. 11891

PROCEEDINGS IN RE MOTION TO DISMISS AND MOTION TO QUASH

The motion to dismiss the complaint and motion to quash the indictment in the above entitled case came duly on for hearing on Friday, January 29, 1932, at 1.30 o'clock p. m., before Hon. Albert M. Cristy, judge of the second division of the aforesaid circuit court, Barry S. Ulrich, Esq., special prosecutor, and Griffith Wight, Esq., deputy city and county attorney, appearing for the Territory, and Frank E. Thompson, Esq. and Montgomery E. Winn, Esq., of the firm of Messrs. Thompson & Winn, appearing for the defendants,

And the following proceedings were had:

The COURT. Before the proceedings get under way, the court will enter and file as the court's Exhibit A a full transcript of the instructions and proceedings of the court in connection with the grand jury, and make it part of the file of Criminal No. 11891.

Mr. WINN. With your honor's and counsel's consent I should like to present both motions at the same time.

The COURT. The court will insist upon the motion for dismissal being taken up first.

Mr. WINN. We feel the members of the grand jury have been subpœnaed here, 21 of them, I believe, and they are business men about town, and we feel the correct order of procedure would be to have the indictment which was rendered last attacked first, and these gentlemen's convenience can be very easily served in that way.

The COURT. Public business will proceed with greater dispatch by taking up your first motion. The court is ready to hear the motion to dismiss.

Mr. WINN. Exception. We feel in this matter the defendants have been prejudiced by the action of the city and county attorney's office in refusing, after it had at its disposal all of the information which it subsequently presented to the grand jury for the grand jury's consideration—as your honor doubtless knows, on January 8 three of the defendants were arrested. On the following day the fourth defendant was arrested.

If we can believe the newspaper reports that were published at that time and the purported statements made by Mr. Jones and Mrs. Fortescue, the city and county attorney's office from the 8th and 9th of January had all of the information which was required to properly present the matter to the grand jury. During the two weeks' period which elapsed between the arrest of the defendants and the presentment of this matter to the grand jury, as we have set forth in our affidavit, and that fact remains undisputed, that there appeared in

a local newspaper two statements alleged to have been made by the defendant, Mr. Jones, and, second, by the defendant, Mrs. Fortescue. Those statements were clearly prejudicial. In addition to that, as your honor will probably recall, there appeared in the Honolulu Star-Bulletin an editorial which we contend inferentially suggested, perhaps demanded, that it was the duty of the grand jury sitting upon this case to bring in a true bill. On this particular point I should like to ask that as an additional ground to be set forth in my motion to quash, and that it be made a part of my motion to dismiss. We have set forth in that additional ground that Mr. Franson, the foreman of the grand jury, said to the grand jury in substance, "Gentlemen, you have read the editorial in the Bulletin, and that article says it is your duty to render a true bill."

The COURT. From what source of information do you get the deliberations of the grand jury?

Mr. WINN. I shall be glad to answer that question at the proper time. I do not feel that this time is the proper time.

The COURT. The court is asking you now, which is the proper time. From what source do you get the secret proceedings of the grand jury?

Mr. WINN. I shall decline to answer that question at the present time. I shall be very glad to answer that question when I consider t the proper time.

The COURT. The court understands you decline to answer the court's question put at this time in connection with the motion now before the court?

Mr. WINN. That is very true.

The COURT. It is now found, upon your so declining, if you desire to continue in that declining, you are clearly in contempt of this court. The court at this time gives you the right to purge yourself of this contempt.

Mr. WINN. I do not feel that I wish to avail myself of that opportunity. I feel that I know my duty as counsel for these defendants as well as your honor knows his duties as a judge.

The COURT. The grounds of your refusal are not on the question of any constitutional right not to incriminate yourself?

Mr. WINN. No, your honor.

The COURT. It is purely upon the ground that you decline and you refuse to inform the court from what source you have obtained information as to the secret sessions of the grand jury?

Mr. WINN. If your honor assumes they are secret proceedings, that does not state my grounds of refusal.

The COURT. State your grounds fully.

Mr. WINN. The grounds of my refusal are that the matter is not now before your honor; that we are now considering the question of whether or not the motion to dismiss and discharge the defendants from custody should be granted or denied. That is the sole thing before your honor now, and your honor's assumption that the matters before the grand jury were secret I take it is a rather violent one, in the face of the fact that every newsboy in town, practically every reporter in town, and practically every group of men in town, wherever congregated, were discussing what went on before the grand jury. However, I do persist in my refusal to inform your honor at the present time the source of my information.



The COURT. You are alleging, as ground for your motion to dismiss, an assertion of fact, and I am asking your source of information for the assertion of fact, so that counsel and this court can be advised whether it is a fact or a fishing expedition. Is that clear?

Mr. WINN. I have subpœnaed 20 members of the grand jury to testify here as to what happened. We believe we are entitled—I believe the rule of law that no affidavit of a grand juror can be introduced in evidence to impeach any bill brought in means that no testimony can be given by a grand juror to impeach a bill that has been rendered, but we say this bill that has been rendered is not a bill.

The COURT. Will you confine yourself to the questions? If we assume what you say in an assertion solely upon your own word that matters transpired in the secret proceedings of the grand jury as you allege, this court, before assuming such thing to be a fact, and not simply a wild declamation on your part, is asking you for the source of that information so that the court may be informed as to whether or not you are on a fishing expedition or are asserting a fact which the court can take as a fact for the purpose of these proceedings.

Mr. WINN. I intend to put the grand jurors on to show that I have never talked to any of them, but that the statements appearing in my motions are true statements.

The COURT. If you haven't talked with them, and have filed in this court a pleading with that assertion, signed by yourself, from what source can the court take as the assertions of fact any statement of yours?

Mr. WINN. That is just what I tried to impress upon your honor. I suggested that the motion to quash be taken up first, because I can make an argument from the facts which can come out in the testimony. For some reason unknown to me your honor declined to take it up in that order.

The COURT. The motion for dismissal of complaint filed January 20, 1932, is signed "Montgomery R. Winn," which, I take it, is your signature?

Mr. WINN. There is no question about that.

The COURT. Reads as follows:

> Come now Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones, by their attorneys, Thompson & Winn, and move this honorable court that the complaint filed by John McIntosh against the defendants Grace Fortescue, Thomas H. Massie, and Edward J. Lord on the 8th day of January, 1932, charging them with first-degree murder, and the complaint filed by the said John McIntosh against the defendant Albert O. Jones on the 9th day of January, 1932, charging him with first-degree murder, be dismissed and that they and each of them be discharged from custody. This motion is based upon the records and files herein and upon the affidavit of Montgomery E. Winn, hereto attached.

And the affidavit is attached setting forth sundry matters of fact, of an arrest on a warrant before the district court of Honolulu—no proceedings in this court whatsoever, except your motion and your affidavit, and the order of this court as to custody when the arrested persons were brought up here and the custody order made, with your consent.

Mr. WINN. Yes; your honor.

The COURT. And with that record before me, and a motion, basing its grounds on something antecedent to a grand jury investigation, you are seeking to incorporate an assertion of fact from yourself which you allege occurred in the secret deliberations of the grand jury, and I am asking you, sir, for your source of information, and I am asking for that so that the court in the records may have a fact instead of an argument by an attorney.

Mr. WINN. I am asking that the ground for motion, referring to Mr. Franson's conduct, be incorporated as a part of my motion. I believe that should be filed as a supplemental affidavit.

The COURT. Ex post facto to the grand jury's investigation?

Mr. WINN. I believe we should be allowed to file an affidavit substantiating our previous motion.

The COURT. I understand you are still trying to assert a fact without any source of information for the fact you are willing to disclose to the court. You are asking this court to consider such assertion as part of this record?

Mr. WINN. I am asking your honor to permit us to put members of the grand jury on the witness stand.

The COURT. On a motion as to facts existing before there was any grand-jury investigation?

Mr. WINN. Does your honor mean the facts did not exist before?

The COURT. The facts did not exist before the motion?

Mr. WINN. No; the facts did not exist before the motion.

The COURT. Your request to add any such fact, you being unwilling to assert any such fact to this court, is denied.

Mr. WINN. Exception.

The COURT. Your exception will be allowed, and exception will be allowed to my further remarks. If you will disclose to this court any credible basis that you yourself have investigated of a fact, basing that fact upon the witnesses whom this court can know you have on your word in court interrogated as to the secret deliberations of the grand jury, so this court will know those are facts you desire to prove, this court may be in position to make additional rulings.

Mr. WINN. I shall be very glad to prove by the 20 grand jurors who are here that what I have just stated occurred. I reiterate my former remark that I shall not divulge at this time the source of my information, other than it was not from a member of the grand jury.

The COURT. Your request is denied and exception allowed. Any other remarks?

Mr. WINN. No; we feel under our constitutional guaranty, the sixth amendment to the United States Constitution, the rights of our clients have been prejudiced.

The COURT. Which right?

Mr. WINN. To a speedy trial.

The COURT. The court is trying to give you one. The motion is dismissed as without merit.

Mr. WINN. Exception.

The COURT. Exception allowed.

We will take up the motion to quash, and before taking up the motion to quash the statement of the court as to the matter of contempt on your part will be passed for further proceedings. The court at this time does not desire to jeopardize the rights of your clients to have you appear in court during the pendency of these proceedings.



Mr. WINN. Your honor wishes to take up the motion to quash?

The COURT. I am taking up the motion to quash. In taking up the motion to quash there are one or two matters the court wants clarified. In the first place, at the conclusion of your first motion to quash, filed January 27, 1932, the seventh ground thereof, "for other reasons to be assigned at the hearing" the court desires that be amplified at the present time so the court will know what you are driving at.

Mr. WINN. We will strike that ground.

The COURT. Seventh ground stricken. In other words, you rely upon the six grounds and the grounds stated in your supplemental motion?

Mr. WINN. That is correct.

The COURT. The court wants other matters clarified, as to all grounds of the motion based on the proceedings in this court and judge thereof in instructions to the grand jury. For the purpose of the record the court has made a transcript of the entire proceedings that were had when the judge was present as part of the record. Do you wish to question the reporter's transcript of that?

Mr. WINN. Not while your honor was in the room.

The COURT. That being clearly understood, the court would like further clarification; from what source of information you allege as a ground and a fact the language found on page 3 of your affidavit attached to your original motion, in the last paragraph, "That your affiant is informed and believes and therefore avers the fact to be that between the hour of 3 and 3.30 o'clock p. m. and subsequent to the Hon. A. M. Cristy having instructed the grand jury, members of the grand jury voted on the bills presented to them, and your affiant is willing and offers to prove by the testimony of the Hon. A. M. Cristy and by the minutes of the secretary of said grand jury and by the affidavit of the grand jurors that at or about the hour of 3.30 o'clock p. m. of said day, Harry A. Franson, foreman of the said grand jury, left the grand jury room," and especially calling your attention to the grand jury's proceedings in the absence of the court, do you make that as an affidavit on information and belief that the court is supposed to believe?

Mr. WINN. Yes; your honor.

The COURT. The court is asking for the source of your information, so that the court may know its truth or falsity.

Mr. WINN. I regret very much I can not tell your honor the source of my information. As a matter of fact, I do not recall the source. I may say, moreover, that if I did know, I would refuse to tell your honor at this time, as this is not the proper time.

The COURT. I understand you are not basing that on the constitutional ground of possibly incriminating yourself?

Mr. WINN. That is so, your honor.

The COURT. That matter will be taken under consideration. There is one other matter we need to clarify here. Your additional grounds in support of your motion to quash the indictment, on the first page, eighth ground, which begins: "Because on Tuesday, the 26th of January, 1932, at or about the hour of 11.45 a. m., the grand jury did vote a no bill on the charge of first-degree murder": The court again asks you to disclose the source of information so the court may know whether or not that is an assertion of fact or a fishing expedition.

Mr. WINN. As I recall that at the present time, that was gotten from a transcript of your honor's charge to the grand jury.

The COURT. Will you refer to the transcript? You will notice your ground goes on "That thereupon the foreman so notified the Hon. A. M. Cristy"; so that happened in the absence of the court.

Mr. WINN. The transcript of the evidence showed that at about 12 o'clock noon—I will read it:

> Judge Cristy and the court reporter reentered the grand-jury room at 12 o'clock.
> The FOREMAN. I have no report to make.
> The COURT. The grand jury will be adjourned, to reassemble this afternoon at 2 o'clock.
> A JUROR. The foreman has been requested to submit a report from this jury, and you have been brought into the room for that purpose.
> The COURT. The foreman reports he has no report to make. You will resume at 2 o'clock this afternoon.

Does that say anything about that the grand jury had voted a no bill on the charge of first-degree murder and the charge of second-degree murder and on the charge of kidnaping?

Mr. WINN. I think that is a very proper inference.

The COURT. That is what this is based on?

Mr. WINN. As I recall, that is true, and I believe I saw a report in the bulletin to the effect that the jury stood 12 to 9 for a no bill, or 11 to 9.

The COURT. Just a moment. Don't you know, as a matter of fact, that came out as a dispatch from Washington and not at the time this was supposed to have occurred?

Mr. WINN. Before I filed my additional grounds.

The COURT. You got that from the newspaper?

Mr. WINN. As I recall.

The COURT. Perhaps Mr. Thompson would like to enlighten the court as to this?

Mr. THOMPSON. I don't know anything about that.

The COURT. Or of the other questions put to Mr. Winn?

Mr. THOMPSON. I don't know anything about them. That is Mr. Winn's motion. I don't wish to exculpate myself as to any of it, but I have none of the facts.

The COURT. In your ninth ground, the court wants a little clarification of your position. You assert here, as a ground of motion for this court to take as a fact, page 2 of your additional grounds, "that the grand jury after being adjourned by the Hon. A. M. Cristy again convened at 2 o'clock p. m. and thereupon another vote was taken and again a no bill was returned on each and every one of the three charges against the said defendants." The court would ask you to clarify that as an assertion of fact so the court may know upon what ground that is urged.

Mr. WINN. As to this, I do not recall where I received that information. I haven't said that is true, but we believe it is true and we offer to prove it. I again say I do not feel justified in answering it, even if I did know.

The COURT. Your position is quite clear. Another assertion of fact, you are unwilling to disclose your source of information, and the balance of the paragraph, ground No. 9, contains many other matters which, if you will look them over in connection with actions in the grand jury in connection with the Honolulu Star-Bulletin editorial,



and upon that the Court will ask that you state upon what basis or foundation the court can take that as a fact in connection with this motion?

Mr. WINN. May I have the indulgence of the court for a moment? I do not recall as to where I got that information. It is quite current information that everyone in town seems to have.

The COURT. It is on the basis of rumor you are bringing this to the court?

Mr. WINN. Obviously. I was not in the grand-jury room, nor have I talked to any grand jurors, and I felt we were under an absolute necessity to depend upon rumors, and if we had rumors that seemed to fit in with your honor's instructions we should follow them out.

The COURT. I am curious to understand your position. You will pardon me if I ask is this it: That you have been willing as a member of the bar to assert as facts in your motion matters of pure rumor instead of confining yourself in the manner of lawyers to assertions of fact coming from credible sources, matters of irregularity in which there should be no possibility of confusion, that you are bona fide prepared to prove from credible sources already investigated, and leaving it for the further hearing of the court and for the disclosure thereof, been willing to present that to the court as an assertion of fact on no further foundation than suggested to the court?

Mr. WINN. Yes; I feel the rumor was so widespread and this was so unusual a case, and where there was so much smoke I perhaps thought I was justified in assuming there was a little fire.

The COURT. A little fire?

Mr. WINN. A little fire.

The COURT. Now, these questions having clarified the assertions of fact that you yourself have any knowledge of, the court would ask you whether you are making as ground of this motion any assertion that there was insufficient evidence before the grand jury to support the indictment?

Mr. WINN. I can't very well make that assertion, as I was not in the grand-jury room, and I know nothing of what went on in the grand-jury room other than what went on here.

The COURT. May I suggest to you, Mr. Winn, that there is a place where the statute permits you to have open to you, if you desire that, making it not a crime against the laws of the Territory for any witness offered by the petitioners on the witness stand to disclose testimony, and the prosecuting authorities are available for that request. But I am asking you for the purpose of understanding this motion whether you do or do not make as a ground of your motion any assertion that there was insufficient evidence, if believed, upon which this indictment could be based?

Mr. WINN. I do not make that a ground for this motion. If subsequently I should find there was insufficient evidence I——

The COURT. I am trying to understand the present motion.

Mr. WINN. The present motion is not based on that.

The COURT. Is the present motion based on any assertion of fact that there were not in fact 12 affirmative votes on the indictment finally returned?

Mr. WINN. No.

The COURT. The court is now ready, having ascertained the basis upon which you are proceeding, to hear the law upon which the court

can enter upon any examination of jurors to bring in a bill upon which there is no ground of insufficiency of evidence and the motive as to the grand jurors, there being a sufficient number voting——

Mr. WINN. I am requesting the court to pass upon the court's own language.

The COURT. There are grounds of your motion that allege improper inducements in the grand jury room which induced an affirmative vote of grand jurors, and it is on that point, as to motives of affirmatively voting upon a bill on which you are not at this time contesting the sufficiency of evidence before them, and in which you are not contesting the sufficiency of affirmatively voting, but upon instructions which might have led men to do their duty.

Mr. WINN. I know nothing at all about what motive the grand jury acted upon when they did as they did. They may have been imbued with the best ideals as to what was best for the community, but as a matter of law, they acted improperly.

The COURT. I want to hear your authority as to how we can open up for your examination the proceedings of the grand jury in the present situation of the grounds of your information.

Mr. WINN. Our position is, and we offer to prove by the members of the grand jury, first, by the minutes of the grand jury, that on Friday afternoon after your honor had, I believe, twice instructed the jury upon the two indictments then presented, the grand jury voted twice, once on the bill of first degree murder, and second on the bill for kidnaping; that they voted 12 to 9 on that, and that the minutes will so show, and we offer to show they then sent Mr. Franson in to you and you returned with Mr. Franson, and, after taking the bench, you said you refused to accept the report made, and Mr. Bodge said to your honor, "Do you mean to say you refuse to accept the report made?" and you said "I do. You gentlemen are adjourned." We say your honor had no right to adjourn without accepting the report.

The COURT. I have asked you for your authorities on opening this question up, and in answer to my question you have gone a little bit further in assertion and offer to prove a specific vote of the grand jury. I repeat my question: Upon what source of information are you prepared to assert as a fact that you are prepared to prove detailed facts as to the proceedings of the grand jury? You didn't confine yourself to authorities. You started on an offer of proof. I am asking on your offer of proof, which you offer to this court, that you inform the court upon what basis or source of information you are prepared at this time, from prior knowledge and preparation, to present to this court the question of fact of poll of the jury on any indictment?

Mr. WINN. I have answered that question. I can not say. The rumor was prevalent around here. There appeared in one newspaper reference to your honor's action as very drastic, and it was cabled to Washington, and every reporter in Honolulu knew about it. It was a topic of conversation at every dinner table, at every luncheon table, and practically every breakfast table in Honolulu.

The COURT. You are basing your assertion of fact upon conversations at the dinner tables and luncheon tables and statements in the newspapers without any further information?



Mr. WINN. I am not doing that. I say we have nothing—we have a certain lot of rumors around town and we propose to show to your honor and offer to prove that those rumors are substantiated by facts that occurred in this grand jury room. I am prepared to show to your honor that we have a right to put any juror on the stand and show how he voted.

The COURT. The court is ready for your authorities, Mr. Winn.

(Argument.)

Mr. WINN. I shall be glad to get additional authorities.

The COURT. The court desires some information. The court has lots of information, but the language of the cases are absurdly out of point to clarify this issue. Do I understand from the prosecuting attorney's office there is any dispute at this time that the grand jury attempted to bring in a no bill on Friday, the first time the court entered? I think it was Friday the 22d day of January. Is there any dispute about that?

Mr. ULRICH. We apparently have not had the benefit of access to the grand jury that the opposing counsel has had.

The COURT. Is there any dispute about this from the language of the court given to the grand jury on January 22 that an attempt was made to bring in a no bill?

Mr. WINN. I can say only from what I said in the judge's chambers.

The COURT. Is there any disputed facts at this time that on January 22 the court correctly stated in the transcript of the proceedings the facts, and later on in the transcript correctly stated the facts on inquiry from the juror that outside of the jury room the court was informed there was no bill ready that afternoon, and Mr. Franson attempted to present a report which the court refused to receive?

Mr. WINN. No.

The COURT. Is there any dispute as to the proceedings taken that noon on the last session that at that time Mr. Franson reported there was no report, but a juror called his attention that he had been instructed to report a no bill?

Mr. WINN. Those are basically the words stated at that time.

The COURT. The fact is not disputed?

Mr. WINN. No, sir.

The COURT. Upon that the court desires authority, upon the point of the necessity to prove a fact that is not disputed.

Mr. WINN. Do I understand it is not disputed that the grand jury voted a no bill?

The COURT. I understand that is admitted.

Mr. WINN. That on the morning of Friday, January 22, another no bill was voted as to all four of the defendants, but your honor refused to accept a no bill?

The COURT. No; at that particular time the record shows that the foreman reported to the court that he had no report to enter, and that a juror called his attention, in the presence of the court, that he had been instructed to present a report, and the foreman said he had no report, and I then adjourned them to 2 o'clock p. m. I might clarify that. It is not admitted by the court or prosecution, so far as any admission has been made here, that either the court or the prosecution inquired the poll of the jury. I am proceeding upon

the fact on this question that there was an attempt to present a report on Friday afternoon, which the court refused to receive, and resubmitted the case for further consideration in the language appearing in the transcript. That on the other occasion, Tuesday noon, the proceedings, as I have listed them, are precisely set out in the transcript, when the foreman said he had no report to present, although a juror did raise the question that he had been ordered to present a report, and the court adjourned them again until the afternoon session. Those facts are admitted. It is a question of the power of the court to submit and resubmit matters to the grand jury for calm and cool deliberation under the kind of instructions that the court has given in the folio on file. That is really the question, is it not?

Mr. WINN. No; there are other questions. Were there no bills returned, as we contend, or was there no final vote taken upon those bills? We say there were three no bills returned, one Friday and one Tuesday morning and one Tuesday afternoon.

The COURT. The first thing the court desires to know upon that point is of what materiality it is, upon your frank admission to the court here now that you are not contesting at this time the insufficiency of the evidence to support an indictment, or the fact of there being 12 affirmative votes on the indictment returned, it being therefore upon the record as to whether the court has any authority to submit and resubmit under the instructions as given.

Mr. WINN. It is material for this reason. We contend it is your honor's function to instruct the jury upon the law. When a grand jury tells your honor that they are ready to make a report, and your honor's duty is a ministerial one, and all your honor has to do is to let a no bill be reported. We are ready to show that the grand jury did vote a no bill on three separate occasions, and the only reason they finally voted a true bill was on the coercion contained in your honor's remarks and the action and remarks of Mr. Franson, foreman of the grand jury.

The COURT. Any authorities upon that precise point?

(Argument.)

(Recess.)

Mr. WINN. I would like to call the court's attention to volume 1 of the American and English Annotated Cases, page 649. There are about 40 cases cited here in the note.

The COURT. Will you pick out what you rely upon.

Mr. WINN. Yes, your honor. The note is headed "Testimony by a member of a grand jury as to number of grand juors concurring in an indictment."

(Mr. Winn reads citation.)

The COURT. There is no contest here. In this particular indictment you are seeking to quash, it was supported by 12 affirmative votes. I understand you have conceded that?

Mr. WINN. Yes.

The COURT. You have conceded that?

Mr. WINN. I have conceded that this one was supported by 12 votes; yes. We do not concede that this is the real indictment. The real indictment or bill that was brought in was not supported by 12. That is what we are talking about. We say this is not a bill at all. We are not endeavoring to impeach that bill; we are ignoring that bill, because that is not a bill.



(Argument.)

The COURT. Have you any authorities, Mr. Winn, that this court could not resubmit to the grand jury the question of whether or not a true bill on matters that were in evidence before them had been reached, and on any other matters that were pertinent thereto, if they sought additional evidence upon, with further forms of indictments?

Mr. WINN. I have some cases, your honor, yes; inferentially so holding, including a case of the Supreme Court of the United States.

The COURT. Let's hear them.

(Argument.)

The COURT. The question is whether the court compelled any indictment, Mr. Winn.

Mr. WINN. That is exactly the question.

The COURT. And whether the court either corruptly did so, or whether the court did so coercively. I understand both of those grounds are being presented.

Mr. WINN. No, your honor; we do not contend that your honor corruptly influenced the jury.

The COURT. And that the charges on which the present bill is founded are wholly unfounded, is that also a ground?

Mr. WINN. Our position is that it was not for your honor to undertake to say as to whether the grand jury should go back and deliberate, but they were the sole judges of the evidence, and that it was not within your honor's jurisdiction to compel them day after day to reconsider a question which they had finally voted upon.

The COURT. Just let us correct your statement and get it straight, Mr. Winn. You said "day after day" which is perhaps incorrect. The court called them back on Tuesday morning and they were adjourned Tuesday afternoon after presenting the bill. Are there any more days that they were asked to reconsider?

Mr. WINN. No, that statement of mine is incorrect.

The COURT. I just wanted to be sure.

Mr. WINN. I am quite willing to be corrected.

(Argument.)

The COURT. You are relying on that case as applying in this grand jury proceeding?

Mr. WINN. I say, your honor, there is absolutely no distinction between the function of a judge in handling a grand jury and the function of a judge in handling the trial jury.

The COURT. Have you finished with your authorities?

Mr. WINN. Yes, your honor.

The COURT. Are you relying upon, at this time, any alleged error in the indictment by reason of the withdrawal of Juror Bodge from the panel?

Mr. WINN. Yes, we are, your honor. That is as stated in the motion.

(Argument.)

Mr. WINN. Our section 2393 of the revised laws says that a grand juror is disqualified under certain circumstances. The next provision of the revised laws says when he may be exempt, if he asks an exemption he may be exempted, when he is a salaried officer of the Territory or of the city and county of Honolulu. Mr. Bodge was neither. He was not a salaried officer.

The COURT. You are assuming, Mr. Winn, I take it from that, that if the legislature has made, as a part of its legislative function, no mention on the question of improprieties to act, that if an impropriety which appeals to the court as a clear impropriety to act comes to the attention of the court, as a judicial body the court is helpless?

Mr. WINN. Your honor, I say that the legislature of the Territory of Hawaii has said when a person may be excused from the grand jury, and your honor can not, as a judge, say that in a given instance, unless it falls within the statute, a man must be excused from the grand jury. Your honor is not the judge of whether it is proper or improper, is our contention.

The COURT. I appreciate your contention, Mr. Winn, and need no further delineation of that particular issue. In what respect, under the decision of the ninth circuit court, the decision that I have just quoted, if there was, as you concede, for the purposes of this motion, 12 qualified jurors remaining, with others that were inpaneled, and to what extent would that disqualify the act of the 12 qualified persons who acted?

Mr. WINN. I shall be very glad to answer that, your honor, as a practical matter. I do not know how Mr. Bodge voted, but I imagine that in that grand jury room Mr. Bodge had some influence. Now it is the duty of not only the members of a grand jury but the members of a trial jury to consult with each other, and see if they can reconcile their differences. It might very well have been in this particular case that Mr. Bodge was one of the men who voted for a no bill, and that if he had been permitted to stay on the grand jury he would have succeeded in preventing Mr. Franson from inducing the members of the grand jury to vote a true bill.

The COURT. I suppose that argument is based on the conception still that as far as this motion is concerned there was ample evidence before the grand jury to support an indictment?

Mr. WINN. Upon that conception, as far as this motion is concerned.

The COURT. You are saying you imagine, not now asserting as a fact, that Mr. Bodge, in face of the fact that there was ample evidence—I am talking now about credible evidence, of course, when I use the word "evidence"—that in face of the fact that there was credible evidence before the grand jury and amply sufficient to warrant an indictment, that Mr. Bodge might have prevented an indictment?

Mr. WINN. Your honor, I am assuming that so far as Mr. —we will assume, first, that Mr. Bodge did vote for a no bill. If that is true then we must follow from that that in Mr. Bodge's mind there was no credible evidence. What may have been in the minds of the remaining members of the jury panel, after Mr. Bodge was ousted from the jury, I am sure I do not know, and it is quite possible that Mr. Bodge might have been able to point out to you or to the members of the grand jury that what they thought was credible evidence, as a matter of fact was not credible evidence at all.

The COURT. That is quite a flight of the imagination, Mr. Winn, and getting down to the facts, instead of imagination, there being no contest about the sufficiency of the evidence, credible evidence, or sufficiency of credible evidence, before the grand jury to sustain the indictment, and there being no contest upon this motion that is now before the court that there were 12 affirmative votes by qualified



members of the grand jury, I take it that you have concluded the authorities on the question of whether or not the transcript of the instructions of the court were in law coercive, and therefore sufficient to quash the indictment regardless of those assumptions?

Mr. WINN. Yes, I have completed the citing of authorities. Was that what your honor asked?

The COURT. Yes, you have completed your presenting of your authorities on that point?

Mr. WINN. Yes.

The COURT. Has the prosecution any authorities upon the point at all at this time?

Mr. ULRICH. If your honor please, there are an abundance of authorities. I do not propose at this time to take the court's time with citing cases which demonstrate what to us seems to be an obvious proposition of law. I will answer, in the first place, as to the propriety of the resubmission, if we may call it that, or the direction from the trial judge to a grand jury to continue with its deliberations, even though an indication has been given to the trial judge that a no bill has been found or voted for or is probably contemplated. We have several authorities directly to the effect that the deliberations of the grand jury are aside and in a very different light from the deliberations of a trial jury, and they are matters entirely in the control of the court at all times, and the court not only may but he should see that these deliberations are conducted in such a way as to, in his his discretion, lead to the most salutary results.

(Argument.)

The COURT. Any further argument?

Mr. WINN. No, your honor.

(Terr. *v.* Fortescue et al., Cr. No. 11, 891. Before the Hon. Albert M. Cristy, Judge. January 29, 1932.)

RULING ON MOTION TO QUASH THE INDICTMENTS

The COURT. The court's mind is, after argument of counsel and the citation of authorities, in connection with the authorities that the court had already consulted before ever acting in this matter, quite clear on the principles of law, that, there being no contest on this motion on the insufficiency of the evidence before the grand jury to support the indictment, or that upon this indictment now before the court that there were not 12 qualified jurors affirmatively supporting it, that the question of motive of the grand jury in the grand jury room reasons for voting affirmatively in the grand jury room, prior ballots, and how many ballots and votes were taken, are not matters of investigation at this time, especially upon the record here showing that there is no dispute upon the fact that on Friday, on the first session of the grand jury upon this case, there was an attempt to produce before the court a report—a partial report of the grand jury in its tour of duty, that a "no bill" had been rendered on the matters then before them, which upon the record before this court at this time indicates that there were two bills before them—one as to first-degree murder and the other as to kidnaping. There is no question about the law in the mind of the court that the court at all times has the right, the duty, and the obligation to see to it that the deliberations of the grand jury be with sufficient time and opportunity to

arrive deliberately and coolly at the conclusions to be expressed, and that the court has the power and the duty and the authority to submit or resubmit, even if a report had been filed and received by the court on Friday on the first session of the grand jury on this case.

As to the question of the court's action in excusing Mr. Bodge, this court at that time, as shown by the record of transcript, which is conceded to be a true and correct transcript of what occurred in the presence of the court, explained at the time the reasons why the court found an impropriety as to Mr. Bodge continuing upon the grand jury, in view of the fact that subsequent to the prior hearing Mr. Bodge had received and accepted a commission upon the police enforcing body of the city and county of Honolulu, and the court at that time was neither apprised nor inferred that Mr. Bodge had any other conclusion than that of the court that the two positions would be inconsistent or improper, but that Mr. Bodge addressed the grand jury at the time the court or after the court had excused him, and entered the excuse on the record, addressing the grand jury and not the court, as to the question of the construction to be put upon the matter, that he was not asking for exemption, the court had excused him, but without stating to the court that he could not see himself any impropriety, or demanding as a right to remain upon the grand jury, but that Mr. Bodge accepted the excuse of the court after making his speech to the grand jury, and the court is quite convinced at this time it would be highly improper and would jeopardize the efficiency of the police department of the city and county of Honolulu if that position had continued.

Mr. Bodge had the opportunity at that time. The record shows what was done. Whether or no the court's action in that regard was improper and erroneous does not invalidate the fact that there were left upon the grand jury 20 grand jurors duly qualified whose qualifications have not been attacked, and that at the time of the report of the grand jury to the court supporting this indictment that the court had a true bill, which is not attacked as to numbers of qualified jurors supporting it, and therefore the court is in the position of ruling that all matters of prior consideration are wholly immaterial, without merit, and having no bearing upon the validity of the present indictment before the court. Those matters being immaterial and having no bearing upon the ruling, the court can not open to evidence any further question about the deliberations or motives or inducements, upon admitted rumor, allegations made by counsel for the defense, based upon no other showing to the court of the truth or veracity of persons qualified with the opportunity and possibility of knowing what counsel alleges or asserts he can prove.

The court therefore, upon the reasons given, is compelled to the solution that the motion to quash the indictments as now before the court, with the original and additional grounds therein alleged, are wholly without merit and are overruled.

Mr. WINN. May we have an exception to your honor's ruling?

The COURT. I want to add one thing to it, so you can have one other exception, Mr. Winn: That the fair-minded reading of the instructions that the court gave the grand jury, some at their request, some at the urge of the court itself upon opening court, with the entire context of the statements therein contained of record, and not isolated quotations as the devil may do with the Scripture, will



convince, I am sure, any reasonable mind, and I am submitting it to any higher appeal that counsel may desire to take in due course of time, that this court at all times left open and free to the grand jurors of this Territory, and will always hereafter continue to leave open and free, the credibility of witnesses, the weight to be given to their testimony, and the sufficiency of evidence, but will insist at all times that any qualified juror who acts in this court must be taken to be presumed to act upon the knowledge that the law must be taken from the court and must be applied in the manner given by the court as the law, and their sole province will be as to whether the evidence is sufficient to warrant the action they are called upon to take under that law so given, no matter and in spite of what any individual juror may think the law ought to be. The errors of law are the errors of the court and the remedies are provided by proper appeals and writs or error. The errors of jurors who take the law into their own hands and who apply their own law would bring on a state of anarchy in any civilized community. You may have an exception to that ruling, Mr. Winn.

Mr. WINN. We are placed in the position of feeling under the necessity of making an offer of proof in order to properly protect our record. I realize the customary routine in making an offer of proof is to call the various witnesses to the stand and ask them questions, and after the objection is made and sustained to make an offer to prove what their answer will be. We have 20 grand jurors here and that procedure in this particular case would take up more time than the court is willing to allot to it, and in lieu of that procedure we have made a written offer of proof and should like counsel to stipulate, if he will, that it will not be necessary for us to call to the stand at this time the various witnesses and go through the customary procedure in making an offer of proof, but that this written offer of proof may be received. I believe that under your honor's ruling it is perhaps doubtful whether or not we can go into the proof at all. In order to be doubly certain we should like to offer it, as our offer of proof.

The COURT. In offering it, Mr. Winn, I again ask you whether it is offered upon an investigation of fact and upon any credible witnesses as to fact whom you know will so testify, or if it contains any matters of secret deliberation of the grand jury?

Mr. WINN. No, your honor.

The COURT. Is it simply unconfirmed rumor?

Mr. WINN. The offer of proof is based upon practically the same information that the motion itself is based upon. That, of course, was the contents, what appeared in the Bulletin and the fact the jury voted in such a way, various rumors upon the street that the jurors voted a certain way, and what we consider to be a legitimate inference from the remarks made by the grand jurors to you honor in open court.

The COURT. And not based upon any preparation by yourself upon any more reliable information as to matters not already contained upon the record of this court than the rumors in the streets and the reports in the newspapers?

Mr. WINN. Your honor, I am afraid if I answer "no" there I would be assuming our rumors were not reliable. I am willing to say that the information contained in there was not gotten from either

the minutes of the grand jury or from any grand juror himself, so that they necessarily must be rumors. We would say they are reliable rumors.

The COURT. I am asking in that connection, Mr. Winn, not simply whether you personally have done it, but whether any person whose credibility you are willing to affirm here, as supporting this offer of proof, as having been investigated in your behalf.

Mr. WINN. No, your honor; no one has told me that they have investigated or has seen the minutes of the grand jury or has talked to any individual member of the grand jury, so this is rumor twice removed.

The COURT. The court will permit you to give counsel a memorandum of what you propose to offer to prove. We will take a five minutes' recess while they have a chance to assimilate it, and act accordingly when the court resumes its session.

(Recess.)

(Following recess.)

The COURT. May the court now see your offer of proof.

(Counsel hands paper to the court.)

The COURT. The first count of the offer of proof, Mr. Winn, is a matter of record in this court as to who are members of the grand jury. The second paragraph of the offer of proof, as to the time of convening the grand jury, is of record in this court. The third offer of proof is of record in the transcript of proceedings had by the judge with the grand jury. The fourth offer of proof is, as I understand it, based upon no personal knowledge of yours as to the poll of the jury?

Mr. WINN. That is true, your honor.

The COURT. And the question of there being a no bill is admitted and not attacked in this proceeding. The question of what the poll was, it is the ruling of the court, can not be proved.

Mr. THOMPSON. Might we take exceptions as you go along?

The COURT. You had better, Mr. Thompson.

Mr. THOMPSON. We respectfully except to the refusal to submit to proof No. 4.

The COURT. Exception allowed. And the matters and things in No. 5 are matters and things which count I understand are not based upon any affirmative knowledge of fact, but simply based on rumors and hearsay, and so forth?

Mr. WINN. Yes.

The COURT. The subject matter of it involving the poll of the jury is immaterial and improper and is refused.

Mr. THOMPSON. Exception.

The COURT. Exception will be allowed in each of these instances in which you except.

The matters and things in paragraph 6, in so far as they pertain to matters occurring in the secret deliberations of the grand jury, I take it, are again upon rumor and press report, and not upon any investigation of fact?

Mr. WINN. I can not say investigation of fact. What I believe to be the fact.

The COURT. Your belief, I understand, is based upon no information coming from grand jurors or the grand jury minutes?

Mr. WINN. That is true.



The COURT. The offer of proof again is both a fishing expedition and an improper matter and is denied and overruled.

Mr. THOMPSON. Exception, and exception to the remarks of the court as to a "fishing expedition."

The COURT. Exception allowed. A double exception, Mr. Thompson, as to the matters and things in paragraph 7, the transactions therein purported to be set out as an offer of proof are fully set forth in the instructions of the court to the grand jury, in which the question was asked by the grand jury as to what transpired between the foreman and judge and therefore refused as immaterial.

Mr. THOMPSON. Exception.

The COURT. Exception allowed. Matters and things in so far as they would have any bearing upon the question of alleged coercion of the court upon the jury are fully and amply set forth in the transcript of the record of the proceedings between the court and grand jury on file herein, and this would be purely cumulative, if material, and the court overrules the offer as immaterial.

Mr. THOMPSON. Exception.

The COURT. Exception allowed. Number 9, relating to the excuse of the court to E. E. Bodge has already been ruled upon as immaterial, and is therefore denied in this offer.

Mr. THOMPSON. To which we respectfully except.

The COURT. Exception allowed. That is contained in paragraph 9 of the offer. Paragraph 10 is fully and amply disclosed by the transcript of proceedings in so far as the same is material in connection with requesting the court for further instructions. The transcript shows the facts, and the offer is therefore merely cumulative and immaterial.

Mr. THOMPSON. Exception.

The COURT. Exception allowed. I take it that items of paragraph 11, Mr. Winn, are again upon rumor and hearsay?

Mr. WINN. That is true, your honor.

The COURT. The matter referring again to the secret deliberations of the grand jury. The court has heretofore ruled and continues the ruling that that is immaterial upon the motion before the court.

Mr. THOMPSON. Exception.

The COURT. One further ground, upon that I will now assert that in so far as the fact of whether or not there was or was not a bill or true bill, it has been stipulated here in the former argument here this afternoon that there was a no bill ready for presentation, but the foreman refused to sign and report and so informed the court, as the transcript shows here; that at 12 o'clock he notified the court he had no bill, and a juror called the attention of the court to the differences between them, and therefore it is merely cumulative, in so far as the subject matter of it goes, and immaterial as alleged.

Mr. THOMPSON. Exception.

The COURT. Exception is allowed. I think you quoted that very fact as shown by the record itself. That the matters and things of paragraph 12 relating to the arguments and deliberations of the grand jury are wholly immaterial upon the conceded fact in this particular motion that there was ample evidence to support the indictment and that 12 men signed the indictment, being duly qualified, and the secret proceedings and the deliberations by which they arrived at that under the facts of ample evidence and qualified jurors is immaterial.

Mr. THOMPSON. To which we respectfully except. I take it it is denied.

The COURT. Yes; the offer is denied. That the matters and things contained in paragraph 13 are wholly immaterial as being part of the alleged arguments and deliberations of the grand jury, and their truth or falsity being entirely immaterial upon the questions presented on the present motion to quash. Therefore, the matters therein are refused.

Mr. THOMPSON. To which we except.

The COURT. The offer of proof may be received and marked "Exhibit B," or, rather, "Exhibit 1 for the defendants," as identification of the detail of the offer of proof desired to be made.

Mr. THOMPSON. May we now except to the refusal to grant each one of the requests and to the refusal of the offer of proof in its entirety?

The COURT. Exception may be noted.

Mr. WINN. There is one other matter, and that is the minutes of the grand jury. I presume the proper way will be to have them marked for identification.

The COURT. The court will not mark them, the court having no control over the proceedings of the grand jury. In this proceeding I take it you are offering to prove through the minutes the matters you allege?

Mr. WINN. Will counsel stipulate it will not be necessary to call Mr. Holt to the stand?

Mr. ULRICH. It may be stipulated that the offer to prove the proceedings by the minutes is made, without the necessity of calling the witness.

The COURT. The court has made the ruling that the minutes of the grand jury contained on your offer of proof would be immaterial, just as the testimony of the witnesses.

Mr. WINN. Exception.

The COURT. In accordance with the rulings of the court heretofore made, the motion to quash is denied.

Mr. WINN. To which we respectfully except.

The COURT. Exception allowed. The matter of plea stands over until Monday at 1.30. The court stands adjourned.

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In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Territory of Hawaii, *v.* Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones, defendants

MOTION TO QUASH INDICTMENT, NOTICE OF MOTION, AND AFFIDAVIT OF MONTGOMERY E. WINN

MOTION TO QUASH INDICTMENT

Now come Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones, by their attorneys, Thompson & Winn, and move this honorable court to quash the indictment presented against the



above-named defendants in the above-entitled cause and matter and in support of said motion assigns the following reasons:

First. Because the Hon. A. M. Cristy, second judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on Friday, the 22d day of January, 1932, did arbitrarily and without justification of law refuse to accept the report of the Territorial grand jury that it, the said grand jury, had returned a no bill against each of the four above-named defendants on the bills charging said defendants with first-degree murder in connection with the alleged kidnaping and killing of one Joseph Kahahawai, presented by the attorney for the city and county of Honolulu, Territory of Hawaii, to said grand jury.

Second. Because by so refusing to accept said report the Hon. A. M. Cristy usurped the time-honored function of the grand jury as the sole and exclusive judge of the facts presented before it and as the sole and exclusive judge of whether or not sufficient facts had been presented to it to warrant the finding of a true bill against said defendants or any of them and by his actions and instructions given to said grand jury he, the Hon. A. M. Cristy, in effect instructed the members thereof that unless they found a true bill against said defendants that their action in refusing so to do would result in "anarchy in this community," and that the members of the grand jury who refused to vote for a true bill would be responsible for such state of anarchy and in this connection the Hon. A. M. Cristy made the following statement to the grand jury: "Are you willing to take the responsibilities for that situation? You know our racial structure"—the reasonable interpretation thereof being that unless the members of the grand jury found a true bill against the defendants that a state of anarchy would prevail in the community because of the prevailing racial feeling and structure in the community and that the members of the grand jury would be responsible for such state of anarchy.

Third. Because on Friday, the 22d day of January, 1932, and after the grand jury had been deliberating for approximately two hours, the Hon. A. M. Cristy was formally notified by Harry A. Franson, foreman of said grand jury, and by one other grand juror, that a no bill had been returned by said grand jury as to each and all of the above-named defendants, but that despite this fact the Hon. A. M. Cristy thereupon refused to accept said report and without authority and justification of law had the grand jury seated and proceeded in a lengthy charge to again specifically charge the grand jury with reference to the criminal character of the alleged acts of the four above-named defendants, and upon the following inquiry, to wit, "Do I understand you are not accepting this report" being propounded by one E. E. Bodge, a member of said grand jury, to the Hon. A. M. Cristy, that he, the Hon. A. M. Cristy, in reply thereto did say: "The court refuses to accept any further report until the grand jury deliberates further upon matters of serious import to the Territory. After Tuesday I will talk to you. I will ask you to seriously deliberate upon it until you return for your deliberations at 10 o'clock on Tuesday next." That the fair meaning and interpretation of said remarks by the said Hon. A. M. Cristy were that in the opinion of the Hon. A. M. Cristy, members of the grand jury were not justified in returning a no bill against each and every one of

said defendants, and that because in the opinion of the Hon. A. N. Cristy the grand jurors were not so justified in returning said no bill as aforesaid, that he would refuse to accept a no bill as returned and would compel the members of the grand jury to deliberate until such a time as they should return a bill in accordance with the views held by the said Hon. A. M. Cristy; that in so instructing the grand jury the Hon. A. M. Cristy failed to distinguish the respective duties of a judge who by law is charged with instructing the members of the grand jury on the law, and the duties of the grand jury as the sole and exclusive judge of the facts presented to it.

Fourth. That at or about the hour of 10 o'clock a. m. on Tuesday, the 26th day of January, 1932, the Hon. A. M. Cristy arbitrarily and without justification of law refused to permit one of the grand jurors, namely, E. E. Bodge, to continue to sit as a member of the grand jury and that the Hon. A. M. Cristy did in open court state to the members of the grand jury that Mr. E. E. Bodge "might be subject to considerable criticism in occupying both positions," meaning thereby that said grand juror might be subjected to considerable criticism in sitting as a member of the grand jury and as a member of the police commission of the city and county of Honolulu to which commission said grand juror had recently been appointed. That in response to said remark the said E. E. Bodge advised the Hon. A. M. Cristy in open court as follows:

> I would like the other members of this jury to understand that I am not trying to evade any duty. I am perfectly willing to serve on this jury. I am not claiming any exemption, but the judge has ruled it would be improper for me to serve on both of these bodies and I should like to say I did not know this appointment was going to be made. The first I knew of it was after the court adjourned on Friday. I was not conferred with at all, and when I conferred with the governor later he said he had tried to get me but was unable to do so. I want it understood that I am not trying to evade any duty. * * * I want to have it understood that I am perfectly willing to serve.

That subsections 3 and 4 of section 2397 of the Revised Laws of Hawaii 1925 read as follows:

> A person is exempted from liability to act as a juror if he is—
> 3. A salaried judicial, civil, or military officer of the United States or of the Territory.
> 4. A person holding a salaried county, city, town, municipal, township, district, or precinct office.

That said provisions give to a grand juror the right to claim a personal exemption if he is a "salaried" judicial, civil, or military officer of the United States or of the Territory of Hawaii, or a person holding a "salaried" county, city, town, municipal, township, district, or precinct office, but that said provisions do not disqualify any grand juror from acting as such even though he is a salaried official unless he desires to claim said exemption. That the said E. E. Bodge was not entitled to claim said exemption inasmuch as he received no salary whatsoever as a member of the police commission, and even in the event that he was entitled to receive a salary as a police commissioner the right to claim an exemption would be purely personal to him and could be waived if he so desired, and that the exemption could not be forced upon him by the court.



Fifth. That on said occasion, to wit, at or about the hour of 10 o'clock a. m. on Tuesday, the 26th day of January, 1932, the Hon. A. M. Cristy again used coercive language to the grand jury, his remark, as hereinafter set forth, tending to cause the members of the grand jury to believe that unless they voted for a true bill against the above-named defendants their failure so to do would be subversive of good government and that the government could not exist unless a true bill were rendered by the members of the grand jury. That the language used by the Hon. A. M. Cristy in part is as follows:

> The jury room will be closed and you will proceed with your further deliberations. Before so doing may I ask you gentlemen, as representatives of the government and the community, to lay aside all race prejudice to rise above such trivial or personal matters and apply yourselves coolly and impartially to the question of whether this government shall exist and how it shall exist.

Sixth. Because the grand jury, after the Hon. A. M. Cristy had delivered said charges, and being influenced and induced to indict these defendants by reason thereof, returned the indictment herein, which was not the voluntary act of the grand jury, and that said indictment is therefore void.

Seventh. For other reasons to be assigned at the hearing.

This motion is based upon the files and records herein, the affidavit of Montgomery E. Winn hereto attached, and upon such other evidence as the court shall permit to be introduced at the hearing on this motion.

Dated Honolulu, Hawaii, January 27, 1932.

GRACE FORTESCUE,
THOMAS H. MASSIE,
EDWARD J. LORD,
ALBERT O. JONES,
*Defendants.*
By THOMPSON & WINN,
*Their Attorneys.*
(Per Montgomery E. Winn.)

NOTICE OF MOTION

To JAMES F. GILLILAND,
*Attorney, city and county of Honolulu.*

You are hereby notified that the foregoing motion will be heard at the hour of 1.30 o'clock p. m. on Friday, the 29th day of January, 1932, in the court room of the Hon. A. M. Cristy in the Judiciary Building, Honolulu, city and county of Honolulu, Territory of Hawaii.

Dated Honolulu, Hawaii, January 27, 1932.

THOMPSON & WINN,
*Attorneys for Defendants.*
(Per Montgomery E. Winn.)

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii

Territory of Hawaii *v.* Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones, defendants

AFFIDAVIT OF MONTGOMERY E. WINN

TERRITORY OF HAWAII,
*City and county of Honolulu, ss:*

Montgomery E. Winn, being first duly sworn, deposes and says:

That he is a member of the firm of Thompson & Winn, attorneys for the defendants above named.

That at or about the hour of 1.30 o'clock p. m. on Thursday afternoon, the 21st day of January, 1932, the Territorial grand jury duly convened in the court room of the Hon. A. M. Cristy, second judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii; that the grand jury at said time and place was composed of 21 jurors whose names are as follows, to-wit: Harry A. Franson, James L. Holt, Peter A. Anderson, Edward Ellis Bodge, Rudolph Bukeley, John Llewellyn Cliff, Rudolph M. Duncan, Enf Fah Chung, Vincent Fernandez, Warren C. Laird, Abner Townsley Longley, Walter C. Love, Marmion M. Magoon, Robert McCorriston, David Namahoe, Abel S. Nascimento, Frank C. Palmer, James A. Rath, jr., Ralph Collier Vincent Scott, Ralph Curtis Turner, Arthur E. Wall.

That Harry A. Franson was the duly appointed foreman of said grand jury and James L. Holt duly appointed secretary of said grand jury; that shortly after said grand jury convened Mr. Griffith Wight, deputy city and county attorney of the city and county of Honolulu, Territory of Hawaii, called numerous witnesses before said grand jury and your affiant is informed and believes that said witnesses testified as to facts surrounding the alleged kidnaping and alleged killing of Joseph Kahahawai on Friday, the 8th day of January, 1932.

That at or about the hour of 4.35 o'clock p. m. on said day, the grand jury was adjourned until the hour of 10 o'clock a. m. on the following day, to wit, at the hour of 10 o'clock a. m., on Friday, the 22d day of January, 1932.

That at or about the hour of 10.15 o'clock a. m. on Friday, the 22d day of January, 1932, said grand jury resumed its investigation of the alleged kidnaping and killing of said Joseph Kahahawai and that additional witnesses were called before said grand jury and your affiant is informed and believes that said witnesses testified before said grand jury in connection with the alleged kidnaping and alleged killing of the said Joseph Kahahawai.

That at or about the hour of 12 o'clock noon on Friday, the 22d day of January, 1932, Mr. Griffith Wight, the deputy city and county attorney, announced to said grand jury that he had completed the testimony and that he thereupon presented to the grand jury for its consideration an indictment charging Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones with first-degree murder and also an indictment charging Grace Fortescue, Thomas H. Massie, Edward J. Lord, and Albert O. Jones with kidnaping.

That said grand jury then recessed for lunch and at the hour of 1.30 o'clock p. m. on said day returned to the courtroom of Hon. A. M. Cristy, second judge as aforesaid, to deliberate and vote upon whether or not any of said defendants should be indicted.



That at or about the hour of 3 o'clock p. m. on said day the grand jury requested Hon. A. M. Cristy to instruct it upon certain matters of law pertaining to the requested indictments and that thereupon Hon. A. M. Cristy did enter the grand jury room and instructed the grand jury, as requested, and after having done so, retired to his chambers in the judiciary building.

That your affiant is informed and believes and therefore avers the fact to be that between the hour of 3 and 3.30 o'clock p. m., and subsequent to Hon. A. M. Cristy having instructed the grand jury, members of the grand jury voted on the bills presented to them and your affiant is willing and offers to prove by the testimony of Hon. A. M. Cristy and by the minutes of the secretary of said grand jury and by the affidavits of the grand jurors that at or about the hour of 3.30 o'clock p. m. on said day, Harry A. Franson, foreman of said grand jury, left the grand jury room and went into the chambers of Hon. A. M. Cristy, and that he, the said Harry A. Franson, did thereupon announce to Hon. A. M. Cristy that the grand jury had deliberated for several hours and after the deliberation had voted as to whether or not a true bill should be returned against any of the defendants on any of the charges presented and that the result of said vote was that a no bill should be returned as to each and every one of the defendants on each and every one of the bills presented; that while said Harry A. Franson was in the chambers of Hon. A. M. Cristy one of the members of the grand jury, at the request of the other members of the grand jury, went into the chambers of Hon. A. M. Cristy and in the presence of Hon. A. M. Cristy and Harry A. Franson requested the foreman to return to the grand jury room, and that said grand juror likewise informed Hon. A. M. Cristy that a no bill had been returned against each and every one of the said defendants and that thereupon Hon. A. M. Cristy informed both the foreman of the grand jury and the other grand juror referred to that he would refuse to accept a no bill and that in order to prevent a no bill being returned he intended to adjourn the grand jury until the hour of 10 o'clock a. m. on Tuesday, the 26th day of January, 1932.

That thereupon Hon. A. M. Cristy returned to the grand jury room and reiterated his remarks to the effect that he would refuse to accept a report from the grand jury and that the grand jury had been adjourned until the hour of 10 o'clock a. m. on Tuesday, the 26th day of January, 1932, and that upon said occasion Hon. A. M. Cristy used the following language, to wit:

If a crime has been committed and the identity of the criminals known; that is, criminals in the sense of the technical provisions of the law, and the grand jury for reasons refused under their oath to present an indictment therefor, I present to you the question of anarchy in this community. Are you willing to take the responsibilities for that situation? You know our racial structure. Whether that is involved in any particular case and in the particular case before you is for your consideration and not mine. But, really, gentlemen, it is a very serious situation which I want you not to act hastily on, and to reflect upon. If there is any juror who can not conscientiously carry out his oath of office, he should resign immediately from the grand jury. We are embarking upon a very necessary tour of duty. It is one that I do not relish any more than you do. I will ask the grand jury to stand adjourned until Tuesday morning at 10 o'clock and return for further consideration upon the matters presented before you. You are excused

until Tuesday morning at 10 o'clock. There are the usual restrictions as to the secrecy of your proceedings.

Juror BODGE. Do I understand you are not accepting this report?

The COURT. There has been nothing presented to me. The court refuses to accept any further report until the grand jury deliberates further upon matters of serious import to the Territory. After Tuesday I will talk to you. I will ask you to seriously deliberate upon it until you return for your deliberations at 10 o'clock on Tuesday next.

That at or about the hour of 10 o'clock a. m. on Tuesday, the 26th day of January, 1932, and subsequent to the refusal of Hon. A. M. Cristy to accept the no bill voted by the grand jury, and subsequent to the inquiry propounded by the said grand juror, E. E. Bodge, to Hon. A. M. Cristy inquiring as to whether or not Hon. A. M. Cristy intended to accept the no bill voted by the grand jury, Hon. A. M. Cristy refused to permit said grand juror, E. E. Bodge, to continue to serve on said grand jury despite the fact that the said grand juror expressly stated to Hon. A. M. Cristy in open court that he was "perfectly willing to serve" and that he was "not claiming any exemption."

That on said occasion Hon. A. M. Cristy used language in part as follows:

The jury room will be closed and you will proceed with your further deliberations. Before so doing may I ask you gentlemen, as representatives of the Government and the community, to lay aside all race prejudice, to rise above such trivial or personal matters and apply yourselves coolly and impartially to the question of whether this Government shall exist and how it shall exist.

Further affiant saith naught.

MONTGOMERY E. WINN.

Subscribed and sworn to before me this 27th day of January, 1932.

[SEAL.] J. NOGUCHI,

*Notary Public, First Judicial Circuit, Territory of Hawaii.*

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