

SUPREME COURT OF LOUISIANA

No. 00-K-0453

STATE OF LOUISIANA

Versus

CHARLES O. POLAND

On Writ of Review to the Court of Appeal,
Second Circuit, Parish of Franklin

KIMBALL, J., dissenting

I disagree with the majority's holding that the defendant's grand jury testimony was properly admitted as evidence in the defendant's subsequent second-degree murder trial. The majority reasons that, because the defendant waived his right to remain silent and not to incriminate himself and voluntarily testified before the grand jury, he somehow also waived the statutory requirement that his grand jury testimony be held in secrecy.

Article 434 of the Louisiana Code of Criminal Procedure does not provide a statutory right which a grand jury target or witness may at his discretion invoke or waive. Rather, Article 434(A) provides a legislative mandate, in accordance with Louisiana's Constitution, that grand jury proceedings are to remain secret. *See In re Grand Jury*, 98-2277, p. 3 (La. 4/13/99), 737 So.2d 1, 5.¹ While the defendant may

¹This court has long recognized the importance of the policy that the secrecy of grand jury proceedings should be carefully maintained. *See In re Grand Jury, supra*; *State v. Trosclair*, 443 So.2d 1098, 1103 (La. 1983). While the court has necessarily recognized that absolute secrecy is not required when the legislature creates statutory exceptions or when to maintain secrecy would conflict with a constitutional provision, there is no existing exception, authorizing the court's holding today. *See, e.g., State v. Square*, 257 La. 743, 244 So.2d 200, 217-18 (La. 1971) ("We recognized then, and we reiterate today, the legislative mandate to preserve grand jury secrecy unless a clearly defined exception is announced by the Legislature."); *State v. Peters*, 406 So.2d 189, 191 ("An accused's constitutional rights cannot be thwarted by state law.").

have knowingly and voluntarily waived his right to remain silent in front of the grand jury, at the time he made that waiver he and his attorney had every reasonable expectation that his grand jury testimony would remain secret, as is the long-standing rule in this state.

Furthermore, the majority's interpretation of the language in La. Code Crim. Proc. art. 433(A)(2), leads to a strange anomaly regarding the admissibility of testimony given by witnesses who are targets at the outset of grand jury proceedings and witnesses who become targets at some point during the proceedings. Article 433 provides in relevant part:

If a witness becomes a target because of his testimony, the legal advisor to the grand jury shall inform him of his right to counsel and cease questioning until such witness has obtained counsel or voluntarily and intelligently waived his right to counsel. Any evidence or testimony obtained under the provisions of this Subparagraph from a witness who later becomes a target shall not be admissible in a proceeding against him.

The majority finds that, had Article 434's secrecy requirements been intended to apply universally to targets of a grand jury investigation, there would have been no need for Article 433's express prohibition against the use of testimony of a witness who later becomes a target. Thus, the majority concludes that the logical inference to be made from the language which excludes testimony of a witness who later becomes a target, is that the witness's testimony would have been admissible if the witness had been a target in the first place.

However, that interpretation gives rise to an illogical disparity. Pursuant to the majority's reasoning, a witness, who is a target of the investigation from the outset of the proceedings, can "waive" grand jury secrecy and have his grand jury testimony admitted against him at trial. Yet, a non-targeted witness who testifies before the grand jury and then during the proceedings becomes a target, may choose to waive his right

to remain silent and give additional testimony, but under Article 433, that testimony “shall not be admissible in a proceeding against him.”

Finally, the majority argues that, because exclusion of the defendant’s grand jury testimony in this case would serve no purpose associated with the secrecy of grand jury proceedings, those secrecy requirements should be waived. Contrary to the majority’s argument, I believe that the court’s holding today will effectively put an end to anyone targeted in an investigation being willing to come forward voluntarily and testify truthfully before the grand jury. Additionally, while it may not be the result intended by the court with today’s decision, the majority’s holding could very well unnecessarily create a slippery slope, along which the secrecy requirements of grand jury proceedings will slowly be eroded.

In conclusion, I am persuaded that the court of appeal was correct in reversing the defendant’s conviction, based on the erroneous admittance of the defendant’s grand jury testimony by the trial court. There is no legislative or jurisprudential authority for the majority’s holding today. For all these reasons, I respectfully dissent.