

At a Civil Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse thereof, 18 Richmond Terrace, Staten Island, New York, on 19th day of March 2015.

P R E S E N T:

THE HONORABLE WILLIAM E. GARNETT, J.S.C.

In the Matter of the Investigation into the Death of Eric Garner,

DECISION AND ORDER

Richmond County
Index Numbers:

Letitia James, New York City Public Advocate, 080304/2014

The Legal Aid Society, 080296/2014

The New York Civil Liberties Union, 080307/2014

NYP Holdings, Inc. a/k/a New York Post, and 080308/2014

The Staten Island Branch of The National Association For The Advancement of Colored People and The New York State Conference of Branches of The National Association For The Advancement of Colored People, 080009/2015

Petitioners,

-against-

DANIEL DONOVAN, Richmond County District Attorney,

Respondent.

INTRODUCTION

On July 17, 2014, Eric Garner died during a confrontation with New York City police officers.

The interaction between Mr. Garner and the police was recorded on a cellular phone. Ultimately, and before a grand jury heard the evidence in this case, that tape and the findings of the Medical Examiner's autopsy of Mr. Garner were widely disseminated. Very few members of the public had not formed an opinion about the conduct of the police.

A grand jury was convened on September 29, 2014 to examine the evidence concerning the death of Mr. Garner. On December 3, 2014, the grand jury concluded its inquiry and did not charge any person with the commission of a crime. Thereafter, the District Attorney summarized the grand jury's investigation in a statement authorized by another judge of this court. No grand jury testimony was disclosed in this statement.

In separate motions, the Public Advocate of the City of New York, the Legal Aid Society, the New York Civil Liberties Union (hereinafter, NYCLU), the National Association for the Advancement of Colored People (hereinafter, NAACP) and the owner of the New York Post moved this court to release the minutes of the grand jury pursuant to Criminal Procedure Law § 190.25 (4) (a). The District Attorney opposed the disclosure.

GRAND JURY SECRECY

The Constitution of the State of New York provides that "no person shall be held to answer for a capital or otherwise infamous crime [i.e., a felony] . . . unless on indictment of a grand jury . . ." (NY Const Art I, § 6). Thus, a district attorney may not prosecute a person for a felony or other crime in the Supreme Court without the acquiescence of a grand jury made up of lay jurors. The grand jury's decision to charge a person is manifested when it files an indictment with the Supreme Court.

This constitutional provision is implemented by Article 190 of the Criminal Procedure

Law. Pertinent to these motions is the admonition contained in CPL 190.25 (4) (a) that grand jury proceedings are secret and, in general, no person may disclose the nature or substance of any grand jury testimony without the written approbation of a court. This prohibition is enforced by Penal Law § 215.70 which makes it a felony to disclose grand jury testimony. The only exception to this proscription is that a person may disclose the substance of his/her testimony without approval. CPL 190.25 (4) (a).

Despite these statutory rules, the secrecy of grand jury testimony is not sacrosanct and the minutes of a grand jury may be divulged, in a court's discretion, in the appropriate case. *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983). In general, disclosure is the exception to the rule. *Id.* at 444.

The law is bottomed on the "presumption of confidentiality [which] attaches to the record of grand jury proceedings." *People v Fetcho*, 91 NY2d 765, 769 (1998). To overcome the presumption of confidentiality, a movant must initially demonstrate "a compelling and particularized need for access to the Grand Jury material." *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. This showing is required to demonstrate how a party has a basis to seek relief from a court. Moreover, the mere fact that disclosure is sought by a government agency will not necessarily warrant the breach of grand jury secrecy, nor will the mere general assertion that disclosure will be in the public interest. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444-445.

Thus, each movant must first show a "compelling and particularized need" such as to demonstrate that the party has a greater stake in the disclosure than does any other citizen - even one critical of the grand jury's decision. The movant must explain the purpose for which the party seeks access to the minutes. *Id.* at 444.

Simply put, what would the movant do with the minutes if the movant got them?

Only after such a showing will a court move on to balance the competing interests in deciding whether to grant disclosure.

COLLATERAL ESTOPPEL

The earlier application of the District Attorney to another judge of this court for a limited disclosure does not collaterally estop the District Attorney from arguing in these cases that the movants do not have a “compelling and particularized need” for disclosure.

First, the District Attorney only asked for a limited summary of the work of the grand jury. No grand jury testimony or the substance of any testimony was released.

More to the point, as will be explained later in this decision, each party must show a “compelling and particularized need.” Thus, even if the first judge was satisfied that the District Attorney had established a need for a summary, that decision does not preclude the District Attorney from opposing these motions or excuse these movants from making the requisite showing of a “compelling and particularized need.”

“COMPELLING AND PARTICULARIZED NEED”

In those cases in which relief has been granted, the successful movant has demonstrated a nexus between the grand jury minutes and a “compelling and particularized need” for those minutes. *People v DiNapoli*, 27 NY2d 229 (1970) (Public Service Commission needed the minutes to adjust rates after a grand jury investigation had revealed evidence of “bid rigging”); *Matter of Quinn [Guion]*, 293 NY 787 (1944) (limited disclosure was allowed for the purpose of the removal of a village tax collector pursuant to the Public Officers Law); *People ex rel Hirshberg v Board of Supervisors*, 251 NY 156 (1929) (a Commissioner sought reimbursement from the District Attorney for the county); *Matter of Aiani v Donovan*, 98 AD3d 972 (2d Dept 2012) (bank records subpoenaed from the United Arab Emirates for a grand jury investigation, not the minutes, were disclosed where the movant had no other means to execute on a large civil judgment); *Jones v State*, 62 AD2d 44 (4th Dept 1978) (statements made by witnesses, not grand jury minutes, were given to the state police for disciplinary proceedings); *Matter of City of Buffalo*, 57 AD2d 47 (4th Dept 1977) (the city’s corporation counsel needed grand jury minutes to sue persons who had been

paid for “no show” jobs); *Matter of Scotti*, 53 AD2d 282 (4th Dept 1976) (limited release to State Police superintendent and Correction commissioner for disciplinary actions); *People v Lindsey*, 188 Misc2d 757 (Cattaraugus County Ct 2001) (in a sixty-five [65] year-old murder case in which the grand jury minutes had earlier been released by the prosecutor, the defendant’s son was given access to the minutes to ensure the accuracy of a prospective movie script); *People v Cipolla*, 184 Misc2d 880 (Rensselaer County Ct 2000) (in a case in which the grand jury minutes had earlier been released, the minutes were given to litigants to further a federal lawsuit); *Matter of FOJP Service Corp.*, 119 Misc2d 287 (Sup Ct, New York County 1983) (a nonprofit employer sought grand jury minutes to further a “RICO” civil suit against attorneys who had unethically approached prospective clients); *People v Werfel*, 82 Misc2d 1029 (Sup Ct, Queen County 1975) (the New York City Department of Investigation, tasked with investigating the background of a judicial candidate, sought the minutes of a grand jury which had heard testimony about a narcotics case of which the candidate had been the subject); *People v Behan*, 37 Misc2d 911 (Onondaga County Ct 1962) (a special prosecutor appointed to investigate corruption in the prisons was granted access to grand jury minutes); *Matter of Crain*, 139 Misc 799 (Court of General Sessions, New York County 1931) (grand jury minutes were disclosed to a commissioner appointed to investigate judicial corruption).

Thus, in each of these cases, the movants were able to demonstrate a “compelling and particularized need” for disclosure. Each movant was able to give a specific reason for the disclosure of the minutes. Each movant could answer the question: What would you do with the minutes if you were given them? Thus, a movant must have a strong reason for disclosure unique to that movant.

The case law also demonstrates that even movants with law enforcement responsibilities or governmental authority must also make the same initial showing of a “compelling and particularized need.”

In the seminal case of *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983), the District Attorney, who had been selected by the Suffolk County legislature to bring a federal lawsuit on behalf of the county, was denied access for having failed to

establish a “compelling and particularized need.”

Similarly, in *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992), the Appellate Division of the Supreme Court for the Second Judicial Department found wanting the District Attorney’s request for the release of grand jury minutes to quell community unrest and to restore confidence in the criminal justice system as “compelling and particularized need[s].”

Of particular note are the efforts by public officials over the years to have the minutes of the Wyoming County grand jury which investigated the 1971 Attica prison uprising released. Since 1975, governors and attorneys general of this State have attempted to have the grand jury minutes released. *Matter of Carey*, 68 AD2d 220 (4th Dept 1979).

Most recently, Attorney General Schneiderman moved to disclose the minutes of the grand jury that had been quoted, but redacted, in the “Meyer report.” That report had concluded, in part, that there had been prosecutorial misjudgments in the investigation. The court ruled that, even after nearly forty (40) years since the report, the Attorney General’s contention that the disclosure of the redacted grand jury minutes would inform the public and complete the historical record did not constitute “compelling and particularized need.” *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

Thus, as with any other movant, a public official, even one with prosecutorial duties, must make the same showing of a “compelling and particularized need” to obtain the release of grand jury minutes.

THE PUBLIC ADVOCATE

The Public Advocate has not demonstrated a “compelling and particularized need” for disclosure of the grand jury minutes.

Although the Public Advocate is a citywide elected official, the Advocate has no direct role in the criminal justice system. The New York City Charter, in Chapter 2, entitled, “Council” describes the work of the Public Advocate. Specifically, in section 24, the Public Advocate is permitted to participate in the discussions of the City Council but may not vote. The Advocate’s primary function is to receive complaints about, and monitor, city agencies.

By section 24 (k), the Public Advocate must refer any criminal complaint to the Department of Investigation “or . . . to the appropriate prosecutorial attorney or other law enforcement agency.” Thus, the Advocate has no explicit role in the city’s criminal justice system. To the contrary, the Public Advocate is mandated to refer criminal complaints to other authorities. Clearly, by the provisions of the City Charter, the Public Advocate’s role in criminal matters is severely circumscribed.

Our criminal justice system is a state, not city, system. The same procedures including those for the grand jury obtain throughout the state. Thus, the City Council of which the Public Advocate is a non-voting member cannot enact laws which would alter the New York State grand jury system.

Counsel for the Public Advocate argued that these minutes are needed to make recommendations and issue reports regarding police conduct including the use of excessive force. The Advocate’s request for the minutes in this one, solitary case is undermined by the fact that the Public Advocate has a myriad of sources for reviewing police actions.

Besides the tape in this case, the Public Advocate, as a monitor of city agencies, has access to the records of the Department of Investigation, the Civilian Complaint Review Board, the Police Department and the City’s Law Department which litigates federal lawsuits against police officers charged with the use of excessive force and other misconduct. Thus, the Public Advocate has a plethora of sources from which the Advocate can glean evidence to support her positions regarding the policing of the criminal law in New York City.

The Public Advocate has no “compelling and particularized need” to gain access to the minutes of the grand jury in this one case to fulfill her Charter responsibilities. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. The Public Advocate’s position in the constellation of public officials makes the Advocate no different from any other public official who argues for change in the administration of justice in New York State.

THE LEGAL AID SOCIETY

The Legal Aid Society has not shown a “compelling and particularized need” for the disclosure of the grand jury minutes.

In its brief, the Society asserted, presumably to show a need for disclosure, that it had represented Eric Garner. As a matter of law, that representation ended upon his death. *See e.g., People v Drayton*, 13 NY3d 902 (2009); *People v Mintz*, 20 NY2d 770 (1967).

The Society further contended that other of its clients had been adversely impacted by the events surrounding the death of Eric Garner. Nevertheless, at oral argument, no effect on other clients was articulated or quantified. The court took the Society’s position at oral argument to be that the Society needed the grand jury minutes for future reference in representing clients whose cases will be presented to a grand jury and as a strategic resource.

Clearly, none of these arguments established a “compelling and particularized need” for the release of these minutes.

THE NYCLU & THE NAACP

The NYCLU and the NAACP have both contended that the disclosure of the grand jury minutes is necessary to foster transparency and demonstrate fairness to the public. The statutory phrase “compelling and particularized need” cannot be conflated by ignoring a demonstrable “need” by simply arguing that disclosure *per se* is compelling. Under the law, a compelling interest in a case is not a “compelling and particularized need.”

Therefore, these movants have not established a “compelling and particularized need” for the minutes. *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992); *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

THE NEW YORK POST

Finally, the entity which owns the New York Post has also failed to demonstrate a “compelling and particularized need” for the minutes. The newspaper would merely publish all, or part of, the minutes and might use them as grist for its editorial mill.

The Court has not found any case in which the testimony and evidence adduced in a grand jury has been disseminated to the public by the media.

Journalistic curiosity is simply not a legally cognizable need under the law.

CONCLUSION

Compelling and Particularized Need

Each of the movants has failed to establish that it has the required "compelling and particularized need" for the grand jury minutes. In every case cited at oral argument or in the motion papers in which disclosure was granted, there existed a clear nexus between the movant's need and the grand jury minutes.

In summary, the movants in this case merely ask for disclosure for distribution to the public. This request is not a legally cognizable reason for disclosure.

What would they use the minutes for? The only answer which the court heard was the possibility of effecting legislative change. That proffered need is purely speculative and does not satisfy the requirements of the law.

Balancing Interests

The second part of the analysis would be the balancing of interests which attach to grand jury proceedings. Of course, this balancing process begins only after a movant has satisfied the "compelling and particularized need" requirement. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444.

Assuming for the sake of argument that one of the movants had established a "compelling and particularized need" for disclosure, the balancing of interests would not have justified disclosure. The disclosure of minutes would have undermined the overriding

concern for the independence of our grand juries. *Id.*

In *People v DiNapoli*, 27 NY2d 229, 235 (1970), the Court of Appeals suggested five factors for the court to consider¹. Only three are arguably applicable in this case.

The shadow of a federal criminal investigation looms over these proceedings. Presumably, if the United States Department of Justice proceeds, the same witnesses and evidence will be examined. Revealing the minutes of the state grand jury may place witnesses in jeopardy of intimidation or tampering if called to a federal grand jury or to a federal trial. Witnesses might be approached to adjust or alter their testimony if perceived to have been too favorable or unfavorable to any of the parties.

In addition, those who were not charged by the grand jury have a reputational stake in not having their conduct reviewed again after the grand jury had already exonerated them.

Most important to the integrity and thoroughness of the criminal justice system is the assurance to witnesses that their testimony and cooperation are not the subject of public comment or criticism. This concern is particularly cogent in "high publicity cases" where the witnesses' truthful and accurate testimony is vital. It is in such notorious cases that witnesses' cooperation and honesty should be encouraged - not discouraged - for fear of disclosure.

Ironically, if courts routinely divulged grand jury testimony, disclosure would largely impact serious and newsworthy cases. It was contended that disclosure in a case such as this would be no different from disclosure after a defendant had been indicted. This argument does not justify disclosure. When a defendant is charged with a crime, the secrecy of the grand jury is trumped by the defendant's constitutional right to confront the witnesses against him (US Constitution, Sixth Amendment) and the defendant's statutory right to discovery

¹ "Those most frequently mentioned by courts and commentators are these: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely."

pursuant to Article 240 of the Criminal Procedure Law. These mandates would compel a limited disclosure. However, when no charges are voted by a grand jury, these rights do not come into play. Thus, this argument fails.

Finally, the decision of the grand jurors in this case was theirs alone, after having heard all of the evidence, having been instructed on the law and having deliberated. Their collective decision should not be impeached by unbridled speculation that the integrity of this grand jury was impaired in any way.

FINAL CONCLUSION

In this case, based on the arguments of the movants and the current state of the law, a decision in favor of the movants would constitute an unjustified departure from the plain statutory language of CPL 190.25 (4) (a) and case law. The movants argue for a “sea change” in the law governing the disclosure of grand jury minutes. If such a dramatic change is warranted, that change should be effected by the state legislature. The judiciary is not the branch of government for statutory repeal or amendments.

CPL 190.25 (4) (a), as interpreted in countless cases over many years, would have been judicially repealed or modified if courts succumb to the temptation to order disclosure in unique or high-publicity cases without reference to clear legal precedent. The law’s uniformity would be lost and the law would vary from court to court. The *ad hoc* release of grand jury minutes would be based on a judge’s subjective decision that a case was of singular importance or notoriety. If current, clearly articulated law governing the disclosure of grand jury minutes were abandoned each time a grand jury decision resulted in controversy, the law would have been changed by a judge. The rules of law established for the determinations of these motions would have been judicially amended and, in cases like

this one, the exception would have swallowed the rule². *Matter of Carey*, 45 Misc3d 187, 213 (Sup Ct, Wyoming County 2014).

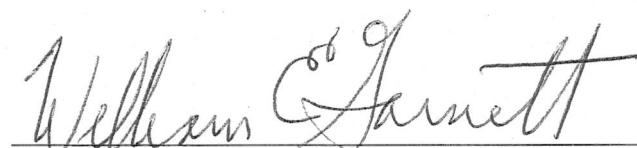
It bears repeating that under the law, a “compelling interest” in a case is not a “compelling or particularized need.” If every newsworthy case were deemed compelling and, thus justified disclosure, the veil of grand jury secrecy would be lifted and every citizen’s right to have fellow citizens, sitting on a grand jury, check the power of the police and the prosecutor without pressure from outside influences - real or perceived - would be imperiled.

Again, in summary, each movant has not established a “compelling and particularized need” for the release of the grand jury minutes and, if that legally-required showing had been made, disclosure, on balance, would not have been warranted.

Thus, the motions for disclosure are denied³.

This opinion shall constitute the decision and order of the court.

E N T E R



HON. WILLIAM GARNETT, J.S.C.

² “At an even more basic level of analysis, this Court must point out that, if the public's right to know could be a paramount or overriding consideration here, there would not exist a general rule of grand jury secrecy in the first place. Nor, if the supposed societal benefit of maximizing the public's awareness could by itself trump all other considerations, would there exist a legal presumption against disclosure of grand jury evidence, let alone a rule providing that such presumption may be overcome only by a showing of a particularized and compelling need for disclosure. To adopt the Attorney General's position in this case would be to effectively displace the presumption against disclosure of grand jury evidence with a presumption favoring the earliest and widest public revelation of grand jury material, at least in the most important and notorious cases.”

³ The NAACP's motions to recuse and to refer the matter to the Grievance Committee of the Appellate Division of the Supreme Court for the Second Judicial Department are denied as meritless.