

IN SUPPORT OF

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A.

AN ACT to amend the criminal procedure law, in relation to grand juries

This measure is being introduced at the request of the Chief Judge of the State.

This measure would amend provisions of sections 190.25 and 210.20 of the Criminal Procedure Law in relation to operation of the grand jury and disclosure of its proceedings.

Recent cases where grand juries voted not to bring charges against police officers involved in deadly encounters with civilians have generated a crisis of confidence in the grand jury system. To some, the grand juries functioned as designed, to others the failure to indict served to intensify concern that the grand jury process is flawed. The public debate, however, has been founded on an incomplete understanding of these grand jury proceedings because secrecy rules prevent public access to those proceedings. This lack of transparency has served to inhibit informed discussion on the role of the grand jury in cases of significant public interest and, more broadly, has exacerbated tension between the police and the communities they serve. Public calls to require special prosecutors in cases where police officers clash with civilians are inevitable where grand jury proceedings are conducted in secret. No matter how fair and dedicated, prosecutors are subject to the perception that the grand jury serves as an unchecked arm of law enforcement.

The current measure is designed to restore the public's faith in the grand jury process for the types of cases that typically generate public mistrust. It does so by reaffirming and strengthening the supervisory role of the court in grand jury proceedings and by amending secrecy rules to allow greater access to certain proceedings that are of significant public interest.

The institution of the grand jury has a long and rich history. Developed in England in the twelfth century to do the bidding of the monarch and subsequently to serve as a bulwark between the state or sovereign and the accused, it is now firmly embedded in the United States Constitution as part of the Fifth Amendment. However, the Federal constitutional right to a grand jury is not binding on the States (*Hurtado v. California*, 110 U. S. 516 [1884]). Thus, in New York State, the grand jury derives its authority, not from the Federal Constitution, but from the State Constitution and the

Criminal Procedure Law (N.Y. Const. Art. I §§6, 14; *Wood v Hughes*, 9 NY2d 144, 149 [1961]).

Although the Criminal Procedure Law vests the district attorney with significant discretionary authority over the grand jury process, the grand jury is foremost a process of the court and not the district attorney. The grand jury is impaneled by a superior court, constitutes a part of such court and is to be drawn and impaneled for such terms as established by the Chief Administrative Judge in consultation and agreement with the Presiding Justice of the appropriate Appellate Division (*see* CPL 190.05, 190.10; *see also* 28 NYCRR 128.17 and 200.13).

Grand jury secrecy is also required by statute (CPL 190.25(4)), and there are many sound reasons supporting secrecy: to prevent tampering with the grand jury's investigation, to prevent the target from fleeing to avoid prosecution, to encourage reluctant witnesses to cooperate, and to protect those who are not indicted. In most cases, secrecy rules do not inhibit public understanding of the criminal justice process because when a grand jury votes to bring charges, there is ample public information about the case through the discovery process, public proceedings and trials. However, where a grand jury votes to dismiss the charges, there are no further proceedings and grand jury proceedings remain secret, thus denying the public even a minimum level of access to the criminal justice process. While, ordinarily, this is not inappropriate, in cases of significant public interest the secrecy rules may become an obstacle to meaningful understanding of the criminal justice process and, on balance, counter-productive to assuring public faith in the institutions of government. Accordingly, this measure is drawn to address those cases by authorizing a court to provide limited disclosure of grand jury proceedings in dismissed cases of significant public interest.

Section one of the measure amends paragraph three of section 190.25 of the Criminal Procedure Law to provide that a judge must be present at grand jury proceedings involving charges against a police officer for felony assault, strangulation or homicide where the officer was acting in the course of his or her official duties. The measure leaves unchanged the district attorney's fundamental role in presenting witnesses, determining what evidence to introduce and what charges the grand jury will consider. With a judge presiding over the proceedings, however, the court will make evidentiary rulings, advise the grand jury on legal questions, and provide legal instructions to the jury. By this measure, the court determines whether the charges submitted are supported by legally sufficient evidence, and it expressly authorizes the court to advise the grand jury, where appropriate, that additional witness may be called to testify.

Section two of the measure adds a new subdivision 4-a to section 190.25 of the Criminal Procedure Law to allow limited public access to grand jury records in cases that end in complete dismissal of all charges. Before permitting disclosure, the court must first find that the public is likely aware of the criminal investigation, knows the identity of the subject of the investigation (or the subject has consented to disclosure), and that there is significant public interest in disclosure. Upon making this determination, the

court may disclose the criminal charge or charges submitted to the grand jury, the legal instructions with which it was provided, the testimony of all public servants who testified before the grand jury and of all persons who provided expert testimony, and the testimony of all other persons who testified before the grand jury, redacted to prevent discovery of their names and such other personal data or information that may reveal or help to reveal their identities. Disclosure may be further limited or denied completely upon a reasonable likelihood that disclosure may lead to discovery of the identity of a witness who is not a public servant or expert witness, imperil the health or safety of any grand juror or witness appearing before the grand jury, jeopardize any current or future criminal investigation, threaten public safety or otherwise be against the interest of justice.

This measure would have no meaningful fiscal impact and would take effect immediately.

Legislative History: None. New bill.

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The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 3 of section 190.25 of the criminal procedure law is amended by adding a new unlettered paragraph at the end thereof to read as follows:

Notwithstanding the foregoing, and except during the deliberations and voting of a grand jury, a superior court judge must be present during any proceedings before a grand jury that involve submission of a criminal charge against a police officer for a felony offense specified in article 120, 121 or 125 of the penal law committed while acting in the course of his or her official duties. While present, the judge shall exercise powers and duties that are appropriate to the judge's supervisory authority over proceedings before the grand jury and that otherwise will assist it in discharge of its functions, including but not limited to ruling on legal issues and determining the admissibility of evidence. The judge may also advise the grand jurors, where appropriate, that additional witnesses may be called to testify before them. At the close of the presentation of evidence, the district attorney shall furnish the court with the charges to be submitted to the grand jury and the court shall instruct the grand jury in accordance with subdivision six of this section as to any such charges supported by legally sufficient evidence for which an indictment is authorized under section 190.65 of this chapter; provided, however, that where a charge is not supported by legally sufficient evidence but the evidence is legally sufficient to support a lesser included offense, the court, at the request of the district attorney, shall instruct the grand jury on the most serious lesser included offense with respect to which the evidence before the grand jury is sufficient.

§2. Section 190.25 of the criminal procedure law is amended by adding a new subdivision 4-a to read as follows:

4-a. (a) Notwithstanding the provisions of subdivision four of this section, when, following submission to a grand jury of a criminal charge or charges the grand jury dismisses all charges presented, an application may be made to the superior court for disclosure of the following material relating to the proceedings before such grand jury:

(i) the criminal charge or charges submitted;

(ii) the legal instructions provided to the grand jury;

(iii) the testimony of all public servants who testified before the grand jury and of all persons who provided expert testimony; and

(iv) the testimony of all other persons who testified before the grand jury, redacted to prevent discovery of their names and such other personal data or information that may reveal or help to reveal their identities.

(b) The application specified in paragraph (a) of this subdivision may be made by any person, must be in writing and, except where made by the people, must be upon notice to the people. Except for good cause otherwise shown, the application must be made within one year of the close of the term of the grand jury which dismissed such charges. Where more than one application is made hereunder in relation to such a dismissal, the court may consolidate them and determine them together. Where no application hereunder is made, the superior court may order disclosure on its own motion as provided in paragraph (c) of this subdivision at any time following notice to the people and an opportunity to be heard.

(c) Upon an application as provided in paragraph (a) of this subdivision or on its own motion, the court shall determine whether:

(i) the general public in the county in which the grand jury was drawn and impaneled likely is aware that a criminal investigation had been conducted in connection with the subject matter of the grand jury proceeding; and

(ii) the identity of the subject against whom the criminal charge specified in paragraph (a) of this subdivision was submitted to a grand jury has already been disclosed publicly or such subject has consented to such disclosure; and

(iii) there is significant public interest in disclosure.

Where the court is satisfied that all three of these factors have been established, and except as provided in paragraph (d) of this subdivision, the court shall direct the district attorney to provide disclosure of the items specified in paragraph (a) of this subdivision.

(d) Notwithstanding the other provisions of this subdivision, on application of the district attorney or any interested person, or on its own motion, the court shall limit disclosure of the items specified in paragraph (a) of this subdivision, in whole or part, where the court determines there is a reasonable likelihood that the disclosure may lead to discovery of the identity of a witness who is not a public servant or expert witness, imperil the health or safety of any grand juror or witness appearing before the grand jury, jeopardize any current or future criminal investigation, threaten public safety or is otherwise against the interest of justice.

(e) Where a court determines not to direct disclosure pursuant to this subdivision, it shall do so in a written order dismissing the application therefor that shall, to the extent practicable, explain the basis for its determination.

§3. The first unlettered paragraph of subdivision 1 of section 210.20 of the criminal procedure law, as amended by chapter 209 of the laws of 1990, is amended to read as follows:

After arraignment upon an indictment, and notwithstanding subdivision three of section

190.25, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that:

§4. This act shall take effect immediately.