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**SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY**

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THE PEOPLE OF THE STATE OF NEW YORK, : By: STEVEN W. FISHER, J.

vs. : Part J-25

JOHN TAYLOR, : Indictment No. 1845/2000

Defendant. : Dated: July 2, 2001

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DECISION ON DEFENDANT’S MOTION #1

This is a motion by defendant John Taylor to dismiss Indictment No. 1845/2000 on the ground that the People’s refusal to disclose requested information prior to the grand jury presentment deprived him of the effective assistance of counsel, and thereby violated his right to appear before the grand jury and present evidence in his own behalf.

On May 28, 2000, the defendant was arraigned on a felony complaint charging him with murder in the first degree and lesser crimes in connection with a robbery and shooting that left five persons dead and two injured inside a Wendy’s restaurant in Flushing, Queens. The defendant was served with statutory notice of the District Attorney’s intention to present the matter to a grand jury, and the defendant served the People with notice of his intent to testify at the grand jury presentment (*see*, CPL 190.50[a]). The defendant then waived his right to release under CPL 180.80 up to and including June 30, 2000.¹

In a subsequent exchange of letters, defense counsel asked the prosecutor to disclose certain information concerning the planned grand jury presentment. Counsel maintained that without the requested information he could not effectively advise the defendant on whether to appear before the grand jury or proffer evidence for the grand jury to consider.

¹ CPL 180.80 requires the release on recognizance of any defendant confined more than 120 hours, or 144 hours if a Saturday, Sunday, or legal holiday intervenes, unless a preliminary hearing is commenced or an indictment is voted.

In a ten-page letter, with a four-page attachment, defense counsel asked the District Attorney (1) to reveal the precise charges that would be presented to the grand jury, including the specific theories under which non-capital homicide would be elevated to capital murder; (2) to provide the defense with all statements, oral, written, or videotaped, of both the defendant and co-defendant Craig Godineaux; (3) to disclose to the defense and present to the grand jury "any and all exculpatory and mitigating evidence of which any law enforcement agents [were] aware;" (4) to present the cases against the defendant and the co-defendant to separate grand juries; (5) to conduct a detailed and recorded *voir dire* examination of the grand jurors to assure that none held a bias owing to the publicity surrounding the case; (6) to refrain from introducing at the grand jury evidence that was inflammatory or offered only to prove crimes not charged in the felony complaint; (7) to charge the grand jury in accordance with legal instructions submitted as an attachment to the letter; and (8) to refrain from concluding the grand jury presentment "until the defendant *** had an adequate opportunity to investigate the existence of any exculpatory or mitigating defenses to the crime charged."

The letter amplified on what counsel considered exculpatory and mitigating evidence in the context of the case, and offered argument in support of each request. The attachment contained proposed instructions on the voluntariness of statements and the "permissive power of the grand jury when considering charges of murder in the first degree." It also demanded that the grand jury be instructed regarding (1) the law of all lesser included offenses, including manslaughter in the first and second degrees, and the affirmative defense of extreme emotional disturbance; (2) the specific-intent element of first-degree murder, and the need to prove as an element of "intentional felony murder"² that the defendant personally caused the death of the victim or commanded another to do so; (3) the fact that death is an authorized sentence upon conviction for first-degree murder; (4) the presumption of innocence, the burden of proof, the "reasonable cause" standard, and the grand jury's right to consider both evidence and lack of evidence; and (5) the grand jury's prerogative to submit questions to witnesses called, and to subpoena witnesses it wishes to hear.

Counsel demanded that the District Attorney respond and inform him as to which,

² See, Penal Law §125.27(1)(a)(vii).

if any, of the defense requests would be granted.

In his reply, the prosecutor disclosed the People's intention to submit for grand jury consideration charges of murder in the first degree and lesser offenses. The prosecutor wrote that the first-degree murder charges would be premised upon two theories: "intentional felony murder"³ and murder with multiple victims,⁴ and he concluded his letter as follows:

"We decline to provide you with any further information or materials at this time. Pursuant to the law as it currently exists in New York State, you are not presently entitled to discovery. The Grand Jury will be properly instructed on the law and in accordance with Mr. Taylor's constitutional rights."

Defense counsel responded by reiterating the need for disclosure of the requested information and by warning that "[i]f your position remains as stated ***, then Mr. Taylor cannot possibly proffer witnesses or himself testify on [the scheduled date]." On June 26, 2000, the defendant appeared in court where his counsel confirmed that the defendant would neither testify nor proffer witnesses to the grand jury. The next day, the instant indictment was returned.

Insofar as relevant here, CPL 190.50 provides that the target of an investigation has the right to testify in his own behalf before the grand jury, and to ask that designated witnesses be called. The statute provides further that, if the grand jury is considering an offense charged in an undisposed of felony complaint upon which the target has been arraigned as a defendant, the District Attorney "must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein" (CPL 190.50[5][a]). A failure to accord the defendant a reasonable time to exercise his right to appear before the grand jury impairs the integrity of the grand jury proceeding and requires the dismissal of any resulting indictment (*see*, CPL 190.50[5][c], 210.20[1][c] & 210.35[4]; *People v. Evans*, 79 N.Y.2d 407 [1992]).

The defendant here was given notice at his arraignment on the felony complaint that the case against him would be presented to the grand jury. A date nearly one full month thereafter

³ *Id.*

⁴ *See*, Penal Law §125.27(1)(a)(viii).

was reserved for his testimony. In any ordinary case, this would clearly constitute full compliance with the requirements of the statute (*see, e.g., People v. Sawyer*, ___ N.Y.2d ___, 2001 WL 463227, [decided May 3, 2001][upholding notice of 1½ days]).

Moreover, absent constitutional imperative, discovery in criminal cases is governed entirely by statute (*see, e.g., People v. Copicotto*, 50 N.Y.2d 222, 225 [1980]; *cf. People v. Colavito*, 87 N.Y.2d 423 [1996]). Because New York's statutes make no provision for discovery by a defendant charged only in a felony complaint (*see*, CPL Article 240), courts are without authority to order pre-indictment discovery in felony cases (*see, e.g., Matter of Hynes v. Cirigliano*, 180 A.D.2d 659 [2d Dept. 1992], *lv. denied* 79 N.Y.2d 757). Thus, in any ordinary case, the defendant would have no right to the items of discovery he demanded prior to his indictment.

Finally, a target of a grand jury investigation has no right to be informed of the manner in which the presentment will be made (*see, e.g., People v. Adessa*, 89 N.Y.2d 677, 683 [1997]; *cf. People v. Stepteau*, 81 NY2d 799 [1993]). Therefore, in any ordinary case, the defendant would not be entitled to have the District Attorney reveal what type of evidence, or what legal instructions, will be presented to the grand jury, as those are matters generally left, in the first instance, to the sound judgment and discretion of the prosecutor (*see, People v. DiFalco*, 44 N.Y.2d 482, 486-487 [1978]).

The defendant argues, however, that this is not an ordinary case in which these rules would apply. Instead he claims that, because the felony complaint charged the death-eligible crime of first-degree murder, and because the District Attorney confirmed that that charge would be among those presented to the grand jury, the legitimacy of the defendant's requests, and the merits of this motion, must be judged under a standard of "heightened due process" which, he maintains, is applicable to all phases of a potential capital case.⁵

The notion of "heightened due process" grows out of the Supreme Court's recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long"

⁵ On January 22, 2001, the People served upon the defendant statutory notice of intent to seek the death penalty pursuant to CPL 250.40. On the same day, with the District Attorney's consent, co-defendant Craig Godineaux pleaded guilty to each count of the joint indictment in which he was named. On February 21, 2001, Godineaux was sentenced to life without parole.

(*Woodson v. North Carolina*, 428 U.S. 280, 305 [1976]) and that that difference "requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos*, 463 U.S. 992, 998-999 [1983]).

Some New York courts have drawn from this that "heightened due process" applies, if at all, only at the penalty phase of a capital trial because that is where the sentencing determination is made (*see, e.g., People v. Bastien*, 170 Misc.2d 103, 105 [Sup. Ct. N.Y. Co, 1996][Weissberg, J.]; *People v. Rodriguez*, 168 Misc.2d 219, 223 [Sup. Ct. N.Y. Co. 1996][Altman, J.]; *People v. Campos*, N.Y.L.J. 5/21/98, p.30, col. 2 [Sup. Ct. Kings Co.][Demarest, J.]).

In my view, however, there seems strong reason to adopt a broader construction because, in every capital case tried under current New York law, at least one aggravating factor to be considered in the determination of sentence in the penalty phase will have been litigated and established in the guilt phase.⁶ Thus, one court has persuasively reasoned that "a heightened due process standard applies not at a particular *time* in a capital prosecution, but rather to a particular *function*, i.e., the making of factual determinations relating to sentencing" (*People v. Arthur*, 175 Misc.2d 742, 752 [N.Y. Co. 1997][Kahn, J.]

In any event, whatever else may be said of the concept, I conclude that "heightened due process" does not apply at the grand jury stage, even in a potential capital prosecution.

The grand jury's limited, albeit critically important, function is "to investigate crimes and determine whether there exists sufficient evidence and a legal reason to believe that a citizen should stand publicly accused of a crime and be subjected to the task of defending against the accusations at trial" (*People v. Franco*, 86 N.Y.2d 493, 499 [1995]; *see, also, People v. Huston*, 88 N.Y.2d 400, 405 [1996]; *People v. Calbud, Inc.*, 49 N.Y.2d 389, 394 [1980]). But the fact that a

⁶ Under New York law, there are fourteen separate aggravating factors which, if established, may be considered by the jury in determining sentence at the penalty phase. Of these, twelve are defined elements of first-degree murder to be proven at the guilt phase, each elevating an intentional killing by a person more than eighteen years old from murder in the second degree to murder in the first degree (CPL 400.27[3]; Penal Law §125.27[1][a]). The remaining two aggravating factors may be established for the first time at the penalty phase (CPL 400.27[7]). A capital case does not proceed into a penalty phase, however, unless the defendant is first convicted at the guilt phase of at least one count of first-degree murder (CPL 400.27[1]). Since any charge of murder in the first degree includes an aggravating factor as an element, at least one aggravating factor must be established at the guilt phase in any case in which death remains a possible sentence.

grand jury finds sufficient evidence and reason to believe that a person should be publicly accused by indictment of murder in the first degree does not mean that that person will face the death penalty.

A defendant indicted for first-degree murder is not exposed to the possibility of a death sentence unless the District Attorney timely files a statutory notice of intent to seek the death penalty (*see*, CPL 250.40), thereafter wins a jury conviction on the charge, and persists in seeking a sentence of death. Significantly, according to data compiled by the Office of Court Administration, in the first five years of New York's current death-penalty law, of the 212 first-degree murder cases brought and resolved, only twelve went on to a penalty phase, with six death verdicts resulting (*see*, Joseph L. Hoffman, Marcy L. Kahn, & Steven W. Fisher, *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2392 [2001]).

Plainly, then, there is a significant attenuation between a grand jury presentment at which a first-degree murder charge will be considered, and a capital sentencing determination to which "heightened due process" is said to apply. Consequently, even assuming that "heightened due process" does apply to all phases of a capital trial relating to sentence determination, there seems no compelling reason to hold that it applies as well to the grand jury stage of all potential capital cases (*cf. People v. Arthur, supra*, at p. 755; *People v. Bell*, N.Y.L.J. 6/16/97, p.32, col.5 [Sup. Ct. Queens Co.][Cooperman, J.]; *People v. Diaz*, N.Y.L.J. 8/8/96, p.24, col.4 [Sup. Ct. Bx. Co.][Bamberger, J.]). This view has been reflected in court decisions declining to allow defendants in potential capital cases to delay grand jury presentments inordinately (*see, e.g., People v. Johnson*, 168 Misc.2d 798 [Sup. Ct. Kings Co. 1996][Marrus, J.][holding that notice of 7 days was not unreasonable]; *People v. Cajigas*, 174 Misc.2d 472 [Co. Ct. Westchester Co. 1997][Angiolillo, J.][holding that notice of 16 days was not unreasonable]), or to circumvent the general prohibition against pre-indictment discovery (*see, e.g., Matter of Brown v. Appelman*, 241 A.D.2d 279 [2d Dept. 1998]; *Matter of Pirro v. LaCava*, 230 A.D.2d 909 [2d Dept. 1996], *lv. denied* 89 N.Y.2d 813).

In the case at bar, the defendant demanded that the grand jury presentment remain open until he "had an adequate opportunity to investigate the existence of any exculpatory or mitigating defenses to the crime charged." He never suggested what avenues his investigation would follow, or how long it might take. As one court observed under similar circumstances, "there is no authority for the proposition that a stay must be granted to defendants who claim only that, if one

were granted them, something useful might turn up" (*People v. Rodriguez*, 168 Misc.2d 219, 224, *supra*).

Moreover, no court has yet allowed a defendant in a potential capital case to dictate in advance what evidence must be presented or withheld, or what legal instructions must be given, to the grand jury. If, as the defendant maintains, the law supports his requests regarding evidence and legal instructions, and if the prosecutor failed to comply with those requests, that failure will be revealed and remedied on defendant's motion to inspect the grand jury minutes (CPL 210.30) and to dismiss the indictment, either for legal insufficiency of the evidence (CPL210.20[1][b]) or for inadequate or erroneous legal instructions (CPL 190.25[6] & 210.35[5]).

Significantly, the essence of defendant's argument here seems to be, not so much that the granting of his requests was actually mandated by law, but that he was entitled to know in advance whether and to what extent they would be granted so that he could make an intelligent tactical assessment of how his testimony and other unspecified evidence would likely be received by the grand jury. In his supporting affirmation, for example, counsel asserts:

"Mr. Taylor's theory of defense with respect to certain counts of the indictment implicates the relative culpabilities and states of mind of the two accused parties. To the extent the prosecution deprived Mr. Taylor of *Brady* material tending to establish or corroborate [the co-defendant's] culpability or guilty state of mind as to any of the charges presented to the grand jury, Mr. Taylor could not fairly decide whether to expose his theory of defense to the grand jury, or whether to appeal to the grand jury's power to dispense mercy." (Affirmation of John Youngblood, Esq., at p.16.)

I decline the invitation to hold that there are constitutional considerations that override state statutes and case law to require pre-indictment disclosure whenever it would be helpful in assisting a defendant in a potential capital case to formulate strategy before the grand jury (*cf. People v. Prater*, 170 Misc.2d 327, 329-330 [Sup. Ct. Kings Co. 1996][Feldman, J.]).

For all the foregoing reasons, therefore, the defendant's motion should be denied in all respects.

It is so ordered.

Justice