

**Whitfield v Bailey**

2009 NY Slip Op 32125(U)

September 15, 2009

Supreme Court, New York County

Docket Number: 110706/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: How Joan A. McEder

PART 11

Index Number : 110706/2008

**WHITFIELD, JOHN**

vs.

**BAILEY, PATRICIA J.**

SEQUENCE NUMBER : 002

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE 6-4-09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to reargue is decided in accordance with the answered Memorandum Decision + CRs.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

SEP 18 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: Sept 15, 2009

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

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JOHN WHITFIELD,

Index No. 110706/08

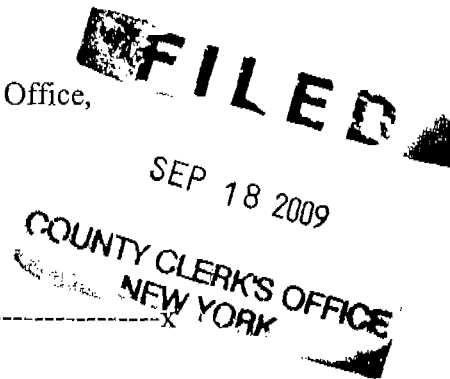
Petitioner,

- against -

PATRICIA J. BAILEY, FOIL Officer  
Of the New York County District Attorney's Office,

Respondent.

For A Judgment Pursuant to Article 78  
Of the Civil Practice Laws and Rules.



-----X  
JOAN A. MADDEN, J.:

Petitioner John Whitfield ("Whitfield"), who is pro se, moves for reargument of this court's decision, order, and judgment dated February 13, 2009 ("the original decision") pursuant to CPLR 2221, and respondent opposes the motion. For the reasons below, the motion is to reargue is granted and, upon reargument, that court directs that the respondent provide the subject documents for in-camera inspection.

Petitioner is an inmate serving a twenty-five year sentence for second degree murder. Richard Doyle ("Doyle") is an inmate serving a twenty-five year sentence for manslaughter. Doyle had previously testified against petitioner at the trial that resulted in the petitioner's conviction of second degree murder. New York State Department of Corrections ("NYSDOC") has issued and enforced a "Separation Order," which separates and precludes Doyle and petitioner from being housed in the same correctional facility.

By letter dated May 20, 2008, petitioner made a FOIL request to the District Attorney's Records Access Officer seeking the following documents relating to Doyle's arrest for petit

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larceny: (1) All DD-5s; (2) All Early Case Assessment Bureau Data Sheets; (3) All Data Analysis Forms; (4) All Notices (CPL §240.20 & CPL §710.30); (6) All Interview Notes; (7) All Memo Book Entries; (8) All Bureau Information Sheets; (9) All Agreement Forms; (10) All Warrant Reports from other Counties; (11) All sentencing Assessment Reports; (12) All CPL §560.10(2) Notices in Connection with Doyle's Confinement; (13) All Miranda Warning sheets along with Responses; (14) All Statements Made by Doyle and His Codefendant Kyle Wilson; (15) All Supplemental Reports, Documents, Notes, Forms.

By letter dated June 3, 2008, the District Attorney's FOIL Records Access Officer denied petitioner's request, noting that providing access to such records would violate NYCRR Title VII §270.2(14)(xvii), which prevents an inmate from obtaining records regarding crime and sentencing information pertaining to another inmate. The Records Access Officer also denied the request on the grounds that access to the records would compromise Doyle's safety and privacy under the exemptions contained in Public Officers Law 87(2)(b) and (f).

Petitioner appealed the denial of his request to the FOIL Appeals Officer, by letter dated June 9, 2008, arguing that NYCRR Title VII §270.2(14)(xvii) does not forbid an inmate from gaining access to another inmate's files and that Doyle's records were public property. By letter dated July 16, 2008, the FOIL Appeals Officer denied the petitioner's appeal for the reasons indicated by the Records Access Officer.

On August 7, 2008, petitioner filed a petition seeking Article 78 relief, asserting that Doyle's records are public property and not entitled to confidentiality. The court found that the records sought by petitioner, which would disclose the criminal and security information regarding an inmate who testified against petitioner at his criminal trial and who was separated from petitioner while incarcerated as a result of violent encounters, were exempt from disclosure

under FOIL. In particular, the court found that the disclosure of such records would potentially endanger Doyle and would constitute unwarranted invasion of his privacy. Public Officers Law §87(2)(b) and (f). The court noted that since NYCRR Title VII §270.2(14)(xvii) was a regulation and not a statute, it alone did not provide a sufficient basis for barring disclosure under FOIL.

Petitioner now moves for an order granting him leave to reargue the original decision and for reconsideration pursuant to CPLR 2221, on the grounds that the court misapplied controlling principles of law regarding whether the record at issue are exempt under FOIL. Petitioner also asserts that the court incorrectly relied on hearsay statements that Doyle and petitioner engaged in violent encounters after they were incarcerated and the separation order was issued.

Respondent opposes the motion, noting that while petitioner denies he had violent encounters with Doyle during their incarceration, he acknowledges that Doyle's testimony against him resulted in the Separation Order.

A motion for reargument is left to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Here, while the lack of evidence of a violent encounter between Doyle and petitioner is not dispositive, a review of the law indicates that respondent's conclusory assertions that disclosure of the subject records would violate Doyle's privacy and endanger his safety are insufficient to warrant the blanket denial of access to such records. See e.g., Chebere v. Johnson, 3 AD3d 365 (1<sup>st</sup> Dept), lv dismissed, 2 NY3d 778 (2004)(reversing trial court's denial of petition

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relating FOIL request by inmate seeking prosecutor's interview notes containing a witness statement and directing an in-camera inspection); Boddie v. Goord, 251 AD2d 799 (3d Dept), lv denied, 92 NY2d 810 (1998)(after in-camera inspection, court determined that provisions of correctional services department's employee manual should not be turned over to inmate as materials, if disclosed would endanger life or safety of another person); Dobranski v. Houper, 154 AD2d 736 (3d Dept 1989)(noting that in-camera inspection was warranted of documents sought in inmate's FOIL request relating to other inmate's on his cell block to determine if disclosure would constitute an unwarranted invasion of the privacy of such inmates and therefore be exempt from disclosure).

Finally, although in the original decision the court relied on the cases cited by respondent in opposition, upon further review, the court finds that such cases are not controlling since they involved parole records of other inmates which are specifically exempt from disclosure under Executive Law § 259-k. See Collins v. New York State Div. of Parole, 251 AD2d 738 (3d Dept), lv denied, 92 NY2d 811 (1998).

In view of the above, it is

ORDERED that the motion to reargue is granted to the extent of directing that respondent submit to this court for in-camera inspection the documents sought in petitioner's FOIL request, and that such documents shall be hand-delivered to Part 11, room 351, on October 15, 2009 by noon, and to the extent respondent maintains that any of the documents produced or portion(s) of such documents should not be disclosed, respondent shall make a written admission in support of its position.

DATED: September 15, 2009

J.S.C.

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