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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No.: 18-0522

RICHARD THOMAS,

Defendant.

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FILED
AUG 31 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

WARHIT, J.

Defendant RICHARD THOMAS is charged under the within indictment with grand larceny in the third degree, grand larceny in the fourth degree, offering a false instrument for filing in the first degree (two counts) and offering a false instrument for filing in the second degree (2 counts). Through this motion Defendant moves for an order dismissing the indictment on grounds that the Office of the Attorney General ("OAG") lacks jurisdiction to prosecute this matter and, if jurisdiction is found to be proper, on grounds that OAG violated Defendant's right to testify before the grand jury. The OAG opposes Defendant's motion in its entirety.

In connection with this application, this Court read and considered:

Notice of Motion, Affirmation of Randall W. Jackson, Esq. and Annexed Exhibits 1 through 10, Affirmation of Assistant Attorney General Brian Weinberg in Opposition to Defendant's Motion to Dismiss and Annexed Exhibits 1 through 4, People's Memorandum of Law Opposing the Defendant's Motion to Dismiss the Indictment Pursuant to Criminal Procedure Law §§ 190.50[5](c), 210.20[1](h) and 210.35; Richard Thomas' Reply Memorandum of Law in Support of his Motion to Dismiss the Indictment Pursuant to Criminal Procedure Law §§ 190.50[5](c), 210.20[1](h) and 210.35; and *Correspondence of the People, dated July 3, 2018, filed upon leave of this Court*

Relevant Procedural History

Defendant was sworn in as the Mayor of Mount Vernon on January 4, 2016. The OAG reports that, in February and March of 2016, it received reports which alleged irregularities relating to expenditures and fund-raising by Defendant's campaign committee and accused Defendant of having improperly inserted himself into the bidding and permitting process related to a home demolition project (Affirmation of AAG Brian Weinberg in Opposition to Defendant's Motion to Dismiss ("Weinberg Affirmation"), ¶ 3). The OAG asserts that in early April 2016 an additional complaint was received which alleged Defendant had appointed an individual who had served as a high -ranking member of his campaign staff to a position with the Mount Vernon Board of Water and Supply ("Water Board") and that the Mayor, who was personally involved in approving this individual's time sheets, had directed this individual be paid a salary despite the fact that no member of the Water Board could confirm this individual had completed any work (*Id.*, ¶ 4). Said another way, this complaint alleged Defendant had appointed a former high ranking campaign staffer to a "no-show" job funded by public funds. The OAG brought these allegations to the attention of the Office of the New York State Comptroller ("Comptroller") (*Id.*, ¶ 7).

In turn, after conducting an examination into various matters pertaining to the financial affairs of the City of Mount Vernon ("City") and issues relating to procurement and payment of City funds, by letter dated April 27, 2016 the Comptroller made a referral to the OAG, pursuant to Executive Law § 63(3), seeking that it investigate and prosecute any person based upon information "arising out of such investigation or

prosecution or both" (*Id.* at ¶¶ 7-8).

Upon receipt of this written request, OAG proceeded to conduct an investigation which included a review of the City's finances and the personal finances of Defendant and the campaign staffer he had appointed to the Water Board (*Id.* at ¶ 9). In connection with this investigation Defendant's financial and bank records were obtained for the purpose of ascertaining whether there was evidence of his having received "kickbacks" from his prior campaign staffer (*Id.*). These financial and bank records revealed Defendant used campaign funds to satisfy personal debts and credit card expenses and that payments were made by the campaign to businesses owned by his family members which were then returned back to Defendant (*Id.* at ¶¶ 10-11).

As part of its investigation into Defendant's finances and his official acts as Mayor, on or about December 9, 2016 the OAG subpoenaed records from Defendant's campaign committees, namely the Friends of Richard Thomas and Richard Thomas for Mayor and the Richard Thomas Inaugural Committee. In connection with these subpoenas Defendant and the aforementioned campaign committees retained the law firm of Kantor, Davidoff, Mandelker, Tworney, Gallnety & Kothba, PC. The former campaign staffer whom Defendant appointed to the Water Board retained attorney Carl D. Bernstein, Esq. (*Id.* at ¶ 13-14).

Between March 2017 and November 2017 the OAG received subpoena compliance, met with Defendant and his then counsel and had telephone communication with counsel for Defendant and his former campaign staffer (*Id.* at ¶ 15). On November 17, 2017, Defendant and counsel, which by then included attorney

Bernstein, met with OAG. At this meeting Defendant made statements and answered questions concerning his personal finances and the finances of his campaign and inaugural committees (*Id.* at ¶ 16).

On March 12, 2018 Defendant was arraigned in the Mount Vernon City Court on a felony complaint filed by then Attorney General Eric T. Schneiderman (*Id.* at ¶ 18-19). At the arraignment the OAG announced its intention to present charges against Defendant to a grand jury (*Id.* at ¶ 20). At a press conference held this same date, former Attorney General Schneiderman and Comptroller DiNapoli announced Defendant's arrest and "acknowledge[d] that this was an investigation that was undertaken with a referral from [the] State Comptroller" (Affirmation of Randall W. Jackson, Esq. ("Jackson Affirmation"), ¶ 17).

On April 2, 2018, in accordance with CPL § 190.50(5)[b], Charles Knapp. Esq., one of Defendant's then attorneys, served written notice upon Assistant Attorney General Weinberg ("AAG Weinberg") of Defendant's intention to testify before the grand jury. Attorney Bernstein, who was also then representing Defendant, also sent correspondence, by email and regular mail, to this effect (*Id.* at ¶ 18 and Weinstein Affirmation, ¶ 21). On April 9, 2018 attorney Knapp inquired, by leaving a voicemail message on AAG Weinstein's cellular, as to whether Defendant's testimony before the grand jury had been scheduled (*Id.* at ¶ 23). In response, on this same date AAG Weinberg sent an email to attorneys Knapp and Bernstein advising that Defendant was scheduled to testify before the grand jury on May 10, 2018 at 9:30 a.m (*see*, Weinstein Affirmation, ¶ 22 and Jackson Affirmation, ¶ 19). Attorney Knapp sent an email

acknowledging receipt of this correspondence.

On May 3, 2018 the OAG commenced its presentation before a Westchester County grand jury; the grand jury was scheduled to meet on Tuesdays and Thursdays through May 17, 2018 (Weinberg Affirmation, ¶¶ 27-28). The following day, on May 4, 2018, attorney Bernstein requested a two week adjournment of Defendant's testimony for the stated purpose of accommodating the addition of attorneys to the defense team (Weinberg Affirmation, ¶ 29). AAG Weinberg declined to grant the two-week request on grounds that the jury term was due to expire on May 17, 2018[1] but agreed to adjourn Defendant's appearance to May 15, 2018 (*see, Id.* at ¶ 30). Attorney Bernstein accepted this accommodation (*Id.* at ¶ 32).

The OAG continued its presentation before the grand jury on May 8, 2018, and May 10, 2018. On May 10, 2018 AAG Weinberg confirmed Defendant's scheduled date to testify with then attorneys, Bernstein and Knapp, who were present in the grand jury waiting room in connection with their representation of other witnesses (Weinberg Affirmation, ¶¶ 34 and 38). Neither attorney indicated there was any issue with Defendant appearing to testify on May 15, 2018 nor did either give any indication of the defense's intention to file a civil motion in Supreme Court for purposes of attempting to halt the grand jury proceeding (*Id.* at ¶ 38).

Attorney Jackson asserts he called AAG Weinberg on Friday, May 11, 2018 for the purpose of advising of the defense's intention to file an "emergency motion" and left

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[1]AAG Weinstein represents that during the pendency of the grand jury proceeding he had been advised by Assistant District Attorneys employed by the Office of the Westchester County District Attorney that, in their experience, it is highly unusual for a Westchester grand jury to vote to extend its term (Weinberg Affirmation, ¶ 34).

a voicemail requesting a return call (Jackson Affirmation, ¶ 20). AAG Weinberg disputes that the message left was a voicemail but acknowledges having received a phone message from a secretary in his bureau that Randall Jackson of Boises, Schiller and Flexner had called and was seeking a return call regarding British Airways (Weinberg Affirmation, ¶ 40). AAG Weinberg, who was not then familiar with attorney Jackson and not assigned to any matter involving British Airways, did not return this call (*Id.*).

On Monday, May 14, 2018 just before 7:00 a.m. attorney Jackson left a message on AAG Weinberg's cell phone requesting a return call (Jackson Affirmation, ¶ 21). At 9:16 a.m. on this same date attorney Jackson left a voicemail message on AAG Weinberg's office phone wherein he indicated his intention to file a civil action for a temporary restraining order ("TRO") and asked AAG Weinberg to call him to arrange a time for a court appearance that day (*Id.*; *and see*, Weinberg Affirmation, ¶ 42). At 9:26 a.m. attorney Jackson sent an email to AAG Weinberg entitled "Rich Thomas matter - today" which read as follows:

> I hope this finds you well. I'm following up on our phone messages from last week and earlier this morning. As I stated in my voicemail, it is our intention to seek a TRO in Manhattan Supreme Court. We would like to discuss with you and we would like to plan to meet you in court at around 11 am today. Please give me a call on my cell phone when you get an opportunity. Thank you.

(*Id.*). By email sent at 10:17 a.m. attorney Jackson forwarded a copy of the Verified Petition he intended to file (*Id* at ¶ 44; Jackson Affirmation, ¶ 22). Shortly after 10:30 a.m. attorney Jackson and AAG Weinberg conversed regarding the civil court appearance. During this telephone conversation, for the first time, attorney Jackson informed AAG

Weinberg that his firm would also be representing Defendant in relation to his pending criminal matter (Weinberg Affirmation, ¶ 45). Based upon this representation, at about 11:00 a.m. on May 14, 2018, attorney Jackson, his colleague Scott Wilson, Esq. and attorney Knapp participated in a conference call with AAGs Weinstein and Cort. During this call, attorney Jackson advised the OAG that Defendant would not testify before the grand jury as scheduled on May 15, 2018 due to the pending "emergency civil motion" but that he was "reserving his right to testify" (AAG Weinberg Affirmation, ¶ 46; *and see*, Jackson Affirmation, ¶ 24)[2].

Shortly after the conference call Attorney Jackson sent a confirming email. In relevant part, it reads:

> We appreciate your agreement to accept service of all of the papers by email . . . because you indicated you could not appear today and would require more time to evaluate the papers, we plan to appear before the judge to argue the TRO at 10:15 am, 60 Centre Street, Room 315, on Wednesday morning. We understand your positions with regarding [sic] to the Mayor's intent to testify. *Until the request for a TRO is resolved, our position is that we are reserving the mayor's rights with regard to testimony– therefore he will not appear tomorrow.* Thank you.

(Weinberg Affirmation, ¶ 49 (emphasis added)).

On May 14, 2018 at 5:29 p.m. AAG Weinberg sent an email in response. In relevant part, this email states:

> On Friday, May 4, 2018, at approximately 5:00 pm . . . Mr Bernstein asked for an adjournment, indicating as a reason that additional counsel would be joining Mr. Thomas' defense team. We did not give as lengthy an

[2]AAG Weinberg notes that defense counsel also indicated Defendant was unavailable to testify as he was required to attend a "statutory meeting" (Weinberg Affirmation, ¶ 46).

> adjournment as Mr. Bernstein asked (because among other reasons, it would have been beyond the conclusion of the grand jury term) but we did accommodate Mr. Thomas with an adjournment to May 15, 2018 at 9:30 am. When we met Mr. Knapp and Mr. Bernstein on Thursday, May 11, 2018[3], in the waiting room of the grand jury (where they were representing two of the witnesses testifying that day), I confirmed the date and time for Mr. Thomas to testify. Neither Mr. Knapp nor Mr. Bernstein indicated there was any problem with Mr. Thomas testifying on May 14, 2018[4] at 9:30 am. Today, during the conference, you indicated for the first time that Mr. Thomas has a work commitment on May 14th and further that you were advising him not to testify until after the issues involved in the civil TRO were decided.
>
> *I am writing to reiterate that should Mr. Thomas choose to exercise his right to testify in the grand jury, he should appear tomorrow . . . and he will be given an opportunity to testify. Should he fail to appear at that time and place, it will be assumed that the notice to testify has been withdrawn.*

(*Id.* at ¶ 51 (emphasis added)). In relevant part, attorney Jackson replied, "Thank you. We understand your position . . . " (*Id.* at ¶ 52). Notably, attorney Jackson did not request his client be given an opportunity to testify after the agreed upon appearance on the civil motion or ask the prosecution to withhold submitting the matter to the grand jury for a vote until after that event.

Defendant did not appear to testify before the grand jury on May 15, 2018[5]. Having

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[3]This date is a typographical error. May 10th was a Thursday,

[4]This email improperly referenced the adjourn date for Defendant's grand jury testimony as May 14th . The agreed upon date was May 15th.

[5]AAG Weinberg indicates that an internet search revealed that during the morning hours of May 15, 2018 Defendant attended a meeting of the Mount Vernon Board of Estimate and Contract which lasted for approximately fifteen (15) minutes. According to AAG Weinberg, on May 29, 2018 the City Council President appeared as the "Acting Mayor" at a meeting of this same entity.

concluded its presentation, the OAG charged the grand jury. Subsequent to deliberation, the grand jury voted a true bill as to the eight charges contained in the within indictment.

As agreed upon, on the following day, the OAG and defense counsel appeared before Hon. Arthur F. Engoron, a judge of the Civil Term of State Supreme Court in New York County, in relation to Defendant's application for a TRO (Jackson Affirmation, ¶ 25)[6]. After hearing argument from both sides, Judge Engoron adjourned the matter to May 18, 2018 without issuing a TRO (Jackson Affirmation, Exhibit 7, pp.31-33). Subsequent to the court appearance, but still on May 16, 2018, AAG Weinberg notified Judge Engoron and counsel for Defendant the within indictment had been filed[7].

On May 18, 2018 Judge Engoron issued a decision wherein he dismissed Defendant's civil action (*see*, Jackson Affirmation, Exhibit 1). In so doing Judge Engoron expressly acknowledged that based upon the procedural posture of the case his court was without authority to determine whether the OAG was vested with authority to prosecute the within matter (Jackson Affirmation, Exhibit). Nonetheless, the judge volunteered his opinion that OAG lacked authority for the within prosecution on grounds that the OAG's investigative power was necessarily limited "to the contours of the Comptroller's authority over state funds" (*Id.*, Exhibit 1, p. 2).

Defendant was arraigned on the within indictment on May 25, 2018. Through counsel, Defendant filed the within motion to dismiss on May 30, 2018.

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[6]The OAG attempted to advise the Court a true bill had been voted but as the Court refused to entertain an *ex parte* conference, this could not be accomplished.

[7]Judge Engoron was unaware that a true bill had been voted and that the filing of an indictment was imminent at the time he heard the case as the People were not at liberty to disclose this in open court (*see*, CPL § 190.25(4); *see also*, Jackson Affirmation, Exhibit 7, p. 31, lines 25-26 and p. 32, lines 1-12).

Conclusions of Law

Jurisdiction to Prosecute

The New York State Executive Law ("Executive Law" or "Exec. Law") empowers the Attorney General to prosecute crimes upon receipt of a referral from, among others, the New York State Comptroller (Exec. Law § 63(3)). It is well settled that the OAG is imbued with broad investigative and prosecutorial authority (*see*, *Landau v. Hynes*, 49 NY2d 128, 135-137 [1979] (noting courts of the state uniformly construe Executive Law § 63(3) as bestowing the broadest of powers upon the attorney general). It is equally well established that any requested investigation must arise from and in relation to the duties and obligations of the requesting agency (*Id.*; *see*, *People v. Cuttita*, 7 NY3d 500 [2006]; *and see*, People *v. Miran*, 107 AD3d 28 [4th Dept. 2013]).

The New York State Comptroller is the State's chief fiscal officer. "Article V, § 1 of the State Constitution... broadly empowers the Legislature to delegate to the Comptroller supervision of the accounts of any political subdivision of the State and administrative duties incidental thereto" (*see*, *Matter of New York Charter Schools Ass'n., Inc. v. DiNapoli*, 914 NE2d 991, 998 [2009] citing *Matter of McCall v Barrios-Paoli*, 93 NY2d 99, 105 [1999]). By definition, a political subdivision is a separate legal entity of a State which includes counties, cities, towns, villages, and special districts such as water districts (*see generally*, encyclopedia.com). The duties of the Comptroller include, among many others, "ensur[ing] that State and local governments use taxpayer money effectively and efficiently to promote the common good" (https://www.osc.state.ny.us/about/response.htm).

In the instant case, the Comptroller was exploring, among other allegations, whether

the Defendant Mayor had appointed one of his high ranking campaign officials to a "no show" job and whether such individual was being paid by funds belonging to a political subdivision of the State (*see*, Weinberg Affirmation, ¶¶ 5-6). This aspect of the investigation falls squarely within the purview of the comptroller's duty and obligation to ensure the local government of Mount Vernon is using taxpayer money effectively and efficiently. Consequently, the within prosecution is authorized by law (*see,* https://www.osc.state.ny.us/about/response.htm; *cf.*, *People v. Cuttita*, 7 NY3d 500 [2006](finding the attorney general lacked jurisdiction to prosecute a defendant who was operating an adult care facility without a license as the Welfare Inspector General of New York (WIG), who referred the matter for investigation, lacked authority over the defendant who was not a state employee, contractee or a recipient of government assistance services).

Significantly, the contrary conclusion espoused by a co-equal judge in *Matter of the Application of Richard Thomas v. Barbara D. Underwood* is not binding upon this Court nor is it persuasive. Moreover, that decision is not persuasive as it is based upon a misapprehension that the Comptroller's authority is limited to oversight of State funds and fails to appreciate the Comptroller's jurisdiction over how political subdivisions, such as the City of Mount Vernon, utilize taxpayer funds (*see*, Jackson Affirmation, Exhibit 1, p. 2; *and see generally*, *Matter of New York Charter Schools Ass'n., Inc*, 914 NE2d at 998).

To the extent charges in the within indictment arise in relation to Defendant's alleged misuse of campaign funds, a subject over which the Comptroller does not have oversight, these charges, despite being different in substance from the crimes the Comptroller

referred to the OAG, were properly investigated and are properly prosecuted by the OAG as they were discovered in connection with a properly authorized investigation directly related to an alleged illegal activity which falls within the authority of the Comptroller (*see generally*, *Miran,* 107 AD3d 28; *see also*, *Landau v. Hynes*, 49 NY2d 128 [1979]). "Courts have uniformly construed Executive Law § 63(3) as bestowing upon the Attorney General of the State of New York the broadest of powers, and the phrase "arising out of," in its most common sense, has been defined as originating from, incident to or having connection with. The location of that phrase in §63(3) makes it obvious that the Attorney General may prosecute any crime connected to an authorized investigation" (*Miran*, 107 AD3d at 35; *cf.*, *People v. Abelove*, 2018 NYLJ LEXIS 2282 [County Court (Rensselaer) June 11, 2018](finding that where the Attorney General is granted prosecutorial power pursuant to an Executive Order of the Governor, issued pursuant to Executive Law § 63(2) rather than Executive Law § 63(3), the OAG's prosecutorial power is limited to that which was conveyed in such order]).

Finally, and further, it is worthy of comment that the prosecutorial authority conveyed upon the OAG by the Comptroller's written request dated April 27, 2016 is valid despite the fact that the OAG had previously investigated certain complaints concerning Defendant and irregularities relating to expenditures and fund-raising by his campaign committee (*see*, *People v. Rogers*, 157 AD3d 1001 3d Dept, 2018]).

Accordingly, Defendant's motion to dismiss the within indictment on grounds that the OAG lacks prosecutorial authority is denied.

Defendant's Right to Testify Before the Grand Jury

Defendant also moves for dismissal of the within indictment on grounds that, despite his having served written notice of his intention to testify before the grand jury, the OAG denied him a reasonable opportunity to do so. By statute, defendants are imbued with the right, if they choose, to testify before a grand jury (Criminal Procedure Law § 190.50(5); *see*, *People v Fox*, 175 Misc.2d 333 92 [Nassau Co. 1997]). Applicable statute requires a defendant who wishes to exercise his right to testify before the grand jury to serve written notice upon the prosecutor (CPL § 190.50(5)). On April 2, 2018 counsel for Defendant served such notice upon the OAG (Jackson Affirmation, ¶ 18).

The statute requires the prosecution, upon being informed of a defendant's intention to testify before the grand jury, to "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]). The prosecutor is to "clearly advise a defendant of the specific time, date and place of the prospective grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein" (*People v. Johnson*, 168 Misc. 2d 798, 798 [Kings Co. Sup. Ct. 1996]).

On April 9, 2018, the OAG informed then counsel that Defendant was scheduled to testify before the grand jury on May 10, 2018 (Weinberger Affirmation, § 22). Thereafter, in response to a request from counsel, the OAG rescheduled Defendant's appearance before the grand jury to May 15, 2018 (*see*, Weinberg Affirmation, ¶¶ 29-32; *and see*, Jackson Affirmation, ¶ 19). As of Friday, May 4, 2018 it was agreed Defendant would testify before the grand jury on May 15, 2018 (Weinberg Affirmation, ¶ 32; Jackson

Affirmation ¶ 19).

Although the defense acknowledges OAG scheduled Defendant's testimony before the grand jury as above indicated, the defense contends the OAG failed to afford Defendant a reasonable opportunity to appear before the grand jury based upon the fact that it convened the grand jury and voted the matter while Defendant's motion, brought pursuant to Article 78 of the Civil Practice Law and Rules to challenge, *inter alia*, the OAG's jurisdiction to prosecute Defendant, remained pending in New York County Supreme Court (*see generally*, Richard Thomas' Memorandum of Law In Support of His Motion to Dismiss the Indictment Pursuant to Criminal Procedure Law §§ 190.50(5)(c), 210.21(1)(H) & 210.35 ("Defendant's Memorandum of Law") and Richard Thomas's Reply Memorandum of Law in Support of his Motion to Dismiss the Indictment Pursuant to Criminal Procedure Law §§ 190.50(5), 210.20(1)(h) & 210.35 ("Defendant's Reply Memorandum"). Defendant alleges the OAG's "decision to convene the Grand Jury while Mayor Thomas's emergency motion was pending is precisely the type of gamesmanship that courts have found improper" (Defendant's Memorandum of Law, p. 17).

In fact, courts have found violations of a defendant's right to testify before the grand jury was violated where a prosecutor failed to honor a defense attorney's oral notice of his client's intention to testify despite not having demanded written notice of such intention and where a prosecutor inexplicably advanced the scheduled date of a defendant's testimony to the following day, which was the very same day his counsel planned to appear before the Appellate Division to seek an order allowing a defendant to present an expert witness before the grand jury (*People v. Rivers*, 631 NYS2d 509, 512 [Sup. Ct. (Kings Co.) 1995]; *People v. Goldman*, 989 NYS2d 231 [Sup. Ct. (Queens Co.) 2014]). So too, courts have

found violations of a defendant's right to testify before the grand jury where the prosecutor failed to provide a defendant's counsel with actual notice of the date for her client's grand jury testimony and where, despite the defendant having served timely notice of an intention to testify, a prosecutor presented the case to the grand jury and did not afford the defendant his right to testify in order to avoid defendant's mandatory release from custody (*People v. Evans*, 79 NY2d 407 [1992]; *People v. Leggett*, 766 NYS2d 515 [Sup. Ct. (Kings Co.) 2003]. A violation of a defendant's right to testify before the grand jury has also been found where, prior to an indictment having been filed but after the conclusion of the grand jury presentation, a defendant's newly retained counsel served notice of the defendant's intention to testify (*People v. Kellman*, 156 Misc.2d 179 [Sup. Ct. (Kings Co.) 1992]). However, a violation of a defendant's right to testify before the grand jury was not found where a defendant's failure to testify was occasioned by the "inadequacy of his counsel's communications with the prosecution" (*People v. Edwards,* 283 AD2d 219 [1st Dept. 2001]). Further, where the prosecution had twice postponed the grand jury presentation to accommodate the defendant's counsel and where counsel did not respond to notice of the third date dismissal of the indictment was not required; dismissal was also not required where the Department of Correction twice failed to produce a defendant before the grand jury and, thereafter, his counsel rejected proposed dates for the defendant's testimony (*People v. Ferrara*, 99 AD2d 257 [2d Dept. 1984]; People *v. Cates*, 655 NYS2d 511 [1st Dept. 1997]).

The determination as to whether a defendant has been afforded a reasonable time to exercise his right to appear before the grand jury is based upon the particular facts of his case *(see, People v Sawyer*, 96 NY2d 815, 816, re-argument denied, 96 NY2d 928

[2001]). A significant factor of consideration is whether and the extent to which a defendant has had the opportunity to consult with counsel concerning his decision whether to give testimony before the grand jury (*see People v. Hymes,* 996 NYS2d 850 [4th Dept. 2014]; *see generally, People v. Embry*, 27 Misc.3d 1231(A) [County Court (Sullivan) 2010]).

In the instant case, the day before Defendant was due to testify, the defense filed a motion in New York County Supreme Court to challenge, *inter alia*, the OAG's authority to prosecute the matter and to seek a Temporary Restraining Order (TRO) to halt the criminal proceeding[8]. The OAG agreed to accept service of same and, further, agreed to appear on May 16, 2018 in New York County Supreme Court to address the defense motion (Jackson Affirmation, ¶ 23).

Counsel for Defendant advised the OAG: "[u]ntil [our] request for a TRO is resolved, our position is that we are reserving the mayor's rights with regard to testimony -therefore he will not appear tomorrow" (Defendant's Memorandum of Law, p. 6; Jackson Affirmation, ¶ 24). In response, the OAG directly informed the defense that if Defendant failed to appear to testify, the OAG would "assume that the notice to testify has been withdrawn" (Weinberg Affirmation, ¶ 51). Defendant's counsel merely responded "Thank you. We understand your position . . ." (*Id.*; ¶ 52).

As of the date the defense filed its civil motion, the presentation of evidence before the grand jury had been on-going, Defendant's grand jury testimony had been scheduled for weeks and the grand jury's term was due to expire in three days. The civil court had not

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[8]While attorney Jackson and AGA Weinberg dispute the type of message left by attorney Jackson for AAG Weinberg on Friday, May 11, 2018, there is agreement that the message requested a return call and did not reference the intention to file an emergency action in civil court relating to the within matter (*see*, Jackson Affirmation, ¶ 20; Weinberg Affirmation, ¶ 40).

signed a TRO; the grand jury proceedings had not been otherwise stayed and counsel for Defendant had not requested that the OAG delay the grand jury vote until after the appearance on the civil court matter.

"[A]n attempt merely to "reserve" the right, even in writing, is insufficient to trigger the people's obligations under the statute. By "reserving" the right, the defendant indicates neither that he intends to testify nor that he intends not to testify, but only that he is aware of his right to appear and has not yet decided whether to exercise it" (*People v. Punter*, 150 Misc.2d 136 [Supreme Court (Bronx Co.) 1991]). Moreover, CPL § 190.50 does not require the prosecution to defer presentation indefinitely or for an extended period because counsel chosen by defendant is engaged in another case (*Ferrara*, 99 AD2d at 257). Logic dictates, therefore, that the prosecution is not required to delay a grand jury presentation to accommodate the strategic choice of Defendant's counsel, namely to commence a civil proceeding to challenge the prosecution in another county.

Despite Defendant's urging, the facts of this case do not support findings of prosecutorial gamesmanship or that the OAG failed to afford Defendant a defendant a reasonable time to exercise his right to appear as a witness before the grand jury. As above discussed, the prosecutor set the date for Defendant's testimony more than three weeks in advance. Although the OAG accommodated a request to postpone Defendant's testimony to permit the addition of counsel to his legal team on May 4, 2018, the defense did not file its emergency civil motion for an additional ten days. Counsel did so despite being fully cognizant the grand jury proceeding was underway and that the grand jury's term was due to expire. Significantly, Defendant made the decision not to testify on May 15, 2018 based upon the advice of his counsel.

To the extent the defense claims Defendant "could not *reasonably* have been required to testify while the emergency motion was pending", this statement stands alone buttressed neither by an explanation nor citation to caselaw or statute (*see*, Defendant's Memorandum of Law, p. 20). In actuality, the pending civil motion filed by the defense did not present a bar to Defendant appearing and testifying before the grand jury. The court appearance relating to this civil matter did not conflict with Defendant's scheduled appearance before the grand jury. Furthermore, as grand jury proceedings are afforded secrecy, the judge determining the civil court motion would not have been made privy to the fact that Defendant testified or to the subject of his testimony (*see*, CPL § 190.24(4)).

Upon consideration of the facts of this case, this Court finds the OAG afforded Defendant a reasonable opportunity to appear and testify before the grand jury and further finds Defendant waived or forfeited such right (CPL § 190.50(5)(a); *see generally, People v. Ocascio*, 609 NYS2d 523 [Supreme Court (Bronx Co.) 1994].

Consequently, Defendant's motion to dismiss the indictment is denied in its entirety.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
August 31, 2018

Honorable Barry E. Warhit
Westchester County Court

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CLERK OF THE COURT