

STATE OF NEW YORK
COUNTY COURT: ST. LAWRENCE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORAL NICHOLAS HILLARY,

Defendant

ORDER

Indictment # 2014-044

Index # 22300

Appearances: The People by Mary E. Rain, Esq., District Attorney
Defendant Oral Nicholas Hillary, by Dumas & Narrow, P.C.,
Edward F. Narrow, Esq., of counsel

JEROME J. RICHARDS, J.

By indictment dated May 15, 2014 and filed on May 16, 2014 defendant is charged with murder in the second degree [Penal Law §125.15(1)], alleging the intentional killing of Garrett Phillips in the Village of Potsdam on October 24, 2011.

On July 24, 2014 this court entered an order resolving issues raised by omnibus motion except for those concerning the legal sufficiency of the grand jury evidence, the sufficiency of the legal instructions to the grand jury, and the integrity of the grand jury proceeding [CPL §210.35]. There has been a duly filed substitution of counsel for defendant, as noted above.

The case was presented to the grand jury over four days, from May 12 - May 15, 2014. Thirty witnesses testified, some over parts of two days. The four folios of the transcript contain 669 pages combining the evidence and the legal instructions.

The sufficiency of the evidence is challenged in this case under CPL §210.20(1)(b) and 210.30(2). This case depends on circumstantial evidence, at least in part. The grand jury heard no testimony from a witness who saw the homicide take place. Although the testimony of several grand jury witnesses implies that there may have been an attempt to assess potential DNA evidence during the investigative phase of the case, no DNA evidence was presented to the grand jury. There was a great deal of testimony about video surveillance cameras showing either Garrett Phillips or Oral Hillary at different locations, some of them fairly near Garrett's

residence, at times within several hours to within minutes before or after the probable time of the crime. Many of the foundation questions for introducing the videos into evidence lacked an adequate foundation. For example, repeatedly the prosecutors asked a foundation witness whether the things shown in the videos accurately showed the scene as it looked on the particular date and time. No factual basis was provided for the 'yes' response provided by many of these witnesses.

There was also quite a bit of testimony, some of it hearsay, about the quality of the changing relationship between defendant, the victim and the victim's mother and her family. The thrust of the prosecution case was to show that defendant had a very controlling personality and that he was often heard to correct or criticize the victim for not meeting defendant's expectations. The basis for this line of testimony was to show that the victim's mother had several times broken up with defendant and had told him to leave her apartment, and that he resisted the breakup. The prosecution view is that defendant blamed the victim for defendant's troubled relationship with the victim's mother. The grand jury was invited to conclude that defendant took out his frustration over the relationship with the mother by picking on the victim. Other witnesses, members of the victim's extended family, described Garrett as a happy, relatively care-free boy, who got along well with most people.

As the prosecutor told the grand jury, former defense counsel asked that the grand jury hear testimony from several potential alibi witnesses, including one of defendant's children and a friend and fellow soccer coach. The purpose of such testimony was to suggest that defendant was elsewhere when the crime was allegedly committed. No witness testified to having seen defendant in the apartment building where the victim and his mother lived at the time of the crime. The prosecution therefore focused a great deal of effort and testimony on showing a time sequence of events making it, in the prosecution's view, both plausible and likely that defendant was in the apartment when Garrett died.

The grand jury proceeding is an accusatory process, not a trial. The question to be answered by the grand jury is whether or not there is sufficient legally competent evidence to give the grand jury reasonable cause to believe that defendant murdered the victim. CPL §190.65(1). 'Legally sufficient evidence' is defined in the criminal law in CPL §70.10(1) as

‘competent (which means admissible) evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent.’ ‘Reasonable cause to believe that a person has committed an offense’ [CPL §70.10(2)] exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter [the Criminal Procedure Law], such apparently reliable evidence may include or consist of hearsay.’ Appellate case law has long explained that while grand jury evidence may *include* hearsay, there must still be competent (i.e., *non-hearsay*) proof of each element of the charged crime. Phrased differently, probable cause may be provided through hearsay information where the individuals providing the information are reliable and have a basis for their knowledge. *People v. Letendre*, 264 AD2d 943 [3 Dept 1999], *affirmed* 94 NY2d 939 [2000].

In reviewing the grand jury evidence the court must also be cognizant of the rule that it is the grand jury, not the reviewing court, that decides whether the evidence meets the reasonable cause test. The court’s focus is restricted to the legal sufficiency of the competent evidence. *People v. Jennings*, 69 NY2d 103 [1986]; *People v. Deegan*, 69 NY2d 976 [1987]; *People v. Galatro*, 84 NY2d 160 [1994]; and *People v. Jensen*, 86 NY2d 248 [1995]. As the *Deegan* court noted, “the fact that the proof presented to the grand jury is also susceptible of inferences of innocence is irrelevant as long as the grand jury could rationally have drawn the guilty inference” [*Deegan* at 979, quoted in *Jensen*, 86 NY2d 248, 252].

Bearing in mind that it is not the job of the prosecutor, at this stage of a case, to prove defendant’s alleged guilt beyond a reasonable doubt, the court would be predisposed to find the grand jury evidence legally sufficient to provide reasonable cause to believe that defendant committed the charged crime.

However, such a conclusion must be based on a proceeding which conforms to the requirements of article one hundred ninety. CPL §210.35(5). If the proceeding fails to conform to that standard, the integrity of the proceeding is impaired and prejudice to the defendant may

result, rendering it defective within the meaning of CPL §210.20(1)(c), requiring dismissal.

Present defense counsel filed an alibi notice on October 9, 2014, stating that at trial the defense intends to introduce proof that at the time of the commission of the crime defendant was at a place or places other than the scene of the crime, which was 100 Market Street, Apartment 4 in the Village of Potsdam. Specifically the notice states that the defense will call Ian Fairlie and defendant's daughter, Shanna-Kay Hillary, to show that defendant was at 118 Leroy Street, Meadow East Apartments, Apartment E-6, and at 16 Gardner Street, in Potsdam. Both of these individuals testified at the grand jury proceeding.

While questioning Tandy Collins, Garrett Phillips' mother, the prosecutor asked her whether defendant attended any of the memorial services for Garrett, and she replied that he had not done so. This information has no probative value on the question of who killed the victim, and clearly suggests that the prosecutor wanted to portray defendant either as uncaring or as having a motive to avoid contact with Garrett's surviving family. The question was improper and highly prejudicial. [TR folio I, page 135].

The questioning of Shanna-Kay Hillary covered approximately 80 pages [TR I-240 – II-322]. The problems arose when the prosecutor asked Shanna about her conversation with her lawyer, within a week after Garrett died. In the grand jury proceeding it was unquestionably improper and prejudicial for Ms. Rain to ask her what her lawyer had told her [TR -II-292], and then to press her, in cross-examining fashion, telling Shanna that she had to answer because she was under subpoena. When this questioning persisted, Shanna disclosed that the attorney with whom she spoke was the same attorney who had represented defendant in his civil claim against police officers. Shanna was not a target of the grand jury investigation, as Ms. Rain eventually stated. What Shanna told her attorney is not relevant to whether Oral Hillary did or did not allegedly kill Garrett Phillips. In effect, with this line of questions, Ms. Rain was trying both to undermine a potential alibi defense and at the same time portray witnesses who could provide a potential alibi defense as lying to protect defendant. The prosecutor's questioning undercut the very essence of the grand jury's fact finding mission. The jury was tasked with believing the proof of the defendant's location near the victim shortly prior to the crime or crediting the alibi witness' testimony that the defendant was home at the time of the crime. The prosecutor's

expression of bias by her disbelief of the witness' testimony for all intents and purposes took out of the jury's hands a determination of what the proved facts were in that regard.

Worst of all, Ms. Rain asked Shanna essentially the same question thirteen times as to how she could "explain the unrefuted proof" that established that defendant was not in Shanna's home at or around (a specific time changed with each question) on the day of the homicide. [TR-II-320]. This testimony was bullying a seventeen-year old girl, who clearly stated that she did not understand what Ms. Rain meant by 'unrefuted proof.' Ms. Rain did not explain what she meant by that, and moreover, it was extremely prejudicial to use words like 'unrefuted proof' in the grand jury while questioning a witness. These questions invaded the fact-finding role of the grand jurors, and told them what Ms. Rain thought that the proof showed. The question was so improper that it could not have been asked at trial. If it would be improper at trial, it certainly is improper at grand jury. The prosecutor's question clearly stated to the grand jury what her belief was regarding the fact at issue and was an improper attempt to influence the grand jurors.

As the legal advisor to the grand jury [CPL §130.25(6)] the prosecutor must present the evidence and instruct the jurors as to the applicable law, in conjunction with the court when necessary. Numerous decisions of the New York Court of Appeals, and other courts, have long established that a prosecutor has a duty of fair dealing with witnesses and with the process. Engaging in pervasive misconduct during a grand jury proceeding can impair the integrity of the proceeding and lead to dismissal of the indictment.

The leading case in this area is *People v. Huston*, 88 NY2d 400 [1996]. In that case the court found that the prosecutor's misconduct was intentional, and biased the proceeding against defendant, and therefore dismissed the indictment with leave to resubmit the charges to a different grand jury. In that case defendant was charged with two counts of murder in the second degree. The trial court stated in its review of the grand jury evidence that it was disturbed by the way the prosecutor seemed to be testifying (unsworn), but denied the motion to dismiss for a defective proceeding. The Appellate Division affirmed the eventual conviction, holding that defendant failed to establish any possibility of prejudice from the prosecutor's misconduct. The Court of Appeals reversed.

As former Chief Judge Kaye wrote in *Huston*, "The prosecutor's discretion during grand

jury proceedings, however, is not absolute. As legal advisor to the grand jury, the prosecutor performs dual functions: that of public officer and that of advocate. The prosecutor is thus 'charged with the duty not only to secure indictments but also to see that justice is done' (*People v. Lancaster*, 69 NY2d at 26; *see also, People v. Pelchat*, 62 NY2d at 105). With this potent authority, moreover, comes responsibility, including 'the prosecutor's duty of fair dealing' (*People v. Pelchat*, 62 NY2d at 104..." 88 NY2d at 406).

Describing the presentation in the *Huston* case, Judge Kaye wrote: "Where, as here, the charges facing the defendant are of the most serious nature, society's interest in justice is especially great. Nevertheless, the prosecutor who submitted defendant's case to the grand jury disregarded his role as public officer and his 'duty of fair dealing.' The grand jury minutes are rife with instances of the prosecutor imparting his personal opinion regarding the proper inferences to draw from the testimony or physical evidence, asking impermissible and inflammatory questions, and conveying – both directly and indirectly – his belief in defendant's guilt." *Huston*, at 406. The court further noted that the exceptional remedy of dismissal is warranted only where a possibility of prejudice is created, and actual prejudice need not be shown. *People v. Huston*, 88 NY2d 400, 409; *People v. Sayavong*, 83 NY2d 709 [1994]; *People v. DiFalco*, 44 NY2d 482 [1978]; Preiser, Practice Commentary, McKinney's Cons. Laws of NY, Book 11A, CPL 210.35, at 676." *See also, People v. Archie*, 28 Misc 3d 617 [Sup Ct Kings County 2010] [indictment dismissed for defective proceeding].

In *Huston* the Court of Appeals also noted, "In rare cases such as this where irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating the risk of prejudice, "the indictment [can]not be permitted to stand even though it is supported by legally sufficient evidence" (*People v. Calbud, Inc.*, 49 N.Y.2d at 395, 426 N.Y.S.2d 238, 402 N.E.2d 1140, *supra*)."

As noted in a later case which also discusses *Huston*, and on markedly different facts reaches a different result, not dismissing the indictment, the court noted that the prosecutor "is not obligated to present the evidence or make statements to the grand jurors in the manner most favorable to the defense." *People v. Thompson*, 22 NY3d 687, 698 [2014]. Indeed, "the statutory test, which does not turn on mere flaw, error or skewing...is very precise and very high (*People v.*

Darby, 75 NY2d 449 [1990].” [internal quotation marks omitted]. *Thompson*, at 699. The key difference between *Huston* and *Thompson* seems to be the fact that in *Thompson* the integrity of the proceeding remained intact, and the independent fact-finding job of the grand jurors was not usurped by the prosecutor. *Thompson* was also a 4-3 decision.

The Second Department noted, in *People v. Goldstein*, 73 AD3d 946 [2 Dept 2010] that “The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias.” 73 AD3d 946, at 949, quoting *Huston*, 88 NY2d, at 409.

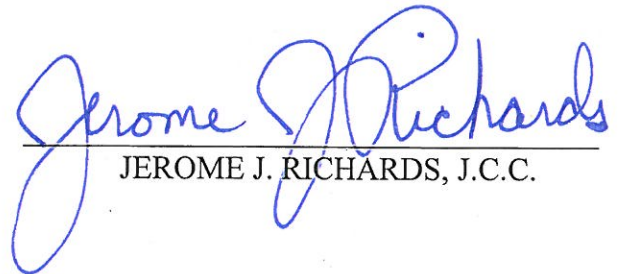
It is particularly troubling to the court that in this serious case, which is so heavily dependent on circumstantial evidence, the prosecutor’s improper questions, direct and indirect expression of opinion, and use of numerous exhibits without proper foundation may have impaired the integrity of the proceeding. The prosecutor seemed to put aside any neutrality and balanced judgment – duties imposed on her by case law – in questioning two witnesses who were later identified as potential alibi witnesses. Any indictment returned on such facts as were presented to the grand jury must be the product of unquestioned fairness, precisely because the meaning of the events described is not conclusive proof of guilt. Here, that was not the case.

The indictment is dismissed and the People are given leave to re-present the case to a different grand jury. CPL 210.20(4). This order shall also be deemed to be a securing order, as provided in CPL §210.45(9). The previous securing order is continued.

So ordered.

Enter.

Date: October 16, 2014


JEROME J. RICHARDS, J.C.C.

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October 16, 2014

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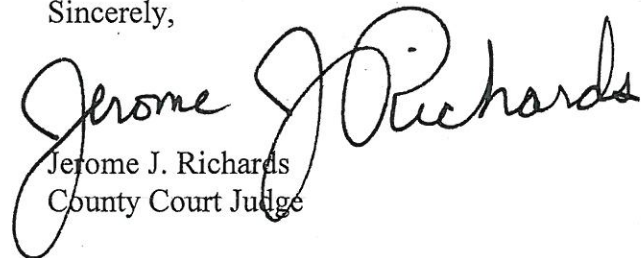
Re: The People of the State of New York v. Oral Nicholas Hillary
Indictment # 2014-044, Index # 22300

Dear Mr. Narrow:

Enclosed please find a copy of an Order regarding the above-entitled matter.

The original Order has been forwarded to the St. Lawrence County Clerk's Office for filing.

Sincerely,


Jerome J. Richards
County Court Judge

cc: Hon. Mary E. Rain, Esq., District Attorney
Mary B. Curran, Chief Clerk

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