

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

[REDACTED],

Defendant.

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SUPPORTING
AFFIRMATION &
MEMORANDUM
Indictment No.: [REDACTED]

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO VACATE JUDGMENT
PURSUANT TO C.P.L 440.10

Attorney For Defendant [REDACTED]

[REDACTED]

[REDACTED], an attorney admitted to practice law in the Courts of the State of New York, affirms the following, under the penalties of perjury:

I am the attorney for [REDACTED], Defendant in the above captioned cause of action, and I am fully familiar with the facts and circumstances of the within action. The facts contained herein are true and based on personal knowledge or upon information and belief. The source of the information is a detailed review of the file maintained by our office, the relevant Kings County Court files, the relevant District Attorney files, and other independent case investigation. This Affirmation and Memorandum is presented in support of Defendant's C.P.L. § 440.10(1) Motion to Vacate Judgment.

INTRODUCTION

In ____ Defendant ██████ was found guilty of the crime of homicide. ██████ was subsequently sentenced to a period of incarceration of 25 years to life for the crime. ██████ is currently incarcerated at the ██████, New York.

After a comprehensive search of records in both the appropriate Kings County, New York Courts and the Kings County District Attorney's Office, it has been determined that there is no true bill from the presumed grand jury proceedings that resulted in ██████ indictment and subsequently, trial and conviction. In the absence of a true bill, there is no way to determine conclusively if a grand jury voted to indict ██████. Without a true bill or any accurate record of a vote in favor of indictment, this Court lacked jurisdiction to proceed against ██████. The lack of jurisdiction is grounds to vacate judgment under C.P.L. §440.10(1)(a). In addition, the decision of the People of New York to proceed against ██████ notwithstanding the absence of a true bill violates several other sub-sections of C.P.L. §440.10(1), as well as the rights of ██████ under both the United States and New York Constitutions. Under the circumstances, this Court is compelled to vacate the judgment against ██████.

ARGUMENT

Pursuant to C.P.L. § 440.10, this Court may vacate the judgment against a defendant for various reasons. Under C.P.L. § 440.10(1)(a), the Court may vacate the judgment if, "The court did not have jurisdiction of the action or of the person of the defendant." *Id.* In light of the absence of a true bill and lack of a vote in favor of indictment, the grand jury proceedings against ██████ were fatally defective and thus this standard is satisfied.

The New York State statutes governing grand jury proceedings are clear in their

recitation of what is required for a valid accusatory instrument. First, “An indictment is a *written accusation* by a grand jury, *filed* with a superior court, charging a person, . . . with the commission of a crime” C.P.L. § 200.10 (emphasis added). In this case, there was no written accusation; if there was no written accusation, by definition a written accusation could not have been filed. Moreover, a grand jury indictment may be dismissed due to a lack of jurisdiction, C.P.L. §210.20(h), or due to the underlying defects. C.P.L. § 210.25 (indictment may be dismissed as defective if it, “does not substantially conform to the requirements stated in article two hundred” or if the, “allegations demonstrate that the court does not have jurisdiction of the offense charged.”). In this case, there was no jurisdiction because there was no valid written accusation; moreover, as a written accusation is a requirement, the proceedings also did not substantially conform to the requirements of Article 200.

Next, pursuant to C.P.L. § 190.65, a grand jury is authorized to indict a defendant when:

(a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

Id. In this case, there is no record that *any* evidence was ever put in front of the grand jury, let alone legally sufficient and competent / admissible evidence. In such a situation, criminal charges cannot stand. See People v. Nitzberg, 289 N.Y. 523, 529, 47 N.E.2d 37, 41 (N.Y. 1943) (“indictment . . . is intended to give assurance to the citizen that he will not be held for trial until he has been accused before the appropriate tribunal upon evidence which is competent and legally sufficient.”).

“The right to be prosecuted on a valid accusatory instrument is a nonwaivable jurisdictional prerequisite.” People v. Moore, 132 A.D.2d 776, 777, 517 N.Y.S.2d 584 (N.Y.

App. Div. 1987), citing N.Y. Const. Art. 1, § 6. In addition, the “State constitutional article declaring that no person shall be held to answer for an infamous crime unless upon indictment by a grand jury does not establish merely a personal privilege of the defendant, but a ‘public fundamental right’ which is the basis of jurisdiction to try and punish an individual.” People v. Rivera, 24 A.D.3d 367, 369, 806 N.Y.S.2d 537 (N.Y. App. Div. 2005) (citations omitted).

In People v. Gelfand, 131 Misc.2d 268, 499 N.Y.S.2d 573 (1986), the court dismissed a grand jury indictment as defective due to the lack of a quorum. In holding for the defendant, the Court criticized the prosecution for attempting to “pass off” a defective indictment. Id. at 276, 499 N.Y.S. 573. In addition, the Court noted that a valid indictment:

is not a mere technical irregularity which might call for sustaining the validity of the indictment. Rather, a valid and sufficient indictment is required in order to prosecute a defendant for a felony.

Id. at 276-77, 499 N.Y.S.2d 573. Similarly, in this case, a valid and sufficient indictment was required to prosecute [REDACTED]. As there was none, the People should not have prosecuted [REDACTED] for a felony.

An analogy also may be drawn to the case of People v. Phillipe, 142 Misc.2d 574, 580, 538 N.Y.S.2d 400, 405 (N.Y.City. Crim.Ct. 1989). In Phillipe, the Court held that the, “Failure to properly sign and verify accusatory instrument or supporting deposition cannot be regarded as mere irregularity curable at any later date” Id. While this case dealt specifically with the validity of supporting depositions, the underlying theory, that an improperly signed accusatory instrument was invalid, is telling. If an improperly signed accusatory document is defective, there can be no question that the complete absence of an accusatory document is also defective.

With respect to the legal standard herein, Defendant is aware that there is a “presumption of regularity” that attaches to grand jury proceedings. U.S. v. Mechanik, 475 U.S. 66, 75 (1986);

People v. Ferguson, 55 Misc. 2d 711, 286 N.Y.S.2d 976 (N.Y. Super 1968). The presumption, however, is just that, a presumption. It is not absolute, and it may be overcome. To overcome the presumption of regularity:

the defendant must offer “specific proof” that the procedure required by law was not employed, . . . that is, “specific proof” of what happened in his case, not probabilities based on what occurred in other cases.

People v. Torres, 175 Misc. 2d 903, 910, 671 N.Y.S.2d 912, 917. (N.Y. Super. 1998). In this case, the specific proof is that there is no true bill and there is no record of a vote ever having occurred. Defendant, through his family and counsel, has exhausted all available avenues to attempt to retrieve a copy of the true bill, including reviewing all available files and making several efforts to obtain this information from the office of the District Attorney. Beyond establishing that the bill does not exist, there is not much more that Defendant can do. It is not incumbent upon the Defendant to ensure that the office of the District Attorney keep accurate records (or, as in this case, any records).

Aside from the clear lack of jurisdiction, this Court may also vacate the judgment against

██████████ due to violations of several other provisions of C.P.L. §440.10(1); specifically:

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or . . .

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom

C.P.L. § 440.10(1)(a), (c), and (f).

The absence of a true bill and the corresponding necessary conclusion that there was no vote to indict ██████████ also gives rise to violations of these provisions. With respect to §

440.10(1)(b), by proceeding without a true bill, the prosecutor perpetrated a fraud upon the court. With respect to § 440.10(1)(c), it was material to the proceedings that ██████ be indicted by a grand jury; by proceeding without a true bill, the prosecutor also violated this provision. With respect to §440.10(1)(h), the prejudicial conduct at issue was the decision to proceed without a grand jury indictment. If this information had appeared in the record, the case certainly would have been dismissed.

Finally, C.P.L. § 440.10(1)(h) permits this Court to vacate a judgment if it was obtained, “in violation of a right of the defendant under the constitution of this state or of the United States.” The Constitution of the State of New York provides that, “No person shall be held to answer for a capital or otherwise infamous crime . . . *unless on indictment of a grand jury.*” N.Y. Const. Art. 1, § 6 (emphasis added). As demonstrated conclusively above, there was no grand jury indictment in this case. Thus, ██████ rights under Article 1 § 6 were violated. Such a violation provides independent grounds to vacate the judgment against ██████.

Next, the proceedings against ██████ in the absence of a valid grand jury indictment violated ██████ right to due process of the law under the Constitution of the United States and the Constitution of New York. See U.S. Const. Amend. XIV (“[No] state shall deprive any person of life, liberty, or property, without due process of law.”); N.Y. Const. Art. 1, § 6. (“No person shall be deprived of life, liberty or property without due process of law.”). In People v. Mackey, 82 Misc.2d 766, 371 N.Y.S.2d 559 (N.Y. Co. Ct. 1975), the Court noted that, “The right to be prosecuted by a grand jury for a felony flows directly from the Constitution and is a matter of substantive due process.” Id. at 769, 371 N.Y.S.2d at 561; citing N.Y. Const. Art. I, § 6; and Boyes v. United States, 370 U.S. 948 (1962).

In Mackey, the Court held that, “The district attorney's failure to properly instruct the

grand jury was not a mere irregularity or a harmless procedural defect It constituted a substantive prejudicial denial of due process rendering the grand jury proceedings defective.” Id. at 770, 371 N.Y.S.2d at 562; citing C.P.L. § 210.35(5). If a failure to instruct gives rise to a due process violation, certainly not having any grand jury proceeding at all must also give rise to a due process violation. This deprivation of due process also provides an independent ground upon which to vacate the judgment against ██████.

Finally, the prosecution of ██████ without a proper grand jury indictment violated his rights to equal protection. Pursuant to N.Y. Const. Art. 1, §11, “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.” See also U.S. Const. Amend. XIV. The decision of the prosecutor to continue against ██████ in the absence of a true bill from the grand jury necessarily resulted in ██████ being treated more harshly than other similarly situation people in the State of New York; this is a violation of equal protection. See People v. Eboli, 34 N.Y.2d 281, 290, 313 N.E.2d 746, 751 (N.Y. 1974) (Abuse of discretionary power afforded prosecutor during grand jury proceedings violates the equal protection guarantee of the Constitution.). As with the other Constitutional violations, this violation provides an independent ground upon which to vacate the judgment against ██████.

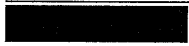
CONCLUSION

As a result of the fatally defective grand jury proceedings, the People of the State of New York never had jurisdiction to charge ██████ in this case. Moreover, ██████ statutory and Constitutional rights were violated by the decision of the People to proceed against him in the absence of a valid indictment. Under the circumstances, ██████ conviction should be vacated and his case dismissed.

Dated: New York, New York
February __, 2009

Respectfully Submitted,

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