

Short Form Order

SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM - PART K-18 QUEENS COUNTY

P R E S E N T: Hon. Sheri S. Roman,  
Justice

THE PEOPLE OF THE STATE OF NEW YORK: Ind. No.: 1915/2007  
:  
-against- :  
:  
: Motion: To Dismiss  
: Indictment  
:  
DENNIS GALLAGHER, :  
:  
DEFENDANT. : Submitted: December 18, 2007  
:  
:

The following papers numbered  
1 to 7 submitted in this motion.

Benjamin Brafman, Esq.  
Mark M. Baker, Esq.  
Christopher Renfroe, Esq.  
For the Motion

Hon. Richard A. Brown, D.A.  
by: Donna Aldea, Esq.  
Opposed

Papers  
Numbered

Notice of Motion and Affidavits/Affirmations Annexed ....1-2  
Answering and Reply Affidavits/Affirmations.....3-6  
Grand Jury Minutes.....7

Upon the foregoing papers, and in the opinion of the court herein, defendant's motion to dismiss the indictment is granted to the extent that Indictment No. 1915/2007 is dismissed in its entirety, with leave to re-present, pursuant to Criminal Procedure Law Sections 210.20(1)(c) and 210.35(5), on the grounds that the Grand Jury proceedings were defective.

See accompanying memorandum decision of this date.

Sheri S. Roman, J.S.C.

Date: January 24, 2008

Gloria D'Amico  
Clerk

**MEMORANDUM**

**SUPREME COURT QUEENS COUNTY  
CRIMINAL TERM PART K-18**

----- X  
THE PEOPLE OF THE STATE OF NEW YORK :  
 : Ind. No. 1915/07  
 :  
 -against- : BY: Sheri S. Roman, J.  
 :  
 DENNIS GALLAGHER, : DATED: January 24, 2008  
 :  
 DEFENDANT :  
----- X

By notice of motion dated October 18, 2007, defendant moves for an order, pursuant to C.P.L. Sections 210.20(1)(b), 210.20(1-a) and 210.30 granting inspection of the Grand Jury minutes and dismissing or reducing the relevant counts of the indictment as not supported by legally sufficient evidence.

In addition, defendant moves pursuant to C.P.L. Sections 210.20(1)(c) and 210.35, for an order dismissing the indictment on various grounds arising out of defective Grand Jury proceedings.

The People submitted an affirmation, dated November 15, 2007, opposing defendant's motion. Due to the numerous issues raised in the motion papers, the court, upon request of the parties, granted defendant leave to submit a reply affirmation, which was received on December 3, 2007, and granted the People leave to submit a sur-reply, which the court received on December 18, 2007.

## BACKGROUND

An indictment was filed against defendant on August 3, 2007 charging him with three counts of Rape in the First Degree; three counts of Rape in the Third Degree; Criminal Sexual Act in the First Degree; Criminal Sexual Act in the Third Degree; Assault in the Second Degree; and Assault in the Third Degree. The charges arose out of an incident which took place in Queens County on July 8, 2007.

This matter was presented to the Grand Jury on July 26, July 27, July 30, and August 1, 2007. The People were represented in the Grand Jury by the Deputy Bureau Chief Kenneth Appelbaum, as well as the Chief of the Special Victims Bureau, and a third Assistant District Attorney. The prosecution called several witnesses in addition to the complainant. The complainant testified to a forcible, non-consensual sexual assault by the defendant at his campaign office on the evening of July 8, 2007.

On August 1, 2007, the defendant waived immunity and testified before the Grand Jury, accompanied by his attorney, Steven Mahler, and co-counsel, Christopher Renfroe, who remained outside the Grand Jury room. Mr. Gallagher's statement to the Grand Jury consisted of a description of how he met complainant at a local bar in the late afternoon of July 8, 2007, and his account of consensual sexual relations with her at his campaign headquarters after 8:00 P.M. that evening.

### Inspection of Grand Jury Minutes

Pursuant to C.P.L. Section 210.30(2) this court, upon request of defense counsel, inspected the Grand Jury minutes to determine "whether the evidence before the Grand Jury was legally sufficient to support the charges contained in the indictment." C.P.L. Section 190.65(1). In addition, pursuant to C.P.L. Section 210.35(5), this court inspected the minutes to determine whether the Grand Jury proceedings were defective to such a degree that the integrity thereof was impaired and resulted in prejudice to the defendant.

After inspection of the Grand Jury minutes, this court finds that the testimony and evidence presented to the Grand Jury was legally sufficient to support each and every one of the counts charged. Had the Grand Jury presentment consisted of the complainant's testimony alone, the evidence, if accepted as true, would have been sufficient to support all of the charges as well as the defendant's commission thereof. C.P.L. Sections 190.65(1); 70.10(1)(2).

However, this court also finds that the Grand Jury proceedings were impaired to such an extent that prejudice to the defendant clearly resulted. C.P.L. Section 210.35(5). It is evident from an assessment of the cross-examination of the defendant, as well as from the concerns voiced by Grand Jurors, (such as repeated requests by Grand Jurors for judicial

intervention as well as statements by Grand Jurors that the prosecutor's questions were an attempt to make defendant look foolish) that the prosecutor's questions had a prejudicial effect.

After reviewing the cross-examination of the defendant by the Assistant District Attorney, this court finds that the prosecutor exceeded the limits of cross-examination in many instances and breached his duty as a quasi-judicial officer. The nature of the prosecutor's cross-examination of the defendant, in addition to his refusal to seek a judicial ruling when requested by defense counsel, and continuing refusal to seek judicial guidance when specifically requested by a Grand Juror, as well as his improper responses to concerns voiced by the Grand Jurors, resulted in a significant impairment of the integrity of the Grand Jury proceedings and created prejudice in the minds of the Grand Jurors. Moreover, this court finds that the cross-examination of the defendant by the prosecutor created more than just a substantial risk of prejudice to the defendant, it created actual prejudice.

Therefore, after inspecting the Grand Jury minutes, this court finds that the indictment must be dismissed with leave to re-present pursuant to C.P.L. Sections 210.20(1)(c) and 210.35(5).

### Questions Regarding Defendant's Elevated Level of Responsibility

A review of the minutes of the prosecutor's cross-examination of the defendant revealed many instances of questioning which lacked any relationship to the defendant's narrative presentation or to the facts of the incident in question. While it is entirely appropriate for a prosecutor to attempt to impeach a defendant's credibility before a Grand Jury, the manner in which the defendant was cross-examined was prejudicial and was an attempt to create improper inferences in the minds of the Grand Jurors.

The improper questioning began immediately after the defendant gave his narrative statement to the Grand Jury. He testified that he was an elected member of the New York City Council and that he had been re-elected for the past six years.

The defendant, who released his entire Grand Jury testimony as an exhibit to the motion, contends that the following questions were improper as they were meant to convey the impression to the Grand Jury that because of his position as an elected official, the defendant was to be held to a higher standard of conduct than an ordinary citizen. The questioning in this regard was as follows: (Substantive responses were given to each question.)

"Q. You're frequently called to speak in public, is that correct?

Q. You're very polished at it, right?

Q. You try to project a certain dignity reflective of the office you hold when you speak in public?

Q. You try to present a certain prestige associated with your office?

Q. Do you try to behave in a manner respectful to the position of the office you hold?

Q. Do you try to behave in a manner respectful to the position of the office you hold?

Q. You have respect for the law?

Q. In order to get elected you have to be convincing that you can get things done, right?

Q. You use the power and prestige to prevent things from happening, if need be is that correct?

**Q. Would you agree you have an elevated responsibility as a role model to the families of your constituency?**

**Q. Would you agree you have a responsibility, to have an elevated responsibility as a role model to the families of your constituency?**

**Q. My question had to do with do you consider that you have an elevated responsibility as a role model among your constituency?**

**Q. Would you agree that in your position you have the responsibility to avoid even the appearance of impropriety?**

Q. You told us about your campaign office upstairs?

Q. Who pays for that office?

Q. Where does money come from in that account?

Q. People reach into their pockets and give you, say five or ten dollars, could be more, that is what pays for the phone and computers?

Q. That pays for everything in there, correct?

Q. That is what pays for the carpet you had sex on, is that correct?"

The People contend that the cross-examination of the defendant regarding his elevated level of responsibility as a City Councilman was not improper because defendant "opened the door" by informing the Grand Jury that he was "an elected member of the New York City Council" and that he has "been re-elected for the past six years." In addition, the People claim that the multiple questions as to defendant's "elevated responsibility" and his ability as a public speaker were asked to "level the playing field" between the complainant and defendant and to "ensure that the Grand Jury would not accord defendant any undue deference merely because of his position or because of his more polished speaking style."

This court finds, however, that the questions incorporating a standard of "elevated responsibility as a role model" and needing to avoid "the appearance of impropriety," were improper. The prosecutor created an unfair inference that in evaluating the defendant's testimony and his credibility, the Grand Jury should apply a more stringent standard than the law actually imposes.

This was prejudicial to the defendant in that the questions conveyed the impression to the Grand Jury that the standards of conduct for this defendant, as an elected official, were higher than for any other target of a Grand Jury investigation. This indictment cannot be based upon an appearance of impropriety or a breach of a moral responsibility to the electorate or to one's family.

The courts have held that, in a Grand Jury presentation, "a prosecutor serves a dual role as advocate and public officer. He is charged with the duty not only to seek convictions but also to see that justice is done." People v. Pelchat, 62 N.Y. 2d 97(1984).

Pursuant to C.P.L. Section 190.50[5][b] a prosecutor has the right to cross-examine a defendant after the completion of his Grand Jury testimony. The cross-examination, however, must be within the limits of proper cross-examination and may include the asking of questions which bear on the defendant's credibility. See People v. Edwards, 240 A.D. 2d 427 (2d Dept. 1997); People v.

Burton, 191 A.D.2d 451(2d Dept. 1993). The questions asked by the prosecutor were not meant to elicit facts or properly impeach his credibility, but were intended to convey an improper standard for determining the defendant's guilt. See People v. Van Davis, 119 Misc. 2d 1013(Sup. Ct. Queens Co. 1983). As a result of this improper line of questioning, the prosecutor's view regarding the defendant's higher standard of conduct permeated the entire presentment.

Further, the issue of whether a constituent paid for the rug where a sexual act took place is not relevant to the fact for ultimate determination by the Grand Jury as to whether the sexual acts to which both defendant and complainant testified were forcible and non-consensual. This court's determination that these questions were propounded to denigrate the defendant is a conclusion borne out by the explicit statement of a Grand Juror that the prosecutor's questioning "was an attempt to make him look foolish."

**Request by Defense Counsel Mahler for a Judicial Ruling**

Immediately after defendant was questioned as to his "elevated responsibility," Defense Counsel Mahler, who accompanied defendant into the Grand Jury, requested that the Assistant District Attorney leave the Grand Jury room to consult. The Assistant District Attorney refused, stating, "We're in the middle of an examination." The record reveals that Mr. Mahler then stated, "I'd like to go for a ruling."

Mr. Mahler then left the Grand Jury room with Mr. Gallagher, accompanied by the Bureau Chief and another Assistant District Attorney, while Mr. Appelbaum remained in the Grand Jury room. However, the defendant returned to the Grand Jury room without going to a judge for a ruling. Mr. Mahler explained in his affidavit in support of the motion that he requested that the prosecutor accompany him for a ruling because he believed that the prosecutor's questions were trying to establish that Mr. Gallagher, as a public official, had an elevated responsibility as a role model, holding him to a higher standard of moral conduct than the average citizen. Mr. Mahler also states that when the prosecutor refused to go with him for a ruling he determined that he would return to the Grand Jury room because, in his opinion, if he left the Grand Jury room with his client for an extended period without the prosecutor, his client would be further prejudiced in the eyes of the Grand Jury.

In response, the People contend that they did not bar defendant from obtaining a judicial ruling and that once outside the Grand Jury room Mr. Mahler did not ask to make a record or to go for a ruling but, instead, returned to the Grand Jury room. The People state in their affirmation, "Under these circumstances, the prosecutor properly denied defendant's request to accompany him outside, as defendant was not entitled to a conference or an explanation about the prosecutor's questions.

Nor can it be said that defendant was improperly denied a judicial ruling because he never, in fact, requested one."

This court finds that the record clearly shows that Mr. Mahler did, in fact, request a judicial ruling having stated to Mr. Appelbaum, "I'd like to go for a ruling." Fundamental fairness and due process of law dictate that the prosecutor should have accompanied defense counsel to obtain a judicial ruling regarding the propriety of the cross-examination.

Pursuant to C.P.L. Section 190.25(6):

"the legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. When necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions shall be recorded in the minutes."

The Court of Appeals stated in People v. Smith, 87 N.Y. 2d 715(1996), that as both the court and the prosecutor are legal advisors to the Grand Jury, as specified by C.P.L. Section 190.25(6), "determining the permissible scope of cross-examination is not the exclusive province of the prosecutor, and the Grand Jury Judge was empowered to issue the preliminary ruling."

This court finds that, based upon the prosecutor's improper questioning, defendant had a proper basis to ask for a judicial ruling. A similar issue was raised in People v. Smays, 156 Misc. 2d. 621(Sup.Ct. N.Y.Co. 1993) wherein the court stated,

"When the prosecutor does engage in abuse of the defendant before the Grand Jury, or otherwise oversteps the bounds of propriety by asking questions improper in form or in their connotation to the Grand Jury, or calling for irrelevant, privileged or otherwise improperly prejudicial answers, counsel must seek the assistance of the court supervising the Grand Jury proceeding."

This court finds that defense counsel properly requested a ruling on the propriety of the cross-examination of defendant. Although Mr. Mahler had other alternatives available, such as advising the witness not to answer, the more expedient and appropriate course, so as to avoid prejudice to defendant, was for the prosecutor to agree to go with defense counsel for a judicial ruling. See People v. Ianniello, 21 N.Y. 2d 418 (1968) stating that a witness in the Grand Jury may refuse to answer questions regarding pertinency and that in such circumstances the appropriate and expedient response by the prosecutor would be to seek a ruling.

As stated by the court in People v. Doe, 151 Misc. 2d 829 (Sup. Ct. Kings Co. 1991), pre-indictment intervention by the court such as by a judicial ruling during the Grand Jury presentment serves judicial economy and the interests of justice. It also avoids inconveniencing witnesses and unnecessarily delaying proceedings.

#### **Questions Regarding Defendant's Marital Situation**

After appropriate inquiry about the facts of the incident,

the prosecutor began an intensive series of questions regarding the defendant's marital situation:

Q. You told us you are separated from your wife but live in the same house?

Q. Is there any sex life between you and your wife at this point?

Q. Do you have some sort of agreement with your wife that this is okay?

Q. Was there any agreement about having sex outside the marriage?

Q. Is this something that if it would happen that you would have to keep secret from her?

Q. Are there times when you have to lie to her about stuff like this?

Q. There are times when you have to lie about your whereabouts and what you're doing?

Q. Are there times when you do have to lie to her about where you're going and where you are?

Q. My question is are there times you have to lie to her about your whereabouts and about what you are doing?

Q. So do you have any other ongoing romantic relationships since you've separated from your wife?

Q. What you claim was a consensual encounter with [complainant], was this the only one?

Q. Do you find your situation at home frustrating....?

Q. Are you happy with the situation?

Q. Are you happy with the situation?

Q. Are you happy with the situation?

Q. Are you happy?

Q. You're not unhappy you're telling us?

Q. Are you happy with the situation?

Q. Do you find the situation frustrating?"

This score of questions centering on defendant's personal relationship with his wife was beyond an exploration of credibility and served to demean him. The prejudicial nature of these questions is reflected by a Grand Juror's query asking the prosecutor what the questions regarding defendant's marital situation had to do with the case.

#### **Vouching for Prosecution Witnesses**

Another issue raised in the defense motion was the prosecutor's asking defendant questions regarding the complainant's motives for reporting the rape. The prosecutor repeatedly asked the defendant about the complainant's motives for reporting a forcible rape as follows:

"Q. You're not telling us, are you, that she reported a forcible rape against a city councilman such as yourself because you didn't want to have another sexual encounter

with her? You're not saying that, are you?

**A.** I can't speak as to why she called. I have been trying to think about why she called ever since the first day afterward.

**Q.** You have been trying to figure it out?

**A.** Yes because I never-

**Q.** You can't tell us why she would falsely make these allegations because you're still trying to figure it out?

**A.** I can't.

**Q.** We're agreed she had nothing to gain by making false accusations of this nature, correct?

**A.** I don't know if she has anything to gain. I remember her talking about the injury to her hand and she had, that she was planning to sue the City of New York.

**Q.** **So we are agreed that as you sit here today, that nothing would give her a motive to falsely accuse you of rape?**

**A.** I don't know what her motives are.

**Q.** As you sit here now, is it fair to say you're unaware of any motive she would have to falsely accuse you of rape? Do you understand that question?

**A.** I don't know what her motives are.

**Q.** Do you understand that question?

**A.** If you rephrase it.

**Q.** As you sit here today, is it fair to say you are unaware of any motive to falsely accuse you of rape?

**A.** I don't, I don't know her motives.

**Q.** Do you understand that question?

**A.** I don't know.

**Q.** Would it be fair to say that you don't know of any motive that she might have?

**A.** I don't know why she would do this, that's correct.

**Q.** Do you not understand my question?

**A.** Actually I don't.

**Q.** I'm asking you, as you sit here now, are you aware of any motive she might have to falsely accuse you of a rape?

**A.** I know of no motive as to why she would do this, I'm wondering why she would."

The prosecutor also asked defendant to provide a motive for other witnesses to give false information about him. The phrase "falsely accuse" was employed as a synonym for the word "lie."

The prosecutor, despite getting responsive answers, asked defendant at least eight times to provide a reason why complainant would "falsely accuse" him of rape. On two of those

occasions the prosecutor not only vouched for the credibility of the complainant, but included the defendant as vouching for the complainant's credibility by stating, "So we're agreed that as you sit here today, that nothing would give her a motive to falsely accuse you of rape?" The prosecutor, by repeatedly asking defendant to provide the Grand Jury with a reason why the complainant would lie, was in effect, asking the defendant to bolster complainant's contrary version of the facts. The repetitive manner in which the prosecutor questioned the witness inferentially communicated to the Grand Jury his assessment that the prosecution witnesses had no motive to lie and that the defendant's version of events was unworthy of belief.

There is a lengthy string of Appellate Division, Second Department cases holding that it is improper for a prosecutor to inquire as to whether the defendant thought the prosecution's witnesses were lying. In People v. Delgado, 79 A.D. 2d 976(2d Dept. 1981), the court stated, "Such a tactic has repeatedly been condemned by the court." Citing People v. Crossman, 69 A.D. 2d 887(2d Dept. 1979) and People v. Mariable, 58 A.D. 2d 877(2d Dept. 1977). Also see, People v. Santiago, 78 A.D. 2d 666(2d Dept. 1980); People v. Calderon, 88 A.D. 2d 604(2d Dept. 1982). In People v. Berrios, 298 A.D. 2d 597(2d Dept. 2002) the court stated that it is reversible error to repeatedly ask a defendant on cross-examination whether the prosecution's witnesses

including the complainant lied during their testimony, stating that it is improper to force a defendant to characterize prosecution witnesses as liars. "Whether the defendant believed that the other witnesses were lying is irrelevant (People v Crossman, supra)."

This court finds, therefore, that the defendant was prejudiced by the prosecutor's repeatedly asking the defendant to provide a motive for the complainant to have reported a rape. As stated by the court in People v. Jaime, 84 A.D. 2d 696(1st Dept. 1981),

"It is unprofessional and improper conduct for a prosecutor to express his personal belief as to the truth or falsity of any testimony. To call the defendant and his witness liars on the one hand and to improperly bolster the People's case by personally vouching for the truthfulness of his own witnesses on the other, is to make himself an unsworn witness, supporting his case by his own veracity and position. This should be condemned in the strongest terms. Citing, People v Mariable, 58 A.D.2d 877(2d Dept. 1977); People v Rivera, 75 A.D.2d 544;(1st Dept. 1980); People v Santiago, 78 A.D.2d 666(2d Dept. 1980).

#### **Actual Prejudice in the Grand Jury**

In their sur-reply, the People contend that "defendant's motion to dismiss the indictment must be denied because, in view of the evidence presented to the Grand Jury, defendant has utterly failed to show that he may have been prejudiced by any of the alleged errors." In order for an indictment to be dismissed pursuant to C.P.L. Section 210.35(5), the defendant must show

impairment of the integrity of the Grand Jury and that prejudice to the defendant may result. According to the Court of Appeals in People v. Darby, 75 N.Y. 2d 449(1990) the standard for showing impairment of the integrity of a grand jury "is very precise and very high." Also see People v. Winningham, 209 A.D.2d 461 (2d Dept. 1994).

Based on this standard, the People state in their sur-reply, "Rather the focus of the inquiry is *on the effect* of the alleged error on the Grand Jury's investigation and the resultant possibility of prejudice to the defendant, *rather than on the alleged error itself.*" The People go on to state that even if errors were made, "the possibility of prejudice must be real, rather than speculative." In the same vein, the People state that "defendant has never even attempted to proffer anything other than conclusory assertions of prejudice and has never shown precisely how he was prejudiced by any of the challenged conduct." Ultimately, their argument is belied by the record.

This is a most unusual Grand Jury presentation because the prejudicial results of the prosecutor's course of conduct can be ascertained from statements made by the Grand Jurors themselves. To be noted, these statements were unavailable to the defense because they were not part of the defendant's testimony to the Grand Jury.

At the conclusion of the People's presentation of the witnesses and immediately prior to the commencement of the instructions, a Grand Juror stated as follows:

**"Juror: I have a question, procedural question. In regards to certain questioning, how can we get a Judge in here? What's the procedure and how do we do it and what time?"**

Appelbaum: To get a Judge? For what purpose?

**Juror: I believe from your questioning, I could be wrong, that there was an attempt to make him look foolish. You brought up subjects that, like public speaking. So far, I don't know.**

Appelbaum: Specifically, what are your questions about? Tell me specific areas.

**Juror: I can't say, his speaking about, over and over disparaging questions, over and over, posed as a fool or incompetent.**

Appelbaum: I just want to know how you have it written.

**Juror: As a role model--is he considered a role model? I don't know what that has to do with this case. I honestly don't. His relationship with his wife? Can he afford to separate? What does this have to do with this case?**

Appelbaum: To the Grand Juror that has questions, I

have a response to your questions as follows, that those questions are legally permissible in the areas of cross-examination. They are to be considered by you as they pertain to his credibility and when you go over the accounts of the events of that night.

Juror: Okay. So we can use this, the fact that you asked these questions.

Appelbaum: I'm telling you they are legally permissible, okay?

Juror: Okay."

After the completion of the entire charge by the Assistant District Attorney, a Grand Juror, apparently not satisfied with the prosecutor's earlier response, again raised the subject of being afforded the opportunity to speak to a Judge, stating:

**"Juror: In regards to the other questions, what does it take to get a Judge here?"**

Appelbaum: I'm going to respond to when you came to me. Relating to those issues, I have determined, made certain determinations, as to the questions that you brought to our attention. Any further questions in any areas beyond that, they can be addressed by a Judge and defense attorney at a later time. That is your answer, okay?

Juror: Okay."

In this case, questions raised by the Grand Jurors themselves clearly demonstrate that the prosecutor's interrogation had alarmed members of the Grand Jury to such an extent that there was a demand to have a Judge determine the propriety of the prosecutor's questions. The language of the Grand Jurors' questions demonstrates frustration at not having the ability to speak to a Judge about the prosecutor's questions and intent. A Grand Juror, clearly concerned about the integrity of the proceedings, demanded "How can we get a Judge in here? What's the procedure and how do we do it and what time?" And again later, a Juror, clearly not satisfied with the prosecutor's response, demanded "What does it take to get a Judge here?"

Although defense counsel did not ultimately seek a judicial ruling, in this case it is clear that on two separate occasions the Grand Jurors themselves asked for a ruling on the very same issues raised by the defense. The Grand Jurors' questions reflect concerns that the Assistant District Attorney had "disparaged" the witness and made him look "foolish" by the use of inappropriate and irrelevant questions. The Grand Jurors were unable to obtain judicial guidance, despite having requested it. When asked specifically by the Assistant District Attorney what the problem was, the juror stated, "As a role model-is he considered a role model? I don't know what that has to do with this case. I honestly don't. His relationship with his wife?"

Can he afford to separate? What does this have to do with this case?" The Grand Jurors were specifically voicing concerns about the areas directly related to the issue of whether the Assistant District Attorney was encouraging the Grand Jury to apply a higher standard to this defendant. While the prosecution argued that the defense failed to ask for a judicial ruling, this is de minimus when the Grand Jurors took umbrage with the cross-examination of defendant and sought a ruling themselves.

The prosecution contends that the defense, in their moving papers, failed to show actual prejudice. However, the People are privy to the Grand Jury minutes in their entirety which disclose Grand Jurors' statements revealing the occurrence of actual prejudice. This issue was never addressed by the People in their reply or sur-reply. The concerns raised by members of the Grand Jury remove the question of whether prejudice occurred out of the realm of mere speculation.

### **Conclusion**

The prosecutor's questioning of the defendant regarding his elevated responsibility, status as a role model, the details of his marriage, the motive for the complainant to lie, as well as vouching for the veracity of the witnesses and failing to go for a ruling when reasonably requested by the defense attorney and by members of the Grand Jury, cumulatively are sufficient to impair the integrity of the Grand Jury. This court finds that the

prosecutor's conduct biased the Grand Jury against the defendant. Additionally, the prosecutor's charge to the Grand Jury that the improper questions were legally permissible for purposes of credibility was an incorrect charge in and of itself.

The questioning of the defendant about issues neither related to the facts nor the defendant's credibility resulted in the People failing in their duty to assure the fairness and justice of the proceedings and to uphold the integrity of the Grand Jury. The prosecutor, as set forth above, attempted to instill his influence and bias into the case. People v. Huston, 88 N.Y. 2d 400(1996).

In order to merit the "exceptional remedy" of dismissal of an indictment pursuant to C.P.L. 210.35(5), a defendant must show that the integrity of the Grand Jury process was impaired, and that he suffered prejudice as a result. People v. Gonzalez, 201 A.D. 2d 414(1st Dept. 1994). In People v. Adessa, 81 N.Y. 2d 677 (1997), the Court of Appeals stated, "It is also beyond dispute that improper influences and exposure to bias can so undermine the Grand Jury's integrity as to require dismissal of the resulting indictment." More than isolated instances of misconduct are required. In this case, the record is replete with instances of a highly inappropriate cross-examination which substantially undermined the integrity of the proceeding. It is a unique circumstance to find the arguments of defense counsel, unbeknownst to them, mirroring the concerns about fairness of

process voiced by Grand Jurors at the time of the Grand Jury presentation.

In People v. Huston, 88 N.Y. 2d 400 (1996) the Court of Appeals held that in the Grand Jury unlike at trial, "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 to see that justice is done."

In the instant case, as in Huston, supra., the prosecutor disregarded his duty of fair dealing. "It is well settled law that the exceptional remedy of dismissal of an indictment pursuant to C.P.L. Section 210.35(5) is warranted only where prosecutorial wrongdoing, fraudulent conduct or errors, potentially prejudice the ultimate decision reached by the Grand Jury." People v. D'Amico, 261 A.D. 2d 633(2d Dept. 1999) citing People v. Huston, 88 N.Y. 2d 400(1996).

\_\_\_\_\_This court has determined, based upon the testimony of the People's witnesses, that the charges were supported by legally sufficient evidence. However, the courts are clear that where irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating a risk of prejudice, "the indictment cannot be permitted to stand even though it is supported by legally sufficient evidence." People v. Huston, supra; citing People v. Calbud, Inc. 49 N.Y. 2d 389 (1980)

\_\_\_\_\_Accordingly, for all of the above stated reasons, the indictment is hereby dismissed in its entirety pursuant to C.P.L. Sections 210.20(1)(c) and 210.35(5) with leave to re-present.

Order entered accordingly.

The clerk of the court is directed to forward a copy of this decision and order to the District Attorney and to the attorneys for the defendant.

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**Sheri S. Roman, J.S.C.**