

STATE OF NEW YORK
SUPREME COURT : RENSSELAER COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER

Indictment No. AG17-1200

JOEL ABELOVE,

Defendant.

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APPEARANCES:

Hon. Barbara Underwood, Attorney General State of New York
Jennifer M. Sommers, Deputy Chief, of counsel
Nicholas N. Viorst, Deputy Chief, of counsel
28 Liberty Place
New York, New York 10271
Attorney for the People

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Attorney for the Defendant

NICHOLS, J.

By Indictment dated December 1, 2017, the Defendant is charged with two counts of Official Misconduct (*see*, Penal Law § 195.00 [2]) and one count of Perjury in the First Degree. *See*, Penal Law § 210.15.

By motion dated March 30, 2018, the Defendant seeks an Order granting various forms of relief, including that of an order dismissing the charge of Perjury in the First Degree due to the Attorney General's lack of jurisdiction to prosecute that charge and, further, for an order dismissing the Indictment pursuant to §§ 210.20 (1)(c) & 210.35 (5) of the Criminal Procedure Law (CPL).

The Office of the Attorney General (OAG) has submitted papers in opposition to the Defendant's motion.

The instant motion practice is properly understood against the backdrop of the established limits of the Attorney's General's authority to institute and prosecute criminal cases. Unlike that vested in the District Attorneys of the various counties of the State, the Attorney General's prosecutorial power is not absolute. Indeed, while the District Attorneys possess general prosecutorial authority in the counties where they are elected and serve, the Attorney General has no such plenary authority and is "without any prosecutorial power except when specifically authorized by statute." Della Pietra v State of New York, 71 N.Y.2d 792, 797; *see*, People v. Gilmour, 98 N.Y.2d 126, 131; People v. Romero, 91 N.Y.2d 750, 754. Moreover, in keeping with the limited nature of the Attorney General's prosecutorial power in general, that prosecutorial power granted to the Attorney General (and, analogously, to special prosecutors) has been ". . . delineate(d) meticulously" by the Legislature." People v. Gilmour, *supra* at 132. Thus, cases in which the Attorney General (or a special prosecutor) has acted in excess of jurisdictional limits have invariably resulted in those cases being dismissed due to that excess. *See*, People v. Gilmour, *supra* at 135; People v. Romero, 91 N.Y.2d 750; People v. Di Falco, 44 N.Y.2d 482; People v. Dondi, 40 N.Y.2d 8, 19; People v. Sam, 49 A.D.2d 732.

On July 8, 2015, Governor Andrew Cuomo issued Executive Order 147 which,

inter alia, appointed the Attorney General as special prosecutor in cases in which the death of an unarmed civilian was caused by a law enforcement officer.

On April 16, 2016, Edson Thevenin, an unarmed civilian, was shot and killed by Sgt. Randall French of the Troy Police Department after a traffic stop that was followed by a vehicle pursuit. The Defendant presented the Thevenin shooting to the Rensselaer County Grand Jury, which returned “No True Bill” on April 22, 2016. On April 29, 2016, the Attorney General asserted jurisdiction over the Thevenin shooting. Thereafter, Governor Cuomo issued Executive Order 163.

After stating that “. . . significant concerns have been raised regarding the investigation into Edson Thevenin’s death,” and reciting the power vested in the Governor by virtue of Executive Law § 63 (2), Executive Order 163, authorized the Attorney General (referred to as the ‘special prosecutor’ therein):

“. . . to investigate, and if warranted, prosecute any and all unlawful acts or omissions or alleged unlawful acts or omissions by any person arising out of, relating to, or in any way connected with the Incident and its subsequent investigation, including its grand jury presentation;

FURTHER, regarding any and all unlawful acts or omissions or alleged unlawful acts or omissions identified above, the special prosecutor shall have all of the powers and duties specified in subdivisions 2 and 8 of section 63 of the Executive Law for purposes of this Order, and shall possess and exercise all the prosecutorial powers necessary to investigate, and if warranted prosecute such acts or omissions;

FURTHER, regarding any and all unlawful acts or omissions or alleged unlawful acts or omissions identified above, the special prosecutor shall conduct a full, reasoned, and independent

investigation including but not limited to, (i) gathering and analyzing evidence, (ii) conducting interviews, and (iii) reviewing investigative reports, scientific reports, and audio and video recordings;

FURTHER, regarding any and all unlawful acts or omissions or alleged unlawful acts or omissions identified above, the special prosecutor shall, (i) attend in person, a term or terms of the County or Supreme Court to be held in and for the County of Rensselaer, (ii) appear in person before any grand jury drawn for any term(s) of said court, for the purpose of conducting any and all proceedings, examinations, and inquiries, and (iii) bring any and all criminal actions and proceedings which may be had or taken before said grand jury and other grand juries.”

The Defendant contends that the Office of the Attorney General (OAG) has exceeded its jurisdiction by prosecuting the charge of Perjury in the First Degree. In this regard, the Defendant contends that the OAG’s jurisdiction to prosecute him is wholly derivative of Executive Order 163, issued pursuant to Executive Law § 63 (2). Therefore, inasmuch as the authority and jurisdiction of the OAG, as delineated by Executive Order 163, is limited to events connected to the Thevenin shooting“and its subsequent investigation, including its grand jury presentation,” the conduct of the Defendant upon which the perjury charge is predicated; conduct that occurred subsequent to the Thevenin shooting and its investigation, is outside the limits imposed by the language of Executive Order 163. Consequently the Defendant argues that the OAG did not have jurisdiction to present the charge of Perjury in the First Degree to the Rensselaer County Grand Jury and/or to prosecute the same.

In opposition to the Defendant’s motion, the OAG asserts that its prosecution of

the charge of Perjury in the First Degree is jurisdictionally appropriate in light of the language of Executive Law § 63 (13) which authorizes the Attorney General to “(p)rosecute any person for perjury committed during the course of the investigation conducted by the attorney-general pursuant to statute.” The OAG contends that its prosecution of the Defendant for perjury was authorized by Executive Law § 63 (2), i.e., by statute, rather than by Executive Order 163. In particular, the OAG submits that:

“ . . . the Attorney General’s authority to conduct the grand jury investigation in this matter arose from Executive Law § 63 (2). Executive Order 163 satisfied the conditions precedents to exercising the Attorney General’s statutory power under Executive Law §63 (2), but was not the source of the Attorney’s General’s power; unquestionably, Executive Law § 63 (2) was the source.”

Upon review, this Court finds that the ability to prosecute for perjury *via* Executive Law § 63 (13), is limited to instances when specific statutory provisions delineate both the Attorney General’s authority to investigate, and the scope of that investigatory authority. Executive Law § 63 (2), limited as it is to a recitation of the general duty and authority of the Attorney General conferred by the Governor *via* executive order, does not delineate the scope of that authority. Rather, that scope, and hence the Attorney General’s jurisdiction, is wholly dependent on the letter of the particular executive order in question.

The Court’s finding is based in large part on the legislative history of Executive Law § 63 (13), a history which, as set forth by the Defendant in his brief, clearly and indisputably demonstrates that the application of Executive Law § 63 (13) was intended

to be limited to instances when the Attorney General's jurisdiction was set forth *via* statute, and not dependent on the contents of an executive order. In addition, that segment of Executive Law § 63 (13), speaking to investigations "conducted pursuant to statute," suggests that the Legislature's grant of authority to the Attorney General was considerably more limited than that posited by the OAG, and not such to confer on the Attorney General the power to prosecute perjury by virtue of any appointment made *via* Executive Law § 63 (2). Finally, the OAG's assertion that the Attorney General's authority to conduct the Grand Jury investigation in this matter was solely derived from Executive Law § 63 (2), as opposed to Executive Order 163 (which, according to the OAG's opposition, is reduced to a condition precedent), is contradicted by decisional authority which clearly stands for the proposition that a given special prosecutor's authority is derived, at least in part, from the applicable executive orders that delineate same. *See, People v. Leahy*, 72 N.Y.2d 510, 514; *People v. Rosenberg*, 45 N.Y. 251, 257; *People v. Dondi*, *supra*.¹

Based on the aforesaid, it is apparent that the Defendant's motion seeking the dismissal of the charge of Perjury in the First Degree is properly granted inasmuch as the Attorney General did not have jurisdiction to prosecute that charge in the first instance and, hence, acted without jurisdiction in presenting that charge to the Rensselaer County

¹ The OAG further asserts that the Defendant's allegedly perjured testimony occurred during his testimony before the Grand Jury at which time the Grand Jury was functioning as an investigative body, i.e., during the course of an investigation. In light of the Court's determination as to the inapplicability of Executive Law § 63 (13) as set forth *supra*, the OAG's assertion is moot.

Grand Jury.

Turning now to the Defendant's motion for dismissal of the Indictment pursuant to Criminal Procedure Law §§ 210.20 (1)(c) & 210.35 (5), the Court grants same and dismisses the Indictment.

Decisional authority clearly establishes a *per se* rule calling for the dismissal of an indictment when an unauthorized person is present at a given grand jury and acting in a prosecutorial role. See, People v. Di Falco, *supra* at 486-488; People v. Fox, 253 A.D.2d 192, 195.

In the instant case, inasmuch as the Attorney General was without jurisdiction to prosecute the charge of Perjury in the First Degree, it necessarily follows that those member(s) of the Attorney General's Office who presented that charge to the Rensselaer County Grand Jury were improperly before that body, and thus unauthorized persons, insofar as that charge is concerned. Accordingly, the Court finds that the dismissal of the Indictment necessarily follows by virtue of that unauthorized presence, and does so as a matter of law. See, People v. Di Falco, *supra*; People v. Fox, *supra*.

However, the Court acknowledges that the facts in this case, *vis a vis* the issue of unauthorized persons before the Grand Jury, are unique. In this regard, while the Attorney General was without jurisdiction and hence unauthorized to appear before the Grand Jury insofar as the charge of Perjury in the First Degree is concerned, it remains that the Attorney General possessed jurisdiction and was authorized to appear before the Grand Jury insofar as the charges of Official Misconduct are concerned.

Thus, the instant case presents a situation in which the special prosecutor is concurrently authorized and unauthorized to appear before the Grand Jury. Consequently, although the Court finds that dismissal of the Indictment is mandated as a matter of law, it has alternatively, examined the entirety of the Grand Jury transcript in order to consider whether an order of dismissal is appropriate in the event that the per se rule discussed *supra* is not applicable to the unique facts of this case. *See, People v. Nash*, 64 A.D.3d 878, 882; *op. after remand*, 69 A.D.3d 113; *lv. denied*, 15 N.Y.3d 754.

Upon that review, the Court finds the integrity of the Grand Jury was impaired in this case and impaired to the extent that prejudice to the Defendant is clearly possible. *See, People v. Huston*, 88 N.Y.2d 400, 409; CPL § 210.35 (5).

In this regard, the Court's examination of the Grand Jury transcript reveals that the evidence presented relative to the charge of Perjury in the First Degree is so inextricably intertwined with the charges of Official Misconduct that the Court cannot foreclose the possibility that the Grand Jury's indictment of the Defendant on the charges of Official Misconduct was influenced by the presentation of evidence relative to perjury. In this regard, the evidence presented in support of the perjury charge certainly carried with it the potential to damage the Defendant's credibility generally. *See, People v. Huston, supra* at 410. Furthermore, the evidence as to perjury also strengthened a core evidentiary component of the Attorney General's case regarding the charges of Official Misconduct. Indeed, by bringing forth evidence of perjury regarding the Defendant's testimony regarding whether a waiver of immunity from prosecution

was sought from a witness in a past case involving the death of a civilian due to a law enforcement-involved shooting, the Attorney General undercut the Defendant's testimony as to his reasons for not seeking a waiver of immunity from Sgt. French in the Thevenin case, and further, suggested that inasmuch as no such forbearance occurred in that past case (the particulars of which the Defendant allegedly perjured himself with regard to), no such forbearance was justified and/or legitimate, in the Thevenin case. Consequently, the improper presentation of that evidence to the Grand Jury was of such a nature to constitute one of ". . . those instances where prosecutorial wrongdoing. . . or errors potentially prejudice the ultimate decision reached by the Grand Jury." People v. Huston, *supra* at 409.

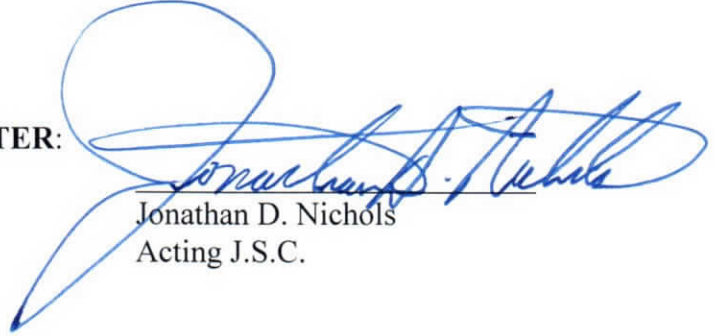
Due to the findings contained in the instant Decision and Order, the Court declines to address the remaining arguments contained in the Defendant's motion, except to the extent that the Court expressly finds that the counts one and two of the Indictment charging the Defendant with Official Misconduct due to his alleged nonfeasance during his presentation of the Thevenin case to a Grand Jury, are based on a legally cognizable theory. Decisional authority clearly establishes that criminal nonfeasance may occur notwithstanding the fact that the duty the public servant in question "refrains from performing" (Penal Law § 195.00 [2]), is one that is discretionary in nature. *See, People v. Flanagan*, 28 N.Y.3d 644, 660-662.

In conclusion, based upon the rationale set forth herein, the Defendant's motion is **Granted** and the Indictment is **Dismissed**.

This constitutes the Decision and Order of the Court.

Dated: June 11, 2018.
Hudson, New York.

ENTER:

A handwritten signature in blue ink, appearing to read "Jonathan D. Nichols", is written over a horizontal line. The signature is stylized and cursive.

Jonathan D. Nichols
Acting J.S.C.