IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 16 CR 590
v.	)	
	)	Judge Gary Feinerman
MARCO PROANO	)	

DEFENDANT MARCO PROANO'S MOTION TO DISMISS INDICTMENT

Defendant, Marco Proano ("Defendant"), by and through his attorney, Daniel Q. Herbert, respectfully moves this Court to dismiss the indictment because it is tainted with information obtained by the government in violation of Defendant's due process rights and due to prosecutorial misconduct. Defendant requests an evidentiary hearing in connection with this Motion. In support of his Motion, Defendant relies on the accompanying Memorandum of Law.

WHEREFORE, for the reasons set forth in the accompanying Memorandum of Law, Defendant requests that the Court dismiss the indictment filed against him or in the alternative conduct an evidentiary hearing.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT

The indictment must be dismissed because it is tainted with information obtained by the government's acquisition and use of immunized statements of the Defendant. Additionally, the indictment must be dismissed because the government presented false, inaccurate, and misleading facts to the grand jury.

THE PROSECUTION VIOLATED DEFENDANT'S RIGHTS UNDER THE FIFTH AMENDMENT BY PRESENTING IMMUNIZED, FALSE, INACCURATE, AND MISLEADING FACTS TO THE GRAND JURY

The essential power of a prosecutor rests not only in her ability to initiate a process that may deprive an individual of her liberty, but also is predicated on the inescapable fact that the

public views her as a paragon of virtue and integrity. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Eighty years ago, the Supreme Court made clear that a prosecutor's duty is to do justice, and not merely to obtain a conviction; to that end, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). In the crucible of our criminal justice system, the integrity of prosecution is necessarily and always premised on the fervent, but often unrealized, hope that a prosecutor's role is to make certain that justice is done and not to merely place another "defendant's skin" on her office wall. *See Berger v. United States*, 476 U.S. 79 (1986) (holding that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done.")

Against this backdrop, the question in this case is whether the prosecution assured that justice was done in its presentation to the grand jury in securing its indictment. The grand jury's historical purpose includes, "both the determination whether there is probable cause to believe a crime has been committed and the protections of citizens against unfounded criminal prosecutions." *United States v. Calandra*, 414 U.S. 338, 343 (1974). Thus, the grand jury's function is "meant to be an independent check on the ability of the government to bring criminal charges against individuals." The grand jury "functions as a shield, standing between the accuser and the accused, protecting the individual citizen against oppressive and unfounded government prosecution." *Calandra*, 414 U.S. at 342-43.

This court has the authority to dismiss an indictment based upon prosecutorial misconduct before a grand jury if the misconduct resulted in prejudice to the defendant. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988). "[D]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's

decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influence of such." *Id*. at 256.

A. Dismissal of the Indictment is Warranted Because It is Tainted

The indictment must be dismissed because it is tainted with information obtained by the government's acquisition and use of immunized statements made by the Defendant. The government not only acquired and used information obtained with the knowledge that these statements were compelled and that their evidence was tainted, it presented that evidence to the grand jury which based the indictment on these immunized statements. Because this indictment was knowingly brought at the expense of Defendant's due process rights and because the indictment could not have been obtained absent these disclosures, the Court must dismiss the indictment.

Although a police officer cannot remain silent in disciplinary proceedings, he does not lose his Fifth Amendment privilege in criminal proceedings. *E.g., Lefkowitz v. Turley,* 414 U.S. 70 (1973). In *Garrity v. New Jersey,* 385 U.S. 493 (1967), the Supreme Court assessed the Fifth Amendment privilege against self-incrimination in a case involving police officers. In *Garrity*, the New Jersey Supreme Court had commissioned the New Jersey Attorney General to conduct an investigation into the fixing of traffic tickets. *Id*. There, police officers were compelled to answer questions regarding the ticketing scheme under the threat of employment termination. *Id*. The officers were later indicted and their compelled statements were used against them at a criminal trial over objection. *Id*.

When the case reached the United States Supreme Court, the Court observed that "policemen are not regulated to a watered-down version of constitutional rights." *Id*. at 500. A police officer's invocation of the privilege against self-incrimination cannot be met with the

response of employment termination. As enunciated in *Gardner v. Broderick*, 392 U.S. 273, 277 (1968), a public employee cannot constitutionally be given the "Hobson's choice between self-incrimination and forfeiting [their] means of livelihood." *Garrity* held that officers' statements, "obtained under threat of removal from office" could not be used against the officers in a subsequent criminal proceeding."

The protections of *Garrity* are "self-executing immunity." *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773, 778 (4th Cir. 1995) (Powell, retired U.S. Sup. Ct. J.); *see also Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985); *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982). As stated in *Aguilera v. Baca*, 394 F.Supp.2d 1203, 1219-20 (C.D. Ca. 2005):

> Where the government compels a witness to testify against herself without officially granting witness immunity, the witness is nevertheless shielded; the government may not use her testimony or any evidence derived from it in any subsequent criminal proceeding. [citing *Garrity*.] This immunity arises automatically and is co-extensive with the use and derivative use immunity mandated by *Kastigar*. . . This so-called *Garrity* immunity automatically attaches to compelled testimony.

See also In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1490 (11th Cir. 1992) ("Immunity under *Garrity* prevents any statements made in the course of the internal investigation from being used against the officers in subsequent criminal proceedings.").

A grant of immunity must be co-extensive with the right to remain silent. *Kastigar v. United States*, 406 U.S. 441, 448-49 & 459-61 (1972). The prosecution is wholly precluded from making any direct or derivative use of compelled testimony. *See e.g., Gardner*, 392 U.S. at 278. As stated in *Kastigar*, there is a "total prohibition on use." *Kastigar*, 406 U.S. at 460. This "provides a comprehensive safeguard, barring the use of compelled testimony as an

'investigatory lead,' and also barring the use of any evidence obtained by focusing the investigation on a witness as a result of his compelled disclosures." *Id*.

The scope of *Garrity* immunity is equivalent to the immunity accorded under federal statutory law, 18 U.S.C. § 6002. *See United States v. Veal*, 153 F.3d 1233, 1241 n. 7 (11th Cir. 1998). The court in *United States v. Vangates*, 287 F.3d 1315, 1321 (11th Cir. 2002) explained this point as:

> The state, of course, can compel a public employee to answer questions in a formal or informal proceeding by granting that employee immunity from future criminal prosecution based on the answers given. Such immunity is the equivalent of the protection afforded an officer under *Garrity*, and is referred to as "use immunity."

Proscribed use may traverse into the non-evidentiary realm, as use of compelled testimony to develop leads, shape testimony, refresh recollection or influence prosecutorial strategy does not leave the declarant "in substantially the same position as if the [s/he] had claimed the Fifth Amendment privilege." *Kastigar*, 406 U.S. at 462. *See United States v. North* ("*North I")*, 910 F.2d 843, 861 (D.C. Cir. 1990), *modified on ref'g,* 920 F.2d 940 (*per curiam)* ("*North II"*) ("Kastigar does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony. It prohibits *any* use,' direct or indirect.") (emphasis original).

There can be no dispute that Defendant, in fact, made *Garrity* protected statements about the very subject at issue in this case. Consequently, the government bears the burden of establishing legitimate, independent sources for this evidence. "Once a defendant demonstrates that he has testified under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Kastigar*, 406 U.S. at 460.

At that hearing, the government has the burden of establishing that its prosecution of Defendant—including the evidence presented to the grand jury which returned the indictment in this case and the evidence which it proposes to introduce against him at the trial of this case—was derived from sources wholly independent of the immunized statements. *United States v. North*, 910 F.2d 843, 854 (D.C.Cir.1990) ("*North I*").

The proof required of the government "is not limited to negation of the taint; rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. The burden imposed is a "heavy one," and cannot be met by denials or speculation. *Id*. at 461. "Neither speculation nor conclusory denials of use or derivative use by government officials will substitute for the affirmative showing of an independent source required for each and every item of evidence presented to the indicting grand jury." *United States v. Hampton*, 775 F.2d 1489 (11th Cir. 1985). *See, e.g., Schmigdall*, 25 F.3d at 1528 ("A government agent's denials that he made use of the immunized testimony, standing alone, are generally insufficient to meet the government's burden, even if made in good faith"); *United States v. Rasco*, 262 F.R.D. 682 (S.D. Ga. 2009) ("mere denials by prosecutors and government agents that they have not misused the defendant's information is not enough under Kastigar"). Nor can the government "escape its error simply by showing the availability of 'wholly independent' evidence from which it might have procured indictment or conviction had it not used the immunized testimony." *United States v. Ponds*, 454 F.3d 313, 328 (D.C.Cir. 2006) (quoting *United States v. Pelletier*, 898 F.2d 297, 303 (2d Cir. 1990)) (emphasis added by Court).

A corollary of the affirmative burden which *Kastigar* imposes on the government is that the burden of proving non-use remains at all times on the government and never shifts to the

defendant to prove use. "[T]he burden of disproving use cannot, under *Kastigar*, be shifted onto the defendant, nor can the defendant be required to assume the burden of going forward with evidence that puts in issue the question of use." *United States v. North*, 920 F.2d 940, 943 (D.C.Cir. 1990) ("*North II*"); see *Schmigdall*, 25 F.3d at 1530 ("The burden of proof remains with the government; the defendant is not required to present evidence that the grand jury was in fact tainted.").

Here, the government heavily relied upon material gathered by the Independent Police Review Authority. It appears that the AUSA Alexakis, who conducted the questioning of the grand jury witnesses, reviewed *Garrity* protected statements, which is prohibited under *Garrity* on its face. As a result, AUSA Alexakis shaped her investigation and questions to the grand jury based upon *Garrity* material. This is not a case in which the government instituted adequate *Garrity* controls before commencing the investigation. Nor is it a case where there has been no use of *Garrity*-protected statements. Special Agent Jennifer Ericks appeared and testified to the shooting incident. The Assistant United States Attorney stated that she had no further questions and asked if any jurors had questions. A juror asked:

> Q: So, what was the officer's excuse for just shooting or what was that again? I mean, why---

Ms. Alexakis:

> A: You're going to hear testimony at a later Grand Jury session about what exactly the officer said after his interview. So, at this time I think I'd just like to limit it to the video. Are there any other questions? I'm not seeing any, so I'd ask at this time the witness be excused.

(See Exhibit A- Grand Jury Testimony of Jennifer Ericks, p. 17). This not only is an example of the government using Defendant's compelled statements, but highlights the government's misconduct in this Grand Jury proceeding. The Grand Juror was unable to ask her question; the

government prevented questions other than those related to the video; and the government specifically acknowledged that the Grand Jury will hear about Defendant's compelled statements concerning the incident.

Defendant's *Garrity*-protected statements have, in fact, been directly and derivatively used. The government relied on IPRA investigative materials extensively. The Grand Jurors were informed of the contents of immunized testimony and relied on that immunized testimony when it returned a true bill. The direct use and derivative use of Defendant's *Garrity*-protected statements simply does not leave him in the same position as if he had exercised his Fifth Amendment privilege against self-incrimination.

B. The Government Misled the Grand Jury by Failing to Adequately Instruct It on The Law and Circumstances Leading Up to the Shooting.

The Indictment must also be dismissed because there was no factual or legal basis for a Grand Jury finding of probable cause. The Government failed to instruct the grand jury on the applicable law. According to the transcripts, the Grand Jury was not instructed on the law at all, nor was it given any explanation as to the requisite elements that make up the underlying charges. Furthermore, the government failed to instruct the Grand Jury on Illinois state law which allows peace officers to use deadly force in certain situations. 720 ILCS 5/7-5. As the Department of Justice has recognized, "[t]he prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration." Principles of Federal Prosecution, United States Attorneys Criminal Resource Manual (2008), § 9-11.010. Here, rather than advising the Grand Jury on the applicable law, the government focused on whether Defendant's actions were in violation of Chicago Police Department policy.

For example, Chicago Police Department Sergeant Larry Snelling ("Sgt. Snelling") provided testimony before the Grand Jury as to whether Defendant's actions were in compliance

with the Chicago Police Department's Deadly Force Policy. Whether or not Defendant's actions were in compliance with Chicago Police Department policy is irrelevant to the underlying charges. This is so because Chicago Police Department's General Orders are intended to "provide members guidance on the 'reasonableness of a particular response option. . .'" *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006). Thus, whether or not Defendant's actions violated CPD policy is completely immaterial to the question of whether Defendant violated the victims' constitutional rights. *Herrera v. City of New Brunswick*, 2008 U.S. Dist LEXIS 7532*21-23 (Court granted defendant's motion for summary judgment despite the fact that the officer violated a police department regulation when he searched the plaintiff). "The mere fact that an arrest was done in violation of police procedures cannot, without more, establish a constitutional violation." *Tanberg v. Sholtis*, 401 F.3d 1151, 1163 (10th Cir. 2005) (citing *Whren v. United States*, 517 U.S. 806, 815(1996) ("[t]he Supreme Court has rejected the use of local police regulations as a standard for evaluating constitutionality of police conduct, on the ground that such a basis of invalidation would not apply in jurisdictions that had a different practice.")

The Supreme Court has made clear that a grand jury does more than merely determine whether probable cause exists:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense- all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained."

Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (quoting *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)) (emphasis added). Since it has the power to

refuse to indict even where a clear violation of law is shown, the grand jury can reflect the conscience of the community in providing relief where strict application of the law would prove unduly harsh." *Gaither v. United States*, 413 F.2d 1061, 1066 n.6 (D.C. Cir. 1969); *see United States v. Cox*, 342 F.2d 167, 189-190 (5th Cir. 1965) (Wisdom, J., concurring) ("By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty."); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979) ("[A] grand jury can return a true bill or no bill as they deem fit" and may consider the availability of administrative relief as an alternative to criminal sanctions.").

It is this power not only to decide whether probable cause exists, but to decide whether the defendant should be charged, and if so for what offenses, that establishes the true independence of the grand jury. This power allows the grand jury to serve as "a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992); *see United States v. Cotton*, 535 U.S. 625, 634 (2002) ("[T]he Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power."). The grand jury's power to return a no bill allows it to fulfill its mission "as a primary security to the innocent against a hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). Here, had the Grand Jurors been properly

instructed on the indicted charge, including the specific *mens rea* requirement, along with Illinois state law, it is certainly possible that the Grand Jury would have returned a no bill.

When presenting a case to the grand jury, the United States Attorney stands in a difficult position. He is a representative of the Executive seeking an indictment. But he also is the representative of the United States who is looked to by the grand jury for an unbiased presentment. The grand jury relies on the United States Attorney and places great trust in he. In this case, the Grand Jury did not receive proper guidance on law nor did it receive proper guidance on the facts leading up to the shooting.

Furthermore, the government failed to inform the Grand Jury of crucial facts leading up to the shooting. Special Agent Ericks misled the jurors by implying that Defendant believed the individuals in the Toyota were guilty of nothing more than a traffic violation. (See Exhibit A- Grand Jury Testimony of Jennifer Ericks, p. 16). Contrary to, the vehicle was wanted for felony possession of a stolen motor vehicle and Defendant was informed of that prior to arriving on scene.

The government, through the testimony of Sgt. Snelling, made great efforts to show that Department policy prohibited shooting at the driver of a vehicle unless that driver was clearly visible by the shooting officer. (See Exhibit B- Grand Jury Testimony of Sgt. Larry Snelling). The government specifically told the Grand Jurors and emphasized to them, that the person operating the vehicle was doing so while lying down and manipulating the gas pedal with his hand. The government did this in an effort to emphasize that Defendant clearly could not see the driver when he discharged his firearm, thus violating Department policy. However, the evidence shows that the driver of the vehicle was in fact struck with a bullet, discharged by Defendant, indicating just the opposite; that he was visible when Defendant discharged his firearm. See

Exhibit A, p. 14. Accordingly, the presentation of the evidence and law was biased and incomplete.

WHEREFORE, for all the reasons stated above, Defendant moves this Honorable Court for an Order dismissing the Indictment and/or granting of an evidentiary hearing.

DATED: May 12, 2017

By:/s/ Daniel Q. Herbert

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on May 12, 2017, he caused a copy of the foregoing **DEFENDANT MARCO PROANO'S MOTION TO DISMISS INDICTMENT** to be filed electronically with the Clerk of the Court through CM/ECF, which will send notification of such filing to all counsels of record.

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