

**IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA**

**STATE OF GEORGIA**

**V.**

**ROBERT E. OLSEN,  
Defendant.**

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**16CR1181-6**

**STATE’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS  
BASED ON THE PRESENCE OF UNAUTHORIZED INDIVIDUALS  
IN THE GRAND JURY ROOM**

Defendant Robert E. Olsen (“Defendant”) has moved to dismiss the indictment against him because there were non-testifying, non-attorney agents of the District Attorney’s Office present during the presentation of the evidence to the grand jury. Georgia law, however, does not prohibit agents of the District Attorney’s Office from being present during the presentation of the evidence. Moreover, Defendant cannot show any prejudice resulting from the presence of those agents. Accordingly, Defendant’s motion should be denied.

**A. Georgia law does not prohibit agents from the District Attorney’s Office from being present in the Grand Jury Room during the presentation of the evidence.**

While Georgia law prohibits the presence of the District Attorney and his staff during deliberations,<sup>1</sup> there is no prohibition on the presence of agents of the District Attorney’s Office during the presentation of the evidence. Indeed, Defendant failed to cite to a single Georgia statute or case that even suggests that any agents of the District Attorney’s Office are prohibited from being present during the presentation of the evidence. Had Georgia wished to implement those prohibitions, it could have done so by implementing rules or statutes similar to those

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<sup>1</sup> *Colon v. State*, 275 Ga. App. 73, 77, 619 S.E.2d 773, 778 (2005) (holding “it is harmful as a matter of law for a district attorney or members of his staff to remain in the presence of the grand jury while the grand jury is deliberating, voting or deciding on any other action concerning any indictment.”).

imposed by the federal government<sup>2</sup> and a few other states.<sup>3</sup> The absence of those prohibitions suggests that neither the District Attorney nor his staff are prohibited from being in the grand jury room during the presentation of the evidence.

Similarly, there are no constitutional prohibitions on the presence of even unauthorized persons during the presentation of the evidence. In *Bank of Nova Scotia v. United States*, the United States Supreme Court examined whether a trial court properly dismissed an indictment because unauthorized persons were present during the presentation of evidence to a grand jury in violation of the express provisions of Federal Rule of Criminal Procedure 6(d).<sup>4</sup> In upholding the appellate court's reversal of the trial court, the Court held "that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."<sup>5</sup>

In addition, the primary purpose behind grand jury secrecy is to preclude the defendant from determining the information presented to the grand jury, not keeping the matters secret from the District Attorney or his staff. As the Georgia Court Appeals noted long ago in *Howard v. State*, there are three reasons to protect the secrecy of grand jury proceedings:

"One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which if known would be for the interest (of defendants) or their confederates to attempt to disprove by procuring false testimony. The third is to

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<sup>2</sup> See USCS Fed Rules Crim Proc R 6 (d) (stating "(1) *While the Grand Jury Is in Session*. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device. (2) *During Deliberations and Voting*. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.").

<sup>3</sup> See, e.g., N.M. Stat. Ann. § 31-6-4 (stating "Persons required or entitled to be present at the taking of testimony before the grand jury include the district attorney and the attorney general and their staffs, interpreters, court reporters, security officers, the witness and an attorney for the target. Security personnel may be present only with special leave of the district court and are neither potential witnesses nor otherwise interested parties in the matter being presented to the grand jury.").

<sup>4</sup> *Bank of N.S. v. United State*, 487 U.S. 250, 254, 108 S. Ct. 2369, 2373, 101 L.Ed.2d 228, 237 (1988).

<sup>5</sup> *Id.*, 487 U.S. at 254, 108 S. Ct. at 2373, 101 L.Ed.2d at 237.

conceal the fact that an indictment is found against a party, in order to avoid danger that he may escape and elude arrest upon it before presentment is made.”<sup>6</sup>

Quoting the *Howard* decision, the Court of Appeals more recently held: “‘The inquisitorial power of the grand jury is the most valuable function which it possesses to-day and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution.’”<sup>7</sup>

Recognizing that the interests of the District Attorney and his agents in maintaining secrecy are aligned with the interests of the grand jury, neither the District Attorney nor his staff are bound by the grand jury rules of secrecy.<sup>8</sup> Were the District Attorney or his staff bound by the grand jury secrecy rules, they would have great difficulty prosecuting cases that result from lengthy grand jury investigations. Notably, the Federal Rule that prohibits members of the government’s non-attorney staff from observing the grand jury expressly allow “disclosure of a grand jury matter ... to ... (ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law.”<sup>9</sup>

Because the rules of secrecy and the reasoning behind them allow agents of the District Attorney’s Office to have access to grand jury matters (other than deliberations and the votes of individual grand jurors), there is no reason to preclude those agents from the presentation of the evidence.

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<sup>6</sup> *Howard v. State*, 60 Ga. App. 229, 235-36, 4 S.E.2d 418, 423-24 (1939) (citing 28 C. J. 813, § 113).

<sup>7</sup> *In re DeKalb Cty. Special Grand Jury Proceedings*, 252 Ga. App. 359, 361, 555 S.E.2d 791, 793 (2001).

<sup>8</sup> *Colon*, 275 Ga. App. at 78, 619 S.E.2d at 779 (noting “the district attorney and his staff are not under the oath of secrecy which binds members of the grand jury.”).

<sup>9</sup> USCS Fed Rules Crim Proc R 6(e)(3).

**B. Even if the District Attorney and his agents were not authorized to be present in the Grand Jury Room, dismissing the indictment is not a proper remedy because Defendant cannot show prejudice.**

Despite Defendant's insinuations to the contrary, as pointed out by the Court of Criminal Appeals of Alabama, "[t]he prevailing view, apart from [states in which there are] statutes expressly affecting the question, is that the presence of an unauthorized person during grand jury proceedings, is at most, a mere irregularity, not sufficient to constitute a ground for setting aside the indictment returned by the grand jury, unless prejudice to the accused is shown."<sup>10</sup> Defendant stated in his brief that "scores of jurisdictions, state and federal, prohibit the prosecution from, inviting people into the grand jury to witness testimony of grand jury witnesses," and then cites 12 cases, all of which are from state jurisdictions, thus implying that the majority of states dismiss indictments when "unauthorized" persons are present.<sup>11</sup> What Defendant left out is that to get to "scores of jurisdictions," Defendant included every federal jurisdiction, which (as noted above) preclude the presence of "unauthorized" persons because of Federal Rule of Criminal Procedure 6(d).

More importantly, an indictment should be dismissed only in the very rare circumstance that it prejudices the defendant. It bears repeating that the United States Supreme Court has held "that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."<sup>12</sup> As the United States Court of Appeals for the First Circuit noted in *In re United States*, "where a court is asked to dismiss an indictment before the conclusion of trial, the standard of prejudice is a high one: that 'dismissal of the indictment is appropriate only 'if it is established that the violation substantially

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<sup>10</sup> *Rutherford v. State*, 612 So. 2d 1277, 1280 (Ala. Crim. App. 1992) (quoting *In re State ex rel. Baxley v. Strawbridge*, 292 Ala. 506, 507, 296 So. 2d 784, 784 (1974) (in turn quoting 4 A.L.R.2d at 395)).

<sup>11</sup> See Defendant's "Motion to Dismiss Based on the Presence of Unauthorized Individuals in the Grand Jury Room" at ¶ 12.

<sup>12</sup> *Bank of N.S.*, 487 U.S. at 254, 108 S. Ct. at 2373, 101 L.Ed.2d at 237.

influenced the grand jury's decision to indict,” or if there is “grave doubt” that the decision to indict was free from the substantial influence of such violations.”<sup>13</sup> The *In re United States* Court noted further that “those circumstances are very rare.”<sup>14</sup>

Like the federal courts, the majority of state courts require a showing of prejudice before the trial court may dismiss an indictment because of the presence of an unauthorized person before the grand jury.<sup>15</sup> In fact, even the California case upon which Defendant relies,<sup>16</sup> *People v. Superior Court (Mouchaourab)*, held that “while [California Penal Code] section 939 provides that only authorized persons are to be present during grand jury proceedings, the presence of unauthorized persons is no longer an express ground for a [California Penal Code] section 995 motion [to dismiss].”<sup>17</sup>

Here, Defendant cannot show any prejudice from the presence of agents of the District Attorney’s Office during the presentation of the evidence. The grand jurors were alone during their deliberations and vote to true bill the case, thus curing the prejudice identified by the

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<sup>13</sup> *In re United States*, 441 F.3d 44, 60 (1st Cir. 2006) (quoting *Bank of N.S.*, 487 U.S. at 256).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Hurn v. State*, 872 P.2d 189, 193 (Alaska Ct. App. 1994) (holding “However, Alaska has not adopted the strict federal rule. In Alaska, an indictment will not be dismissed for a violation of Rule 6(k) unless the defendant shows that the violation prejudiced the fairness of the grand jury proceedings.”); *People v. Rickard*, 761 P.2d 188, 195 (Colo. 1988) (holding “[i]n our view, the dismissal of an indictment, absent factual findings that the defendant was prejudiced, is an abuse of discretion.”); *State v. Summer*, 139 Idaho 219, 223-24, 76 P.3d 963, 967-68 (2003) (holding “there must be both unauthorized persons and resulting prejudice.”); *People v. Fassler*, 153 Ill. 2d 49, 53-54, 178 Ill. Dec. 782, 784, 605 N.E.2d 576, 578 (1992) (holding “while unauthorized persons are never to be permitted to be present in the grand jury room, the presence of such a person is not sufficient to vitiate the indictment unless it appears that the defendant was prejudiced by such presence.”); *Hubbell v. Ind. Supreme Court*, 754 N.E.2d 884, 888 (Ind. 2001) (holding “In Indiana, there is no per se rule presuming prejudice when unauthorized persons appear before the grand jury, or even when those persons participate in the interrogation of witnesses.”); *State v. Manney*, 24 N.J. 571, 583, 133 A.2d 313, 319 (1957) (“The rule was regulatory rather than essential or mandatory, and a mere technical violation, without proof of some circumstances at least suggesting prejudice, is not sufficient to invalidate the indictments returned.”); *People v. Webb*, 157 Misc. 2d 474, 479, 597 N.Y.S.2d 565, 569 (Cnty. Ct. 1993) (“The mere presence of an unauthorized person in the Grand Jury does not automatically require dismissal. There must be some showing that the presence of the unauthorized person created a possibility of prejudice and impaired the integrity of the proceeding.”); *State v. Stull*, 78 Ohio App. 3d 68, 72, 603 N.E.2d 1123, 1126 (1991); *Mason v. State*, 322 S.W.3d 251, 257 (Tex. Crim. App. 2010).

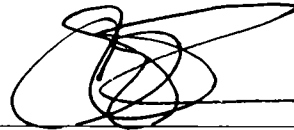
<sup>16</sup> See Defendant’s “Motion to Dismiss Based on the Presence of Unauthorized Individuals in the Grand Jury Room” at ¶ 12.

<sup>17</sup> *People v. Superior Court (Mouchaourab)*, 78 Cal. App. 4th 403, 436, 92 Cal. Rptr. 2d 829, 856 (2000).

Georgia Court of Appeals in *Colon v. State*.<sup>18</sup> Defendant did not show (nor can he show) that the grand jurors were intimidated by having agents of the District Attorney's office present during the presentment of the evidence. Moreover, Defendant himself and three of his attorneys were present during the entire presentation of the evidence, which would counterbalance any imagined prejudice from the presence of the District Attorney's agents.

**WHEREFORE**, the State respectfully requests that the Court deny Defendant's motion to dismiss the indictment.

**Respectfully submitted this 19th day of August, 2016.**



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<sup>18</sup> See *Colon*, 275 Ga. App. at 77, 619 S.E.2d at 778.

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served a copy of: **STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS BASED ON THE PRESENCE OF UNAUTHORIZED INDIVIDUALS IN THE GRAND JURY ROOM**, upon counsel for defendant, ☒ by e-mail; ☒ by depositing the same in the United States Mail with adequate postage affixed thereon to insure delivery, addressed to; ( ) handing the same to him/her or someone in charge of his/her office personally to:

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This the 19th day of August, 2016.



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