UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Criminal No. 3:14CR227(AWT)
	:	
v.	:	
	:	
EARL O'GARRO, JR.	:	October 3, 2015

GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS

The defendant's motion to dismiss the Second Superseding Indictment does not present a close question and should be denied. The defendant does not cite any persuasive evidence of actual grand jury bias in the preindictment stage of this case. To the contrary, the grand jury proceedings were fair and impartial.

I. Legal Standard

"When a person is brought before the grand jury and charged with a criminal offense, that individual is constitutionally entitled to have his case considered by an impartial and unbiased grand jury." *United States v. Burke*, 700 F.2d 70, 82 (2d Cir. 1983). "The grand jury need not deliberate in a sterile chamber, however, to satisfy this constitutional guarantee," *id.*, and a defendant challenging an indictment on grounds of adverse preindictment publicity must "bear the heavy burden of demonstrating that he has suffered actual prejudice as a result of the publicity," *United States v. Myers*, 510 F. Supp. 323, 325-26 (E.D.N.Y. 1980); *see also Beck v. Washington*, 369 U.S. 541, 549 (1962) ("[P]etitioner has failed to show that the body which indicted him was biased or prejudiced against him."); *Burke*, 700 F.2d at 82. This requirement reflects the "strong presumption of regularity" accorded to grand

jury proceedings. *United States v. Nunan*, 236 F.2d 576, 594 (2d Cir. 1956); *see also United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994) ("[A] presumption of regularity attaches to grand jury proceedings.").

II. Argument

As the First Circuit recently observed in the Boston Marathon bombing case, "any high-profile case will receive significant media attention. It is no surprise that people in general, and especially the well-informed, will be aware of it. Knowledge, however, does not equate to disqualifying prejudice." *In re Tsaernav*, 780 F.3d 14, 15 (1st Cir. 2015) (per curiam) (denying writ of mandamus to compel district court to grant change of venue because of widespread pretrial publicity). That commonsense principle comports with the longstanding rule that a grand jury need not be "completely immunized from reports of those events transpiring about it." *Myers*, 510 F. Supp. at 325. Indeed, the Second Circuit has explained that a grand jury may even launch an investigation on its own accord based on media reports: "[A] Grand Jury is not confined to a passive role, but may and often should proceed on its own initiative . . . . That it is induced to such action by newspaper reports forms a continuum with its historic function of ferretting out crime and corruption, and is in no way inconsistent with its duty to decide on and in accordance with the evidence adduced before it." *Nunan*, 236 F.2d at 593 (internal citations omitted). The mere existence of preindictment publicity, therefore, is not enough to establish a constitutional violation and cause the dismissal of an indictment.[1] If the law were

[1] The same is true of pretrial publicity in general. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976) ("[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an

otherwise, "many persons, either prominent or notorious, could readily avoid indictment, a result detrimental to the system of justice." *Myers*, 510 F. Supp. at 326. Hence the requirement that a defendant establish actual prejudice.

The defendant has not come close to meeting his burden. The government does not dispute that there were periodic articles in the local press concerning the defendant, or that the original case agent learned about one aspect of this case—the defendant's alleged theft of City of Hartford insurance premiums—from an article in the Hartford Courant. But there is simply no evidence that any media reports infected grand jury deliberations in this case. First, the government confirmed on the record—as is its practice—that the grand jurors did not know the defendant or the other individuals and companies involved in this case.

Second, putting aside the defendant's hyperbole, there has been no "media storm surrounding the Earl O'Garro matter." Def's Mot. at 6. Instead, there was a smattering of articles, primarily in Hartford-area media outlets, that began in October 2013 and then steadily decreased in frequency. Eight of the nine articles cited by the defendant were published between October and December 2013—nearly a year before the original Indictment was returned in November 2014. The ninth article was published in August 2014 and was primarily about allegations that the defendant failed to pay restaurant workers (conduct unrelated to any allegations in this case). As a result, the impact of any "media storm" in late 2013 over the events at the center of this case had dissipated by the time the Indictment was returned.

---

unfair trial."). "Jurors . . . need not enter the box with empty heads in order to determine the facts impartially." *Skilling v. United States*, 561 U.S. 358, 398 (2010).

And media attention had subsided even further by the time a new grand jury returned the Superseding Indictment in August 2015 and the Second Superseding Indictment in September 2015. *See Tsaernav*, 780 F.3d at 22 ("The nearly two years that have passed since the Marathon bombings has allowed the decibel level of publicity about the crimes themselves to drop and community passions to diminish.").

Third, although the relevant conduct occurred in the metropolitan Hartford area, both the grand jury that returned the original Indictment and the different grand jury that returned the Superseding Indictment and Second Superseding Indictment sat in New Haven. The grand juries were thus insulated from the significant portion of the news coverage that flowed from Hartford-area outlets (principally the Courant).

Fourth, the articles published about the defendant have been largely factual accounts of the events in question, containing "no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 383 (affirming denial of motion to transfer venue); *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990) (affirming denial of motion to transfer venue in part because "[m]any of the articles were simply factual accounts of the frequent court proceedings"). The published articles have not been inflammatory or salacious in nature. Accordingly, even assuming *arguendo* the grand jury was exposed to media reports about the defendant, there is no reason to conclude prejudice would have resulted.

Finally, the defendant blithely ignores that *he generated* the most colorful coverage of this case. *See* Def's Mot. at 5-6 (listing nine print articles, but not the defendant's television interview). On November 13, 2013, the defendant gave an on-camera interview to an NBC Connecticut News reporter, and discussed the allegations against him. George Colli, *Troubleshooters Exclusive: Finding O'Garro*, http://www.nbcconnecticut.com/trouble shooters/Troubleshooters-Exclusive-Finding-OGarro-231837901.html (last visited Oct. 2, 2015). It is ironic that the defendant urges the court to dismiss this case because of preindictment publicity when the defendant willingly contributed to that publicity. *See Maldonado-Rivera*, 922 F.2d at 967 (noting that "some of the pretrial publicity had been generated by the defendants themselves," including one defendant who "discussed the case in an interview on television").

In sum, the defendant's conclusory statement that preindictment news reports in this case "had an undeniable and irreversible impact on the grand jury," Def's Mot. at 6, is insufficient to meet his burden of establishing actual prejudice, *see Burke*, 700 F.2d at 82 ("The appellants have failed to cite any persuasive evidence of actual grand jury prejudice in the preindictment stage of this criminal action. They contend in very general terms that the . . . article and the adverse publicity generated by this story prejudiced them, an argument which is clearly insufficient to warrant reversal under prevailing law."). Given the presumption of regularity afforded to grand jury proceedings, the absolute lack of evidence of actual bias, and indeed the many factors that strongly indicate no prejudice infected the

deliberations, the court should summarily deny the defendant's motion to dismiss the Second Superseding Indictment.

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES ATTORNEY

/s/ *Avi M. Perry*
AVI M. PERRY
Federal Bar No. phv07156

MICHAEL J. GUSTAFSON
Federal Bar No. CT01503

ASSISTANT UNITED STATES ATTORNEYS
157 Church Street
New Haven, Connecticut 06510
Tel. (203) 821-3700

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2015, a copy of the Government's Opposition to Motion to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Avi M. Perry*

AVI M. PERRY
ASSISTANT UNITED STATES ATTORNEY