

NO. A 00000

STATE OF TEXAS)	IN THE DISTRICT COURT
VS.)	216TH JUDICIAL DISTRICT
JOE SMITH)	KERR COUNTY, TEXAS

MOTION FOR DISCLOSURE OF GRAND JURY TESTIMONY

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith makes this Motion for Disclosure of Grand Jury Testimony of all witnesses who have testified before grand juries investigating this case pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, article I, §§ 3, 10, 13, and 19 of the Texas Constitution, and articles 20.02 and 39.14 of the Texas Code of Criminal Procedure, and shows the following:

I.

The defense is uncertain who has testified before the grand jury or juries that have investigated Mr. Smith's cases. Counsel has filed a Motion To Compel Endorsement Upon The Indictment Of The Names Of Grand Jury Witnesses, as required by article 20.20 of the Texas Code of Criminal Procedure. The defense presently has reason to believe and does believe that the following three persons have testified to date: "Felicity Smith" (pseudonym), complainant in cause numbers A 00003 and A 00002; Carol Johnson, an officer with the Kerr County Sheriff's Department who investigated cause numbers A 00000, A 00001, and A 00002; and L.S., a person who witnessed most if not all of the events surrounding the alleged sexual assaults in cause numbers A 00000 and A 00001. Additionally, counsel

knows that an application for subpoena before grand jury was prepared to obtain the testimony of "Jane Doe" (pseudonym), complainant in cause number A00003.

II.

A defendant is entitled to disclosure of grand jury testimony upon a showing of "particularized need." *Dennis v. United States*, 384 U.S. 855, 874 (1966); *see also* TEX. CODE CRIM. PROC. art. 20.02(d)(defendant may petition for disclosure of grand jury testimony and "court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.").

III.

Defendant asserts that a "particularized need" exists justifying this motion for disclosure of the grand jury testimony of the previously described witnesses, for the following reasons:

1. When complainant "Smith" initially spoke to investigator Johnson on April 27, 2011, she insisted in response to multiple questions that there had been no vaginal penetration. Instead, she said that Mr. Smith had attempted to penetrate her vagina, and that his erect penis had contacted her, over her underwear. The complainant, though, had told different stories to other persons, and upon learning of this, Johnson spoke to her again on May 11, to reconcile the discrepancies. At this time, the complainant continued to insist that her vagina had never been penetrated, and she added another allegation - that Mr. Smith attempted to put his penis in her mouth. This alleged attempt at penetration failed, although, according to the complainant on May 11, contact was made with her mouth. On or about July 18, 2011, the grand jury in this case issued two indictments against Mr. Smith, the first alleging contact between the complainant's sexual organ and Mr. Smith's penis; the second alleging *penetration* of the complainant's *mouth* and sexual organ. It is apparent, then, that the complainant told a different story to the grand jury than she told to the investigator, and possibly, to other people. It is likely that she also contradicted herself in material ways before the grand jury. Because these multiple, different stories given by the

complainant cannot all be true, each can be used to impeach her trial testimony. This impeachment evidence is exculpatory and disclosure is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675-78 (1985). Disclosure is also required under the Due Course of Law provisions of Article I, §§ 13 and 19 of the Texas Constitution.

2. The complainant told investigator Johnson that L.S. was in the presence of her and Mr. Smith almost the entire time during which this alleged sexual assault occurred. She also told Johnson that L.S. told at least one other person that he and Mr. Smith and the complainant had "had a threesome." The defense believes that L.S. testified before the grand jury that indicted Mr. Smith, and that he told the truth, namely, that any sexual activity between him and the complainant, and between the complainant and Mr. Smith on or about February 18, 2011 was entirely consensual and therefore non-criminal. Such testimony, and anything else L.S. might have told the grand jury that can be used to contradict the complainant's testimony, is exculpatory and disclosure is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675-78 (1985). Disclosure is also required under the Due Course of Law provisions of Article I, §§ 13 and 19 of the Texas Constitution.
3. Investigator Carol Johnson interviewed Mr. Smith, the complainant, L.S., and a number of persons claiming knowledge of the alleged sexual assaults on or about February 18, 2011, and September 3, 2010. Undoubtedly, if she testified before the grand jury, the attorneys representing the state, and the grand jurors would have questioned her about these interviews, and the numerous discrepancies between the various witnesses, and about the discrepancies between the wholly contradictory versions that the complainant herself has put forth in this case at various times. Johnson's direct knowledge of those interviews and of the complainant's discrepancies is exculpatory and disclosure is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675-78 (1985). Disclosure is also required under the Due Course of Law provisions of Article I, §§ 13 and 19 of the Texas Constitution.

IV.

It is a reasonable deduction that the state has utilized this grand jury, at least in part,

for discovery purposes and has obtained a wealth of knowledge in the process. If transcribed, the testimony before the grand jury is available to the state to impeach witnesses, to refresh the witnesses's recollections, and to prepare the prosecution's case. It is fundamentally unfair for state to unilaterally employ the grand jury process to gather information to prosecute an individual for criminal activity, while at the same time denying the person prosecuted equal access to the information gathered. "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations. *Dennis v. United States*, 384 U.S. 855, 873 (1966).

V.

If the witnesses who testified before the grand jury also testify for the state at trial, the prosecution will have to produce their grand jury testimony for purposes of cross examination. TEX. R. EVID. 615(f)(3). Because of the volume of material, the defense will be required to ask for a recess after each witness has testified, if delivery is delayed until trial. Such recess will have to be granted "for a reasonable examination of such statement[s] and for preparation for its use in trial." TEX. R. EVID. 615(d). Such recesses will be prejudicial to defendant and will slow down the trial.

VI.

The information contained in the grand jury transcripts is material and relevant to defendant's case. The information contained in the grand jury transcripts is not privileged,

or, if privileged, then the privilege must give way to the overriding interest defendant has in preparing and presenting his case and in order to preserve defendant's right to compulsory process, to confront and cross-examine witnesses against him, to effective assistance of counsel, to due process and to equal protection of the law, guaranteed by the above cited provisions of the United States and Texas Constitutions. This motion is made well in advance of trial, in good faith, and not for the purpose of delay.

VII.

The grand jury testimony, if it exists, is presently in possession and exclusive control of the state, and is not otherwise procurable by the defendant through the exercise of due diligence.

Respectfully submitted:

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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion For Disclosure Of Grand Jury Testimony has been mailed and e-mailed to Mary Brown, Kerr County District Attorney's Office, 521 Earl Garrett St.; Kerrville, Texas 78028, on this the ____ day of January, 2020.

MARK STEVENS

CERTIFICATE OF CONFERENCE

I have spoken with assistant district attorney Mary Brown about this motion and we were unable to agree on its resolution.

MARK STEVENS

ORDER

On this the ____ day of _____, 2020, came on to be considered Defendant's Motion For Disclosure Of Grand Jury Testimony, and said Motion is hereby (GRANTED) (DENIED).

SIGNED on the date set forth above.

JUDGE PRESIDING