The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

In re Grand Jury

No. 217—2018-CV-00382

ORDER

This case involves the proposed use of grand jury material by the New Hampshire Attorney General to prepare a report. Because of the secrecy of grand jury proceedings, file and the pleadings in this case have been kept under seal.

Following extensive briefing, this Court issued a Sealed Order on the extent to which grand jury material may be used by the Attorney General on August 12, 2019. In that Order, the Court stated that the Order would remain under seal for 10 days and that any party who seeks that the Order remain under seal after that must file a memorandum setting forth the reasons that the Order should remain under seal.

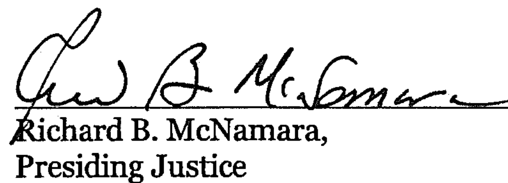
All parties have advised the Court that they have no objection to the Court's August 12, 2019 Order being made public. The Court believes that making the August 12, 2019 Order public, while providing that the remainder of the file remains under seal, strikes the appropriate balance between the interests of grand jury secrecy and the public's constitutional right to access to judicial proceedings.

Accordingly, the Court orders as follows. This Court's August 12, 2019 Order is unsealed, and is now public. A new copy of the Order, dated August 12, 2019, with the

word "Sealed" removed shall be placed in the file. Since no party has filed a Motion to Reconsider, the case will be closed once the time for appeal expires.

SO ORDERED

8/27/19
DATE



Richard B. McNamara,
Presiding Justice

RBM/

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

In re: Grand Jury

No. 217-2017-CV-00382

ORDER

The Office of the New Hampshire Attorney General ("OAG") seeks permission to produce a public report detailing its investigation into St. Paul's School ("SPS") and in so doing disclose materials and testimony provided to a grand jury. For the reasons stated in this Order, the Court DENIES the OAG's Supplemental Motion to Produce and Publicly Disclose a Report of the OAG's Investigation into SPS (the "Motion to Produce and Disclose"). Accordingly, the OAG may not produce any report that contains any material produced to the grand jury through subpoena or testimony or that is characterized as a "Grand Jury Report."

The Court believes that no confidential information is contained in this Order, and there is no reason why it should not be made public. Accordingly, the Court orders that any party who seeks that this Order remain under seal shall file a memorandum, no longer than 5 pages in length, setting forth the reasons that the Order should remain under seal within 10 days from the notice of decision in this matter. If no such memorandum is filed, the Order shall be made public. Because the Court has issued no order which changes the *status quo ante*, there is no reason for the Order to be stayed.

I. <u>Procedural Background</u>

Although the entire file in this case has been placed under seal, much of the

information about the OAG's actions has been placed in the public domain by the OAG. The OAG's Motion to Produce and Disclose includes as Appendix A a six-page Settlement Agreement (the "Settlement Agreement") between the State and SPS dated September 11, 2018. The Settlement Agreement specifically provided that it would be made public. (Settlement Agreement ¶ 22.) A three-page Appendix to the Settlement Agreement calls for and outlines the duties of an Independent Compliance Overseer to carry out the terms of the Settlement Agreement. Under the Settlement Agreement, SPS agreed "to a period of oversight by the [OAG] and to implement improvements in its training, policies, and practices related to responding to allegations of physical and sexual abuse made by students." (Motion to Produce and Disclose ¶ 4.)

The Settlement Agreement not only discloses that the OAG instituted a grand jury investigation into whether SPS engaged in conduct constituting endangering the welfare of a child contrary to RSA 639:3, violations of RSA chapter 642 occurred, and obstructing government operations, but the Settlement Agreement contains specific detail about the scope and conduct of the investigation. It states in relevant part that:

> WHEREAS, as a result of the Grand Jury inquiry, and with the cooperation of St. Paul's School, thousands of pages of documents were produced for inspection by the Office of the Attorney General and the Grand Jury;
>
> WHEREAS, pursuant to the powers of the Grand Jury, numerous witnesses testified regarding their knowledge of these matters;
>
> WHEREAS, the Attorney General convened an investigative task force to pursue leads, interview witnesses, and gather evidence based on the documents and testimony provided to the Grand Jury;
>
> WHEREAS, as a result of its investigation, the Office of the Attorney General has indicated its intention to seek indictments based on the New Hampshire child endangerment statute, RSA 639:3, I, against St. Paul's School regarding this matter;

NOW THEREFORE, the Office of the Attorney General and St. Paul's School agree to resolve this matter without criminal proceeding in accordance with the terms and conditions set forth below. Such resolution will facilitate the protection of children to a greater extent than a criminal proceeding, and will ensure a system of accountability, oversight, transparency, and training.

Accordingly, the Office of the Attorney General agrees that there will be no prosecution of St. Paul's School or its individual agents regarding the handling of past allegations of the physical abuse or sexual abuse of students by faculty or staff, or by fellow students in exchange for the following:

A. Oversight of St. Paul's School (to include the Advanced Studies Program) by the Office of the Attorney General for a period of up to five years, such oversight to include . . .

(Settlement Agreement at 1.)

The Settlement Agreement outlines the obligations of SPS through the Independent Compliance Overseer ("Compliance Overseer") in 25 paragraphs, encompassing five pages. The Settlement Agreement also provides:

> The Office of the Attorney General will release a report concerning its investigation and will also release investigative materials, to include grand jury materials contingent on the required approval from the New Hampshire Superior Court. St. Paul's School agrees to waive any claim of confidentiality in the grand jury proceedings or records.

(Settlement Agreement ¶ 23.)

Before producing a report in accordance with the provisions of the Settlement Agreement, the OAG sought permission to disclose the Motion to Produce and Disclose along with transcripts of grand jury testimony to prospective witnesses and to provide those witnesses 14 days to object to the OAG's use of their testimony and production of the report. That Motion was granted by this Court on November 1, 2018. In due course, a number of individuals, using various pseudonyms (the "Doe Witnesses") filed Motions to Stay and modify the November 1, 2018, Order. The OAG agreed to take no action with respect to the November 1, 2018, Order until the Doe Witnesses' Objections were

resolved.[1]

II. Grand Jury Secrecy

Both the OAG and the Doe Witnesses agree that, in New Hampshire, grand jury proceedings are secret. The parties further agree that the rule of grand jury secrecy is encompassed in New Hampshire Rule of Criminal Procedure 8, Supreme Court Rule 52, and the common-law interpreting and applying these provisions. New Hampshire Rule of Criminal Procedure 8 is modeled upon Federal Rule of Criminal Procedure 6 and part (b) (6) provides that:

> A grand juror, interpreter, stenographer, typist who transcribes recorded testimony, attorney for the State, or any person to whom disclosure is made under paragraph (C) below, shall not disclose matters occurring before the grand jury, except:
>
> (A) As provided by the Supreme Court rules;
>
> (B) To an attorney for the State for use in performance of such attorney's duties;
>
> (C) To such state, local or federal government personnel as are deemed necessary by an attorney for the State to assist in the performance of such attorney's duty to enforce state criminal laws;
>
> (D) When so directed by a court in connection with a judicial proceeding;
>
> (E) When permitted by the court at the request of an attorney for the State, when the disclosure is made by an attorney for the State to another grand jury in the State; or
>
> (F) When permitted by a court at the request of an attorney for the State

[1] Two other issues were raised by the parties, but can be disposed of summarily. First, the parties disagree on the extent to which the underlying pleadings in this case must remain under seal. As a general rule, grand jury proceedings are secret. Opinion of the Justices, 96 N.H. 530, 531 (1950). While the public has a right of access to the Courts under Part 1, Article 22 of the New Hampshire Constitution, that right can be protected by issuing this Order publicly, which does not reference grand jury testimony in any way. Second, the OAG raised a claim that the independence of counsel for the anonymous witnesses was compromised by the fact that attorney's fees for witnesses are being paid by St. Paul's School. Payment of witnesses fees by a corporate entity is common and only prohibited if the independence of counsel is compromised. The OAG conceded at oral argument it has no basis for such a claim and its argument was abandoned.

upon a showing that such matters may disclose a violation of federal criminal law or the criminal law of another state, to an appropriate official of the federal government or of such other state or subdivision of the state, for the purpose of enforcing such law.

A. The Position of the Parties

The OAG argues that in the circumstances of this case, the material presented before the grand jury is not confidential and may be disclosed in a "public report." The New Hampshire Supreme Court has specifically stated that a party seeking disclosure of grand jury proceedings must demonstrate "particularized need". State v. Damiano, 124 N.H. 742, 749 (1984). This is the same standard applied by the federal courts when interpreting the requirements for piercing grand jury secrecy under Federal Rule of Criminal Procedure 6. Douglas Oil Co. v. Petrol Stop Northwest, 441 U.S. 211, 216 (1979). The Court believes that the federal precedent relating to what constitutes a "particularized need" is applicable to determining whether grand jury disclosure should occur under New Hampshire law.

The State does not, however, argue that it can meet the traditional standard of a showing of "particularized need." Rather, it makes two related arguments. First, it argues that the principles underlying grand jury secrecy do not limit a witness's ability to disclose the testimony materials that they provided to the grand jury and, therefore, secrecy is not absolute nor all-inclusive and can be waived. In support of this argument, citing Butterworth v. Smith, 494 U.S. 624 (1990),the State suggests that prohibiting it from producing a grand jury report would be violative of the First Amendment rights of SPS and grand jury witnesses.

Second, the State argues that, in light of SPS's waiver of confidentiality, the OAG investigation into SPS presents a unique circumstance justifying the disclosure of a public

report containing otherwise secret grand jury information. In making this argument, the OAG relies upon a handful of cases that either allow waiver of grand jury secrecy by a witness, In re Biaggi, 478 F.2d 489 (2d Cir. 1973), or allow disclosure in "special circumstances," In re Petition of the American Historical Association, 49 F. Supp.2d 274 (S.D.N.Y 1999).

The Doe Witnesses object. They argue that there is no New Hampshire precedent for a "grand jury report" and that, while witnesses may have the right to disclose their testimony before a grand jury, there is no precedent for the proposition that grand jury witnesses can assign their First Amendment rights to the OAG so that the OAG may prepare a report or dissemination of a report of the grand jury investigation to the public.

B. "Particularized Need" and "Special Circumstances"

A few federal courts have held that the disclosure of grand jury minutes may be permitted for reasons other than the "particularized need" standard of Federal Rule of Criminal Procedure 6 and Douglas Oil. See, e.g., Carlson v. United States, 109 F. Supp. 3d 1025, 1032–34 (N.D. Ill. 2015) (authorizing release of grand jury minutes under the court's inherent authority); see also In re Petition of Craig, 131 F.3d 99, 103 (2d Cir. 1997); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261, 1268–71 (11th Cir. 1984); In re Special February 1975 Grand Jury, 662 F.2d 1232, 135–36 (7th Cir. 1981).

But at least one commentator has concluded that it is "exceedingly doubtful this power actually exists." L. Shaw, 2 Federal Grand Jury § 18.12 (2019). Shaw reasons that the United States Supreme Court has specifically held that whatever the scope of the federal courts' inherent power to formulate procedural rules not specifically required by the Constitution or Congress, such power does not include the power to develop rules that

circumvent or conflict with the Federal Rules of Civil Procedure. See Carlisle v. United States, 463 U.S. 416, 425–26 (1996).

Although New Hampshire Rule of Criminal Procedure 8 was adopted by the New Hampshire Supreme Court itself, it is by no means clear that a trial court has authority to assume powers from a rule that does not explicitly grant such power. Moreover, while in the 19th century New Hampshire's then highest court held that grand jury secrecy could be breached to allow a grand jury witness to testify about what another grand jury witness said before the grand jury where the latter witness testified differently at trial than he did before the grand jury, State v. Wood, 53 N.H. 484, 493 (1873); but more recently the Court held that the presence of unauthorized persons in the grand jury room required that an indictment be quashed. State v. Vanderheyden, 132 N.H. 536, 537 (1992)

In any event, pursuant to the federal cases referenced above, determining whether special circumstances exist to disclose grand jury material is "highly discretionary and fact sensitive." In re Petition of Craig, 131 F.3d at 106. Like Craig, which involved the Roosevelt administration's conflict with the press during World War II, these cases often concern important historical events or matters of great public interest. Id.; see also In re Petition of American Historical Association, et al, 49 F. Supp.2d 274 (S.D.N.Y. 1999) (seeking grand jury materials from the prosecution of Alger Hiss). In these cases, the courts generally outline several factors that may be considered in determining whether certain circumstances warrant disclosure:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which

> the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

In re Petition of Craig, 131 F.3d at 106.

Whether a "special circumstances" exception exists to the New Hampshire rule of grand jury secrecy is a difficult question. The Court believes that the decision in State v. Wood (supra) holding that a grand juror could testify as a witness at a trial about grand jury testimony is a reflection of the pragmatic approach taken by the New Hampshire Supreme; that that a privilege must yield when there is compelling public interest in breaching the privilege or the privilege is being used unfairly. Nelson v. Lewis, 130 N.H. 106, 109 (1987); State v. Mirski, 121 N.H. 901, 911 (1981). Assuming without deciding that a special circumstances exception to grand jury secrecy exists in New Hampshire, the Court need not, however, consider whether special circumstances exist justifying disclosure of the documents to the public because the OAG does not merely seek disclosure, but seeks to create a "public report detailing its investigation into SPS" in which it discloses "the grand jury materials and testimony provided by assenting witnesses during the course of its investigation into SPS." (Motion to Produce and Disclose at 22.)

III. Grand Jury Reports

The critical issue here is the OAG's desire to prepare a "Grand Jury Report." The OAG's argument has two fundamental premises. First, it argues that no statute, rule or other source of law in New Hampshire prohibits grand jury witnesses from disclosing their testimony or materials they provided to the grand jury and that, since SPS was the target of the investigation and it has waived any grand jury confidentiality, the Court may permit the OAG to "release the subpoenas, orders and grand jury materials produced in response

to the subpoenas served on SPS and to include those materials, or reference to those materials, in a publicly-issued report by [the OAG] concerning the grand jury investigation." (Motion to Produce and Disclose ¶ 46.) The OAG relies on the proposition that, "[h]istorically, grand jury secrecy primarily serves to protect the integrity of the grand jury as it executes its functions and therefore, does not prohibit witnesses from publicly disclosing their testimony or material that they produced to the grand jury." (Id. ¶11A.) To properly consider the OAG's argument, the Court must carefully examine the history of the grand jury and its common-law authority.

A. The Common Law Powers of the Grand Jury

The grand jury is one of the oldest institutions of Anglo American law, and to some extent, one of the most problematic. The United States Supreme Court recently rejected the traditional view of the grand jury as an arm of the courts, describing it as a separate institution that has not been "textually assigned" to any of the three branches of government described in the federal Constitution. United States v. Williams, 504 U.S. 36, 47 (1992). The OAG asserts in its memorandum that the institution of the grand jury can be traced back to at least the 12th century. (Motion to Produce and Disclose ¶¶13–15, citing Mark Kadish, Behind the Locked Door of an American Grand Jury, 24 Fla. St. U. L. Rev. (1996).) In fact, historians have debated whether the Norman conquest actually brought a precursor to the grand jury to England. See S. Beale et al, Grand Jury Law and Practice § 1.2 (2018) [hereafter "Beale"], citing 1 Holdsworth, A History of English Law (7th ed. 1956) and Pollock and Maitland, The History of English Law, (2nd ed. 1923).

The original purpose of the grand jury was not only to increase the number of criminal prosecutions but to enhance the King's authority and indirectly to increase

revenue for the crown, which received the property forfeited by persons accused of crimes. Beale § 1.2, citing Pollock and Maitland at 143. But by the 17th century, English grand juries had begun to act as an institution that could shield the innocent from unfounded charges. Beale, § 1:2. By the time of the American Revolution, English law characterized the grand jury as one of the principal protections against arbitrary government prosecution. State v. Gerry, 68 N. H. 495, 497 (1896). Blackstone considered the grand jury "a substantial protection of every citizen against false and malicious charges of crime." 4 W. Blackstone Commentaries on the Laws of England 349–50 (U. Chicago Ed. 1979). This text was likely "the chief, if not the only, legal textbook the framers of the 1784 Constitution possessed." State v. Gerry, 68 N. H. at 498. The handful of early New Hampshire decisions discussing the institution of the grand jury tended to reflect Blackstone's sanguine view. During the colonial era, grand juries were openly partisan and played an important role in colonists' opposition to British rule. Grand juries often refused to indict for crimes involving resistance to British law and the inclusion of the grand jury in the federal Bill of Rights and State constitutions was largely a result of the role of the grand jury played during the American Revolution. Beale, § 1:3.

Yet by the middle of the 19th century, there was no longer a consensus regarding the value or appropriate function of the grand jury. Six new states were admitted in 1889 and 1890, Montana, Washington, North Dakota, South Dakota, Idaho, and Wyoming — none guaranteed the right to indictment by grand jury. Beale, § 1:5, citing Younger, The People's Panel: the Grand Jury in the United States 1634–1941, at 151–52. The late 19th century concern that grand juries were inquisitorial procedures that posed a threat to individual liberty is reflected in Justice Matthews's language holding that the federal

Constitution did not require that states institute felony prosecutions by grand jury and that suggested the historical record establishes that the earliest grand jury were little more than a mob.[2] Hurtado v. People of California, 110 U.S.518, 529 (1884). Currently, about half of the states require felony cases to proceed by grand jury indictment, although most states retain the institution for use in certain cases.

While the institution of a grand jury as an accusatory body was losing favor, the end of the 19th century into the early part of the 20th century was a time in which there were a number of important and highly publicized grand jury investigations. Beale, § 1.5. In some states this led to a renewed interest in grand juries as an investigative tool and a renewed interest in grand jury reports. The concept of a grand jury indictment appears to have been developed from the common law right of the grand jury to present charges not requested by a prosecutor.[3]

B. Grand Jury Reports

There is some evidence that by the colonial era it was common for grand juries to issue reports on a variety of noncriminal matters and served as "general watchdogs over state and local government." Beale, § 2:1. But at the current time, the grand jury's authority to issue reports "varies considerably." Beale, § 2:2.

In 29 states, not including New Hampshire, the grand jury has either statutory or

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[2] "The system thus established is simple . . . . The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is, nevertheless, to be banished. Accusation, therefore, was equivalent to banishment, at least. When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our ancient liberties." Hurtado, 110 U.S. at 530 (quotation omitted).

[3] Originally, at common law, indictments were couched in formal terms written on parchment in Latin. Presentments, brought in by lay juries on their own initiative, were informal and in English. If they contained criminal charges, such charges were then formalized and translated. Richard Kuh, The Grand Jury

judicially recognized authority to issue reports. Beale, § 2.1.But in 16 of those states, grand jury reports are authorized on only a few specific topics by statute. Beale, § 2.1. The scope of grand jury authority makes any generalization difficult; for example, in Pennsylvania and Wyoming grand juries may be authorized to investigate and report their findings on the presence of organized crime in the states. Beale, § 2.1. In several states, including California, Nebraska and Nevada, grand juries have the authority in certain circumstances to file reports exonerating individual who has not been indicted. Beale, § 2.1. In New York, grand juries may recommend disciplinary action or removal for misconduct or neglect by public officials and may make "recommendations for legislative and executive or administrative action in the public interest. N.Y. Crim Code § 190.85. Oklahoma grand juries may report on the condition or operation of any public office or institution. 22 Okl. St. Ann. § 1182. In Utah grand juries may recommend removal or disciplinary action against public officials or employees based on a finding of noncriminal misconduct. Utah Code Ann. § 77-10a-17. California, which has a long history of extensively using the grand jury as a watchdog for State and local government, has statutory provisions governing a variety of procedural issues, including the employment of specialists and the appointment of special counsel to assist the grand jury in its investigation, the consultation with a subject during investigation, and the timing of presentation of reports and responses to reports. Cal. Penal Code §§ 922, 926, 933.05, 936.7.

In New Jersey, Florida, South Carolina, and Virginia, judicial decisions establish that the grand jury has broad investigative and reporting authority. Miami Herald Pub. Co. v. Marko, 352 So.2d 518, 521–23 (Fla. 1977); In re Presentment by Camden County Grand

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"Presentment": Foul Blow or Fair Play? 55 Colum. L. Rev. 1103, 1104, (1955).

Jury, 169 A.2d 465, 472–73 (N.J. 1961); State v. Bramlett, 164 SE. 873, 876 (S.C. 1932); Vihko v. Commonwealth, 393 S.E.2d 413, 415 (Va. Ct. App. 1990).

The prevailing view of the federal courts is that grand juries have no common-law authority to make accusations against individuals falling short of indictment. Application of United Elec., Radio & Mach. Workers of America, 111 F. Supp. 858, 868 (S.D.N.Y. 1953); but see In re Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219, 1222 (D.D.C. 1974). Statutory authority for the issuance of grand jury reports exists in 18 U.S.C.A. § 3333, which applies to special grand juries that may submit a report to the court concerning "organized crime conditions in the district" or "noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action."

C. Criticism of Individuals in Grand Jury Reports

Grand jury reports that criticize individuals are extremely controversial. A grand jury report that does not result in an indictment but references supposed misconduct results in a quasi-official accusation of wrongdoing drawn from secret *ex parte* proceedings in which there is no opportunity available or presented for a formal defense. The Florida Supreme Court described a grand jury report finding a public official guilty of wrongdoing without affording him a trial as "not far removed from and . . . no less repugnant to traditions of fair play than lynch law." State ex rel. Brautigam v. Interim Report of Grand Jury, 93 So.2d 99, 102 (Fla. 1957). In holding that a grand jury report on alleged mismanagement of public office could not be released where no evidence

warranting indictment had been covered, Judge Fuld of the New York Court of Appeals cogently stated:

> In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted. An indictment charges a violation of a known and certain public law and is but the first step in a long process in which the accused may seek vindication through exercise of the right to a public trial, to a jury, to counsel, to confrontation of witnesses against him and, if convicted, to an appeal. A report, on the contrary, based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body occupying a position of respect and importance in the community, its potential for harm is incalculable.

Wood v. Hughes, 9 N.Y.2d 144, 154 (1961).

Statutes in a number of states which permit grand jury reports expressly prohibit grand jury reports that censure or criticize individuals. Beale § 2:3; see Nev. Rev. Stat. § 172.267(2); N.Y. Crim. Proc. Law § 190.85 (2)(b); Okla. Stat. Ann. tit. 22 § 346; Wash Rev. Code Ann. § 10.27.160. Those jurisdictions that do permit reports criticizing individuals provide elaborate procedural safeguards. For example, the federal statute authorizing a special grand jury to submit a report to the court contains a number of procedural safeguards intended to ensure accuracy and fairness to individuals whose conduct is discussed in a grand jury proceeding and contains procedural protections analogous to New York law. 18 U.S.C.A § 3333. New York and federal courts may not accept a grand jury report unless the court finds the report is supported by the preponderance of the evidence heard by the grand jury. Beale § 2.3; 18 U.S.C.A. § 3333(b)(1). Alaska requires that a person adversely affected by a grand jury report be given notice of the report, a reasonable time to review the report and supporting grand jury record, and provided an

opportunity to challenge the record and file a written response and request that it be released with the report. Alaska R. Crim. P. 6.1(c)(1)–(4). Nevada, Florida, Colorado, and New Jersey have less elaborate procedural schemes that accomplish the same purpose. Beale § 2.3. In states where there is no statutory provision on point, "the majority view is that the grand jury is not empowered to issue reports that criticize or censure individuals." Beale § 2.3; citing Ex parte Burns, 73 So.2d 912 (Ala.1954); Ex parte Faulkner, 251 S.W.2d 822 (Ark.1952); In re Floyd County Grand Jury Presentments for May Term 1996, 484 S.E.2d 769 (Ga. Ct. App. 1997); In re Report of Grand Jury of Marshall County, 438 N.E.2d 1316 (Ill. Ct. App. 1982); Rector v. Smith, 11 Iowa 302 (1860); Bowling v. Sinnette, 666 S.W.2d 743 (Ky. 1984); In re Report of Grand Jury of Carroll Cty. November Term, 1976, 386 A.2d 1246 (Md. Ct. Spec. App. 1978); Bennett v. Kalamazoo Circuit Judge, 150 NW. 141 (Mich.1914); In re Grand Jury of Hennepin County Impaneled on November 24, 1975, 271 N.W.2d 817 (Minn. 1978); Petition of Davis, 257 So.2d 884 (Miss. 1972); Matter of Interim Report of Grand Jury for March Term of Seventh Judicial Circuit of Missouri 1976, 553 S.W.2d 479 (Mo. 1977) (en banc); Simington v. Shrimp, 60 Ohio App. 2d 402, 398 N.E.2d 812 (1978); Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882 (1952); State ex rel. Town of Caledonia, Racine County v. County Court of Racine County, 254 N.W.2d 317 (Wis. 1977). Several states prohibit critical reports only if they accuse an individual of an indictable or impeachable offense without formally charging him or her with that offense. Biglieri v. Washoe County Grand Jury Report Dated March 15, 1966, 601 P.2d 703 (Nev. 1979); Appeal of Messano, 106 A.2d 537 (N.J. 1954); State v. Bramblett, 164 S.E. 873 (S.C. 1932).

D. Common-law Authority for Grand Jury Reports in New Hampshire

A New Hampshire grand jury is an investigatory body as well as an accusatory body and it "may return an indictment submitted by the Attorney General involving a crime committed within the county or refuse to do so." Powell v. Pappiagianis, 108 N.H. 523, 524 (1968). The New Hampshire Supreme Court has emphasized that the grand jury's common-law powers "are not restricted" and even has authority "to hand down a presentment." Id. But the parties in this case have not cited, and the Court cannot find, any instance in which a New Hampshire grand jury has returned a presentment that did not result in criminal charges.

Recognizing that both New Hampshire Rule of Criminal Procedure 8 and the common law permit witnesses from disclosing their testimony to the grand jury, the OAG argues that since SPS was the witness subpoenaed to produce records it has a right to disclose its involvement in the grand jury process. See Butterworth v. Smith, 494 U.S. 624, 626 (1990).[4] But this argument misses the law. The OAG does not merely seek access to documents: it seeks to prepare a report, with the imprimatur of a grand jury investigation and submit it to the public. SPS does not seek to prepare such a report. In fact, it is quite likely that the material provided to the grand jury could not be submitted to the public because it would contain confidential information about former employees of SPS and former students of SPS.[5]

Since in New Hampshire the grand jury is "little regulated by either Constitution or statute" but retains its common law rights, State v. Canatella, 96 N.H. at 204, a New

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[4] The OAG seeks the documents submitted to the grand jury, not a witness's testimony about what he said to the grand jury. It is not clear that there is equivalence, but the Court need not decide the issue at this time.
[5] At oral argument, the parties informed the Court that SPS had indeed hired the former Attorney General of the Commonwealth of Massachusetts to do an investigation of sexual abuse at the school and made the

Hampshire grand jury's secrecy can be invaded for the purposes of the OAG preparing a report only if doing so is authorized by the common law. Critical to this issue is the fact that the grand jury investigation in this case is over. Any "grand jury report" produced by the OAG will not be a presentment by the grand jury of its conclusions that someone should be charged. Rather, it will be the OAG's summary of what it believes is relevant for the public to know about the grand jury's deliberations. The Court must therefore determine if the common law powers of the grand jury allow the OAG to use grand jury materials and prepare a public report of the grand jury investigation under these circumstances.

The grand jury is itself part of the common law generally considered to be created by Henry II. The common law developed as judges traveled throughout the realm and wrote down their decisions, choosing the best customs and applying them through use of the first legal reporter, the Yearbook. J.H. Baker, An Introduction to English Legal History, 225 (3rd ed. 1990). This judge created body of law became the so-called common law, and has expanded or contracted and changed for 800 years.

Part II, Article 90 of the New Hampshire Constitution, enacted in 1784, specifically provided that the common law would remain in full force and effect unless repugnant to the rights and liberties contained in the Constitution. State v. Sanders, 66 N.H. 39, 75-76 (1889); see also Ridlon v. N.H. Bureau of Securities Regulation, 2019 WL 3311343 *8 (July 24, 2019) (Hantz-Marconi, J. dissenting).

Common law was defined by Chief Justice Charles Doe as "in general a system of natural principles, necessarily adopted by custom and common consent, and necessarily

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investigation public.

comformable to the progress of society." Brooks v. Howison, 63 N.H. 382, 386 (1885). "Custom" is not a historical determination but arises from society's needs and norms, set against a background of common usage. See generally J. Reid, Chief Justice: the Judicial World of Charles Doe, 349–55 (Harvard University Press 1967).

The common law authority of the grand jury cannot authorize breach of its secrecy so that the OAG can prepare a public report of its determinations, considerations, and evidence that the OAG unilaterally decides the public should see. Such a "grand jury" report has no connection with the traditional common-law role of the grand jury; such a report will not result in "ferreting out crime" or "absolving those enveloped in a cloud of rumors and suspicion." Powell v. Pappagianis, 108 N.H. at 524. There is no historical basis for such a report in New Hampshire; and the most that can be said of the cases that have authorized grand jury reports to be prepared is that they proceed pursuant to statute or custom that is not generally recognized. See generally Beale § 2.3.

Common law was said by Chief Justice Doe to be "the perfection of reason." Lisbon v. Lyman, 49 N.H. 553, 571 (1870). But allowing a "Grand Jury Report" to be cobbled together from confidential material for public consumption by a prosecutor can scarcely be said to meet that standard.

The potential for unfairness in the OAG's request is magnified by the absence of satisfactory remedies. If a report is promulgated, the accused may have no remedy at all, even if the accusations are demonstrably false. Most of the states that permit grand jury reports either contain procedures to protect the reputation of those referenced in the report but who are not charged, or prohibit disclosure of their identities altogether. In light of the fragmentary nature of American law regarding grand jury reports, the Court

cannot find that the use of grand jury materials and the breach of grand jury secrecy in order to prepare a report is a practice authorized by New Hampshire common law.

The OAG argues that common law precedent for such a report does in fact exist because the Hillsborough County Superior Court authorized an agreement between the OAG and the Diocese of Manchester to waive the secrecy of a grand jury investigation into sexual abuse of children by employees of the Diocese of Manchester and to authorize the release of sealed subpoenas, pleadings, and orders related to the grand jury investigation. (Motion to Produce and Disclose ¶ 31.) A copy of the agreement between the Diocese of Manchester and the OAG ("Diocese-OAG Agreement") is appended to the OAG's Motion to Produce and Disclose as Exhibit B. The Hillsborough County Superior Court endorsed the Diocese-OAG Agreement without explanation and without any written order.

The Diocese-OAG Agreement provides virtually no protection for accused but not indicted individuals, victims, or third parties. It provides in relevant part:

> The Office of the Attorney General will *take all reasonable steps to ensure the confidentiality of the identity of the victims in the Report, the release of the Investigative File, and the disclosure of the Documents.* The Office of the Attorney General will not disclose any mental health or other medical records, *except that the Office of the Attorney General reserves the right to quote or cite in its Report those portions of such records that illustrate the information that the Diocese had and its response to information regarding sexual abuse of minors by clergy.* The Office of the Attorney General will provide the Diocese with a copy of its Report, the Investigative File, and the Documents to which the Office of the Attorney General intends to release to the public no later than ten business days prior to the release of the Report, Investigative File, and/or Documents. To the extent the Diocese has a dispute as to the quotation or citation of any portion of the medical and mental health records obtained from the Diocese pursuant to Grand Jury subpoena, the Diocese may file a motion in the Hillsborough County Superior Court for adjudication of that matter. . . . To the extent the Diocese has concern that release of the Documents will infringe upon the privacy interests of Diocesan Personnel, an accused priest, or a third-party, the Diocese may present those concerns to the Office of the Attorney General before the Documents are released. The Office of the Attorney General will

> consider the concerns of the Diocese prior to releasing the report and/or documents. However, with the exception of mental and medical health records, the Office of the Attorney General retains sole discretion regarding the information and/or documents that it intends to release.

(Diocese-OAG Agreement at 7–8 (emphasis added).)

The Court respectfully disagrees with the decision of the Hillsborough County Superior Court to approve the Diocese-OAG Agreement. The Diocese-OAG Agreement fulfilled none of the traditional purposes of the common law grand jury. Rather than investigation of crime, the report is a *post hoc* summary of information the grand jury considered, but did not indict on. It did not protect the privacy interests of those witnesses and subjects that were never charged with a crime by the grand jury.

The deficiency of the Diocese-OAG Agreement is cast in bold relief by the December 2018 decision of the Pennsylvania Supreme Court in In re Fortieth Statewide Investigating Grand Jury, 197 Atl. 3d 712 (Pa. 2018). Pennsylvania has a statute that specifically authorizes investigative grand juries and investigative reports. However, as in most states, the statute contains statutory procedures to provide individuals with due process protections for their reputational rights. The relevant statute, 42 Pa.C.S. § 4552(e), establishes two procedures by which a named but not indicted individual may protect his or her reputational interest. First, such a person may by submit a written response to the report. In the alternative, he or she may request that the supervising judge examine the record and determine those allegations which may result in reputational harm were based on facts derived from the grand jury investigation and which are supported by a preponderance of the evidence. The Pennsylvania Supreme Court found that in the circumstances before it, both procedures failed to satisfy the due process rights of the petitioners in In re Fortieth and, despite the existence of a statute authorizing the report,

the petitioners were entitled to have a report published with redactions of their names and other identifying information in order to protect their right to reputation. 197 Atl. 3d at 724.[6]

In re Fortieth is instructive for two reasons. First, the fact that such a report was created pursuant to statutory authorization strongly suggests that no common-law authority for such reports exists; and the fact that the due process procedures engrafted in the statute were found to be insufficient to protect the citizenry suggest that use of the grand jury here in this case, in the manner proposed by the OAG, would be inconsistent with settled principles of constitutional law, and could not reasonably be considered to be part of the common law.

IV. Conclusion

A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. "Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." State v. Hall, 152 N.H. 374, 376 (2005) quoting United States v. Calandra, 414 U.S. 338, 343–44 (1974). Over the last 60 years, the common law of criminal procedure has expanded the role of constitutional protections to pretrial proceedings to make sure that rights protected in criminal trials by the Constitution are not rendered nugatory by pretrial state actions. See, e.g., Miranda v. Arizona 384 U.S. 436 (1966) (right to counsel during interrogation to protect Fifth Amendment rights); Stovall v. Denno, 388 U.S. 293 (1967) (due process rights to pretrial identification procedures);

[6] In fact, despite the procedural protections in the Pennsylvania statute, commentators have cogently criticized the fairness of the Pennsylvania grand jury report procedure. See generally Gallini, Bringing Down a Legend: How an "Independent" Grand Jury Ended Joe Paterno's Career, 80 Tenn. L.Rev. 705 (2013).

Brady v. Maryland, 373 U.S. 83 (1963) (due process right to exculpatory evidence must be provided prior to trial).

The somewhat anomalous grand jury is like a rock which has withstood the tidal changes in the law governing criminal procedure. The grand jury remains an accusatory body which may base its decision entirely on hearsay evidence. Hall, 152 N.H.at 376. Evidence presented to a grand jury in derogation of a defendant's Fifth Amendment rights provides no basis to vitiate the indictment. United States v. Blue, 384 U.S. 251 (1966); State v. Blake, 113 N.H. 115 (1973). A grand jury may consider evidence obtained in violation of the defendant's Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). And a defendant has no right to require the State to present exculpatory evidence to a grand jury. Hall 152 N.H. at 376. It is for these reasons that trial judges universally instruct juries that an indictment is not evidence; it is simply the manner in which a person is brought to trial. N.H. Pattern Crim. Instruction 31. And it is for this reason that the custom and reason of the common law does not authorize reports based upon grand jury proceedings.

Mark Twain famously said that a lie is halfway around the world while the truth is putting on its shoes. In an internet age, he might have added that the lie will forever outrun the truth as search engines become ever more efficient. An allegation of wrongdoing or impropriety, based upon half-truths, illegally seized evidence, or rumor, innuendo or hearsay may blight an individual's life indefinitely. Private and embarrassing information about the trauma suffered by a victim of sexual abuse may become public and remain public forever. The difficulty is magnified by the fact that statutory procedures in other states that allow grand jury reports to be promulgated and provide procedural

safeguards may lead lay people to believe that there is some evidentiary value to a grand jury report that was issued in New Hampshire with absolutely no procedural safeguards. The Court believes that the common law powers of the grand jury do not allow a prosecutor to present a summary of its investigations and findings that the prosecutor, in its sole discretion, believes are important.[7]

Accordingly, the Court DENIES the OAG's Motion to Produce and Disclose. The OAG may not produce any report that contains any material produced to the grand jury through subpoena or testimony or which is characterized as a "Grand Jury Report." The Court believes that no confidential information is contained in this Order, and there is no reason why it should not be made public. Therefore, the Court orders that any party who wishes that this Order remain under seal shall, within 10 days from the notice of decision in this matter, file a memorandum, no longer than 5 pages in length, setting forth the reasons that the Order should remain under seal. If no such memorandum is filed, the Order shall be made public. Because the Court has issued no Order that changes the *status quo ante*, there is no reason for the Order to be stayed.

SO ORDERED

8/12/19
DATE

Richard B. McNamara,
Presiding Justice

RBM/

[7] Because there is no common law authority for a grand jury report, the remedies such as those proposed by the Pennsylvania Supreme Court in In re Fortieth are not available to the OAG.