

NO: 20-CI-005721

**JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE ANNIE O'CONNELL**

ANONYMOUS GRAND JUROR #1

PLAINTIFF

V.

COMMONWEALTH OF KENTUCKY

DEFENDANT

OPINION AND ORDER

On March 13, 2020, officers of the Louisville Metro Police Department (“LMPD”) executed a search warrant at 3003 Springfield Drive, Apt. 4 in Louisville, Kentucky. During the execution of that warrant, Breonna Taylor was shot and killed; an officer received a gunshot wound to the leg; and neighboring apartments sustained property damage. Due to a conflict with the Jefferson County Commonwealth’s Attorney, the Office of Daniel Cameron, the Attorney General of Kentucky, took over the investigation and grand jury proceedings regarding the execution of the search warrant.

The matter was ultimately presented to the grand jury empaneled in Jefferson County Circuit Court for the month of September 2020. This Court presided over the grand jury for the month of September 2020. On September 23, 2020, the grand jury returned an indictment against former LMPD Detective Brett Hankison, charging three (3) counts of wanton endangerment in the first degree. (Case No. 20-CR-1473) No charges were returned against any other officers involved in the execution of the search warrant at 3003 Springfield Drive, Apt. 4.

The case against Hankison was randomly assigned to Jefferson Circuit Court Division Thirteen (13) for further proceedings. On September 28, 2020, Hankison made his first appearance before that court. Hankison was arraigned, and the trial court ordered that all discovery, including grand jury recordings, be submitted to the court file. That same day - and

almost simultaneously with the trial court's order regarding discovery - one of the jurors empaneled for the September 2020 grand jury (herein Anonymous Grand Juror #1) filed a Motion for Release of Grand Jury Transcripts/Recordings/Reports along with a petition for a Declaration of Rights Pursuant to KRS 418.040. The Commonwealth filed a Motion to Dismiss and Response to Anonymous Grand Juror #1's motion and petition. On October 7, 2020, the Court heard arguments from both parties. The matter now stands submitted for ruling.

While Anonymous Grand Juror #1 makes distinctly separate requests, they are related in subject matter. The Court will take each in turn.

I. This Court has jurisdiction and authority to release grand jury proceedings pursuant to RCr 5.24 (1).

Anonymous Grand Juror #1 first makes a motion pursuant to RCr 5.24 for release of grand jury proceedings. As a preliminary matter, this Court has jurisdiction to hear Anonymous Grand Juror #1's motion. "A grand jury is part of the court and under judicial control, so there can be no doubt that a session of the grand jury is a 'proceeding in a circuit court.'" *Greenwell v. Com.*, 317 S.W.2d 859, 861 (Ky. App. 1958). In Jefferson County, the "circuit court" is comprised of thirteen judges, each of whom presides over a division of the circuit court. Each judge also presides over the grand jury, on a rotating basis, for one month at a time. In September 2020, this Court presided over the grand jury. This motion is brought by a juror seated during the September 2020 grand jury session. The motion concerns proceedings over which this Court presided and an indictment that resulted therefrom. Therefore, this Court properly has jurisdiction to hear the motion.¹

¹ With respect to venue, it is possible that this motion may also have been brought before the Hon. Mitch Perry, the judge presiding over the grand jury for the month of October (and during which this motion was filed), and/or it may have been filed in front of Hon. Ann Smith, now the trial judge presiding over the resulting indictment in *Commonwealth v. Brett Hankison*. However, there is no authority which clearly resolves this issue. Absent authority that would prevent this Court from hearing and ruling on the motion and applying the logic outlined above, this Court concludes that Anonymous Grand Juror #1's motion was properly filed before this Court.

At the outset, it must be noted that, at this stage, the trial court in *Commonwealth v. Brett Hankison* has already ordered the grand jury recordings released. As such, the recorded proceedings are now widely available to the public. The Attorney General argues that this renders Anonymous Grand Juror #1's motion moot. However, information exists which has not been released. By this Court's estimation, the information about the grand jury proceedings in this matter that remains secret is 1) the identities of the grand jurors themselves; and 2) any proceedings, including the deliberations, that were not recorded. Anonymous Grand Juror #1 now seeks leave of court to release "information and details about the process of the grand jury proceedings . . . and any potential charges presented or not . . ." What seems to have provoked this motion is that the Attorney General himself has made several public comments about the proceedings that led to the indictment of Brett Hankison, including statements that unilaterally characterize the grand jury's process and decision. Presumably, Anonymous Grand Juror #1 seeks to make additional information public that may refute, support, or clarify the Attorney General's characterizations.

Kentucky Rule of Criminal Procedure 5.24(1) states: "Subject to the right of a person indicted to procure a transcript or recording as provided by Rule 5.16(3), and ***subject to the authority of the court at any time to direct otherwise***, all persons present during any part of the proceedings of a grand jury shall keep its proceedings and the testimony given before it secret, except that counsel may divulge such information as may be necessary in preparing the case for trial or other disposition." (Emphasis added.) Rules of procedure, which are promulgated by the Kentucky Supreme Court, are interpreted in accordance with their plain language. Here, giving RCr 5.24 its plain meaning, it is clear that a court may lift the veil of secrecy attached to grand jury proceedings and testimony *at any time*. It is notable that the rule does include any limiting

language or restrictions on the court’s power to “direct otherwise.” This authority of the court to “direct otherwise” is unconditional and without limitation or exception. Exercise of the court’s authority does not require a motion by any party, nor does it place any burden on any party to support such a request. The rule prescribes no balancing test, no weighing of interests, nor does it require particular findings as a predicate to the Court’s exercise of authority. In making the choice to include this language, it would seem that the Kentucky Supreme Court envisioned a scenario where a trial court would, in its discretion, determine that grand jury proceedings ought to be made public.²

II. Justice requires disclosure of the grand jury proceedings in this case.

Having established that this Court has both jurisdiction and power to lift the veil of secrecy on grand jury proceedings and testimony, the question then becomes whether it ought to be done in this matter. This Court does not take Anonymous Grand Juror #1’s motion lightly. In making such a request they ask this Court to make a rare exception to the long-established secrecy afforded to the proceedings of the grand jury. The grand jury “is an instrument of the people, which on one hand insulates citizens from overzealous prosecution, yet on the other hand has broad power to investigate criminal activities and other matters detrimental to the public interest.” *Branzburg v. Meigs*, 503 S.W. 2d 748, 751 (Ky. 1971). While there is no case law

² Because there is little Kentucky authority to guide this Court, both parties have cited to extra-judicial sources of information (the “Grand Jury Handbook” and a statement from the Commonwealth’s Attorneys Association). Again, because the plain language of RCr 5.24(1) is clear, this Court does not find reason to resort to those sources. Likewise, both parties cite to case law outside of Kentucky, specifically Ferguson, Missouri (*Doe v. Bell* and *Doe v. McCulloch*). Although the circumstances of those cases are somewhat similar to the one here, this Court, of course, is not bound to follow those decisions. Louisville, Kentucky is not Ferguson, Missouri - and, for the purpose of the question presented here today, most notably because the Missouri rule regarding grand jury secrecy does not appear to contain similar language to Kentucky’s “*subject to the authority of the court at any time to direct otherwise.*”

directly on point with the issue presented in this case, Kentucky courts have long recognized the function of grand jury secrecy.³

Likewise, the Supreme Court of the United States has emphasized the importance and purpose of preserving the secrecy of grand jury proceedings. “We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.” *Douglas Oil Co. Of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-682 (1958)

However, even the United States Supreme Court has stopped short of ruling that grand jury secrecy is absolute. As the Court stated in *Douglas Oil Co. Of California*, “[i]t is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.” *Id.*, at 223. “In sum, as so often is the situation in our jurisprudence, the court’s duty in a case of this kind is to weigh carefully the competing interest in light of the relevant circumstances and the standards announced by this Court . . . if disclosure is ordered, the court may include protective limitations on the use of the disclosed material.” *Id.* And a court has “substantial discretion” to determine whether grand jury proceedings should be released. *Id.*

The traditional justifications for the rule of grand jury secrecy were summarized in *United States v. Rose*, 215 F.2d 617, 628–29 (3d Cir. 1954), and later cited with approval by the United States Supreme Court in *Douglas Oil*. The purposes of grand jury secrecy are: “(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or

³ “[I]t is the public policy of this commonwealth to keep secret the proceedings of the grand jury.” *Bazzell v. Illinois Cent R. Co. et al.*, 262 SW 966, 967 (1924); “From earliest times it has been the policy of the law in furtherance of justice to shield the proceedings of grand juries from public scrutiny.” *Greenwell v. Com.*, 317 S.W.2d 859, 861 (Ky. App. 1958).

their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.” *Id.* Nonetheless, “disclosure is wholly proper where the ends of justice require it.” *Id.*

As applied in this case, this Court finds that the traditional justifications for secrecy in this matter are no longer relevant and that the ends of justice require disclosure. First, the individual subject of indictment in this matter, Brett Hankison, has already been charged and arraigned. There is little concern for his escape, as he has appeared in court and posted bond, demonstrating his intent to return to court.

Secondly, this grand jury’s business is now concluded. The grand jury in this matter was afforded all the privacy and secrecy necessary to freely deliberate. While there was much public speculation about the timing of the Attorney General’s presentation to a grand jury, the fact of this grand jury’s attention to the case of *Commonwealth v. Brett Hankison* became public only shortly before the return of its indictment. Therefore, fear of interference with deliberations at this stage -- *after* the grand jury has deliberated and been excused -- is of no concern.

Third, the trial court presiding over the matter of *Commonwealth v. Hankison* has already ordered the disclosure of the grand jury recordings. Aside from its request to redact the identifying information of witnesses, the Commonwealth has complied with that court’s order without objection. Considering that the trial court has limited the disclosure of the identities of the witnesses testifying before the grand jury, this Court is satisfied that those witnesses (and any

possible future testimony at trial) are sufficiently protected. This Court has no reason to believe that those witnesses' identities have been compromised, or that they will not testify truthfully if called upon to do so in the future.

Likewise, there can be little concern that additional witnesses will be deterred from coming forward. At least, there is little concern that releasing the remaining undisclosed grand jury proceedings would create that effect. Rather, it is more likely that the already highly public nature of this matter (generated in part by the Attorney General's own press releases, interviews and press conferences), and not the release of grand jury proceedings, would have that consequence.

Finally, the identities of other law enforcement officers involved in the execution of the search warrant at Breonna Taylor's home are already known to the public. Thus, whether this grand jury considered charging any other officers involved, or whether any future grand jury were to investigate or consider charges against those officers, their identities are not secret. This is a rare and extraordinary example of a case where, at the time this motion is made, the historical reasons for preserving grand jury secrecy are null.

Additionally, the Court must weigh these factors against the other interests involved. In objecting to this motion, the Attorney General speculates that allowing this grand juror to speak may compromise Brett Hankison's right to a fair trial. Hankison did not join this argument or raise this issue himself, nor did he request to be heard by this Court.⁴ When asked to be more specific about its concerns, the Commonwealth acknowledged it did not know how allowing this grand juror to speak would undermine Hankison's trial. Therefore, this Court cannot find that

⁴ This Court notes that Anonymous Grand Juror #1 provided notice to Mr. Hankison's lawyer on this motion, and, if memory serves, the defendant's lawyer was present at the hearing on this motion.

this concern is founded in reality. Should it become so, that issue may properly be brought before the trial court.

The Commonwealth also asserts that to release information about the grand jury proceedings in this case would “destroy the principle of secrecy that serves as the foundation of the grand jury system.” To be clear, this Court’s ruling on *this* motion is applicable only to *this* case. Further, when considering the Attorney General’s swift compliance with the trial court’s order to release the grand jury recordings, coupled with the Attorney General’s multiple public statements and characterizations about the grand jury and the resulting indictment, the Commonwealth’s objection now reads as theatrical *sturm und drang*.

There exist additional interests to consider in making this decision: the interest of the citizens of the Commonwealth of Kentucky to be assured that its publicly elected officials are being honest in their representations; the interest of grand jurors, whose service is compelled, to be certain their work is not mischaracterized by the very prosecutors on whom they relied to advise them; and, the interest of all citizens to have confidence in the integrity of the justice system. Considering those interests, there is no doubt that justice requires disclosure of the grand jury proceedings in this case.

III. Anonymous Grand Juror #1’s Petition for Declaration of Rights was not properly filed and, therefore, must be dismissed.

Having reached the conclusion above, this Court need not address Anonymous Grand Juror #1’s petition for declaration of rights pursuant to KRS 418.040. Nonetheless, such a Petition must be initiated and filed as a separate, original action with proper notice and service of process. That procedure was not filed in this matter. Therefore, the Petition for Declaration of Rights must be dismissed.

WHEREFORE, IT IS HEREBY ORDERED Anonymous Grand Juror #1's motion to release grand jury proceedings is **GRANTED, to include the unrecorded grand jury proceedings in *Commonwealth v. Brett Hankison***. Any participant in those proceedings, including grand jurors, may disclose such information, subject to the trial court's order regarding information to be redacted.

IT IS FURTHER ORDERED that this Court's Order concerning juror qualification forms and identifying information of grand jurors remains in effect. Neither this Court, nor any office or agency thereof, shall disclose any identifying information of the grand jurors in this matter without further order of the court.

IT IS FURTHER ORDERED that an individual grand juror who wishes to identify themselves as a participant in the grand jury proceedings in this matter may but shall not be compelled to do so. The identity of any individual grand juror in this matter shall not be released without their written authorization.

IT IS FURTHER ORDERED that Anonymous Grand Juror #1's Petition for Declaration of Rights is **HEREBY DISMISSED**.

The Court urges any grand juror who chooses to disclose their identity to do so with extreme caution, for to do so may result in a level of public attention and scrutiny over which this Court will have no control. Furthermore, this Order is not intended to coerce, compel or even encourage any grand juror to come forward. It merely grants one grand juror's request to do so and gives others the option. Grand jury deliberations are a collaborative process. Any one grand juror's memory, opinions and perceptions are their own. No one grand juror speaks for the others, nor does one's statement carry any more weight than another's.

Nothing in this Court's Order shall be construed to conflict with any order of the trial court in *Commonwealth v. Brett Hankison*. (Case No. 20-CR-1473). Violation of any of these orders shall be punishable by contempt of court.

IT IS SO ORDERED.

JUDGE ANNIE O'CONNELL

