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## In Disclosure of Grand Jury Testimony, a Question of Intent

By MICHAEL BRICK

Talking to the grand jury was a risk, of course. Though the testimony is supposed to be kept secret by law, a defendant's words can be used at trial to undermine an alibi or drain credibility.

Andria Sergio was ready to take her chances. Her younger sister had been charged with murder, accused of leaving her newborn daughter to freeze to death in a garbage bag behind the family home in Bay Ridge in early April.

Ms. Sergio, 27, had been arrested too, charged with improperly disposing of a body, a misdemeanor violation of public health laws. The police said she had told them, "What you're looking for is in the back."

Prosecutors took the case to a grand jury seeking indictment for a felony. The baby had been born alive in the family home, where the sisters lived with their parents; Ms. Sergio's role in her death was unclear.

On April 18, court documents showed, Ms. Sergio went to a grand jury room with her lawyer, Daniel N. Arshack. There she waived Miranda rights and gave her account.

"Defendant stated she had not known her sister Laura was pregnant," prosecutors later wrote in a summary. They said Ms. Sergio had told of finding her sister surrounded by blood. Referring to her by the letter D for defendant, they continued: "D and other sister Cara cleaned up blood from bathroom and bedroom. D brought three bags outside to back porch."

After her testimony, Ms. Sergio was indicted on felony charges of hindering prosecution. If convicted, she could face seven years in prison.

But then the case took an unexpected turn, on account of her grand jury testimony. Prosecutors must disclose certain evidence, including a defendant's statements to the police, when a case begins with a felony arraignment. On May 1, Jacqueline Kagan, deputy chief of the Crimes Against Children Bureau, filed the summary of Ms. Sergio's grand jury testimony at the arraignment.

The next day, radio programs and tabloid newspapers published the gruesome details.

"Blood Trail of Tragic Newborn," wrote The New York Post.

"Didn't Know Dead Infant Discarded in Towels -- Sis," wrote The Daily News.

Later that month, Mr. Arshack accused the prosecutors of filing the summary in an effort to prejudice the jury pool. He asked for a dismissal and a special prosecutor to investigate the district attorney's office. "As a direct result of A.D.A. Kagan's questionable acts," he wrote in court documents, "every reader of The New York Post and other media outlets has been given a wholly unbalanced and, most importantly, intended to be secret, account of Ms. Sergio's testimony."

The secrecy of grand jury proceedings has its origins in 14th-century England, where members were sworn to silence to prevent the escape of suspected criminals, according to research by Mark J. Kadish, a law professor at Georgia State University.

As the law evolved, Mr. Kadish has written, standards have been codified, exceptions have developed and the purposes of secrecy have shifted among protecting the rights of defendants, the government and the public. New York law classifies the improper disclosure of grand jury testimony as a Class E felony.

In the Brooklyn case, the prosecutor's colleagues wrote a 23-page defense of the disclosure, arguing that it was intended to notify Ms. Sergio of the evidence. The deputy chief of the appeals bureau, Jane S. Meyers, wrote that in previous cases prosecutors have been precluded from using grand jury testimony for failure to give notice.

"Since that time, assistant district attorneys have been routinely instructed and trained to serve and file notice of a defendant's grand jury testimony," Ms. Meyers wrote.

The administrative judge for State Supreme Court in Brooklyn, Neil Jon Firetog, denied the motion for a special prosecutor last month. On Thursday, he explained his reasoning in a written memorandum.

"The conclusion must be drawn that the People violated the secrecy of the grand jury," Justice Firetog wrote. But, he added, various cases have reached contradictory conclusions on prosecutors' notification responsibilities. He set no sanctions, writing that because Ms. Kagan had not set out with the conscious objective of breaking the law, "the prosecution did not act intentionally."

Mr. Arshack said he was puzzled by the judge's definition of intent. "It's not something that happened by mistake," he said in a telephone interview. "Certainly the disclosure was intentional."

Stephanie-Ama E. Dwimoh, chief of the Crimes Against Children Bureau, said the ruling would clarify the rules of grand jury secrecy, perhaps leading prosecutors to refrain from disclosing grand jury testimony to defense lawyers.

"To do so in the future would arguably be in violation of grand jury secrecy," Ms. Dwimoh said. "It does give us guidance, a rule of thumb."

With that detour at its end, Ms. Sergio's case was returned to the trial courts. There, a judge will sort out what happened to that newborn girl on that cold night in April at that house on Colonial Road.