

Lawyer Claims D.A. Subpoena Could Impact Defense

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Although the Manhattan District Attorney's Office has withdrawn a subpoena issued to a criminal defense attorney because the witness the office was investigating has pleaded to a misdemeanor, prosecutors continue to defend the subpoena as a proper exercise of their authority and claim it does not violate attorney-privilege rules.

Defense attorney [Vino Varghese of Varghese & Associates](#), the target of the subpoena, argues otherwise. He and his lawyers are seeking a ruling on [his motion to quash](#), claiming the issuance of such subpoenas could have repercussions for the entire criminal defense bar. The Legal Aid Society has filed supporting papers.

"It is hard to imagine a grand jury summons with a more chilling effect on the unique constitutional role of defense counsel and on every attorney who performs it," wrote Steven Wasserman, a staff attorney at Legal Aid.

Varghese's case also has drawn the attention of the National Association of Criminal Defense Lawyers. Two of the group's attorneys, Lawrence Goldman and Elizabeth Johnson of Goldman and Johnson, are representing Varghese pro bono to quash the subpoena.

[Varghese](#) represents Richard Hovan, a former teacher at Riverdale Country School in the Bronx charged with rape and engaging in sexual conduct with a teenage student. Varghese was served with a subpoena to appear before a grand jury investigating a witness in Hovan's case, Marina Bontkowski.

[Varghese](#) moved before Justice [Charles Solomon](#) to dismiss Hovan's indictment, asserting that the subpoena is "outrageous government conduct," and continued to move to quash it.

Last month, the district attorney withdrew the subpoena after Bontkowski, Hovan's ex-fiancee, pleaded guilty to third-degree perjury, a misdemeanor.

The district attorney claims Bontkowski told prosecutors she saw Hovan on a couch with a high school student who was topless. But prosecutors said she perjured herself when she testified before a grand jury in 2012 that she couldn't remember whether the student was wearing a shirt.

Prosecutors subpoenaed Varghese to learn what he and Bontkowski discussed before she testified.

In [court papers](#) responding to Hovan's dismissal motion, Assistant District Attorney [Shanda Strain](#), citing electronic messages recovered by her office, said evidence "strongly suggests" that Bontkowski complied with Hovan's requests that she speak with Varghese before testifying.

According to Strain, after Bontkowski testified, she told Hovan in message, "But no one can know that I talked to your atty or that I've told you about what's been going on with their investigation." Prosecutors also claim that Hovan, passing on advice from Varghese, told Bontkowski to delete some electronic messages.

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In any event, Bontkowsky confirmed to prosecutors that she spoke with Varghese before appearing before the grand jury.

In his motion to quash, Goldman said the subpoena calls for privileged work product, interferes with Varghese's representation of the accused in a pending case and "is an impermissible intrusion" into his obligation to provide effective representation.

"The fear that the District Attorney will subpoena an attorney's work product will have a serious chilling effect on [a] constitutionally required defense investigation. Until this issue is decided, defense lawyers in New York County will be inhibited from providing effective representation by proper preparation," wrote Goldman.

"If the Court does not reject this extraordinary prosecutorial intrusion, no criminal defense attorney, at least in New York County, will feel free to interview witnesses or communicate by email with clients," said Goldman. "Further, the ability to subpoena a defense lawyer in a pending case essentially gives the prosecutor the right to disqualify counsel."

Goldman also criticized prosecutors' search warrants that led to the D.A. obtaining 400 emails between Hovan and Varghese.

But Strain in court papers argues the attorney-client privilege does not apply as Varghese never represented Bontkowsky, and her comments to him are not attorney work product.

Strain also raised the crime-fraud exception to the attorney-client privilege.

"To the extent that defendant sought the assistance or advice of his attorney in order to persuade or aid Ms. Bontkowsky to engage in the criminal conduct for which she was ultimately convicted, the crime-fraud exception would apply," Strain wrote.

"The true outrage here is that Hovan, at least, wrongly sought to persuade Ms. Bontkowsky to be less than cooperative with the grand jury," Strain said. "When she did exactly what he wanted, thereby causing the People to investigate and file charges against Ms. Bontkowsky, he then proclaimed himself the victim of governmental misconduct. The court should reject this claim out of hand."

Strain said the D.A.'s office was faced with clear evidence that Bontkowsky had perjured herself after being pursued by Hovan and Varghese.

Messages recovered by prosecutors "will be devastating evidence against Hovan at his criminal trial, as they reveal his desperately seeking to tamper with a key witness against him. ...If there is a more benign explanation for these exchanges, it is at least plausible that Mr. Varghese could be the witness that could provide such a benign explanation."

At a court hearing last month before Solomon, Strain asked for a Gomberg hearing with Hovan and Varghese—a procedure to determine potential attorney conflicts—"so there should not be a claim of ineffectiveness of counsel."

'Fair Warning'

Wasserman, of the Legal Aid Society, said he has represented colleagues who were subpoenaed to testify before grand juries, such as when a defense lawyer witnessed a crime or acquired information that may support a larger pattern of crime.

But Wasserman said in this case it appears a defense attorney is being conscripted by prosecutors to threaten a witness.

"Presumably the purpose of threatening the recalcitrant witness is to induce her to revert to her original narrative against his client and thus to cooperate in convicting him," Wasserman said.

The evidence sought "is equally obtainable from other sources," he said.

In response to the motion to quash, Assistant District Attorney [Evan Krutoy](#) said the issue is moot because the subpoena has been withdrawn and he asked Justice [Larry Stephen](#) to place the subpoena matter under seal, citing rules for grand jury secrecy.

Goldman asked the court to address the subpoena "in order either to stop the abuse of the grand jury process or give fair warning to defense counsel to beware of subpoenas for work product." He opposed sealing.

In an email to the Law Journal, Varghese said the issuance of the subpoena is unprecedented and he has no conflict of interest. He reiterated that any interviews with a witness are privileged.

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"The entire 'perjury' investigation against Marina was to gather evidence against Richard, get her to revert back to her original story implicating him, and to attempt to get me off the case," he said.

Varghese said his client, Hovan, has assured him that he didn't say anything that would attempt to change Bontkowski's testimony.

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