

**People v Trovato**

2008 NY Slip Op 33729(U)

January 29, 2008

Supreme Court, Westchester County

Docket Number: 06-1047-02

Judge: Richard A. Molea

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

FILED and ENTERED  
*January 29, 2008*  
WESTCHESTER  
COUNTY CLERK

-against-

DECISION AND ORDER

Indictment No. 06-1047-02

ANNE TROVATO and CARMELA MAGNETTI,

Defendants.

-----X  
MOLEA, J.

Upon considering the defendant's present application seeking the dismissal of the instant indictment in furtherance of justice pursuant to CPL 210.40, the Court has considered the following submissions: notice of motion, affirmation, memorandum of law and reply of counsel for the defendant, Theodore J. Brundage, Esq., in conjunction with the exhibits submitted therewith comprising five (5) audiotapes, and the affirmation in opposition, memorandum of law and sur-reply affirmation of Assistant District Attorney Steven A. Bender.

RELIEF REQUESTED

By notice of motion, the defendant moves this Court to dismiss the instant indictment in furtherance of justice pursuant to CPL 210.40, alleging that law enforcement personnel engaged in exceptionally serious misconduct in connection with the investigation and prosecution of the defendant in this case insofar as Criminal Investigator Peter Becerra of the Westchester County District Attorney's Office attempted to interfere with the defendant's right to counsel under the Sixth Amendment to the United States Constitution and Article 1 - Section 6 of the New York State Constitution during the pendency of the investigation and prosecution of the defendant in this case.

FILED  
JAN 29 2008  
TIMOTHY G. IDGW  
COUNTY CLERK  
COUNTY OF WESTCHESTER

## FACTUAL BACKGROUND

On May 14, 2006, the Ossining Village Police Department and the Westchester County District Attorney's Office commenced an investigation into the death of Patricia Mery upon locating the body of the deceased in the living room of her home located at 4 Yates Avenue in the Village of Ossining, New York. Upon examining the body of Patricia Mery, law enforcement authorities determined that her death was the result of a homicide due to their observation of several plastic bags covering her head, evidence of blunt force trauma and multiple stab wounds to her body, as well as the positioning of a baseball bat and large steak knife on the floor near the body.

It is alleged by the People that the defendant and her co-defendant responded to the Ossining Village Police Department on the evening of May 14, 2006 and were individually questioned by law enforcement authorities in connection with their investigation into the death of Patricia Mery. Although the People do not relate to the Court the circumstances under which these meetings were arranged, they acknowledge that Investigator Peter Becerra of the Westchester County District Attorney's Office spoke via telephone with the mother of the defendant, Gloria Magnetti, about the criminal investigation being conducted in connection with the death of Patricia Mery in advance of the defendant's meeting with law enforcement authorities at the Ossining Village Police Department on the evening of May 14, 2006.<sup>1</sup> It is

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<sup>1</sup>Significantly, the People reveal that this telephone conversation was one of approximately 409 such conversations shared between Investigator Becerra and Gloria Magnetti from May 14, 2006 through June 26, 2007, and the Court recognizes that the nature of these telephone conversations is the primary subject of the allegations raised by the defense in support of the instant motion and the analysis of same by the Court will be addressed *infra*.

significant to note that Investigator Becerra developed a professional relationship with Gloria Magnetti, which commenced on May 4, 2006, through his active participation in a criminal usury investigation being conducted by the Westchester County District Attorney's Office which involved extensive planning and coordination of a campaign to conduct surreptitious surveillance of Magnetti, with her full knowledge and participation, during all of her ensuing dealings with the targets of that investigation.<sup>2</sup> During the May 14, 2006 meeting, the People allege that the defendant provided law enforcement authorities with a false alibi for her co-defendant during her examination by indicating, in substance, that she accompanied her co-defendant to the Galleria Mall between approximately 2:00 PM and 8:00 PM on May 11, 2006. Neither of the defendants were charged with any criminal conduct immediately following their examination at the Ossining Village Police Department on May 14, 2006, and they were permitted to leave without hindrance upon the completion of their respective examinations.

On the evening of May 17, 2006, Gloria Magnetti and the defendant responded to the Ossining Village Police Department to meet with Investigator Becerra and other law enforcement officials in order to be questioned about the death of Patricia Mery. Although neither the People nor the defense indicate how this meeting was arranged, it can be readily inferred by the Court from the undisputed facts alleged in the People's moving papers that one or more law enforcement officials contacted Gloria Magnetti and the defendant to orchestrate this meeting on the evening of May 17, 2006, resulting in the procurement of a written statement from the

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<sup>2</sup>This criminal investigation continued for approximately seven months, culminating on November 2, 2006 with the arrest of two of the individuals who were participants in this criminal usury operation. The ensuing prosecution of these individuals resulted in their entry of guilty pleas on June 28, 2007 and the imposition of sentence on October 11, 2007.

defendant which was subsequently noticed by the People pursuant to CPL 710.30. Although the People do not provide any context to the specific role played by Investigator Becerra during the questioning, the People affirm that Investigator Becerra "impressed upon both Magnettis the importance of supplying the police with a truthful statement about the Mery murder" at that time.

In the absence of any discussion of the surrounding circumstances, the People also allege that the defendant voluntarily returned to the Ossining Village Police Department on the night of May 17, 2006 which resulted in the procurement of two additional written statements and an oral statement from the defendant, each of which were subsequently noticed by the People pursuant to CPL 710.30. Similarly, absent any discussion of the surrounding circumstances, the People allege that the defendant voluntarily responded to the Westchester County District Attorney's Office on May 18, 2006 to meet with law enforcement officials in order to be questioned further about the death of Patricia Mery, resulting in the procurement of another statement from the defendant which was subsequently noticed by the People pursuant to CPL 710.30. Again, absent any discussion of the surrounding circumstances, the People allege that the defendant voluntarily met with unidentified law enforcement authorities on the evening of May 19, 2006 at an unidentified restaurant located in the Village of Pleasantville, where she made a series of statements concerning the death of Patricia Mery which were subsequently noticed by the People pursuant to CPL 710.30.

In the absence of any discussion of the surrounding circumstances, the People also allege that Gloria Magnetti voluntarily responded to the Ossining Village Police Department on the night of July 10, 2006 and related her observations of defendant Trovato's statements and actions

as she observed them on the night of May 11, 2006.<sup>3</sup> It is further alleged by the People, without relating the circumstances under which the meeting was arranged, that the defendant voluntarily responded to the Pleasantville Diner on the afternoon of July 30, 2006 and provided Investigator Becerra with a detailed account of her co-defendant's inculpatory statements and actions relating to the death of Patricia Mery on the night of May 11, 2006, after which he unsuccessfully attempted to persuade her to provide him with a written statement memorializing the oral statement she had just given to him.<sup>4</sup> Immediately following this meeting between the defendant and Investigator Becerra, the People allege that he spoke with Gloria Magnetti on the telephone and attempted to persuade her to advise the defendant to provide him with a written statement memorializing the oral statement she had just given to him in the Pleasantville Diner.

Although the People do not specify the exact number of telephone calls exchanged between Investigator Becerra and the defendant from the night of July 30, 2006 until August 1, 2006, they allege that he spoke with the defendant via telephone on several occasions during this time period as he repeatedly attempted to persuade her to provide him with a written statement memorializing the oral statement she gave him in the Pleasantville Diner on July 30, 2006. The

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<sup>3</sup>It is significant to note that between May 4, 2006 and July 30, 2006, Investigator Becerra continued to speak and meet with the defendant's mother, Gloria Magnetti, on a regular basis with respect to both the continuing investigation into the death of Patricia Mery and the unrelated criminal usury investigation, the latter of which involved Gloria Magnetti's proffering of controlled payments of US currency to the targets thereof while under the surreptitious surveillance of law enforcement authorities on multiple occasions, including the dates of May 30, 2006, June 6, 13, 21, 29, 2006, and July 5, 11, 18, 2006.

<sup>4</sup>Through examination of the audiotapes recording one of the multitude of telephone conversations between Investigator Becerra and Gloria Magnetti, the Court observed that Investigator Becerra surreptitiously made an audio recording of the statements made by the defendant during this meeting.

People also allege that on August 1, 2006, Investigator Becerra spoke individually with both Gloria Magnetti and the defendant, listening first to Gloria Magnetti express her concern that the defendant needed a lawyer, while thereafter advising the defendant that he could no longer speak with her about the criminal investigation into the death of Patricia Mery because he had become aware that she had already retained an attorney to represent her in connection with that matter.<sup>5</sup> The recent flurry of telephone conversations between Investigator Becerra and the defendant ended on the following day when the People allege that the defendant telephoned him and spoke critically of her newly retained attorney, William Fleming, Esq.,<sup>6</sup> while he was preparing to surrender her at the Ossining Village Police Department on a felony complaint charging her with the crime of hindering prosecution in the first degree.<sup>7</sup>

On August 8, 2006, lead counsel for the defendant, William Fleming, Esq., and newly retained co-counsel, Geoffrey Orlando, Esq., met personally with members of the Westchester County District Attorney's Office in order to discuss the possibility of the defendant's cooperation in the prosecution of her co-defendant. While in attendance at this meeting, Mr. Orlando discreetly advised Second Deputy District Attorney Patricia Murphy that he was concerned about information which had been conveyed to him by Gloria Magnetti concerning the

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<sup>5</sup>The Court's records reflect that William Fleming, Esq., was retained to represent the defendant on or about August 2, 2006.

<sup>6</sup>The People specifically deny that Investigator Becerra disparaged defendant's retained attorney, William Fleming, Esq., yet acknowledge that while Investigator Becerra was speaking with Gloria Magnetti on a subsequent date, he advised her that Fleming had previously been relieved of continued employment by the Westchester County District Attorney's Office.

<sup>7</sup>Co-defendant Anne Trovato was subsequently charged with the crime of murder in the second degree upon the filing of a felony complaint in the Ossining Village Court on August 4, 2006.

actions of Investigator Becerra to the effect that he had been making disparaging remarks to her about Mr. Fleming's general competence and the level of his commitment to the representation of the defendant.<sup>8</sup> Ultimately, the defendant did not avail herself of the opportunity presented by the People to cooperate in their prosecution of her co-defendant in exchange for a plea bargain. The defendant was subsequently arraigned under the instant indictment in the Westchester County Court (Zambelli, J.) on September 26, 2006, which charged her with the crimes of criminal facilitation in the second degree, hindering prosecution in the first degree, and tampering with physical evidence.<sup>9</sup>

Although the People assert in their moving papers that Investigator Becerra had refrained from contacting or speaking directly with the defendant following her arrest on August 2, 2006, it is beyond cavil that he made no efforts to curtail his contact with Gloria Magnetti following the defendant's arrest. To the contrary, he actively continued to discuss the criminal prosecution of the defendant with Gloria Magnetti unabated throughout the ensuing eleven months until he was directed to cease such activities on or about June 27, 2007 by his superiors in the Westchester County District Attorney's Office, despite the fact that the active phase of the criminal usury investigation<sup>10</sup> had concluded on November 2, 2006. Significantly, the People have failed to

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<sup>8</sup>The People concede in their moving papers that no action was taken by the District Attorney's Office with respect to this complaint.

<sup>9</sup>Co-defendant, Anne Trovato, was distinctly charged under the instant indictment with the crimes of murder in the second degree, burglary in the second degree, and criminal possession of a weapon in the fourth degree.

<sup>10</sup>The Court's characterization of the investigation in this manner references that period of time during which Gloria Magnetti was utilized by law enforcement authorities to proffer controlled payments of US currency to the targets of that investigation while under the surreptitious surveillance of law enforcement authorities.

suggest that there was any legitimate law enforcement purpose for the continued willingness of Investigator Becerra to speak with Gloria Magnetti about her daughter's pending criminal matter subsequent to her arrest on August 2, 2006.

Although the People suggest in their moving papers that Becerra's continued contact with Gloria Magnetti throughout the period extending between August 2, 2006 and June 27, 2007 was the result of her "manipulative and artful" efforts to obtain information about the pending criminal prosecution of the defendant, the Court's examination of the audio-taped conversations between the two reveals a starkly contrasting characterization of these persistent communications.<sup>11</sup> As the Court indicated previously, the relationship between Investigator Becerra and Gloria Magnetti had commenced on or about May 4, 2006, through his active participation in an unrelated criminal usury investigation being conducted by the Westchester County District Attorney's Office. However, upon the commencement of the criminal investigation into the death of Patricia Mery in mid-May of 2006, Investigator Becerra embarked on a persistent campaign of telephone and personal communications with Gloria Magnetti over the ensuing thirteen months in an attempt to utilize her to persuade her daughter to cooperate with the People in their prosecution of her co-defendant by agreeing to testify against her at trial in exchange for a plea bargain.

To this end, Investigator Becerra exploited the trusting relationship that he had developed with Gloria Magnetti from their contact in connection with criminal usury investigation, as he attempted to obtain her cooperation by repeatedly advising her, in substance, that she should trust

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<sup>11</sup>It is significant to note that the defense submitted five audiotapes containing recordings of a multitude of telephone conversations shared between Investigator Becerra and Gloria Magnetti between late 2006 and early 2007 for review as exhibits to the instant motion.

him, that he considered her his friend, that he is being truthful with her and that he was only speaking with her because he feels badly for her and the defendant and their family. As an indication of the confidence that Gloria Magnetti has in the sincerity of Investigator Becerra's motives, she states on several occasions that he is the only person that she can talk to, that he is the only person she trusts, that she believes that he is telling her the truth and that she knows that he is trying to help her.

Investigator Becerra further attempts to persuade Gloria Magnetti to convince the defendant to cooperate with the District Attorney's Office by making dire prognostications about what will happen to the defendant if she does not do so. In this regard, Investigator Becerra tells Gloria Magnetti, in substance, that if the defendant takes her case to trial that her conviction is a certainty, stating that the People have the defendant "dead to rights" and that "she is going to do seven years (in State Prison) on this case, period.". He further makes statements of dubious validity to the effect that the District Attorney's Office was already looking to "cut a deal with Annie (the co-defendant) to have her plead to manslaughter and testify against Carmela (the defendant)", and, in substance, that if the defendant were to take the case to trial, the People could try to charge her with the murder of Patricia Mery.<sup>12</sup>

The audiotape recordings are further replete with conversation evincing the efforts undertaken by Investigator Becerra to undermine the faith that Gloria Magnetti and her family have in the competence of the defendant's attorneys and their commitment to her defense. With full knowledge that the defendant's retained attorneys are being paid to represent the defendant

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<sup>12</sup>The Court notes with significance that during several of the exchanges between Investigator Becerra and Gloria Magnetti, she can be heard crying and sobbing uncontrollably.

by Gloria Magnetti and her husband, Investigator Becerra tells her, in substance, that she should not be listening to the defendant's attorneys, that they will lie to her, that one of the attorneys is a "fat bastard" and that she had "to be crazy for paying that f\*\*k". During one particular telephone conversation, Investigator Becerra goes so far as to directly challenge Gloria Magnetti's faith in the defendant's attorneys by telling her that she must decide who she wants to believe, the District Attorney's Office, or the defendant's lawyers, as he suggests that her daughter's life is hinging upon her trust in him and the District Attorney's Office. In further attempts to undermine her faith in the defendant's attorneys, Investigator Becerra made disparaging remarks concerning the trial preparation strategies and tactics being employed by the defendant's attorneys, including his criticism of their request for additional fees to examine telephone records, calling the effort unnecessary and cynically asking Gloria Magnetti "what are the phone records for, are they going to get her off". Investigator Becerra also challenged Gloria Magnetti's willingness to continue to pay for the defendant's attorneys by telling her that the attorneys are purposely dragging the case out in order to garner additional fees, also suggesting that she and her husband require them to enter into a contingency fee arrangement whereby she will only be required to pay them if the defendant were acquitted in the case.<sup>13</sup> In this regard, Investigator Becerra subsequently advises Gloria Magnetti that she should threaten to withhold further fee payments to the defendant's attorneys unless the defendant agreed to cooperate with the District Attorney's Office, thereby forcing the defendant to seek the appointment of counsel through what he calls "legal aid". Although no motive for the efforts undertaken by Investigator Becerra to

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<sup>13</sup>The Court takes judicial notice of the fact that such fee arrangements are not permissible between defendants and the attorneys who represent them in criminal matters in the State of New York.

undermine the confidence of the defendant and her family in the defendant's retained attorneys is entirely clear, it might be surmised that these efforts were directed toward having the defendant relieve these attorneys in favor of an attorney who might be more willing to persuade the defendant to cooperate with the People in their prosecution of the co-defendant.

In response to these varied efforts undertaken by Investigator Becerra, Gloria Magnetti agreed to comply with several of the requests he made of her while positing them as though they were favorable to the defendant, including her agreement to be interviewed by law enforcement authorities at the District Attorney's Office for the purpose of giving them a sworn statement which could be used during the trial of the defendant, as well as her oft-repeated agreement to try to persuade her daughter to cooperate with the People and testify against her co-defendant at trial in exchange for a plea bargain. In response to his request, Gloria Magnetti further agreed to try to persuade her daughter to provide the People with a DNA sample from her hair, and to provide the People with photographs within her possession which depict the co-defendant on a specific date of interest to them. Indeed, the influence which Investigator Becerra had over Gloria Magnetti is revealed by her willingness to continue to take direction from him despite receiving contrary direction from her daughter's attorneys, as she acknowledged in one of the recorded telephone conversations that the defendant's attorneys had admonished her not to speak with him, after which she advises that she told the defendant that she should cooperate with the People because he (Investigator Becerra) is the only one that she trusts. Furthermore, the Court notes with significance that Investigator Becerra repeatedly heard Gloria Magnetti break down and cry while speaking with him on the telephone, bespeaking of the sincerity of her concerns for her daughter's welfare and her fragile emotional condition, which only seemed to further embolden

him to continue with his campaign of manipulation to obtain her cooperation in his effort to persuade the defendant to cooperate with the People in their prosecution of the co-defendant.

Although the communications between Investigator Becerra and Gloria Magnetti ended on June 27, 2007 at his behest when he was directed to cease further contact with her by his superiors in the District Attorney's Office, the defendant's attorneys made application before this Court on August 21, 2007 to be relieved from the continued representation of the defendant. In support of this application, the defendant's attorneys represented to the Court, in substance, that the conduct engaged in by Investigator Becerra with respect to Gloria Magnetti had irreparably undermined the defendant's confidence in them as her attorneys in this case. Without passing on the legitimacy of the claims raised by defendant's attorneys, the Court responded by asking the defendant if she joined in her attorneys' application to be relieved, which she answered in the affirmative. The Court then asked the defendant if she could afford to retain new counsel, which she answered in the negative and followed with a request to be represented by assigned counsel. Following the Court's assignment of new counsel for the defendant pursuant to County Law § 18-b, having assigned Theodore Brundage, Esq. on August 30, 2007, the Court granted defense requests for successive adjournments on September 12, 2007, October 4, 2007 and November 1, 2007 in order to afford defense counsel an adequate opportunity to familiarize himself with the file pertaining to this matter. In connection with defense counsel's adjournment requests, he further advised the Court that he was discussing the possibility of a negotiated plea disposition with the People throughout these periods. Only after exhausting all plea negotiations with the People and becoming fully familiar with the facts of this case, did defense counsel seek leave of the Court to bring the instant motion seeking the dismissal of the instant indictment in

furtherance of justice pursuant to CPL 210.40. The instant motion was filed with the Court and served upon the People on November 9, 2007.

#### CONCLUSIONS OF LAW

The defendant moves the Court to dismiss the instant indictment in furtherance of justice pursuant to CPL 210.20(1)(i) and CPL 210.40, alleging that the People engaged in exceptionally serious misconduct in connection with the investigation and prosecution of the defendant for the crimes charged under the instant indictment. In support of the instant application, the defense submits that Criminal Investigator Peter Becerra of the Westchester County District Attorney's Office engaged in a campaign of conduct involving the use of manipulation against the mother of the defendant, Gloria Magnetti, in an effort to utilize her to persuade the defendant to cooperate with the People in their prosecution of the co-defendant by testifying against her at trial in exchange for a negotiated plea bargain. The People oppose the defendant's instant application upon two grounds, claiming that the defendant's motion is untimely pursuant to CPL 255.20, and in the alternative, claiming that the defense has failed to meet its burden to demonstrate the existence of some compelling factor which warrants the extraordinary remedy of dismissal within the meaning of CPL 210.40.

Turning first to consider the People's challenge to the timeliness of the defendant's instant motion, the Court finds that although the defendant's motion was presumptively untimely because it was not made within forty-five days after arraignment pursuant to CPL 255.20(1), the Court finds that this failure is excused upon a showing of good cause by the defense, as the

instant motion was brought prior to the commencement of trial and is based upon grounds which could not reasonably have been raised by defense counsel within the prescribed period (*see*, CPL 255.20[3]; *see also*, *People v. Colon*, 180 AD2d 876).

Turning next to consider the instant motion on the merits, the Court recognizes that it may dismiss an otherwise valid indictment in the interest of justice when "such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment . . . would constitute or result in injustice" (*see*, CPL 210.40 [1]). In this regard, the Court also acknowledges that its discretionary power to dismiss an indictment in furtherance of justice must be exercised sparingly and only under the most exceptional circumstances (*People v. Harmon*, 181 AD2d 34, 35; *People v. Dunlap*, 216 AD2d 215, 217; *People v. Guzman*, 168 AD2d 154; *see also*, *People v. Belge*, 41 NY2d 60, 62-63 [Fuchsberg, J., concurring] [court should exercise its discretion "sparingly" and only in that "rare" and "unusual" case where it "cries out for fundamental justice beyond the confines of conventional considerations"]). These limitations on the Court's discretion require that its determination involve a "sensitive balancing of the interests of the individual and the People" (*People v. Rickert*, 58 NY2d 122, 127; *see also*, *People v. Clayton*, 41 AD2d 204), which must follow its review the facts of the case and its consideration, both individually and collectively, of the criteria set forth in CPL 210.40(1)(a) - (j) (*see*, *People v. Clayton*, *supra*, at 208).

With respect to the "seriousness and circumstances of the offense" charged as enumerated in CPL 210.40(1)(a), the Court notes that in connection with the crimes charged under the instant indictment the defendant is alleged to have provided material assistance to her co-defendant in

her efforts to cause the death of Patricia Mery. Specifically, it is alleged that the defendant enabled her co-defendant to cause the death of Patricia Mery by transporting her to and from the area of the crime scene, by helping her to dispose of incriminating physical evidence after she caused the death of Patricia Mery, and by providing law enforcement authorities with a false alibi for the defendant. Accordingly, the Court finds that the crimes with which the defendant is charged are clearly serious (*see, People v. Serrano*, 163 AD2d 497; *People v. Saunders*, 161 AD2d 611; *People v. Foster*, 127 AD2d 684).

With respect to the “the extent of harm caused by the offense” as enumerated in CPL 210.40(1)(b), the Court observes that the crime which the defendant is alleged to have supplied the means for her co-defendant to commit is the brutally violent intentional murder of Patricia Mery. To the extent that the Court might consider the defendant’s commission of the crimes with which she is charged to have been instrumental in enabling her co-defendant to commit the heinous crime of murder, the harm caused by the defendant’s crimes could be no greater.

With respect to the “evidence of guilt, whether admissible or inadmissible at trial” as enumerated in CPL 210.40(1)(c), the Court finds that the statements alleged by the People to have been made by the defendant to law enforcement authorities at the Ossining Village Police Department on May 17, 2006 and at the Pleasantville Diner on July 30, 2006, all of which were noticed to the defendant pursuant to CPL 710.30, provide significant material evidence of the defendant’s guilt for the crimes charged under the instant indictment.

With respect to the “history, character and condition of the defendant” as enumerated in CPL 210.40(1)(d), the Court finds that although the defendant has no prior criminal history, this fact alone cannot be considered a highly persuasive factor militating in favor of the defendant’s

dismissal application, nor can the vague assertion that the defendant suffers from an unspecified chronic medical condition.

With respect to “any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant” as enumerated in CPL 210.40(1)(e), the Court finds that Criminal Investigator Peter Becerra of the Westchester County District Attorney’s Office pursued a relentless campaign of exploitation against the mother of the defendant over a thirteen month period in an effort to utilize her to persuade the defendant to cooperate with the People in their prosecution of her co-defendant. Although this conduct must be imputed to the Office of the Westchester County District Attorney, the Court’s analysis is not complete until the effect of the conduct at issue is evaluated in view of all of the pertinent facts of this case. In this regard, the defense submits that the actions of Investigator Becerra infringed upon the defendant’s right to counsel, as well as her right to counsel of her choice. Upon considering this claim, the Court notes that the defendant was represented by retained counsel throughout the entire period during which her mother was being improperly influenced by the actions of Investigator Becerra. Furthermore, the Court notes that despite the persistent campaign of manipulative persuasion engaged in by Investigator Becerra against the defendant’s mother, his efforts proved fruitless because the defendant never did agree to cooperate with the People in their prosecution of her co-defendant in this case. Of course, were the Court to assume the accuracy of the defendant’s claim that the actions of Investigator Becerra poisoned the attorney-client relationship existing between the defendant and her retained attorneys, despite the absence of a sworn affidavit of the defendant to that effect, the fact remains that the defendant has not been without competent representation for any period of time as a result of the

dissolution of that relationship. This fact leaves the Court without the ability to identify any resultant prejudice flowing from the actions of Investigator Becerra to the defendant in connection with this case. Accordingly, while the actions of Investigator Becerra are undeniably inappropriate and objectionable, as they did not result in any founded violation of the defendant's constitutional rights nor in any other form of demonstrated prejudice to the defendant, they are not sufficient to warrant the dismissal of the instant indictment in the interest of justice pursuant to CPL 210.40 upon consideration of the facts of this case (*see, People v. Bebee*, 175 AD2d 250, *lv. denied* 78 NY2d 1126; *see also, People v. Urcuiolio*, 77 AD2d 579).

With respect to "the purpose and effect of imposing upon the defendant a sentence authorized for the offense" as enumerated in CPL 210.40(1)(f), "the impact of a dismissal upon the confidence of the public in the criminal justice system" as enumerated in CPL 210.40(1)(g), and "the impact of a dismissal on the safety or welfare of the community" as enumerated in CPL 210.40(1)(h), the Court recognizes that in support of the crimes charged under the instant indictment, the People allege that the defendant engaged in conduct which was instrumental in enabling her co-defendant to commit the heinous crime of murder. The Court further notes that the sentencing range for the top count charged under the instant indictment, that being criminal facilitation in the second degree as charged under count two, provides for a minimum sentence of an indeterminate term of imprisonment between one (1) and three (3) years and a maximum sentence of an indeterminate term of imprisonment of between five (5) years and fifteen (15) years (*see, Penal Law § 70.00 [2][c] and [3][b]*). Although the crimes charged under the instant indictment have not yet been proven before a finder of fact, the Court finds that the imposition of an authorized sentence upon the defendant's conviction of the charged crimes would serve the

purpose of appropriately punishing the defendant for her role in connection with a heinous crime and would serve to deter others from such criminal conduct in the future, while promoting the rehabilitation of the defendant herself (*see, People v. Suite*, 90 AD2d 80). Furthermore, the Court believes that the dismissal of the charges pending against the defendant in this case would serve to undermine the cherished principles underlying the evenhanded administration of justice in our society and would serve to unduly minimize the seriousness of the defendant's alleged criminal conduct in the view of the public. Concomitantly, the Court believes that the safety and welfare of the community are best served when the judicial system requires that all members of our society who are involved in criminal conduct share an equal level of accountability for their actions in the eyes of the law. Accordingly, upon this state of the record, the Court does not find that any laudable purpose serving the best interests of our community as a whole would be served by the dismissal of the crimes charged against the defendant under this indictment.

Finally, to the extent that the defense seeks support for the instant motion by suggesting to the Court that "a judgment of conviction would serve no useful purpose" as enumerated in CPL 210.40(1)(j), the Court finds no support in the record for the defendant's underlying premise that the prosecution of the defendant in this case was motivated by the People's desire to use the charges contained in the instant indictment as leverage against the defendant in an effort to persuade her to cooperate in their prosecution of the co-defendant. Accordingly, for the reasons set forth above in connection with the Court's consideration of those factors enumerated in CPL 210.40(1) (f) - (h), the Court rejects the defendant's speculative claim that the continued prosecution of the defendant by the People in pursuit of the entry of a judgment of conviction against her would serve no useful purpose.

Based upon the Court's consideration of the statutorily enumerated factors set forth in CPL 210.40 and their application to the facts of this case, the Court finds that the dismissal of the instant indictment in the furtherance of justice is not appropriate. Accordingly, upon these findings of the Court, the defendant's present application seeking the dismissal of the instant indictment in furtherance of justice is summarily denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
January 29, 2008



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Honorable Richard A. Molea  
Acting Justice of the Supreme Court

TO:

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