SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MANUELA MORGADO,

Defendant.

---X

DECISION & ORDER

Indictment No.: 12-1333

ADLER, J.

Defendant stands accused under Indictment No.: 12-1333 of one count of murder in the second degree (Penal Law §125.25[1]). By notice of motion dated February 19, 2013, with accompanying affirmation and memorandum of law, defendant moves for omnibus relief. In response, the People have submitted an affirmation in opposition dated March 5, 2013, with accompanying memorandum of law.

It is alleged that on or about and between the hours of 6:00 p.m. on September 30, 2012 and 10:30 a.m. on October 1, 2012, the defendant, Manuela Morgado, while in the vicinity of 1035 East Boston Post Road, Apt. 3-2, in the Village of Mamaroneck, New York, did intentionally cause the death of her four-year-old son, J.R.

The motion is disposed of as follows:

A. MOTION FOR DISCOVERY AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If any items set forth in CPL Article 240 have not been provided to the defendant pursuant to the consent discovery order in the instant matter, said items are to be provided immediately.

The People recognize their continuing duty to disclose exculpatory material (see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.E.2d 215 and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.E.2d 104) at the earliest possible date. If the People are or become aware of any material which is arguable exculpatory but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such will be disclosed to the defendant.

The People also recognize their continuing duty to disclose any written or recorded statement of a witness whom they intend to call at trial or a pre-trial hearing regarding the subject matter of the testimony which is in their possession or control. Defendant's motion for early discovery is denied (see CPL §§240.44 & 240.45).

To any further extent, the application is denied as seeking material or information beyond the scope of discovery (see *People v. Colavito*, 87 N.Y.2d 423, 639 N.Y.S.2d 996, 663 N.E.2d 308; *Matter of Brown v. Grosso*, 285 A.D.2d 642, 729 N.Y.S.2d 492, *lv. denied* 97 N.Y.2d 605, 737 N.Y.S.2d 52, 762 N.E.2d 930; *Matter of Brown v. Appelman*, 241 A.D.2d 279, 672 N.Y.S.2d 373; *Matter of Catterson v. Jones*, 229 A.D.2d 435, 644 N.Y.S.2d 573; *Matter of Catterson v. Rohl*, 202 A.D.2d 420, 608 N.Y.S.2d 696; *lv. denied* 83 N.Y.2d 755, 613 N.Y.S.2d 127, 241 N.E.2d 279).

B. MOTION FOR *SANDOVAL/VENTIMIGLIA* HEARING

1. *Sandoval* - Granted solely to the extent that a *Sandoval* hearing shall be held immediately prior to trial at which time:

A. The People must notify the defendant of all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the defendant (see CPL §240.43); and

B. Defendant must then sustain her burden of informing the Court of the prior misconduct which might unfairly affect her as a witness in her own behalf (see *People v. Malphurs*, 111 A.D.2d 266, 489 N.Y.S.2d 102, *lv. denied* 66 N.Y.2d 616, 494 N.Y.S.2d 1039, 485 N.E.2d 243).

2. *Ventimiglia* - The People's papers appear to indicate that they have no evidence of any prior bad acts of the defendant which they intend to introduce at trial. Accordingly, the request for a *Ventimiglia* hearing is denied at the current time. In the event that the People subsequently determine that they will seek to introduce such evidence, they shall so notify the Court and defense counsel and a *Ventimiglia* hearing (see *People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261, 420 N.E.2d 59) shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People to prove their case in chief. The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia* hearing to be consolidated and held with the other hearings herein.

C. MOTION TO STRIKE PREJUDICIAL LANGUAGE FROM INDICTMENT

Denied. The language concluding the indictment merely identifies the defendant's acts as public, rather than private wrongs and such language should not be stricken as prejudicial (*People v. Winters*, 194 A.D.2d 703, 599 N.Y.S.2d 293, *lv. denied*

82 N.Y.2d 761, 603 N.Y.S.2d 1003, 624 N.E.2d 189; see *People v. Gill*, 164 A.D.2d 867, 599 N.Y.S.2d 376, *appeal denied*, 76 N.Y.2d 893, 561 N.Y.S.22d 555, 562 N.E.2d 880; *People v. Garcia*, 170 Misc. 2d 543, 647 N.Y.S.2d 355). The defendant's remaining contentions are without merit and his application is accordingly denied.

D. MOTION TO DISMISS INDICTMENT FOR FACIAL INSUFFICIENCY

Denied. The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL §200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v. Iannone*, 45 N.Y.2d 589, 412 N.Y.S.2d 110, 384 N.E.2d 656; *People v. Cohen*, 52 N.Y.2d 584, 439 N.Y.S.2d 321, 421 N.E.2d 813).

E. MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

3 Defendant moves pursuant to CPL §§210.20(1)(b) and (c) to dismiss the indictment, or counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient and that the Grand Jury proceeding was defective within the meaning of CPL §210.35. On consent of the People, the Court has reviewed the minutes of the proceedings before the Grand Jury.

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses

charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (CPL §70.10[1]); *People v. Jennings*, 69 N.Y.2d 103, 115, 512 N.Y.S.2d 652, 504 N.E.2d 1079). "In the context of a grand jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v. Bello*, 92 N.Y.2d 523, 526, 683 N.Y.S.2d 168, 705 N.E.2d 1209; *People v. Ackies*, 79 A.D.3d 1050, 1056, 914 N.Y.S.2d 211). In rendering a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt" (*Id.*, quoting *People v. Boampong*, 57 A.D.3d 794, 795, 869 N.Y.S.2d 586 [internal quotations omitted]).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offense charged (see CPL §210.30[2]). Accordingly, defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

The Court further finds that the Grand Jury proceeding was not defective within the meaning of CPL §210.35. A review of the minutes supports a finding that a quorum of the grand jurors were present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, that all 21 of the grand jurors who voted to indict heard all the "essential and critical evidence" (see *People v. Collier*, 72 N.Y.2d 298, 300, 532 N.Y.S.2d 718, 528 N.E.2d 1191; *People v. Perry*, 199 A.D.2d

889, 890, 605 N.Y.S.2d 790, *appeal denied* 83 N.Y.2d 856, 612 N.Y.S.2d 388, 634 N.E.2d 989; *People v. Julius*, 300 A.D.2d 167, 751 N.Y.S.2d 486, *lv. denied* 99 N.Y.2d 655, 760 N.Y.S.2d 120, 790 N.E.2d 294), and that the Grand Jury was properly instructed (see *People v. Calbud*, 49 N.Y.2d 389, 426 N.Y.S.2d 389, 402 N.E.2d 1140 and *People v. Valles*, 62 N.Y.2d 36, 476 N.Y.S.2d 50, 464 N.E.2d 418).

The Court does not find that release of the Grand Jury minutes or certain portions thereof to the parties was necessary to assist the Court in rendering a determination. In the absence of a showing of a compelling and particularized need for disclosure of the minutes of the Grand Jury proceeding, defendant's motion for release thereof is denied (see *People v. Robinson*, 98 N.Y.2d 755, 751 N.Y.S.2d 843, 781 N.E.2d 908).

F. MOTION FOR A BILL OF PARTICULARS

Defendant moves for an order compelling the People to provide her with a supplemental bill of particulars on the ground that the bill of particulars previously provided by the People in response to defendant's timely request fails to adequately amplify the indictment.

In New York, an indictment serves three purposes: 1) "to provide [a] defendant with sufficient information regarding the nature of the charge and the conduct which underlies the accusation to allow him or her to prepare or conduct a defense" (*People v. Morris*, 61 N.Y.2d 290, 293, 473 N.Y.S.2d 769, 461 N.E.2d 1256; see also *People v. Iannone*, 45 N.Y.2d 589, 412 N.Y.S.2d 110, 384 N.E.2d 656; *People v. Fitzgerald*, 45 N.Y.2d 574, 412 N.Y.S.2d 102, 384 N.E.2d 602, *rearg. denied* 46 N.Y.2d 837, 414

N.Y.S.2d 1055, 386 N.E.2d 1105); 2) a means of ensuring that the crime for which the defendant is tried is in fact one for which he was indicted "rather than some alternative seized upon by the prosecution" (*Id.*); and 3) to protect an individual charged with a crime from prosecution at another time for the same offense (*People v. Sanchez*, 84 N.Y.2d 440, 445, 618 N.Y.S.2d 887, 643 N.E.2d 509). Such information need not be contained in a single document, and may be provided by a bill of particulars (*Fitzgerald*, 45 N.Y.2d at 580; see also CPL §200.95).

A bill of particulars is defined as "a written statement by the prosecutor specifying * * * items of factual information which are not recited in the indictment and which pertain to the offense charged and include the substance of each defendant's conduct encompassed by the charge which the people intend to prove at trial on their direct case" (CPL §200.95[1][a]). The People are only required to include information in the bill of particulars as to the theory that will be advanced at trial (see *Fitzgerald*, 45 N.Y.2d at 580), not information as to the evidence that will be used to prove that theory (CPL §200.95[1][a]).

Here, the bill of particulars set forth in the consent discovery order provided to defendant has adequately informed her of the substance of her alleged conduct and in all respects complies with CPL §200.95.

G. MOTION TO PRECLUDE NOTICED STATEMENTS

Denied. The language in the notice served by the People in accordance with CPL §710.30 informed the defendant of the time and place that the statement was made and of the sum and substance of that statement (CPL §710.30[1]; see *People v.*

Lopez, 84 N.Y.2d 425, 618 N.Y.S.2d 879, 643 N.E.2d 501; *People v. Hartley*, 224 A.D.2d 712, 638 N.Y.S.2d 924; *appeal denied* 90 N.Y.2d 858, 661 N.Y.S.2d 185, 683 N.E.2d 1059). There is no requirement that the substance of a statement must be recited verbatim (see *People v. Steisi*, 257 A.D.2d 582, 683 N.Y.S.2d 578; *lv. denied* 93 N.Y.2d 979, 695 N.Y.S.2d 66, 716 N.E.2d 1111).

In the affirmation in opposition, the People contend that defendant has waived her right to challenge the sufficiency of the CPL §710.30 notices by moving in the alternative to suppress the statements. However, a defendant may move in the alternative to suppress without waiving a preclusion claim, so long as the suppression claim is not litigated to a final determination (see *People v. Kirkland*, 89 N.Y.2d 903, 653 N.Y.S.2d 256, 686 N.E.2d 230; *People v. Smith*, 283 A.D.2d 189, 724 N.Y.S.2d 598, *lv. denied* 97 N.Y.2d 643, 735 N.Y.S.2d 500, 761 N.E.2d 5; *People v. Figueroa*, 278 A.D.2d 139, 717 N.Y.S.2d 592, *lv. denied* 96 N.Y.2d 758, 725 N.Y.S.2d 285, 748 N.E.2d 1081).[1]

H. MOTION TO SUPPRESS NOTICED STATEMENTS

This branch of defendant's motion is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any and all statements allegedly made by her, which have been noticed by the People pursuant to CPL §710.30(1)(a), were

---

[1]As noted by the Hon. John J. Brunetti:

> "Some may read *Kirkland* as holding that a defendant waives preclusion by merely moving for suppression after denial of his motion to preclude. That is not the law. All *Kirkland* holds is that litigation of a suppression claim to a final order denying suppression on its merits will waive any right to appeal the denial of a preclusion claim interposed prior to the litigation of the suppression claim" (Brunetti, New York Confessions, Ch. 6, p. 268-269 [Gould Publishing 1st Ed.]).

involuntarily made within the meaning of CPL §60.45 (see CPL §710.20[3]; CPL §710.60[3][b]; *People v. Weaver*, 49 N.Y.2d 1012, 429 N.Y.S.2d 399, 406 N.E.2d 1335), and/or were obtained in violation of the physician-patient privilege (see *People v. Decina*, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799).

I. MOTION TO STRIKE IDENTIFICATION

Denied. Defendant's identity is not in issue, and the identification was made by the superintendent of her building (see *People v. Rodriguez*, 79 N.Y.2d 445, 583 N.Y.S.2d 814, 593 N.E.2d 268; *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 924).

J. MOTION TO CONDUCT PRE-TRIAL HEARINGS 20 DAYS IN ADVANCE OF TRIAL

Defendant's motion to schedule pre-trial hearings 20 days prior to trial is denied. The hearings will be scheduled at a time that is convenient to the Court, upon due consideration of all of its other cases and obligations.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 19, 2013

HON. LESTER B. ADLER
SUPREME COURT JUSTICE

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
Attorneys for Defendant
One North Broadway, Ninth Floor
White Plains, New York 10601
BY: Saad Siddiqui, Esq.

HON. JANET DiFIORE
District Attorney, Westchester County